No. 22-1395

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

ARKANSAS STATE CONFERENCE NAACP, *et al.*,

Plaintiffs-Appellants,

v.

ARKANSAS BOARD OF APPORTIONMENT, *et al.*,

Defendants-Appellees.

On Appeal from the Eastern District of Arkansas
(No. 4:21-cv-01239-LPR)
District Judge: Honorable Lee P. Rudofsky

BRIEF OF AMICUS CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1(A), Amicus Curiae the Lawyers' Committee for Civil Rights Under Law is a 501(3)(c) nonprofit organization that has no parent corporations in which any person or entity owns stock.

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the leadership and the resources of the private bar in combating racial discrimination and the resulting inequality of opportunity. Since then, the Lawyers' Committee has actively participated the voting rights arena, fighting to ensure that all Americans have an equal opportunity to participate in the electoral process. Section 2 of the Voting Rights Act of 1965 has been a major weapon used by the Lawyers' Committee in that fight. The Lawyers' Committee has litigated significant voting rights cases including *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013), *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), and *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016). On behalf of private plaintiffs, the Lawyers' Committee has filed dozens of cases under Section 2 of the Voting Rights Act in the last decade and currently has several active Section 2 cases.

Additionally, the Lawyers' Committee has participated as amicus curiae in significant voting rights cases before the United States Supreme Court, such as *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) , cases that have defined the contours of Section 2. The Lawyers' Committee has also published numerous reports on the history of voting discrimination, many of which have been cited by members of Congress in various

committee reports and legislative documents in connection with reauthorizations and amendments to the Voting Rights Act.

Amicus Curiae has a direct interest in this case because it raises important voting rights issues central to the organization's mission that includes representing private plaintiffs that have suffered voting rights discrimination. Amicus has requested and obtained the consent of all parties to file this Brief.[1]

INTRODUCTION

In the fifty-seven years since the passage of the Voting Rights Act, hundreds of courts around the country—including the United States Supreme Court and this Court—have presided over Section 2 cases brought by private litigants without a whisper that there was no private right of action. Indeed recently, when the previously unasserted thought that there was no private right of action under Section 2 first surfaced, three-judge panels in the Fifth and Eleventh Circuits quickly dispatched the argument, with but one of the six judges dissenting.

That result is not surprising. Common sense dictates that, if the text and structure of the Voting Rights Act of 1965 even hinted at the notion that private litigants had no right to file an action under Section 2, surely one of the many hundreds of defendants who had been sued by private plaintiffs under Section 2 in the last six decades and who

[1] Under Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned counsel certifies that no counsel for a party authored this Brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this Brief.

had fought tooth and nail against liability, would have at least attempted to make that argument. Until very recently, that never happened. Nor—until very recently—had any court ever raised the issue, an omission even more telling, because the district court's decision purports to raise a question of subject-matter jurisdiction. *Ark. State Conf. NAACP v. Ark. Bd. Apportionment*, 2022 WL 496908, at *10 n.73 (E.D. Ark. Feb. 17, 2022)[2]; *see* Plaintiffs-Appellants' Br. at 11[3]. Indeed, in holding unconstitutional a companion provision of the Voting Rights Act, the Supreme Court expressly recognized suits under Section 2 by "individuals," and the availability of injunctive relief in such suits "to block voting laws from going into effect." *Shelby County, Alabama v. Holder*, 570 U.S. 529, 537 (2013). Surely, at least one eminent jurist would have thought of this supposed threshold issue at some moment in over a half century. The silence of this multitude of defendants and judges is damning.

The fact is, as has been spelled out with precision in Plaintiffs-Appellants Brief, there is no basis to support the notion that private plaintiffs have no right to sue under Section 2 of the Voting Rights Act. The text and structure of the statute clearly support the congressional intent, further and expressly stated in the legislative history, to create rights and remedies for private persons to sue under the provision. To rule otherwise as did the district court here, in the face of the history of this most important of laws

[2] Otherwise, as the district court rightly concluded, the issue would have been waived by Defendants. *Id.* at 18–19.

