No. 25A-_____

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.

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

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PARTIES TO THE PROCEEDING

The applicants in this Court are Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown.

The respondent in this Court is Michael Howe, in his official capacity as Secretary of State of North Dakota.

The North Dakota Legislative Assembly was a movant in the Eighth Circuit but is not a party in this Court.

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EMERGENCY APPLICATION TO STAY THE EIGHTH CIRCUIT'S MANDATE PENDING PETITION FOR CERTIORARI

TO: The Honorable Brett M. Kavanaugh, Circuit Justice for the Eighth Circuit

Pursuant to Supreme Court Rules 22 and 23, Applicants respectfully request a stay of the Eighth Circuit's mandate pending this Court's disposition of Applicants' forthcoming petition for certiorari. The Eighth Circuit, over the dissent of Chief Judge Colloton, denied Applicants' motion to stay the issuance of the mandate on July 10, 2025, and thus absent action by this Court the mandate will issue on July 17, 2025. *See* Fed. R. App. P. 41(b). Applicants ("Plaintiffs") also respectfully ask this Court to administratively stay issuance of the mandate pending disposition of this Application because the North Dakota Legislative Council has published a memorandum questioning whether Plaintiff Collette Brown, who is an elected state representative, is eligible to remain in office once the Eighth Circuit's mandate issues vacating the district court's judgment, which had enjoined the 2021 enacted North Dakota legislative map as violating Section 2 of the Voting Rights Act. Appendix ("App.") 101. An administrative stay is warranted to maintain the status quo while the Court considers this stay application. Finally, to the extent the mandate is issued before this Application is granted, Applicants ask that the mandate be both recalled and stayed.

INTRODUCTION

"Since 1982, private plaintiffs have brought more than 400 actions based on § 2 [of the Voting Rights Act] that have resulted in judicial decisions." *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710, 721 (8th Cir. 2025)

(Colloton, C.J., dissenting). But as a result of the decision below, private plaintiffs can no longer enforce Section 2 of the Voting Rights Act (VRA) in the Eighth Circuit.

The divided panel did not overturn the district court's conclusion in this case that the challenged legislative map denies Native American voters an equal opportunity to elect their candidates of choice. Instead, the panel majority held that private plaintiffs cannot rely on 42 U.S.C. § 1983 to file suit under the Voting Rights Act to stop such unlawful voting discrimination. The decision below follows another divided decision of the Eighth Circuit in which it found that Section 2 itself provides no implied right of action. Together, these decisions make the Eighth Circuit the only Circuit in which private plaintiffs cannot enforce Section 2.

The Eighth Circuit has now held that the VRA neither provides a right of action for Section 2, nor does Section 2 create individual rights that can be enforced through Section 1983. Indeed, the Eighth Circuit has held that Section 2 does not unambiguously confer any individual rights at all. This is so, the majority below reasoned, because the VRA also identifies states and political subdivisions as the entities that are prohibited from denying or abridging a citizen's right to vote. The divided panel thus held that a statute that confers rights *and* identifies those prohibited from violating those rights is, in fact, not one that protects against "the deprivation of any rights . . . secured by the Constitution and laws." 42 U.S.C. § 1983.

A stay is appropriate because there is a reasonable probability that this Court will grant certiorari and a fair prospect that it will reverse the Eighth Circuit's judgment. These decisions starkly split from those of the Fifth, Sixth, and Eleventh

Circuits as well as every three-judge district court to consider the question. They directly contravene this Court's Section 1983 and Section 2 precedents. They turn the statutory text of both Section 2 and Section 1983 on their heads. They upend sixty years of practice. And they knee-cap Congress's most important civil rights statute. That blow is especially harmful to Native Americans and these Plaintiffs in particular. North Dakota—like many states—has a long and sad history of official discrimination against Native Americans that persists to this day. Tribal Nations and individual Native American voters have successfully fought for decades to vindicate their voting rights under Section 2.

Take this case. North Dakota reduced from three to one the number of legislative seats in which Native American voters in northeastern North Dakota could elect representatives of their choice. The district court found in Plaintiffs' favor and imposed a remedial map—one the Secretary neither objected to nor appealed—correcting the violation and resulting in the election of three Native American legislators in 2024, including Plaintiff Representative Collette Brown.

Plaintiffs face potentially urgent harm in the absence of a stay. In a memorandum posted on its website after the Eighth Circuit denied Plaintiffs' stay motion, the North Dakota Legislative Council contends that it is questionable whether legislators elected pursuant to the district court's remedial map may continue to serve once the Eighth Circuit's mandate issues if they do not reside in the 2021 legislatively adopted map's version of their district. App. 101.[1] Plaintiff Collete

[1] Plaintiffs do not agree with the Legislative Council's questioning of Representative Brown's legal status to retain her position. The North Dakota Constitution provides that "[a]n individual may not

Brown resides on the Spirit Lake Reservation and was elected in 2024 as a state representative for district 9. She does not reside in the 2021 map's version of district 9 that the district court enjoined. The specter that she becomes potentially ineligible to serve the moment the Eighth Circuit's mandate issues warrants entry of an administrative stay to maintain the status quo while the Court considers the stay application.

Moreover, apart from this urgent issue, the Secretary has contended that a map must be in place by December 31 to accommodate election procedures that commence in January for the 2026 election. But this Court likely cannot adjudicate Plaintiffs' certiorari petition (or subsequent merits case) by that date. Plaintiffs thus face irreparable harm if a decidedly unlawful map governs the 2026 election while similarly situated plaintiffs in other circuits retain their Section 2-compliant districts. And the Secretary is unharmed by maintaining the status quo—*i.e.*, implementing a map the imposition of which he declined to oppose or appeal.

This case "is not about the law as it exists." *Allen v. Milligan*, 599 U.S. 1, 23 (2023). It is about North Dakota's attempt to remake both Section 2 and Section 1983 jurisprudence anew. The Court should stay the Eighth Circuit's mandate while it considers this case.

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serve in the legislative assembly unless the individual lives in the district from which selected." N.D. Const. art. IV, § 5. Representative Brown indeed lives in the district from which she was selected—district 9 in the map that governed the 2024 election. The Eighth Circuit's vacatur does not reach back in history to undo factual events that occurred. Regardless, however, the Legislative Council's memorandum warrants an administrative stay to maintain the status quo while the Court considers this stay application.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

I. The 2021 redistricting process

From 1990 to 2022, Native American voters in northeastern North Dakota were able to elect their candidates of choice from state legislative district 9—one state senator and two state representatives.[2] PX P001 at 44; PX P042 at 6.[3] As of the 2020 Census, district 9 was wholly contained within Rolette County and had a Native American voting age population ("NVAP") of roughly 74%. App. 50. But the 2020 Census reported that district 9 was underpopulated, and thus it needed to expand to satisfy population equality requirements. App. 54. Because the district's northern boundary is the Canadian border, there were three options for its expansion—south, west, or east. App. 54. In late September 2021, the North Dakota legislative management redistricting committee ("redistricting committee") released a proposed map that added parts of two counties to the east—Towner and Cavalier Counties. App. 52. The added territory was almost entirely composed of white residents, with the Towner County portion having just a 2.7% NVAP and the Cavalier County portion having a 1.8% NVAP. App. 54. Overall, the addition of this nearly 100% white population dropped district 9's NVAP by 20 points. PX P042 at 3.

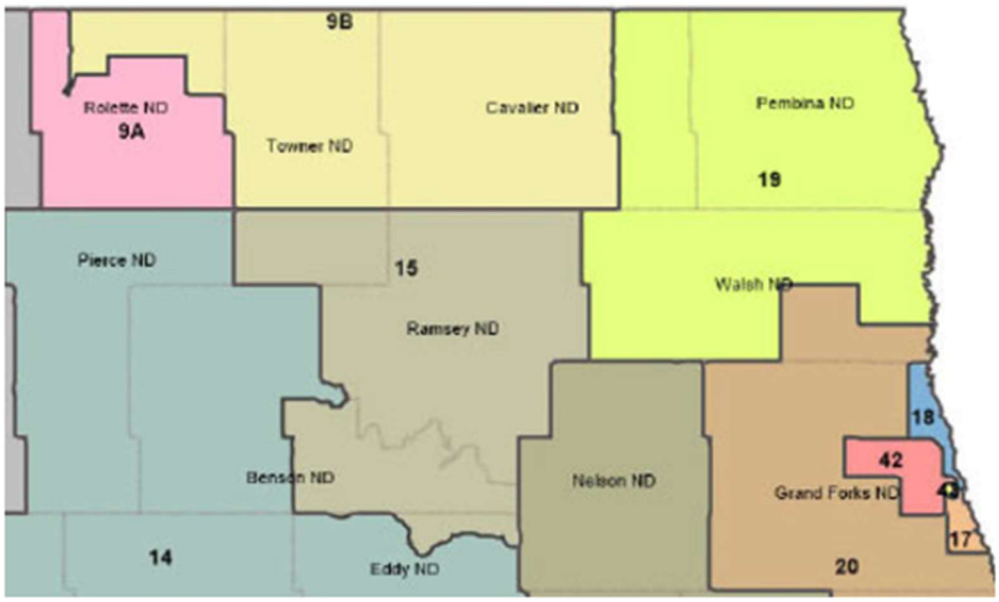
Additionally, the redistricting committee proposed subdividing district 9 into two single-member house districts, districts 9A and 9B. App. 52. With an NVAP of roughly 80%, district 9A was overwhelmingly packed with Native Americans and

[2] Most North Dakota legislative districts are multimember.

[3] "PX" refers to Plaintiffs' trial exhibits.

contained the Turtle Mountain Band of Chippewa Indians ("Turtle Mountain") reservation and part of its off-reservation trust lands. App. 54. District 9B had an NVAP of 32.2% and contained the remainder of the Turtle Mountain off-reservation trust lands as well as the portions of Towner and Cavalier Counties appended to district 9. App. 54.

Meanwhile, just to the south in Benson County is the Spirit Lake Tribe ("Spirit Lake"). It was assigned to district 15, which has an NVAP of 23.1%. App. 54. The configuration is shown below:



App. 54.

Following release of this proposed plan, the chairmen of Turtle Mountain and Spirit Lake requested that the redistricting committee revise the proposal to unify Turtle Mountain and Spirit Lake in district 9 by extending the district south from Rolette County into Benson County rather than eastward from Rolette County into Towner and Cavalier Counties. App. 52-53. The two Tribal Chairman highlighted

how nonracial interests favored the unification of Benson and Rolette Counties, thereby bringing together the two Tribal Nations. They also showed how voting in the region was racially polarized and emphasized that the redistricting committee's proposal would reduce the opportunity for Native American voters to elect their preferred candidates. App. 52-53. The committee rejected the Tribal Nations' proposal, instead voting to advance House Bill 1504, which contained the original proposed configuration for districts 9, 9A, 9B, and 15. App. 53. The legislative assembly enacted the Bill and the Governor signed it into law. App. 53.

The results of the November 2022 election played out as the Tribal Chairmen had warned. The incumbent preferred by Native American voters in district 9, Native American Senator Richard Marcellais, lost to his white opponent. PX P001 at 21. Plaintiff Collette Brown—a Native American who was also preferred by Native American voters—lost her bid for district 15 senator. PX P001 at 27. Native American voters elected their preferred candidate, Representative Jayme Davis, in district 9A, PX P001 at 21, while the incumbent Native American preferred candidate lost in district 9B, PX P001 at 21.[4]

For the first time since 1990, there were no Native Americans serving in the North Dakota Senate following the 2022 election, and districts in which Native Americans had the opportunity to elect candidates of their choice in the region shrunk from three seats to just one.

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[4] *See* N.D. Sec'y of State, Districts 9 and 15 2022 Election Results, https://results.sos.nd.gov/ResultsSW.aspx?text=Race&type=LG&map=DIST&eid=vxUYQ0lrpP4.; [https://perma.cc/4DLM-A3WD].

II. District Court proceedings

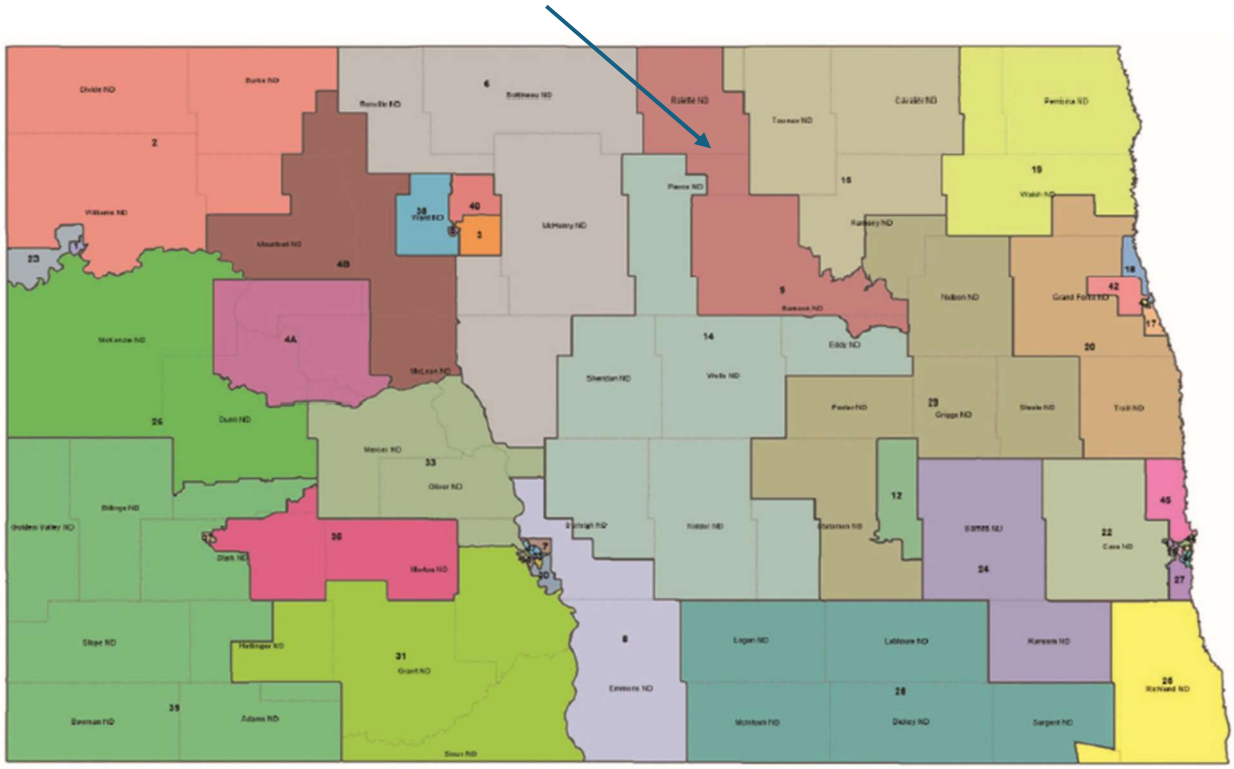
In February 2022, Plaintiffs filed suit against the North Dakota Secretary of State ("the Secretary") under 42 U.S.C. § 1983 and Section 2 of the Voting Rights Act ("VRA"). ECF No. 1 at 1. The suit alleged that the configuration of districts 9, 9A, 9B, and 15 diluted Native American voting strength in northeastern North Dakota by reducing from three to one the number of legislators Native American voters had an equal opportunity to elect.

The Secretary moved to dismiss, arguing, *inter alia*, that there is no implied right of action to enforce Section 2 of the Voting Rights Act. App. 90-91. The district court did not reach this question because Plaintiffs also plead their claim under 42 U.S.C. § 1983, which the court held provided Plaintiffs a cause of action to enforce Section 2. App. 91. Applying the test articulated in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the district court first concluded that Section 2 creates individual rights, observing that "[i]t is difficult to imagine more explicit or clear rights creating language" than the text of Section 2. App. 95 (referencing 52 U.S.C. § 10301(a)). Second, the district court concluded that "nothing in [Section 2's enforcement provisions are] incompatible with private enforcement[.]" App. 96. Accordingly, the district court ruled that "the Secretary has not rebutted the presumption that § 1983 may provide a remedy for the Plaintiffs in this case." App. 97.

The district court held a four-day bench trial in June 2023 and on November 17, 2023, ruled in Plaintiffs' favor. The court ruled that Plaintiffs had proved each of the three *Gingles* preconditions. Regarding the first, the court reasoned that

Plaintiffs proffered two demonstrative districts in which Native Americans would be a majority of eligible voters, with NVAPs of 66-69%. App. 64. Plaintiffs' demonstrative plan 1 is shown below, with district 9—which connects Rolette and Benson Counties—identified by an arrow.

Plaintiffs' Demonstrative Plan 1



App. 55.

The court determined that "[t]he evidence at trial shows that the Tribes' proposed plans comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries, and keeping together communities of interest." App. 64-65. Citing the trial evidence, the court observed that the demonstrative districts "did not appear more oddly shaped than other districts" and were "reasonably compact." App. 65. Indeed, the Secretary's expert

conceded as much, testifying that Plaintiffs' proposed districts were compact and that demonstrative district 9 in Plaintiffs' Plan 1 split the same number of counties as the enacted version of district 15 while resolving the enacted plan's split of Towner County. ECF No. 117 at 115, 122-23. Moreover, the Secretary's expert testified that Plaintiffs' Plan 2 split fewer counties in the region than the enacted plan and had the same number of statewide county splits. ECF No. 117 at 124; *see Allen v. Milligan*, 599 U.S. 1, 44 n.2 (2023) (Kavanaugh, J., concurring) ("In this case, for example, it is important that at least some of plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan.").

The Secretary's expert likewise testified that Plaintiffs' demonstrative plans better respected communities of interest than did the enacted plan. ECF No. 117 at 130. Ultimately, the Secretary's expert conceded that a reasonably configured district in which Native American voters constitute the majority of eligible voters could be drawn in the region, such that an evaluation of Plaintiffs' demonstrative districts was "more of a remedial question than it is necessarily a *Gingles* 1 question." ECF No. 117 at 110-11.

The district court also found, based on the testimony of the Tribal Nations' current and former Chairmen, that nonracial interests motivated the unification of Benson and Rolette Counties (and thus the two Tribal Nations), including "shared representational interests, socioeconomic statuses, and cultural values." App. 65. In particular, the court credited testimony of the Chairmen that "the Tribes often collaborate to lobby the Legislative Assembly on their shared issues, including

gaming, law enforcement, child welfare, taxation, and road maintenance, among others." App. 65.

Although the Secretary's counsel attempted to suggest that including two Tribal Nations in the same legislative district was *per se* a racial gerrymander, his expert testified to the contrary. He agreed that "Native American [T]ribes can have shared interests other than the race of their members," and that he had no basis to dispute the testimony of the Tribal Chairmen regarding the Tribes' nonracial shared interests. He conceded that he "ha[d] no evidence that plaintiffs' demonstrative plans are a racial gerrymander." ECF No. 117 at 167-68.

With respect to the second *Gingles* precondition, the district court observed that "[t]he parties and their experts agree that voting in district 9 and 15 (when voting at large) is racially polarized, with Native American voters cohesively supporting the same candidates." App. 66. Reviewing the electoral, demographic, and qualitative evidence, the district court likewise concluded that Plaintiffs had shown by a preponderance of the evidence that Native Americans within subdistricts 9A and 9B were politically cohesive, App. 67, a view shared by the Secretary's expert, ECF No. 117 at 140-42.

The district court also considered at length the electoral evidence and concluded that Plaintiffs had proved the third *Gingles* precondition, *i.e.*, whether white voters usually defeat the preferred candidates of Native American voters. App. 67-80.

Finally, the district court assessed the totality of circumstances evidence and concluded that Plaintiffs had shown a violation of Section 2. App. 84. The court enjoined further implementation of the affected districts and provided more than a month for the legislative assembly to adopt a remedial map. App. 84-85.

The district court denied the Secretary's motion for a stay pending appeal, rejecting his argument that Section 1983 did not provide Plaintiffs a cause of action to enforce Section 2. App. 41-46. The legislative assembly failed to adopt a proposed remedial map during the time allotted by the district court. After the chair of the redistricting committee publicly commented that he preferred Plaintiffs' demonstrative Plan 2 over Plaintiffs' demonstrative Plan 1, ECF No. 160 at 3-5, Plaintiffs requested that their Plan 2 be imposed as the remedial map. The Secretary filed no opposition, which the district court determined, pursuant to its local rules, to mean the Secretary viewed the motion as well-taken. App. 39. The district court granted the motion, imposing Plaintiffs' Plan 2 as the remedial map. App. 39.

III. Eighth Circuit proceedings

The Secretary appealed the district court's liability order, but not its order imposing the remedial map. After the district court denied the Secretary's motion for a stay of the district court's liability finding, the Secretary renewed that motion in the Eighth Circuit, contending, *inter alia*, that private plaintiffs cannot sue under Section 2 using Section 1983's cause of action. *See* Sec'y's Mot. for Stay at 4, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. Dec. 13, 2023) (Doc. 5344314). On December 15, 2023, the Eighth Circuit denied the Secretary's

motion for a stay in an order by Judges Colloton, Benton, and Kelly. App. 40. As a result, the 2024 elections were held under the district court's remedial map, and Native American candidates won all three legislative positions for district 9, with Senator Marcellais returning to office, Representative Davis winning reelection, and Plaintiff Collette Brown winning the second state house seat.[5]

A. Eighth Circuit holds that Section 2 contains no implied private right of action in *Arkansas NAACP*.

The Secretary's argument for a stay was premised on an Eighth Circuit decision that was published one business day after the district court issued its liability decision in this case. In *Arkansas State Conference NAACP v. Arkansas State Legislature*, a divided panel of the Eighth Circuit held that Section 2 does not contain an implied private right of action.[6] 86 F.4th 1204, 1207 (8th Cir. 2023) ("*Arkansas NAACP*"). The *Arkansas NAACP* majority first observed that it was "unclear whether § 2 creates an individual right." *Id.* at 1209. On the one hand, the majority reasoned, Section 2 "unmistakably focuses on the benefited class." *Id.* (cleaned up) (quoting 52 U.S.C. § 10301(a)'s "right of any citizen . . . to vote" language). On the other hand, the majority noted that the text of Section 2 also identifies those prohibited from violating those rights: "states and political subdivisions." *Id.* The majority noted that "[i]t is unclear what to do when a statute focuses on both." *Id.* at 1210. Notably, the majority

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[5] N.D. Sec'y of State, District 9 2024 Election Results, https://results.sos.nd.gov/resultsSW.aspx?text=Race&type=LG&map=DIST [https://perma.cc/9U8C-22HD].

[6] The court did not decide whether 42 U.S.C. § 1983 would allow for private enforcement of Section 2 because the *Arkansas NAACP* plaintiffs did not plead that cause of action. *Arkansas State Conference of NAACP v. Arkansas Bd. of Apportionment*, 91 F.4th 967, 967 (8th Cir. 2024) (Stras, J. concurring).

did not cite or discuss this Court's decision in *Health & Hospital Corp. of Marion County v. Talevski*, in which this Court expressly answered that question. 599 U.S. 166, 185 (2023) ("[I]t would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights (and we have never so held).").

Unsure of how to decide the first step of the implied-private-right analysis, the *Arkansas NAACP* majority held that under the second step of the analysis, Congress had intended only the Attorney General, and not private plaintiffs, to enforce Section 2, notwithstanding Supreme Court precedent, decades of practice, and statutory references to "aggrieved person[s]" other than the U.S. Attorney General in the Act. *Arkansas NAACP*, 86 F.4th at 1211. Then-Chief Judge Smith dissented, concluding that five Justices in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), had found Section 2 to imply a private right of action. 86 F.4th at 1223 ("the simple fact is that a majority of the justices explicitly recognized a private right of action under Section 2 in *Morse*." (cleaned up)).

The *Arkansas NAACP* plaintiffs petitioned for en banc review, which the court denied—with Judge Smith, now Chief Judge Colloton, and Judge Kelly voting to grant rehearing. Dissenting from the denial of rehearing en banc, Chief Judge Colloton wrote that the panel majority "rendered an ambitious and unprecedented ruling" that contravened "controlling precedent for an inferior court" from the Supreme Court in *Morse*. *Arkansas State Conference of NAACP v. Arkansas Bd. of Apportionment*, 91 F.4th 967, 969-70 (8th Cir. 2024) ("*Arkansas NAACP II*")

(Colloton, C.J., dissenting). In denying rehearing en banc, Chief Judge Colloton observed that the Eighth Circuit "regrettably misses an opportunity to reaffirm its role as a dispassionate arbiter of issues that are properly presented by the parties." *Id.* at 974.

B. The Eighth Circuit forecloses Section 1983 enforcement of Section 2 in *Turtle Mountain*.

After the Eighth Circuit denied the Secretary's motion for a stay in this case, a different panel (Colloton, C.J, Gruender, J., and Kobes, J.) heard the merits. The merits panel held that Section 2 is not privately enforceable under Section 1983 and vacated the district court's judgment, with Chief Judge Colloton dissenting. *Turtle Mountain*, 137 F.4th 710.[7]

The majority concluded that its prior decision in *Arkansas NAACP* (which did not present a Section 1983 claim) controlled the outcome in this case (which does include a Section 1983 claim). The majority started by addressing the *Gonzaga* test, which this Court fashioned to limit the overextension of Section 1983 claims to spending power statutes. In that discussion, the majority held that *Arkansas NAACP* had already decided that Section 2 was not a rights-creating statute: "It is thus unnecessary to undertake an independent analysis of *Gonzaga*'s first step given that *Arkansas* [*NAACP*] has already decided the issue." *Id.* at 718. The majority treated the issue as already-decided even as the Secretary conceded that the court's prior

[7] In light of *Arkansas NAACP*, Plaintiffs focused on their Section 1983 argument while preserving for further appellate proceedings their argument that Section 2 also creates an implied private right of action. *See* Brief of Plaintiff-Appellees at 21, n.2, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. Mar. 18, 2024) (Doc: 5374180).

statements regarding whether Section 2 is rights-creating were nonbinding dicta. *See* Oral Arg. at 7:53, Case No. 23-3655, http://media-oa.ca8.uscourts.gov/OAaudio/2024/10/233655.MP3 [https://perma.cc/7QZV-K22A] (Counsel for Secretary: "[I]t was not the holding of the court, so it's not controlling."); *see also Turtle Mountain*, 137 F.4th at 724 (Colloton, C.J., dissenting) (noting the dicta).

