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' BRIEF

Respectfully submitted,

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Attorney for City of Hammond, Thomas McDermott, in his official and personal capacities, Eduardo Fontanez, and Lonnie Randolph, in His personal capacity

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-1125

Short Caption: City of Hammond v. Lake County Judicial Nominating Commission

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

City of Hammond, Thomas McDermott, Eduardo Fontanez, and Lonnie Randolph

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Bose McKinney & Evans LLP and Rogelio Dominguez

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Bryan H. Babb Date: 1/30/2024

Attorney's Printed Name: Bryan H. Babb

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Bradley M. Dick Date: 2/1/2024

Attorney's Printed Name: Bradley M. Dick

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-1125

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Seema R. Shah Date: 1/31/2024

Attorney's Printed Name: Seema R. Shah

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Jurisdictional Statement

1. *Statement Concerning District Court's Jurisdiction*

Plaintiffs sued Defendants alleging violations of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301 (Count I). The district court had jurisdiction over Count I under 28 U.S.C. § 1331. Plaintiffs also alleged that Defendants violated the Indiana Constitution (Counts II, III, and IV). The district court had jurisdiction over those claims under 28 U.S.C. § 1367.

2. *Statement Concerning Appellate Jurisdiction*

Appellate jurisdiction arises pursuant to 28 U.S.C. § 1291. The District Court entered an Opinion and Order on January 4, 2024 and directed the Clerk to enter judgment. (ECF 113; Short Appendix ("S.App.") A1.) On January 5, 2024, the Clerk entered judgment. (ECF 114.) On January 12, 2024, the Clerk entered an Amended Judgment in a Civil Action entering judgment in favor of Defendants on Plaintiffs' VRA claim (Count I) and dismissing Plaintiffs' state-law claims (Counts II, III, and IV) without prejudice. (ECF 115; A24.) This final judgment, under Rule 58 of the Federal Rules of Civil Procedure, resolved all claims as to all parties. There are no post-judgment motions in the District Court. On January 26, 2024, all Plaintiffs filed their notice of appeal. (ECF 116.)

Statement of the Issues

In eighty-eight of Indiana's judicial circuits, voters elect state superior court judges in open elections. In three judicial circuits—where 66% of Indiana's black voters reside—voters only vote on whether to retain a judge someone else selected. The State has admitted it maintains retention votes in "highly diverse jurisdiction[s]" to "limit[] political influence." The district court found that "the State has *all but admitted* there is a race-based motivation behind this paradigm," and "the statistics alone are jarring." (S.App.A10.)

This Court has held the VRA applies to "retention elections" for state superior courts judges in Indiana. *Bradley v. Work*, 154 F.3d 704, 709 (7th Cir. 1998). The Supreme Court recently identified "guideposts" for identifying VRA violations. *Brnovich v. Democratic Nat. Comm.*, 141 S.Ct. 2321 (2021). The district court concluded Indiana violated the VRA under *Brnovich*. (S.App.A21.)

The district court, however, concluded this Court's decision in *Quinn v. Illinois*, 887 F.3d 322, 325 (7th Cir. 2018), where this Court held the VRA did not even apply to appointed school-board seats, compelled the opposite result. The district court agreed that "*Brnovich* has changed the landscape," "but with *Quinn* in the way, that is a matter that only the Circuit can address." (S.App.A17.)

1. Does Indiana's voting scheme for state superior court judges violate the VRA under *Brnovich* and is *Quinn* distinguishable or in need of reconsideration?
2. Did the State's admission of racial motivation mandate the conclusion that the scheme violates the VRA?

Statement of the Case

A. Background

The Plaintiffs in this case are Lake County voters ("Voters").[1] Thomas McDermott is the Mayor of Hammond, resides in Lake County, Indiana, and is a registered voter in Lake County. (ECF 84-2 p.1 ¶¶ 2-4.) Eduardo Fontanez is Hispanic, a member of a minority group, and is a registered voter in Lake County, Indiana. (ECF 84-3 p.1 ¶¶ 2-4.) Senator Lonnie Randolph is an Indiana Senator from Lake County, Indiana, is black, a member of a minority group, resides in Lake County, and is a registered voter in Lake County. (ECF 84-1 p.1 ¶¶ 2-5.)

The Voters previously had the right to vote for superior court judges of the county division, and they voted in those elections. (ECF 84-2 p.1 ¶ 5; ECF 84-3 p.1 ¶ 5; ECF 84-1 p.1 ¶ 6.) As will be detailed, Indiana abridged that voting right, and the Voters now only enjoy the lesser voting right of voting whether to retain state superior court judges appointed by the Governor. (ECF 84-2 p.1 ¶ 7; ECF 84-3 p.1 ¶ 6; ECF 84-1 p.1 ¶ 7.) To vote in a full and open election for state superior court judges, the Voters would have to move to another state judicial circuit that enjoys full voting rights and register to vote. (ECF 84-2 pp.1-2 ¶ 9; ECF 84-3 pp.1-2 ¶ 9; ECF 84-1 p.2 ¶ 10.) Moving to another state judicial circuit would be an extreme burden and expense for the Voters. (ECF 84-2 p.2 ¶ 10; ECF 84-3 p.2 ¶ 10; ECF 84-1 p.1 ¶ 11.)

[1] The City of Hammond is a plaintiff in this matter as to the now dismissed state-law claims.

The Voters filed suit and alleged, in part, that Indiana's differential voting scheme violated the VRA and Indiana's Constitution. (ECF 1 pp.1-2.) The Voters sought to enjoin the nominating process that occurs with the Lake County Judicial Nominating Commission. (ECF 23.) But in the Second Amended Complaint, the Voters focused on retention votes for state superior court judges compared with full and open elections. (ECF 58 pp.1-2.) The Second Amended Complaint named the State of Indiana, the Secretary of State, and the Lake County Board of Elections as defendants, in addition to the Lake County Judicial Nominating Commission. (*Id.*)

The Voters moved for summary judgment contending that the lesser voting rights for state superior court judges for voters in the state judicial circuit that encompasses Lake County violated the VRA and the Indiana Constitution. (ECF 85 p.8.) The Voters did not challenge the judicial nominating process that constrains the Indiana Governor's ability to fill judicial vacancies in three state judicial circuits. (*Id.* pp.9-19.) The Voters designated census data and other evidence demonstrating that Indiana's differential voting rights had a substantial impact on minority voters. (ECF 84-10 pp.1-170; ECF 84-4 pp.1-32.)

The State simultaneously moved for summary judgment as well. (ECF 82.) The State designated evidence that the State maintains lesser voting rights for state superior court judges in Lake County because Lake County is diverse:

> 18. A merit selection process is essential in a highly populated and highly diverse jurisdiction like Lake County to provide safeguards for limiting political influence in Lake County superior courts.

(ECF 81-1 p.6) (highlighting added).

The Lake County Board of Elections also moved for summary judgment, contending that it was not a proper party. (ECF 93.) The parties responded to the other parties' motions and then filed replies in support of their own motions. (ECF 96-112.)