[3] References to Plaintiffs-Appellants' Brief will be cited to as, Appellants' Br. at [page number]. The page numbers are from the Brief's original page numbering, not from the time-stamped ECF Page IDs.

designed to ensure equal opportunity of all to participate in our democracy, is an unprecedented act of judicial incursion into the legislative sphere.

The Lawyers' Committee writes in full support of Plaintiffs-Appellants' Principal Brief and urges this Court to find in favor of Plaintiffs-Appellants for all the reasons set forth in their Brief, and for the additional reasons set forth herein.

ARGUMENT

I. CONGRESS INTENDED TO CREATE A PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 2 OF THE VOTING RIGHTS ACT.

In reaching its novel conclusion that there is no private right of action to enforce Section 2 of the Voting Rights Act, the district court purported to apply the approach taken by the Supreme Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001). To the extent the district court needed to apply *Sandoval*,[4] its reading and application of the case were incorrect for several reasons. Overall, the district court read *Sandoval* out of context divorcing it from the line of cases that informed the approach taken by Justice Scalia in *Sandoval*, most notably *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and improperly construing the case law as limiting its consideration of any evidence of congressional intent other than the statute's text. The district court failed to

[4] Amicus agrees with Plaintiffs-Appellants that the issue on this appeal is controlled by *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), and that the district court did not have to attempt to analyze the issue under the standards set down in *Sandoval*. Even if such analysis were necessary, the result would be the same because proper application of *Sandoval* unequivocally supports the conclusion that Congress intended to create a private right of action to enforce Section 2. *See* Plaintiffs-Appellants' Br. at 20–27.

even consider the issue considered "critical" by the Court in *Sandoval*, *i.e.*, whether the statute contained rights-creating language. Further, the district court's limited text-constrained analysis was itself faulty. Finally, had the Court properly considered the statute's full legal context, as prescribed by *Sandoval*, it would have easily found that which has been clear to plaintiffs, defendants and courts alike for nearly sixty years: private plaintiffs have a right to sue to enforce Section 2 of the Voting Rights Act.

A. The District Court Misread *Alexander v. Sandoval*.

In *Sandoval*, the Court was confronted with the issue of whether there was a private right of action to enforce regulations prohibiting racial discrimination issued pursuant to Title VI of the Civil Rights Act of 1964. 532 U.S. at 279, 293. Section 601 of Title VI prohibits racial discrimination in federally funded programs and activities; § 602 authorizes federal agencies to issue regulations to effectuate § 601. *Id.* at 279. In concluding that private persons could not sue to enforce the regulations, the Court ruled, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* at 286.

Applying this two-part inquiry—whether a statute has rights-creating language and a private remedy—the *Sandoval* Court found that § 602 did not have rights-creating language because there was no indication as to whom the statute intended to benefit. *Id.* at 288–89 . Thus, Justice Scalia wrote "[i]t focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the

regulating." *Id.* at 289. As for the remedies, Justice Scalia reasoned that the methods of enforcing § 602 did not "manifest an intent to create a private remedy; if anything, they suggest the opposite" because the statute "empowers" agencies to terminate funding, not individuals to sue under the statute. *Id.* Section 602 was "phrased as a directive to federal agencies engaged in the distribution of public funds," and nothing more. *Id.* at 289–90. The Court's reasoning thus focused on who benefitted from the statute and who was entitled to bring an enforcement action. *Id.* On both counts, Justice Scalia concluded that the agency was at the center of it, not the individual. *Id.*

The obviousness that § 602 created no individual rights allowed the *Sandoval* Court to decide the case without resort to other accepted indicia of congressional intent, such as legislative history. In the Court's words, it could "begin (and *find that we can end*) our search for Congress's intent with the text and structure" of the statute. 532 U.S. at 288 (emphasis added). The district court, however, took *Sandoval* one step further, changing *Sandoval's* case-specific conclusion as to its ability to decide the case solely on the basis of the language and structure of Title VI to instead stand for the proposition that "a court begins (and *often ends*)" by examining only the statute. *Ark. State Conf. NAACP*, 2022 WL 496908, at *11 (emphasis added).