The majority reasoned that *Arkansas NAACP* explained that Section 2 "focuses on both the individuals protected and the entities regulated." *Id.* at 719 (cleaned up). Because Section 2 identifies both, the majority reasoned that Congress did not "speak with a 'clear voice' that manifests an 'unambiguous' intent to confer individual rights." *Id.* (quoting *Gonzaga*, 536 U.S. at 280). "Accordingly, we conclude that the plaintiffs are within the general zone of interest that the statute is intended to protect, without the statute having unambiguously conferred an individual right." *Id.*

The majority rejected Plaintiffs' contention that *Talevski* compelled a contrary conclusion given this Court's instruction that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." *Id.* at 720 (quoting *Talevski*, 599 U.S. at 185). The majority reasoned that the Federal Nursing Home Reform Act ("FNHRA") has a "reference to regulated parties" whereas Section 2 has a joint "focus" on both the rights-bearers and rights-violators. *Id.* To support the majority's "focus/reference" distinction, it observed that the statutory text first mentions "any State or political subdivision" before it says "the right of any citizen .

. . to vote." *Id.* (citing 52 U.S.C. § 10301(a)). The majority also rejected Plaintiffs' argument that *Gonzaga*'s "unambiguous conferral" statutory construction standard does not apply to Reconstruction Amendment enforcement statutes—which by their nature enforce Amendments that expressly create rights. *Id.* at 721.

Chief Judge Colloton vigorously dissented. He observed that *Gonzaga*'s test was an ill-fit for determining whether Reconstruction Amendment enforcement statutes can be the subject of Section 1983 suits. "[T]he federalism concerns that animated the Court's decisions on § 1983 and the Spending Clause do not have the same force here, because the Reconstruction Amendments already altered the constitutional balance by limiting the power of the States and enlarging the power of Congress." *Id.* at 722 (Colloton, C.J., dissenting). "There is thus reason to question whether courts should apply a substantive canon requiring unmistakable clarity when interpreting laws enacted under the Fourteenth and Fifteenth Amendments. Why not simply implement the statute as written based on traditional tools of statutory interpretation?" *Id.*

But Chief Judge Colloton noted that it was unnecessary to decide that question, because under *Gonzaga* "it is clear that Congress in § 2 of the Voting Rights Act intended to confer a voting right." *Id.* He reasoned that *Talevski* foreclosed the Secretary's argument that Section 2's consideration of both rights-bearers and potential rights-violators was relevant. *Id.* at 723. And he highlighted the uniform view (in favor of Plaintiffs) of every circuit court to consider the question. *Id.* at 723. Chief Judge Colloton rejected the majority's view that *Arkansas NAACP* bound it,

characterizing that case's discussion of the issue as "indeterminate dicta . . . . and ill-considered dicta at that." *Id.* at 724.

Next, Chief Judge Colloton concluded that the Secretary did not overcome the presumption that Section 1983 applied because there is no "indicia of congressional intent to preclude private enforcement of the Voting Rights Act under § 1983." *Id.* at 725. On the merits, Chief Judge Colloton explained that "[t]he district court's decision is adequately supported by the record and should be affirmed." *Id.*

Plaintiffs timely filed a petition for rehearing en banc on May 28, 2025, and on June 27, 2025, filed a notice of supplemental authority regarding this Court's decision in *Medina v. Planned Parenthood South Atlantic*, 606 U.S. __; No. 23-1275, 2025 WL 1758505 (U.S. June 26, 2025). On July 3, 2025, the court denied Plaintiffs' petition for rehearing en banc, with Chief Judge Colloton, Judge Smith, and Judge Kelly noting that they would have granted the petition, and with Judge Erickson not participating. App. 2.

Plaintiffs moved to stay the issuance of the mandate on July 9, 2025, but the court denied that motion on July 10, 2025, with Chief Judge Colloton noting he would grant the stay motion. App. 1.

JURISDICTION

The district court had jurisdiction over Plaintiffs' suit pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) & (4). The Eighth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction to grant a stay pursuant to 28 U.S.C. § 2101(f).

REASONS FOR GRANTING A STAY OF THE MANDATE

This Court may stay a lower court's issuance of the mandate in order "to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. § 2101(f). "To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *see id.* ("In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent."). Each requirement is readily met here.

I. There is a reasonable probability that four Justices will vote to grant review.

There is a reasonable probability that four Justices will vote to grant review, given the split of authorities on this issue of exceptional importance. Everywhere else in the country, private plaintiffs can rely on an unbroken line of Supreme Court and circuit precedent to enforce the individual rights given to them by Congress in the Voting Rights Act. But the decision below extinguished the only remaining pathway for private enforcement of Section 2 of the VRA in the Eighth Circuit.

The Eighth Circuit's pronouncement that Section 2 is not privately enforceable contravenes this Court's precedents and undermines the guarantee of uniformity in federal law. Citizens in the Eighth Circuit now have fewer enforceable rights and protections against racial discrimination in voting than citizens elsewhere in the

nation. There is a reasonable probability this Court will grant review of the Eighth Circuit's decision to ensure uniform application of the law.

A. The Eighth Circuit has created a stark circuit split.

A "conflict among the lower courts on [an] important and recurring issue" in the enforcement of federal law is a strong indicator that Supreme Court review is warranted. *California v. Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers). The Eighth Circuit has created a stark circuit split with the holdings of the Fifth, Sixth, and Eleventh Circuits, multiple three-judge district courts, and the practice of every other court of appeals.

For decades, private plaintiffs have vindicated their rights in Section 2 cases filed in every circuit, litigating many of those cases to the Supreme Court. Every case that this Court has decided under the current version of Section 2 was brought by private plaintiffs. *See, e.g.*, *Milligan*, 599 U.S. at 1; *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Holder v. Hall*, 512 U.S. 874 (1994); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Growe v. Emison*, 507 U.S. 25 (1993); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986). And private plaintiffs have successfully vindicated their rights in Section 2 cases in circuits throughout the country. *See, e.g.*, *Clerveaux v. East Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282 (11th Cir. 2020); *Rural W. Tenn. African-Am. Affs. Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000), *cert. denied*, 531 U.S. 944 (2000); *Sanchez v. Colorado*, 97 F.3d 1303 (10th Cir. 1996), *cert. denied,* 520 U.S. 1229 (1997); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382 (8th

Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1233 (1996); *Cane v. Worcester County*, 35 F.3d 921 (4th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995); *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991); *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

In contrast to the Eighth Circuit, the Fifth, Sixth, and Eleventh Circuits have each held that Section 2 is privately enforceable, as has every three-judge court to consider the issue. *See Robinson v. Ardoin*, 86 F.4th 574, 587-88 (5th Cir. 2023); *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, 406 (6th Cir. 1999); *see also Singleton v. Allen*, No. 2:21-cv-01291-AMM, 2025 WL 1342947 (N.D. Ala. May 8, 2025) (three-judge court); *League of United Latin Am. Citizens v. Abbott*, No. EP-21-CV-00529-DCG-JES-JVB, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court); *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) (three-judge court).

In *Robinson*, the Fifth Circuit squarely held that "Section 2 provides for a private right of action." 86 F.4th at 587-88. *Robinson* explains that another section of the VRA—Section 3—explicitly anticipates private enforcement of the Act. *See id.* at 588. Section 3 states in three separate subsections that proceedings to enforce the voting guarantees provided under the Act can be brought by the Attorney General or by an "aggrieved person." 52 U.S.C. § 10302(a), (b), and (c). *Robinson* concluded that private plaintiffs are "aggrieved person[s]" under the text of the VRA and that

Congress intended private enforcement of Section 2. 86 F.4th at 588. And *Robinson* further noted that this conclusion followed directly from an earlier Fifth Circuit decision holding that the VRA validly abrogates States' sovereign immunity, the purpose of which is to allow private plaintiffs to sue to vindicate their rights under the VRA. *See id.* (citing *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017)).

The Eleventh Circuit has likewise held that the VRA is "enforceable by private parties." *Ala. State Conf. of NAACP*, 949 F.3d at 652. Like the Fifth Circuit, the Eleventh Circuit carefully examined the text of the VRA, reading the rights created under Sections 2 alongside the remedies provided under Section 3, and concluded that the statute "explicitly provides remedies to private parties to address violations" of the Act. *Id.* (citing 52 U.S.C. 10302(a)-(c)). The Sixth Circuit too has held that "an individual may bring a private cause of action under Section 2[.]" *See Mixon*, 193 F.3d at 406.

Well-reasoned decisions by three-judge district courts have also repeatedly and uniformly held that Section 2 is privately enforceable. The decision granting a permanent injunction in *Singleton v. Allen* was decided after *Arkansas NAACP* and explicitly rejected the Eighth Circuit's reasoning. 2025 WL 1342947, at *171. Like the plaintiffs in this case, the plaintiffs in *Singleton* "availed themselves of Section 1983" in pressing their Section 2 claims. 2025 WL 1342947, at *172. Unlike the Eighth Circuit, Judges Marcus, Moorer, and Manasco concluded that Section 2 is enforceable through Section 1983 as it contains "rights-creating, individual-centric

language with an unmistakable focus on the benefited class." *Id.* (citing *Talevski*, 599 U.S. at 183). *Singleton* emphasized that Section 2 is plainly a rights-creating statute: "every sentence of Section [2] either refers to rights of the benefited class, contains rights-creating language that creates new rights for that specific class, or expressly focuses on the benefited class." *Id.* at *173.

All other three-judge district courts to reach the issue agree. For example, a three-judge court per curiam decision issued by Judges Branch, Jones, and Grimberg explained that "[w]e think it obvious that, by its clear terms, Section 2 guarantees a particular individual right to all citizens." *Georgia State Conf. of the NAACP*, 2022 WL 18780945, at *4. Section 2 identifies a specific right in "explicit terms" and "expressly defines the particular class of persons that holds the right." *Id.* (citations and internal quotation omitted); *see also id.* ("If that is not rights-creating language, we are not sure what is.").

This Court need not wait for any further developments on this issue before acting on the clear circuit split. The Eighth Circuit's pronouncement that Section 2 of the VRA is not privately enforceable is already subverting the guarantee of uniformity in federal law. Citizens in the Eighth Circuit's seven states now have fewer enforceable rights and protections against racial discrimination in voting than citizens in the rest of the nation. That result is unjust, untenable, and requires action by this Court.

B. This issue is exceptionally important and will be recurring until this Court resolves the circuit split.

This Court has recognized that many consider the VRA to be "the most successful civil rights statute in the history of the Nation." *Milligan*, 599 U.S. at 10 (citation omitted). As such, there is no question that the private enforceability of Section 2 is a question of exceptional importance. In *Shelby County v. Holder*, this Court assured the nation that Section 2 would remain an essential and effective backstop against discrimination in voting throughout the country. 570 U.S. 529, 537 (2013) ("Both the Federal Government and individuals have sued to enforce § 2 . . . ."); *id.* at 557 ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

Section 2 is, and always has been, enforced primarily by private litigants. From 1982 through August 2024, "private plaintiffs have been party to 96.4% of Section 2 claims that produced published opinions . . . and the sole litigants in 86.7% of these decisions." *See* Ellen D. Katz, *Curbing Private Enforcement of the Voting Rights Act: Thoughts on Recent Developments*, 123 MICH. L. REV. ONLINE 23, 34 (2024); *see also Singleton*, 2025 WL 1342947, *179 n.68 (noting that "the Department of Justice has previously observed that private plaintiffs have brought over 400 Section [2] cases resulting in judicial decisions since 1982, while the Department of Justice itself has brought just 44 cases") (citing Br. U.S. as Amicus Curie, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655, 2024 WL 1417744 (8th Cir. Mar. 25, 2024)). This issue will recur until this Court addresses the split that the Eighth Circuit has created.

Indeed, the question of whether Section 2 is privately enforceable—either through an implied right in Section 2 itself or through Section 1983—is likely to be raised on this Court's mandatory appellate docket in the upcoming Term. The *Milligan* case has now reached final judgment in the plaintiffs' favor. *See Singleton*, 2025 WL 1342947. Alabama contended that Section 2 is not privately enforceable under either an implied right or Section 1983, and the district court thoroughly analyzed and rejected its argument. *Id.* at *171-81. Alabama filed its notice of appeal on June 6, 2025, *see* Notice of Appeal, *Singleton v. Allen*, No. 2:21-cv-01291-AMM (N.D. Ala. June 6, 2025), ECF No. 329, and its jurisdictional statement is due in this Court on August 5, 2025, *see* S. Ct. R. 18(3). That this Court will likely be presented this issue on its mandatory appellate docket amplifies the probability that it will grant certiorari in this case to ensure a uniform application of the Court's decision.

Both this case and the Alabama case should stand on the same footing while this Court adjudicates the private enforcement question. In Alabama, the remedial district is in effect and scheduled to govern the 2026 election. In this case, the Eighth Circuit's denial of Plaintiffs' motion to stay issuance of the mandate means that, absent a stay from this Court, a legislative map with an adjudicated violation of Section 2—which Chief Judge Colloton opined should be affirmed—would be allowed to spring back to life. *See Turtle Mountain*, 137 F.4th at 725 (Colloton, J., dissenting). That would be highly inequitable. That is particularly so given that North Dakota's Legislative Council has asserted that, should the prior (and unlawful) map spring back into place, one of the plaintiffs in this case may no longer be able to serve, citing

a North Dakota constitutional provision requiring legislators to reside in the district from which they were selected. App. 101. That possibility strongly favors a stay here. Both Alabama's and North Dakota's remedial maps should govern the 2026 election while this Court adjudicates the private enforcement question.

II. There is a fair prospect that this Court will reverse the judgment below.

There is a fair prospect that this Court will reverse the Eighth Circuit's judgment. That judgment conflicts with this Court's precedents under Section 1983, as well as its prior decisions regarding implied rights of action under the VRA itself. It is also inconsistent with Congress's ratification of the long-standing private enforceability of Section 2.

A. Section 2 of the Voting Rights Act creates individual rights that are enforceable through Section 1983.

This Court's precedents compel the conclusion that Section 2 creates rights that are enforceable through Section 1983. A statute is presumptively enforceable through Section 1983 when "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." *Talevski*, 599 U.S. at 183 (citation and internal quotation marks omitted). In *Talevski*, this Court held that the Federal Nursing Home Reform Act ("FNHRA")—a statute enacted under Congress's Spending Clause power—created rights enforceable under Section 1983. *Id.* at 192. This Court's decisions in both *Talevski* and *Medina v. Planned Parenthood South Atlantic*, No. 23-1275, 606 U.S. __ (2025), demonstrate that there is a fair prospect for reversal.

Section 2 contains distinctly rights-creating language. It protects the "right of any citizen . . . to vote" free from racial discrimination. 52 U.S.C. § 10301(a); *see also Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (recognizing that Section 2 "grants [individual citizens] a right to be free from" voting discrimination). Section 2 explicitly refers to a citizen's "right" and is "phrased in terms of the persons benefitted"—the main criteria for whether a statute contains rights-creating language. *Talevski*, 599 U.S. at 183.

Indeed, parroting the very language of Section 1983, the VRA creates public remedies against "[w]hoever shall deprive or attempt to deprive any person of any right secured by [Section 2] . . . ." 52 U.S.C. § 10308(a) & (c) (referencing 52 U.S.C. § 10301). Congress's express recognition that someone could "deprive any person of any right secured by [Section 2]," *id.*, is a surefire indication that Section 2 guards against the "deprivation of any rights . . . secured by the Constitution and laws," 42 U.S.C. § 1983. In characterizing Section 2 as securing rights, Congress certainly detected none of the ambiguity that the majority below did. And if the decision below was correct, then Congress's express reference in § 10308(a) and (c) to Section 2 as securing rights would be a nullity. *See, e.g.*, *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 699 (2022) (rejecting interpretation that renders statutory provision a "nullity" or leaves "whole provisions without work to perform").

Like Congress, this Court has had no difficulty concluding that Section 2 confers individual rights. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. at 437 (holding that the protected "right . . . does not belong to the 'minority as a

group,' but rather to 'its individual members.'") (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)). In addition to focusing on the individual rights-holder, Section 2 also identifies the "class of beneficiaries," *Talevski*, 599 U.S. at 183, to which Plaintiffs belong—individuals denied the right to vote "on account of race or color." 52 U.S.C. § 10301(a). Section 2 provides that a violation is established if political processes are not equally open to "members of a class of citizens" so protected. 52 U.S.C. § 10301(b). "If all of this is not rights-creating language with an unmistakable focus on the benefitted class, it is difficult to imagine what is." *Singleton*, 2025 WL 1342947 at *174 (three-judge court) (internal quotations and citations omitted).

In both the *Arkansas NAACP* decision and the decision below, the Eighth Circuit reasoned that it is ambiguous whether Section 2 confers individual right because the language of the statute "focuses on both" the right holders and those prohibited from violating the rights. *Arkansas NAACP*, 86 F.4th at 1210; *Turtle Mountain*, 137 F.4th at 719 ("Given this dual focus on the individuals protected and the entitles regulated, we concluded that '[i]t is unclear whether Section 2 creates an individual right.'").

This directly contravenes *Talevski*. As *Talevski* explains, "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights," 599 U.S. at 185. Yet the Eighth Circuit failed to mention or consider *Talevski* at all in its *Arkansas NAACP* decision. And its attempt to distinguish *Talevski* in its decision below is unpersuasive.

The majority below reasoned that FNHRA merely includes "reference" to the regulated entities, *i.e.*, nursing homes, while "Section 2 focuses on both the entities regulated and 'any citizen.'" *Turtle Mountain*, 137 F.4th at 720 (quoting 52 U.S.C. § 10301(a)). Both this reasoning and its premise are wrong.

First, nothing in the text of Section 1983 supports the conclusion that a rights-creating statute is unenforceable when it does more than create rights. So long as *one* of the focuses of a "dual focused statute" is the conferral of rights, that is enough for Section 1983 to apply. Statutory rights do not disappear by the inclusion of something else in the statute.

Second, the majority relied on an unconvincing distinction between a "reference" (FNHRA) and a "focus" (Section 2) on the regulated entities that was "entirely artificial . . . . a sure sign that [the] distinction is made-to-order." *Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). The relevant FNHRA provisions start by saying either "[a] nursing facility must protect and promote the rights of each resident, including each of the following rights," 42 U.S.C. § 1396r(c)(1)(A), or "[a] nursing facility must permit each resident to remain in the facility . . . .," *id.* § 1396r(c)(2)(A). The statutes first identify the regulated entity before the rights they cannot violate.

Section 2 is no different. It says:

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed 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 . . . .

52 U.S.C. § 10301(a). The majority below sought to distinguish Section 2 by reasoning that "the subject of § 2's prohibition is 'any State or political subdivision,' rather than on the conferral of a right to 'any citizen.'" *Turtle Mountain*, 137 F.4th at 720 (quoting 52 U.SC. § 10301(a)). This is hardly telling; of course it is the States and political subdivisions that are the subject of Section 2's "prohibition." So too are the nursing homes the subject of FNHRA's "prohibition." The individual right will never be the subject of a statute's "prohibition," the regulated entity must be. Rather, the question is whether the statute identifies rights that are prohibited from being violated. Both FNHRA and Section 2 do.

Returning to the text of Section 1983, nowhere does it indicate that whether a provision of the "Constitution and laws," 42 U.S.C. § 1983, is enforceable depends upon whether the rights are conferred in the beginning, middle, or end of the statutory sentence. Under the Eighth Circuit's reasoning, a statute would be enforceable under Section 1983 if it says a "right shall not be violated by any State or political subdivision" but would be unenforceable if it says "no State or political subdivision shall violate a right." Taking this logic to its next step would lead to the absurd result that the First and Fourteenth Amendments are unenforceable under Section 1983. *See* U.S. Const. amend I ("Congress shall make no law . . ."); U.S. Const. amend XIV ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). But of course, "[t]he Fourteenth Amendment hardly fails to secure § 1983-enforceable rights because it directs state actors not to deny equal protection." *Talevski*, 599 U.S. at 185 n.12.

This Court's decision in *Medina* (issued after the decision below, but before the Eighth Circuit denied en banc rehearing and denied a motion to stay the mandate), further supports the conclusion that there is a fair prospect that this Court will reverse. *Medina* emphasized that Congress's use of the word "right" in statutory language and title headings carries great weight. *Medina*, 2025 WL 1758505 at **10-11 ("[A] title may underscore that the statutory text creates a right[.]"); *Id.* at **13.

This reasoning applies with greater strength to Section 2. Start with the law's title, *i.e.*, the "Voting Rights Act." That Congress made "Rights" one of just three words in the law's title "underscore[s] that the statutory text creates a right." *Id.* Section 2 thus starts at a stronger rights-creating posture than FNHRA.

Moreover, Congress explained that the Voting Rights Act was "[a]n Act . . . [t]o enforce the fifteenth amendment to the Constitution of the United States . . . ." Pub. L. No. 89-110, 79 Stat. 437, 437 (1965). Section 2 thus enforces the Fifteenth Amendment's guarantee that "[t]he *right* of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. Const. amend. XV (emphasis added).

There are more statutory titles to consider as well, each brightly flashing "rights-creating" signals. Section 2 is contained in Chapter 103 of Title 52. See 52 U.S.C. § 10301. Chapter 103's title is "Enforcement of Voting *Rights*." Section 2 is codified at Section 10301 of Chapter 103. Section 10301's title is "Denial or abridgement of *right* to vote on account of race or color through voting qualifications or prerequisites; establishment of violation." *Id.* (emphasis added). And again, from

there, Section 2's text explicitly confers a "*right* of any citizen of the United States to vote" that cannot be denied or abridged "on account of race." *id.* § 10301(a) (emphasis added).

Although certainly not necessary for Plaintiffs to prevail, given the decision in *Medina*, there is also a fair prospect that this Court will hold that the *Gonzaga* test's "unambiguous conferral" requirement—developed in the context of a spending power statute—does not apply to statutes enacted to enforce Reconstruction Amendments. As the Supreme Court explained in *Medina*, "'*Gonzaga* sets forth our established method' for determining whether a spending-power statute confers individual rights." *Medina*, 2025 WL 1758505, at **10 (quoting *Talevski*, 599 U.S. at 183); *id.* at 15 (explaining that the *Gonzaga* test "measure[s] whether spending-power legislation confers a privately enforceable right"); *id.* at **9 (same).

As Chief Judge Colloton explained in dissent below, "the federalism concerns that animated" the development of the unambiguous conferral requirement under Section 1983 and the spending power "do not have the same force here, because the Reconstruction Amendments already altered the constitutional balance by limiting the power of the States and enlarging the power of Congress." *Turtle Mountain*, 137 F.4th at 722 (Colloton, C.J., dissenting). There is thus a fair prospect that this Court will decline to extend *Gonzaga*'s judicially-created rule of construction to Reconstruction Amendment enforcement statutes like the VRA.

B. Section 2 is enforceable through its own right of action, as Congress intended and has ratified.

Since 1965, Congress and the Supreme Court have repeatedly made clear that private actors can enforce the VRA generally, and Section 2 specifically. In *Morse*, 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.'" 517 U.S. at 232 (opinion of Stevens, J., joined by Ginsburg, J.) (omission in original) (quoting S. Rep. 97-417, at 30 (1982)); *accord id.* at 240 (Breyer, J., concurring in the judgment, joined by O'Connor & Souter, JJ.).

Decades earlier, this Court found a private right of action to enforce Section 5 of the VRA. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 556-557 (1969). Given *Allen*, the Court in *Morse* recognized that Congress had likewise intended to create private rights of action to enforce Section 2, as well as the prohibition on poll taxes in Section 10 of the VRA. *See* 517 U.S. at 232-234 (opinion of Stevens, J.); *id.* at 240 (Breyer, J., concurring).

As Chief Judge Colloton explained, "[t]he *Morse* majority . . . necessarily decided that § 2 is privately enforceable as an essential analytical step in its decision that § 10 is privately enforceable." *Arkansas NAACP II*, 91 F.4th at 970 (Colloton, C.J., dissenting). Moreover, "Congress is undoubtedly aware of [this Court] construing § 2 to [be privately enforceable]. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels [this Court] staying the course." *Milligan*, 599 U.S. at 39. Congress has never questioned the view that Section 2 is privately enforceable. Since *Morse*, Congress has twice amended Section 2 and made

no attempt to cabin private enforcement. "Congress is presumed to . . . adopt" pre-existing 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). "[T]he *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict." *Milligan*, 599 U.S. at 42 (Kavanaugh, J., concurring).

As the three-judge district court adjudicating the Alabama congressional Section 2 case just reasoned, "[i]t is difficult in the extreme for us to believe that for nearly sixty years, federal courts have consistently misunderstood one of the most important sections of one of the most important civil rights statutes in American history, and that Congress has steadfastly refused to correct our apparent error." *Singleton*, 2025 WL 1342947, at *181. A strict rule of *stare decisis* in favor of affirming *Morse*'s conclusion with respect to Section 2's private enforceability far exceeds the "fair prospect" standard necessary to warrant a stay of the Eighth Circuit's contrary decision.

Given the rupture that the Eighth Circuit has created as to previously uniform precedent and congressional intent, there is a fair prospect of reversal.

III. The irreparable harm Plaintiffs face and the balance of the equities favor a stay of the mandate.

Finally, there is eminently good cause for a stay because Plaintiffs will suffer irreparable harm without one and the balance of equities further favors a stay. After Plaintiffs in this case proved at trial that North Dakota's legislative districts unlawfully dilute Native American voting strength in violation of Section 2 of the

VRA, this Court denied the Secretary's motion for a stay of the district court's judgment while the Secretary's appeal moved forward. App. 40. Thereafter, on January 8, 2024, the district court ordered into place the current remedial map—an order the Secretary neither opposed nor appealed. App. 37-39. The district court's remedial map was used in the 2024 election cycle and resulted in Plaintiff Collette Brown's election to the North Dakota Legislature for District 9. Plaintiffs would suffer significant harm if the remedial map were discarded, especially given that the only judges to consider the merits of Plaintiffs' suit have either found in their favor or concluded that finding should be affirmed. Indeed, plaintiff Collette Brown faces the threat of being ejected from her seat should the prior, unlawful map be reinstated. *See supra* at 3-4, n.1.

This is not one of the "close cases" requiring the Court to balance the equities in adjudicating Plaintiffs' motion for a stay, given the reasonable probability of Supreme Court review and the fair prospect of reversal. *Hollingsworth*, 558 U.S. at 190. But the equities favor granting a stay. There will be minimal harm to the Secretary if the mandate does not issue and the status quo is maintained, *See id.* "'[O]nce the election occurs, there can be no do-over and no redress' for voters whose rights were violated." *Singleton v. Allen*, 691 F. Supp. 3d 1343, 1355 (N.D. Ala. 2023) (three-judge court) (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014)).

