No. 24-1125

In the
United States Court of Appeals
For the Seventh Circuit

CITY OF HAMMOND, et al.,
Plaintiffs-Appellants,

v.

LAKE COUNTY JUDICIAL NOMINATING COMMISSION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division
Honorable Phillip P. Simon
No. 2:21-cv-00160-PPS-JEM

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Summary of the Argument

All Indiana voters vote on state superior court judges, some in open elections, others only on whether to retain the judge. The State does not dispute that a retention vote is a lesser voting right. The State does not dispute that Indiana's different rights create stark racial disparities, with 80% of white voters enjoying full voting rights and 66% of black voters only having the lesser right of a retention vote. The State designated evidence that lesser voting rights were necessary in Lake County because it is "highly diverse." (ECF 81-1p.6.) This violates the Voting Rights Act ("VRA").

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The State makes two main arguments. First, the State claims the VRA does not apply because the Governor appoints state superior court judges in the judicial circuit that encompasses Lake County. But under the Indiana Constitution, the Governor fills *all* judicial vacancies. The Voters do not challenge the Governor's constitutional appointment power. The Voters challenge the lesser voting right of a retention vote, and this Court has held that retention votes are "governed by § 2 of the Voting Rights Act." *Bradley v. Work*, 154 F.3d 704, 709-10 (7th Cir. 1998).

Second, the State claims the VRA is not violated because all Lake County voters only receive retention votes for state superior court judges. Because these are state-court judges, with state-wide jurisdiction, this Court must compare voting rights in the judicial circuit encompassing Lake County with the "State's entire system of voting." *Brnovich v. Democratic Nat. Committee*, 141 S.Ct. 2321, 2339 (2021). This Court's decision in *Quinn v. Illinois*, 887 F.3d 322 (7th Cir. 2018), is not controlling because it involved an appointed local office, no voting was involved, and it pre-dated *Brnovich*.

The State then argues—for the first time on appeal—that the VRA allegedly does not contain a private right of action. The State waived this alleged issue. Regardless, the Supreme Court has recognized that "the existence of the private right of action under Section 2...has been clearly intended by Congress since 1965." *Morse v. Republican Party of Virginia*, 517 U.S. 186, 232 (1996) (internal quotation omitted). *Morse* is controlling.

This Court should conclude that Indiana's differential voting rights for state superior court judges violates the VRA.

Argument

I. Indiana's method of voting for judges violates the VRA.

A. A retention vote is an abridged voting right.

The VRA applies to retention votes, and in its Brief, the State does not dispute that a retention vote is a lesser voting right.

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The VRA applies to retention votes. In Lake, Marion, and St. Joseph Counties, voters vote only on whether to retain state superior court judges. Ind. Code §§ 33-33-45-42, 33-33-49-13.2, 33-33-71-43. In *Bradley*, 154 F.3d at 709-10, this Court held that the "retention elections stage of the Lake County process satisfies this definition of voting, and thus is governed by § 2 of the Voting Rights Act." In all other counties, voters vote in open elections for state superior court judges, choosing between judicial candidates. Ind. Code Article 33-33.

A retention vote is an abridged or lesser voting right. The VRA prohibits "prerequisiste[s] to voting . . . which results in a denial or abridgment of the right of any citizen of the United States to vote." 52 U.S.C. § 10301(a). The VRA preserves the "opportunity"

"to elect representatives of their choice." 52 U.S.C. § 10301(b). *Brnovich*, 141 S.Ct. at 2338, instructs that a court must analyze "the size of burden imposed by a challenged voting rule." In its Brief, the State contends, for the first time on appeal, that *Brnovich*'s factors allegedly do not apply. (State.Brief.p.20.) *Brnovich* directs courts to look at "the totality of circumstances." Whether a voting right is abridged and the size of the abridgement are certainly relevant under a totality of the circumstances analysis.

"It is hard to imagine many more fundamental 'prerequisites' to voting than . . . who you are eligible to vote for." *Allen v. Milligan*, 143 S.Ct. 1487, 1515 (2023). "When an election law reduces or forecloses the opportunity for electoral choice, it restricts a market where a voter might effectively and meaningfully exercise his choice between competing ideas or candidates, and thus severely burdens the right to vote." *Common Cause Ind. v. Individual Members of the Ind. Election Comm'n*, 800 F.3d 913, 928 (7th Cir. 2015). A retention vote is clearly an abridged or lessened voting right. The State does not dispute that a retention vote is a severely abridged voting right because it precludes "elect[ing] representatives of their choice," only allowing an up or down vote on the current state superior court judge. 52 U.S.C. § 10301(b).

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B. The State has admitted it imposes lesser voting rights based on race.