But the *Sandoval* Court counseled only against giving dispositive weight to "context shorn of text," 532 U.S. at 288, and recognized that legislative history matters when it "clarifies text," *see id.* Thus, *Sandoval* supports the proposition that ascertainment of congressional intent is subject to the same approach that the Court has

taken for decades, including resorting to an examination of how legislative history sheds light on the text. Applying that approach inexorably would have lead to the district court to conclude that Congress's intention to create a private right of action to enforce Section 2 of the Voting Rights Act was clear.[5]

The reason the *Sandoval* Court was able to ascertain congressional intent without resort to any other contextual evidence of intent was that, in the specific statute before it, there was the complete absence of the "'rights-creating' creating language so critical to the Court's analysis in *Cannon*." *Sandoval*, 532 U.S. at 288 (citing *Cannon*, 441 U.S. at 690 n.13). The *Sandoval* Court's reference to *Cannon* in this regard is of paramount significance, because *Cannon* makes it abundantly clear that where the text of the statute provides support for the creation of private rights, it is not only permissible, but required to examine the fuller legal context to ascertain congressional intent. 441 U.S. at 690–97.

The above-cited language from *Cannon* was not Justice Scalia's first reference to that case in *Sandoval*. Justice Scalia began his analysis of Congress's intent to create

[5] The district court, in support of its expansion of *Sandoval*'s case-specific explanation of its ability to decide the case on the basis of the statute alone into a broader statement that this is "often" the case, referred to footnote 7 in *Sandoval*. *Ark. State Conf. NAACP*, 2022 WL 496908, at *11. In that footnote, Justice Scalia emphasized that the Court's approach in *Sandoval* was "not novel, but well established in earlier decisions." 532 U.S. at 288 n.7. One earlier decision cited to in footnote 7 of *Sandoval*, was *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981), which in turn, provides,"[i]n a case in which *neither* the statute nor the legislative history reveals a congressional intent to create a private right of action for the benefit of the plaintiff," the inquiry into congressional intent may end. *Id.* at 94 n.31 (emphasis added).

a private right of action in § 602 of Title VI by reiterating the *Cannon* Court's conclusion, "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages." *Sandoval*, 532 U.S. at 279. Justice Scalia then and returned to *Cannon* to ascertain congressional intent to create a private right of action under Title VI. *Id.*at 280, 282, 288, 290. The *Sandoval* Court's reliance on *Cannon* is singularly important, because *Cannon* is on all fours with this case.

Cannon involved the question of whether a plaintiff who alleged that she was excluded from participation in a federally funded medical education program on the basis of her sex could enforce her rights under § 901 of Title IX of the Education Amendments of 1972. 441 U.S.at 680–81, which prohibited discrimination on the basis of sex under such federally-funded programs. *Id.* at 683–84. Justice Stevens, writing for the majority, concluded that § 901 did recognize a private right of action and reached that conclusion by considering whether the statute benefitted a class and whether the statute intended to create a private remedy. *Id.* at 688–89. The Court's reasoning on the remedy involved closely looking at not only the language of Title IX but also on other sources. *Id.* at 694–97.

With respect to the benefitted class of persons, the *Cannon* Court unequivocally found that Title IX "explicitly confers a benefit on persons discriminated against on the basis of sex" and that the plaintiff in the case belonged to that class. *Id.* at 693–94. As for the intent to create a remedy, the Court looked to both language and history. Observing that Title IX was patterned after Title VI, with precisely identical language

describing the benefitted class and identical remedies, the *Cannon* Court focused on the fact that "the drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Id.* at 696. The Court also reasoned that the presence of attorneys' fees language in in Title VI confirmed congressional intent to create a remedy through an enforcement mechanism in Title IX. *Id.* at 699. Furthermore, the Court in *Cannon* pointed to the consensus among judges and litigants of the assumption that both Titles VI and IX created private rights of action as "further evidence that Congress at least acquiesces in, and apparently, affirms, that assumption," ultimately concluding that there was "no doubt" that Congress intended to create private remedies in Title IX. *Id.* at 702–03.