The candidate qualifying period for the 2026 election will begin in January 2026. N.D. Cent. Code §§ 16.1-11-06, 16.1-11-15. The Secretary has previously

contended, citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006), that the legislative map should be set by December 31 of the year proceeding an election. *See* Sec'y's Mot. for Stay, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. Dec. 13, 2023) (Doc. 5344314). Given this Court's calendar and practice, it is highly unlikely it will resolve Plaintiffs' petition and issue a merits decision before that time. Absent a stay from this Court, North Dakota will proceed to conduct elections using the 2021 legislative map that a federal court has found unlawfully dilutes the voting strength of Native American voters. Absent a stay from this Court, Collette Brown may lose her seat in the legislature—all without any court ever disagreeing with the merits of Section 2 violation below. Prematurely altering the legislative districts before the disposition of Plaintiffs' certiorari petition further harms the public by causing unnecessary voter confusion and waste of government resources when the current remedial maps are likely to be upheld following this Court's review.

In contrast, the Secretary will merely see a delay in the adoption of the State's preferred legislative map if a stay is granted and Plaintiffs are not meritorious in this Court. To the extent that the Secretary asserts that the State will suffer irreparable harm if it is unable to enforce its preferred map, the State has no cognizable interest in enforcing an unlawful map. *Singleton*, 691 F. Supp. at 1356 n.1. In this case, the district court found that the map unlawfully diluted the voting power of Native American citizens and the Secretary did not effectively dispute this finding on appeal. App. 30-35; ECF No. 123 at 27 (The Secretary's proposed legal conclusions stating that the first *Gingles* precondition was satisfied); ECF No. 158-3 at 13-16 (The North

Dakota Legislative Council confirming that "[t]he compactness [of Plaintiffs' maps] meets the standards used by the committee when drawing the existing district map"); ECF No. 117 at 140-42 (The Secretary's expert testifying that the second *Gingles* precondition was satisfied); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 190 (2017) ("[T]his Court to date has not . . . remanded a case for a determination of [racial] predominance, without evidence that some district lines deviated from traditional principles."). Staying the mandate and maintaining the current map until certiorari proceedings resolve will avoid any risk of irreparable harm to Plaintiffs and will not unfairly prejudice the Secretary.

A stay will also place North Dakota voters on equal footing to Alabama voters while this Court considers the question of private enforcement of the Voting Rights Act in cases arising from both states. It is inequitable for a remedial map to govern the 2026 election in one state but not the other while the Court considers whether it will adhere to sixty years of precedent.

CONCLUSION

For the foregoing reasons, the Court should grant a stay of the Eighth Circuit's mandate.

July 15, 2025

Respectfully submitted,

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No. 25A-_____

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.

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

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3655

Turtle Mountain Band of Chippewa Indians, et al.

Appellees

v.

Michael Howe, in his official capacity as Secretary of State of North Dakota

Appellant

North Dakota Legislative Assembly, et al.

State of Alabama, et al.

Amici on Behalf of Appellant(s)

National Congress of American Indians, et al.

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of North Dakota - Eastern
(3:22-cv-00022-PDW)

REVISED ORDER

Before COLLOTON, Chief Judge, GRUENDER, and KOBES, Circuit Judges.

Appellees' motion to stay the mandate is denied. Chief Judge Colloton would grant the motion.

July 10, 2025

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3655

Turtle Mountain Band of Chippewa Indians, et al.

Appellees

v.

Michael Howe, in his official capacity as Secretary of State of North Dakota

Appellant

North Dakota Legislative Assembly, et al.

State of Alabama, et al.

Amici on Behalf of Appellant(s)

National Congress of American Indians, et al.

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of North Dakota - Eastern
(3:22-cv-00022-PDW)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Chief Judge Colloton, Judge Smith, and Judge Kelly would grant the petition for rehearing en banc.

Judge Erickson did not participate in the consideration or decision of this matter.

July 03, 2025

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Susan E. Bindler

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3655

Turtle Mountain Band of Chippewa Indians; Spirit Lake Tribe; Wesley Davis; Zachery S. King; Collette Brown

Plaintiffs - Appellees

v.

Michael Howe, in his official capacity as Secretary of State of North Dakota

Defendant - Appellant

North Dakota Legislative Assembly; William R. Devlin, Representative also known as Bill Devlin; Senator Ray Holmberg, Representative; Senator Richard Wardner, Representative; Senator Nicole Poolman, Representative; Michael Nathe, Representative; Terry Jones, Representative; Claire Ness, Senior Counsel at the North Dakota Legislative Council

Movants

State of Alabama; State of Florida; State of Georgia; State of Iowa; State of Kansas; State of Louisiana; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of South Carolina; State of South Dakota; State of Texas; State of Utah; State of West Virginia

Amici on Behalf of Appellant(s)

National Congress of American Indians; Lawyers' Committee for Civil Rights Under Law; United States of America; NAACP Legal Defense and Educational Fund, Inc.

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of North Dakota - Eastern
(3:22-cv-00022-PDW)

JUDGMENT

Before COLLOTON, Chief Judge, GRUENDER, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

May 14, 2025

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Susan E. Bindler
Clerk of Court

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May 14, 2025

Philip J. Axt
ATTORNEY GENERAL'S OFFICE
600 E. Boulevard Avenue
Bismarck, ND 58505-0000

RE: 23-3655 Turtle Mountain Band of Chippewa Indians, et al v. Michael Howe

Dear Counsel:

The court has issued an opinion in this case. Judgment has been entered in accordance with the opinion.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. Except as provided by Rule 25(a)(2)(iii) of the Federal Rules of Appellate Procedure, no grace period for mailing is allowed. Any petition for rehearing or petition for rehearing en banc which is not received within the 14-day period for filing permitted by FRAP 40 may be denied as untimely.

Susan E. Bindler
Clerk of Court

HAG

Enclosure(s)

cc: Grant Bakke
Andrew G. Braniff
Colin Burke
Matthew Lee Campbell
Pooja Chaudhuri
Clerk, U.S. District Court, North Dakota
Kyle T. Edwards
Mark P. Gaber
Jon M. Greenbaum
Samantha Blencke Kelty
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Deuel Ross
Brian D. Schmidt
Bryan L. Sells
Samuel Spital
Joseph Scott St. John
David H. Thompson
Daniel Stephen Volchok
Bradley Wiederholt
Brenda Wright

District Court/Agency Case Number(s): 3:22-cv-00022-PDW

United States Court of Appeals
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May 14, 2025

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Opinions Clerk
610 Opperman Drive
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Eagan, MN 55123-0000

RE: 23-3655 Turtle Mountain Band of Chippewa Indians, et al v. Michael Howe

Dear Sir or Madam:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant and appeared on the brief was Philip J. Axt, AAG, of Bismarck, ND. The following attorney(s) also appeared on the appellant brief; David H. Thompson, of Washington, DC, Peter A. Patterson, of Washington, DC, David Ray Phillips, of Bismarck, ND, Athanasia O. Livas, of Washington, DC.

Counsel who presented argument on behalf of the appellees and appeared on the brief was Mark P. Gaber, of Washington, DC. The following attorney(s) also appeared on the appellees' brief; Timothy Q Purdon, of Bismarck, ND, Bryan L. Sells, of Atlanta, GA, Matthew Lee Campbell, of Boulder, CO, Molly E. Danahy, of Washington, DC, Allison A. Neswood, of Boulder, CO, Michael Stephen Carter, of Sacaton, AZ, Samantha Blencke Kelty, of Washington, DC, Melissa L. Neal, of Washington, DC.

The following attorney(s) appeared on the amicus brief of the states of Alabama, Florida, Georgia, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, South Carolina, South Dakota, Texas, Utah, & West Virginia on behalf of appellant; Edmund G. LaCour, Jr., AAG, of Montgomery, AL, Soren A. Geiger, former Assist. Solicitor General for Alabama, of Arlington, VA,

The following attorney(s) appeared on the amicus brief of National Congress of American Indians on behalf of appellees; Kevin Matthew Lamb, of Washington, DC, Daniel Stephen Volchok, of Washington, DC, Kyle T. Edwards, of San Francisco, CA.

The following attorney(s) appeared on the amicus brief of Lawyers' Committee for Civil Rights Under Law on behalf of appellees; Jon M. Greenbaum, of Washington, DC, Ezra D. Rosenberg, of Newark, NJ, Pooja Chaudhuri, of Washington, DC.

The following attorney(s) appeared on the amicus brief of United States of America on behalf of appellees; Erin H Flynn, formerly of the U.S. Dept. of Justice, Washington, DC.

The following attorney(s) appeared on the amicus brief of NAACP Legal Defense & Educational Fund, Inc. on behalf of appellees; Janai S. Nelson, of New York, NY, Samuel Spital, of New York, NY, Michael Skocpol, of Washington, DC, Brenda Wright, of New York, NY, Deuel Ross, of Washington, DC, Colin Burke, of New York, NY.

The judge who heard the case in the district court was Honorable Peter D. Welte.

If you have any questions concerning this case, please call this office.

Susan E. Bindler
Clerk of Court

HAG

Enclosure(s)

cc: MO Lawyers Weekly

District Court/Agency Case Number(s): 3:22-cv-00022-PDW

United States Court of Appeals
For the Eighth Circuit

No. 23-3655

Turtle Mountain Band of Chippewa Indians; Spirit Lake Tribe; Wesley Davis; Zachery S. King; Collette Brown

Plaintiffs - Appellees

v.

Michael Howe, in his official capacity as Secretary of State of North Dakota

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North Dakota Legislative Assembly; William R. Devlin, Representative also known as Bill Devlin; Senator Ray Holmberg, Representative; Senator Richard Wardner, Representative; Senator Nicole Poolman, Representative; Michael Nathe, Representative; Terry Jones, Representative; Claire Ness, Senior Counsel at the North Dakota Legislative Council

*Movant*s

State of Alabama; State of Florida; State of Georgia; State of Iowa; State of Kansas; State of Louisiana; State of Mississippi; State of Missouri; State of Montana; State of Nebraska; State of South Carolina; State of South Dakota; State of Texas; State of Utah; State of West Virginia

Amici on Behalf of Appellant(s)

National Congress of American Indians; Lawyers' Committee for Civil Rights Under Law; United States of America; NAACP Legal Defense and Educational Fund, Inc.

Amici on Behalf of Appellee(s)

Appeal from United States District Court
for the District of North Dakota - Eastern

Submitted: October 22, 2024
Filed: May 14, 2025

Before COLLOTON, Chief Judge, GRUENDER and KOBES, Circuit Judges.

GRUENDER, Circuit Judge.

In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), *reh'g denied*, 91 F.4th 967 (8th Cir. 2024), we held that § 2 of the Voting Rights Act ("the Act") does not provide for an implied private right of action to remedy certain voting guarantees contained in the Act. The question before us today is whether private plaintiffs can instead maintain a private right of action for alleged violations of § 2 through 42 U.S.C. § 1983. We answer this question in the negative and vacate the judgment of the district court.

I.

In 2021, Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, and three individual Native American voters sued North Dakota's Secretary of State ("the Secretary") under § 2 of the Act and 42 U.S.C. § 1983, alleging that the State's 2021 redistricting diluted Native American voting strength in violation of § 2 of the Act. Section 2 prohibits "vote dilution," which occurs when the voting strength of a politically cohesive minority group is diluted by either (1) unlawfully packing one district with a supermajority of the minority or (2) dividing the minority group among several districts so that the majority bloc outnumbers the minority group in each of the districts. *See Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993). Specifically, § 2 provides that:

> (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).[1]
>
> (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.

The Secretary filed a motion to dismiss the complaint, asserting that the private plaintiffs lacked a cause of action. The Secretary argued that § 2 did not permit a private right of action and that the private plaintiffs could not use § 1983 as an end around to bring claims for alleged § 2 violations. The district court declined to decide whether § 2, standing alone, contained an implied private right of action.[2] Instead, the district court concluded that the plaintiffs could enforce § 2 of the Act through § 1983 and, on that basis, denied the motion to dismiss.

---

[1]Section 10303(f)(2) states that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."

[2]At the time of the district court's decision, we had not yet considered whether § 2 of the Act is privately enforceable. We have since held that private plaintiffs do not have the ability to sue under § 2. *See Ark. State Conf.*, 86 F.4th 1204.

After denying the Secretary's motion to dismiss, the case proceeded to a bench trial. On November 17, 2023, the district court ruled that the 2021 redistricting map violated § 2 and permanently enjoined the Secretary from "administering, enforcing, preparing for, or in any way permitting the nomination or election" of candidates in several legislative districts. The district court ordered that a remedial map be drawn and gave North Dakota's Legislative Assembly ("the Assembly") approximately one month to adopt one. After the Assembly failed to adopt a remedial map by the court-imposed deadline, the district court ordered that the Assembly adopt the plaintiffs' proposed map for the November 2024 election. The plaintiffs' map combined two distinct Native American tribal reservations into a single, elongated district that stretched diagonally across northeast North Dakota.

The Secretary appeals, arguing that the district court erred in finding that private plaintiffs could enforce § 2 of the Act through § 1983. In addition, the Secretary argues that the district court erred in finding that the 2021 redistricting map violated § 2.

II.

To understand the context of § 2, we must examine the Act's historical background. We begin with the Fifteenth Amendment, which was ratified in 1870. It guarantees that the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," and gives to Congress the "power to enforce [the Amendment] by appropriate legislation." U.S. Const. amend. XV.

Despite its enactment, some States flagrantly disregarded the Fifteenth Amendment by instituting measures that disenfranchised minority voters. *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966). Congress attempted to cure the problem of racial discrimination in voting by enacting new laws. *Id.* at 313. One such law was the Civil Rights Act of 1871. That statute "created the federal cause of action now codified as § 1983." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 177 (2023). In relevant part, § 1983 states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Thus, § 1983 provides a cause of action for private plaintiffs seeking to enforce the Fifteenth Amendment. *See, e.g.*, *United States v. Raines*, 172 F. Supp. 552, 556 (M.D. Ga. 1959), *rev'd on other grounds*, 362 U.S. 17 (1960) ("[T]he self executing ban of the Fifteenth Amendment proscribes certain conduct and Section 1983 provides a remedy therefor." (internal quotation marks omitted)). Another law that Congress enacted to cope with the problem of racial discrimination was the Civil Rights Act of 1964, which outlawed certain tactics used by States to disqualify minorities from voting in federal elections. *Katzenbach*, 383 U.S. at 313.

Congress's new laws, however, did little to protect voters prior to disenfranchisement, and after the fact litigation proved to be too costly and time consuming. *Id.* at 314. As a result, "Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of [the] country through unremitting and ingenious defiance of the Constitution," and it "concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment." *Id.* at 309.

Congress responded by passing the Voting Rights Act in 1965 to "banish the blight of racial discrimination in voting." *Id.* at 308. The Act "create[d] stringent new remedies for voting discrimination where it persist[ed] on a pervasive scale," and "Congress assumed the power to prescribe these remedies from . . . the Fifteenth Amendment." *Id.* As originally enacted, § 2 stated: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Section 2 "had little independent force because it was a mirror image of the Fifteenth Amendment: each prohibited

intentional discrimination." *Ark. State Conf.*, 86 F.4th at 1208 (internal quotation marks omitted). However, § 2 paired with § 12 did something new: together, the provisions granted the Attorney General the power to bring civil suits for injunctive and other relief against State and local officials who violated § 2. 52 U.S.C. § 10308(d). Accordingly, private plaintiffs maintained the ability to bring a § 1983 lawsuit to enforce the Fifteenth Amendment, while the Attorney General was invested with authority under § 12 of the Act to enforce the rights guaranteed by the Fifteenth Amendment.

Fifteen years later, the Supreme Court considered in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), whether a § 2 violation required discriminatory purpose or intent. Private plaintiffs claimed that the City of Mobile had a practice of unfairly diluting the voting strength of minorities in violation of § 2 of the Act, the Fourteenth Amendment, and the Fifteenth Amendment. *Id.* at 58 (plurality opinion). The plurality opinion for four Justices declined to address the § 2 claim as separate from the Fifteenth Amendment claim because, even "[a]ssuming . . . that there exist[ed] a private right of action[,] . . . it [was] apparent that the language of § 2 no more than elaborate[d] upon that of the Fifteenth Amendment." *Id.* at 60. "The plurality then observed that prior decisions had made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 658 (2021) (internal quotation marks and alteration omitted). Thus, *Bolden* "confirmed what many already thought: without purposeful exclusion of voters from the political process, there was no § 2 or Fifteenth Amendment violation." *Ark. State Conf.*, 86 F.4th at 1208 (internal quotation marks omitted).

In 1982, Congress amended § 2 in response to *Bolden*. *See Chisom v. Romer*, 501 U.S. 380, 393 (1991). Congress replaced the language "to deny or abridge" with "in a manner which results in a denial or abridgement," and added subsection (b). *Id.* at 393-94. "The two purposes of the amendment are apparent from its text." *Id.* at 395; *Brnovich*, 594 U.S. at 658 ("The oft-cited Report of the Senate Judiciary Committee accompanying the 1982 Amendment stated that the amendment's purpose was to repudiate *Bolden* and establish a new vote-dilution test."). The

amended version of subsection (a) "adopts a results test, thus providing that proof of discriminatory intent is no longer necessary to establish *any* violation of that section." *Chisom*, 501 U.S. at 395. And subsection (b) "provides guidance about how the results test is to be applied." *Id.* In changing the evidentiary bar required to prove a § 2 violation, Congress made it easier to prevail under § 2 than under the Fifteenth Amendment. "Congress took no action, however, to clarify *who* [could] sue under § 2." *Ark. State Conf.*, 86 F.4th at 1208.

For decades, courts assumed that an implied private right of action existed under § 2 to enforce alleged violations of the Act. *See id.* at 1219 n.8 (Smith, J., dissenting) ("[S]ince 1982, more than 400 Section 2 cases have been litigated in federal court [under an assumed private right of action]."). In *Arkansas State Conference*, this court considered a challenge to that assumption. After reviewing the text, history, and structure of the Act, we concluded that § 2 does not permit an implied private right of action. *Id.* at 1207 (majority opinion). We declined to address whether the private plaintiffs could instead maintain a private right of action for alleged violations of § 2 through § 1983, as "the plaintiffs did *not* plead a § 1983 claim, brief it [in the district court], or request leave to add it, even after being put on notice of the possible deficiency in their original complaint." *Ark. State Conf.*, 91 F.4th at 967 (Stras, J., concurring in the denial of rehearing) (internal quotation marks and alterations omitted). The private plaintiffs in this case, however, properly brought the § 1983 issue before the court, and it is this issue which we address today.

III.

We review *de novo* whether a plaintiff has a cause of action. *Buckley v. Hennepin Cnty.*, 9 F.4th 757, 760 (8th Cir. 2021). Section 1983 provides a cause of action to any citizen deprived by a person acting under color of state law of "any rights . . . secured by the Constitution and laws." A cause of action does not exist under § 1983 merely because a state official has violated a federal statute. *Frison v. Zebro*, 339 F.3d 994, 998 (8th Cir. 2003). "This is because in order to seek redress through § 1983, a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Id.* (internal quotation marks and alterations omitted); *see*

Talevski, 599 U.S. at 183 ("Although federal statutes have the potential to create § 1983-enforceable rights, they do not do so as a matter of course.").

In *Gonzaga University v. Doe*, 536 U.S. 273, 283-84 (2002), the Supreme Court set forth a two-step process for determining whether a cause of action exists under § 1983. The first step requires a court to determine whether Congress intended to create "new rights enforceable under § 1983." *Id.* at 290. The Court has stated that nothing short of an "unambiguously" conferred individual right would support a cause of action brought under § 1983. *Id.* at 283. This is a "stringent" standard and only the "atypical case" will surmount the "significant hurdle." *Talevski*, 599 U.S. at 183-84, 186. The "touchstone" for determining whether a provision unambiguously confers a new individual right is "congressional intent," which we discern from the text and structure of the statute. *Frison*, 339 F.3d at 999.

A statute unambiguously confers an individual right when it is phrased "with an *unmistakable focus* on the benefited class." *Gonzaga*, 536 U.S. at 284. Conversely, a plaintiff asserts only a violation of federal law when the statute "focus[es] on the person regulated" or "the agencies that . . . regulat[e]," rather than on the "individuals protected." *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001). In the latter case, a plaintiff merely "falls within the general zone of interest that the statute is intended to protect." *Gonzaga*, 536 U.S. at 283. If a plaintiff demonstrates that the statute at issue confers a federal right, then that "right is presumptively enforceable by § 1983." *Id.* at 284. *Gonzaga*'s second step allows a defendant to "rebut this presumption by showing that Congress specifically foreclosed a remedy under § 1983." *Id.* at 284 n.4 (internal quotation marks omitted).

In *Arkansas State Conference*, we carefully examined the text and structure of the Act and determined that § 2 did not satisfy the first step of *Gonzaga*. 86 F.4th at 1209-10. The question in *Arkansas State Conference* was whether § 2 contained an implied private right of action, which is admittedly a different inquiry than whether a statutory violation may be enforced through § 1983. *See Gonzaga*, 536 U.S. at 283. "But the inquiries overlap in one meaningful respect—in either case we must *first* determine whether Congress *intended to create a federal right*." *Id.* (first

emphasis added); *see id.* at 290 ("[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."). The Supreme Court has emphasized that, in both the implied right of action context and the § 1983 context, the "*initial* inquiry" is determining whether the statute confers any right at all. *Id.* at 285 (emphasis added); *see City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 119 (referring to *Gonzaga*'s first step as the "threshold" inquiry). It is thus unnecessary to undertake an independent analysis of *Gonzaga*'s first step given that *Arkansas State Conference* has already decided the issue.[3] We need only recite and elaborate upon our decision there.

We recognized in *Arkansas State Conference* that certain language in § 2 "unmistakably focuses on the benefited class" in that the very first sentence refers to the "right of any citizen." 86 F.4th at 1210 (alterations omitted). In this fashion, § 2 contains elements similar to those statutes which the Supreme Court has held unambiguously confer individual rights. Take, for example, Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 ("No person . . . shall . . . be subjected to discrimination"), which contain "explicit right- or duty-creating language" in that they focus on the "individuals protected."

[3]The plaintiffs contend that the relevant statements in *Arkansas State Conference* are *dicta* because the court went on to address the private remedy issue. The court discussed the private remedy issue to bolster the conclusion it had already reached with respect to the first step of *Gonzaga*—that § 2 does not provide for an implied private right of action. *See Osher v. City of St. Louis*, 903 F.3d 698, 703 (8th Cir. 2018) (discussing the private remedy issue even though the court had already concluded that the first step of *Gonzaga* was not met). In addition, the United States as *amici* argues that the statements are *dicta* because the court declined to address the § 1983 issue. The court did not address the § 1983 issue because "the plaintiffs did *not* plead a § 1983 claim, brief it [in the district court], or request leave to add it, even after being put on notice of the possible deficiency in their original complaint." *Ark. State Conf.*, 91 F.4th at 967 (Stras, J., concurring in the denial of rehearing) (internal quotation marks and alterations omitted). Even on appeal, "only a single footnote in one of the briefs mention[ed] the possibility." *Ark. State Conf.*, 86 F.4th at 1218.

Gonzaga, 536 U.S. at 284 n.3, 287 (internal quotation marks omitted). However, we also found that the gravamen of § 2 is a proscription of discriminatory conduct, with the very subject of its prohibition being "any State or political subdivision." 52 U.S.C. § 10301(a); *see Ark. State Conf.*, 86 F.4th at 1209 (noting that the opening passage of § 2 "is a general proscription of discriminatory conduct, not a grant of a right to any identifiable class" (internal quotation marks and citations omitted)). Provisions that focus on the persons or entities regulated do "not confer the sort of *individual* entitlement that is enforceable under § 1983." *Gonzaga*, 536 U.S. at 287 (internal quotation marks omitted).

In *Gonzaga*, the Supreme Court examined the nondisclosure provisions of the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *Id.* In relevant part, FERPA directs the Secretary of Education to enforce that: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency or organization." 20 U.S.C. § 1232g(b)(1). Even though FERPA as a whole contains numerous references to "rights," the Court held that FERPA's nondisclosure provisions "lack the sort of rights-creating language critical to showing the requisite congressional intent to create new rights." *Gonzaga*, 536 U.S. at 287 (internal quotation marks omitted); *see* 20 U.S.C. § 1232g. This is because a "focus on the states as regulated entities evinces . . . a degree of removal from the interests of the [individuals]." *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1199 (8th Cir. 2013). Here, § 2's prohibition prevents "any State or political subdivision" from imposing an improper voting qualification or prerequisite, while in *Gonzaga*, the prohibition prevented the Secretary of Education from disbursing funds under certain conditions.

We thus determined that § 2 "focuses on both" the individuals protected and the entities regulated. *Ark. State Conf.*, 86 F.4th at 1210. Given this dual focus on the individuals protected and the entities regulated, we concluded that "[i]t is unclear whether § 2 creates an individual right." *Id.* at 1209. The parties spar over the meaning of this particular language. However, the court's conclusion naturally

follows from the recognition that Congress did not speak with a "clear voice" that manifests an "unambiguous" intent to confer individual rights. *Gonzaga*, 536 U.S. at 280. As this court has previously held, "[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." *Does v. Gillespie*, 867 F.3d 1034, 1043 (8th Cir. 2017) (internal quotation marks and citation omitted); *see id.* at 1045 ("Conflicting textual cues are insufficient."); *see also Carey v. Throwe*, 957 F.3d 468, 483 (4th Cir. 2020) ("To the extent [the *Gonzaga*] standard permits a gradation, we think it sound to apply its most exacting lens when inferring a private remedy would upset the usual balance of state and federal power."). Accordingly, we conclude that the plaintiffs are within the general zone of interest that the statute is intended to protect, without the statute having unambiguously conferred an individual right.[4]

The plaintiffs raise several arguments against this conclusion, all of which we find unpersuasive. First, the plaintiffs argue that *Arkansas State Conference* is inconsistent with *Talevski*. Two statutory provisions were at issue in *Talevski*. One provision provides: "A nursing facility must protect and promote the rights of each resident, including . . . [t]he right to be free from . . . any physical or chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms." 42 U.S.C. § 1396r(c)(1)(A)(ii). The other provides: "A nursing facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility" unless one of several enumerated exceptions is met. *Id.* § 1396r(c)(2)(A). The exceptions focus on the

[4]We do not decide the Secretary's additional arguments that § 2 does not unambiguously confer a new individual right because (1) it has an aggregate, rather than an individual, focus and (2) any right conferred is not "new." We also do not decide the fifteen States' argument as *amici* that § 2 creates new *remedies* enforceable by the Attorney General, not new *rights* enforceable by private plaintiffs. Furthermore, because we conclude that the statute at issue does not satisfy the first step of *Gonzaga*, we decline to address whether Congress specifically foreclosed a remedy under § 1983.

individual residents—for example, one exception allows for transfer or discharge when it is "necessary to meet the resident's welfare." *Id.* And even when a transfer or discharge is to be effected, the provision states that the nursing facility must give the residents at least thirty days' notice unless *inter alia* "the resident's health improves" or "the resident's urgent medical needs" necessitate an earlier discharge. *Id.* § 1396r(c)(2)(B). The Court determined that these provisions contain "rights-creating, individual-centric language with an unmistakable focus on the benefited class." *Talevski*, 599 U.S. at 183 (internal quotation marks omitted).