B. The District Court's Ruling

The district court found the following undisputed facts regarding the affects of Indiana's differential voting systems:

> According to 2020 Census data, 193,504 black residents 18 years old or older reside in Marion County, Indiana. [DE 101 at ¶8.] In Lake County, there are 89,806 black residents age 18 or older. [*Id.* at ¶9.] And in St. Joseph County, Indiana, there are 25,176 black residents age 18 or older. [*Id.* at ¶10.] These three counties make up nearly 66% of the total black residents in Indiana (308,486 out of Indiana's total of 467,861 black residents age 18 or older). [*Id.* at ¶¶11-13.] Put another way, two-thirds of black people of voting age in Indiana—those who reside in Lake, Marion and St. Joseph Counties—are unable to vote to elect the vast majority of their state court judges. [*Id.* at ¶13.] By contrast, 81% of whites who reside in Indiana live in one of the 89 Indiana counties other than Lake, Marion and St. Joseph Counties, and they *can* vote to elect all their superior court judges. [*Id.* at ¶¶34-37.]

(S.App.A5)

The district court identified the state's interests in the current system:

> By the affidavit of General Counsel Bonnet, the State Defendants express the following view: "A merit selection process is essential in a highly populated and highly diverse jurisdiction like Lake County to provide safeguards for limiting political influence in Lake County superior courts." [DE

> 81-1 at ¶18.] The State identifies the purposes of the Lake County selection process as "to ensure fairness, integrity, impartial administration of justice, and judicial accountability." [DE 81-1 at ¶21.] The State believes it "has a compelling interest in judicial independence, impartiality, fairness, and judicial accountability" that "has long required some specialization in Indiana counties to ensure the judicial selection process reflects the diversity of the jurisdiction." [DE 81-1 at ¶22.]

(*Id.* at p.8)

The district court concluded that Plaintiffs' theory was sound, the racial disparities were "jarring," and the State had all but admitted to a race-based motivation:

> Plaintiffs' theory for a violation of § 2 seems sound to me. For starters, the statistics alone are jarring. How is it that 66% of blacks in Indiana are prevented from voting for superior court judge when more than 80% of whites can? More startling still is the fact that, as I just noted, the State has *all but admitted* that there is a race-based motivation behind this paradigm. Look no further than the affidavit submitted by the Secretary of State's General Counsel, Mr. Bonnet: "A merit selection process is *essential in a highly populated and highly diverse* jurisdiction like Lake County to provide safeguards for limiting political influence in Lake County superior courts." Affidavit of Jerold A. Bonnet, General Counsel to the Indiana Secretary of State [DE 81-1], ¶18 (emphasis added). Let's not beat around the bush: the reference to "diversity" is a not so subtle reference to race. The State thus appears to acknowledge that the "diversity" of Lake County, meaning the significant presence of racial minorities among its electorate, is a reason that superior court judges are not chosen by election but by a merit selection process instead. In 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.

(*Id.* at pp.10-11.)

The district court found two decisions to be dispositive: *Quinn* and *Brnovich*. This Court decided *Quinn* in 2018. "*Quinn* involved an action by voters challenging the Illinois law providing that Chicago School Board members are appointed by the mayor." (*Id.* at p.13.) *Quinn* first held that the VRA "does not apply 'unless an office is elected.'"(*Id.*)

(quoting *Quinn*, 887 F.3d at 324). "The second reason blithely given for rejecting the plaintiffs' VRA claim was that in Chicago no one votes for the school board, so all are 'treated identically, which is what § 2 requires.'" (*Id.*)

The district court also analyzed *Brnovich*. "In the recent VRA § 2 case of *Brnovich* . . ., the United States Supreme Court advised that 'courts must consider the opportunities provided by *a State's entire system of voting* when assessing the burden imposed by a challenged provision.'" (*Id.* at p.15) (quoting *Brnovich*, 141 S.Ct. at 210).

The district court found "the Seventh Circuit's reasoning in *Quinn* . . . to be unsatisfying, especially in light of *Brnovich*, as discussed below. Nonetheless, *Quinn* is controlling law and I am not free to disregard it where it plainly applies. And I agree with the State Defendants that *Quinn* is controlling here." (*Id.* at p.16.) "Plaintiffs argue that *Brnovich* has changed the landscape and mandates a different result here. [DE 100 at 11.] As discussed below, I think they're correct, but with *Quinn* in the way, that is a matter that only the Circuit can address." (*Id.* at p.17.)

The district court concluded that Plaintiffs should prevail under *Brnovich*, but believed this Court's decision in *Quinn* compelled the opposite result:

> The question instead is whether under the VRA the General Assembly can withhold the right to vote for a state judicial office in counties with a high percentage of black voters while conferring the right in counties with overwhelmingly white voters. In my view, *Brnovich* requires that question to be

> answered "no." But because *Quinn* stands in the way, summary judgment will be granted in favor of the Defendants.

(*Id.* at p.21.)

The district court declined to exercise supplemental jurisdiction over the Voters' state-law claims. (*Id.* at p.22.) Because the district court denied the VRA claim and dismissed the state-law claims, it did not address whether the Lake County Board of Elections was a proper party. (*Id.*)[2]

Summary of the Argument

Trial courts in Indiana are state entities. The Indiana Legislature has divided Indiana into state judicial circuits. In eighty-eight of those circuits, voters vote in open elections for superior court judges. In three judicial circuits, voters only vote on whether to retain a superior court judge appointed by the Governor. The three judicial circuits with lesser voting rights include Marion County (Indianapolis), Lake County, and St. Joseph County. By selecting these three areas for lesser voting rights, sixty-six percent of black voters enjoy lesser voting rights, while eighty-one percent of white voters enjoy full voting rights. The State has admitted this was done expressly because Lake County is highly

[2] The district court *sua sponte* addressed whether the VRA provides a private right of action in a footnote and concluded it does. (S.App.A9 n.3.) The State did not raise this issue. As the concurrence in *Brnovich* recognized, "[b]ecause no party argues that the plaintiffs lack a cause of action here, and because the existence (or not) of a cause of action does not go to a court's subject-matter jurisdiction, this Court need not and does not address the issue today." 141 S.Ct. at 2350 (internal quotation omitted). The State cannot raise this issue for the first time on appeal and it has waived it. *See Whitehead v. Pacifica Senior Living Mgmt. LLC*, No. 21-15035, 2022 WL 313844, at *3 (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.").

diverse: "A merit selection process is essential in a highly populated and *highly diverse* jurisdiction like Lake County to provide safeguards for limiting political influence in Lake County superior courts." (ECF 81-1 p.6) (emphasis added.) The State reiterated that "diversity" included "ethnic backgrounds" and "racial backgrounds." (ECF 110 p.3.) The district court found that "the State has *all but admitted* there is a race-based motivation behind this paradigm." (S.App.A10.)

This Court has held that the VRA applies to retention votes for superior court judges in Lake County. *Bradley*, 154 F.3d at 709. The district court analyzed the factors from *Brnovich* and concluded that "these five factors weigh heavily in favor of Plaintiffs' § 2 claim here." (S.App.A18.) As will be detailed, the district court was correct.

But the district court concluded that "*Quinn* is controlling law and I am not free to disregard it where it plainly applies." (S.App.A16.) In this regard, the Voters disagree with the district court's conclusion for two reasons. First, *Quinn* is distinguishable. *Quinn* involved a purely appointed position, and this Court held "unless an office is elected, § 2 as a whole does not apply." 887 F.3d at 325. In *Bradley*, this Court held the VRA applies to the "retention elections stage of the Lake County process."154 F.3d at 709. *Quinn* does not apply here because it involved a purely appointed position, and this case involves differential voting rights.

Quinn also involved a local school board. In that context, *Quinn*'s focus on the fact that no Chicago residents voted for the school board perhaps makes sense. But here, this case involves state superior courts with state-wide jurisdiction. One cannot determine

whether voting on state superior courts has been abridged without comparing the voting procedures in different judicial circuits.