In its Brief, the State does not dispute that the size of disparities created by Indiana's differential voting schemes are extreme. Indeed, before the district court, the State designated evidence that lesser voting rights were necessary *because* Lake County is "highly diverse." On appeal, the State now claims this is all allegedly OK because a state law requires one minority person to be on the Lake County JNC. Express racial quotas

are illegal. An illegal seat on a JNC does not cure a VRA violation. As the district court concluded, "[i]n the language of § 2, the State of Indiana has imposed a procedure on Lake County that denies its citizens the right to vote for superior court judges on account of race or color."

The Supreme Court has directed that a court must look to the "size of any disparities in a rule's impact on members of different racial and ethnic groups." *Brnovich*, 141 S.Ct. at 2339. The State did not dispute that 66% of Indiana's black residents live in a County that only has retention votes for superior court judges, and more than 80% of Indiana's voting age white residents live in judicial circuits where all judges are elected. (ECF 86 ¶¶ 8-13, 37; ECF 101 pp.3-10.) As the district court concluded, "[t]o say the least, as it relates to choosing judges, there's a huge disparity between how Indiana's white and black citizens are treated." (S.App.A20.)

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On appeal, the State argues that this is OK because the Lake County JNC "must include at least one member of a 'minority group.'" (State.Brief.p.23)(quoting Ind. Code § 33-33-45-28(b)). The State's defense is odious. The Supreme Court long ago declared "an explicit racial classification" unconstitutional. *Regents of University of California v. Bakke*, 438 U.S. 265, 319 (1978). The Northern District of Indiana previously enjoined an express racial quota on Lake County's JNC. *Back v. Carter*, 933 F. Supp. 738, 757 (N.D. Ind. 1996). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 208 (2023). An illegal race-based quota on a JNC does not insulate a VRA violation. Two wrongs don't make a right.

In this regard, the State's designated evidence that it maintains lesser voting rights in the judicial circuit that encompasses Lake County ***because*** it is "highly diverse" is even more telling. (ECF 81-1 p.6.) As the district court concluded, "the State has *all but admitted* there is a race-based motivation behind this paradigm." (S.App.A10.) The State clearly believes that race-based legislation is acceptable, which is why it defends extreme racial disparities in voting by pointing to a statute with an express racial quota. Neither is legal.

As to the affidavit, on appeal, the State claims that the General Counsel of the Office of the Indiana Secretary of State is now merely a "staff member[]" offering his opinion. (State.Brief.p.28.) But the State then cites this "staff member[]" to support the State's interests. (*Id.* p.25.) The State never disclaims that it maintains differential voting schemes in Lake County because it is "highly diverse." This is the State's position.

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Indiana's differential voting scheme creates extreme racial disparities, and the State believes lesser voting rights are needed because Lake County is "highly diverse." An illegal race-based quota does not cure a VRA violation. As the district court concluded, "[i]n the language of § 2, the State of Indiana has imposed a procedure on Lake County that denies its citizens the right to vote for superior court judges on account of race or color." (SA.p.A11.) This Court should reach the same conclusion.

II. The State's arguments do not change this result.

In its Brief, the State has two main arguments. First, the State claims that the VRA does not apply because the Governor appoints state superior court judges. Second, the State contends the VRA is not violated because all Lake County residents only vote in

retention votes for state superior court judges. Both arguments fail, and the State's other arguments do as well.

A. The Governor's appointment authority is irrelevant.

In its Brief, the State repeatedly claims that the VRA does not apply because the Governor appoints state superior court judges in Lake County: "Because Lake County Superior Court judges are appointed, § 2 does not apply"; and "Indiana has decided that Lake County Superior Court judges should be appointed." (State.Brief.pp.10, 12.) The Governor's appointment authority is irrelevant because the Governor fills all judicial vacancies. And contrary to the State's assertions, this Court has held that the VRA applies to retention votes in Lake County. *Bradley*, 154 F.3d at 709-10. This case has nothing to do with judicial appointments.

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Under the Indiana Constitution, the Governor appoints judges to fill *all* judicial vacancies in *all* courts, including *all* state superior court judges: "when, at any time, a vacancy shall have occurred . . . in the office of Judge of any Court; the Governor shall fill such vacancy, by appointment." Ind. Const. Art. 5, § 18. Illustrating this, in May 2024, the Governor "appointed Elizabeth A. Bellin as Judge in Elkhart Superior Court 4." Order Rescinding Judge Pro Tempore Appointment, Indiana Supreme Court (May 22, 2024), *available at* https://www.in.gov/courts/files/order-judges-2024-24S-MS-57b.pdf. The voters do not challenge the Governor's appointment authority because it applies statewide and does not involve voting.