In the view of the *Cannon* Court, the issues of benefitted persons and private remedies were intertwined. Thus, Justice Stevens wrote, "there would be far less reason to infer a *private remedy* in favor of individual persons if Congress, instead of drafting Title IX with an *unmistakable focus on the benefited class*," had written it " as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Id.* at 691–92.

In short, *Sandoval* answered the question of whether an implementing statute created a private right of action to enforce an agency regulation. Because § 602, the statute that plaintiffs sued under, gave rights and remedies only to governmental agencies, it was easy for the Court to find that Congress could not have intended to

create a private right of action to enforce the regulations without going beyond the statute's text. But the Court acknowledged that Congress had created a private right of action to enforce § 601, which protected individuals from discrimination, because that question had already been decided in the affirmative in *Cannon*, on grounds that should have led to the same conclusion as to Section 2 of the Voting Rights Act here.

The textual reasoning of the *Sandoval* Court was, therefore, firmly rooted in and informed by the necessary context in the case before it. However, *Sandoval* did not foreclose reliance on legislative history and precedent as it cited to and discussed *Cannon* in depth for both. As explained below, had the district court correctly read and applied *Sandoval*, it would have easily concluded that Congress intended to create a private right of action to enforce Section 2 of the Act.

B. The District Court Failed to Undertake the Essential Search for Rights-Creating Language in Section 2.

The district court's first error in its application of *Sandoval* was its failure to engage in an analysis of the existence *vel non* of congressional intent to create a private right. The district court jumped to the issue of congressional intent to create a private remedy. But *Sandoval* requires consideration of both whether a statute contains rights-creating language as a threshold matter and next, whether it provides a remedy. The Eighth Circuit has adopted this approach in private right of action cases. *See Lakes and Parks All. Minn. v. Fed. Transit Auth.*, 928 F.3d 759 (8th Cir. 2019).

And both *Cannon* and *Sandoval* make it clear that the rights and remedies analyses are inextricably intertwined. Indeed, in *Sandoval*, the Court considered

whether recourse under a different remedial scheme could "overbear other evidence of congressional intent" including rights-creating language. 532 U.S. at 290–91. Similarly, in *Cannon*, the Court first considered the class of persons benefitted by the statute and then looked to whether the private remedies gave to the benefitted class a right to enforce. 441 U.S. at 688, 695–97.

Here, the district court never considered the scope and nature of the benefit bestowed by Congress on private persons. *Ark. State Conf. NAACP*, 2022 WL 496908, at *10. Had the district court followed the dictates of *Sandoval* and *Cannon* and reviewed the text of Section 2 for rights-creating language, it would necessarily have found it. And that conclusion would have, in and of itself, led the district court to look at the remedies in the context of the benefitted class.

Simply put, it is impossible to conclude that Section 2 of the Voting Rights Act does not include the "critical" language creating private rights. *See Sandoval*, 532 U.S. at 288. Section 2 protects against the "denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section [203] of this title," and further establishes that a violation occurs if it is shown "that the political processes . . . are not equally open to participation by members of a class of citizens protected" by Section 2 (a). 52 U.S.C. § 10301(a), (b). The existence of congressional intent to create a private right could not be clearer.

C. The District Court's Limited Textual Analysis Was Faulty.

The only textual analysis that the district court undertook was into the "remedy"

prong of the *Sandoval* test, and even that limited analysis was fatally circumscribed. *Ark. State Conf. NAACP*, 2022 WL 496908, at *10–11. The *Cannon* Court, for example, considered remedial language throughout Title IX, not only focused on the remedial scheme in the statute before it, but also on the presence of a provision allowing attorneys' fees in a companion statute, in its search for congressional intent of a private remedy. 411 U.S. at 695–703. Here, unlike the *Cannon* Court, district court's inquiry into remedy was exceedingly parsimonious.

