No. 22-1395

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-Appellants,

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

[PROPOSED] BRIEF OF *AMICI CURIAE* LOCAL GOVERNMENTS AND LEADERS IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF INTEREST

Amici are local governments and leaders.[1] We submit this brief in support of Plaintiffs-Appellants' request for rehearing *en banc*, given the clear error of the panel's decision and its failure to follow binding precedent. The Voting Rights Act ("VRA") is among the most effective civil rights statutes ever passed by Congress, and we believe that its robust enforcement remains crucial to our communities.

Several *amici* are leaders of color or their jurisdictions are represented by elected leaders of color. In some instances, these elections were influenced, either directly or indirectly, by the VRA and its enforcement. Without the VRA and its unique ability to ensure voting access and equality, many of our communities would be underrepresented. The panel's decision calls into serious doubt private litigation against racially discriminatory voting rules and structures that have enabled the election of leaders more representative of our communities. Diminishing Section 2 also will undermine enforcement against discriminatory laws and practices impacting all voters, election cycles, and elected offices.

The VRA is an integral tool of equality in the United States, relying on private enforcement to ensure that both voters and candidates are protected. Whether to

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief. A list of all *amici* is available at Appendix A.

overturn the VRA's well-settled enforcement mechanisms is a decision for Congress, not the courts, especially after decades of private enforcement in federal courts throughout the country. *Amici* respectfully request that this Court grant rehearing *en banc* and reverse the judgment below.

SUMMARY OF ARGUMENT

It is well-established that private parties, including the plaintiffs in this litigation, have the right to pursue claims in federal court under Section 2 of the VRA. Nearly 60 years of case law, including nearly 20 decisions from this Circuit alone, make clear that private enforcement, through a private right of action, is appropriate under this remedial federal statute. *Amici* adopt and underscore the arguments of Plaintiffs-Appellants in their request for rehearing.

*Amic*i offer several additional points for consideration, all of which favor reconsideration by the full Circuit. First, the district court's justification for *sua sponte* analyzing the private right of action question—its obligation to ensure jurisdiction—was clear error. And if courts have an obligation to dismiss private party Section 2 cases *sua sponte* for want of a federal question, then the panel's conclusion affirming dismissal can be correct only if every court, including the U.S. Supreme Court, previously failed to fulfill their jurisdiction-finding duty. Second, the panel misread Eighth Circuit controlling precedent and failed to acknowledge no fewer than 18 prior cases in which private litigants had their VRA claims decided

by this Circuit. Third, the panel's analysis of the statute is contrary to the text, which clearly contemplates private enforcement. And fourth, the panel's narrowed understanding of the VRA is inconsistent with the remedial nature of federal antidiscrimination laws.

ARGUMENT

The panel's decision erred for a number of reasons. *Amici* support Plaintiffs-Appellants in their position and add the following four points for consideration in support of *en banc* review.

I. *SUA SPONTE* REVIEW OF SUBJECT-MATTER JURISDICTION BY THE DISTRICT COURT WAS REVERSIBLE ERROR AND FAILED TO RECOGNIZE THE OBLIGATION OF PRIOR COURTS BY ITS OWN LOGIC

It is the obligation of federal courts to ensure that they have jurisdiction over a matter. *See, e.g.*, *Bueford v. Resolution Trust Corp.*, 991 F.2d 481, 485 (8th Cir. 1993). In reaching its conclusion that the VRA does not provide a private right of action, the district court found that it lacked subject matter jurisdiction under 28 U.S.C. § 1331, for want of a federal question. The "existence (or non-existence) of a private right of action is a jurisdictional inquiry because the absence of a private right of action is fatal to subject-matter jurisdiction." *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 586 F. Supp. 3d 893, 919 (E.D. Ark. 2022). As the panel acknowledges, however, this conclusion runs afoul of Supreme Court precedent. *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th

1204, 1217 (8th Cir. 2023) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("[T]he lack of a cause of action does not deprive a federal district court of subject-matter jurisdiction.")). Despite this misapplication of controlling law by the district court—undermining the premise for the issue being raised—the panel *relied on this error* to amend the dismissal to be with prejudice. *Id.* at 1218. The improper premise behind the private-right-of-action question is enough to reverse the judgment.