The plaintiffs argue that *Talevski* mandates a contrary outcome because the Court there stated that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." *Id.* at 185. The plaintiffs' argument, however, fails to recognize that the Court's reference to regulated parties merely acknowledged that those regulated parties were not a focus of the statutory provisions at issue in that case. As the Court found in *Talevski*, a statute's reference to regulated parties does not undermine a statute's focus on individual rights when it does not cause a "material diversion" from that focus. *Id.*; *see also Planned Parenthood S. Atl. v. Kerr*, 95 F.4th 152, 165 (4th Cir. 2024), *cert. granted in part*, 145 S. Ct. 1000 (2024) (concluding that a statutory provision that focuses on "discrete beneficiaries"—and which does not also focus on the regulated entities—creates individual rights enforceable via § 1983). We did not suggest in *Arkansas State Conference* that § 2 of the Act 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. *Ark. State Conf.*, 86 F.4th at 1210. Indeed, the subject of § 2's prohibition is "any State or political subdivision," rather than on the conferral of a right to "any citizen." 52 U.S.C. § 10301(a); *see Ark. State Conf.*, 86 F.4th at 1209 ("The opening passage [of § 2] focuses on what states and political subdivisions cannot do, which is impose or apply discriminatory voting laws." (internal quotation marks and alterations omitted)). And § 2's historical background suggests that the "right of any citizen" in § 2 merely parrots a preexisting right guaranteed by the Fifteenth Amendment. *See* U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the

United States or by any State on account of race, color, or previous condition of servitude."). *Arkansas State Conference* is therefore not inconsistent with *Talevski*.

Second, the plaintiffs suggest that § 2 must automatically confer an individual right because it contains the language "the right of any citizen . . . to vote" and "members of a class of citizens protected by subsection (a)." The Supreme Court has rejected the notion that the mere use of the word "right" in a statute is sufficient in and of itself to discern an unambiguous intent to confer individual rights. *See Gonzaga*, 536 U.S. at 289 n.7 (rejecting the dissent's suggestion that "any reference to 'rights,' . . . should give rise to a statute's enforceability under § 1983"). Instead, courts must "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." *Suter v. Artist M.*, 503 U.S. 347, 357 (1992) (internal quotation marks omitted). We ask whether "Congress intended to create a federal right *for* the identified class, not merely that the plaintiffs fall within the general zone of interest that the statute is intended to protect." *Talevski*, 599 U.S. at 183 (internal quotation marks omitted). Section 2 focuses on both the entities regulated and "any citizen." 52 U.S.C. § 10301(a). And we have held that "[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." *Gillespie*, 867 F.3d at 1043 (internal quotation marks and citation omitted). Thus, the mere reference to "right of any citizen" and "members of a class of citizens protected by subsection (a)" does not by itself unambiguously confer an individual right. 52 U.S.C. § 10301.

Third, the plaintiffs argue that *Gonzaga* only applies to statutes enacted under the Spending or Commerce Clauses. The Supreme Court, however, has not limited *Gonzaga*'s applicability to statutes enacted pursuant to the Spending or Commerce Clauses. *See 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 (as the law in *Gonzaga* did) has been dispelled by *Abrams*, 544 U.S. at 125, which treats *Gonzaga* as establishing the effect of § 1983 itself."). Rather, the Court has applied

the *Gonzaga* test in broadly applicable terms. For example, in *Talevski*, the Court cited *Gonzaga* for the proposition that it had "crafted a test for determining whether a particular federal law actually secures rights for § 1983 purposes." 599 U.S. at 175. The Court nowhere indicated that *Gonzaga*'s applicability was confined to the Spending or Commerce Clauses. Moreover, other circuits have applied *Gonzaga* outside of these two contexts. *See Vote.Org v. Callanen*, 89 F.4th 459, 474 (5th Cir. 2023) (applying *Gonzaga* to the Materiality Provision); *Schwier v. Cox*, 340 F.3d 1284, 1296-97 (11th Cir. 2003) (applying *Gonzaga* to § 1971 of the Voting Rights Act). Accordingly, we reject the plaintiffs' contention that *Gonzaga* only applies to statutes enacted under the Spending or Commerce Clauses.

Because § 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. The district court erred in finding otherwise, and we need not decide whether the district court erred in concluding that the 2021 redistricting map violated § 2 of the Act.

IV.

For the foregoing reasons, we vacate the judgment of the district court and remand with instructions that the case be dismissed for want of a cause of action.

COLLOTON, Chief Judge, dissenting.

The essence of a claim under § 2 of the Voting Rights Act "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Since 1982, private plaintiffs have brought more than 400 actions based on § 2 that have resulted in judicial decisions. The majority concludes that all of those cases should have been dismissed because § 2 of the Voting Rights Act does not confer a voting right. Consistent with all other courts to address the issue, I conclude that § 2 confers an individual right and that the enforcement scheme described in the Act is not incompatible with private enforcement under 42 U.S.C. § 1983. Because the

district court did not clearly err in ruling that the plaintiffs met their burden to establish a violation of § 2, I would affirm the judgment.

I.

Section 1983 provides a cause of action for persons who are subjected to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The reference to "and laws" encompasses any law of the United States. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 174-80 (2023). A principal purpose of including "and laws" in § 1983 was to "ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute." *Maine v. Thiboutot*, 448 U.S. 1, 7 (1980) (quoting *Chapman v. Hous. Welfare Rts. Org.*, 441 U.S. 600, 637 (1979) (Powell, J., concurring)).

"Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). We examine the text and structure of a statute to determine whether Congress intended to confer an individual right. The Secretary argues that § 2 confers no individual right, and that a remedy under § 1983 is not available.

In *Gonzaga*, which involved a statute enacted pursuant to Congress's spending power, the Court held that nothing short of an unambiguously conferred right is enforceable under § 1983. *Id*. at 283. The Court explained that the "typical remedy" for a State's noncompliance with federally imposed conditions in spending laws is not a private cause of action but termination of funding by the federal government. *Id*. at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)). The Court also observed that where "Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id*. at 286 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)).

The plaintiffs argue that the unambiguous conferral rule of *Gonzaga* should not apply to legislation like the Voting Rights Act that was enacted under Congress's power to enforce the Fifteenth Amendment. *Gonzaga* involved a statute enacted under Congress's spending power, and "§ 1983 actions are the exception—not the rule—for violations of Spending Clause statutes." *Talevski*, 599 U.S. at 193-94 (Barrett, J., concurring). But the federalism concerns that animated the Court's decisions on § 1983 and the Spending Clause do not have the same force here, because the Reconstruction Amendments already altered the constitutional balance by limiting the power of the States and enlarging the power of Congress. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 454 (1976). There is thus reason to question whether courts should apply a substantive canon requiring unmistakable clarity when interpreting laws enacted under the Fourteenth and Fifteenth Amendments. Why not simply implement the statute as written based on traditional tools of statutory interpretation?

It is unnecessary to pursue that inquiry further in this case, because even applying the unambiguous conferral rule of *Gonzaga*, it is clear that Congress in § 2 of the Voting Rights Act intended to confer a voting right. Subsection (a) of § 2 expressly forbids "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) (emphasis added). Subsection (b) then defines a violation of § 2 by reference to "members of a class of citizens protected by subsection (a)" and "members of a protected class." *Id.* § 10301(b). The statute explicitly uses the term "right" to describe duties that a defined party ("State or political subdivision") owes to a particular individual ("any citizen"). *See Talevski*, 599 U.S. at 231 (Alito, J., dissenting).

As a three-judge district court explained last year after comprehensive analysis, "every sentence of Section Two either refers to rights of the benefited class, contains rights-creating language that creates new rights for that specific class, or expressly focuses on the benefited class." *Singleton v. Allen*, 740 F. Supp. 3d 1138, 1158 (N.D. Ala. 2024). Other courts likewise have recognized that § 2 includes clear rights-creating language and is enforceable under § 1983. *Coca v. City of Dodge City*, 669 F. Supp. 3d 1131, 1141-42 (D. Kan. 2023) ("Not only does Section 2

contain clear rights-creating language—a legal position thus far unquestioned by any members of the Supreme Court—but it also does not contain a comprehensive enforcement scheme incompatible with individual enforcement."); *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-22, 2022 WL 2528256, at *5 (D.N.D. July 7, 2022) ("It is difficult to imagine more explicit or clear rights creating language."); *League of United Latin Am. Citizens v. Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court).

The Secretary resists this straightforward conclusion on several grounds. None is persuasive.

The Secretary contends that § 2 does not confer a voting right because it purportedly focuses on the entities regulated rather than the individuals protected. That § 2 forbids a State or political subdivision to impose certain voting procedures, however, does not negate the clear congressional intent to confer a voting right on members of what the statute describes as a protected class. The Supreme Court rejected the same argument in *Talevski*, where the statute at issue declared what a nursing facility must do to protect rights secured by the statute. *See* 42 U.S.C. § 1396r(c)(1)(A), (B), (2)(A), (B)(i) ("A nursing facility must . . . ."). The Court explained that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." *Talevski*, 599 U.S. at 185.

When the Supreme Court in an earlier case referred to statutes that "focus on the person regulated rather than the individuals protected," the Court described a provision that included no rights-creating language and was twice removed from the individuals who would benefit from the statutory protection. *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001). By contrast, § 2 explicitly uses the phrase "right of any citizen of the United States to vote" and repeatedly focuses on the benefited class. Unlike *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017), where a statute's reference to an individual was "nested within one of eighty-three subsections" and "two steps

removed from the Act's focus on which state plans *the Secretary*" was required to approve, there are no "mixed signals" in § 2. *Id.* at 1042-43.

Congress manifested the same intent in another provision of the Voting Rights Act, often called the Materiality Provision. That subsection, structured like § 2, provides that "No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission . . . [that] is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Two circuits have rejected an argument comparable to the position advanced by the Secretary in this case: "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.'" *Vote.org v. Callanen*, 89 F.4th 459, 475 (5th Cir. 2023) (alterations in original) (quoting *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003)). *Schwier* anticipated the Supreme Court's insight in *Talevski*; *Vote.org* followed *Talveski*'s example. 89 F.4th at 474 & n.3. For the same reasons, § 2 unambiguously confers an individual voting right despite Congress's identification of the regulating entities as the subject of the provision.

The majority concludes that no analysis of the statute is necessary because this court supposedly decided in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), that § 2 of the Voting Rights Act does not confer an individual voting right. This conclusion misreads dicta in *Arkansas State Conference*. That decision held only that § 2 does not provide a private remedy. *Id*. at 1210-17. The panel was agnostic about whether § 2 confers a private right.

The *Arkansas State Conference* opinion includes four inconclusive paragraphs in Part III.A about whether § 2 confers an individual right. *Id*. at 1209-10. The opinion makes plain that the court did not decide the issue. The first sentence of the discussion says it "is *unclear whether* § 2 creates an individual right." *Id*. at 1209 (emphasis added). The last sentence says it "is *unclear what to do* when a statute focuses on both" individuals who are protected and entities that are

regulated. *Id*. at 1210 (emphasis added). After declining to decide whether § 2 confers an individual right, the panel skipped over that non-jurisdictional question and decided the case on another ground.

Arkansas State Conference thus contains only indeterminate dicta about whether § 2 confers an individual right, and ill-considered dicta at that. In professing that it is "unclear what to do when a statute focuses on both" a rights-holder and a regulated entity, the decision ignored *Talevski*. Several months before the decision in *Arkansas State Conference*, the Supreme Court explained that where statutory provisions confer a right with an "unmistakable focus on the benefited class," but "also establish who it is that must respect and honor these statutory rights," there is no "material diversion from the necessary focus" on the rights-holders. 599 U.S. at 185-86 (internal quotation omitted). For the reasons discussed, § 2 confers an individual voting right, and dicta in *Arkansas State Conference* present no barrier to this panel reaching the correct conclusion.

The Secretary next contends that § 2 has an "aggregate focus" and protects only "collective" rights. But the statute protects the individual right of "any citizen," and "the right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006) (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)). That a statute includes an "unmistakable focus on the benefited class" does not alter the individual rights-creating nature of the statute. *Talevski*, 599 U.S. at 186 (internal quotation omitted).

The Secretary also maintains that § 2 does not confer an individual right because it allegedly repeats the same protection already secured by the Fifteenth Amendment. The majority refutes that argument: "In changing the evidentiary bar required to prove a § 2 violation, Congress made it easier to prevail under § 2 than under the Fifteenth Amendment." *Ante*, at 7. In any event, potential overlap with the Fifteenth Amendment does not remove rights conferred by § 2 from the scope of "any rights . . . secured by the Constitution and laws." 42 U.S.C. § 1983. The plain language of § 1983 encompasses such a right, and the Supreme Court has recognized

that § 5 and § 10 of the Voting Rights Act confer individual rights (and rights of action) despite a comparable grounding in the Fifteenth Amendment. *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996); *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969); *see Singleton*, 740 F. Supp. 3d at 1161-62.

Where, as here, Congress conferred a right on individuals, there is a presumption that Congress intended for the right to be enforceable under § 1983. The Secretary next contends, however, that the Voting Rights Act includes a comprehensive enforcement scheme that implies a congressional intent to preclude private enforcement.

"[T]he *sine qua non* of a finding that Congress implicitly intended to preclude a private right of action under § 1983 is incompatibility between enforcement under § 1983 and the enforcement scheme that Congress has enacted." *Talevski*, 599 U.S. at 187. "[T]he inquiry boils down to what Congress intended, as divined from text and context." *Id.*

The Secretary argues that because § 12 of the Act, 52 U.S.C. § 10308(d), provides for enforcement actions by the Attorney General, Congress must have intended to preclude private actions under § 1983. This contention is unconvincing.

The Supreme Court has discerned congressional intent to preclude enforcement under § 1983 only where statutes included "self-contained enforcement schemes that included statute-specific rights of action." *Talevski*, 599 U.S. at 189 (citations omitted). In each of those cases, the statute at issue "required plaintiffs to comply with particular procedures and/or to exhaust particular administrative remedies under the statute's enforcement scheme before suing under its dedicated right of action." *Id.* (internal quotation omitted). "And each statute-specific right of action offered fewer benefits than those available under § 1983." *Id.*

There are no equivalent indicia of congressional intent to preclude enforcement of the Voting Rights Act under § 1983. The Act includes no statute-specific right of action that might suggest an intent to make the § 1983 remedy

unavailable. The Act does confer authority to sue on a government official, but there is no "unusually elaborate" set of enforcement provisions applicable to both government officials and private citizens. *Cf. Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). The authority of the Attorney General to bring enforcement actions in select cases comfortably coexists with the ability of private plaintiffs to sue under § 1983 to vindicate their own voting rights. The "presumption is that § 1983 can play its textually prescribed role as a vehicle for enforcing those rights, even alongside a detailed enforcement regime that also protects those interests, so long as § 1983 enforcement is not incompatible with Congress's handiwork." *Talevski*, 599 U.S. at 188-89.

For these reasons, the district court correctly concluded that the plaintiffs could sue under § 1983 to allege a violation of their rights under § 2 of the Voting Rights Act.

II.

The Secretary argues alternatively that the district court erred by granting relief on the merits under § 2. The district court's decision is adequately supported by the record and should be affirmed.

To prove a violation of § 2, plaintiffs must establish three preconditions as described by the Court in *Gingles*:

> First, the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district. Second, the minority group must be able to show that it is politically cohesive. And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate.

Allen v. Milligan, 599 U.S. 1, 18 (2023) (internal citations omitted). If the three preconditions are established, plaintiffs "must then show, under the 'totality of the

circumstances,' that the political process is not 'equally open' to minority voters." *Id.* (quoting *Gingles*, 478 U.S. at 45-46).

The plaintiffs challenged North Dakota state legislative districts 9 and 15, which were created by the State's 2021 legislative redistricting plan. Under the plan, district 9 encompassed all of Rolette County and stretched eastward to include portions of Towner and Cavalier Counties. District 9 was divided into two subdistricts: 9A and 9B. The Turtle Mountain Reservation was placed in subdistrict 9A. Portions of the Tribe's trust lands located within Rolette County were placed in subdistrict 9B along with the portions of Towner and Cavalier Counties encompassed by district 9. The Spirit Lake Reservation was placed in district 15.

Under the 2021 plan, voters in district 9 and district 15 each elected one state senator. Voters in subdistricts 9A and 9B each elected one member of the state House of Representatives. Voters in district 15 elected two at-large members of the state House. According to the 2020 Census, the Native American voting age populations of Rolette County and the relevant portions of Towner and Cavalier Counties are 74.4 percent, 2.7 percent, and 1.8 percent, respectively. Subdistrict 9A, subdistrict 9B, and district 15 had Native American voting age populations of 79.8 percent, 32.2 percent, and 23.1 percent, respectively.

To support their vote dilution claim under § 2, the plaintiffs introduced two maps illustrating alternative configurations of district 9. The maps were offered to demonstrate that the Native American voting age population in northeast North Dakota is sufficiently large and geographically compact to constitute an effective majority in a single multimember district. Under both illustrative plans, the Turtle Mountain Reservation and trust lands and the Spirit Lake Reservation are encompassed by district 9. The Native American voting age population is 66.1 percent in the plaintiffs' first illustrative plan and 69.1 percent in the second illustrative plan.

After a four-day bench trial, the district court ruled that the plaintiffs had satisfied the three preconditions to establish § 2 liability under *Gingles*. The court

then concluded that under the totality of the circumstances, the State's 2021 legislative redistricting plan "deprive[d] Native American voters" in districts 9 and 15 and subdistricts 9A and 9B "of an equal opportunity to participate in the political process and to elect representatives of their choice, in violation of Section 2 of the VRA." Accordingly, the court enjoined the Secretary from implementing elections in the contested districts, and gave the Secretary and the North Dakota Legislative Assembly thirty-five days to submit a proposed remedial redistricting plan.

The Secretary and Legislative Assembly failed to submit a proposed remedial plan by the deadline, so the court ordered the Secretary to adopt and implement one of the plaintiffs' illustrative plans as the remedial map. The Secretary did not appeal the district court's remedial order.

On this appeal, the Secretary argues that the district court erred in finding that the plaintiffs met their burden to establish the first and second *Gingles* preconditions. He does not challenge the court's findings as to the third precondition or the totality of the circumstances.

Vote dilution claims are "peculiarly dependent upon the facts of each case," and require "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (internal quotations omitted). To preserve "the benefit of the trial court's particular familiarity with the indigenous political reality," we apply a clear error standard of review to the predicate factual determinations and to the ultimate finding regarding vote dilution. *Id.*; *Abrams v. Johnson*, 521 U.S. 74, 91, 93 (1997). The plaintiffs bear the burden to show unlawful vote dilution. *Voinovich v. Quilter*, 507 U.S. 146, 155-56 (1993).

As to the first *Gingles* precondition, a district is "reasonably configured . . . if it comports with traditional districting criteria," including geographic contiguity and compactness, respect for existing political boundaries, and keeping together communities of interest. *Milligan*, 599 U.S. at 18, 20, 34. The district court found that the plaintiffs' illustrative maps satisfied these criteria.

The court first concluded that the illustrative districts do "not appear more oddly shaped than other districts" and "are reasonably compact" based on objective compactness scores and in comparison to other districts created by the State's 2021 redistricting plan. The court next found that the illustrative redistricting plans respect existing political boundaries by consolidating the Turtle Mountain Band's reservation and trust lands into one district. The court also determined that the Tribes represent a community of interest based on shared representational interests, socioeconomic statuses, education levels, and cultural practices and values, and found that the illustrative plans effectively keep this community of interest together in one district. The court found that the Native American voting age population is 66.1 percent in the plaintiffs' first illustrative plan and 69.1 percent in their second illustrative plan. These findings are supported by the record, and the court did not clearly err in ruling that the plaintiffs met their burden to establish the first precondition.

The Secretary urges reversal on two grounds. First, the Secretary argues that the court erred because the State's enacted version of district 9 apparently performs better than the plaintiffs' illustrative maps with respect to certain traditional districting criteria. But *Gingles* does not require a district court to conduct a "beauty contest" between the plaintiffs' illustrative maps and the State's districts as enacted. *Id.* at 21. The court did not clearly err in finding that the illustrative maps comported with traditional districting criteria. The court was not required to resolve whether the illustrative maps or the State's districts were in some sense superior as measured by those criteria. The illustrative maps satisfied the first precondition by establishing that the minority group was sufficiently large and geographically compact to constitute a majority in a reasonably configured district.

The Secretary also contends that the district court erred by omitting an explicit finding on whether race was the predominant factor motivating the plaintiffs' illustrative district lines. "Section 2 itself 'demands consideration of race,'" but "race may not be 'the predominant factor in drawing district lines unless there is a compelling reason.'" *Milligan*, 599 U.S. at 30-31 (plurality opinion) (first quoting *Abbott v. Perez*, 585 U.S. 579, 587 (2018), then quoting *Cooper v. Harris*, 581 U.S.

285, 291 (2017)). "Race predominates in the drawing of district lines . . . when 'race-neutral considerations come into play only after the race-based decision had been made.'" *Id.* (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017)). But "race consciousness" in drawing a map "does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

The Secretary asserts that race was the predominant factor in drawing the illustrative maps, and that the plaintiffs failed to establish the first precondition because their maps are impermissible racial gerrymanders. The only evidence cited is that plaintiffs' illustrative districts stretch diagonally across the State and join two Native American reservations. As the district court observed, however, the plaintiffs' illustrative districts do "not appear more oddly shaped than other districts." Nor is the fact that the maps join two Native American reservations sufficient to undermine the district court's ruling. Nonracial considerations—such as consolidating reservation and trust lands and keeping together tribal communities of interest—justify the district lines. Insofar as race was considered in order to show that an additional majority-minority district could be drawn, that is "the whole point of the enterprise," *Milligan*, 599 U.S. at 33 (plurality opinion), and it is therefore permissible under the statute. By rejecting the State's arguments, the district court implicitly found that race did not impermissibly predominate.

The plaintiffs' illustrative districts are not "so bizarre [on their] face that [they are] unexplainable on grounds other than race." *Shaw*, 509 U.S. at 644 (internal quotation omitted). Nor is this a case where the districts have "no integrity in terms of traditional, neutral redistricting criteria." *Milligan*, 599 U.S. at 28 (quoting *Bush v. Vera*, 517 U.S. 952, 960 (1996) (plurality opinion)). As in *Milligan*, "[w]hile the line between racial predominance and racial consciousness can be difficult to discern, it was not breached here." *Id.* at 31 (plurality opinion) (citation omitted). The Secretary cites no persuasive evidence of racial predominance, and his own expert testified that he had no evidence that the demonstrative plans are a racial gerrymander. With no direct evidence of legislative purpose or compelling circumstantial evidence of impermissible race-based redistricting, remand for an

express finding on lack of racial predominance is not warranted. *See Bethune-Hill*, 580 U.S. at 190.

The second *Gingles* precondition requires the plaintiffs to show that the minority group is politically cohesive. *Milligan*, 599 U.S. at 18. This showing "typically requires a statistical and non-statistical evaluation of the relevant elections." *Bone Shirt*, 461 F.3d at 1020.

The parties and their experts agreed that voting in at-large elections in districts 9 and 15, as enacted by the State in 2021, is racially polarized, with Native American voters cohesively supporting the same candidates. Although subdistricts 9A and 9B of the State's 2021 redistricting plan did not contain enough precincts for a full statistical analysis, the court considered available population statistics, election data, and expert reports and testimony interpreting this information. The court reasonably inferred that the undisputed political cohesiveness at the district level was also present at the subdistrict level.

The court's statistical inference was buttressed by testimony from tribal leaders that voters who live on the Turtle Mountain Reservation and voters who live on the Spirit Lake Reservation vote similarly. *See Sanchez v. Bond*, 875 F.2d 1488, 1493-94 (10th Cir. 1989) ("The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically cohesive."). Considering this statistical and non-statistical evidence, the district court did not clearly err in finding that Native American voters in the relevant districts and subdistricts are a politically cohesive group.

* * *

In sum, § 2 of the Voting Rights Act confers an individual right, and the enforcement authority of the Attorney General is not incompatible with private enforcement of the right under § 1983. The district court did not clearly err in ruling

that the plaintiffs met their burden to establish the first two *Gingles* preconditions. I would therefore affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Turtle Mountain Band of Chippewa Indians, et al., Plaintiffs, vs. Michael Howe, in his Official Capacity as Secretary of State of North Dakota, Defendant.	**ORDER** Case No. 3:22-cv-22

The North Dakota Legislative Assembly moves for an extension of time to file (Doc. 156) and to expedite (Doc. 162). Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown oppose the motion (Doc. 161) and move for a remedial order (Doc. 159). The Legislative Assembly opposes the Plaintiffs' motion. Doc. 163. Defendant Michael Howe, Secretary of State of North Dakota, has not responded to either motion.

As to the Legislative Assembly's motion for extension of time to file, the Assembly asks for an extension of time to file a remedial plan until February 9, 2024. An initial problem with the Legislative Assembly's request is that it is not a party to this case, and it did not seek leave to file its motion for an extension of time to file. Another problem is that the two parties to this case oppose the extension sought by the Legislative Assembly. The Plaintiffs actively oppose the extension, and the Secretary did not file a response, though he did oppose the same motion made by the Legislative Assembly to the Eighth Circuit Court of Appeals.

After finding a Section 2 violation of the Voting Rights Act, federal law requires that, "whenever practicable," the state be "afford[ed] a reasonable opportunity . . . to adopt[] a substitute measure rather than for the federal court to devise and order into effect its own plan." Wise v.

Lipscomb, 437 U.S. 535, 540 (1978). Here, that is what the Court ordered. The Secretary was provided a reasonable time, until December 22, 2023, to propose a remedial plan. The Plaintiffs are correct that the Court did not order the Secretary (or the Legislative Assembly) to adopt a new plan by that date; it provided a reasonable opportunity to the Secretary to propose his own plan to correct the proven Section 2 violation. The law requires nothing more and nothing less. But if the Secretary elects to not offer a proposed remedial plan (as is the case here), then it becomes the "unwelcome obligation of the federal court" to devise a remedy. Id. (internal citations and quotations omitted). And that is where we find ourselves now. On this record, an extension of time is not warranted because the Secretary was provided a reasonable opportunity to propose a remedial plan, and an extension has not been requested by either party to this case. So, the motion for extension of time to file (Doc. 156) and the motion to expedite (Doc. 162) are **DENIED**.

