A NEW FRONTIER FOR VOTING RIGHTS: PRIVATE PLAINTIFFS' RIGHTS OF ACTION UNDER § 2 OF THE VOTING RIGHTS ACT FOLLOWING *ARKANSAS NAACP*

Abstract: On November 20, 2023, in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, the U.S. Court of Appeals for the Eighth Circuit held that the private plaintiffs-appellants lacked both a right of action and a remedy under § 2 of the Voting Rights Act ("VRA"). This Comment argues that the Eighth Circuit misapplied authorities ranging from Supreme Court precedent to the VRA's text, structure, and legislative history—all of which acknowledge private litigants' ability to enforce the VRA. This Comment recognizes, however, that the ruling is not fatal to private litigants' § 2 claims because 42 U.S.C. § 1983 likely provides for private enforcement.

INTRODUCTION

The Reconstruction Amendments freed Black Americans from involuntary servitude, established their rights to United States citizenship, due process, and equal protection under state laws, and afforded them the franchise.[1] Although Congress supplemented these Amendments with the Civil Rights Acts of 1866 and 1871,[2] President Hayes's decision to remove federal troops from the South effectively granted southern states carte blanche to deny Black citizens' constitutional and statutory rights.[3] Furthermore, a series of Reconstruc-

[1] U.S. CONST. amends. XIII–XV. The Fourteenth Amendment provides, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

[2] Civil Rights Act of 1866, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981); Civil Rights Act of 1871, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983); *see* KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION 303–41 (2021) (detailing the origins, debate, and reception of the Civil Rights Act of 1866).

[3] *See, e.g.*, Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 158–85 (1995) (describing how the removal of the federal troops that protected Black Americans' constitutional rights enabled a new era of white supremacy); *see also* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 119–21 (2019) (same). For more information about the causes and effects of Reconstruction's end, see generally MICHAEL W. FITZGERALD, *Political Reconstruction, 1865–1877*, *in* A COMPANION TO THE AMERICAN SOUTH 284, 284–312 (John B. Boles ed., 2002); HEATHER RICHARDSON, *Reconstruction and the Nation*, *in* A COMPANION TO THE CIVIL WAR AND RECONSTRUCTION 447, 447–67 (Lacy K. Ford ed., 2005).

tion-era Supreme Court cases eviscerated the Fourteenth and Fifteenth Amendments' protections, emboldening the Jim Crow regime.[4]

Coalescing in the early twentieth century, the Civil Rights Movement promoted federal legislation that strengthened Black Americans' constitutional civil and voting rights.[5] Ultimately, Congress passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965 ("VRA"), each of which created individual statutory rights of action for Black Americans seeking to enforce their Fourteenth and Fifteenth Amendment rights, respectively.[6]

Section 2 of the VRA prohibits states from denying or abridging any citizen's right to vote on the basis of their race or color,[7] and § 12 authorizes the Attorney General to commence enforcement actions for alleged violations under § 2 and other provisions of the VRA.[8] In 1975, Congress amended § 3, allowing either the Attorney General *or* an individual private plaintiff to initiate an enforcement action.[9] Since the VRA's enactment, courts have implied a private right of action for plaintiffs to enforce the rights that several sections of

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[4] *E.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80–82 (1872) (limiting the Fourteenth Amendment's Privileges and Immunities Clause to guaranteeing select federal rights like access to federal seaports and courts of justice); United States v. Cruikshank, 92 U.S. 542, 552–55 (1875) (limiting the federal government's ability to punish alleged perpetrators of the Colfax Massacre against Black Louisianans by holding that states are the exclusive guarantors of their citizens' life and personal liberty); Civil Rights Cases, 109 U.S. 3, 25–26 (1883) (overruling the Civil Rights Act of 1875 and opining that state legislatures have exclusive authority to regulate "private wrong[s]" against individuals). *See generally* John Montoya, *Defying Congressional Intent: Justices Miller and Bradley Alter the Course of Reconstruction*, 10 COLUM. J. RACE & L. 82 (2020) (arguing that the Justices' opinions in *Slaughterhouse*, *Cruikshank*, and the *Civil Rights Cases* hollowed the Fourteenth Amendment); John Anthony Scott, *Justice Bradley's Evolving Concept of the Fourteenth Amendment from the* Slaughterhouse Cases *to the* Civil Rights Cases, 25 RUTGERS L. REV. 552 (1971) (focusing exclusively on Justice Bradley's opinions).

[5] *See generally* ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT 1–39, 275–90 (1984) (detailing the movement's formation and legacy and focusing on the NAACP, which orchestrated several successful legal challenges to Jim Crow laws).

[6] *See, e.g.*, 111 CONG. REC. 8295 (1965) (statement of Sen. Jacob Javits) (supporting the passage of the VRA and stating that "[it would] not only . . . correct an active history of discrimination, [such as] the denying to Negroes of the right to register and vote, but also . . . attempt to do something about the accumulated wrongs and the continuance of wrongs [against Black Americans]"); S. REP. 97-417, at 4–9 (1982) (contextualizing the historical need for the VRA by detailing how southern states denied Black citizens' voting rights statutorily and by violence, harassment, and literacy tests); *cf.* FONER, *supra* note 3, at 116 (describing the violence and oppression that Black Americans suffered without federal protection after the Civil War). Additionally, each of the Acts empowered the Department of Justice to file enforcement actions against a state alleged to have invaded a private plaintiff's civil or voting rights. *Compare* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended 42 U.S.C. §§ 1971–2000(h)), *with* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended 52 U.S.C. §§ 10101–10702).

[7] 52 U.S.C. § 10302.

[8] *Id.* § 10308.

[9] Pub. L. 94-73, 89 Stat. 400 (1975) (codifying a private right of action by inserting "aggrieved person" alongside "Attorney General" in § 3 as someone who can sue to enforce § 10).

the Act grant them, including § 2.[10] A plurality of Supreme Court Justices have also opined that § 2 supplies plaintiffs such private rights,[11] but the Court has not granted certiorari on the exact question.[12] In November 2023, in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, the U.S. Court of Appeals for the Eighth Circuit answered the question in the negative.[13] A divided panel held that Congress did not intend to create a private right of action for plaintiffs to enforce § 2.[14]

Part I of this Comment contextualizes the history of the Supreme Court's implied rights and remedies jurisprudence, examining its application to voting rights and the factual and procedural postures of *Arkansas NAACP*.[15] Part II contrasts the majority and dissenting opinions from *Arkansas NAACP*, highlighting how each interprets existing § 2 precedent and leverages other interpretive tools.[16] Part III anticipates the effects of private enforcement of federal statutory rights post-*Arkansas NAACP* and argues that, even if § 2 of the VRA does not itself grant a private right of action, plaintiffs may still enforce their § 2 rights through 42 U.S.C. § 1983.[17]

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUNDS OF *ARKANSAS STATE CONFERENCE NAACP V. ARKANSAS BOARD OF APPORTIONMENT*

Courts have long-recognized private plaintiffs' rights of action and access to judicial remedies under both the common law and federal statutes.[18] The

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[10] *See* Ellen D. Katz et al., *To Participate and Elect: Section 2 of the Voting Rights Act at 40*, UNIV. MICH. L. SCH. VOTING RTS. INITIATIVE (2022), https://voting.law.umich.edu [https://perma.cc/C9TY-JXMN] (indicating that private plaintiffs brought 160 of 182 successful suits under § 2 between 1981 and 2022).

[11] Morse v. Republican Party of Va., 517 U.S. 186, 231–32 (1996) (plurality opinion) (acknowledging § 10 of the VRA confers a private right of action likely extending to § 2).

[12] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., joined by Thomas, J., concurring) (stating that "[o]ur cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2" and noting that lower courts have also left this question unanswered (citing Mobile v. Bolden, 446 U.S. 55, 60 & n.8 (1980) (plurality opinion))). Justice Gorsuch's concurrence in *Brnovich* likely reflects what scholars have termed "the signals model," whereby judges use concurring and/or dissenting opinions to influence the Court's docket. *See, e.g.*, Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 942–47 & n.103 (2016) (describing the "signals model" and collecting examples of how Justices have leveraged it).

[13] Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206–07 (8th Cir. 2023), *aff'g* 586 F. Supp. 3d 893 (E.D. Ark. 2022), *reh'g en banc denied*, 91 F.4th 967 (8th Cir. 2024).

[14] *Id.*

[15] *See infra* notes 18–62 and accompanying text.

[16] *See infra* notes 63–91and accompanying text.

[17] *See infra* notes 92–130 and accompanying text.

[18] *E.g.*, Pollard v. Bailey, 87 U.S. 520, 527 (1874) ("A general liability created by statute without a remedy may be enforced by an appropriate common-law action."); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 376 (1982) ("[Courts'] function is to decide what remedies are

enforcement of civil and political rights, like VRA litigation, has relied heavily on notions of private rights and remedies.[19] Section A of this Part traces how private rights and remedies evolved under federal statutes.[20] Section B details several seminal cases interpreting the VRA and attends to the legislative history of its enactment and reauthorizations.[21] Section C explains the specific factual and procedural posture of *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*.[22]

A. Private Rights of Action and Remedies Under Federal Statutes

From the Founding, the Supreme Court has recognized that legal remedies accompany legal rights.[23] Private plaintiffs have sued to enforce myriad federal statutory rights, and the Court has routinely implied statutory rights of action and/or access to judicial remedies that are not expressly within a federal statute's text.[24] In 1964, in *J.I. Case Co. v. Borak*, the Supreme Court endorsed

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appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations" (quoting Montana-Dakota Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 261–62 (1951) (Frankfurter, J., dissenting))); *see also* David L. Noll & Luke P. Norris, *Federal Rules of Private Enforcement*, 108 CORNELL L. REV. 1639, 1641 & nn.1–5 (2023) (collecting federal statutes that create private rights of action); STEPHEN B. BURBANK & SEAN FARHANG, *Retrenching Civil Rights Litigation: Why the Court Succeeded Where Congress Failed* (tracing how federal courts implied rights of action to enforce civil rights statutes), *in* THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE U.S. 197–223 (Lynda G. Dodd ed., 2018); *cf.* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 411–12 (1982) (discussing early examples of federal courts acknowledging private rights of action to enforce federal laws); Suzette M. Malveaux, *Is It Time for a New Civil Rights Act? Pursuing Procedural Justice in the Federal Civil Court System*, 63 B.C. L. REV. 2403, 2405 (2022) (arguing that, in the context of private enforcement of the Civil Rights Act "[t]he Court's increasing resistance toward process that supports private rights of action has endangered various substantive rights").