In four state judicial circuits, the Governor's authority to appoint state superior court judges is constrained by a JNC. In Lake, Marion, St. Joseph, and Allen Counties, a

JNC provides a list of nominees for a superior court vacancy for the Governor to select. Ind. Code §§ 33-33-2-40, 33-33-45-35, 33-33-49-13.4, 33-33-71-37. A JNC constrains the Governor's authority to appoint judges.

The Voters did not challenge the existence of the JNC in their VRA claim. In Count I (VRA claim), the Voters did not request any relief related to the JNC. (ECF 58 p.9.) The Voters requested that "Defendants should be enjoined from placing any Lake County Superior Court on a ballot for a retention vote." (*Id.* p.8.) The Voters also alleged (Counts II-IV) that judicial nominating followed by retention votes violated the Indiana Constitution. (ECF 58 pp.9-11.) The district court dismissed those claims without prejudice, and the Voters do not challenge that on appeal. (S.App.A22) The State's claim that the Voters challenge the JNC process appear to stem from the dismissed state-law claims. The VRA claim does not challenge the JNC appointment process. (ECF 58 pp.7-9.)

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The Voters have made clear that they "do not challenge the JNC appointment process because it does not involve voting, and the Governor fills all vacancies under the Indiana Constitution." (State.Brief.p.16.) The Voters "are not challenging how the Governor appoints judges and whether this authority is constrained by a JNC. The Voters instead challenge the differential voting rights for superior court judges: retention votes or open elections." (*Id.* p.17.)

Despite this, the State argues that "plaintiffs' challenge amounts to a challenge to the process by which Lake County judges are *initially* selected—the nomination and appointment process." (State.Brief.p.16.) This is not true. The Voters do not challenge the nomination/appointment process in their VRA claim. The State continues that "[n]or do

plaintiffs seek to end retention elections while leaving the nomination and appointment process for Lake County judges intact." (*Id.*) That is ***exactly*** what the Voters seek through their VRA claim.

This Court has held that the VRA applies to retention votes. *Bradley*, 154 F.3d at 709-10. One judicial circuit refutes the State's argument that the Voters challenge the JNC nomination/appointment process. There is a JNC for Allen County. Ind. Code § 33-33-2-40. When a judicial vacancy on the state superior court arises, the JNC provides the Governor a list of nominees and the Governor appoints one. *Id.* The same process applies in Lake County. Ind. Code § 33-33-45-35. But the Indiana Legislature has implemented different voting rights in these judicial circuits. In Allen County, voters then vote on state superior court judges in open elections. Ind. Code § 33-33-2-9. In Lake County, voters only vote on whether to retain the judge. Ind. Code § 33-33-45-42. The different voting rights are what the Voters challenge.

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Because the Voters only challenge the lesser voting right of a retention vote, not the nomination/appointment process, many of the State's arguments are inaccurate or irrelevant. The State argues that "Indiana has decided that Lake County Superior Court judges should be appointed rather than elected." (State.Brief.p.12.) This is misleading because the Governor fills all judicial vacancies, not just in Lake County. Ind. Const. Art. 5, § 18.

The State argues that "[b]ecause Lake County Superior Court judges are appointed, § 2 does not apply." (State.Brief.p.10.) This is inaccurate because this Court has

held that the VRA applies to retention votes, regardless of the fact that the judges are initially appointed. *Bradley*, 154 F.3d at 709-10.

The State quotes *Quinn* to support that "no court has understood § 2 to require that any office be filled by election." 887 F.3d at 324 (State.Brief.p.14.) But all voters in Indiana vote on state superior court judges. Some vote in open elections; some in retention votes. *Quinn* did not address that, and this Court has held that the VRA applies to retention votes. *Bradley*, 154 F.3d at 709-10. The VRA applies to Indiana's different voting rights.

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The Governor's appointment authority under the Indiana Constitution is irrelevant. The fact that a JNC limits the Governor's appointment authority in four judicial circuits is irrelevant. The Voters' VRA claim challenges the lesser voting right of a retention vote, and the VRA applies to it. *Bradley*, 154 F.3d at 709-10.

B. This Court must review the State's entire system of voting.

In its Brief, the State contends that the VRA is not violated because all Lake County voters have lesser voting rights. To support this contention, the State inaccurately calls state superior court judges "local" or "county" judges. They are state court judges. Under the VRA and *Brnovich*, this Court must compare the State's entire system of voting for superior court judges, not just Lake County, and the State's reliance on *Quinn* is misplaced.

Brnovich instructs that "courts must consider the opportunities provided by a state's entire system of voting when assessing the burden imposed by a challenged provision." 141 S.Ct. at 2339. The VRA provides that "[n]o voting qualification or prerequisite

to voting or standard, practice, or procedure shall be ***imposed by*** or ***applied by*** any ***State*** or political subdivision." 52 U.S.C. § 10301(a) (emphases added).