Given that the Secretary did not submit a proposed remedial plan by December 22, 2023, the Plaintiffs now move for a remedial order. Doc. 159. Substantively, the Eighth Circuit stated in Bone Shirt v. Hazeltine, 461 F.3d 1011, 1022-23 (8th Cir. 2006):

> In formulating a remedial plan, the first and foremost obligation of the district court is to correct the Section 2 violation. See Westwego Citizens for Better Gov't, 946 F.2d at 1124. Second, the plan should be narrowly tailored, and achieve population equality while avoiding, when possible, the use of multi-member districts. Abrams v. Johnson, 521 U.S. 74, 98, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997); Chapman v. Meier, 420 U.S. 1, 26-27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). Third, the plan must not violate Sections 2 or 5 of the Voting Rights Act. Finally, the plan should not "intrude on state policy any more than is necessary" to uphold the requirements of the Constitution. Upham v. Seamon, 456 U.S. 37, 41-42, 102 S.Ct. 1518, 71 L.Ed.2d 725 (1982) (per curiam) (quoting White v. Weiser, 412 U.S. 783, 794-95, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973)).

Here, the Plaintiffs' proposed plan 2 meets all four requirements. It corrects the Section 2 violation, is narrowly tailored, and achieves population equality. Per this Court's findings, proposed plan 2 "comports with traditional redistricting principles." Doc. 125 at 18-19. Proposed plan 2 does not

violate Section 2 of the Voting Rights Act. Doc. 125. It requires changes to only three districts (Doc. 65-2 at 41) and is the least intrusive option that complies with the Voting Rights Act and the Constitution.

Procedurally, the Court notes that the Secretary did not respond to the motion, and Civil Local Rule 7.1(F) states that an adverse party's "failure to serve and file a response to a motion may be deemed an admission that the motion is well taken." D.N.D. Civ. Local R. 7.1(F). The Court deems the Secretary's lack of response as an admission that the motion for a remedial order encouraging the Court to adopt proposed plan 2 is well taken.

Because the motion (Doc. 159) is unopposed and is in the interest of justice, it is **GRANTED**. The Court **ORDERS** that the Plaintiffs' proposed plan 2 be adopted and implemented as the remedial map to correct the Section 2 violation.

IT IS SO ORDERED.

Dated this 8th day of January, 2024.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-3655

Turtle Mountain Band of Chippewa Indians, et al.

Appellees

v.

Michael Howe, in his official capacity as Secretary of State of North Dakota

Appellant

North Dakota Legislative Assembly, et al.

Appeal from U.S. District Court for the District of North Dakota - Eastern
(3:22-cv-00022-PDW)

AMENDED ORDER

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

The application for leave to file an overlength motion is granted. The motion to expedite is granted. The motion for a stay of the district court's judgment has been considered by the court and is denied.

December 15, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Turtle Mountain Band of Chippewa Indians, et al., Plaintiffs, vs. Michael Howe, in his Official Capacity as Secretary of State of North Dakota, Defendant.	**ORDER** Case No. 3:22-cv-22

Defendant Michael Howe, the Secretary of State of North Dakota, moves to stay the remedial order and judgment pending appeal in this Voting Rights Act ("VRA") case. Doc. 131. Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown move to amend or correct the remedial order, given the Secretary's motion to stay. Doc. 134. The Plaintiffs oppose the Secretary's motion (Doc. 142), and the Secretary opposes the Plaintiffs' motion (Doc. 140). The North Dakota Legislative Assembly also moves to intervene and moves for a stay. Doc. 137; Doc. 151. All four motions are denied.

A. Motion to Stay Judgment Pending Appeal

The Secretary asks for a stay of the judgment finding a Section 2 violation after trial and a final decision on the merits. Tellingly though, the Secretary does not challenge the merits of the order and decision on the Section 2 claim. Instead, he argues (1) a stay of the judgment is appropriate per Purcell v. Gonzalez, 549 U.S. 1 (2006), and (2) that 42 U.S.C. § 1983 does not apply to the VRA.

1. Purcell Principle

In his motion, the Secretary largely leans on Purcell to suggest a stay pending appeal is warranted. But Purcell does not apply on these facts. And even if it did, it is perhaps more troubling

to suggest that Purcell permits what the Secretary asks for here—that a federal court overlook and stay a proven Section 2 violation because it requires a state to correct the violation well before any election is ever scheduled to occur.

Purcell and its progeny articulated a general principle "that lower federal courts should ordinarily not alter the election rules on the eve of an election." Republican Nat'l Comm. v. Democratic Nat'l Comm., 589 U.S. ___, 140 S. Ct. 1205, 1207 (2020) (emphasis added). But the context is critical—Purcell and the majority of cases relying on and citing to it are cases involving preliminary injunctive relief, where there is no merits decision on a claim. Purcell, 549 U.S. at 4 (granting stay of preliminary injunction concerning voter identification procedures entered weeks before an election); North Carolina v. League of Women Voters of N.C., 574 U.S. 927 (2014) (granting stay of preliminary injunction entered close to an election date); Wise v. Circosta, 978 F.3d 93, 103 (4th Cir. 2020) (denying preliminary injunction of new absentee ballot rule less than a month before election); Veasey v. Perry, 769 F.3d 890, 895 (5th Cir. 2014) (granting stay of preliminary injunction entered 9 days before election); Genetski v. Benson, No. 20-000216-MM, 2020 WL 7033539, at *2 (Mich. Ct. Cl. Nov. 2, 2020) (declining to grant preliminary injunction the day before an election). As explained in Purcell, there are "considerations specific to election cases" when deciding whether to enjoin an election law in close temporal proximity to an election. Purcell, 549 U.S. at 4. Also of chief concern in Purcell cases is the risk of voter confusion. See Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring) (stating, "Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.").

This is not a preliminary injunctive relief case. This is a case where a Section 2 violation of the VRA was proven by evidence at trial. Beyond that, there is no imminent election, little risk

of voter confusion, and the final judgment was not issued on the "eve" of any election. It strains credibility to seriously suggest otherwise. As the Plaintiffs correctly point out, the deadlines cited by the Secretary concern the opening date for candidate signature gathering—for elections that are still months away. Indeed, the Secretary's concern is not as to voter confusion but rather the administrative burden of correcting the Section 2 violation. Because there is no imminent election and no order for preliminary injunctive relief enjoining an election rule, Purcell does not apply, and it does not support granting a stay pending appeal.

2. Traditional Stay Pending Appeal Factors

Setting Purcell aside, in deciding whether to grant a stay pending appeal, courts consider four factors: (1) whether the stay applicant has made a strong showing that the applicant is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Chafin v. Chafin, 568 U.S. 165, 179 (2013). "The most important factor is likelihood of success on the merits, although a showing of irreparable injury without a stay is also required." Org. for Black Struggle v. Ashcroft, 978 F.3d 603, 607 (8th Cir. 2020). Stays pending appeal are disfavored, even if the movant may be irreparably harmed. Nken v. Holder, 556 U.S. 418, 427 (2009).

First, the Secretary has not made a strong showing he is likely to succeed on the merits. Once again, nowhere in the Secretary's motion does he challenge (or even address) the merits of the Section 2 claim and the Court's finding of a Section 2 violation after trial. He instead focuses on a new legal theory that 42 U.S.C. § 1983 provides no cause of action for private plaintiffs to bring a Section 2 claim. This issue was addressed in an order denying the Secretary's motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), though both

parties raise new arguments that were not raised during the initial briefing of that issue. No doubt this issue is ripe for appellate review given the Eighth Circuit's recent decision in Arkansas State Conference of NAACP v. Arkansas Board of Apportionment, __ F.4th __, No. 22-1395, 2023 WL 8011300 (8th Cir. Nov. 20, 2023). But simply because the issue is set for appellate review does not mean the Secretary has made a strong showing that he is likely to succeed on the merits. This seems particularly true when he does not challenge or address the merits of the substantive Section 2 claim at issue. So, the first factor does not weigh in favor of a stay pending appeal.

Next, the Secretary will not be irreparably injured absent a stay. The Secretary largely rehashes his Purcell analysis to show irreparable injury absent a stay. As noted above, Purcell does not apply, and the Court struggles to understand how the Secretary would be irreparably injured by complying with Section 2 of the VRA. And per Nken, even if the Secretary may be irreparably harmed, a stay pending appeal is not a matter of right. 556 U.S. at 433. The second factor does not weigh in favor of a stay pending appeal.

Third, granting a stay would substantially injure the Plaintiffs and all other Native Americans voting in districts 9 and 15. A stay would effectively allow an ongoing Section 2 violation to continue until a decision on the § 1983 issue is reached by a reviewing court. There is substantial harm inherent in the deprivation of the Plaintiffs' fundamental voting rights. See Martin v. Kemp, 341 F. Supp. 3d 1326, 1340 (N.D. Ga. 2018). As such, the third factor weighs heavily against a stay.

Finally, the public interest lies in correcting Section 2 violations, particularly when those violations are proven by evidence and data at trial. Concerns as to the logistics of preparing for an election cycle cannot trump violations of federal law and individual voting rights. This factor also weighs against a stay pending appeal.

Again, it is worth emphasizing that this motion for a stay pending appeal is not made in the context of any preliminary injunction, where there is no final decision on the merits of a claim. And it is not made in the context of any imminent election. Instead, it is a request for a stay after a full and final decision on the merits, after a trial, on a Section 2 claim—a merits decision the Secretary does not address or even challenge in his motion. In that context, the law and the four factors conclusively instruct that a stay pending appeal is inappropriate, and the Secretary's motion to stay is denied.

B. Motion to Amend or Correct Remedial Order and Motion to Intervene

Turning to the Plaintiffs' motion to amend or correct the remedial order, the motion presents an issue of jurisdiction. The filing of a notice of appeal generally divests the district court of jurisdiction over the case, and the district court cannot reexamine or supplement the order being appealed. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Liddell v. Board of Educ., 73 F.3d 819, 822 (8th Cir. 1996). Here, the Plaintiffs ask the Court to reexamine the deadlines in the remedial order in response to the Secretary's Purcell concerns. But the Court cannot reexamine the remedial order because the Secretary filed his notice of appeal before the motion to amend or correct. The Court lacks jurisdiction to amend or correct the remedial order, and the motion (Doc. 134) is denied.

The same is true for the Legislative Assembly's motion to intervene and motion to stay. It is axiomatic that the motion to intervene is untimely per Federal Rule of Civil Procedure 24, but again, this Court lacks jurisdiction to reexamine or supplement the order and judgment on appeal. Adding the Legislative Assembly as a party at this late stage is a rather extraordinary request to supplement the order and judgment on appeal, and the motions (Doc. 137; Doc. 151) are denied.

C. Conclusion

After a trial, and careful review of all of the evidence and data, the Court concluded the 2021 redistricting plan violated Section 2 of the VRA. Put simply, the facts and the law do not support a stay of the remedial order and judgment pending appeal. The Secretary's motion to stay pending appeal (Doc. 131) is **DENIED**. Because the notice of appeal divested this Court of jurisdiction over this case, the Plaintiffs' motion to amend or correct the remedial order (Doc. 134) and the Legislative Assembly's motion to intervene (Doc. 137) and motion to stay (Doc. 151) are also **DENIED**.

IT IS SO ORDERED.

Dated this 12th day of December, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Turtle Mountain Band of Chippewa Indians, et al., Plaintiffs, vs. Michael Howe, in his Official Capacity as Secretary of State of North Dakota, Defendant.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 3:22-cv-22

Plaintiffs Turtle Mountain Band of Chippewa Indians ("Turtle Mountain Tribe"), Spirit Lake Tribe ("Spirit Lake Tribe"), Wesley Davis, Zachery S. King, and Collette Brown assert the State of North Dakota's 2021 legislative redistricting plan dilutes Native American voting strength by unlawfully packing subdistrict 9A of district 9 with a supermajority of Native Americans and cracking the remaining Native American voters in the region into other districts, including district 15—in violation of Section 2 of the Voting Rights Act of 1965. Defendant Michael Howe, the Secretary of State of North Dakota, denies the Section 2 claim, arguing the 2021 redistricting plan is lawful.

Section 2 of the VRA prohibits any "standard, practice, or procedure" that "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). It prohibits what the Tribes claim happened here—"the distribution of minority voters into districts in a way that dilutes their voting power." Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248 (2022) (citing Thornburg v. Gingles, 478 U.S. 30, 46 (1986)). In Gingles, the United States Supreme Court identified three preconditions that must be initially satisfied to proceed with a Section 2 voter dilution claim:

1. The minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district;

2. The minority group . . . is politically cohesive; and,

3. The white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority's preferred candidate.

478 U.S. at 50-51. Failure to prove any of the three preconditions defeats a Section 2 claim. Clay v. Bd. of Educ., 90 F.3d 1357, 1362 (8th Cir. 1996). If all preconditions are met, then there is a viable voter dilution claim, and the analysis shifts to determining whether, under the totality of the circumstances, members of the racial minority group 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).

A four-day bench trial was held on June 12, 2023. After consideration of the testimony at trial, the exhibits introduced into evidence, the briefs of the parties, and the applicable law, what follows are my findings of fact and conclusions of law. And as explained below, the Tribes have established a Section 2 violation of the VRA.

I. FINDINGS OF FACT

A. The Parties

Two Tribes and three individual voters make up the Plaintiffs. For the Tribes, the Turtle Mountain Tribe is a federally recognized Tribe under 88 Fed. Reg. 2112 (2023), possessing "the immunities and privileges available to federally recognized Indian Tribes[.]" Jamie Azure is its Chairman. Doc. 117 at 10:25-11:4. The Turtle Mountain Reservation is located entirely within Rolette County in northeastern North Dakota and covers 72 square miles. A large portion of Turtle Mountain's trust land is also located in Rolette County. Id. at 13:12-14:23; Id. at 15:11-16:4. The Turtle Mountain Tribe has over 34,000 enrolled members, and approximately 19,000 members

live on and around the Turtle Mountain Reservation, including on Turtle Mountain trust lands in Rolette County. Id. at 13:12-14:23.

The second Tribe is the Spirit Lake Tribe, which is also a federally recognized Tribe. Douglas Yankton, Sr. is its former Chairman. He served as Chairman during the 2021 redistricting process. Doc. 115 at 45:12-22. The Spirit Lake Tribe is located on the Spirt Lake Reservation. The Spirit Lake Reservation covers approximately 405 square miles, primarily in Benson County in northeastern North Dakota. Id. at 47:10-48:2, 55:13-23. The Spirit Lake Tribe has approximately 7,559 enrolled members, with approximately 4,500 members living on or near the Spirit Lake Reservation. Id. at 47:10-48:2.

Three individual voters join the Tribes as Plaintiffs: Wesley Davis, Zachary King, and Collette Brown. Davis and King are enrolled members of the Turtle Mountain Tribe. They live on the Turtle Mountain Reservation, are eligible to vote, and plan to continue voting in elections. They currently reside in what is now Senate district 9 and House subdistrict 9A. Doc. 108 at 6. Brown is an enrolled member of the Spirit Lake Tribe. She lives on the Spirit Lake Reservation, is eligible to vote, and plans to continue voting in elections. She resides in district 15. Doc. 116 at 7:8-9:11.

The Secretary is sued in his official capacity as Secretary of State of North Dakota. Doc. 108 at 7. The Secretary is responsible for "supervis[ing] the conduct of elections," and "publish[ing] . . . a map of all legislative districts." N.D. Cent. Code §§ 16.1-01-01(1) & (2)(a).

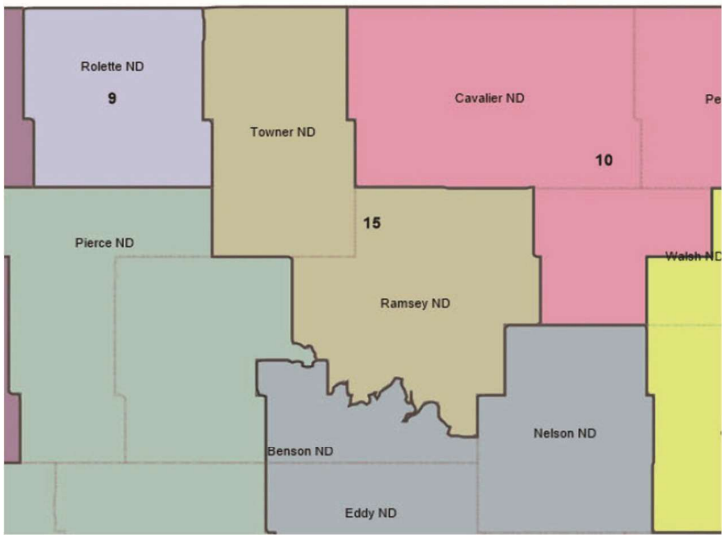
B. North Dakota's 2021 Redistricting Plan

Article IV, Section 2 of the North Dakota Constitution requires the state legislature to redraw the district boundaries of each legislative district following the Census that happens every 10 years. The North Dakota Legislative Assembly ("Legislative Assembly") is required to

"guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates." N.D. Const., Art. IV, Sec. 2. It is also required to "fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators" and requires that the "senate must be composed of not less than forty nor more than fifty-four members, and the house of representatives must be composed of not less than eighty nor more than one hundred eight members. These houses are jointly designated as the legislative assembly of the state of North Dakota." Id., Sec. 1. So, one Senator and at least two House members are allocated to each district. Section 2 of Article IV allows the House members to be either elected at-large from the district or elected from subdistricts created within the district. Id., Sec. 2.

1. North Dakota's Legislative Districts Before the 2021 Redistricting

Recall that the Tribes challenge changes made to districts 9 and 15. For the decade prior to the 2021 redistricting, district 9 was entirely within Rolette County. Doc. 108 at 3. It had a Native American voting age population ("NVAP") of 74.4%, did not contain any subdistricts, and contained the entirety of the Turtle Mountain Reservation, and its trust land located within Rolette County. Id. This map shows the pre-2021 legislative districts in the region:



Pl. Ex. 103.

2. 2021 Redistricting Process and Plan

As a result of the COVID-19 pandemic, the 2020 Census data was delayed. Doc. 116 at 149:18-150:2. While waiting for the new data, on April 21, 2021, Governor Burgum signed House Bill 1397. It established a legislative management redistricting committee ("Redistricting Committee") that was required to develop and submit a redistricting plan by November 30, 2021, along with implementation legislation. Doc. 108 at 1.

On May 20, 2021, then-Chairman Yankton sent a letter to the Redistricting Committee, requesting they schedule public hearings on each of the reservations located within North Dakota. Pl. Ex. 155. In response, the North Dakota Tribal and State Relations Committee held a joint meeting with the Tribal Council of the Turtle Mountain Tribe at the Turtle Mountain Community College on the Turtle Mountain Reservation. Def. Ex. 305; Doc. 108 at 2.

Redistricting was discussed at the joint meeting for roughly 30 minutes. Def. Ex. 418 at 17:18-21; Def. Ex. 305. Chairman Azure testified he became aware that redistricting had been added to the meeting agenda shortly before the meeting began. Doc. 117 at 29:21-31:24. He testified the Tribe had limited information about the 2020 Census population data and the discussion focused primarily on a population undercount. Id. at 29:21-31:24. One individual spoke in favor of subdistricts generally during the 30-minute discussion. Id. at 70:4-73:19.

Eventually, on August 12, 2021, the Census Bureau released redistricting data in legacy format (meaning the format used in specific redistricting software). Doc. 108 at 2. The Census data was released in a user-friendly format to the public on September 16, 2021. Id. at 2. The Redistricting Committee held public meetings in Bismarck on August 26, 2021, in Fargo on September 8, 2021, and again in Bismarck on September 15 and 16. Additional public meetings

of the Redistricting Committee were held in Bismarck on September 22 and 23, and September 28 and 29. Id. at 3.

Brown testified on behalf of the Spirit Lake Tribe at the August 26 Redistricting Committee meeting. She advocated for the Redistricting Committee to consider tribal input and for the use of single member districts to elect representatives to the House. Def. Ex. 327. Brown also encouraged the Redistricting Committee to comply with the requirements of the VRA. Id.

On September 1, 2021, the Tribal and State Relations Committee held a public meeting at the Spirit Lake Casino and Resort on the Spirit Lake Reservation and discussed redistricting. Doc. 108 at 2. Chairman Yankton testified that Spirit Lake may be interested in a legislative subdistrict to elect its House member. Def. Ex. 334. At subsequent meetings, representatives of Spirit Lake requested a subdistrict. Def. Ex. 351; Def. Ex. 398.

At its September 28 and 29 meetings, the Redistricting Committee released several proposals for creating two subdistricts in district 9. Def. Ex. 405. One proposal extended district 9 to the east to incorporate population from Towner and Cavalier Counties, created a subdistrict in district 9 that generally encompassed the Turtle Mountain Reservation, and placed Spirit Lake in an at-large district with no subdistrict. Def. Ex. 408.

About a month after that proposed plan was introduced, the Tribes each consulted their leadership, obtained an analysis of racially polarized voting, created a new proposal for district 9, and sent a letter to the Governor and legislative leaders with their proposal. Pl. Ex. 156 at 19-24; Doc. 115 at 77:5-79:18; Doc. 117 at 34:14-36:11. The letter stated that the Redistricting Committee's proposal as to district 9, which placed the Turtle Mountain Reservation in a subdistrict, was a VRA violation. It also stated that the Turtle Mountain Tribe did not request to be placed in a subdistrict. Pl. Ex. 156 at 19-24. Included in the letter was an illustration of an

alternative district map, where the Turtle Mountain and Spirit Lake Reservations were placed into a single legislative district with no subdistricts. Pl. Ex. 156 at 19-24; Doc. 108 at 4. Effectively, this alternative district combined Rolette County with portions of Pierce and Benson Counties, instead of combining Rolette County with portions of Towner and Cavalier Counties. Compare Pl. Ex. 156 at 19-24 with Def. Ex. 408. The letter stated that voting in the region is racially polarized, with Native American voters preferring different candidates than white voters. Id. at 19-24.

Then, at the November 8, 2021, Redistricting Committee meeting, Senator Richard Marcellais, who represented district 9 since his election in 2006, spoke in favor of the Tribes' proposed district. Def. Ex. 429 at 21-23. Representative Marvin Nelson from district 9 also spoke in favor of the proposal. Id. at 33-35. Representative Joshua Boschee moved for the adoption of an amendment to include the Tribes' proposal, but the amendment did not pass. Doc. 108 at 4. The Redistricting Committee passed and approved its final redistricting plan and report, which recommended passing the original proposal involving districts 9 and 15 (extending district 9 to the east to incorporate population from Towner and Cavalier Counties, creating a subdistrict in district 9 encompassing the Turtle Mountain Reservation, and placing Spirit Lake in an at-large district with no subdistrict).

The next day, the House of Representatives debated and passed House Bill 1504, the redistricting legislation accompanying the Redistricting Committee's final plan and report. Id. at 5. Then the Senate debated House Bill 1504. Senator Marcellais moved for an amendment (similar to the one he proposed to the Redistricting Committee), but it did not pass. Id. The Senate passed House Bill 1504, which was signed by Governor Burgum on November 11, 2021. Id.

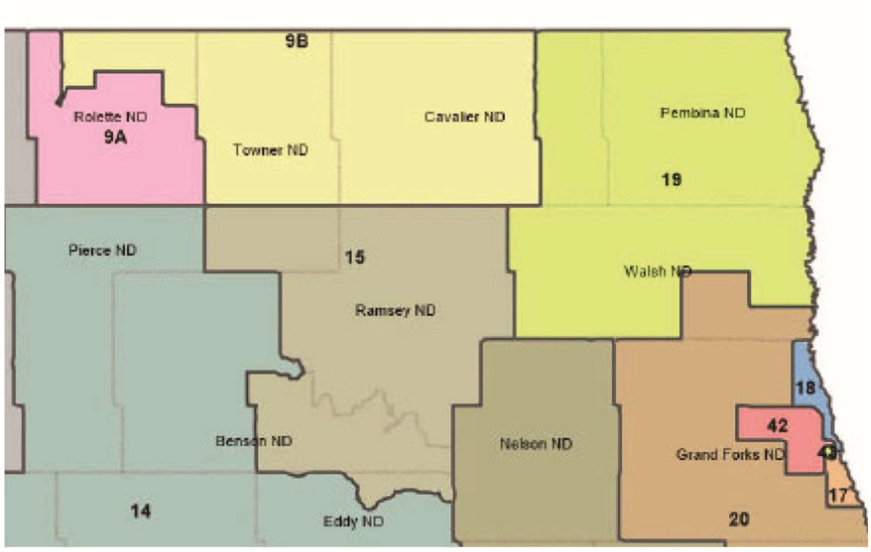
3. 2021 Redistricting Plan As Enacted

As enacted, the 2021 redistricting plan created 47 legislative districts and subdivided district 9 into single-member House subdistricts 9A and 9B. Id. The plan extended district 9

eastward to include portions of Towner and Cavalier Counties, with the Towner County and Cavalier County portions included with parts of Rolette County in subdistrict 9B. Pl. Ex. 100. It also placed the Turtle Mountain Reservation into Senate district 9 and House subdistrict 9A and placed portions of Turtle Mountain trust lands located within Rolette County into House subdistrict 9B. Doc. 108 at 5. The plan placed the Spirit Lake Reservation in district 15. Doc. 108 at 5.

According to the 2020 Census, the NVAP of Rolette County is 74.4%. The NVAP of the portion of Towner County in district 9 is 2.7%. There is an NVAP of 1.8% in the portion of Cavalier County in district 9. Pl. Ex. 1 at 16. Subdistrict 9A has a NVAP of 79.8% and subdistrict 9B has a NVAP of 32.2%. Pl. Ex. 42 at 7; Doc. 115 at 134:13-19, 136:7-137:25. District 15 has a NVAP of 23.1%. Doc. 115 at 135:3-13; Doc. 108 at 4.