But assuming *arguendo* that the district court was correct in the connection between private right of action and federal question subject-matter jurisdiction, the opinion failed to examine the implications of its own logic. *See Arkansas State Conf. NAACP*, 586 F. Supp. 3d at 919. ("[C]ourts have an independent obligation to assure themselves that they have subject-matter jurisdiction over a lawsuit before they reach the merits.") (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)). Neither the district court nor the panel addressed the fact that all other courts handling VRA cases were *obligated* to do the same even though generally it is presumed that judges know and apply the law correctly. *See, e.g.*, *United States v. Trung Dang,* 907 F.3d 561, 565 (8th Cir. 2018) (noting that appellate courts "presum[e] 'that district judges know the law'" (citation omitted)).

The district court assumed itself to be the first to examine the issue, especially under its own narrow framing of the question. *Arkansas State Conf. NAACP*, 586

F.Supp.3d at 905 ("The narrow question before the Court is only whether, under current Supreme Court precedent, a court should imply a private right of action to enforce § 2 of the Voting Rights Act where Congress has not expressly provided one."). But because there is an obligation on *all courts* to examine jurisdiction in *all cases*, more justification was needed as to why this question had not been determined by other courts previously.

There are numerous similar VRA cases currently pending in federal courts. Some of which have expressly rejected this argument. *See, e.g.*, *Robinson v. Ardoin*, 86 F.4th 574, 588 (5th Cir. 2023) ("We conclude that the Plaintiffs here are aggrieved persons . . . and that there is a right for these Plaintiffs to bring these claims."). In fact, the Fifth Circuit denied *en banc* review just last week because "no member of the panel or judge in regular active service requested that the court be polled" on the question. *Robinson*, Case No. 22-30333: Dkt. No. 363-2. The logic of the district court decision rests on a flawed assumption that all of these other courts, including many in this Circuit, had not independently assessed their jurisdiction to hear the VRA cases before them. The failure to confront this context further undermines the panel's affirmance of the district court's *sua sponte* determination.

II. THE PANEL'S DECISION FAILED TO FOLLOW THIS CIRCUIT'S CONTROLLING PRECEDENT

For more than 40 years, individuals and groups—a variety of partisan and nonpartisan private parties—have sued states and localities under the VRA in the

Eighth Circuit to enforce the substantive guarantees of the Act. In fact, they are the primary enforcers of Section 2. In affirming the dismissal of this case, the panel failed to follow binding Circuit precedent recognizing the ability of private parties to bring cases to vindicate Section 2 rights.

More than 30 years ago, this Circuit recognized the U.S. Supreme Court's ruling that "a private litigant attempting to protect his right to vote was a proper party to effectuate the goals of the Act, and therefore granted standing to aggrieved voters 'seek[ing] judicial enforcement of the prohibition' against the infringement of the right to vote on account of race." *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 557 (1969)). In *Roberts*, though this Court ultimately held that the plaintiff did not have standing, it expressly rejected arguments that standing to sue under the VRA was limited to the Attorney General. The *Roberts* court reasoned that, while the VRA as enacted in 1965 had only an "implied" private right of action, Congress "amended the [VRA] in 1975 to reflect the standing of 'aggrieved persons' to enforce their right to vote." 883 F.2d at 621.

The panel waved this away: "*Roberts* assumed a private right of action existed under § 2, but only for the purpose of deciding that losing candidates could not bring one." *Arkansas State Conf. NAACP*, 86 F.4th at 1217. Calling it dicta, the panel concluded that "[s]aying who else might be 'aggrieved' was not 'necessary to that

result.'" *Id.* (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996)). But such a wooden analysis belies the thrust of *Roberts*. The question was not whether *anyone* could bring a claim in federal court for the alleged misconduct. The question was whether the *particular plaintiff* could assert rights of voters in an election challenge. And *Roberts* itself used the term "hold" in explaining its analysis on this point: "standing to sue under this Act 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." 883 F.2d at 624 (emphasis added).

Moreover, the panel failed to address *all of the other cases* from this Circuit brought by private parties and individuals. Since 1982, this Circuit has ruled on no fewer than 18 cases pertaining to the VRA. In these cases, this Court did not categorically dismiss claims brought by private parties, but instead addressed the merits (or denied relief on alternative grounds). *See Arkansas State Conf. NAACP*, 86 F.4th at 1219 n.8 (Smith, C.J., dissenting) (collecting cases). At least 14 of these decisions came after *Roberts* and its holding about private parties. The panel, however, failed to take on this litany of cases directly, citing to and addressing only *Roberts*. In that way, this case extends well beyond a failure to follow the law of the Circuit and honor the decision of a prior panel. Instead, the panel's decision disregards 40 years of established precedent.