[19] BURBANK & FARHANG, *supra* note 18. Although similar, rights (or causes) of action and standing are distinct legal concepts. *See* U.S. Dep't of Lab. v. Triplett, 494 U.S. 715, 721 n.** (1990) (acknowledging the difference between standing and implied causes of action). For a thorough treatment of the difference, see Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784–92 (2004).

[20] *See infra* notes 23–38 and accompanying text.

[21] *See infra* notes 39–50 and accompanying text.

[22] *See infra* notes 51–62 and accompanying text.

[23] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . whenever that right is invaded." (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23)); *see also, e.g.*, Pollard v. Bailey, 87 U.S. 520, 527 (1874) (stating that litigants may bring a common law action to enforce statutory rights in the absence of an express statutory remedy); De Lima v. Bidwell, 182 U.S. 1, 176–77 (1901) (same); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 376 (1982) (same); Bell v. Hood, 327 U.S. 678, 684 (1946) (same).

[24] *See, e.g.*, Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39–40 (1916) (finding an implicit right of action for private plaintiffs under a federal statute); *see also* Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 5–10 (2023) (summarizing the modern doctrine of implied federal statutory rights beginning with *Borak*); Daniel P. Tokaji, *Public Rights and Private*

this axiom when it held that the Securities Exchange Act of 1934 conferred the plaintiff-corporation's shareholders a private right to enforce the Act.[25] Decided the same year that Congress passed the Civil Rights Act, *Borak* instructed lower courts to consider Congress's purpose in passing a statute before deciding whether the statute created a private right of action.[26] For a decade after *Borak*, the Court reaffirmed its purposive approach to evaluating whether a federal statute conferred a private right of action.[27] In its 1975 decision in *Cort v. Ash*, however, the Supreme Court substituted *Borak*'s congressional intent analysis for a more stringent four-factor test.[28] Although *Cort* presented a steeper hill for private plaintiffs to climb, federal courts nonetheless invoked *Cort* to find private rights in numerous federal statutes.[29]

Rights of Action: The Enforcement of Federal Election Laws, 44 IND. L. REV. 113, 126–29, 137–38 (2010) (noting that the implied private rights doctrine emerged in non-election cases).

[25] J.I. Case Co. v. Borak, 377 U.S. 426, 430–31 (1964); *see also id.* at 433 ("It is for the federal courts to 'adjust their remedies to grant the necessary relief' where federally secured rights are invaded." (quoting *Bell*, 327 U.S. at 684)).

[26] *See id.* (instructing courts to imply the necessary remedies to effectuate Congress's purpose); *see also, e.g.*, Robert H.A. Ashford, *Implied Causes of Action Under Federal Laws: Calling the Court Back to* Borak, 79 NW. U. L. REV. 227, 236 & n.39, 243–45 (1984) (explaining the relevant facts of *Borak* and its holding); Tamar Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553, 553–55 (1981) (same).

[27] *E.g.*, Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 381 (1970) (explaining that the central inquiry in the search for an implied right of action is congressional intent, an inquiry for which legislative history is often dispositive (citing *Borak*, 377 U.S. at 431)); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (holding that supplying a legal remedy to an invasion of legal rights requires courts to imply private rights of action (citing *Borak*, 377 U.S. at 433)).

[28] Cort v. Ash, 422 U.S. 66, 78 (1975). To decide if a statute implies a private right of action when it does not expressly state one, the *Cort* test asks: (1) whether Congress created the statute to protect or benefit a particular class of people; (2) whether legislative history indicates that Congress either "explicit[ly] or implicit[ly]" intended to establish a right of action for members of that class; (3) whether finding an implied right of action for the plaintiff accords with the broader legislative scheme; and (4) whether inferring a federal right of action would interfere with a "traditional[]" area of state law. *Id.* (internal citations omitted); *see also* Ashford, *supra* note 26, at 241–43 (contextualizing the *Cort* decision and quoting the relevant language in which the Court articulated a test for an implied cause of action arising under federal statute); *see also* Derek A. Ziegler, Note, *As the Rainstorm Continues, Must We Throw Out the Raincoat Too?: Private Enforcement of Section 2 of the Voting Rights Act*, 123 MICH. L. REV. 967, 979–83 (2025) (discussing *Borak*'s purposive approach and explaining how the *Cort* decision portended a shift away from implying private rights and remedies); Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 5–11 (2014) (tracing courts' deviation from previous implied rights doctrine); *cf.* 15A MOORE'S FEDERAL PRACTICE § 103.32 nn.6–12.5 (3d ed. 2024) (collecting Supreme Court cases interpreting implied statutory rights and remedies).

[29] *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (applying the four *Cort* factors and holding that Title IX conferred the plaintiff a cause of action). "When Congress intends private litigants to have a cause of action to support their statutory rights," the *Cannon* Court cautioned, "the far better course is for it to specify as much when it creates those rights." *Id.*; *accord id.* at 717–18 (Rehnquist & Stewart, JJ., concurring). It conceded, however, that Congress's failure to identify judicial remedies "is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation." *Id.* at 717 (majority opinion).

In 2001, in *Alexander v. Sandoval*, the Supreme Court announced a paradigmatic shift away from the congressional intent analysis—holding that Title VI of the Civil Rights Act of 1964 did not confer private plaintiffs a statutory right of action to challenge disparate-impact regulations.[30] The *Sandoval* Court restricted plaintiffs' rights and remedies to those expressly provided in that statute's text.[31] Where Congress amends a statute *after* the Court holds that it does not confer a private right of action, the *Sandoval* Court reasoned, Congress will incorporate the express right of action only if it truly *intended* to establish such a right.[32] Under this theory, Congress's silence reveals its intent to foreclose a cause of action.[33] Thus, a court may only recognize a private right of action under a statute where Congress has evinced its "statutory intent" to create one.[34] It does so by using express, "rights-creating language."[35]

Sandoval thus dispensed with the idea of "contemporary legal context" that *Cort* and its progeny had popularized.[36] Instead, it directed lower courts to re-

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[30] Alexander v. Sandoval 532 U.S. 275, 286 (2001) (5-4 decision); Civil Rights Act of 1964, Pub. L. 88-352, § 601, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d). The *Sandoval* Court acknowledged that *Cort* and its more restrictive progeny governed, labeling *Borak* a relic of the "*ancien regime*" of purposive implied rights doctrine. 532 U.S. at 287; *cf. Cannon*, 441 U.S. at 730 (Powell, J., dissenting) (arguing that neither *Borak* nor *Cort* supported finding an implied right of action under Title VI and collecting cases that refused to find an implied right); *see also* 15A MOORE'S FEDERAL PRACTICE, *supra* note 28, § 103.32 nn.22–27 (noting how *Sandoval* restrained federal courts' ability to imply rights of action when Congress did not expressly grant them in a statute); Beske, *supra* note 24, at 17 n.131, 64 (arguing that Borak's downfall coincided with the ascent of new textualism and skepticism about congressional intent).

[31] *See* 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." (citing Touche Ross & Co. v. Redington 442 U.S. 560, 578 (1979)); *see also Touche Ross*, 442 U.S. at 578 (limiting statutory remedies to those "Congress enacted into law"); Tokaji, *supra* note 24, at 132–33 (observing that the modern Court's restrictive approach to private rights of action evinces its narrow focus on statutory intent); Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2078–88 (2017) (examining the historicist lens Justice Scalia used to evaluate Congress's intent to confer private rights).

[32] 532 U.S. at 286; *see also* Bellia, *supra* note 31, at 2086–88 (arguing that *Sandoval* reflects Justice Scalia's historicist interpretive framework)*; cf.* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* (presenting Justice Scalia's thoughts on legislative history as a method for statutory construction), *in* A MATTER OF INTERPRETATION 3, 29–37 (Amy Gutmann ed., 1997).

[33] *See Sandoval*, 532 U.S. at 286 (first citing Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102 (1991) (recognizing that "Congressional silence" constituted a "serious obstacle" preventing the Court from finding additional implied rights of action); and then citing Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 812 & n.9 (1986) (collecting cases supporting the Court's holding that refusing to imply a cause of action "would flout congressional intent to provide a private federal remedy for the violation of the federal statute")).

[34] *Id.* at 286.

[35] *Id.* at 291.

[36] *Compare id.* at 288 ("We have never accorded dispositive weight to context shorn of text."), *with Cannon*, 441 U.S. at 698–99 ("[O]ur evaluation of congressional action in 1972 must take into account its *contemporary legal context* . . . it is not only appropriate but also realistic to presume that

frain from looking outside a statute's text unless its terms were ambiguous.[37] Critically, when a private plaintiff belongs to a class that Congress sought to protect by a statute, *Sandoval* permits federal courts to circumvent that statute's lack of explicit rights-creating language and imply private rights and/or remedies.[38]

B. The History of Private Rights and Remedies in § 2 of the VRA

Contemporary House and Senate Reports indicate that Congress wanted plaintiffs to be able to vindicate the rights created in multiple sections of the VRA.[39] In 1966, in *Gray v. Main*, the U.S. District Court for the Middle District of Alabama first heard private plaintiffs' § 2 claims regarding Alabama counties' refusal to count Black voters' ballots.[40] The court held that the plaintiffs *could* sue to enforce § 2, however, it directed them to style their claims under 42 U.S.C. § 1983 instead of the VRA.[41] Then, in 1969, a related question reached the Supreme Court in *Allen v. State Board of Elections*: does § 5 of the VRA create a private right of action?[42] The Court said yes, holding that § 5 created an implicit right.[43] Under *Allen*, a federal court may hear private liti-

Congress was thoroughly familiar with these unusually important precedents . . . and that it expected its enactment to be interpreted in conformity with them." (emphasis added)).