For example, Section 12(f) of the Act provides:

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to *this section* and shall exercise the same without regard to *whether a person asserting rights under the provisions of chapters 103 to 107 of this title shall have exhausted any administrative or other remedies* that may be provided by law.

52 U.S.C. 10308(f) (emphasis added.)

Section 2 falls within Chapter 103 of the Voting Rights Act. At a minimum, this would seem to constitute evidence that Congress knew that private persons would be seeking to enforce Section 2 in court. But the district court cavalierly dismissed the relevance of Section 12(f). Invoking the "logical relation canon," and explaining that, because Section 12(f) follows Section 12(e) and because Section 12(e) talks in terms of the Attorney General's filing in district court an application for an order to count the ballots of registered voters who are prevented from voting and permits observers to notify the Attorney General of such violations, the district court concluded that 12(f) applies only to observers and the Attorney General not to private actors. *Ark. State Conf.*

NAACP, 2022 WL 496908, at *12–13; *see* 52 U.S.C. 10308(e), (f).

The district court's application of the "logical relation" canon is itself illogical. The logical relation canon of construction is part of the whole-text canon, "which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). The district court cited to this very quote from the Scalia and Garner text which, in fact, encourages reading the text of a canon as whole and looking at the "many parts." The district court also cited to *Does v. Gillespie*, 867 F.3d 1034 (8th Cir. 2017), for its logical relation proposition. But *Gillespie* involved a § 1983 action in which this Court looked at the statute in depth for rights-creating language and found that there was none because the statute was framed as a "directive to the Secretary." *Id.* at 1043. *Gillespie*, thus, had nothing to do with "logical relation." *Id.*

Contrary to the district court's strained construction, Congress's express reference to "this section," which includes Section 2, undermines the district court's reading that Section 12(f) is somehow limited by Section 12(e). *Ark. State Conf. NAACP*, 2022 WL 496908, at *12. The district court overlooked that *Sandoval* requires a court to analyze not only the text of a statute, but also its "structure," 532 U.S. at 288, in ascertaining congressional intent. Contrary to the district court's reasoning, nothing in Section 12(f) limits its application to the observer provisions of the Act. And the district court's using the canon of "logical relation" in this regard was myopic,

considering that a more logical reading, applying *Sandoval* and *Cannon*, would have been that 12(f) evinces congressional intent to include a remedy for the persons the Act intended to benefit: private individuals asserting their rights under chapters 103 to 107.

In addition to Section 12(f), Section 3, 52 U.S.C § and Section 14, 52 U.S.C. § evince clear congressional intent to create a remedy for private litigants. Appellants' Br. at 33–43. Plaintiffs- Appellants include an in depth discussion of Sections 3 (the bail-in provisions of the Act, 52 U.S.C. § 10302) and Section 14(e) (the attorneys' fees provision of the Act, 52 U.S.C. § 10310(e)). *See id.* at 22–43. Amicus adds that *Cannon*, by way of analogizing Title VI to Title IX, found that the presence of attorneys' fees language in Title VI "explicitly presumes the availability of private suits to enforce Title VI in the education context," and "hence Congress must have assumed that [a private cause of action] could be implied under Title VI itself." 441 U.S. at 699–700. Certainly, the even more explicit reference to an award of attorneys' fees to private persons in suits brought to *enforce* the voting guarantees of the Fourteenth and Fifteenth Amendments in Section 14(e) of the Act is at least as persuasive as that deemed persuasive in *Cannon*. This is particularly so because enforcement of the rights guaranteed by the Fourteenth and Fifteenth Amendments is the foundation of Section 2 of the Voting Rights Act. 441 U.S. at 698 (citing *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 650–51.