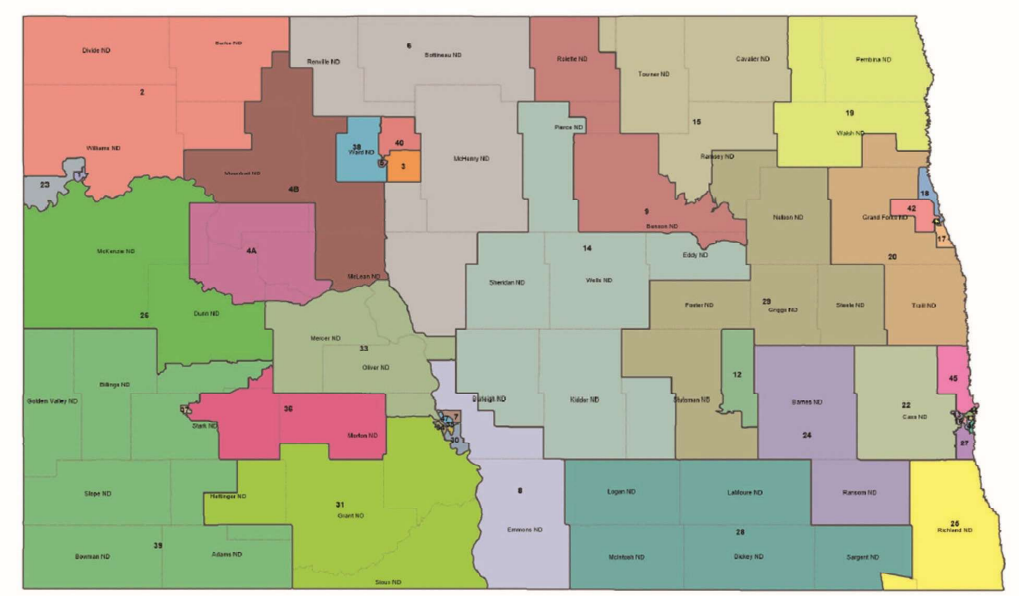
Voters in Senate district 9 and Senate district 15 each elect one Senator. Doc. 108 at 5. Voters in House subdistricts 9A and 9B each elect one representative to the House of Representatives. Id. Voters in district 15 elect two representatives at-large to the House of Representatives. Id. This is the 2021 plan's map of the legislative districts in northeastern North Dakota:



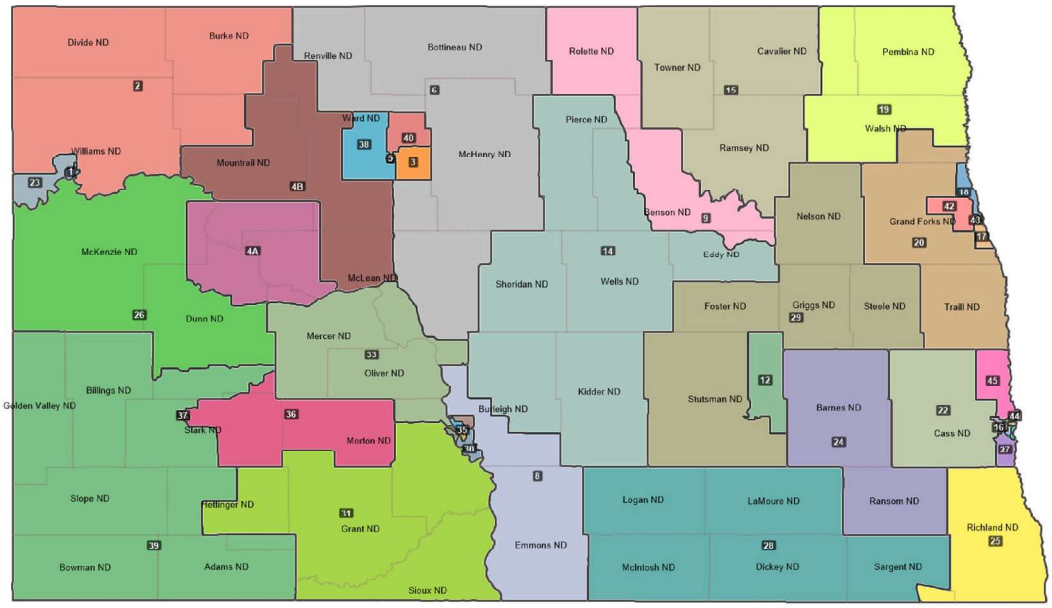
Pl. Ex. 101.

C. The Tribes' Proposed Plans

In support of their Section 2 claim, the Tribes produced two proposed plans containing alternative district configurations that demonstrate the Native American population in northeast North Dakota is sufficiently large and geographically compact to constitute an effective majority in a single multimember district. This is the first proposed plan:



Pl. Ex. 105. And this is the second proposed plan:



Pl. Ex. 106. Both feature a district 9 that has a majority NVAP. The first proposed plan has a NVAP of 66.1%, and the second has a NVAP of 69.1%. Doc. 115 at 134:22-135:2, 135:14-17, 166:1-3.

D. Trial Testimony and Evidence on Section 2 Claim

At trial, former Chairman Yankton (Doc. 115 at 41-120), Collette Brown (Doc. 116 at 6-44), former Senator Richard Marcellais (Doc. 116 at 44-71), former House of Representatives member Marvin Nelson (Doc. 116 at 170-189), and Chairman Jamie Azure (Doc. 117 at 10-66) testified as fact witnesses for the Tribes. Erika White (Doc. 117 at 186-203) and Bryan Nybakken (Doc. 118 at 6-38), two representatives of the Secretary of State's office, testified as fact witnesses for the Secretary.

Four expert witnesses testified. Dr. Loren Collingwood (Doc. 115 at 120-201), Dr. Daniel McCool (Doc. 116 at 72-143), and Dr. Weston McCool (Doc. 116 at 144-170) testified as expert witnesses for the Tribes. Dr. M.V. Hood III (Doc. 117 at 72-182) testified as an expert witness for the Secretary.

Former Chairman Yankton testified to the shared representational interests, socioeconomic status, and cultural and political values of Turtle Mountain Tribal members and Spirit Lake Tribal members. Doc. 115 at 50:24-52:11, 52:24-73:9; Doc. 117 at 22:4-16-27:15, 28:18-25; 50:3-7; 52:23-53:1, 55:9-12. 115. He also testified as to the political cohesiveness of the Tribes, explaining that the voters who live on the Turtle Mountain Reservation and the voters who live on the Spirit Lake Reservation vote similarly. Doc. 115 at 52:12-53:25.

He also testified specifically as to the 2018 election (which is a key point of contention in this case), where Native American voter turnout was particularly high. He stated that there were unique circumstances that led to increased Native American voter turnout in 2018. Those

circumstances included the election being a high-profile race, a backlash by Native American voters (who perceived North Dakota as trying to block them from voting by imposing a residential address requirement to vote), and the significant national attention and resources that flowed into the Tribes following the decision allowing the address requirement to go into effect just before the election. He testified that those resources—and resulting high voter turnout among Native American voters—was unlike anything he had seen, before or since. Doc. 115 at 80:18-86:17.

Dr. Loren Collingwood testified next. Doc. 115 at 119. Dr. Collingwood is an Associate Professor of Political Science at the University of New Mexico. Id. at 120. He teaches statistical programming, along with American politics, among other things. He has published several papers on the VRA and is qualified as an expert on voting behavior, race and ethnicity, racially polarized voting, map drawing, electoral performance, and redistricting analysis. Id. at 128:7-17.

Dr. Collingwood's expert testimony was extensive. He opined on each of the three Gingles preconditions. He reviewed the statistical data and analysis he used in reaching his expert conclusions as to racially polarized voting, white bloc voting, and the NVAP in the as-enacted districts compared to the Tribes' proposed districts. His expert reports were also admitted and received as exhibits. Pl. Ex. 1, 42.

Dr. Collingwood concluded that all three Gingles preconditions were met in districts 9 and 15. He found that racially polarized voting is present in North Dakota statewide and specifically in districts 9 and 15. He also found that, in statewide elections featuring Native American candidates, white voters vote as a bloc to Native American voters in all of the elections analyzed. He opined on the NVAP percentages. He further opined that there is racially polarized voting in district 9, subdistricts 9A and 9B, and district 15. Doc. 115 at 144-45.

Dr. Collingwood also opined on white bloc voting. Id. at 153-66. After wide review of his statistical analysis, he concluded that the white voting bloc usually defeats the Native American-preferred candidate of choice in districts 9, 9B, and 15. Id.

As to the 2018 election, Dr. Collingwood testified that the election was "an anomalous election." Id. at 156. He noted that he had "never seen any turnout number like this, ever." Id. As a result, he gave the 2018 election results less probative value and less weight, though the results were still included in his analysis. Id. at 158.

Collette Brown testified next for the Tribes. Doc. 116 at 6. Brown is the Gaming Commission Executive Director for the Spirit Lake Gaming Commission. Id. at 8. She ran for the Senate seat in district 15 in the 2022 election. Id. at 9. She spoke about the need for Native American representation and some of the difficulties she faced in her election campaign. Id. at 14. Brown also testified about her involvement in the 2021 redistricting process. Id. at 23. She stated that the Tribes did not request the subdistricts in district 9A and 9B. Id. at 23.

Former Senator Richard Marcellais testified next. Marcellais is an enrolled member of the Turtle Mountain Tribe and was the elected state Senator for district 9 from 2006-2022. Id. at 45, 48. He testified that he lost the 2022 election, and that after his loss, there are no Native Americans serving in the North Dakota Senate. Id. at 53.

Dr. Daniel McCool then testified as the second expert witness for the Tribes. Dr. Daniel McCool is a political science professor at the University of Utah. He specializes in Native American voting rights and Native American water rights. Id. at 73. He opined on the presence of the Senate Factors in North Dakota and the impact of the 2021 redistricting plan on Native Americans. Id. at 81. He reviewed in detail his expert report and concluded that there was substantial evidence of all of the Senate Factors, except factors four and six. Id. at 89-126. He

concluded that, under the totality of the circumstances, Native Americans in North Dakota have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Id.

Dr. Weston McCool testified as the third expert witness for the Tribes. He is a National Science Foundation post-doctoral research fellow with the Anthropology Department at the University of Utah. Id. at 144. His expertise is in quantitative data analysis and analytical methods. Id. He opined specifically as to Senate Factor 5. He reviewed his statistical analysis of seven socioeconomic variables, including education, employment, and health. Id. at 161. He concluded that Native Americans in the counties at issue bear the effects of discrimination along the socioeconomic factors articulated by Senate Factor 5, and the disparities serve as obstacles to hinder Native Americans' ability to effectively participate in the political process. Id.

Next former Representative Marvin Nelson testified. Doc. 116 at 170. He testified as to his experience representing Rolette County from 2010 to 2022. Id. at 172.

The final witness for the Tribes was Turtle Mountain Tribal Chairman Jamie Azure. Doc. 117 at 11. He testified about the Turtle Mountain Tribe and its membership. Id. at 14. He also spoke about the legislative district make-up before the 2021 redistricting plan, relative to the Tribes' Reservations and trust lands. Id. at 17. And as to the 2021 redistricting plan, he testified about the Tribes sharing community interests and that the Tribes did not request the subdistricts as enacted in district 9. Id. at 19.

Chairman Azure also spoke at length about the 2018 election. Id. at 20. He discussed the record voter turnout that year because of concerns over a voter identification law. He noted there was "a lot of attention" and many national resources were directed at the Tribes. Id. He also said

he had never seen that level of Native American voter engagement in his life and has not seen it since. Id. at 21.

The first witness for the Secretary was expert witness Dr. M.V. Hood, III. He is a political science professor at the University of Georgia and director of the School of Public and International Affairs Survey Research Center. Doc. 117 at 72. Dr. Hood is an expert on American politics, election administration, southern politics, racial politics, and Senate electoral politics. Id. at 75:12-76:7.

Dr. Hood's expert testimony was extensive. He reviewed his expert report (Pl. Ex. 81) and opined on each of the three Gingles preconditions. Doc. 117 at 72:2-182:20. Notably, he testified that he agreed that the first precondition was met but questioned whether there was enough data to prove the second precondition. Id. at 89.

On the third precondition (white bloc voting), he reached a different result than Dr. Collingwood. Id. He analyzed the same elections as Dr. Collingwood (Doc. 117 at 83:14-18), though he statistically weighed the elections differently, and concluded that white bloc voting was not present in district 9 at-large and as-enacted. Id. at 86. He stated that "Gingles 3 is not met because the Native American candidate of choice is not typically being defeated by the majority white voting bloc." Id. at 89. Dr. Hood also testified that he did not review the 2022 election results. Id. at 162.

As to the 2018 election, Dr. Hood testified that the Native American turnout in 2018 was historically high and that the results should not necessarily be excluded from a performance analysis. Dr. Hood testified that those 2018 results "prove[] that Native American turnout can be that high" and that if "[i]t was that high in 2018," it could be that high again. Id. at 86:7-15.

Erika White, the North Dakota Election Director, testified next. She spoke about the role of the Secretary in North Dakota elections and the processes and deadlines that are imposed on state elections by statute. Doc. 117 at 192. She testified too about the redistricting process.

The Secretary's final witness was Brian Nybakken, the Elections Systems Administration Manager in the Secretary's Elections Office. Doc. 118 at 6-33. He testified about the elections systems in place in North Dakota, auditor training, voter identification requirements, and certain election issues pertaining to Native Americans in North Dakota. Id.

II. CONCLUSIONS OF LAW

Section 2 of the VRA prohibits any "standard, practice, or procedure" that "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). A violation of Section 2 is established if it is shown that "the political processes leading to [a] nomination or election" in the jurisdiction "are not equally open to participation by [minority voters] 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). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by minority and white voters to elect their preferred candidates." Bone Shirt v. Hazeltine, 461 F.3d 1011, 1017-18 (8th Cir. 2006) (cleaned up).

Section 2 prohibits "the distribution of minority voters into districts in a way that dilutes their voting power." Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248 (2022) (citing Gingles, 478 U.S. at 46). Recall that, under Gingles, three preconditions must be initially satisfied to proceed with a Section 2 voter dilution claim:

1. The minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district;

2. The minority group . . . is politically cohesive; and,

3. The white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority's preferred candidate.

478 U.S. at 50-51. Failure to prove any of the three preconditions defeats a Section 2 claim. Clay v. Bd. of Educ., 90 F.3d 1357, 1362 (8th Cir. 1996).

If all preconditions are met, then there is a viable voter dilution claim, and the analysis shifts to determining whether, under the totality of the circumstances, members of the racial minority group 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); see also Johnson v. De Grandy, 512 U.S. 997, 1011-12 (1994) (once the three preconditions are met, the totality of the circumstances is addressed). To assess the totality of the circumstances, the Court considers the factors identified in the Senate Judiciary Committee Majority Report accompanying the bill that amended Section 2 (also known as the "Senate Factors"). S. Rep., at 28-29, U.S. Code Cong. & Admin. News 1982, pp. 206-207; Gingles, 478 U.S. at 36. Two other factors are also relevant: (1) was there a significant lack of response from elected officials to the needs of the minority group, and (2) was the policy underlying the jurisdiction's use of the current boundaries tenuous. Gingles, 478 U.S. at 44; Bone Shirt, 461 F.3d at 1022.

The Senate Report stresses that these factors are "neither comprehensive nor exclusive." Gingles, 478 U.S. at 45. The extent to which voting is racially polarized (Senate Factor 2) and the extent to which minorities have been elected under the challenged scheme (Senate Factor 7) predominate the analysis. Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist., 894 F.3d 924, 938 (8th Cir. 2018); Bone Shirt, 461 F.3d

at 1022; Cottier v. City of Martin, 551 F.3d 733, 740 (8th Cir. 2008); Harvell v. Blytheville Sch. Dist. No. 5, 71 F.3d 1382, 1390 (8th Cir. 1995).

A. The Gingles Preconditions

1. Gingles 1: Sufficiently Large and Geographically Compact

The first Gingles precondition requires a Section 2 plaintiff to demonstrate that the minority group (here, Native Americans) is sufficiently large and geographically compact to constitute a majority in a potential district.[1] Gingles, 478 U.S. at 50. This is also known as the "majority-minority standard." Jeffers v. Beebe, 895 F. Supp. 2d 920, 931 (E.D. Ark. 2012). As explained in Gingles, "unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." Gingles, 478 U.S. at 50. So, this precondition focuses on electoral potential—and specifically here, whether Native American voters have the potential to constitute the majority of voters "in some reasonably configured legislative district." See Cooper v. Harris, 581 U.S. 285, 301 (2017); see also Houston v. Lafayette Cnty., Miss., 56 F.3d 606, 611 (5th Cir. 1995). Hence the analysis for the first precondition considers the proposed district(s) and not the existing district. See, e.g., Bone Shirt, 461 F.3d at 1018.

As an initial matter, the Secretary argues the first precondition is not met because district 9, as-enacted, better reflects traditional redistricting criteria than the Tribes' proposed districts. He also asserts that the first precondition is not met as to district 15. But a Section 2 claim is not a competition between which version of district 9 better respects traditional redistricting criteria. See

[1] While the first precondition refers to a minority constituting a majority in a "single-member district," the analysis is done on a case-by-case basis, and the Gingles factors "cannot be applied mechanically and without regard to the nature of the claim." See Voinovich v. Quilter, 507 U.S. 146, 158 (1993).

Allen v. Milligan, 143 S. Ct. 1487, 1505 (2023) (noting Gingles 1 is not a "beauty contest" between plaintiffs' maps and the state's districts). The claim is not defeated simply because the challenged plan performs better on certain traditional redistricting criteria than the proposed plan. Id. (finding that plaintiffs' demonstrative plans were reasonably configured, even where the enacted plan arguably performed better on certain traditional redistricting criteria than the demonstrative plans).

With that issue resolved, the question is whether Native American voters have the potential to constitute the majority of voters in some reasonably configured legislative district. The parties agree that Native American voters have the potential to constitute the majority of voters in both proposed versions of district 9. The NVAP in the Tribes' first proposed plan is 66.1%. Doc. 15 at 134:22-135:2, 135:14-17, 166:1-3. The NVAP in the Tribes' second proposed plan is 69.1%. Id. So, the remaining issue is whether these proposed districts are "reasonably configured." See Johnson v. De Grandy, 512 U.S. 997, 1008 (1994).[2]

A district is reasonably configured "if it comports with traditional districting criteria, such as being contiguous and reasonably compact." Milligan, 143 S. Ct. at 1503. Courts may also consider other traditional redistricting criteria, including respect for political boundaries and keeping together communities of interest. Id. at 1505 (considering respect for political subdivisions and communities of interest as traditional redistricting criteria); Alabama Legislative Black Caucus v. Alabama, 575 U.S. 254, 259 (2015) (citing compactness and not splitting counties or precincts as examples of traditional redistricting criteria, amongst others).

The evidence at trial shows that the Tribes' proposed plans comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries, and

[2] De Grandy articulated this standard in the context of single-member districts. Here, given the comparison of subdistricts to multimember districts, it is more useful to consider the number of representatives that Native American voters have an opportunity to elect.

keeping together communities of interest. First, as to contiguity and compactness, the proposed districts are made up of a contiguous land base (Pl. Exs. 105, 106) and contain no obvious irregularities as to compactness. Indeed, the evidence at trial demonstrated that the proposed districts did not appear more oddly shaped than other districts, and both proposed districts are reasonably compact. See Doc. 115 at 139:17-23, 141:4-8; Pl. Ex. 1 at 32, 39. The proposed plans are also comparatively compact when viewed against other districts in the 2021 redistricting plan. Pl. Ex. 1 at 32, 39. Statistically too, Dr. Collingwood testified the compactness scores of the proposed districts are within the range of compactness scores for other districts in the 2021 redistricting plan. See Doc. 115 at 139:17-140:5, 141:24-143:20; Pl. Ex. 1 at 32, 39; Pl. Ex. 42 at 9-11; Pl. Ex. 126, 128, and 129.

The Tribes' proposed plans also respect existing political boundaries, including Reservation boundaries, and keep together communities of interest. As to political boundaries, the proposed plans keep together the Turtle Mountain Reservation and its trust lands. Pl. Exs. 105, 106. The plans similarly preserve and keep together two communities of interest. Several witnesses testified that the Tribes represent a community of interest because of their geographic proximity and their members shared representational interests, socioeconomic statuses, and cultural values. Doc. 115 at 50:24-52:11, 52:24-73:9; Doc. 117 at 22:4-16-27:15, 28:18-25; 50:3-7; 52:23-53:1, 55:9-12. Chairman Azure and former Chairman Yankton persuasively testified to all those shared interests. Id. As to representational interests, the Tribes often collaborate to lobby the Legislative Assembly on their shared issues, including gaming, law enforcement, child welfare, taxation, and road maintenance, among others. See Doc. 115 at 56:12-61:18, 64:1-70:6; Doc. 116 at 21:11-21; Doc. 117 at 25:23-28:8. The residents on the Tribes' Reservations also have similar socioeconomic and education levels—levels that differ from the white residents in neighboring counties. Pl. Ex.73

at 513; Doc. 116 at 156:17-159:8; 161:13-161:24. Residents of the Tribes also participate in similar cultural practices and events and share cultural values. See Doc. 117 at 18:14-19:13.

All this evidence shows that the Tribes' proposed plans comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries, and keeping together communities of interest.[3] The proposed plans demonstrate that Native American voters have the potential to constitute the majority of voters in some reasonably configured legislative district. And as a result, the Tribes have proven by a preponderance of the evidence that the first Gingles precondition is satisfied.

2. Gingles 2: Racially Polarized Voting and Political Cohesion

"The second Gingles precondition requires a showing that the Native American minority is politically cohesive." Bone Shirt, 461 F.3d at 1020. "Proving this factor typically requires a statistical and non-statistical evaluation of the relevant elections." Id. (citing Cottier, 445 F.3d at 1118). "Evidence of political cohesiveness is shown by minority voting preferences, distinct from the majority, demonstrated in actual elections, and can be established with the same evidence plaintiffs must offer to establish racially polarized voting, because political cohesiveness is implicit in racially polarized voting." Id.

The parties and their experts agree that voting in districts 9 and 15 (when voting at large) is racially polarized, with Native American voters cohesively supporting the same candidates. Doc. 108 at 6. Based on the evidence at trial, voting in subdistricts 9A and 9B is also racially polarized, with Native American voters cohesively supporting the same candidates. Pl. Ex. 13, 14; Doc. 115

[3] The Secretary expresses concern that the districts under the Tribes' proposed plans would be illegal racial gerrymanders. But 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. See Cooper, 581 U.S. at 292.

at 145:23-146:2. Although subdistricts 9A and 9B do not contain enough precincts for a full statistical analysis, subdistrict 9A has an NVAP of 68.5%. Pl. Ex. 1 at 15. That, combined with the undisputed political cohesiveness of district 9 at-large, demonstrates that voters in subdistrict 9A are politically cohesive. Pl. Ex. 1 at 15; Doc. 115 at 149:7-150:25.

Dr. Hood agreed that Native American voters are politically cohesive in subdistricts 9A and 9B. Pl. Ex. 80 at 4-6; Doc. 117 at 139:19-140:16. He testified that his conclusion assumed that the vote distribution within in each subdistrict "mirrors the overall district." Doc. 117 at 140:1-16. Testimony from Chairman Azure and former Chairman Yankton confirms the statistical data. Both testified that voters living on the Turtle Mountain Reservation and Spirit Lake Reservation vote similarly. Doc. 116 at 16:5-19:19, 28:14-25; Doc. 115 at 52:12-53:25.

The statistical evidence, combined with the lay witness testimony, shows that the Native American minority is politically cohesive. The Tribes have proven by a preponderance of the evidence that the second Gingles precondition is met.

3. Gingles 3*:* White Bloc Voting

With the first and second preconditions met, the analysis turns to the third precondition, which is the chief point of disagreement between the Tribes and the Secretary. The third Gingles precondition "asks whether the white majority typically votes in a bloc to defeat the minority candidate." Bone Shirt, 461 F.3d at 1020. "This is determined through three inquiries: (1) identifying the minority-preferred candidates; (2) determining whether the white majority votes as a bloc to defeat the minority preferred candidate, and (3) determining whether there were special circumstances . . . present when minority-preferred candidates won." Id. (cleaned up).

Not all elections are equally relevant in assessing white bloc voting. "Endogenous[4] and interracial elections are the best indicators of whether the white majority usually defeats the minority candidate." Id. "Although they are not as probative as endogenous elections, exogenous elections hold some probative value." Id. In addition, "[t]he more recent an election, the higher its probative value." Id. There is no requirement that a particular number of elections be analyzed in determining whether white bloc voting usually defeats minority-preferred candidates. Gingles, 478 U.S. at 57 n.25. "The number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances." Id.

In assessing the third precondition, courts look to the districts in which it is alleged that Native American preferred candidates are prevented from winning, not on neighboring "packed" districts. Bone Shirt, 461 F.3d at 1027 (Gruender, J., concurring) ("If the State's approach were correct, packing would be both the problem and the solution—i.e., having illegally packed Indians into one district, the State could then point out that Indians are sometimes able to elect their preferred candidate in the packed district"); De Grandy, 512 U.S. at 1003-04 (focusing on whether white voters vote as a bloc "to bar minority groups from electing their chosen candidates except in a district where a given minority makes up the voting majority"). Finally, courts must also consider whether "special circumstances . . . may explain minority electoral success in a polarized contest." Gingles, 478 U.S. at 57 & n.26. Special circumstances must be considered if "the election was not representative of the typical way in which the electoral process functions." Ruiz v. City of Santa Maria, 160 F.3d 543, 557 (9th Cir. 1998).

[4] An endogenous election is an election where a district (or subdistrict) is electing a direct representative for that district (or subdistrict), as opposed to an exogenous election, which in this case, are statewide elections.

i. Subdistrict 9B

Starting with subdistrict 9B, the parties agree that a white bloc voting usually defeats Native American preferred candidates in subdistrict 9B when the three most probative election types are considered. And the evidence at trial supports that conclusion.

Because the challenged plan that created the subdistrict was enacted in 2021, the only endogenous election data available is from the 2022 election. Nonetheless, the data is highly probative. One of two state legislative elections in subdistrict 9B's boundaries was the district 9 at-large Senate election, which featured a Native American candidate,[5] who lost:

Election	Result	Native American Candidate Win or Lose
2022 State Senate District 9	Weston: 63.0% Marcellais*: 36.8%	Lose

Pl. Ex. 1 at 21. The other endogenous election in subdistrict 9B featured two white candidates. The Native American preferred candidate, incumbent Marvin Nelson, also lost:

Election	Result	Native American Candidate Win or Lose
2022 State House District 9B	Henderson: 56.5% Nelson*: 37.6%	Lose

Id. Beyond the 2022 endogenous election data, there are four exogenous (or statewide) elections since 2016 that featured Native American candidates that voters in precincts within the boundaries of now-subdistrict 9B voted in.[6] In each of those contests, the Native American candidate lost:

Election	Result	Native American Candidate Win or Lose
2022 Public Service Commissioner	Fedorchak: 64.4% Moniz*: 35.3%	Lose

[5] In all tables below, the Native American preferred candidates are marked with an asterisk.
[6] To account for the lack of subdistrict specific election data, this data is generated from collecting precinct data from those precincts now in subdistrict 9B.

2016 Insurance Commissioner	Godfread: 58.4% Buffalo*: 41.6%	Lose
2016 Public Service Commissioner	Fedorchak: 60.2% Hunte-Beaubrun*: 32.4%	Lose
2016 U.S. House	Cramer: 62.2% Iron Eyes*: 32.9%	Lose

Id. at 17-20.