III. THE PANEL'S DECISION DID NOT FOLLOW THE TEXT OF THE VRA

The text of the VRA makes clear that such a cause of action was authorized by Congress. Section 2 forbids "any State or political subdivision" from imposing a practice or enacting a law that would deny any citizen the right to vote on account of race. 52 U.S.C. § 10301. Section 3 repeatedly refers to proceedings initiated by "the Attorney General *or an aggrieved person*" to enforce Section 2 or other provisions of the VRA. *Id.* § 10302 (emphasis added). Putting these sections together, the VRA makes it clear that Congress intended to permit "aggrieved person[s]" to bring proceedings against "any State or political subdivision." That means private parties can litigate Section 2 claims. *See also Roberts*, 883 F.2d at 621 ("Congress amended the Voting Rights Act in 1975 to reflect the standing of 'aggrieved persons' to enforce their right to vote."). Section 2 provides "the 'rights-creating' language" central to the private right of action analysis, *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001), while Section 3 offers the private remedy for individuals to pursue. *Id.* at 289.

Courts analyzing the question of the VRA's abrogation of sovereign immunity, which necessarily requires the action of private parties, have put it plainly: "It is implausible that Congress designed a statute that primarily prohibits certain state conduct, made that statute enforceable by private parties, but did not intend for private parties to be able to sue States." *Alabama State Conf. of NAACP*

v. Alabama, 949 F.3d 647, 652 (11th Cir. 2020), *cert. granted, judgment vacated sub nom. Alabama v. Alabama State Conf. of NAACP*, 141 S. Ct. 2618 (2021); *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017) (concluding that the VRA abrogates state sovereign immunity).

IV. THE PANEL'S DECISION DID NOT COMPORT WITH OTHER FEDERAL CIVIL RIGHTS LAWS

The VRA also must be understood within the ambit of federal civil rights laws, especially when it comes to the availability of private enforcement. The VRA is part of a line of essential federal laws aimed at ensuring that state and local governments comply with the requirements of the Constitution, and that both governmental actors and private businesses do not engage in invidious discrimination. The panel's reading of the VRA did not give proper care to this essential context, which informs the meaning of Section 2.

In 1944, the Supreme Court implied a private right for Black workers to enforce provisions of the Railway Labor Act. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 207 (1944). ("That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation."). A decade later, federal courts ruled the Civil Aeronautics Act barring discriminatory treatment of Black passengers could be enforced in federal court by private citizens even though such a private right of action was not expressed in the statute. *See, e.g.*, *Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499, 501 (2d Cir. 1956). In 1979,

the Supreme Court found a private right to enforce the provisions of Title IX. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979) ("The package of statutes of which Title IX is one part also contains a provision whose language and history demonstrate that Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy."). And, in deciding *Allen v. State Board of Elections* in 1969, the Supreme Court concluded that Congress had granted a private right to sue under Section 5 of VRA, even though it pertained to the Justice Department's authority under pre-clearance. 393 U.S. at 560.

All of these decisions were known to Congress at the time that the VRA was amended in 1982. To the extent that the district court or panel viewed *Sandoval* as indicating an alternative trajectory of the Supreme Court's modern analysis of federal antidiscrimination laws, and thus a need to find no private right, that is incorrect. *Sandoval*, in fact, supports the finding of a private right of action here. *See* Part III, *supra* (Section 2 provides the right, and Section 3 offers the remedy). By its very terms, *Sandoval* did not depart from the precedent cited above. Instead, the Court plainly stated: "we reach this conclusion applying our standard test for discerning private causes of action." 532 U.S. at 293. The decision did not bar enforcement of the statute by private parties, but limited certain theories of relief. Section 601 provides for private rights and enforcement of Title VI against discrimination by recipients of federal funds. That provision is the analogue to

Section 2 of the VRA, and its private enforcement was not questioned or diminished by *Sandoval*.

CONCLUSION

For all of the foregoing reasons and for the reasons provided by Plaintiffs-Appellants, the request for rehearing *en banc* should be granted and the judgment should be reversed.

Respectfully submitted,

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City of Columbus, Ohio

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Jonathan B. Miller, an attorney for Public Rights Project, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 2,566 words and complies with the typeface requirements and length limits of Rules 27, 29, and 32(a)(5)-(7) and the corresponding local rules.

/s/ Jonathan B. Miller
Jonathan B. Miller

Dated: December 18, 2023

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically with the Court's CM/ECF system on December 18, 2023. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

/s/ Jonathan B. Miller
Jonathan B. Miller