Moreover, the district court erred in cherry picking canons of statutory

construction. Certainly, the district court could not have applied the "logical relation" canon and failed to mention the fundamental canon of statutory construction that gives the greatest deference to congressional intent: remedial statutes are to be broadly construed so as to effectuate their beneficial purpose. *Steger v. Franco*, 228 F.3d 869, 864 (8th Cir. 2000) (remedial statute should be broadly construed to effectuate its purpose) (citing *Tcherepnin v. Knight*, 339 U.S. 332, 336 (1967)); *see also Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (in §1983 context, noting remedial statutes should be broadly construed especially where legislative history supports it).

Few statutes in this Nation's history have possessed a more important remedial purpose than the Voting Rights Act of 1965. 52 U.S.C. § 10101, *et seq*. Responding to the states' tenacious "ability . . . to stay one step ahead of federal law," Congress passed the Act to provide a "new weapon[] against discrimination." Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 524–25, 550 (1973). As the Supreme Court recently described the legal context of the Act:

> Inspired to action by the civil rights movement, Congress responded in 1965 with the Voting Rights Act. Section 2 was enacted to forbid, in all 50 States, any 'standard, practice, or procedure ... imposed or applied ... to deny or abridge the right of any citizen of the United States to vote on account of race or color.' 79 Stat. 437. The current version forbids any "'standard, practice, or procedure' that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). Both the Federal Government and individuals have sued to enforce § 2, see, *e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994), and injunctive relief is available in appropriate cases to block voting laws from going into effect, see 42 U.S.C. § 1973(d).

Shelby Cty., Ala. v. Holder, 570 U.S. 529, 537 (2013).

A statute with so important a remedial purpose should not be strictly construed. Amicus emphasizes that it is *not* suggesting that, because remedial statutes must be broadly construed, that in itself necessitates implying a private right of action to enforce Section 2 of the Act. Rather, the point is that, if—as the district court did here—the court chooses to parse the statute to ascertain whether Congress intended to create a private remedy, it must approach that task with the perspective of a broad construction, not the myopic one exhibited by the district court here. Had the district court properly construed the statute, it would have easily found the existence of ample evidence of congressional intent to create both private rights and private remedies.

D. The District Court Erred by Interpreting *Sandoval* as Foreclosing Reliance on Legislative History.

Had the district court undertaken the proper approach, it would have viewed the Voting Rights Act in the larger context of the law, including its legislative history, as specifically prescribed in *Sandoval*. That is precisely what the *Cannon* Court did also, even though it recognized "that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." 441 U.S. at 694. Here, as demonstrated, there is sufficient textual support in the statute to merit a contextual analysis. Examination of the legislative history, deemed material to the issue of the creation of a private right of action by the Court in *Cannon*, would have ended the discussion.

In 1975, Congress amended the Act to insert protections for language minorities, among other things, and expand the constitutional underpinnings of the Act by referencing the guarantees of the Fourteenth Amendment. *See* S. Rep. No. 94-295, at 22–24 (1975); 42 U.S.C. §§ 1973(a), 1973(d). The 1975 Senate Report accompanying these amendments went on to state in no uncertain terms:

> In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. It has, on the one hand, given enforcement responsibility to a governmental agency, and on the other, has also **provided remedies to private persons acting as a class or on their own behalf. The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights.**

S. Rep. No. 94-295, at 22–24 (emphasis added.)

In 1982, Congress again amended Section 2, in response to the Court's decision in *City of Mobile v. Bolden*, 445 U.S. 55 (1980), this time to create a discriminatory "results" cause, in addition to a discriminatory intent cause. Accompanying the 1982 amendments was a 245-page 1982 Senate Committee Report. S. Rep. No. 97-417 (1982), which, as Plaintiffs-Appellants correctly explain, became the authoritative source for questions of congressional intent. Appellants' Br. at 44–45. For example, recognizing Section 2's command that courts consider the "totality of circumstances" as an element of the claim, the Supreme Court looked to the 1982 Senate Report to compile a list of relevant "circumstances." *Gingles v. Thornburg*, 478 U.S. 30, 47 (1986)

This authoritative Senate Report was unequivocal in its acknowledgement of the

existence of a private right of action to enforce Section 2. S. Rep. No. 97-417, at 5 (1982) ("The Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965."). The accompanying House Report was no less certain on the issue. H. Rep. No. 97-227, at 32 (1981) ("It is intended that citizens have a private cause of action to enforce their rights under Section 2. This is not intended to be an exclusive remedy for voting rights violations, since such violations may also be challenged by citizens under 42 U.S.C. §§ 1971, 1983 and other voting rights statutes. If they prevail they are entitled to attorneys' fees under 42 U.S.C. §§ 1973(e) and 1988.").