In Indiana, "trial courts are state entities." *Lake Cnty. Bd. of Comm'rs v. State*, 181 N.E.3d 960, 961 (Ind. 2022). The Indiana Legislature has determined the boundaries of state judicial circuits and has dictated different voting procedures for state superior courts in different judicial circuits. Ind. Code Article 33-33. State superior courts have state-wide jurisdiction, and parties can bring suit in any county. Ind. Trial Rule 75. Preferred venue rules, such as where property is located, could require Lake County residents to litigate in other judicial circuits. *Id.* As the district court concluded, state superior courts are "a *state* judicial office, whose officers are paid by the *state*, who collect a *state* pension upon retirement and whose positions are a creation of *state* law." (SA.p.A15.) Under the VRA and *Brnovich*, because the *State* has "imposed" different voting rules for *state* superior court judges, in different *state* judicial circuits, a court "must consider the opportunities provided by a *state*'s entire system of voting when assessing the burden imposed by a challenged provision." 141 S.Ct. at 2339; 52 U.S.C. § 10301 (emphasis added).

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Despite all of this, the State repeatedly calls state superior court judges "local" or "county judges." (State.Brief.pp.12, 18.) These are not "local" or "county" judges. They are state court judges. *Lake Cnty.*, 181 N.E.3d at 961. The State then concludes that "Section 2 nowhere requires States to make the drastic choice of holding elections for all local offices—school board, city manager, town treasurer, county judge—or none of them." (State.Brief.p.19.) The function of state superior courts is identical across the State. Ind.

Code Article 33-33. Parties can be hailed into state superior courts across the State. Ind. Trial Rule 75. This case does not involve a local office, with jurisdiction only over its constituents. For a state office, such as state superior court judge, the VRA prohibits limiting voting rights for that state office only in high minority areas. *See Brnovich*, 141 S.Ct. at 2339; 52 U.S.C. § 10301.

The State argues that the "relevant electorate here is the electorate of Lake County," citing the VRA's use of the term "political subdivision." (State.Brief.p.18) The State contends that "plaintiffs do not dispute that ***Lake County*** affords all voters the same range of voting opportunities for a given position." (Stated.Brief.p.24) (emphasis added). The bolded language is inaccurate. Lake County does not afford voters anything. State law dictates how state superior courts judges are voted on. Ind. Code § 33-33-45-42. Because the Voters challenge a law "imposed by…[the] State," 52 U.S.C. § 10301(a), this Court should look to the "State's entire system of voting" for state superior court judges to determine if it is "equally open." *Brnovich*, 141 S.Ct. at 2338-39. Because it is not and because this differential voting scheme creates jarring racial disparities, it violates the VRA. *See id.*

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The State cites *Quinn* to support "that every voter in Lake County has an equal opportunity to vote on the retention of Lake County Judges." (State.Brief.p.18.) *Quinn* involved a purely local position. 887 F.3d at 323. This Court concluded that "[e]very voter throughout Illinois influences education policy. Some do this by electing a school board, some by electing a mayor who appoints a school board, but influence is there for everyone

to wield." *Id.* at 325. In that situation, every person equally influences the selection of a school board where their children attend school.

The same is not true for state superior court judges. State superior court judges sit over courts of general jurisdiction and any resident of any county can be hailed into any state judicial circuit. Ind. Trial Rule 75. In such a circumstance, voting on state superior court judges in different manners in different judicial circuits means that influence is not "there for everyone to wield." *Quinn,* 887 F.3d at 325. A voter in Lake County has less influence on who a state superior court judge is than a voter in Porter County, which shares a border with Lake County, even though a Lake County resident may be forced to litigate in a state superior court in Porter County in front of a judge elected by that Porter County resident. Ind. Trial Rule 75.

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As *Brnovich* emphasized, a Court must look to "'the totality of circumstances,'" and "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered." 141 S.Ct. at 2338 (quoting 52 U.S.C. § 10301). So, a "circumstance that has a logical bearing on whether voting is 'equally open'" for state superior court judges is that voters in different judicial circuits vote on the same state positions in different manners, meaning that there is not an "equal 'opportunity,'" *id.*, to "influence" judges "for everyone to wield." *Quinn*, 887 F.3d at 325.

The States cites two cases to support looking only to Lake County. In *Johnson v. Waller Cnty.*, 593 F. Supp. 3d 540, 546 (S.D. Tex. 2022), the "[p]laintiffs allege that Waller County allocated fewer hours of early voting." In *Hernandez v. Woodard*, 714 F. Supp. 963, 965-66 (N.D. Ill. 1989), the plaintiffs alleged "the County Clerk of Will County" violated

the VRA based on registration rates in the county. In both cases, plaintiff challenged the action of a county official. That is nothing like Voters' claims. Here, Voters challenge a state law regarding voting on state court judges.