[37] *Sandoval*, 532 U.S. at 288; *see also* Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002) ("For a statute to create such private rights, its text must be 'phrased in terms of the persons benefited.'" (quoting *Cannon*, 441 U.S. at 690 n.13)).

[38] *See* 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981))).

[39] *E.g.*, H.R. REP. NO. 91-397, at 8 (1969). The House Judiciary Committee stated that the Court's decision in *Allen v. State Board of Elections* affirmed that § 5 affords "private persons" authority to commence enforcement actions in federal courts. *Id.* (citing Allen v. State Bd. of Elections, 393 U.S. 544 (1969)). The Committee reiterated Congress's intent to allow individual voters of color to bring VRA enforcement actions rather than forcing them to rely solely on a politically-appointed Attorney General. H.R. REP. NO. 91-397 at 20; *see also* S. REP. 97-417, at 30 (1982) (stating that the Committee was "[r]eiterat[ing] the existence of the private right of action under Section 2, as [Congress] ha[d] . . . clearly intended . . . since 1965" (citing *Allen*, 393 U.S. 544)). *See generally About Section 5 of the Voting Rights Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/about-section-5-voting-rights-act [https://perma.cc/HVK6-HJER] (Nov. 17, 2023) (explaining that § 5 "was enacted to freeze changes in election practices or procedures . . . until the new procedures have been determined . . . to have neither discriminatory purpose or effect").

[40] 291 F. Supp. 998, 999–1000 (M.D. Ala. 1966).

[41] *See id.* (noting how § 1983 provided for the enforcement of § 2 of the VRA); *cf. Gonzaga*, 536 U.S. at 284 ("Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983."); *see also* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 (1990) (observing that "[s]ection 1983 provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States" and that "§ 1983 provides a cause of action for violations of federal statutes as well as the Constitution" (first quoting 42 U.S.C. § 1983; and then citing Maine v. Thiboutot, 448 U.S. 1, 4 (1986))).

[42] 393 U.S. 544, 557 (1969).

[43] *Id.* Unlike the modern amended version of § 3, which explicitly identifies "aggrieved voters" alongside the Attorney General as possessing a right of action under the Act, the original version named only the Attorney General. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437, 437–

gants' claims against state officials for abridging federal statutory rights, like those created in § 5 of the VRA, when it establishes that Congress created the statute to protect members of a specific class.[44] The *Allen* Court recognized Congress's intent to use the VRA to protect Black Americans' voting rights—a class historically denied the franchise.[45]

Since *Allen*, the Court has heard several VRA cases but never one presenting the question of whether the VRA created a private right of action such that plaintiffs other than the U.S. Attorney General can sue to enforce their § 2 rights.[46] In the Supreme Court's 1996 decision in *Morse v. Republican Party of Virginia*, for example, a plurality of the Justices opined that § 2 confers private plaintiffs a right of action and access to judicial remedies.[47] Federal courts have heard and ruled on the merits of hundreds of § 2 claims without doubting their subject matter jurisdiction.[48] Many have also construed *Morse* as binding precedent.[49] Recently, however, Justice Gorsuch signaled that plaintiffs may not be able to privately enforce their § 2 rights.[50]

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38 (codified as amended at 52 U.S.C. § 10302); *cf., e.g.*, Roberts v. Wamser, 883 F.2d 617, 624 (8th Cir. 1989) ("[S]tanding to sue under [§ 2] is limited to the Attorney General and to 'aggrieved persons,' a category that we hold to be limited to persons whose voting rights have been denied or impaired."); Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1262 (N.D. Miss. 1987) (finding that Congress's 1982 reauthorization of § 2 of the VRA reflect Congress's intent to permit "challenges to . . . discriminatory voter registration practices and procedures" (citing S. REP. No. 97–417, 10 n.22, 12, 52 n.180 (1982))), *aff'd sub nom.* Miss. State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991).

[44] 393 U.S. at 557.

[45] *Id.* As the *Allen* Court observed, "a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implie[s] a private right of action." *Id.* It also worried that failing to recognize an implied cause of action would make the VRA an "empty promise" to Black people. *Id.* (citing J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964))*; see also supra* notes 1–14 and accompanying text (discussing the historical context underlying the legal protections extended to Black Americans during both Reconstruction and the Civil Rights Movement).

[46] *See, e.g.*, Morse v. Republican Party of Va., 517 U.S. 186, 231 (1996) (Stevens, J., joined by Ginsburg, J.) (plurality opinion); Shelby County. v. Holder, 570 U.S. 529, 537 (2013). In *Morse*, the plurality held that § 10 confers a private right of action—opining that "[i]t would be anomalous . . . to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language." 517 U.S. at 232. Then, in 2013, in *Shelby County v. Holder*, the Court recognized that private individuals and the U.S. government have used federal courts to enforce § 2, reaffirming that "[§ 2's right of action] is permanent [and] applies nationwide." 570 U.S. at 537; Joel Heller, Shelby County *and the End of History*, 44 U. MEM. L. REV. 357, 387 (2013) (acknowledging that either "the federal government or private parties" have been able to commence enforcement actions under § 2 of the VRA).

[47] 517 U.S. at 231–32; *accord id.* at 240 (Breyer, J., joined by O'Connor & Souter, JJ., concurring in judgment).

[48] *See, e.g.*, Brief of Plaintiffs-Appellants at 48, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204 (8th Cir. 2023) (No. 22-1395) (collecting cases that reach the merits of private plaintiffs' § 2 claims (citing Katz et al., *supra* note 10)).

[49] *See*, *e.g.*, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1219 n.8 (Smith, C.J., dissenting) (collecting cases both pre- and post-*Morse* that hold that § 2 confers a private

C. The Facts of Arkansas NAACP

In December 2021, two non-profit advocacy organizations, the Arkansas NAACP and the Arkansas Public Policy Panel, sued to enjoin the Arkansas Board of Apportionment from implementing its 2021 district map for the Arkansas House of Representatives.[51] Specifically, the plaintiffs alleged that the Board's plan violated § 2 by diluting Black voting strength.[52] The district court denied the plaintiffs' motion for injunctive relief, holding that it lacked subject-matter jurisdiction because the U.S. Attorney General had declined to join the plaintiffs' claims.[53] The plaintiffs appealed, and the U.S. Court of Appeals for the Eighth Circuit affirmed the district court.[54]

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right of action); *see also* Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 801, 822–63 (2017) (arguing that "the precedential effect of a judicial decision should be determined by reference to the deciding court's reasons for judgment," analogizing this approach to the common law principle of *ratio decidendi*, and advocating that lower courts employ it to more easily identify plurality decisions' precedential value). *See generally Ratio Decidendi*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining "*ratio decidendi*" as "[t]he principle or rule of law on which a court's decision is founded," and, alternatively, "[t]he rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided otherwise"); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case,* 40 YALE L.J. 161, 166–71 (1930) (discussing how to isolate a decision's *ratio decidendi*).

[50] *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring) (observing that the Supreme Court has not considered whether § 2 confers a private right of action); *see also* Turtle Mountain Band of Chippewa Indians v. Howe, 137 F.4th 710, 719–20 (8th Cir. 2025) (holding that 42 U.S.C. § 1983 does not permit private plaintiffs to sue states for violations of § 2 of the VRA), *vacating and remanding* 2023 WL 8004576 (D.N.D. Nov. 17, 2023).

[51] Complaint for Injunctive and Declaratory Relief at 1, Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893 (E.D. Ark. 2022) (No. 21-cv-1239). The plaintiffs named several Arkansas officials, and the State itself, as defendants. *Id.* at 2. In Arkansas, like many other states, the constitution requires redistricting after every decennial census. *Id.* at 4 (citing ARK. CONST. art. 8, §§ 1, 2, 4).

[52] *Id.* at 6, 9. The plaintiffs argued that the reapportionment plan should have contained at least five additional majority-Black districts. *Id.*; *see also* Rachel E. Dudley, Note, *From 1965 to 2023: How* Allen v. Milligan *Upheld the Voting Rights Act but Failed to Adapt to the Age of Computers*, 55 LOY. U. CHI. L.J. 737, 753–63 (2024) (detailing the tests that federal courts apply when evaluating § 2 VRA claims and arguing that *Arkansas NAACP* illustrates how federal courts have eroded § 2). For an analysis of the district court's reasoning, For an analysis of the district court's reasoning, see Carolyn Shapiro, *The Limits of Procedure: Litigating Voting Rights in the Face of a Hostile Supreme Court*, 83 OHIO. L.J. ONLINE 111, 116–18 (2022), http://hdl.handle.net/1811/101812 [https://perma.cc/8EF9-QPJC].

[53] *Ark. NAACP*, 586 F. Supp. 3d at 921–22; *see also* Defendants' Surreply in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 1, 5–11, *Ark. NAACP*, 586. F. Supp. 3d 893 (No. 21-cv-1239) (raising the issue of the district court's subject-matter jurisdiction).

[54] Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1218 (8th Cir. 2023), *aff'g* 586 F. Supp. 3d 893, *reh'g en banc denied*, 91 F.4th 967 (8th Cir. 2024). Notably, the Eighth Circuit clarified that the district court, in fact, possessed subject matter jurisdiction. *See id.* at 1217 ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998))).

