

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

WINNEBAGO TRIBE OF NEBRASKA;
OMAHA TRIBE OF NEBRASKA; VICTORIA
KITCHEYAN; CHEYENNE ROBINSON;
BRIAN CHAMBERLAIN; RONA STEALER;
JAMES LOUIS LaROSE; ARIC ARMELL;
LYNELLE BLACKHAWK; ESTHER MERCER;
and GREGORY PHILLIPS,

Plaintiffs,

v.

THURSTON COUNTY, NEBRASKA;
THURSTON COUNTY BOARD OF
SUPERVISORS; GLENN MEYER, in his official
capacity as Chairman; MARK ENGLISH, in his
official capacity as Vice Chairman; GEORGIA
MAYBERRY, in her official capacity as
Supervisor; JAMES PRICE, SR., in his official
capacity as Supervisor; DAVIN FRENCH, in his
official capacity as Supervisor; ARNIE HARLAN,
in his official capacity as Supervisor; JIM
MUELLER, in his official capacity as Supervisor;
and PATTY BESSMER, in her official capacity as
County Clerk,

Defendants.

Civil Action No. 8:23-cv-00020-
RFR-JMD

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General “to attend to the interests of the United States in a suit pending in a court of the United States.” This case presents important questions about enforcement of Section 2 of the Voting Rights Act, 52 U.S.C.

§ 10301. Congress has vested the Attorney General with authority to enforce Section 2 on behalf of the United States. *See* 52 U.S.C. § 10308(d). Accordingly, the United States has a substantial interest in ensuring Section 2’s proper interpretation. The United States submits this Statement of Interest to address how Section 2 is enforceable through 42 U.S.C. § 1983. The United States expresses no view on the merits of any claim, nor any issues other than those set forth in this brief.

I. Background

Plaintiffs here—two federally recognized American Indian tribes and nine individual voters—challenged the redistricting plan for Thurston County, Nebraska’s Board of Supervisor districts. They sued under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and, significantly here, under 42 U.S.C. § 1983. ECF No. 1 ¶¶ 137-140, 157-160. In their answer to Plaintiffs’ complaint, Defendants did not argue that the plaintiffs lacked a private right of action under Section 2. *See generally* ECF No. 9. On November 22, 2023, the parties asked this Court to approve a proposed consent decree that resulted from a settlement agreement. ECF No. 36. During that same week, the Eighth Circuit became the first court of appeals to hold that Section 2 lacks a private right of action. *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1216 (8th Cir. 2023). On December 13, 2023, this court stated that “[i]n light of that groundbreaking ruling and the questions left open by that case, the Court would like the parties to weigh in on the continued viability of their joint motion and the proposed consent decree in its current form.” ECF No. 39 at 2. The court requested supplemental

briefing to be submitted by December 27, 2023 and extended that deadline to January 17, 2024 after the parties' joint motion seeking an extension. ECF No. 41.

II. Private plaintiffs can enforce rights Section 2 confers through Section 1983.

Although the United States disagrees with the Eighth Circuit's finding in *Arkansas State Conf. NAACP* that Section 2 lacks a private right of action,¹ that decision is not a barrier to approving the consent decree here. The Eighth Circuit panel expressly left open the question whether Section 1983 provides an alternative avenue for private enforcement of Section 2. *Arkansas State Conf. NAACP*, 86 F.4th at 1218. Section 2 is enforceable through 42 U.S.C. § 1983.²

¹ “[T]he existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965,” and the Supreme Court, in turn, has “entertained cases brought by private litigants to enforce § 2.” *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (internal citations and quotation marks omitted); see also *Mixon v. Ohio*, 193 F.3d 389, 406 & n.12 (6th Cir. 1999) (“An individual may bring a private cause of action under Section 2 of the [VRA].”); *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1031 (N.D. Ala. 2022) (three-judge court) (“although the Supreme Court has not directly decided this question, it has decided a close cousin of a question, and that precedent strongly suggests that Section Two provides a private right of action”), *aff’d sub nom. Allen v. Milligan*, 143 S. Ct. 1487 (2023) (not discussing the private right of action question). A more exhaustive recitation can be found below. See *infra* at 3 n.2 (listing United States’ briefs detailing Section 2’s private right of action). The Eighth Circuit panel’s opinion in *Arkansas State Conf. NAACP* is an outlier contrary to decades of precedent and practice. Plaintiffs in that case have petitioned for a rehearing and/or rehearing en banc. See Pet. for Reh’g and/or Reh’g En Banc, *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 22-1395 (8th Cir. Dec. 11, 2023). The Fifth Circuit recently held “there is a right” for private plaintiffs to bring a Section 2 challenge to Louisiana’s congressional redistricting plan. *Robinson v. Ardoin*, 86 F.4th 574, 588 (5th Cir. 2023). After the Eighth Circuit panel’s opinion in *Arkansas State Conf. NAACP*, the defendants-appellees petitioned for a re-hearing en banc, which the Fifth Circuit denied. *Robinson v. Ardoin*, 22-30333, Ord. Denying Pet. for Reh’g En Banc (5th Cir. Dec. 15, 2023).

² The United States has submitted several Statements of Interest and amicus curiae briefs addressing the availability of a private right of action to enforce Section 2, including under Section 1983. U.S. Amicus Br. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2022), <https://perma.cc/ZQ7F-4GSR>; U.S. Statement of Interest, *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-cv-22-PDW-ARS, 2022 WL 2528256 (D.N.D.