To determine whether Indiana violates the VRA, this Court must review Indiana's entire system of voting on state superior court judges. Under this analysis, Indiana violates the VRA because voting for state superior court judges is not equally open and everyone does not have an equal opportunity to influence state superior court judges.

C. The State's arguments that it complies with *Brnovich* fail.

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The State then offers various arguments that Indiana does not violate the VRA under the *Brnovich* factors, many of which have been previously addressed, but the State is incorrect.

The State contends that Indiana's differential voting scheme has a long pedigree. (State.Brief.pp.21-22.) But the State does not claim there is a long pedigree of doing so in only in high-minority areas.

The State also contends there is state interest in "judicial independence, fairness, integrity, impartial administration of justice, and judicial accountability." (State.Brief.p.25) (internal quotation omitted). But if that is the virtue of retention votes, the State does not explain why state superior court judges should be selected in any other manner or why Lake County residents should potentially be hailed into other judicial circuits that elect their judges. Ind. Trial Rule 75.

The State argues that "[a]dopting merit selection for Lake County was consistent with the General Assembly's decision to adopt merit selection for other large counties."

(State.Brief.p.27.) The State concedes that Hamilton County is one of Indiana's largest counties, but then contends that the "legislative action may not have caught up to population shifts." (*Id.*) These arguments ignore that Indiana only implemented retention votes in Marion County in 2017. Ind. Code § 33-33-49-13.3. The Legislature has clearly singled out high-minority and high-population counties for differential treatment.

D. The State's arguments on discriminatory intent are not persuasive.

Before the district court, the State designated the affidavit of the General Counsel of the Secretary of State that merit selection is "essential" to "limit[] political influence" because Lake County is "highly diverse." (ECF 81-1 p.6.) The State now calls this mere opinion. (State.Brief.p.28.) But the Secretary of State is the highest election official in Indiana. *Common Cause of Ind. v. Ind. Sec'y of State*, 2013 WL 12284648 *2 (S.D. Ind. Sep. 6, 2013). The State chose to defend the statutory scheme with this evidence. It cannot disclaim it now because the State revealed discriminatory intent.

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The State argues that "diverse" does not refer "only to *racial* diversity." (State.Brief.p.28.) Before the district court, the State admitted "diversity" includes "ethnic backgrounds" and "racial backgrounds." (ECF 110 p.3.) The State has admitted that "racial backgrounds" are one reason it maintains lesser voting rights in Lake County, and it cannot avoid the position it took on appeal.

The State contends—for the first time on appeal—that the Voters did not specifically plead intentional discrimination. (State.Brief.p.28.) But the State cites nothing to support that the Voters needed to do so or why this new argument is not waived. The State contends that intentional discrimination can be proved by "historical background."

(State.Brief.p.29.) That is true, but Supreme Court has recognized that discriminatory intent can also be proven by "direct evidence of intent." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). An affidavit designated by Indiana's highest election official admitting discriminatory intent is "direct evidence of intent." *Id.*

The State then contends that an express racial quota for membership on the Lake County JNC somehow demonstrates that there is not a discriminatory purpose. (State.Brief.p.29.) As previously detailed, an express racial quota is illegal and was previously enjoined. *Back*, 933 F. Supp. at 757; Ind. Code § 33-33-45-28(b)(2)(C). An express racial quota confirms that Indiana's judicial election laws are drafted with race in mind, which is consistent with Bonnett's affidavit that the State believes that lesser voting rights must be maintained because Lake County is "highly diverse." (ECF 81-1 p.6.)

The State's efforts to distance itself from its own evidence from the office of Indiana's highest election officer are not convincing. The State admitted it maintains lesser voting rights because Lake County is "highly diverse." The State violated the VRA.

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III. The State's private right of action arguments fail.

A. The State waived whether a private right of action exists.

Before the district court, the State never raised the issue of an alleged lack of a private right of action under the VRA. On appeal, the State devotes a mere three pages to this issue. It is too late and on too thin of a record for this Court to decide such a weighty issue for the first time on appeal.

"A private right of action is not a component of subject-matter jurisdiction." *Bertrand ex rel. Bertrand v. Maram*, 495 F.3d 452, 458 (7th Cir. 2007). Before the district court,

the State never raised that the VRA allegedly lacked a private right of action. (ECF 61 pp.26-27; ECF 82, 99.) When this Court's "jurisdiction is not at issue, we can assume without deciding the right-of-action question and proceed directly to the merits." *Planned Parenthood of Indiana, Inc. v. Comm'r of Indiana State Dep't Health*, 699 F.3d 962, 983 (7th Cir. 2012). In *Simon v. DeWine*, 98 F.4th 661, 666 n.1 (6th Cir. 2024), "[t]he Ohio Redistricting Commission argues for the first time on appeal that the Voting Rights Act does not confer a private right of action." "We need not address this issue to resolve the appeal. Instead, we assume without deciding that the Voting Rights Act confers a private right of action." *Id.* This Court should do the same.