On appeal, the plaintiffs raised three main arguments.[55] First, they claimed that the district court erred by disregarding the Supreme Court's holdings in *Allen* and *Morse*, *inter alia*, which remain in force and recognize private plaintiffs' rights under § 2 of the VRA.[56] Next, they asserted that the VRA's text and structure satisfy *Sandoval*'s requirements for implying statutory rights.[57] Lastly, they cited the VRA's legislative history to argue that both houses of Congress had unequivocally communicated their intent that § 2 supply plaintiffs a private right of action and access to a judicial remedy.[58] Affirming the district court's dismissal for lack of subject matter jurisdiction, a divided Eighth Circuit panel reasoned that neither the VRA's text, structure, nor legislative history supported individuals' private enforcement of § 2 claims.[59] Acknowledging that other courts have allowed plaintiffs to enforce § 2, the court opined that those cases reflected other judges' assumptions rather than concrete evidence of Congress's intent to create a private right of action.[60] Instead, the majority interpreted § 2's lack of express remedies as evidence of Congress's intent to foreclose its private enforcement.[61] Without the Attorney General's joinder—the only "plaintiff" that § 2 vests with a right of action—the majority reasoned that the district court had properly dismissed the suit.[62]

II. Discussion: Breaking with Longstanding § 2 Precedent

With its 2023 decision in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, the U.S. Court of Appeals for the Eighth Circuit broke from Supreme Court precedent by holding that § 2 of the VRA does not permit private enforcement.[63] The court located authority for its decision in

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[55] *See* Brief of Plaintiffs-Appellants, *supra* note 48, at 15–19 (summarizing appellants' three main arguments).

[56] *Id.* at 16–17.

[57] *See id.* at 17–18 (discussing § 2's rights-creating language and §§ 3 and 14(e)'s enforcement provisions).

[58] *Id.* at 18–19.

[59] *See Ark. NAACP*, 86 F.4th at 1214 ("*Sandoval* still sets the implied-cause-of-action ground rules, so the question is what—if anything—the legislative history tells us about the 'text and structure' of the Voting Rights Act."(quoting Alexander v. Sandoval, 532 U.S. 275, 288 (2001))). The dissent, however, contended that the majority erred by disregarding the "vast sea of cases . . . affirming the private right of action within [§] 2." *Id.* at 1218–24 (Smith, C.J., dissenting) (quoting Coca v. City of Dodge City, 669 F. Supp. 3d 1131, 1140 (D. Kan. 2023)); *see also* Charquia Wright, *Circuit Circus: Defying SCOTUS and Disenfranchising Black Voters*, 83 OHIO ST. L.J. 601, 620 n.89, 626 & nn.138–45 (2022) (discussing potential for circuit courts to leverage *Sandoval* to constrain implied private causes of action across civil rights law).

[60] *Ark. NAACP*, 86 F.4th at 1209, 1215.

[61] *Id.* at 1210.

[62] *Id.* at 1211.

[63] 86 F.4th 1204, 1206–07, 1215–16 (8th Cir. 2023). Expressly disavowing *Morse v. Republican Party of Virginia*, the court contended that any of *Morse*'s § 2 language was nonbinding obiter dictum. *Id.* The Arkansas NAACP court thus read Sandoval as directly repudiating the "contemporary

several Supreme Court Justices' concurrences and dissents questioning the Court's 1996 decision in *Morse v. Republican Party of Virginia*.[64] Before the case reached the Eighth Circuit, the U.S. District Court for the Eastern District of Arkansas had heeded these Justices' "signals" by holding that § 2 confers neither private rights nor remedies.[65] The Eighth Circuit subsequently af-

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legal context" upon which it believed the *Morse* Court wrongly relied. *Id.* at 1216 (quoting *Sandoval*, 532 U.S. at 287–88). The majority asserted that the "assumption" that § 2 confers private rights and remedies—one that more than a half-century's worth of federal courts have made—could not remain standing on its "flimsy footing." *Id.* at 1217–18.

[64] *Id.* at 1216 (collecting concurring and dissenting opinions); *see, e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., joined by Thomas, J., concurring) (implying that § 2 may not create a private a right of action); Allen v. Milligan, 143 S. Ct. 1487, 1545 n.22 (2023) (Thomas, J., joined by Gorsuch, J., dissenting) (stating that the Court's decision does not address the issue of whether § 2 confers a private right of action); *see also* Re, *supra* note 12, at 942–47 (discussing the "signals" that the Supreme Court issues via non-binding dicta and Justices' concurring opinions, and noting how they shape the Court's docket); Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 5–6 (1994) (commenting on the "overwhelming consensus" among jurists and academics that trial courts should not allow thoughts of "what their higher courts would likely do on appeal" to influence their findings); DAVID SCHULTZ, CONSTITUTIONAL PRECEDENT IN US SUPREME COURT REASONING 1–29 (2022) (tracing how the Supreme Court has conceptualized precedent's authority from Chief Justice Jay to Chief Justice Roberts).

[65] *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893, 906 & n.73, 916 (E.D. Ark. 2022) (acknowledging that the district court would "be the first federal court in the nation to affirmatively conclude that the judiciary may not imply a private right of action to enforce § 2," and discussing Justice Gorsuch's concurring opinions calling § 2's private right into question), *aff'd*, 86 F.4th 1204 (8th Cir. 2023). The district court dismissed plaintiffs' arguments that a private right under § 2 was well-established, concluding that "neither the Supreme Court nor the Eighth Circuit has decided this issue one way or the other." *Ark. NAACP*, 586 F. Supp. 3d at 906 n.73; *cf. Ark. NAACP*, 86 F.4th at 1220 (Smith, C.J., dissenting) (observing that "the district court issued a *sua sponte* order directing the parties to 'be prepared to discuss' whether Section 2 can be enforced via a private right of action" (quoting Brief for Plaintiffs-Appellants, *supra* note 48, at 26)). Ten days before the Eighth Circuit's *Arkansas NAACP* ruling, however, in *Robinson v. Ardoin*, the Fifth Circuit held that private plaintiffs *can* sue to enforce § 2. 86 F.4th 574, 588 (5th Cir. 2023). A week later, in *Turtle Mountain Band of Chippewa Indians v. Howe*, the U.S. District Court for the District of North Dakota granted three Native American plaintiffs' request for a preliminary injunction against the State of North Dakota because its legislative redistricting plan violated § 2 of the VRA. *See* No. 22-22, 2023 WL 8004576, at *1, *17 (D.N.D. Nov. 17, 2023), *vacated and remanded*, 137 F.4th 710 (8th Cir. 2025); *see also* Turtle Mountain Band of Chippewa Indians v. Jaeger, No. 22-cv-22, 2022 WL 2528256, at *3–*6 (D.N.D. July 7, 2022) (observing that the *Arkansas NAACP* district court did not rule on the plaintiffs' ability to bring suit under § 1983, and opining that § 1983 supported the Native plaintiffs' § 2 VRA claims). What is more, the *Arkansas NAACP* plaintiffs-appellants recognized that the *Turtle Mountain* litigation could affect the circuit split that *Arkansas NAACP* created. *See* Unopposed Application for an Extension of Time to File a Petition for a Writ of Certiorari, at 2, No. 23A929 (U.S. Jan. 30, 2024) ("An extension would likely also preserve judicial resources because legal developments in pending cases may obviate the need for such a petition, such as in *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655, (8th Cir.)."). With the Eighth Circuit's May 2025 decision in *Turtle Mountain*, however, the court has widened that split. *See* 137 F.4th at 720 (holding that plaintiffs may not privately enforce their § 2 rights through 42 U.S.C. § 1983); *see also infra* note 108 and accompanying text (discussing the Fourth, Fifth, and Sixth Circuit cases that have either assumed or affirmatively found that § 2 confers a private right of action).

firmed, prohibiting private enforcement actions under § 2.[66] Section A of this Part details the Eighth Circuit's reasoning in *Arkansas NAACP*.[67] Section B examines then-Chief Judge Smith's dissent and how it exemplifies the position that the VRA is privately enforceable.[68] Moreover, Section B acknowledges how, in *Turtle Mountain Band of Chippewa Indians v. Howe*, the Eighth Circuit rejected the argument that 42 U.S.C. § 1983 allows private plaintiffs to enforce their federal statutory rights under § 2 of the VRA.[69]

A. Majority's Holding, Reasoning, and Dismissal of Morse *as Dicta*

Hewing closely to the Supreme Court's emphasis on text and structure as interpretative tools in *Alexander v. Sandoval*, a divided Eighth Circuit panel affirmed the district court.[70] The majority rooted its analysis in the VRA's text and structure, arguing that each demonstrated Congress's intent to foreclose the Act's private enforcement.[71] Specifically, the *Arkansas NAACP* court distinguished the VRA from the Civil Rights Act of 1964, which, as the court acknowledged, permitted private enforcement.[72] However equivocally the court's *Sandoval* analysis answered the private right question, it asserted that §§ 2 and 12 evince Congress's unequivocal intent to prevent private enforcement.[73] The VRA's text and structure, the court reasoned, reflected Congress's intentional omission of private remedies.[74] Therefore, the majority concluded that, like the district court, it could not reach the merits without the Attorney General's joinder.[75]

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[66] *Ark. NAACP*, 86 F.4th at 1206–07, 1216.

[67] *See infra* notes 70–82 and accompanying text.

[68] *See infra* notes 83–91 and accompanying text.

[69] *See infra* notes 83–91 and accompanying text.

[70] *Ark. NAACP*, 86 F.4th at 1216 (citing Alexander v. Sandoval, 532 U.S. 275, 286–88 (2001)).

[71] *Id.* at 1211 (citing Freeman v. Fahey, 374 F.3d 663, 665 (8th Cir. 2004)).

[72] *Id.* at 1209 ("'[A] civil action for preventive relief' . . . can 'be instituted by the person' experiencing discrimination." (quoting 42 U.S.C. § 2000a-3(a)). Similarly, whereas *Sandoval* constrained private rights of action under federal statutes *unless* the statute focuses on members of a protected class, the *Arkansas NAACP* court alleged that *Sandoval* did not instruct an appellate court how to construe a statute like the VRA that simultaneously protects members of an identifiable class *and* state and local governments. *Id.* at 1210.

[73] *Id.* at 1210 & n.2 (asserting that the omission was "no accident" and arguing that "[t]he fact that § 12 lists criminal penalties among the potential remedies is strong evidence that it cannot provide a private right of action").

[74] *Id.* at 1211. The court's reasoning relied heavily on the canon of statutory construction, *expressio unius est exclusio alterius*, whereby the inclusion of one enforcement mechanism implies the purposeful exclusion of another. *Id.* (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012)); *cf. In re* AFY, 734 F.3d 810, 821 (8th Cir. 2013) (announcing a rule of statutory construction using *expressio unius*). *See generally* 2A SUTHERLAND, STATUTORY CONSTRUCTION § 47:23 (Norman Singer & Shambie Singer eds., 7th ed. 2024) (defining *expressio unius est exclusio alterius*).