Second, to the extent this Court concludes *Quinn* is not distinguishable, then it is no longer good law after *Brnovich*. As the district court noted, "Plaintiffs argue that *Brnovich* has changed the landscape and mandates a different result here. [DE 100 at 11.] As discussed below, I think they're correct, but with *Quinn* in the way, that is a matter that only the Circuit can address." (S.App.A17.) *Quinn*'s focus purely on Chicago conflicts with *Brnovich*'s admonition that a court must look to "a State's entire system of voting when assessing the burden imposed by a challenged provision." 141 S.Ct. at 2339. When one looks to Indiana's entire system for voting on state superior court judges, it is clear that it is not equally open, there is not equal opportunity to elect judges of one's choice, this was done on account of race, and this violates the VRA.

Finally, the State has admitted that it has implemented a lesser voting right in Lake County because Lake County is "highly diverse." This admission of an intentionally discriminatory purpose requires a conclusion that the lesser voting rights in the state judicial circuit encompassing Lake County violates the VRA. As will be detailed, this Court should reverse the district court, hold that Indiana has violated the VRA, and remand the matter to the district court to permit the State of Indiana to rectify the violation.

Standard of Review

"[R]eview [of] a district court's grant of summary judgment [is] *de novo*." *Boardman v. Service Employees International Union*, 89 F.4th 596, 599 (7th Cir. 2023). "Summary judgment is appropriate when there is no genuine dispute of material fact and the movant is

entitled to judgment as a matter of law." *Id.* "We construe the facts in the light most favorable to the nonmoving party . . . and draw all reasonable inferences in her favor." *Id.* at 599-600.

Argument

I. Indiana's method of voting for judges violates the VRA under *Brnovich,* and *Quinn* is distinguishable or in need of reconsideration.

A. Judicial elections and retention votes are subject to the VRA.

The United States Supreme Court has held that the VRA applies to judicial elections, and this Court has held that the VRA applies to judicial retention votes in the state judicial circuit that encompasses Lake County.

Section 2 of the VRA provides the following:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement 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 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
>
> * * *

52 U.S.C. § 10301.

"Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an

election." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). The Supreme Court held that representative, as used in the VRA, "describes the winners of representative, popular elections." *Id.* at 399. "If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered 'representatives' simply because they are chosen by popular election, then the same reasoning should apply to elected judges." *Id.* "When each of several members of a court must be a resident of a separate district, it seems both reasonable and realistic to characterize the winners as representatives of that district." *Id.* at 401. The Court held "that state judicial elections are included within the ambit of § 2." *Id.* at 404.

The Supreme Court noted that a state "could, of course, exclude its *judiciary* from the coverage of the Voting Rights Act by changing to a *system* in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion." *Id.* at 401 (emphases added). Indiana has not excluded its judiciary from VRA coverage. Instead, it has implemented lesser and different voting rights in different judicial circuits.

This Court has held that the VRA applies to retention votes in the state judicial circuit that encompasses Lake County. In *Bradley*, 154 F.3d at 709, this Court considered "the retention election itself: the process by which judges on the bench must have their names appear on the ballot, for the voters to case a vote of 'yes' or 'no' in response to the question of whether Judge X should continue to serve." 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": "it is the voters directly who make the choice, through the casting of their ballots. That is what the Voting Rights Act is all about. Since,

after *Chisom*, it is not open to question whether the electoral model makes any sense for the judicial branch of government, we conclude § 2 applies in principle to retention elections." *Id.* at 709-10.

In *Bradley*, voters brought "a § 2 vote dilution claim," but "given the extent and timing of the change in statutory scheme any challenge the Voters might have had to the former system is now moot." *Id.* at 710. But this Court expressly recognized that "[f]uture litigation may prove that the 'totality of the circumstances' under the revised system shows a violation of the mandates of the Voting Rights Act." *Id.*

The district court held that "it is clear that the VRA applies to judicial elections." (S.App.A9.) Before the district court, the State argued that *Bradley* decided the issue before the district court. (ECF 82 p.10.) The district court rejected this argument because *Bradley* held "that the plaintiffs' challenge to the former system was moot," "the *Bradley* decision decides nothing except that § 2 applies to retention elections, and leaves the door open for precisely the claim the Plaintiffs make here." (S.App.A12-13.) It cannot be disputed that the VRA applies to judicial elections and retention votes.

B. Indiana Superior courts are state entities with state-wide jurisdiction.

Superior courts in Indiana are state courts with state-wide jurisdiction. The judges are state employees. They all apply state trial court rules. Litigants can file suit in any judicial circuit in the state. The connection this case has to Lake County is that the Legislature has used Lake County's boundaries to define the 31st judicial circuit's boundaries and imposed lesser voting rights there.

The Indiana Constitution provides that the "judicial power of the State shall be vested in one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish." Ind. Const. Art. 7 § 1. The Indiana Constitution requires that the "State shall, from time to time, be divided into judicial circuits." Ind. Const. Art. 7 § 7. The Indiana Legislature has divided the State into judicial circuits. Ind. Code Art. 33-33. Generally, the Indiana Legislature has chosen to have state judicial circuits coincide with the geographic boundaries of counties. *Id.* But that is not always the case: Dearborn and Ohio Counties constitute one judicial circuit. Ind. Code § 33-33-15-1(a). Nothing in the Indiana Constitution would preclude the Legislature from establishing judicial circuit boundaries unrelated to county boundaries.

The Indiana Supreme Court has held that Indiana's trial courts are state entities. "Indiana's judiciary is a branch of our state's constitutional system." *Lake Cnty. Bd. of Comm'rs v. State*, 181 N.E.3d 960, 963 (Ind. 2022). "[T]rial courts are units of the judicial branch of our state's constitutional system and thus state entities." *Id.* at 961. Indiana "trial courts are state entities." *Id.* at 967.

All Indiana state trial courts apply the Indiana Trial Rules: "Except as otherwise provided, these rules govern the procedure and practice in all courts of the state of Indiana . . . ." Ind. Trial Rule 1. State superior courts have state-wide jurisdiction, and litigants in Indiana may file suit in any judicial circuit: "Any case may be venued, commenced and decided in any court in any county . . . ." Ind. Trial Rule 75(A). There are also preferred venue rules. One such preferred venue is "the county where the greater percentage of individual defendants included in the complaint resides." Ind. Trial Rule 75(A)(1).

Essentially, defendants can have home field advantage. For most Indiana residents, this means home field before a judge they elected. For Lake County residents, it means home field before a judge appointed by the Governor and subject to a retention vote.

Each judicial circuit has at least one circuit court judge, Ind. Code Art. 33-33, but some judicial circuits have far more. Ind. Code § 33-33-53-1(b) ("There are nine (9) judges of the Monroe circuit court."). In total, Indiana has 115 elected circuit court judges. Ind. Code Art. 33-33; Directory of Courts & Clerks in Indiana, available at https://www.in.gov/courts/files/court-directory.pdf.

The Indiana Legislature has also created superior courts. Ind. Code Art. 33-33. In several counties, there are no superior court judges. *See, e.g.*, Ind. Code § 33-33-53-1(b) (providing that the tenth judicial circuit has nine circuit court judges and has no superior courts). Other judicial circuits have many superior court judges. *See, e.g.*, Ind. Code § 33-33-49-6(a) (providing that Marion County has thirty-six superior court judges). In all, there are 204 superior court judges in Indiana. Directory of Courts & Clerks in Indiana, *supra*.