The next set of data focuses on the most recent three election cycles, where special circumstances were not present—here, the 2022, 2020, and 2016 elections.[7] Per the table below, the defeat rate of the Native American preferred candidates was 100% for every election cycle:

Election	Result	Native American Preferred Candidate Win or Lose	Defeat Rate for Native American Preferred Candidates
2022 Agricultural Commissioner	Goehring: 70.9% Dooley*: 28.9%	Lose	**2022 Defeat Rate: 100%**
2022 Attorney General	Wrigley: 65.6% Lamb*: 34.3%	Lose	
2022 Public Service Commissioner (4 Year)	Haugen Hoffart: 65.4% Hammer*: 34.3%	Lose	
2022 Secretary of State	Howe: 57.1% Powell*: 33.7%	Lose	
2022 U.S. House	Armstrong: 61.4% Mund*: 38.4%	Lose	
2022 U.S. Senate	Hoeven: 60.6% Christiansen*: 27.5%	Lose	
2020 Auditor	Gallion: 59.8% Hart*: 40.1%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Governor	Burgum: 65.3% Lenz*: 29.8%	Lose	
2020 President	Trump: 60.8% Biden*: 37.0%	Lose	

[7] As discussed in detail below, the 2018 election involved special circumstances that made it atypical.

2020 Public Service Commissioner	Kroshus: 60.4% Buchmann*: 39.8%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Treasurer	Beadle: 58.6% Haugen*: 41.2%	Lose	
2020 U.S. House	Armstrong: 64.4% Raknerud*: 33.4%	Lose	
2016 Governor	Burgum: 61.7% Nelson*: 35.8%	Lose	**2022 + 2020 + 2016 Defeat Rate: 100%**
2016 President	Trump: 56.6% Clinton*: 33.8%	Lose	
2016 Treasurer	Schmidt: 53.6% Mathern*: 39.8%	Lose	
2016 U.S. Senate	Hoeven: 72.9% Glassheim*: 22.1%	Lose	

Pl. Ex. 1 at 17-20. This evidence establishes that white bloc voting usually—and always in the most probative elections—defeats the Native American preferred candidates in subdistrict 9B. As a result, the third precondition is met as to subdistrict 9B.

ii. District 15

The parties also agree that the same conclusion follows as to district 15. Again, the only endogenous election is the 2022 state legislative election, where two Native-American preferred candidates appeared on the ballot. Both were defeated:

Election	Result	Native American Candidate Win or Lose
2022 State Senate District 15	Estenson: 65.5% Brown*: 33.8%	Lose
2022 State House District 15	Frelich: 41.6% Johnson: 38.6% Lawrence-Skadsem*: 19.7%	Lose

Pl. Ex. 1 at 27. There have been no endogenous all-white elections in district 15. Four exogenous elections since 2016 have featured Native American candidates within the boundaries of district 15. In each of those contests—100% of the time—the Native American candidate lost:

Election	Result	Native American Candidate Win or Lose
2022 Public Service Commissioner	Fedorchak: 69.3% Moniz*: 30.6%	Lose

Election	Result	Native American Candidate Win or Lose
2016 Insurance Commissioner	Godfread: 64.6% Buffalo*: 35.4%	Lose
2016 Public Service Commissioner	Fedorchak: 63.8% Hunte-Beaubrun*: 27.6%	Lose
2016 U.S. House	Cramer: 65.5% Iron Eyes*: 27.9%	Lose

Pl. Ex. 1 at 17-20. As shown below, Native American preferred candidates have lost every exogenous all-white election in the record:

Election	Result	Native American Preferred Candidate Win or Lose	Defeat Rate for Native American Preferred Candidates
2022 Agricultural Commissioner	Goehring: 75.0% Dooley*: 24.9%	Lose	**2022 Defeat Rate: 100%**
2022 Attorney General	Wrigley: 70.9% Lamb*: 29.0%	Lose	
2022 Public Service Commissioner	Fedorchak: 69.3% Moniz*: 30.6%	Lose	
2022 Public Service Commissioner (4 Year)	Haugen Hoffart: 70.4% Hammer*: 29.4%	Lose	
2022 Secretary of State	Howe: 61.2% Powell*: 27.8%	Lose	
2022 U.S. House	Armstrong: 62.8% Mund*: 37.1%	Lose	
2022 U.S. Senate	Hoeven: 58.5% Christiansen*: 24.8%	Lose	
2020 Auditor	Gallion: 65.4% Hart*: 34.5%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Governor	Burgum: 67.6% Lenz*: 25.8%	Lose	
2020 President	Trump: 64.3% Biden*: 33.0%	Lose	

2020 Public Service Commissioner	Kroshus: 64.1% Buchmann*: 35.7%	Lose	**2022 + 2020 Defeat Rate: 100%**
2020 Treasurer	Beadle: 63.2% Haugen*: 36.3%	Lose	
2020 U.S. House	Armstrong: 68.7% Raknerud*: 28.1%	Lose	
2016 Governor	Burgum: 71.1% Nelson*: 24.8%	Lose	**2022 + 2020 + 2016 Defeat Rate: 100%**
2016 President	Trump: 57.6% Clinton*: 31.2%	Lose	
2016 Treasurer	Schmidt: 59.5% Mathern*: 31.8%	Lose	
2016 U.S. Senate	Hoeven: 75.7% Glassheim*: 18.5%	Lose	

Pl. Ex. 1 at 27-30.

Again, like subdistrict 9B, all this evidence establishes that white bloc voting usually—and always in the most probative elections—defeats the Native American preferred candidates in district 15. As a result, the third precondition is met as to district 15.

iii. District 9

District 9 at-large presents a much closer call and is the central point of disagreement between the parties. The Secretary disputes whether the white vote bloc usually defeats the Native American preferred candidate in (as-enacted and at-large) district 9. But based on the evidence at trial, the Tribes proved by a preponderance of the evidence that a white bloc voting does usually defeat Native American preferred candidates in the as-enacted and at-large district 9.

Without question, and consistent with case law, the most probative election in district 9 at-large is the 2022 Senate election. The election featured each of the three factors that makes an election more probative—(1) it is an endogenous election, (2) it featured a Native American candidate, and (3) it is part of the most recent election cycle. Native American incumbent Senator Marcellais lost his bid for reelection despite Native American voters casting roughly 80% of their

ballots for him. Pl. Ex. 1 at 15; see Bone Shirt, 461 F.3d at 1021 (affirming finding that Gingles 3 was satisfied where "[i]n the only mixed-race endogenous election . . . the Indian-preferred candidate for state senate lost even though he received 70 percent of the Native-American vote"). As the 2022 election data shows, Senator Marcellais, the Native American candidate, was defeated by his opponent, the candidate of choice of white voters in the district:

Election	Result	Native American Candidate Win or Lose
2022 State Senate District 9	Weston: 53.7% Marcellais*: 46.1%	Lose

Pl. Ex. 1 at 17. Moving to the statewide exogenous elections since 2016, four have featured Native American candidates within the current boundaries of district 9. In those elections, the Native American candidate lost half of the elections:

Election	Result	Native American Candidate Win or Lose
2022 Public Service Commissioner	Fedorchak: 54.1% Moniz*: 45.7%	Lose
2016 Public Service Commissioner	Fedorchak: 46.5% Hunte-Beaubrun*: 46.1%	Lose
2016 Insurance Commissioner	Godfread: 43.2% Buffalo*: 56.8%	Win
2016 U.S. House	Cramer: 46.9% Iron Eyes*: 49.3%	Win

Pl. Ex. 1 at 17-20. When all contests featuring Native American candidates (whether endogenous or exogenous) are taken together, the defeat rate for Native American candidates is 60%.

Among exogenous all-white elections, Native American preferred candidates lost 100% of the 2022 elections, 67% of the 2022 and 2020 elections combined, and 56% of the 2022, 2020, and 2016 elections combined:

Election	Result	Native American Preferred Candidate Win or Lose	Defeat Rate for Native American Preferred Candidates
2022 Agricultural Commissioner	Goehring: 60.2% Dooley*: 39.6%	Lose	**2022 Defeat Rate: 100%**
2022 Attorney General	Wrigley: 55.3% Lamb*: 44.6%	Lose	
2022 Public Service Commissioner (4 Year)	Haugen Hoffart: 55.2% Hammer*: 44.6%	Lose	
2022 Secretary of State	Howe: 47.5% Powell*: 42.3%	Lose	
2022 U.S. House	Armstrong: 52.8% Mund*: 47.0%	Lose	
2022 U.S. Senate	Hoeven: 51.3% Christiansen*: 36.4%	Lose	
2020 Auditor	Gallion: 46.5% Hart*: 53.4%	Win	**2020 Defeat Rate: 33%**
2020 Governor	Burgum: 52.8% Lenz*: 43.1%	Lose	
2020 President	Trump: 47.2% Biden*: 50.8%	Win	
2020 Public Service Commissioner	Kroshus: 46.4% Buchmann*: 53.4%	Win	
2020 Treasurer	Beadle: 45.6% Haugen*: 54.2%	Win	
2020 U.S. House	Armstrong: 50.6% Raknerud*: 47.0%	Lose	
2016 Governor	Burgum: 48.3% Nelson*: 48.7%	Win	**2016 Defeat Rate: 25%**
2016 President	Trump: 44.2% Clinton*: 45.1%	Win	
2016 Treasurer	Schmidt: 41.6% Mathern*: 50.0%	Win	
2016 U.S. Senate	Hoeven: 59.7% Glassheim*: 33.9%	Lose	

Pl. Ex. 1 at 17-20. From this data, a pattern emerges: the more recent the election, the more likely the Native American preferred candidate is to lose. When averaged together, the total defeat rate

is 56%. Beyond that, even when the 2018 election results (which, as explained below, was an atypical election) are factored in, the 100% defeat rate for Native American candidates of choice in the most recent election is highly probative and compelling evidence of white bloc voting. Said another way, giving each election the appropriate weight per Eighth Circuit and Supreme Court case law, the evidence proves by a preponderance that Native American candidates of choice will not be successful over 50% of the time in as-enacted and at-large district 9.

iv. 2018 Election and Special Circumstances

One of the key differences of opinion between Dr. Collingwood and Dr. Hood concerns the probative value and weight of the 2018 election. "Only minority electoral success in typical elections is relevant to whether a Section 2 majority voting bloc usually defeats the minority's preferred candidate." Ruiz, 160 F.3d at 557. So, a central issue is whether 2018 was a typical election, deserving equal weight as other elections, or whether it was an atypical election, deserving less weight than other elections. The Secretary argues that 2018 is a typical election deserving equal weight; the Tribes assert that the 2018 election was atypical and deserves less weight.

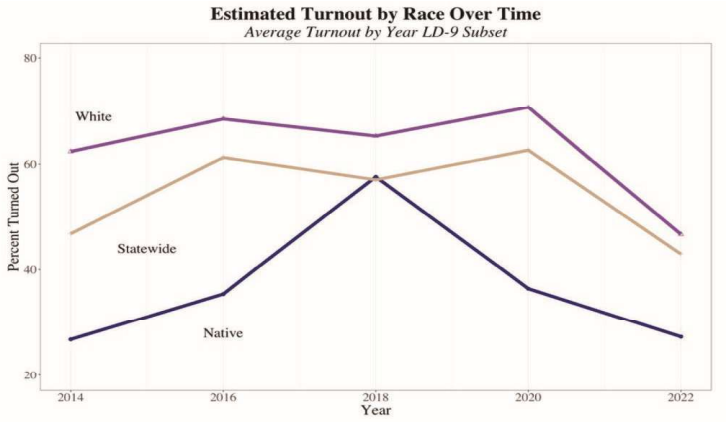
In 2018, a North Dakota voter identification law was upheld that required a residential address to vote. The voter identification requirement affected the number of Native Americans eligible to vote and resulted in significant national and regional attention to Native American voters and increasing voter turnout. Voter turnout did increase dramatically, as compared to years prior and since:

Election	White Electorate Share	Native American Electorate Share
2014	67%	33%
2016	63%	37%
2018	50%	50%
2020	63%	37%
2022	60%	40%

Pl. Ex. 42 at 4-5. Because of the increase in Native American voter turnout, Native American preferred candidates also performed much better than in any other years, prior or since. Pl. Ex. 1 at 18.

Chairman Azure and former Chairman Yankton persuasively testified about the extraordinary resources that poured into North Dakota's Native American reservations in the lead up to the 2018 election. Doc. 115 at 80:18-86:17; Doc. 117 at 21:8-12. The voter identification law caused a backlash among Native American voters, which was aided by substantial financial resources promoting get-out-the-vote efforts on the reservations. Id. National celebrities gave concerts and performances on the reservations to promote turnout. Id. Both testified that the resources—and resulting turnout among Native American voters—was unlike anything they have seen before or since. Id.

That testimony is supported by the data. Native American turnout in 2018 was unusually high. Not only did it exceed statewide turnout and approach white turnout in district 9, but it inverted the normal pattern of lower turnout in midterm versus presidential elections:



Pl. Ex. 43.

With those facts in mind, the experts offer competing opinions on the probative value of the 2018 election. Dr. Hood concluded that the third precondition was not met in as-enacted and at-large district 9 because Native American preferred candidates were successful in over 50% of the elections he reviewed. To reach that conclusion and opinion, Dr. Hood reviewed the election data from Dr. Collinwood's report and added together the elections in at-large district 9 and subdistrict 9A and 9B. Pl. Ex. 81 at 4. He also included the election data from the 2018 election. Doc. 117 at 143. In other words, Dr. Hood considered all election data equally and gave no probative weight or value to any one election. Doc. 117 at 85:19-86:6. Also, and importantly, Dr. Hood did not consider the 2022 election results. Id. at 150.

Dr. Collingwood reached a different conclusion. He concluded the 2018 election presented special circumstances, including unprecedented voter turnout, that "warrant and counsel against mechanically interpreting" the results. Pl. Ex. 1 at 18. As a result, he gave the 2018 election less weight when calculating white bloc voting in district 9. He also did consider the 2022 election, weighed that election more heavily, and concluded that the Native American preferred candidate "lost every single contest." Pl. Ex. 1 at 21. Dr. Collingwood opined that the third precondition is met because "white voters are voting as a bloc to prevent Native Americans from electing

candidates of choice in recent elections, in endogenous elections . . , and in 60% of contests across all tested years in which the Native American preferred candidate was a Native American." Pl. Ex. 1 at 43.

Having heard the testimony by both experts at trial, along with having reviewed their respective reports, Dr. Collingwood's conclusions and analysis are more credible because they follow the general directives of the Eighth Circuit in weighing elections in VRA cases. Indeed, the Eighth Circuit has recognized that endogenous elections should be considered more probative than exogenous elections; elections with a Native American candidate are more probative than elections that do not feature a Native American candidate; and that more recent elections have more probative value than less recent elections. Bone Shirt, 461 F.3d at 1020-21. Dr. Hood gave all elections equal probative value and generally weighed all elections the same. But Dr. Collingwood's report and methodology more closely tracks the instruction from the Eighth Circuit in weighing election data in VRA cases, making it more credible and reliable. In addition, Dr. Hood's testimony at trial acknowledged that endogenous elections, elections featuring Native American candidates, and more recent elections are more probative. Doc. 117 at 142:9-143:7. He also testified that the 2022 endogenous election for the district 9 Senate seat was the "single most probative" election because it featured all three probative characteristics (id. at 143:12-17), but he did not consider the 2022 endogenous election in reaching his conclusions (id. at 150).

Substantively and statistically, Dr. Hood's conclusion on the third precondition rests on adding together all data from district 9 and subdistricts 9A and 9B. But recall that subdistrict 9A has a near 80% NVAP, and Native American preferred candidates win 100% of the time. A district with a packed minority population is not one where the defeat of minority preferred candidates is to be expected, and it should not be considered as part of the third Gingles precondition. See Bone

Shirt, 461 F.3d at 1027. And importantly, as Dr. Hood testified and acknowledged at trial, if subdistrict 9A was removed from his analysis, the Native American preferred candidates defeat rate is 59.5%. Doc. 117 at 148:16-24. That alone also satisfies the third Gingles precondition.

Having reviewed the testimony and evidence, giving the elections the appropriate weight consistent with Eighth Circuit case law, the Tribes have proven by a preponderance of the evidence that the white majority typically votes in a bloc to defeat the minority candidate in as-enacted and at-large district 9. As such, the third Gingles precondition is also established as to as-enacted and at-large district 9.

B. Totality of the Circumstances and the Senate Factors

With the Gingles preconditions met, the Section 2 analysis turns to the totality of the circumstances and analysis of the Senate Factors. The Senate Factors come from the Senate Committee report to the 1982 amendment to the VRA and directs courts to consider the following factors in determining whether the totality of the circumstances indicate a Section 2 violation:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.R. No. 97-417 at 28-29 (1982); Gingles, 478 U.S. at 44-45. Two additional factors are also probative in determining a Section 2 violation: (1) was there a significant lack of response from elected officials to the needs of the minority group; and (2) was the policy underlying the jurisdiction's use of the current boundaries tenuous. Gingles, 478 U.S. at 44. "[T]his list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered. Furthermore, . . . there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Id. at 45 (internal citations omitted).

1. Senate Factors 2 and 7

"Two factors predominate the totality-of-circumstances analysis: the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme." Bone Shirt, 461 F.3d at 1022. As to Senate Factor 2, the extent of racially polarized voting, the record reflects a high level of racially polarized voting in districts 9 and 15 and subdistricts 9A and 9B. That evidence is largely undisputed and was discussed at length above. As to Senate Factor 7—the extent to which Native Americans have been elected—the only election under the 2021 redistricting plan in 2022 resulted in the loss of a Native American Senator (who had held the seat since 2006). Brown, a Native American, also lost the district 15 race. In effect, as a result of the 2021 redistricting plan, Native Americans experienced a net-loss of representation. Both factors weigh the totality of the circumstances towards a Section 2 violation.

2. Remaining Senate Factors

This leaves factors one, three,[8] and five,[9] along with tenuousness, lack of response, and proportionality. As to the first Senate Factor, which considers historical discrimination practices, the Tribes offered expert testimony from Dr. Daniel McCool. He testified as to the long history of mistreatment of Native Americans in North Dakota and discussed evidence of contemporary discrimination against Native Americans, including many successful voting discrimination claims affecting Native Americans. Doc. 116 at 90-126. The evidence of discrimination in the democratic and political process against Native Americans in North Dakota is well-documented and undisputed by the Secretary. So, the first Senate Factor 1 weighs toward a Section 2 violation.

Next, as to the third Senate Factor, which considers discrimination through voting practices and procedures, the Tribes suggest that the 2021 redistricting plan itself is the best evidence of voting practices or procedures that enhance the opportunity for discrimination. But beyond that blanket assertion, there is no evidence that the Secretary used the 2021 redistricting plan to enhance the opportunity of discrimination against Native Americans. As a result, the third Senate Factor does not weigh toward finding Section 2 violation.

Senate Factor 5 considers the effects of discrimination against Native Americans more broadly, in such areas as education, employment, and health care. Dr. Weston McCool offered undisputed evidence as to the lower socio-economic status of Native Americans in North Dakota and that Native Americans continue to experience the effects of discrimination across a host of socioeconomic measures, which results in inequal access to the political process. Doc. 116 at 148.

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[8] Senate Factor 4, which addresses candidate slating processes, is not applicable on these facts.
[9] The parties agree that Senate Factor 6 is not at issue.

And the Secretary did not challenge that evidence. Senate Factor 5 weighs toward a Section 2 violation.

The three remaining factors in the totality of the circumstances analysis are tenuousness, lack of response, and proportionality. Tenuousness looks at the justification and explanation for the policy or law at issue. "The tenuousness of the justification for the state policy may indicate that the policy is unfair." Cottier v. City of Martin, 466 F. Supp. 2d 1175, 1197 (D.S.D. 2006).

While the actions of the Legislative Assembly may not have ultimately went far enough to comply with Section 2 of the VRA, the record establishes that the Secretary and the Legislative Assembly were intensely concerned with complying with the VRA in passing the 2021 redistricting plan and creating the districts and subdistricts at issue. The justification by the Secretary for the 2021 redistricting plan is not tenuous, and this factor does not weigh in favor of a Section 2 violation.

The next factor is lack of response. The Tribes generally assert the Legislative Assembly was unresponsive to the needs of the Native American community. But the Secretary presented ample evidence of Tribal representatives and members generally advocating for subdistricts. Doc. 116 at 28, 32-33, 33-34, 134, 141. Again, the record is clear that the Legislative Assembly sought input from the Tribes and their members and attempted to work with the Tribes to comply with the VRA, even though the VRA compliance measures fell short. Also recall that the redistricting plan was developed under a truncated timeline because of the COVID-19 pandemic. On these facts, one cannot find a lack of response by the Secretary and the Legislative Assembly, and as a result, this factor does not weigh in favor of a Section 2 violation.

The final factor is proportionality. Based on their share of statewide VAP, Native Americans should hold three Senate seats and six House seats. However, under the 2021

redistricting plan, Native Americans hold zero seats in the Senate and two House seats. Either of the proposed plans would yield one Senate seat and three House seats. While certainly not dispositive, this obvious disparity as to proportionality is further evidence of vote dilution under the totality of circumstances.

All told, while a closer decision than suggested by the Tribes, the two most critical Senate Factors (2 and 7) weigh heavily towards finding a Section 2 violation. Those factors, together with the evidence on Senate Factors 1, 5, and proportionality, demonstrates that the totality of the circumstances deprive Native American voters of an equal opportunity to participate in the political process and to elect representatives of their choice, in violation of Section 2 of the VRA.

III. CONCLUSION AND ORDER

"Determining whether a Section 2 violation exists is a complex, fact-intensive task that requires inquiry into sensitive and often difficult subjects." Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist., 201 F. Supp. 3d 1006, 1082 (E.D. Missouri 2016). This case is no exception. It is evident that, during the redistricting process, the Secretary and the Legislative Assembly sought input from the Tribes and other Native American representatives. It is also evident that the Secretary and the Legislative Assembly did carefully examine the VRA and believed that creating the subdistricts in district 9 and changing the boundaries of districts 9 and 15 would comply with the VRA. But unfortunately, as to districts 9 and 15, those efforts did not go far enough to comply with Section 2.

"The question of whether political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." Id. (citing Gingles, 478 U.S. at 45). Having conducted that evaluation and review, the 2021 redistricting plan, as to districts 9 and 15 and subdistricts 9A and 9B, prevents Native

American voters from having an equal opportunity to elect candidates of their choice in violation of Section 2 of the VRA. The Secretary is permanently enjoined from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the North Dakota Legislative Assembly from districts 9 and 15 and subdistrict 9A and 9B. The Secretary and Legislative Assembly shall have until December 22, 2023, to adopt a plan to remedy the violation of Section 2. The Tribes shall file any objections to such a plan by January 5, 2024, along with any supporting expert analysis and potential remedial plan proposals. The Defendant shall have until January 19, 2024, to file any response. The first election for the state legislative positions in the remedial district shall occur in the November 2024 election.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 17th day of November, 2023.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachery S. King, and Collette Brown,

Plaintiffs,

vs.

Alvin Jaeger, in his official capacity as Secretary of State of North Dakota,

Defendant.

ORDER DENYING MOTION TO DISMISS

Case No. 3:22-cv-22

Before the Court is the Defendant Secretary of State of North Dakota Alvin Jaeger's (the "Secretary") motion to dismiss for lack of jurisdiction and for failure to state a claim filed on April 15, 2022. Doc. No. 17. Plaintiffs Turtle Mountain Band of Chippewa Indians ("Turtle Mountain"), Spirit Lake Tribe ("Spirit Lake"), Wesley Davis, Zachery S. King, and Collette Brown (together, the "Plaintiffs") responded in opposition on May 13, 2022. Doc. No. 24. The Secretary filed his reply on May 27, 2022. Doc. No. 26. The United States also filed a Statement of Interest. Doc. No. 25. For the reasons below, the motion to dismiss is denied.

I. FACTUAL BACKGROUND

Article IV, Section 2 of the North Dakota Constitution requires the state legislature to redraw the district boundaries of each legislative district following the census, which takes place at the end of each decade. Following the release of the 2020 Census results, North Dakota Governor Doug Burgum issued Executive Order 2021-17[1] on October 29, 2021. This Executive Order convened a special session of the Legislative Assembly for the purposes of "redistricting of

[1] N.D. Exec. Order No. 2021-17 (Oct. 29, 2021), available at: https://www.governor.nd.gov/executive-orders.

government." N.D. Exec. Order No. 2021-17 (Oct. 29, 2021). On November 10, 2021, the Legislative Assembly passed House Bill 1504, which provided for a redistricting of North Dakota's legislative districts. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021). House Bill 1504 was signed into law by North Dakota Governor Doug Burgum on November 11, 2021. Id.

In this action, the Plaintiffs challenge the above redistricting plan passed by the North Dakota Legislative Assembly (i.e., House Bill 1504), and signed by the North Dakota Governor, under Section 2 of the Voting Rights Act ("VRA") ("Section 2"), 52 U.S.C. § 10301. Doc. No. 1. More specifically, the Plaintiffs bring a voter dilution claim and allege that the newly adopted redistricting plan dilutes the voting strength of Native Americans on the Turtle Mountain and Spirit Lake reservations, and in surrounding areas, in violation of Section 2 of the VRA. Id. at 29-31. In addition to the Section 2 challenge, the Plaintiffs also bring a claim under 42 U.S.C. § 1983 ("§ 1983"). Id. at 3. The Plaintiffs seek declaratory and injunctive relief prohibiting the Secretary from conducting elections under the allegedly dilutive redistricting plan and seek remedial relief from the State of North Dakota's failure to conduct elections under a plan that complies with the requirements of the VRA. Id. at 31. In lieu of an answer, the Secretary filed this motion to dismiss. Doc. No. 17.

II. LEGAL DISCUSSION

The Secretary's motion asks for dismissal on three grounds—first, that Turtle Mountain and Spirit Lake (together, the "Tribal Plaintiffs") lack standing to bring claims under the VRA. Id. at 8-13. Second, the Tribal Plaintiffs cannot allege a VRA claim because they are not "citizens" of the United States. Id. at 7-8. Finally, the Secretary argues that Section 2 of the Voting Rights Act does not provide a private right of action. Id. at 4-7. The Plaintiffs, for their part, argue the Tribal Plaintiffs have standing and that the citizenship requirement to bring a claim under the VRA has

been satisfied. Additionally, as to the private right of action, the Plaintiffs argue that when read and considered together, § 1983 provides a private remedy to enforce Section 2 of the VRA, and alternatively, Section 2 implies its own private right of action. The United States, in its Statement of Interest, similarly argues that Section 2 contains a private right of action, and alternatively, § 1983 provides a remedy that can be used to enforce Section 2 of the VRA. Doc. No. 25.

A. Standing

Turning first to the issue of standing, the Secretary argues that the Tribal Plaintiffs should be dismissed for lack of standing. The Tribal Plaintiffs respond that standing can be established through the individual Plaintiffs, the diversion of the Tribal Plaintiffs' resources, or the principles of organizational standing. The Court agrees that the Tribal Plaintiffs have standing.