[75] *Ark. NAACP*, 86 F.4th at 1208–10; *cf. id.* at 1213 (discussing how private remedies like those available to plaintiffs under § 1983 are unavailable to the Attorney General).

The majority similarly rejected the plaintiffs-appellants' claims that *Morse* recognized a private right of action to enforce § 2.[76] Even though the Eighth Circuit's precedent suggests that it is bound by the Supreme Court's "considered dicta,"[77] the *Arkansas NAACP* panel distinguished *Morse*'s § 2 language as "the least valuable kind [of dicta]."[78] The court found plaintiffs-appellants' arguments about legislative history unavailing.[79] It discounted legislative history as an imprecise tool, and it noted how *Sandoval* clarified that courts cannot rely on committee reports to imply a statutory right of action.[80]

[76] *See id.* at 1215–16 & n.6 (characterizing *Morse*'s § 2 language as "mere dicta . . . not holdings," and reiterating that "a 'judge's power to bind is limited to the issue that is before him'" (quoting United States v. Rubin, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring))); *see also id.* at 1216 n.7 (describing how implementing the Supreme Court's preferred interpretive tools to analyze § 2's text illuminates the *Morse* Court's incorrect understanding of § 2 (citing City of Mobile v. Bolden, 446 U.S. 55, 60 n.8 (1980) (plurality opinion)). *But see* Morse v. Republican Party of Va. 517 U.S. 186, 231 (1996) (plurality opinion) (explaining how Congress's intent and federal courts' disposition of § 2 suits support private enforcement actions under § 2); *id.* at 240 (Breyer, J., concurring) (same).

[77] *Ark. NAACP*, 86 F.4th at 1216 (citing *In re* Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1064 (8th Cir. 2017) (en banc) (stating that the Eighth Circuit is bound by "the Supreme Court's *considered dicta* almost as firmly as by the Court's outright holdings" (emphasis added))); *see also* United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997) (observing that the "[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative" (quoting Doughty v. Underwriters at Lloyd's, 6 F.3d 856, 861 n. 3 (1st Cir.1993)). Alternatively, then-Chief Judge Smith argued for a stricter adherence to stare decisis. *Id.* at 1219 (Smith, C.J., dissenting). "Until the Court rules or Congress amends the statute," the former Chief Judge wrote, "I would follow existing precedent that permits citizens to seek a judicial remedy." *Id.*; *cf.* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 314–19 (2020) (citing examples of contemporary Justices' "discretionary" approach to precedent and frequent disregard of stare decisis). *But cf.* THE FEDERALIST No. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . .").

[78] *See Ark. NAACP*, 86 F.4th at 1216 (citing *In re Pre-Filled Propane*, 860 F.3d at 1064); *cf., e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 548, (2013) ("[W]e are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct." (citing Cent. Va. Cmnty. Coll. v. Katz, 546 U.S. 356, 363 (2006))).

[79] *See Ark. NAACP*, 86 F.4th at 1216; Brief of Plaintiffs-Appellants, *supra* note 48, at 45–50.

[80] *See Ark. NAACP*, 86 F.4th at 1213–14 ("There are many reasons to doubt legislative history as an interpretive tool." (citing Exxon Mobil Corp. v. Allapattah Servs., Inc. 545 U.S. 546, 568 (2005))); *id.* at 1215 ("[T]he legislative history ignores . . . [the VRA's] 'text and structure.'" (quoting Alexander v. Sandoval, 532 U.S. 275, 288 (2001))); *id.* at 1216 (suggesting not only that *Sandoval* had superseded *Morse* but also that *Sandoval* required lower courts to move beyond tools like legislative history to interpret statutes); *see also* Brief for Tom Cotton as Amicus Curiae Supporting Defendants-Appellees at 6–7, *Ark. NAACP*, 86 F.4th 1206 (No. 22-1395) (same). The majority gave short shrift to the plaintiffs-appellants' argument that the VRA's 1982 reauthorization, which added "aggrieved persons," reflected Congress's intent to create a private right of action. *Ark NAACP*, 86 F.4th at 1214 (citing Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.")). *But see Sandoval*, 532 U.S. at 293–317 (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting) (arguing that judges should use interpretive tools like "text, structure, or history" before limiting an implied right, and collecting cases where the Court relied on such tools to imply statutory rights); S. REP. 97-417, 30 (1982) ("[We] reiterate[] the existence of the private right of action under Section 2.").

Further, the majority distinguished the *Arkansas NAACP* facts from the Eighth Circuit's 1989 ruling in *Roberts v. Wamser*, which had assumed that private plaintiffs possess a right of action under § 2.[81] Lastly, the court modified the district court's dismissal to be with prejudice.[82]

B. The Dissent and Other Courts' Reactions

Dissenting, then-Chief Judge Smith found ample support for the plaintiffs-appellants' position in both *Morse* and the fact that scores of federal courts had reached the merits of private plaintiffs' § 2 cases since the VRA's 1982 amendments.[83] However dicta-like *Morse*'s language may appear, the dissent contended, the Eighth Circuit's own precedent required the panel to defer to the *Morse* Court.[84] Similarly, the dissent noted that the defendants-appellees would not have raised the dispositive argument about § 2's private right of action without

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[81] *Compare Ark. NAACP*, 86 F.4th at 1216–17 ("*Roberts* assumed a private right of action existed under § 2, but only for the purpose of deciding that losing candidates could not bring one."), *with* Roberts v. Wamser, 883 F.2d 617, 618–19 (8th Cir. 1989) (holding that a losing candidate lacked standing under the VRA to bring a § 2 claim). The majority also invoked Professor Garner's canonical treatise on vertical and horizontal precedent to support its conclusion that judicial decisions' "[a]ssumptions and statements of belief about other issues are not holdings, no matter how confident the court making them may sound." *Ark. NAACP*, 86 F.4th at 1216 (citing BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT (Thomson Reuters ed., 2016)).

[82] *Ark. NAACP*, 86 F.4th at 1218. In light of the Eighth Circuit's intervening decision in *Turtle Mountain v. Howe*, which held that 42 U.S.C. § 1983 is unavailable for the private enforcement of § 2 rights, it is unclear how—if at all—the district court plaintiffs can bring substantive claims for voting rights violations Arkansas officials. 137 F.4th 710, 717 (8th Cir. 2025), *vacating and remanding* 2023 WL 8004576 (D.N.D. Nov. 17, 2023). *But see, e.g.*, Coca v. City of Dodge City, 669 F. Supp. 3d 1131, 1140 (D. Kan. 2023) (holding that § 1983 provides a means for private plaintiffs to enforce private rights under § 2 of the VRA).

[83] *Ark. NAACP*, 86 F.4th at 1224 (Smith, C.J., dissenting) (noting that the Court "has yet to overrule itself on that precise issue" (quoting *Coca*, 669 F. Supp. 3d at 1140)); *id.* at 1223 ("[S]cores if not hundreds of cases have proceeded under the assumption that [§] 2 provides a private right of action." (quoting *Coca*, 669 F. Supp. 3d at 1140)); *see also* Katz et al., *supra* note 10 (finding that private plaintiffs brought 160 of the 182 successful § 2 claims between 1981 and 2022).

[84] *Ark. NAACP*, 86 F.4th at 1222–23 (citing *In re* Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1064 (8th Cir. 2017) (en banc)). Then-Chief Judge Smith categorically rejected the majority's application of *In re Pre-Filled Propane*'s holdings about dicta. *Id.* The majority cited the same case for the proposition that Supreme Court dicta, like *Morse*'s § 2 language, controls only when the Court has not opined further on a particular question. *Id.* at 1216 (citing *In re Pre-Filled Propane*, 860 F.3d at 1064). Nonetheless, the majority read *Sandoval* as an intervening decision that abrogated *Morse*. Then-Chief Judge Smith disagreed, and he countered that appellate courts like the Eighth Circuit "should afford deference and respect to Supreme Court dicta . . . where, as here, it is consistent with longstanding Supreme Court precedent." *Id.* at 1222 (quoting *In re Pre-Filled Propane*, 860 F.3d at 1059); *cf.* Hutto v. Davis, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

the district court first broaching the issue *sua sponte*.[85] Then-Chief Judge Smith read the weight of the existing law binding on the court as insuperable evidence of the right.[86] He would have relied on *Morse*, which he believed had resolved the question—rooting its holding in the Court's earlier decisions encouraging lower federal courts to imply a private right where Congress had created a statute to protect members of a certain class.[87] As the VRA was created to protect voters of color, the earlier implied rights tests would have yielded a straightforward conclusion: § 2 creates a private right of action.[88]

In May 2025, in *Turtle Mountain Band of Chippewa Indians v. Howe*, the U.S. Court of Appeals for the Eighth Circuit considered and rejected arguments that private plaintiffs can use 42 U.S.C. § 1983 to pursue § 2 claims.[89] With the issue "properly . . . before the court" in *Turtle Mountain*, the panel's majority determined that "Congress did not speak with a 'clear voice' that manifests an

[85] *Ark. NAACP*, 86 F.4th at 1220 (citing Brief for Plaintiffs-Appellants, *supra* note 48, at 26); *cf. id.* at 1217–18 (arguing that "the absence of a federal cause of action has jurisdictional consequences [for federal courts]" (citing Cross v. Fox, 23 F.4th 797, 801 (8th Cir. 2022))).