Throughout the state, when a vacancy arises "in the office of Judge of any Court; the Governor shall fill such vacancy, by appointment, which shall expire, when a successor shall have been elected and qualified." Ind. Const. Art. V, § 18. That is, in every judicial circuit throughout the state, the Governor fills judicial vacancies, as provided by the Indiana Constitution. For example, when a vacancy recently arose in Hamilton County's judicial circuit, the Governor "appointed Andrew Bloch to serve as Judge of the Hamilton

Circuit Court." *Order Revoking Judge Pro Tempore Appointment* (Jan. 16, 2024) https://www.in.gov/courts/files/order-judges-2024-24S-MS-16.pdf.

The Governor also appoints judges to fill vacancies in Lake County, but his authority there is constrained. In Lake, St. Joseph, Marion, and Allen Counties, the Legislature has provided that the Governor fills a vacancy on a superior court from a list of nominees compiled by a judicial nominating commission ("JNC"). Ind. Code §§ 33-33-2-43, 33-33-45-38, 33-33-49-13.4(c), 33-33-71-40. That is, the JNC process constrains the Governor's appointment authority by limiting whom he may appoint. Ind. Code § 33-33-45-38(a) (providing the Governor appoints a superior court judge in Lake County from a list of candidates provided by the JNC). But the Governor fills judicial vacancies in all judicial circuits. Through this case, the Voters do not challenge the JNC appointment process because it does not involve voting, and the Governor fills all vacancies under the Indiana Constitution, but in some judicial circuits the JNC process limits the Governor's authority.

This case is about what happens next. In all judicial circuits, the Indiana Constitution requires that circuit court judges are elected: "a Judge for each circuit shall be elected by the voters thereof." Ind. Const. Art. 7 § 7. In eighty-eight judicial circuits, voters also elect superior court judges. Ind. Code Art. 33-33. In Allen County, voters elect superior court judges in non-partisan elections. Ind. Code § 33-33-2-9.

But in Lake, Marion, and St. Joseph Counties, voters vote only on whether to retain the appointed superior court judge. Ind. Code §§ 33-33-45-42, 33-33-49-13.2, 33-33-71-43. Voters in these counties cannot vote in primaries for superior court judges. *Id.* If the voters

vote not to retain the judge, then the Governor would appoint a new judge to that court. *See, e.g.*, Ind. Code § 33-33-45-42(d). A successful vote not to retain a judge results in a then unknown person later filling that position. *Id.*

In summary, state superior court judges are state judges that have state-wide jurisdiction. The Governor appoints judges throughout the state when there is a vacancy. In certain counties, such as Lake County, a JNC constrains the Governor's authority to fill vacancies. However, 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.

C. Indiana's method for selecting judges violates the VRA under *Brnovich*.

The district court concluded that "[i]n my view, these five [*Brnovich*] factors weigh heavily in favor of Plaintiffs' § 2 claim here." (S.App.A18.) As to whether Indiana's differential voting scheme complies with the VRA, the district court would have concluded that "*Brnovich* requires that question to be answered 'no.'" (*Id.* at p.21.) The district court was correct that under the factors discussed in *Brnovich*, Indiana's unequal voting procedures for state superior court judges violates the VRA.

1. The United States Supreme Court's *Brnovich* decision.

The United States Supreme Court recently analyzed Section 2 of the VRA in *Brnovich*. The Court began its analysis by looking at Section 2's language. The "political processes leading to nomination and election . . . must be 'equally open' to minority and non-minority groups alike," meaning "without restrictions as to who may participate." *Brnovich*, 141 S.Ct. at 2337. "Thus, equal openness and equal opportunity are not separate

requirements. Instead, equal opportunity helps to explain the meaning of equal openness." *Id.* at 2337-38. Opportunity means "a combination of circumstances, time, and *place* suitable or favorable for a particular activity or action." *Id.* at 2338 (internal quotation omitted) (emphasis added). "The statute's reference to equal 'opportunity' may stretch that concept to some degree to include consideration of a person's ability to *use* the means that are equally open. But equal openness remains the touchstone." *Id.* (emphasis in original).

Section 2 "requires consideration of 'the totality of circumstances.' Thus, any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered." *Id.* The Court then looked to five non-exclusive "important circumstances." *Id.*

"First, the size of the burden imposed by a challenged voting rule is highly relevant. The concepts of 'open[ness]' and 'opportunity' connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important." *Id.* (alteration in original). Second, "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982 is a relevant consideration." *Id.* Third, the "size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider." *Id.* at 2339. Fourth, "courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision." *Id.* Fifth, "the strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account." *Id.*

The Court then held that some factors from vote dilution cases "are plainly inapplicable in a case involving a challenge to a facially neutral time, place, or manner voting rule." *Id.* at 2340. The Court concluded that factors such as "racially polarized voting, racially tinged campaign appeals, and the election of minority-group candidates" were not to "be disregarded," "[b]ut their relevance is much less direct." *Id.* The Court also rejected a "disparate-impact model." *Id.* But the majority agreed "that an 'abridgment' of the right to vote under § 2 does not require outright denial of the right; that § 2 does not demand proof of discriminatory purpose; and that a 'facially neutral' law or practice may violate that provision." *Id.* at 2341.

2. Retention votes are a significant abridgement of the right to vote.

Retention votes are a significant prerequisite or abridgment to the right to vote and are a significant burden on the Voters' right to vote and select judicial candidates of their choice.

First, *Brnovich* instructs that a court must analyze "the size of burden imposed by a challenged voting rule," and the "concepts of 'open[ness]' and 'opportunity' connote the absence of obstacles and burdens that block or seriously hinder voting." 141 S.Ct. at 2338.

In the judicial circuit that encompasses Lake County, voters only vote on whether to retain the Governor's appointee to the superior court. Ind. Code § 33-33-45-42(b). There is no choice of candidates. If the judge is not retained, the Governor appoints a then unknown person of the Governor's choosing to fill the vacancy. Ind. Code § 33-33-45-42(d).

This limited voting right is a sever abridgment of the right to vote. The VRA prohibits a "prerequisite to voting. . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). "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). A retention vote, therefore, is the ultimate "prerequisite to voting" because it limits the ballot to an up or down vote on a single, previously-appointed person, with an unknown replacement if they are not retained.

The VRA preserves the "opportunity" "to participate in the political process and *to elect representatives of their choice*." 52 U.S.C. § 10301(b) (emphasis added). A retention vote does not allow voters "to elect representatives of their choice." It is an up or down vote, and the result of a no vote is an unknown person being appointed to fill the vacancy. Ind. Code § 33-33-45-42. That is in no sense "elect[ing] representatives of *their* choice." 52 U.S.C. § 10301(b) (emphasis added).

"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) (holding that the system of electing judges in Marion County violated the First Amendment because it did not provide for contested elections). As a result, the fact that voters in Lake County only vote on whether to retain a judge is a severe burden on the right to vote because they have no choice between competing ideas or candidates.

Indiana expressly seeks to curtail "competing ideas" in retention votes, "and thus severely burdens the right to vote." *Id.* In partisan judicial elections, candidates have wide latitude to campaign and let voters decide between "competing ideas." Ind. Code of Judicial Conduct § 4.2(B) (permitting candidates for partisan election to "speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature," to "publicly endorse and contribute to candidates for election to public office running in the same election cycle," and to "identify himself or herself as a candidate of a political organization"). In contrast, judges up for retention votes are essentially under a gag order unless challenged:

> (D) A candidate for retention to judicial office ***whose candidacy has drawn active opposition may campaign*** in response and may:
>
> (1) establish a campaign committee and accept campaign contributions pursuant to the provisions of Rule 4.4;
>
> (2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature; and
>
> (3) seek, accept, and use endorsements from any appropriate person or organization other than a political organization.