Section 1983 provides a general remedy for private plaintiffs to redress violations of federal rights committed by state actors. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that “the plain language” of Section 1983 “undoubtedly embraces” suits by private plaintiffs to enforce federal statutory rights); *see also Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994) (unanimous op.) (recognizing how “§ 1983 remains a generally and presumptively available remedy for claimed violations of federal law”) (citing *Dennis v. Higgins*, 498 U.S. 439, 443 (1991)). Under the test set forth in *Gonzaga University v. Doe*, a federal statute is “presumptively enforceable” under Section 1983 if it “unambiguously confer[s]” individual federal rights. 536 U.S. 273, 283-284 (2002). That standard is met if the statute in question “is ‘phrased in terms of the person benefited’ and contains ‘rights-creating,’ individual-centric language with an ‘unmistakable focus on the benefited class.’” *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023) (quoting *Gonzaga*, 536 U.S. at 284, 287).

Section 2 unquestionably is a rights-creating statute. It is the cornerstone provision of the Voting Rights Act. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 536-537 (2013) (discussing history and scope of Section 2 and acknowledging how “[b]oth the Federal Government and individuals have sued to enforce § 2”). Section 2 provides: “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

May 20, 2022), <https://perma.cc/TZN6-U5BL>; U.S. Statement of Interest, *Chandler v. Allen*, No. 2:21-cv-1531-AMM (N.D. Ala. Sept. 22, 2023), <https://perma.cc/3Y97-CUK2>; U.S. Statement of Interest, *Coca v. City of Dodge City*, No. 6:22-cv-1274-EFM-RES, 2023 WL 2987708 (D. Kan. Feb. 10, 2023), <https://perma.cc/3R7T-5XS6>.

denial or abridgement of *the right of any citizen . . . to vote on account of race or color.*” 52 U.S.C. 10301(a) (emphasis added); *see also* 52 U.S.C. 10303(f)(2) (extending rights to language minority groups). Section 2 “grants” individual citizens “a right to be free from” discriminatory voting practices. *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess. 23 (1965)). Denying a motion to dismiss alleging that Section 2 does not provide a private right of action, the U.S. District Court for the District of North Dakota stated that “[i]t 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.” *Turtle Mountain Band of Chippewa Indians v. Jaeger*, 3:22-cv-22-PDW-ARS, 2022 WL 2528256, at *5-6 (D.N.D. July 7, 2022) (“*Turtle Mountain*”) (finding “that Section 2 may be enforced through § 1983”);³ *see also Georgia State Conf. NAACP v. Georgia*, No. 1:21-cv-5338-ELB-SCJ-SDG, 2022 WL 18780945, at *4 (N.D. Ga. Sept. 26, 2022) (three-judge court) (“If that is not rights-creating language, we are not sure what is.”).

³ The district court in *Turtle Mountain* further found that nothing in Section 2 or elsewhere in the Voting Rights Act rebuts the presumption that the statute is privately enforceable via Section 1983. 2022 WL 2528256, at *1. That decision in the *Turtle Mountain* case came after the district court decision in the *Arkansas State Conf. NAACP* case. After a trial and judgment for the plaintiffs in *Turtle Mountain*, the defendant moved to stay the district court’s remedial order and argued, in part, that Section 1983 does not apply to the Voting Rights Act. *Turtle Mountain Band of Chippewa Indians*, 3:22-cv-22-PDW-ARS, 2023 WL 8602898, at *1 (D.N.D. Dec. 12, 2023). The district court denied the stay motion. *Id.* at *3. The defendant then sought a stay from the Eighth Circuit based, in part, on the district court’s conclusion that Section 1983 confers a right of action for Section 2 violations. The Eighth Circuit denied this motion to stay even after the court of appeals’ panel decision in the *Arkansas State Conf. NAACP* case. *Turtle Mountain Band of Chippewa Indians v. Howe*, 23-3655, Am. Ord. (8th Cir. Dec. 15, 2023).

Defendants can rebut the presumption that a federal right is enforceable through Section 1983 only by “demonstrat[ing] that Congress shut the door to private enforcement either [1] expressly, through specific evidence from the statute itself” or “[2] impliedly, by creating a *comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.*” *Gonzaga*, 536 U.S. at 284 n.4 (emphasis added; citations and internal quotation marks omitted). Defendants did not do that here. Moreover, Congress did not “shut the door to private enforcement” of Section 2, *id.*, because “there is certainly no specific exclusion of private actions” in the Voting Rights Act. *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 n.18 (1969); *cf. Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) (holding that a voting provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101, is enforceable by private plaintiffs through Section 1983). Nor does the Voting Rights Act provide for “a more restrictive private remedy,” *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121 (2005), than Section 1983. While the Voting Rights Act permits the United States to enforce Section 2, these public remedies do not constitute “a comprehensive enforcement scheme” and are “[c]ompatible with individual enforcement under § 1983.” *Gonzaga*, 536 U.S. at 284 n.4 (citations and internal quotation marks omitted); *Turtle Mountain*, 2022 WL 2528256, at *6 (“[P]rivate enforcement actions have co-existed with collective enforcement brought by the United States for decades.”).

III. Conclusion

The private plaintiffs' complaint in this case, like the one in *Turtle Mountain* and unlike the one in *Arkansas State Conf. NAACP*, includes a claim under Section 1983. And as explained in this Statement of Interest and by the court in *Turtle Mountain*, Section 2 is enforceable through Section 1983. The decision in *Arkansas State Conf. NAACP* is not a barrier to approving the consent decree in this matter.

Dated: January 17, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2024, I electronically filed the foregoing Statement of Interest of the United States, using the CM/ECF system, which will send notification of such filing to all counsel of record.

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