[86] *Id.* at 1220. The majority and the dissent disputed the precedential value of the Eighth Circuit's 1989 decision in *Roberts v. Wamser*. *See* 883 F.2d 617, 620 (8th Cir. 1989) (considering "whether the Voting Rights Act can properly be understood as granting an unsuccessful candidate the right to maintain a judicial challenge to allegedly discriminatory voting procedures that allegedly caused him to lose the election"). Whereas the majority distinguished *Roberts*—arguing that it was "a third party standing case" that had "assumed a private right of action existed under § 2, but only for the purpose of deciding that losing candidates could not bring one" and distinguishing it as "a third-party standing case"—the dissent saw *Roberts* as controlling horizontal precedent, describing it as recognizing "standing to sue under [§ 2 of the VRA]" to include "persons whose voting rights have been denied or impaired." *Ark. NAACP*, 86 F.4th at 1216–17 (quoting *Roberts*, 883 F.2d at 624); *id.* at 1219 n.8 (Smith, C.J., dissenting) (quoting *Roberts*, 883 F.2d at 624); *cf.* GARNER ET AL., *supra*, at 37–43 (discussing horizontal precedent). *See generally* Caster v. Merrill, No. 21-1536, 2022 WL 264819, at *81 (N.D. Ala. Jan. 24, 2022) (recognizing that federal courts have historically heard and adjudicated the merits of private plaintiffs' § 2 actions), *aff'd sub nom.* 143 S. Ct. 1487 (2023), *and appeal dismissed as moot sub nom.* Caster v. Sec'y of State for Ala., No. 22-10272, 2023 WL 9325885 (11th Cir. Aug. 9, 2023).

[87] *See Ark. NAACP*, 86 F.4th at 1222 (arguing that *Morse* had already established that a private right exists under § 2 and discussing how the *Morse* decision "was built on a firm foundation of precedent, including *Borak* and *Allen*"); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) ("[A] federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action." (citing J. I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)); Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) ("[T]he Court has long recognized that . . . the failure of Congress to . . . so [specify] is not inconsistent with an intent on its part to have such a remedy available to the persons benefited by its legislation.").

[88] *See Ark. NAACP*, 86 F.4th at 1221 (discussing *Borak*, and intimating that Congress's passage the VRA "one year later" suggests that Congress drafted the VRA with *Borak* in mind). The former Chief Judge also chided the majority for characterizing the *Morse* Court's analysis of a private right of action in § 2 as "subordinate clause, negative pregnant, devoid-of-analysis, throw-away kind of dicta." *Id.* at 1222–23 (quoting Singleton v. Merrill, 582 F. Supp. 3d 924, 1032 (N.D. Ala. 2022)).

[89] 137 F.4th 710, 713 (8th Cir. 2025), *reh'g and reh'g en banc denied*, 2025 WL 1833993, at *1 (8th Cir. July 3, 2025).

'unambiguous' intent to confer individual rights."[90] Accordingly, and buttressed by its reading of "§ 2's historical background [to] suggest[] that the 'right of any citizen' in § 2 merely parrots a preexisting right guaranteed by the Fifteenth Amendment," the court ruled that § 2 does not meet the Supreme Court's "rights-creating language" tests.[91]

III. WHERE TO GO FROM HERE: REIMAGINING PRIVATE ENFORCEMENT OF § 2

Then-Chief Judge Smith's dissent from the Eighth Circuit's decision in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment* correctly identified how § 2 of the VRA confers both private rights and remedies.[92] Beyond disrupting decades of well-settled precedent, the majority also implied that the federal courts which had previously reached the merits of private plaintiffs' § 2 actions had committed legal error by doing so.[93] State actors defending against private plaintiffs' claims of § 2 violations have cited *Arkansas NAACP* in their dispositive motions, but federal courts have thus far summarily dismissed these arguments and refused to adopt the Eighth Circuit's rule.[94] Section A details the authorities that establish private plaintiffs' right of action under §2 and probes federal courts' power to grant such plaintiffs judicial remedies.[95] Section B explains how, regardless of the Eighth Circuit or other federal courts' response to *Arkansas NAACP*'s § 2 holding, 42 U.S.C. § 1983 provides an alternative vehicle for private plaintiffs to vindicate claims of § 2 violations.[96]

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[90] *Id.* at 719 (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002)).

[91] *Id.* at 720 (quoting U.S. CONST. amend. XV, § 1)); *see also id.* (arguing that the Supreme Court's 2023 decision in *Health & Hospital Corporation of Marion County v. Talevski* prohibits private plaintiffs' use of § 1983 to sue state officials for violations of § 2 of the VRA); *cf. Gonzaga*, 536 U.S. at 287 (noting that statutory provisions that "lack the sort of '*rights-creating' language* critical to showing the requisite congressional intent to create new rights" are not enforceable via § 1983 (first citing *Sandoval*, 532 U.S. at 288–289; and then citing *Cannon*, 441 U.S. at 690 n.13) (emphasis added)).

[92] *See* 86 F.4th 1204, 1218–24 (8th Cir. 2023) (Smith, CJ., dissenting) (arguing that Supreme Court precedent, legislative history, and public policy support private rights and remedies under § 2).

[93] *See id.* at 1217–18 (majority opinion) (discounting scores of federal courts' decisions on the merits of plaintiffs' § 2 as reflecting "assumption[s]" that § 2 allows private enforcement).

[94] *See, e.g.*, Legislative Defendants' Proposed Findings of Fact and Conclusions of Law at 156, N.C. State Conf. NAACP v. Hirsch, No. 18–1034 (M.D. N.C. July 1, 2024) (arguing that § 2 of the VRA does not create a private right of action (citing *Ark. NAACP*, 86 F.4th 1204)); *cf, e.g.*, Brief in Support of Motion to Dismiss at 3, Shackelford v. Morgan & Morgan Complex Litig. Servs., No. 24-123 (E.D. Ark. Aug. 28, 2024) (invoking reasoning of *Arkansas NAACP* to argue the FTCA is not privately enforceable).

[95] *See infra* notes 97–104 and accompanying text.

[96] *See infra* notes 106–130 and accompanying text.

A. Section 2 Implies a Private Right of Action

By declining to follow binding Supreme Court and Eighth Circuit precedent, the *Arkansas NAACP* court disregarded well-settled principles of *stare decisis* and committed legal error.[97] The United States Supreme Court's 1996 decision in *Morse v. Republican Party of Virginia* and the Eighth Circuit's 1989 decision in *Roberts v. Wamser* are binding precedent that the *Arkansas NAACP* court was required to follow.[98] Whether seen as an express holding or obiter dictum, the § 2 language in both the *Morse* plurality opinion and Justice Breyer's concurrence reflects the *Morse* Court's *ratio decidendi*.[99] Scholars and jurists agree that *ratio decidendi* constitutes binding law.[100]

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[97] *Compare Ark. NAACP*, 86 F.4th at 1206 (holding that § 2 does not confer a private right of action), *with* Roberts v. Wamser, 883 F.2d 617, 624 (8th Cir. 1989) (finding a private right of action under § 2), *and* Morse v. Republican Party of Va., 517 U.S. 186, 240 (1996) (Breyer, J., concurring) (same). Then-Chief Judge Smith remarked that "[i]t would be ambitious indeed for a [lower] court . . . to deny a private right of action in the light of precedent and history." *Ark. NAACP*, 86 F.4th at 1224 (Smith, C.J., dissenting) (quoting League of United Latin Am. Citizens v. Abbott, No. 21-cv-00259, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court)).

[98] *See*, *e.g.*, Williams, *supra* note 49, at 801 (applying the "*ratio decidendi* model" to plurality decisions suggest that "the [case's] precedential effect . . . should be determined by reference to the deciding court's reasons for judgment"). Although lower courts have historically had difficulty extracting precedential value from decisions like *Morse*, *Morse*'s *ratio decidendi* demonstrates that § 2 of the VRA confers a private right of action. 517 U.S. at 232 (plurality opinion); *id.* at 240 (Breyer, J., concurring). The Eighth Circuit should heed Professor Williams's "revised approach" to isolating the *ratio decidendi* from plurality decisions like *Morse*. *See* Williams, *supra* note 49, at 802, 864 (acknowledging how "plurality decisions involve a special kind of incompletely theorized agreement," and encouraging lower courts to "look[] to the majority's partially overlapping and partially diverging reasons for that judgment" in order to "identify a domain of shared agreement among the majority Justices regarding why that result was correct"). *Compare* GARNER ET AL., *supra* note 86, at 33 ("[F]ederal courts owe unflinching fealty to Supreme Court precedents . . . even if the court believes that the precedent was wrongly decided or is likely to be soon overturned by the Supreme Court itself."), *with* Re, *supra* note 12, at 938 (arguing that lower courts faced with ambiguity as to the "best reading" of a higher court's decision should "should narrow from below" in order to adopt "[the] *more correct* view of the law" (emphasis added)).

[99] *See Morse*, 517 U.S. at 240 (1996) (Breyer, J., concurring) (referencing Justice Stevens' explanation of the Court's "rationale" in *Allen* whereby "Congress established private right of action to enforce § 5" that applies both to §§ 2 and 10); *cf. supra* note 49 and accompanying text (defining *ratio decidendi*).

[100] *See, e.g.*, Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2040–41 (1994) (stating that a judicial decision's "rationale, or *ratio decidendi*, is binding law" and collecting authorities). That the Court has not overruled *Morse*, nor supplied another decision addressing private plaintiffs' § 2 rights, indicates that *Morse* continues to bind lower courts. *See id*; *cf.* Williams, *supra note* 49, at 846 (commenting on "the notorious blurriness" that lower courts face when discerning holdings and dicta). The *Arkansas NAACP* decision reflects the Eighth Circuit "narrowing [Supreme Court precedent] as resistance." Re, *supra* note 12, at 961, 963, 965. No Supreme Court decision had either expressly or implicitly overruled *Morse* when the Eighth Circuit decided *Arkansas NAACP*. *Id.* at 960–66 (arguing that lower courts narrow Supreme Court precedent as a means of resistance, and acknowledging the Court's ability to grant certiorari in such instances as "doctrinal test balloon[s]"), *with* Baude, *supra* note 78, at 329–30 (detailing the "discretionary features" of the Supreme Court's ap-

Moreover, the VRA's extensive legislative history—including the House and Senate Reports that accompanied its 1982 reauthorization—suggests that Congress intended the Act to be privately enforceable and underscores the *Arkansas NAACP* court's error.[101] In its analysis, the Eighth Circuit discounted not only the VRA's legislative history but also the analytical value of the contemporary legal context from which it emerged, belying two critical sources of Congress's intent.[102] In turn, the court denied that Congress meant to confer rights to the very class that it drafted the VRA to protect: people of color, like the Arkansas NAACP's members, who have been historically disenfranchised.[103] The Act's rights-creating language, especially the use of the term "aggrieved person" to identify those who may "institute[] a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment," further establishes Congress's intent for § 2 to be privately enforced.[104]

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proach to precedent, and alleging that the Justices' use of precedent to evade existing law is troubling and threatens judicial neutrality).