Ind. Code of Judicial Conduct § 4.2(D) (emphasis added). The point of retention elections is not to present "competing ideas." *Common Cause*, 800 F.3d at 928. Apparently, the only way for a voter to know whether to vote to retain a judge that is not challenged is to independently research that judge's decisions. This is system designed to eliminate choice and competing ideas and is a sever burden on the right to vote.

Scholars too have critiqued that retention votes do not provide a real choice. "To begin with, scholars have noted that the design of retention referenda leaves voters with very little information about judicial candidates: without another candidate in the race, there is no one with an interest in providing information to the public about the incumbent." Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 Mo. L. Rev. 675, 683 (2009).

Retention votes "prevent[] any individual from opposing the incumbent directly; they eliminate indications of partisanship that allow voters to translate their policy preferences cost-effectively into votes; and they increase voter fears of uncertainty by forcing a choice of retaining or rejecting the incumbent before the voter knows the names of potential replacements." James Bopp, Jr., *The Perils of Merit Selection*, 46 Ind. L. Rev. 87, 97 (2013). Confirming the illusory nature of retention votes "judges in retention elections have been retained 98.9% of the time." *Id.* Retention votes present no choice at all and are a severe burden on voting rights.

A retention vote is a severely burdened right to vote that does not present an opportunity to elect a representative of choice.

3. Analyzing the state's entire voting system.

The extreme burden caused by retention votes is revealed when one considers the opportunities provided by Indiana's entire system of voting because Indiana provides the opportunity to vote for superior court judges in open elections in the vast majority of the state.

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. "[W]here a state provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means." *Id.*

The VRA precludes the "abridgement" of the right to vote "on account of race or color." 52 U.S.C. § 10301(a). Abridge means "[t]o reduce or diminish." Black's Law Dictionary (11th ed. 2019). "The term 'abridge,' however—whose core meaning is 'shorten' . . .—necessarily entails a comparison." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (2000). "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice." *Id.* As a result, to determine whether voting rights for state superior court have been abridged necessitates looking at the opportunities to vote for superior court judges throughout Indiana.

If all voters across the State of Indiana faced the same burden faced by Lake County voters, then Indiana's voting would be equally open and present equal opportunity and there would be no abridgement of the right to vote. But to determine whether there is equal openness and opportunity, the Supreme Court has dictated that "courts must consider the opportunities provided by a State's entire system of voting." *Brnovich*, 141 S.Ct. at 2339. In eighty-eight of Indiana's judicial circuits, voters vote on superior court judges in open elections. Ind. Code Art. 33-33. Those voters get a meaningful choice.

For the individual named plaintiffs in this case—or any other Lake, Marion, or St. Joseph County resident—to vote in full and open judicial elections for all judgeships would require them to move to a different county at least thirty days before an election. Ind. Code § 3-7-13-1. For named plaintiff Indiana Senator Lonnie Randolph, he could no

longer represent the district he was elected to represent. Ind. Code § 2-1-9-9 (providing that "the senator shall represent, after November 7, 2022, the district established under IC 2-1-15 in which the senator's legal residence is located").

Forcing residents to move at least thirty days before an election and give up an elective office to have full voting rights "seriously hinder[s] voting." *Brnovich*, 141 S.Ct. at 2338. As this Court has recognized, "citizens lumped into a district can't extricate themselves except by moving, so clever district-line drawing can disadvantage minorities." *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014). Lake County residents face one of two enormous burdens. First, they can chose to vote in a retention vote that provides no meaningful choice, or second, they can "extricate themselves" from this lesser voting right by moving to another judicial circuit at least thirty days before an election to enjoy full voting rights enjoyed by other Indiana residents. The burden Indiana's voting system imposes on Lake County residents is substantial, supporting that the system violates the VRA. *Brnovich*, 141 S.Ct. at 2338.

In response, the State argued that "Indiana's selection process for Lake County superior court judges does not create a severe burden because all Lake County registered voters have the same burden." (ECF 99 p.5.) This argument ignores that *Brnovich* dictates 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 (emphasis added). The VRA "commands[] consideration of 'the totality of circumstances' that have a bearing on whether *a State* makes voting 'equally open' *to all* and gives *everyone* an equal opportunity to vote." *Id.* at 2341 (emphases added). A court should consider

"a person's ability to *use* means that are equally open." *Id.* at 2338-39. In *Brnovich*, the Supreme Court "consider[ed] Arizona's 'political processes' *as a whole*." *Id.* at 2344 (emphasis added).

The State's argument that a court should only look to Lake County – when deciding whether voting on state superior court judges is equally open – conflicts with *Brnovich*'s command to look to "a state's entire system" of voting. 141 S. Ct. at 2339. The question is whether Indiana "makes voting 'equally open' to all and gives everyone an equal opportunity to vote." *Id.* at 2341. Looking at Indiana's entire system of voting on state superior court judges, it is not equally open because voters in eighty-eight judicial circuits vote in full and open elections and voters in three state judicial circuits only receive the lesser right of voting on whether to retain judges. For a Lake County resident "to *use* means equally open"—that is, vote in full elections—the resident would have to move to another judicial circuit. *Id.* at 2338-39. Indiana's "entire system" of voting is not "equally open," and there is certainly not "equal opportunity" to vote in full elections for state superior court judges. As a result, this two-tiered system of voting violates the VRA.

The district court rejected the State's argument in this regard:

> In the recent VRA § 2 case of *Brnovich v. Democratic National Committee*, 594 U.S. ----, 141 S.Ct. 2321, 210 L.Ed.2d 753 (2021), the United States Supreme Court advised that "courts must consider the opportunities provided by *a State's entire system of voting* when assessing the burden imposed by a challenged provision." *Id.* at 2339 (emphasis added.) Furthermore, the Indiana Supreme Court has observed that: "trial courts are units of the judicial branch of our state's constitutional system and thus state entities." *Lake County Board of Commissioners v. State*, 181 N.E.3d 960, 961 (2022). In a situation that involves 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, I'm at a loss to see why the appropriate comparison isn't the State's entire voting system.
>
> In other words, why is the pertinent comparison not to other counties in which the State has granted the vote for selection of judges of the State? Suppose the evidence in this case were even more blunt than it already is, and there was legislative history indicating the Lake County procedure was enacted because the legislature believed Lake County had too many black people who couldn't be entrusted with electing qualified judges. Would the State still insist that § 2 of the VRA was not implicated? Is racial bias immunized when it motivates exclusion of an electorate with a high minority population rather than a more overt exclusion of minority voters specifically?

(S.App.A15); *cf. Suesz v. Med-1 Solutions*, 757 F.3d 636, 639 (7th Cir. 2014) (jointly writing for the en banc majority, Judges Posner and Hamilton jointly writing for an en banc majority) (holding that the determination of the relevant "judicial district" for purposes of a federal statute, in that case the FDCPA, should be analyzed in light of the underlying purposes of that federal statute).