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Or, this Court should conclude the State waived this issue. In *Whitehead v. Pacifica Senior Living Mgmt. LLC*, No. 21-15035, 2022 WL 313844, at *3 n.2 (9th Cir. Feb. 2, 2022), "Pacifica also argues, for the first time on appeal, that section 432 does not provide a private cause of action. Because Pacifica did not raise this argument in the district court, it is waived."

The State contends that waiver does not apply because the district court addressed this issue in a footnote. (State.Brief.p.30 n.2.) This Court has stated that "[i]f the district court raises an issue sua sponte and the appellate brief is the first opportunity to discuss it, the waiver rule does not preclude review." *Duncan Place Owners Ass'n v. Danze, Inc.*, 927 F.3d 970, 974 (7th Cir. 2019). But in *Duncan*, this Court held that waiver did apply because the party had numerous opportunities to address the issue before the district court and did not do so. *Id.* The State could have addressed whether the VRA has a private

right of action before the district court. A district court footnote does not open up a significant issue to be addressed for the first time on appeal.

The State also contends this Court can affirm the district court's decision on any basis supported in the record. (State.Brief.p.30.) This Court has stated that "[w]e may affirm on any ground supported in the record, *so long as that ground was adequately addressed in the district court and the nonmoving party had an opportunity to contest the issue*." *West Side Salvage, Inc. v. RSUI Indemnity Co.*, 878 F.3d 219, 222 (7th Cir. 2017) (emphasis added)(quotation omitted). In *Pierce v. N. Carolina State Bd. of Elections*, 97 F.4th 194, 211 n.6, (4th Cir. 2024), the Fourth Circuit declined to address whether "Plaintiffs lack a private cause of action to enforce Section 2...in the first instance on the thin briefing provided." In this case, the parties did not brief the issue at all before the district court. The State's Brief devotes only three pages to the issue. (State.Brief.pp.30-33.) This "thin briefing" on an issue of great importance militates against this Court addressing it for the first time on appeal.

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Finally, the State argues that the Voters never sought leave to bring this claim under § 1983. (State.Brief.pp.33-34.) But the State never raised this argument before its appellate brief.

This Court should either assume a private right of action exists, or this Court should conclude the State waived the issue. This non-jurisdictional issue is too important to be addressed for the first time on appeal.

B. The VRA contains a private right of action.

The VRA now expressly recognizes a private right of action. The Supreme Court has concluded as much, as have most circuits. The Eighth Circuit's decision conflicts with Supreme Court precedent, and should not be followed by this Court.

The VRA was enacted in 1965. It contains three operative sections: Section 2, which is at issue in this case; Section 5, which requires preclearance of certain changes in certain jurisdictions; and Section 10, which addresses poll taxes. As enacted, the VRA did not include an express private right of action.

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In *Allen v. State Bd. of Elections*, 393 U.S. 544, 554 (1969), "private citizens" alleged a State violated Section 5. The Court noted that the VRA did "not explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act." *Id.* at 554-55. The Court then reasoned that Section 5 "does provide that 'no person shall be denied the right to vote for failure to comply with (a new state enactment covered by, but not approved under, § 5).'" *Id.* at 555 (quoting Section 5). "Analysis of this language in light of the major purpose of the Act indicates that appellants may seek a declaratory judgment that a new state enactment is governed by § 5." *Id.*

The Court rejected that the VRA could not be enforced by private citizens:

> The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the subdivisions thereof. The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the

> individual citizen standing to insure that his city or county government complies with the § 5 approval requirements.

Id. at 556-57 (footnotes omitted). "The guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." *Id.*

In 1975, Congress amended the VRA. The Senate Report provides that the amendment "afford[s] to private parties the same remedies which Section 3 now affords only to the Attorney General." S. REP. 94-295, 39-40, 1975 U.S.C.C.A.N. 774, 806. The amendment "would authorize courts to grant similar relief to private parties in suits brought to protect voting rights in covered and *noncovered* jurisdictions." *Id.* (emphasis added). The reference to non-covered jurisdictions is important because Section 5 applies only to covered jurisdictions, but Sections 2 and 10 apply to noncovered jurisdictions. The amendment specified that an "aggrieved person" could seek certain remedies. *Id.* "An 'aggrieved person' is any person injured by an act of discrimination." *Id.* "The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights." *Id.* at 807.