1. Applicable Law

Article III of the United States Constitution limits the subject matter jurisdiction of federal courts to "cases" and "controversies." U.S. Const. art. III, § 2. This jurisdictional limitation requires every plaintiff to demonstrate it has standing when bringing an action in federal court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Warth v. Seldin, 422 U.S. 490, 518 (1975). The essence of standing is whether the party invoking federal jurisdiction is entitled to have the court decide the merits of the dispute. Id. at 498.

"[T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an 'injury in fact' . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant' . . . Third, it must be 'likely,' as opposed to merely

'speculative,' that the injury will be 'redressed by a favorable decision.'" Sierra Club v. Robertson, 28 F.3d 753, 757-58 (8th Cir. 1994) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

To show an injury-in-fact, a plaintiff must show "an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical." Id. Merely alleging an injury related to some cognizable interest is not enough; rather, a plaintiff "must make an adequate showing that the injury is actual or certain to ensue." Id. If a plaintiff lacks Article III standing, a federal court has no subject-matter jurisdiction over the claim and the action must be dismissed. Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist., 813 F.3d 1124, 1128 (8th Cir. 2016).

2. Individual Standing

The Secretary does not dispute that the individual Plaintiffs in this matter have standing to bring this claim under Section 2. Instead, the Secretary's argument is focused on the Tribal Plaintiffs' lack of standing. When there are multiple plaintiffs, at least one of the plaintiffs must demonstrate standing for each claim and each form of relief being sought. Spirit Lake Tribe v. Jaeger, No. 1:18-CV-222, 2020 WL 625279, at *3 (D.N.D. Feb. 10, 2020). One plaintiff having standing to bring a specific claim generally confers standing to all plaintiffs on that claim. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264 (1977); see also Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006). Here, the individual Plaintiffs' right to sue has not been challenged, and even if it had been, the argument would fail, as individuals residing in an allegedly aggrieved voting district have standing to bring a claim under the VRA. See Gill v. Whitford, 138 S. Ct. 1916 (2018); see also Roberts v. Wamser, No. 88-1138, 1989 WL 94513 (8th Cir. Aug. 21, 1989). Because the individual Plaintiffs have standing, there is no authority to

dismiss the Tribal Plaintiffs from the action due to lack of standing.

3. Diversion of Resources

Moreover, even without the individual Plaintiffs, the Tribal Plaintiffs have standing to bring a Section 2 claim. As this Court noted in Spirit Lake, "[t]he Court can see no reason why a federally recognized Indian Tribe would not have standing to sue to protect the voting rights of its members when private organizations like the NAACP and political parties are permitted to do so." 2020 WL 625279, at *5. Here, just as in Spirit Lake, the Tribal Plaintiffs assert they have been forced to divert resources in response to the North Dakota Legislative Assembly's actions. Doc. No 1, ¶¶ 43-44. This is sufficient to establish standing. See Spirit Lake Tribe, 2020 WL 625279, at *4. Further, and consistent with Spirit Lake, because standing has been established in alternative ways, the Court need not examine the merits of associational standing or standing under *parens patriae*. Id.

4. Citizenship

The Secretary goes on to argue that the Tribal Plaintiffs cannot advance a VRA claim because they are not "citizens" of the United States. In Spirit Lake, this Court held that this argument is a challenge to standing. 2020 WL 625279, at *4. As discussed above, because the individual Plaintiffs have standing, there is no standing issue as to the Tribal Plaintiffs. Nevertheless, this Court held in Spirit Lake that the Indian Tribes do have standing to protect the voting rights of its members. Id. The same analysis applies here, and the Secretary's argument is without merit.

B. Private Right of Action

With the standing issues resolved, the Court turns to the Secretary's argument that Section 2 of the VRA does not provide a private right of action, and as a result, the complaint fails to state

a claim (due to lack of subject matter jurisdiction) and the case must be dismissed. The Plaintiffs counter that their § 1983 claim provides the remedy necessary to enforce Section 2 of the VRA, and alternatively, the plain language of Section 2 implies a private right of action. The Court finds that § 1983 provides a private remedy for violations of Section 2 of the VRA, and therefore, it is not necessary for the Court to decide whether Section 2, standing alone, contains a private right of action.

1. Relevant Legal Background

The question of whether Section 2 of the VRA contains a private right of action presents a novel legal question. In a recent United States Supreme Court decision involving a Section 2 case, Justice Gorsuch (joined by Justice Thomas) concurred with the majority opinion but wrote separately to "flag" an issue that was not before the Court. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350, 210 L. Ed. 2d 753 (2021). His concurrence stated, in relevant part:

> I join the Court's opinion in full, but flag one thing it does not decide. Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2. Lower courts have treated this issue as an open question.

Id. Following Brnovich, the United States District Court for the Eastern District of Arkansas took notice of Justice Gorsuch's concurrence, and when presented with a case alleging voter dilution among African American voters, examined whether Section 2, standing alone, contains a private right of action. See generally Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment, No. 4:21-CV-01239-LPR, 2022 WL 496908 (E.D. Ark. Feb. 17, 2022). In what can only be described a thorough and well-reasoned—though admittedly, controversial—order, the district court found that Section 2 of the VRA, standing alone, does not provide a private right of action.[2]

[2] Notably, the district court explicitly states it did not consider whether Section 2 contains rights-creating language and that its decision was premised on the lack of a private remedy. Arkansas State Conf. NAACP, WL 496908, at *10.

Id. at 10. This lack of remedy inevitably led the district court to conclude that private individuals do not have a private right of action to enforce Section 2, and the case was dismissed for lack of subject matter jurisdiction after the Attorney General of the United States declined to join the lawsuit. Id. at 23. Here, the Secretary encourages this Court to follow Arkansas State Conf. NAACP and find that the Plaintiffs do not have a private right of action under Section 2 of the VRA—leading to dismissal of the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

2. Applicable Law

"Subject matter jurisdiction refers to the court's power to decide a certain class of cases." LeMay v. United States Postal Serv., 450 F.3d 797, 799 (8th Cir. 2006) (citing Continental Cablevision of St. Paul, Inc. v. United States Postal Serv., 945 F.2d 1434, 1437 (8th Cir. 1991)). "It is axiomatic that the federal courts lack plenary jurisdiction." Southwestern Bell Tel. Co. v. Connect Communications Corp., 225 F.3d 942, 945 (8th Cir. 2000). Rather, "[t]he inferior federal courts may only exercise jurisdiction where Congress sees fit to allow it." Id. Put simply, federal courts cannot hear cases that fall outside of the limited jurisdiction granted to them. Bhd. of Maint. of Way Emps. Div. of Int'l Bhd. of Teamsters v. Union Pac. R. Co., 475 F. Supp. 2d 819, 831 (N.D. Iowa 2007).

Federal Rule of Civil Procedure 8(a) requires a pleading only to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Nevertheless, a complaint may be dismissed for "failure to state a claim upon which relief can be granted," and a party may raise that defense by motion. Fed. R. Civ. P. 12(b)(6). To survive a Rule 12(b)(6) motion, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is

plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A plaintiff must show that success on the merits is more than a "sheer possibility." Id.

3. Section 1983

Whether the VRA contains a private right of action is significant because, without it, the Court does not have subject matter jurisdiction to decide a Section 2 claim that is not joined by the United States Attorney General. At first blush, the Secretary's argument, and the decision in Arkansas State Conf. NAACP, are compelling. However, unlike the complaint in Arkansas State Conf. NAACP, the Plaintiffs here seek relief under § 1983 and Section 2 of the VRA. So, the Plaintiffs argue they have a private right of action to support their Section 2 claim because the complaint seeks to enforce Section 2 in conjunction with § 1983. The Secretary, for his part, argues that Congress effectively shut the door to a § 1983 remedy. However, the Court is not persuaded.

Section 1983 provides a remedy for violations of federal rights committed by state actors. Gonzaga Univ. v. Doe, 536 U.S. 273, 284, 122 S. Ct. 2268, 2276 (2002). Rights are enforceable through § 1983 only if it is clear that Congress intended to establish an individual right. Gonzaga Univ., 536 U.S. 273, at 284. "Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983." Id. This presumption of enforceability is only overcome in cases where Congress intended to foreclose any § 1983 remedy. Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19–20, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); see also Alexander v. Sandoval, 532 U.S. 275, 290, 121 S. Ct. 1511, 1521, 149 L. Ed. 2d 517 (2001).

Prior to Gonzaga University, the United States Supreme Court's case law regarding what rights are enforceable through § 1983, in the Court's words, "may not [have been] models of clarity." Gonzaga Univ., 536 U.S. 273, at 278. As such, the Gonzaga University Court sought to

clarify the test for what rights can be enforced through § 1983. The Supreme Court held that the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute confers a right on a particular class of person. Id. at 258. Accordingly:

> A court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context. Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries.

Id. at 285 (cleaned up). In sum, § 1983 can create a remedy for a plaintiff when one does not already exist. When a statute does not provide an explicit right of action, the analysis of whether a plaintiff may bring a § 1983 claim is dependent on whether the statute sought to be enforced through § 1983 confers rights on a particular class of people.

Importantly (and likely not coincidentally), Arkansas State Conf. NAACP, which is the only factually similar case cited by the Secretary in support of his motion, specifically notes that § 1983 was not alleged in the complaint at issue in that case, and that because Section 2 lacked a private right of action, there was no need to consider whether the text of the statute conferred a right. 2022 WL 496908, at *10. Stated another way, the analysis in Arkansas State Conf. NAACP ended because there was no private remedy available, and no other claims were alleged. However, here, because a § 1983 claim was alleged, there is a presumption of a private remedy, should Section 2 create a right. This fact is significant and undoubtably distinguishes Arkansas State Conf. NAACP. So, the questions this Court is left with, then, is whether Section 2 confers rights on a particular class of people, and if so, whether the Secretary can rebut the presumption that § 1983 provides a remedy.

4. Text of Section 2

Turning to the first question, it is undisputed that Section 2 of the VRA does not explicitly contain a private right of action, making the Plaintiffs' claim contingent on the existence of an implied private right of action. As alluded to in Gonzaga University, to enforce a statute under an implied private right of action, the Plaintiffs must satisfy two requirements: (1) the statute's text must contain language that confers a right, and (2) the party must demonstrate the availability of a private remedy. Sandoval, 532 U.S. at 286–88, 121 S.Ct. 1511. As noted above, § 1983 provides a private remedy. The Court now turns to whether the text of Section 2 confers a right. As relevant here, Section 2 states:

> 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 . . ..

52 U.S.C. § 10301(a). The plain language of Section 2 mandates that no government may restrict a citizen's right to vote based on an individual's race or color. It is difficult to imagine more explicit or clear rights creating language. It cannot be seriously questioned that Section 2 confers a right on a particular class of people. And indeed, the Secretary does not argue that Section 2 does not contain rights creating language. When this right is taken collectively with the remedy available through § 1983, an implied private right of action is present, and the motion to dismiss must be denied, unless the Secretary can show that the VRA's enforcement scheme demonstrates congressional intent to preclude a § 1983 remedy. See generally Gonzaga Univ., 536 U.S. 273.

5. The VRA's Enforcement Scheme

To that end, a party can rebut the presumption that a federal right is enforceable through § 1983 by demonstrating congressional intent to foreclose a § 1983 remedy. See id. at 284 n.4. Congressional intent may be found directly in the statute creating the right or inferred from the

statute's creation of a "comprehensive enforcement scheme that is incompatible with individual enforcement." City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 120 (2005). An express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a remedy under § 1983. Blessing v. Freestone, 520 U.S. 329, 341 (1997).

Section 2 does not contain any language creating a private remedy distinct from § 1983. In fact, Section 2 proscribes no remedy at all. As a result, the Court cannot conclude that anything in Section 2 indicates congressional intent to specifically prevent enforcement through § 1983 by providing a separate private remedy.

Now to the enforcement scheme. The Secretary argues Section 12 of the VRA ("Section 12"), 52 U.S.C. § 10308, provides a comprehensive scheme to enforce Section 2 that is incompatible with private enforcement. Admittedly, Section 12 contains no express, private remedies and provides the right to the Attorney General to seek an injunction and potential fines and imprisonment for violations of the VRA. See 52 U.S.C. § 10308. Critically, though, there is also nothing in Section 12 that is incompatible with private enforcement, as there can be collective and private remedies available for the same federal statute. See Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979) (collective and private remedies available for violation of Title IX). Tellingly, the VRA itself seems to anticipate private litigation, as it contains a provision allowing for court-ordered attorneys' fees for "the prevailing party, other than the United States." 52 U.S.C. § 10310(e).

Further, there has been private enforcement of Section 2 since the VRA's inception. See Allen v. State Bd. of Elections, 393 U.S. 544, 555 (1969); Ala. State Conf. of NAACP v. Alabama, 949 F.3d 647, 652 (11th Cir. 2020); Mixon v. Ohio, 193 F.3d 389, 398–99 (6th Cir. 1999); Singleton v. Merrill, No. 2:21-cv-1530-AMM, 2022 WL 265001, at *79 (N.D. Ala. Jan. 24, 2022).

These private enforcement actions have co-existed with collective enforcement brought by the United States for decades. See, e.g., Allen, 393 U.S. 544, at 555.

Given the lack of evidence that Congress intended to provide an explicit private remedy, and the robust history of the private and collective rights co-existing, the Court cannot conclude that private enforcement of Section 2 is incompatible with the enforcement scheme in Section 12. As a result, the Secretary has not rebutted the presumption that § 1983 may provide a remedy for the Plaintiffs in this case, the Court has subject matter jurisdiction to entertain this private claim, and the complaint does not fail to state a claim upon which relief can be granted. Accordingly, the motion to dismiss is denied. Because this Court finds that Section 2 may be enforced through § 1983, the Court need not decide whether Section 2 of the VRA, standing alone, contains an implied private right of action.

III. CONCLUSION

The Court has carefully reviewed the record, the parties' filings, and the relevant legal authority. For the reasons above, the Secretary's motion to dismiss for lack of jurisdiction and failure to state a claim (Doc. No. 17) is **DENIED**.

IT IS SO ORDERED.

Dated this 7th day of July, 2022.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court

North Dakota Legislative Council
Prepared by the Legislative Council staff
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REDISTRICTING LITIGATION UPDATE

This memorandum provides an update regarding the redistricting litigation in the Eighth Circuit Court of Appeals concerning the North Dakota Legislative Assembly and outlines the potential legislative implications of the recent ruling in *Turtle Mountain Band of Chippewa Indians v. Howe,* 137 F.4th 710 (8th Cir. 2025).

BACKGROUND

Judgment

On May 14, 2025, the Eighth Circuit Court of Appeals issued a ruling in the redistricting case of *Turtle Mountain Band of Chippewa Indians v. Howe,* 137 F.4th 710 (8th Cir. 2025), holding private plaintiffs may not maintain a private cause of action to enforce Section 2 of the Voting Rights Act [Pub. L. 89-110; 79 Stat. 437; 52 U.S.C. 10301 et seq.] through 42 U.S.C. § 1983. As such, the Eighth Circuit Court of Appeals vacated the judgment of the United States district court, which imposed the plaintiff's redistricting map, and remanded with instructions for the district court to dismiss the case for want of a cause of action. *Id.* at 721. If the ruling takes effect, it will have the practical effect of reverting the district boundaries to those drawn by the Legislative Assembly and approved during the 2021 special legislative session (Appendix A). The 2021 map would alter the boundaries of Districts 9 and 15, as currently delineated under the 2023 map (Appendix B).

In the companion case, *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 709 (8th Cir. 2025), the Legislative Assembly sought to intervene in *Turtle Mountain Band of Chippewa Indians*, 137 F. 4th 710, "to appeal the district court's order imposing the remedial map." *Id.* at 710. On May 14, 2025, the Eighth Circuit Court of Appeals held, "Because we concluded in *Turtle Mountain Band of Chippewa Indians*, 137 F.4th 710, that the plaintiffs do not have a cause of action and, therefore, vacated the judgment of the district court, we dismiss this appeal as moot." *Id.* The judgment dismissing the appeal in the companion case became effective on June 6, 2025, upon the issuance of the mandate.

Post-Judgment Procedures

Petition for Rehearing En Banc

Following the issuance of the opinion in *Turtle Mountain Band of Chippewa Indians*, 137 F.4th 710, the appellees, the Turtle Mountain Band of Chippewa Indians, et al, timely filed a petition for rehearing en banc in the Eighth Circuit Court of Appeals. This petition was filed pursuant to Rule 40 of the Federal Rules of Appellate Procedure, which authorizes a petitioner to ask a federal appellate court to rehear a case by all federal appellate judges within the circuit, rather than a panel of judges. Under this rule, a rehearing en banc is not favored and ordinarily will be allowed only if one of the following criteria is met:

- The panel decision conflicts with a decision of the court to which the petition is addressed and the full court's consideration is therefore necessary to secure or maintain uniformity of the court's decisions;
- The panel decision conflicts with a decision of the United States Supreme Court;
- The panel decision conflicts with an authoritative decision of another United States court of appeals; or
- The proceeding involves one or more questions of exceptional importance, each concisely stated.

Fed. R. App. P. 40.

The appellee's petition argued the Eighth Circuit Court of Appeals should grant rehearing en banc to resolve alleged conflicts created by the panel majority and reinstate private enforcement of Section 2 of the Voting Rights Act. The petition also alleged the private enforceability of Section 2 is an issue of exceptional importance. The appellant filed a timely response to the petition for rehearing, arguing the Eighth Circuit Court of Appeals panel properly applied the law to determine the general private cause of action in 42 U.S.C. § 1983 does not apply to vote dilution claims under Section 2 of the Voting Rights Act and requesting the petition be denied. On July 3, 2025, the Eighth Circuit Court of Appeals denied the petition for rehearing en banc and the petition for panel rehearing.

Petition for a Writ of Certiorari

To appeal the judgment issued by the Eighth Circuit Court of Appeals, the appellee must file a petition for a writ of certiorari with the United States Supreme Court. A petition for a writ of certiorari requests the Supreme Court to issue a writ of certiorari, which is an order requiring an appellate court to deliver its record for review by the Supreme Court. If the Supreme Court issues a writ of certiorari, the Supreme Court has agreed to hear the case on appeal.

Supreme Court Rule 10 indicates the Court may consider the following factors when determining whether to issue a writ of certiorari:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 13 requires a party seeking a petition for a writ of certiorari to review a judgment issued by a United States Court of Appeals to file the petition with the United States Supreme Court within 90 days after the entry of judgment. Under this rule, "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate." U.S. Sup. Ct. R. 13. However, if a petition for rehearing has been filed with the appropriate United States Court of Appeals, the deadline to file a petition for a writ of certiorari "runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment." *Id*.

This rule further provides that while "an application to extend the time to file a petition for a writ of certiorari is not favored," if good cause can be demonstrated, a Justice of the United States Supreme Court may extend the time to file the petition for no more than 60 days. U.S. Sup. Ct. R. 13. The request for the extension must "set out specific reasons why the extension of time is justified." *Id.*

Because the court dismissed the petition for a panel rehearing and rehearing en banc, under Supreme Court Rule 13, the time for calculating the deadline started to run on July 3, 2025, as this date was the date of the denial of rehearing.

Motion to Stay Ruling Pending a Petition for a Writ of Certiorari

If the appellee files a petition for a writ of certiorari with the United States Supreme Court, the appellee likely would file a motion to stay the mandate with the Eighth Circuit Court of Appeals pending a petition for a writ of certiorari. Under Rule 41(d) of the Federal Rules of Appellate Procedure, "A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the petition would present a substantial question and that there is good cause for a stay." The United States Supreme Court has held to demonstrate the

presence of a "substantial question" and to make a showing of "good cause," the petitioner must demonstrate "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

Under this rule, the stay may not exceed 90 days, unless the period can be extended for good cause. *Id.* The stay also may exceed 90 days if "the time for filing the petition for certiorari has been extended, in which case the stay continues for the extended period, or if the petition for certiorari has been filed, in which case the stay continues until the Supreme Court's final disposition." *Id.* This rule also provides, if the United States Supreme Court denies the petition for a writ of certiorari, "the court of appeals must issue the mandate immediately on receiving a copy of a [United States] Supreme Court order denying the petition, unless extraordinary circumstances exist." *Id.*

As a result of the July 3, 2025, ruling denying the motion for a panel rehearing and rehearing en banc, the appellee filed a motion to stay the issuance of the mandate (Appendix C) on July 9, 2025. In the motion, the appellees stated they "intend to file a petition for a writ of certiorari with the Supreme Court to resolve this circuit split on a question of exceptional importance." The motion also stated "the uniform disagreement with this Court's dispositions in [prior] cases by every other circuit and three-judge district court to consider the issue, there is a fair prospect that the Supreme Court will reverse this Court's judgment." The appellees argue that a stay is necessary to prevent "irreparable harm."

On July 10, 2025, the Eighth Circuit Court of Appeals denied the stay of the issuance of the mandate pending a petition for a writ of certiorari (Appendix D). Thus, under Rule 41(b), of the Federal Rules of Appellate Procedure, the mandate becomes effective 7 days after the date of denial, unless the court modifies the effective date through an order.

Because the Eighth Circuit Court of Appeals denied the motion to stay, the appellee likely will ask the United States Supreme Court to stay the Eighth Circuit's ruling pursuant to 28 U.S.C. §2101(f), which states:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

The United States Supreme Court implemented 28 U.S.C. §2101(f) through Supreme Court Rule 23. This rule states in part, "A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment." U.S. Sup. Ct. R. 23. Additionally, this rule provides in part, "[a]n application for a stay shall set out with particularity why the relief sought is not available from any other court or judge." *Id.* In effect, if the United States Supreme Court fails to stay the Eighth Circuit Court of Appeals' ruling, the district boundaries will revert to those drawn by the Legislative Assembly and approved during the 2021 special legislative session pending the approval or denial of a writ of certiorari.

Effective Date of Judgment

Under Rule 41(b) of the Federal Rules of Appellate Procedure, if the petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate is denied, the Eighth Circuit Court of Appeals must issue the court's mandate 7 days after the entry of an order denying the petition or motion. The mandate becomes effective upon issuance by the court. Fed. R. App. P. 41(c). According to the explanatory note for Rule 41(c), "A court of appeals' judgment or order is not final until issuance of the

mandate; at that time the parties' obligations become fixed." *Id*. Because the petition for panel rehearing, the petition for rehearing en banc, and the motion to stay the issuance of the mandate were all denied, the court's judgment will become enforceable upon the issuance of the mandate, which is scheduled to take effect on July 17, 2025. However, the effective date could be changed if the United States Supreme Court grants a stay or the Eighth Circuit Court of Appeals shortens or extends the time by order.

Potential Effects on Members of the Legislative Assembly

The May 14, 2025, ruling by the Eighth Circuit Court of Appeals vacated the district court ruling and remanded with instructions that the case be dismissed for lack of a cause of action. Practically speaking, the ruling renders the district court judgment as though it never existed, reverting to the 2021 district lines approved by the Legislative Assembly during the 2021 special legislative session. Uncertainty surrounds the actual effects on the members of the Legislative Assembly, given the unknowns regarding whether the petition for rehearing will be granted or denied, whether the ruling will be appealed to the United States Supreme Court, or whether a stay will be granted on the imposition of the appellate court's mandate if an appeal to the United States Supreme Court is pending. One of the potential issues facing members residing outside their respective districts is whether they will be legally authorized to continue serving in their current offices.

Historically, when a redistricting cycle results in a member no longer residing in the member's district, the member has been allowed to serve until after the next general election, at which time a new member may be elected to serve the district. It is unclear whether this practice would be applied to members who are no longer residing in their district, given the novel scenario of the appellate court entirely vacating the lower court's ruling.

However, an argument also could be made that a member residing outside the member's district is now disqualified from continuing to serve because Section 5 of Article IV of the Constitution of North Dakota prohibits an individual from serving in the Legislative Assembly unless the individual lives in the district from which the individual was selected. A member living outside the district would not become "unqualified" under this argument until the original 2021 map takes effect.

A member who is disqualified from serving creates a vacancy under Sections 44-02-01(7) and 44-02-03.1(8). Section 44-02-03.1 outlines the procedure for filling a vacancy in the office of a member of the Legislative Assembly. Section 44-02-03.1(1) requires the Secretary of State to notify the Chairman of the Legislative Management of the vacancy. If the former member belongs to a political party, the Chairman of the Legislative Management must inform the corresponding district committee of the political party of the former member's vacancy. N.D.C.C. § 44-02-03.1(2). Within 21 days of the notification from the Chairman of the Legislative Management, the district committee must appoint an individual to fill the vacancy. *Id.* If the district committee does not make an appointment within 21 days after receiving the notice from the Chairman of the Legislative Management, the Chairman of the Legislative Management is required to appoint a resident of the district to fill the vacancy. *Id.*

A complicating factor is the reorganization of the political parties. Under Section 16.1-03-17, the political parties in certain districts are "required to organize or reorganize" in accordance with Chapter 16.1-03 if a legislative redistricting plan becomes effective after party organization and before a primary or general election. These districts required to organize or reorganize include, "[a] district that does not share any geographical area with the pre-redistricting district having the same number" and "[a] district with new geographic area that was not in that district for the 2020 election and which new geographic area has a 2020 population that is more than twenty-five percent of the district's population as determined in the 2020 federal decennial census." However, these districts are not required to organize or reorganize until a new redistricting plan is implemented. Since the judgment of the Eighth Circuit Court of Appeals is not yet effective, districts subject to Section 16.1-03-17 are not required to organize or reorganize at this time. Section 16.1-03-07(7) provides if a party is required to organize or reorganize after redistricting of the Legislative Assembly, "the state party chair may appoint a temporary district party organization chair in any newly established district or a district that lacks a district committee able to carry out the

responsibilities of [Chapter 16.1-03]." These responsibilities include organizing the district to comply with filing deadlines for a primary election.

Section 44-02-03.1(6) requires the Governor to call a special election to fill a vacancy occurring in the Legislative Assembly if petitioned by at least 4 percent of the qualified electors of the district in which the vacancy occurred. If a petition for a special election is not filed within 30 days of the appointment by the district committee or the Chairman of the Legislative Management under Section 44-02-03.1(2), that appointment stands. However, if a petitioner files a valid special election petition, the Secretary of State is required to notify the Governor that a special election must be called to fill the vacancy. N.D.C.C. § 44-02-03.1(6). The Governor is then required to issue a writ of election directed to the Secretary of State, which mandates the administration of a special election at a time designated by the Governor. *Id.* The special election must conform with the timelines outlined in Title 16.1 and be called at least 15 days before the deadline for candidates to file for office before a regularly scheduled primary or general election. *Id.* The Governor may not schedule a special election from a general election through 80 days following the adjournment of the ensuing regular session of the Legislative Assembly. *Id.* Under Section 44-02-03.1(5), an individual elected at a special election may serve for the remainder of the term of office the disqualified member would have served.

ATTACH:4