Congress maintained the same view when the Act was reauthorized in 2006. H. Rep. No. 109-478, at 11 (2006) ("Section 2 has been instrumental in paving the way for minority voters to more fully participate in the political process across the country."). Rather than consider this clear evidence of congressional intent to create a private right of action, the district court intentionally closed its eyes to it. Acting more like the courts whose prior decisions the district court criticized as judicial legislating, the district court itself assumed the law of legislator, and wrote a private right of action—clearly intended by Congress—out of the Act. This was improper, and the district court's decision must be reversed.

II. ALTERNATIVELY, THE DISTRICT COURT SHOULD HAVE PERMITTED PLAINTIFFS' ACTION TO PROCEED UNDER § 1983.

Should this Court affirm the district court's unprecedented construction of Section 2 of the Voting Rights Act as not creating a private right of action, it would be

unfair to dismiss Plaintiffs' complaint without giving them an opportunity to replead the same cause under 52 U.S.C. § 1983, as Plaintiffs-Appellants request. Appellants' Br. at 29–30, n.16. The ability of Plaintiffs to assert precisely the same claim under § 1983 is undisputed, and the availability of such a claim further underscores the weakness of the district court's textual analysis.

Under § 1983 any person can bring a civil action seeking redress against another for the deprivation of rights under the "Constitution and laws." The relevant text of § 1983 reads:

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

52 U.S.C § 1983.

For decades, the Supreme Court has authorized § 1983 suits by private actors seeking to vindicate the deprivation of their civil rights under federal statutes. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Supreme Court conclusively held that § 1983 actions may be brought by private plaintiffs to enforce rights created by federal statutes. The Court reasoned that Congress's failure to attach any modifiers to the phrase "and laws," meant that plaintiffs could bring § 1983 civil rights actions under *all federal statutes*, not just federal equal protection laws. *Id.* at 4.

Over the years, the Court refined its broad holding in *Maine*, applying it to

different factual scenarios involving private actors seeking to enforce federal statutory rights under § 1983. In determining whether a plaintiff had a right to sue under § 1983, the courts adopted a test similar to the "rights-creating" test of *Sandoval*. Thus, for example, in cases where the legislation was enacted pursuant to Congress's spending powers and the only enforcement mechanism was the termination of federal funds, the Court found no rights-creating language. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 101 (1981). Similarly, in cases where the focus of a funding statute was on "the aggregate services provided by the State" rather than "the needs of any particular person," the Court found no congressional intent to include rights-creating language in the statute. *Blessing v. Freestone*, 520 U.S. 329, 117 (1997). To the contrary, the Court did find that a statute contained rights-creating language when statutory provisions conferred clear benefits, either monetary or some other benefit, to a class of plaintiffs. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1980); *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 430 (1987).

Ultimately, the Court articulated clearly a test for determining rights-creation under § 1983 in *Gonzaga v. Doe*, 536 U.S. 273 (2002). In that case, the Court considered whether the Family Educational Rights and Privacy Act ("FERPA") created individual rights enforceable under § 1983, *id.* at 278, and concluded that it did not because the provisions "contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions," *id.* at 290–91. Notably, *Gonzaga* was decided

a year after *Sandoval*, and the Court was heavily influenced by much of the reasoning in *Sandoval*. In fact, in *Gonzaga*, Chief Justice Rehnquist noted that a significant area of "overlap" existed between § 1983 and implied right of action suits, such that "a court's role in discerning whether personal rights exist in the § 1983 context should therefore not differ from its role in discerning whether personal rights exist in the implied right of action context." *Id.* at 283. Expounding on the overlap, Justice Rehnquist stated, "the initial inquiry [under § 1983]—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute confers rights on a particular class of persons." *Id.* at 284.