Moreover, the State's blithe assertion that everyone in Lake County is subject to the same restriction is completely undercut by the State's admission that lesser voting rights are maintained in Lake County ***because*** it is diverse. The State has admitted that lesser voting rights are imposed in Lake County because it is "highly diverse." (ECF 81-1 p.6.) In its Reply Brief, the state contended that Lake County is diverse in many regards, including "cultural backgrounds," "ethnic backgrounds," and "racial backgrounds." (ECF 110 p.3.) The Supreme Court has instructed courts to consider "any circumstance that has a logical bearing on whether voting is 'equally open' and affords equal 'opportunity' may be considered." *Brnovich*, 141 S.Ct. at 2338. One such circumstance is a state intentionally abridging voting rights in high minority areas and forcing them to move if

they want full and open voting rights. A state cannot intentionally impose restrictions in a high-minority area and then defend that action by claiming that non-minorities were also burdened by the scheme.

In conclusion, the state's entire voting system is not equally open when one has to move to a different judicial district to exercise full voting rights. The State has expressly imposed these burdens because Lake County is "highly diverse." This favors a finding that Indiana's differential voting scheme violates the VRA.

4. **Indiana's current method of selecting trial court judges was not widespread in 1982.**

Next, a court must analyze "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982." *Brnovich*, 141 S.Ct. at 2338. The "degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account." *Id.* In *Brnovich*, the Court reasoned that Congress could not have intended the 1982 amendments to the VRA to outlaw in person voting because it was ubiquitous at that time. *Id.* at 2339.

Until the early 1970s, all Indiana residents elected all judges. *See, e.g.*, Burns Indiana Statute 4-1902 (1968) (providing for elections for Lake County superior court judge) (ECF 84-5 p.2). In the early 1970s, the Legislature implemented retention votes in Lake and St. Joseph Counties. Ind. Code §§ 33-5-29.5-42 (1973) (ECF 84-6 pp.2-3); 33-5-40-47 (1973) (ECF 84-6 p.4). During the decade preceding this change Lake County "saw an increase in its minority population of 6.4 percent" and St. Joseph County saw a 2.7 percent increase. (ECF 84-4 p.7.) From 1972 to 1982, the Legislature implemented the same

retention-vote system in Allen County. Ind. Code §§ 33-5-5.1-44 (1973) (ECF 84-7 p.2). But in 1982, the Legislature re-enacted elections for superior court judges in Allen County. Ind. Code § 33-5-5.1-29(b) (ECF 84-8 p.3). In 1982, superior court judges in Marion County were elected. Ind. Code § 33-5-35.1-24 (1981) (ECF 84-9 p.4). As a result, in 1982, retention votes for superior court judges were in effect *only* in Lake and St. Joseph Counties.

The Voters have located only two other states in 1982 that had trial courts, in only limited portions of the state, selected by judicial nomination. (ECF 84-4 p.26.) Missouri first implemented its plan in 1940, *African-American Voting Rights v. State of Missouri*, 994 F.Supp. 1105, 1112 (E.D. Mo. 1997), and Arizona first implemented its plan in 1974.[3] Ariz. Const. Art. 6 § 37 (using judicial selection for trial courts in counties with populations greater than 250,000). A plan that appears to have existed only in three states (two of which for around a decade) was certainly not "standard practice" or "in widespread use" in 1982. *Brnovich*, 141 S.Ct. at 2338.

Two of these uncommon systems have been challenged as violating the VRA. In *African-American Voting Rights*, 994 F.Supp. at 1122-26, the district court analyzed retention votes under factors from *Thornburg v. Gingles*, 478 U.S. 30 (1986), which was a vote dilution case. The district court concluded that "plaintiffs have offered (at best) marginal evidence of vote fragmentation or dilution." *Id.* at 1126. Similarly, in *Bradley*, 154 F.3d at 710, this Court analyzed whether retention votes in Lake County constituted "vote dilution," but concluded because of recent changes to the law "that the record was too thin

[3] Kansas too has a similar hybrid system for trial courts but counties can opt into the plan. Ks. Const. Art. 3 § 6.

to support declaratory relief against the new system." Both cases applied the *Gingles* vote-dilution factors, and neither court addressed whether such a system was in widespread use in 1982.

But *Brnovich* held that the *Gingles* vote-dilution factors' "relevance is much less direct" in non-vote dilution cases. 141 S.Ct. at 2340. Retention votes for superior court judges in Lake County do not dilute minority votes. Instead, it abridges the right to vote, giving voters in Lake County "less opportunity than other members of the electorate to participate in the political process," 52 U.S.C. 10301(b), because Lake County residents get only an up or down retention vote on superior court judges they did not choose, while voters in the vast majority of Indiana's judicial circuits get to vote in general elections for a *specific* judge of their choice. This case would appear to be the first time that a court has been called upon to apply the *Brnovich* factors to the uncommon system of having different voting procedures for state trial court judges in different parts of a state.

It is certainly true that in 1982 eleven other states (in addition to Indiana, Missouri, and Arizona) had implemented some version of the Missouri Plan (appointment followed by a retention vote), but these systems applied statewide. Alaska Const. Art. 4 § 5 (providing for appointment of all judges by the governor); Colo. Const. Art. 6 § 20; Del. Const. Art. 4 § 3; Haw. Const. Art. 6 § 3; Iowa Const. Art. V § 15; Kan. Const. Art. 3 § 6; *Opinions of the Justs. to the Senate*, 372 Mass. 883, 905, 363 N.E.2d 652, 666 (1977) (providing Legislature "may not create courts the judges of which are not to be appointed by the Governor with the consent of Council"); Md. Const. Part Art. IV § 5a; Neb. Const. Art. V § 21; Utah Const. Art. VIII § 8; Vt. Const. Ch. II § 32; Wyo. Const. Art. 5 § 4. In such

circumstances, the system is "equally open" and provides equal "opportunity" for all voters to participate and does not violate the VRA. 52 U.S.C. § 10301. Indiana, for example, selects appellate (as opposed to trial) judges using a statewide system of appointment followed by retention votes. Ind. Const. Art. 7 § 10. The Voters have not challenged Indiana's system for appellate judges because it is "equally open" to all Indiana voters, in that no one gets to choose the appellate judge of their choice, and everyone votes on whether to retain the appointed appellate judge.

The district court rejected the State's arguments on this issue:

> Applying this factor, the State Defendants would consider only the process in place *in Lake County* in 1982. [DE 99 at 6-7.] They cite the *Quinn* decision for that limitation, but *Quinn* preceded *Brnovich* and engages in no consideration of what was standard practice in 1982 when § 2 was amended. Finally, *Brnovich* itself shows that this factor is concerned with what was standard practice in 1982 not just in a particular jurisdiction, but across multiple States or other political subdivisions across the United States. *Brnovich*, 141 S.Ct. at 2338-39.

(S.App.A19.) The district court was correct that *Brnovich* rejects that a court should only ask what was common in one particular locality in 1982: "the degree to which a challenged rule has a long pedigree or is in widespread use *in the United States* is a circumstance that must be taken into account." 41 S.Ct. at 2339 (emphasis added). The State's focus only on whether the challenged system was in place in Lake County in 1982 was misplaced.

Because Indiana's current differential scheme for voting on trial judges was not "widespread" or "standard practice" in the United States in 1982, it supports finding that violates the VRA. *Brnovich*, 141 S.Ct. at 2338.

5. Indiana's system has an outsized impact on minority voters.

A court next looks 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 size of any disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential." *Id.* The differential voting schemes implemented by the Indiana Legislature have an out-sized impact on minority voters. Indeed, the State maintains that this is on purpose.