[101] *See, e.g.*, H.R. REP. NO. 91-397, at 8 (1969) (emphasizing that *Allen* affirmed Congress's intent to permit "private persons" a right of action under § 5 (citing Allen v. State Bd. of Elections, 393 U.S. 544 (1969)). When Congress reauthorized the Voting Rights Act in 1982, the Senate Judiciary Committee echoed the prior Congress's intent for § 2 to confer a private right of action—namely, it "reiterate[d] the existence of the private right of action under [§] 2." S. REP. 97-417, at 30 (1982). Although the *Alexander v. Sandoval* Court disagreed, Justice Stevens implored the Court to "offer reasoned arguments drawn from the text, structure, and history" before limiting an implied right. 532 U.S. 275, 306, 310 n.19, 312 & n.21, 314 n.23, 315 n.26, 316–17. (2001) (Stevens, J., dissenting) (collecting cases in which the Court relied on legislative history to imply private statutory rights); *see also supra* note 39 and accompanying text (discussing Congress's subsequent amendment to the VRA and the legislative history that supports Congress's intent for provide a private right of action).

[102] *See Ark. NAACP*, 86 F.4th at 1214 ("*Sandoval* still sets the implied-cause of action ground rules . . . ." (citing *Sandoval*, 532 U.S. at 288)); *Sandoval*, 532 U.S. at 287–88 (dismissing the notion of contemporary legal context and asserting that "[the Court] ha[s] never accorded dispositive weight to context short of text."). *But see Ark. NAACP*, 86 F.4th at 1221 (Smith, C.J., dissenting) (alluding to courts' previous use of contemporary legal context to imply rights of action). For more information regarding the VRA's contemporary legal context, see *supra* notes 5–6 and accompanying text.

[103] *See Sandoval*, 532 U.S. at 289 ("Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981))).

[104] *E.g.*, 52 U.S.C. § 10302 (a)–(c). The *Sandoval* Court identified examples of rights-creating language. *See* 532 U.S. at 286 (analyzing "rights-creating language" in 42 U.S.C. § 2000d-1 (citing Cannon v. Univ. of Chi., 441 U.S. 667, 690 n.13 (1979))). In *Arkansas NAACP*, then-Chief Judge Smith clarified that the "major purpose of the Act," which was to enable private citizens to vindicate their Fifteenth Amendment rights, supports the conclusion that private plaintiffs possess rights of action and access to judicial remedies to enforce § 2. *See* 86 F.4th at 1220–21 (Smith, C.J., dissenting). Additionally, he noted how, in cases like *Cannon*, "the Supreme Court [has] recognized private rights of action [under] statutes . . . protecting civil and political rights." *Id.* at 1220 (quoting Tokaji, *supra* note 24, at 128 (alteration in original)).

B. 42 U.S.C. § 1983 Supplies an "Alternative Vehicle" to Enforce § 2

Regardless of whether other courts adopt *Arkansas NAACP*'s holding, individuals retain the ability to prosecute states' noncompliance with § 2 of the VRA via 42 U.S.C. § 1983.[105] The plain text and structure of § 1983, as well as the Supreme Court's implied rights and remedies jurisprudence, indicate that individuals other than the U.S. Attorney General may access federal courts to enforce § 2 violations.[106] Since the Eighth Circuit issued its opinion in *Arkansas NAACP*, several federal courts have rejected its conclusion outright.[107] The Fourth, Fifth, and Sixth Circuits, for example, have explicitly discounted the *Arkansas NAACP* court's analysis[108] In *Singleton v. Allen*, one of the first post-*Arkansas NAACP* § 2 enforcement actions, the U.S. District Court for the Northern District of Alabama rejected the Eighth Circuit's private right of action analysis.[109] The *Singleton* court explained that "[*Arkansas NAACP*] is not binding on this Court, nor does its analysis compel us to dismiss these Section Two claims."[110]

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[105] *See infra* notes 106–130 and accompanying text (arguing that 42 U.S.C. § 1983 provides an alternative vehicle to enforce the statutory rights that arise under § 2 of the VRA).

[106] *See, e.g.*, Coca v. City of Dodge City, 706 F. Supp. 3d 1265, 1273 (D. Kan. 2023) (stating that § 1983 provides "an alternative vehicle" for private plaintiffs' to bring claims alleging violations of § 2 of the VRA); *see also* Brief for United States as Amicus Curiae in Support of Plaintiffs-Appellees and Urging Affirmance at 7–28, Turtle Mountain Band of Chippewa Indians v. Howe, 137 F.4th 710 (8th Cir. 2025) (No. 23-3655) (same). In *Sandoval*, the Court acknowledged that some "remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights." 532 U.S. at 290–91 (citing Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 19–20 (1981)). Nonetheless, the Court stated that private plaintiffs could resort to § 1983 to bring suits alleging violations of Title VI of the Civil Rights Act of 1964. *Id. See generally* WILLIAM BAUDE ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1009–15 (7th ed. 2023) (describing plaintiffs' rights of action and access to judicial remedies under 42 U.S.C. § 1983); Paul Feingold, Note, *Section 1983 and Voting Rights: A Case Study on the Materiality Provision and the Future of Private Enforcement*, 93 FORDHAM L. REV. 149 (2024) (suggesting that *Talevski* permits private litigants to use § 1983 to enforce voting rights under the Civil Rights Act's Materiality Provision).

[107] *E.g.*, Singleton v. Allen, 740 F. Supp. 3d 1138, 1156 (N.D. Ala. 2024); Miss. State Conf. NAACP v. State Bd. of Election Comm'rs, 739 F. Supp. 3d 383, 410–11 (S.D. Miss. 2024) ("Chief Judge Smith's dissent . . . express[ed] the more persuasive analysis."). Even if *Morse* was dicta, the *Mississippi NAACP* court acknowledged, the Fifth Circuit is also "bound by Supreme Court *dicta*." 739 F. Supp. 3d at 411; *cf. In re* Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1064 (8th Cir. 2017) (en banc) (requiring the Eighth Circuit to abide by Supreme Court dicta).

[108] *See, e.g.*, Pierce v. N.C. State Bd. of Elections, 97 F.4th 194, 211 n.6 (4th Cir. 2024) (declining to adopt the Eighth Circuit's holding in *Arkansas NAACP*); La Union del Pueblo Entero v. Abbott, 93 F.4th 310, 325 n.22 (5th Cir. 2024) (reasoning that "[t]he Supreme Court has long allowed private plaintiffs *and* the United States to bring VRA [§] 2 suits" (emphasis added)); Robinson v. Ardoin, 86 F.4th 574, 588 (5th Cir. 2023) (opining that "[§ 2's] purpose surely is to allow the States to be sued by someone"); Simon v. DeWine, 98 F.4th 661, 666 n.1 (6th Cir. 2024) (noting that "we assume without deciding that the Voting Rights Act confers a private right of action" (citing *Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999))).

[109] 740 F. Supp. 3d at 1156.

[110] *Id.*

Should other circuits adopt the majority's reasoning, which recent decisions suggest is unlikely,[111] then § 1983 should still permit private parties, like those in *Arkansas NAACP*, to sue state officials for violating their § 2 rights.[112] In its May 2025 decision in *Turtle Mountain Band of Chippewa Indians v. Howe*, however, the U.S. Court of Appeals for the Eighth Circuit denied plaintiffs' attempt to enforce § 2 of the VRA via § 1983.[113] A divided panel vacated the U.S. District Court for the District of North Dakota's grant of a preliminary injunction against state officials for violating the three Native American plaintiffs' § 2 voting rights.[114] The *Turtle Mountain* panel and the en banc Eighth Circuit both denied rehearing, foreclosing any chance of reversal absent the Supreme Court granting certiorari.[115]

If the Supreme Court ultimately grants certiorari on the *Arkansas NAACP* plaintiffs-appellants' petition, it is unclear how it will rule given Justices Thomas's and Gorsuch's "signals" that § 2 may not supply a private right of action.[116] In light of the Eighth Circuit's intervening decision in *Turtle Mountain*, the Supreme Court could grant certiorari to the *Arkansas NAACP* plaintiffs-appellants *and* the *Turtle Mountain* plaintiffs-appellees—potentially consolidating the appeals.[117] It could then certify two questions presented: first, whether § 2 of the VRA contains a private right of action and, second, if it does not, whether plaintiffs may invoke § 1983 to vindicate the federal statutory rights that § 2 affords

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[111] *See supra* notes 107–110 and accompanying text (providing examples of federal courts rejecting *Arkansas NAACP*'s holding and reasoning). For more federal district decisions acknowledging that § 2 confers a private right of action, see, e.g., City of Hammond v. Lake Cnty. Jud. Nominating Comm'n, No. 21-160, 2024 WL 68279, at *4 n.3 (N.D. Ind. Jan. 4, 2024) (declining to adopt *Arkansas NAACP*'s holding), *appeal docketed*, No. 24-1125 (7th Cir., Jan. 29, 2024); Nairne v. Ardoin, 715 F. Supp. 3d 808, 831 & nn.82–83 (M.D. La. 2024) (arguing that the Fifth Circuit has already affirmed § 2's private right of action (citing Robinson v. Ardoin, 86 F.4th 574, 588 (5th Cir. 2023))), *appeal docketed sub nom.*, Nairne v. Landry, No. 24-30115 (5th Cir. Feb. 22, 2024).

[112] Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 586 F. Supp. 3d 893, 906–07 & n.76 (E.D. Ark. 2022) (noting that "plaintiffs suing under 42 U.S.C. § 1983 don't have much trouble satisfying the private-remedy prong of the test 'because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes'" (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 284 (2002))), *aff'd*, 86 F.4th 1204 (8th Cir. 2023); *see also supra* note 41 and accompanying text (identifying § 1983's accepted uses).