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The amendment "allows a court, in its discretion, to award attorneys' fees to a prevailing party in suits to enforce the voting guarantees." *Id.* "Such a provision is appropriate in voting rights cases because…Congress depends heavily upon private citizens to enforce the fundamental rights involved. Fee awards are a necessary means of

enabling private citizens to vindicate these Federal rights." *Id.* Congress passed the proposed amendments.

Section 3 now provides that "whenever…an aggrieved person institutes a proceeding under ***any statute***" certain remedies are available. 52 U.S.C. § 10302 (emphasis added). Likewise, the attorney fee provisions provides "[i]n ***any*** action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e) (emphasis added). These provisions expressly recognize that private parties may enforce the VRA, and these provisions were not limited Section 5, which *Allen* held included an implied right of action.

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The Supreme Court then recognized that Section 2 contains a private right of action. In *Morse v. Republican Party of Virginia*, 517 U.S. 186, 190 (1996), Justice Stevens announced the judgment of the Court with Justice Ginsburg joining. Justice Stevens first noted that "our evaluation of congressional action must take into account its contemporary legal context," and "during the 1960's the Court had consistently found such remedies notwithstanding the absence of express direction from Congress." *Id.* at 231. The Court then referenced its *Allen* holding "that private parties may enforce § 5 of the Voting Rights Act." *Id.* "Congress has not only ratified *Allen*'s construction of § 5 in subsequent reenactments, but extended its logic to other provisions of the Act." *Id.* at 232 (internal citation omitted).

The Court commented that "[a]lthough § 2, like § 5, provides no right to sue on its face, 'the existence of the private right of action under Section 2...has been clearly intended by Congress since 1965.'" *Id.* (quoting S. Rep. No. 97-417 at 30). "We, in turn, have

entertained cases brought by private litigants to enforce § 2." *Id.* "It would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language." *Id.*

Moreover, "[i]n 1975, Congress amended [Section 3] to cover actions brought by 'the Attorney General *or an aggrieved person*." *Id.* at 233. "The Senate Report explained that the purpose of the change was to provide the same remedies to private parties as had formerly been available to the Attorney General alone." *Id.*

The Court also found the VRA's provision for attorney's fees for private parties important: "Obviously, a private litigant is not the United States, and the Attorney General does not collect attorney's fees. Both this section and § 3 thus recognize the existence of a private right of action under § 10." *Id.* at 234.

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Justices Breyer, O'Connor, and Souter concurred in the judgment. *Id.* at 235. "Congress must be taken to have intended to authorize a private right of action to enforce § 10 of the Act." *Id.* at 240. *Allen*'s rationale "applies with similar force not only to § 2 but also to § 10." *Id.* "In addition, I do not know why Congress would have wanted to treat enforcement of § 10 differently from enforcement of §§ 2 and 5, particularly after 1975." *Id.* "For these reasons, I believe Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5." *Id.* As a result, five of nine Justices agreed that Section 2 is privately enforceable, and *Morse*'s conclusion that Section 10 was privately enforceable was based on the conclusion that Section 2 is privately enforceable.

"This is the sort of message that, whether or not technically dictum, a court of appeals must respect, given the Supreme Court's entitlement to speak through its opinions

as well as through its technical holdings." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010). The majority of Justices in *Morse* clearly concluded that Section 2 could be privately enforced. This Court should follow this clear direction unless or until the Supreme Court addresses the issue.

Since *Morse*, the Supreme Court has recognized that "[b]oth the Federal Government and individuals have sued to enforce § 2, and injunctive relief is available in appropriate cases to block voting laws from going into effect." *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 537 (2013) (internal citation omitted). The Sixth Circuit has concluded that an "individual may bring a private cause of action under Section 2 of the Voting Rights Act." *Mixon v. State of Ohio*, 193 F.3d 389, 406 (6th Cir. 1999). The Eleventh Circuit has noted that a "majority of the Supreme Court has indicated that section 2 of the Voting Rights Act contains an implied private right of action." *Ford v. Strange*, 580 F. App'x 701, 705 n.6 (11th Cir. 2014). The Fifth Circuit has held that Section 2 is privately enforceable:

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> One section of the Act provides that proceedings to enforce voting guarantees in any state or political subdivision can be brought by the Attorney General or by an "aggrieved person." 52 U.S.C. § 10302. We conclude that the Plaintiffs here are aggrieved persons, that our *OCA-Houston* decision has already held that sovereign immunity has been waived, and that there is a right for these Plaintiffs to bring these claims.

Robinson v. Ardoin, 86 F.4th 574, 588 (5th Cir. 2023).

Since *Morse*, "scores if not hundreds of cases have proceeded under the assumption that Section 2 provides a private right of action. All the while, Congress has consistently reenacted the VRA without making substantive changes, impliedly affirming the previously unanimous interpretation of Section 2 as creating a private right of action."