2020 census data reveals that Lake, Marion, and St. Joseph Counties are the most diverse in population 18 and over:

Geographic Area	Percentage Minority
Indiana	20%
Marion County	44%
Lake County	41.59%
St. Joseph County	24.9%
Allen County	24.58%

(ECF 86 pp.3-5 ¶¶ 17, 21, 25, 29, 33; ECF 101 pp.3-10 (State did not dispute any of these statistics).) Counties with abridged voting rights "are home to approximately 86.7% of African American residents and 51.4% [of] Latino residents." (ECF 84-4 p.8.)

The majority of Indiana's black residents live in Marion, Lake, and St. Joseph Counties:

Geographic Area	Number of Black Voting Age Residents
Marion County	193,504
Lake County	89,806

St. Joseph County	25,176
Indiana	467,861

(ECF 86 pp.2-4 ¶¶ 8-12; ECF 101 pp.3-10.)

Sixty-six percent of Indiana's black voting age residents live in a County that only has retention votes for superior court judges:

Voting Age Black Residents Living in Lake, St. Joseph, and Marion Counties	308,486
Total Voting Age Black Residents in Indiana	467,861
Percentage of Voting Age Black Residents Living in a County with only retention votes for superior court Judges	65.94%

(*Id.* ¶¶ 8-13.) In contrast, more than 80% of Indiana's voting age white residents live in judicial circuits where all judges are elected. (*Id.* p.5 ¶ 37)

By implementing retention votes for superior court judges in only Lake, Marion, and St. Joseph Counties, Indiana has provided 66% of its black population with lesser retention votes for superior court judges, while over 80% of Indiana's white residents vote for all judges in elections. This disparity demonstrates that Indiana's system violates the VRA. *Brnovich*, 141 S.Ct. at 2339. Indeed, the State maintains that this is not a coincidence, but was on purpose because Lake County is "highly diverse." (ECF 81-1 p.6.)

The district court concluded the Voters' "undisputed statistics" demonstrated "a huge disparity":

> The next *Brnovich* factor is the size of the disparities in the challenged rule's impact on different racial and ethnic groups. Based on the undisputed

> statistics, more than 80% of white Hoosiers of voting age live in judicial circuits where all state court judges are elected. [DE 101 at ¶¶34-37.] By comparison, the three counties (including Lake County) in which superior court judges are appointed subject to retention votes are home to 66% of Indiana's black voting age residents. [DE 101 at ¶13.] To 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.) The district court was correct.

The size of the disparities of the challenged rule's impact strongly favors a conclusion that it violates the VRA. Indeed, the State maintains that this was done because Lake County is "highly diverse."

6. State's interests.

"Finally, the strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account." *Brnovich*, 141 S.Ct. at 2339. The district court rejected the State's proffered reasons for the differential treatment:

> The fifth and final *Brnovich* factor is the strength of the State's interests served by the challenged voting rule. The State Defendants identify a number of interests they say support the merit selection of trial court judges "in a highly populated, heavy caseload area where the public has expressed concern regarding partisan bias." [DE 99 at 8.] These are "maintaining public confidence, judicial independence, impartiality, fairness, and judicial accountability." [*Id.*] The State Defendants do not offer evidence to support that the Lake County selection process is particularly suited to meet any of those interests, or that the identified interests are somehow especially associated with a judicial district because it is "highly populated" and has a "heavy caseload." [By the way, note the convenient omission here of Mr. Bonnet's use of "highly diverse" as a pertinent descriptor of why Lake County requires a merit selection process.]

(S.App.A20-21.) A retention vote, as opposed to an open election, does nothing to alleviate a heavy caseload.

In addition, even if retention votes somehow resulted in "judicial independence, impartiality, fairness, and judicial accountability," it is entirely unclear why this would only be done in some state superior courts. (ECF 99 at p.8.) As previously detailed, state superior courts are courts of state-wide jurisdiction. Ind. Trial Rule 75. Lake County residents can be hailed into any judicial circuit in the state. *Id.* Apparently, according to the State, when a Lake County resident is sued in another judicial circuit, they would face judges that are not independent or impartial, but when other litigants come to Lake County they receive the benefit of an independent judiciary.

Moreover, even if a high population and caseload somehow necessitated retention votes, Allen County and Hamilton County also have high populations, (287,203 and 253,195 respectively) (ECF 84-10 pp.3, 10), but they do not have retention votes for superior court judges. Ind. Code §§ 33-33-2-9 (providing for elections for Allen County judges); 33-33-29-2 (providing that Hamilton County "superior court is a standard superior court"); 33-29-1-3 (providing for the election of standard superior court judges). But as the State has admitted, retention votes are only necessary "in a highly populated *and* highly diverse jurisdiction like Lake County." (ECF 81-1 p.6) (emphasis added.) Allen and Hamilton Counties are not nearly as diverse as Lake County, (75% of Allen County and 82% of Hamilton County's voting age populations are white (ECF 84-10 pp.3, 10)), explaining the different treatment they receive. The State's interests do not justify Indiana's differential voting scheme.

In conclusion, under the "totality of circumstances," Indiana providing voters in Lake County the lesser voting right of a retention vote for appointed judges (under Ind.

Code § 33-33-45-42) violates the VRA. *Id.* This Court should then remand this matter to the district court to "afford the jurisdiction an opportunity to remedy the violation." *Harper v. City of Chicago Heights*, 223 F.3d 593, 599-600 (7th Cir. 2000). The most straightforward fix for Indiana to remedy the violation of the VRA would be for the Legislature to make all superior court judges elected, as was previously the case in Indiana, but there could potentially be other solutions, such as providing for retention votes statewide. Regardless, Indiana should be afforded the opportunity to remedy the violations.

D. *Quinn* is distinguishable and is inconsistent with *Brnovich*.

1. *Quinn* is not controlling here.

This Court should conclude that *Quinn* is distinguishable from this case and not controlling because it involved an appointed local school board position, not a state office, and this Court has already held the VRA applies to state superior court retention votes. Moreover, *Quinn* did not address selective reduction of voting rights only in high minority areas.

In *Bradley*, 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." 154 F.3d at 709. That holding directly applies to this case and dictates that the VRA applies to retention votes for state superior court judges. And as previously detailed, under the *Brnovich* factors, the lesser voting rights in Lake County violate the VRA.

In *Quinn*, 887 F.3d at 323, "the Mayor of Chicago appoints the City's Board of Education." This Court held that "unless an office is elected, § 2 as a whole does not apply." *Id.* at 325. The school board at issue in *Quinn* was not elected in any sense, and therefore,

this Court held the VRA did not apply. In contrast, state superior court judges in Lake County are elected in retention votes, and this Court has already held that the VRA applies to these votes. *Bradley*, 154 F.3d at 709. *Quinn* is not controlling here.

In *Quinn*, the plaintiffs argued that it violated the VRA that voters in other areas of Illinois elected their school board members, but this Court rejected this argument:

> There is a further problem with plaintiffs' position. Black and Latino citizens do not vote for the school board in Chicago, but neither does anyone else. Every member of the electorate is treated identically, which is what § 2 requires. See, e.g., *Frank v. Walker*, 768 F.3d 744, 752–55 (7th Cir. 2014). It is misleading to say that political processes in Chicago are not equally open to participation by persons of all races. Every voter in Chicago exercises the same influence when voting for a candidate who has a particular position on education—as well as policing, zoning, the parks, and the many other issues any city must address. Every voter throughout Illinois influences education policy. Some do this by electing a school board, some by electing a mayor who appoints a board, but influence is there for everyone to wield.