Thus, while *Sandoval* focused on rights creation and the availability of remedies in the private right of action context, *Gonzaga* made clear that § 1983's inquiry ended with rights-creation because the statute itself provided the remedy. In an advisory footnote in *Gonzaga*, the Court did imply two limitations on § 1983 actions that touched on remedy, but only in the context of a rebuttable presumption. *Id.* at 284 n.4. First, the Court noted that, while there is a presumption of "enforcement" under § 1983, the presumption can be rebutted if the statute expressly forbids recourse to § 1983. *Id.* Second, the Court indicated that the presumption can be impliedly rebutted if "the statute contained a comprehensive enforcement scheme that is incompatible" with

individual enforcement actions. *Id.*[6] Neither exception applies here. The Voting Rights Act does not expressly forbid recourse to § 1983. Allowing a private right of action is not incompatible with enforcement of the Act by the Department of Justice. To the contrary, such concurrent enforcement has been a mainstay of Section 2 litigation for almost sixty years.

Thus, if this Court chooses to affirm the district court's fundamental alteration of voting rights law, it should provide Plaintiffs-Appellants with an opportunity to plead the same cause as it did under Section 2 of the Act, but with the remedy in § 1983 substituting for supposed lack of private remedy in the Act. Fairness dictates that course. The district court here, after a full trial on Plaintiffs' preliminary injunction motion, raised an issue *sua sponte* that had not been raised in Defendants'

[6] In the FERPA context, the *Gonzaga* Court noted that neither limitation applied because FERPA did not expressly foreclose recourse under § 1983, nor did it contain a remedial scheme that was incompatible with individual enforcement under § 1983, such as detailed administrative proceedings or administrative review processes. *Id.* Following *Gonzaga*, the Eighth Circuit has Circuit declined to find rights-creating language so as to permit a private action under § 1983 where the focus of the statute in question was on the distribution of funds by agencies to private parties not on the individuals protected. *See Osher v. City of Saint Louis Mo.*, 903 F.3d 698, 702 (2018) (statute did not contain "rights-creating language" "phrased in terms of the persons benefitted," but rather the statute focused on the persons regulated, *i.e.*, "*the head of the displacing agency shall* provide for payment of the listed relocation benefits," as opposed to the individuals protected); *Midwest Foster Care and Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1197–98 (8th Cir. 2013) (foster care statute did not contain rights-creating language as it focused on states regulated as opposed to individuals); *Stenger v. Bi-State Dev. Agency of Mo.*, 808 F.3d 734, 738 (8th Cir. 2015) (federal labor-relations statute conditioned on federal funding and financial assistance to states did not contain rights-creating language, where focus was on duties of Secretary of Labor as opposed to "affected employees").

comprehensive motion to dismiss. It then issued an opinion that overturned not only the reasoning in *Morse*, but also decades of acknowledgement by federal courts—including by the Supreme Court in *Shelby County*—that Section 2 provided a private right of action. Allowing the filing of an amended complaint would not prejudice Defendants, as the cause of action under § 1983 is precisely the same cause of action as under Section 2 of the Voting Rights Act. § 1983 would Plaintiffs the vehicle for their private remedy, which the district court suddenly wrested from settled voting rights jurisprudence.

CONCLUSION

The Court should rule in favor of Plaintiffs-Appellants. The Court should reject the District Court's unprecedented decision, which works upheaval to decades of settled Section 2 jurisprudence.

CERTIFICATE OF COMPLIANCE WITH FRAP 32

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6,466 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman font in 14 point type.

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I hereby certify that the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program and, according to the program, is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, I electronically filed the Brief of Amicus Curiae Lawyers' Committee for Civil Rights Under Law with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Pooja Chaudhuri
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