[113] 137 F.4th 710, 713, 721 (8th Cir. 2025). Specifically, the majority ruled that the judgment of the district court should be vacated and "the case . . . dismissed for want of a cause of action." *Id.* at 721.

[114] *Id.*

[115] Turtle Mountain Band of Chippewa Indians v. Howe, No. 23-3655, 2025 WL 1833993, at *1 (8th Cir. July 3, 2025).

[116] *See supra* notes 12, 64 and accompanying text (discussing Professor Re's signals model as well as the Justices' "signals" to lower courts expressing doubt that § 2 of the VRA confers a private right of action).

[117] *See supra* note 65 and accompanying text (discussing the *Arkansas NAACP* plaintiffs-appellants' potential filing of an application for a writ of certiorari).

them.[118] Lastly, were the Court to consolidate *Arkansas NAACP* and *Turtle Mountain*, it could affirm private plaintiffs' right to enforce § 2 violations on either theory—(1) reversing *Arkansas NAACP* without reaching the merits of *Turtle Mountain* or (2) affirming *Arkansas NAACP* while holding that *Turtle Mountain* was wrongly decided.[119]

Both the plain text of 42 U.S.C. § 1983 and the Court's own precedent establish that § 1983 is an appropriate vehicle to enforce the rights that § 2 confers.[120] For example, in its 2023 decision in *Health and Hospital Corporation of Marion County v. Talevski*, the Supreme Court held that the Federal Nursing Home Reform Act ("FNHRA") created federal rights enforceable via § 1983.[121] Namely, the Court clarified that "[t]he test for unambiguous conferral [of private rights] is satisfied where the provision in question is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric lan-

[118] *See* Stephen L. Wasby, *Case Consolidation and GVRs in the Supreme Court*, 53 U. PAC. L. REV. 83, 86, 88 (2021) (describing "consolidation, grouping, and linking" as "ways in which the justices provide greater focus on particular issues they have agreed to decide" and noting that they are appropriate mechanisms "for purposes of obtaining broader perspectives on an issue").

[119] *Cf. Turtle Mountain*, 137 F.4th at 721 (Colloton, CJ., dissenting) ("Consistent with all the other courts that address the issue, I conclude that § 2 [of the VRA] confers and individual right and that the enforcement scheme described in the Act is not incompatible with private enforcement under § 1983.").

[120] *E.g.*, 42 U.S.C. § 1983 (providing for a private right of action to those persons "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws"). The *Arkansas NAACP* plaintiffs-appellants have taken steps to file a petition for certiorari. *See* Unopposed Application for an Extension of Time to File a Petition for Writ of Certiorari, *supra* note 65 (providing briefing on the arguments plaintiffs-appellants plan to include in a petition for certiorari). In light of Professor Re's account of certain Supreme Court Justices issuing "signals" to lower courts about likely holdings on certain issues, Justices Thomas and Gorsuch have recently signaled that they may hold that § 2 prohibits private enforcement. Re, *supra* note 12; *see also* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., joined by Thomas, J., concurring) (implying that § 2 may not create a private right of action); Allen v. Milligan, 143 S. Ct. 1487, 1545 n.22 (2023) (Thomas, joined by Gorsuch, JJ., dissenting) (stating that the Court's decision does not address the issue of whether § 2 confers a private right of action). Nevertheless, a ruling that § 2 does not confer private rights and remedies will not prevent relief. *See* Alexander v. Sandoval, 532 U.S. 275, 299–300 (2001) (Stevens, J., joined by Souter, Ginsburg, & Breyer, JJ., dissenting) (opining that Court wrongly denied respondents relief for not bringing § 1983 claim). Instead, it will create redundancy by requiring a § 1983 claim where one under § 2 previously had previously sufficed. *See id.*; *see also infra* notes 121–128 (explaining why § 1983 permits the private enforcement of § 2 of the VRA).

[121] *See* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1459 (2023) (holding that absent a statute's express prohibition of private enforcement under § 1983, a defendant seeking to avoid § 1983 liability must demonstrate that Congress implicitly forbade private enforceability "by creating a comprehensive enforcement scheme" (quoting Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005) (internal quotation marks omitted))); *cf.* Chickasaw Nation v. United States, 534 U.S. 84, 93 (2001) (describing interpretive canons as "guides" that do not need to be conclusive). *Compare Talevski*, 143 S. Ct. at 1458 (noting 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"), *with Sandoval*, 532 U.S. at 288 (stating that the analysis of federal statutes' private enforceability begins and ends with "text and structure").

guage with an 'unmistakable focus on the benefited class.'"[122] The inquiry into a federal statute's private enforcement under § 1983, the Court explained, is "divined from [the statute's] text and context."[123] Similar to how this Comment characterizes § 2 of the VRA, the *Talevski* Court determined that the text and structure of FNHRA demonstrated Congress's intent to confer private rights "presumptively enforceable under § 1983."[124]

Additionally, and notwithstanding the Eighth Circuit's decision in *Turtle Mountain*,[125] federal courts have dutifully applied *Talevski* to conclude that § 2 of the VRA creates private rights enforceable under § 1983.[126] In his dissent in *Turtle Mountain*, Chief Judge Colloton articulated the legally correct view: *Talevski* required the court to find § 2 enforceable via § 1983.[127] Just as the rebuttable presumption that litigants can invoke § 1983 to enforce federal statutory rights attaches to the FNHRA, it also applies to § 2 of the VRA because a private right of action was neither expressly proscribed by the Act's text nor implicitly precluded by an enforcement scheme incompatible with private suits.[128]

Whereas the removal of federal troops was fatal to Reconstruction, the removal of a private right of action from § 2 of the VRA need not be fatal to citi-

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[122] *Talevski*, 143 S. Ct. at 1446 (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 284, 287 (2002) (emphasis deleted)).

[123] *Id.* at 1459.

[124] *Id.*

[125] Turtle Mountain Band of Chippewa Indians v. Howe, 137 F.4th 710, 720 (8th Cir. 2025) (applying *Talevski* to § 2 of the VRA to conclude that § 2's voting rights are not privately enforceable via 42 U.S.C. § 1983); *see also supra* notes 6–10 and accompanying text (discussing the text of the VRA and the statutory rights that it creates).

[126] *See, e.g.*, Vote.Org v. Callanen, 89 F.4th 459, 475–76 (5th Cir. 2023) (reasoning that *Talevski* permits the enforcement of citizens' voting rights under § 1983); Get Loud Ark. v. Thurston, 748 F. Supp. 3d 630, 648–49, 664–65 (W.D. Ark. 2024) (holding that *Talevski* permits § 1983 actions to enforce the Civil Rights Act's Materiality Provision, and distinguishing *Arkansas NAACP* by relying on *Talevski* to conclude that § 1983 supported plaintiffs' request for a preliminary injunction against state-officials' enforcement of Arkansas's "wet signature rule," which the court found violated the Civil Rights Act's Materiality Provision). *Talevski* opened the door for private plaintiffs' suits to enforce § 2 of the VRA under § 1983 because, like the FNHRA, the VRA "also establish[es] who it is that must respect and honor these statutory rights," and this does not constitute "a material diversion from the necessary focus on the [rights-holders]." 143 S. Ct. at 1458.

[127] *See Turtle Mountain*, 137 F.4th at 721–22, 729 (Colloton, C.J., dissenting) ("[Section] 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.").

[128] *Talevski*, 143 S. Ct. at 1459 & n.13; *Turtle Mountain*, 137 F.4th at 721–22, 729. *Contra Turtle Mountain*, 137 F.4th at 720 (majority opinion) (holding that "§ 2 merely parrots a preexisting right guaranteed by the Fifteenth Amendment" (quoting U.S. CONST. amend. XV, § 1)); *id.* (reading *Arkansas NAACP* as "not inconsistent with *Talevski*"). Notably, *Talevski* did not overrule the Supreme Court's 2005 decision in *Rancho Palos Verdes*; instead, the Court conceded, when "a statutory provision unambiguously secures [private] rights a defendant 'may defeat t[he] presumption by demonstrating that Congress did not intend' that § 1983 be available to enforce those rights." *Talevski*, 143 S. Ct. at 1459 (quoting Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005) (alteration in original)); *cf.* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 252 (2009) (discussing examples "of a comprehensive enforcement scheme . . . incompatible with individual enforcement under § 1983").

zens' enforcement of their voting rights.[129] *Talevski*, along with the courts that have applied it, presents a novel *and* legally viable method for Americans to vindicate their § 2 rights in the post-*Arkansas NAACP* world: the proverbial new frontier of voting rights.[130]

CONCLUSION

In 2023, in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, the U.S. Court of Appeals for the Eighth Circuit interpreted the text and structure of § 2 of the Voting Rights Act as denying private plaintiffs rights of action and courts' ability to supply those litigants with judicial remedies. The court flouted *stare decisis*, ignoring precedent from both the Supreme Court and the Eighth Circuit as well as interpretive tools that reveal Congress's intent to permit the VRA's private enforcement. State and local governments defending against private plaintiffs' claims of § 2 violations have cited to the Eighth Circuit's holding in their dispositive motions, but other federal courts have thus far dismissed these arguments. Regardless of whether other circuits adopt the Eighth Circuit's view of § 2, the Supreme Court recently held that private statutory rights, like those under § 2, are presumptively enforceable via 42 U.S.C. § 1983.

MICHAEL J. SANDERS

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[129] *See supra* notes 1–4 (discussing Reconstruction and the Jim Crow regime's negative impacts on voting rights).

[130] *See Turtle Mountain*, 137 F.4th at 725 (Colloton, CJ., dissenting) ("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.'"(quoting *Talevski*, 143 S. Ct. at 1460)); *see also* Brief for United States as Amicus Curiae, *supra* note 106, at 7–28 (arguing that the Supreme Court's holding in *Talevski* affirms the plaintiffs-appellants ability to privately enforce the VRA via 42 U.S.C. § 1983).