Coca v. City of Dodge City, 669 F. Supp. 3d 1131, 1140 (D. Kan. 2023). The district court concluded it was bound to follow *Morse*: "The simple fact is that the Supreme Court explicitly recognized a private right of action under Section 2 in *Morse*." *Id.*

Other district courts have come to the same conclusion. "Even if these statements [in *Morse*] are or might be dicta, this court is obligated to respect it." *Stone v. Allen*, No. 2:21-CV-1531-AMM, 2024 WL 578578, at *7 (N.D. Ala. Feb. 13, 2024) (internal quotation omitted); *see, e.g., League of United Latin Am. Citizens v. Abbott*, No. EP21CV00259DCGJESJVB, 2023 WL 8880313, at *8 (W.D. Tex. Dec. 21, 2023).

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The State, however, contends that "[n]either § 2 nor any other provision authorizes private enforcement of § 2's prohibition on denying or abridging the right to vote." (State.Brief.p.31.) This ignores that Section 3 (52 U.S.C. § 10302(a)) expressly permits "an aggrieved person [to] institute[] a proceeding under any statute," and the Supreme Court has recognized that adding the "aggrieved person" language "was to provide the same remedies to private parties." *Morse*, 517 U.S. at 233. This argument also ignores that 52 U.S.C. § 10310(e) provides for attorneys' fees to "the prevailing party, *other than the United States*," and the Supreme Court has recognized that "this section . . . recognize[s] the existence of a private right of action." *Morse*, 517 U.S. at 234.

The State relies upon *Arkansas State Conference NAACP v. Arkansas Bd. of Appropriation*, 86 F.4th 1204 (8th Cir. 2023). (State.Brief.p.31.) There, the Eighth Circuit reasoned that because Section 12(d) (52 U.S.C. § 10308(d)) permits the Attorney General to enforce Section 2 (§ 10301) this means a private person may not: "Congress not only created a

method of enforcing § 2 that does not involve private parties, but it also allowed some one else to bring lawsuits in their place." 86 F.4th at 1211.

The Supreme Court addressed this in *Allen*, acknowledging that Section 12 empowers the Attorney General to enforce various provisions of the VRA. 393 U.S. at 555 n.18. The Court found "merit in the argument that the specific references to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights." *Id.* "In any event, there is certainly no specific exclusion of private actions." *Id.*

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Moreover, if the Eighth Circuit's reasoning was correct, then *Allen* and *Morse* were wrongly decided because Section 12(d) (52 U.S.C. § 10308(d)) permits the Attorney General to enforce Sections 5 (§ 10304) and 10 (§ 10306), and *Allen* and *Morse* held those Sections were privately enforceable. One should question reasoning that results in reversing numerous Supreme Court decisions.

The State contends that the VRA may be enforced by "the appointment of federal observers backed by the Attorney General, 52 U.S.C. §§ 10302(a)." (State.Brief.p.31.) But that section provides that observers may be appointed in a suit by "the Attorney General ***or an aggrieved person***." 52 U.S.C. § 10302(a) (emphasis added.) This language supports the existence of a private right of action.

The State argues that the district court ruled that a private right of action exists because *Morse* and other cases merely assumed it did. (State.Brief.p.32.) This is not accurate. The district court concluded that "a majority of Supreme Court justices 'explicitly recognized a private right of action under Section 2 in *Morse*." (S.App.p.A9 n.3.) *Morse*

did not merely assume the existence of a private right of action. Instead, it looked to specific statutory language authorizing suits by "*an aggrieved person*," the provision of attorneys' fees to "the prevailing party, *other than the United States*," its prior decisions (*Allen*), and Legislative history that recognizes "the existence of the private right of action under Section 2." *Morse*, 517 U.S. at 323. This was not a mere assumption.

This court should follow clear precedent from the Supreme Court that recognizes a private right of action under Section 2.

Conclusion

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The Court should reverse the district court's grant of summary judgment and remand to the district court to allow the state to correct the violation of the VRA.

Dated: May 31, 2024

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

The undersigned, as one of the counsel for the Plaintiffs, certifies that:

1. This brief complies with the type-volume limitation of Circuit Rule 32(c) which requires a reply brief contain no more than 7,000 words, because it contains 6,970 words, as reported by the word-count function of Microsoft Word for Office 365.

2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6), as supplemented by Circuit Rule 32 because it has been prepared using 12-point type in Book Antiqua, a proportionally-spaced typeface in Microsoft Office 365.

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Dated: May 31, 2024

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Certificate of Service

I certify that on May 31, 2024, I caused the foregoing "Plaintiffs-Appellants' Reply Brief" to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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