Id. at 325. Each issue highlighted by this Court—"policing, zoning, the parks"—are local issues that this Court recognized "any city must address." *Id.* Citizens of Chicago could influence these local issues by voting for a Mayor. Citizens of other cities could influence their school board by voting for the school board members.

But a fundamental difference between this case and *Quinn* is that state superior court judges are not a local office. As the district court correctly recognized here, this case involves state court judges:

> Furthermore, the Indiana Supreme Court has observed that: "trial courts are units of the judicial branch of our state's constitutional system and thus state entities." *Lake County Board of Commissioners v. State*, 181 N.E.3d 960, 961 (2022). In a situation that involves 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, I'm at a loss to see why the appropriate comparison isn't the State's entire voting system.

(S.App.A15.) *Quinn* did not address the issue this case presents—does the VRA tolerate a state implementing lesser voting rights in high minority areas of a state for a state office that is elected in open elections in other parts of the state. Indiana superior courts have state-wide jurisdiction, and a Lake County resident could be hailed into any court of this state. *See* Ind. Trial Rule 75. This is fundamentally different than a local school board.

Quinn was based on the observation in *Chisolm* that "Louisiana could, of course, exclude its *judiciary* from the coverage of the Voting Rights Act by changing to a *system* in which judges are *appointed*." 887 F.3d at 324 (quoting *Chisolm*, 501 U.S. at 401) (emphases added). But *Chisolm* did not address or hold that a state could implement lesser voting rights for state court judges only in high minority areas. The references to "Louisiana," its "judiciary," and "a system in which judges are appointed," support that the Supreme Court envisioned the State removing its entire judiciary to appointed positions. This does not in any way support that a state can provide lesser voting rights for judges in high-minority areas. Because neither *Quinn* nor *Chisolm* addressed the issue this Court faces, *Quinn* is not controlling.

This Court should conclude that *Quinn* is not controlling because this Court has already held that retention votes for state superior court judges are subject to the VRA, *Quinn* involved an appointed local position, and *Quinn* did not address selective reduction of voting rights only in high minority areas.

2. *Quinn* is inconsistent with *Brnovich*.

To the extent this Court concludes that *Quinn* is not distinguishable, then this Court should reconsider it in light of *Brnovich*.

This Court is "bound to follow a decision of the Supreme Court." *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). "Stare decisis cannot justify adherence to an approach that Supreme Court precedent forecloses." *Fed. Trade Comm'n v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019), *cert. granted* and then *denied*.[4] "We do not take lightly suggestions to overrule circuit precedent, and therefore require a compelling reason to do so." *Int'l Union of Operating Engineers Loc. 139 v. Schimel*, 863 F.3d 674, 677 (7th Cir. 2017) (internal quotation and citation omitted). One such compelling reason would be changes in "Supreme Court" precedent. *Id.*

In this case, *Quinn* could be read to support that in determining whether voting rights have been curtailed a court should look only to the locality (reasoning that no one in Chicago voted on school board members), and the district court here "agree[d] with the State Defendants that *Quinn* is controlling." (S.App.A16.) In contrast to *Quinn*, *Brnovich* dictates that a court "*must* consider the opportunities provided by a State's entire system of voting." 141 S.Ct. at 2339 (emphasis added). *Brnovich* "consider[ed] Arizona's 'political processes' *as a whole*." *Id.* at 2344 (emphasis added). Because the Supreme Court has directed that a court must look to a state's entire system of voting, "Supreme Court

[4] When an "opinion overrules circuit precedent and creates a circuit split," the panel circulates the decision "under Circuit Rule 40(e) to all judges in active service" to determine if it should be heard en banc. *Id.* at 767 n.1.

precedent forecloses" exclusively focusing on the locality. *Credit Bureau Ctr., LLC*, 937 F.3d at 767.

As the district court concluded, "Plaintiffs argue that *Brnovich* has changed the landscape and mandates a different result here. [DE 100 at 11.] As discussed below, I think they're correct, but with *Quinn* in the way, that is a matter only the Circuit can address." (S.App.A17.) The Voters believe the district court is correct and that to the extent this Court concludes that *Quinn* conflicts with *Brnovich*, this Court is "bound to follow" *Brnovich*. *Colby*, 811 F.2d at 1123.

In addition, *Brnovich* made clear that § 2 "requires consideration of 'the totality of circumstances.' Thus, 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. As a result, to the extent that *Quinn* looked to the fact that all Chicago residents were treated the same, that is one circumstance. It does not foreclose this Court from considering the fact that these are state superior court judges and they are elected in open elections in most of the state, but not in high minority areas. Another circumstance is that the State has admitted that it maintains lesser voting rights in Lake County because it is "highly diverse." (ECF 81-1 p.6.) To the extent *Quinn* can be read to mandate consideration of one circumstance (are all residents of a locality treated equally), *Brnovich* dictates that any other circumstance relating to equal openness and opportunity must also be considered.

To the extent this Court concludes that *Quinn* is not distinguishable, this Court should reconsider it in light of *Brnovich*.

II. The State admission of a discriminatory purpose mandated a conclusion that Indiana's differential voting scheme violates the VRA.

The State has designated evidence that it maintains the current voting scheme for the purpose of "limiting political influence" in a "highly diverse jurisdiction like Lake County." (ECF 81-1 p.6 ¶ 18.) The State has admitted that it limits voting rights based on race, and this establishes a violation of the VRA. The State's designated evidence demonstrates that Plaintiffs are entitled to summary judgment.

In *Chisom*, the Supreme Court recognized that "plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system." 501 U.S. at 394 n.21 (internal quotation omitted). But proof of discriminatory intent would plainly prove a violation of the VRA: "Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice . . . results in minorities being denied equal access to the political process." *Id.* The Supreme Court has recently emphasized that the "law in the States shall be the same for the black as well as for the white." *Students for Fair Admissions, Inc. v. Harvard College*, 143 S.Ct. 2141, 2159 (2023) (internal quotation omitted). The Supreme Court has "routinely affirm[ed] lower court decisions that invalidated all manner of race-based state action." *Id.* at 2160. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . .," and "cannot be overridden except in the most extraordinary case." *Id.* at 2162-63 (internal quotation omitted).

The VRA does not countenance intentional discrimination because it was enacted to bring an "end to the denial of the right to vote based on race." *Brnovich*, 141 S.Ct. at

2330. In *Brnovich*, the Supreme Court instructed that courts should "start with the text of VRA § 2." *Id.* at 2337. The VRA provides that "[n]o . . . prerequisite to voting . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color*." 52 U.S.C. 10301(a) (emphasis added). Clearly, the prohibition on abridging votes rights "on account of race or color" precludes intentionally doing so.

Courts have repeatedly concluded that intentional discrimination violates the VRA. In *Frank*, 768 F.3d at 754, this Court recognized that if a state made "changes for the purpose of curtailing black voting" that this "would clearly violate § 2." The "showing of intent is sufficient to constitute a violation of section 2." *McMillan v. Escambia Cnty., Fla.*, 748 F.2d 1037, 1046 (5th Cir. 1984). "Congress intended that fulfilling *either* the more restrictive intent test or the results test would be sufficient to show a violation of section 2." *Id.* "Specifically, the plaintiff may prove *either:* (1) discriminatory intent on the part of legislators or other officials responsible for creating or maintaining the challenged system; *or* (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group." *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (emphasis added). Today, a plaintiff can prove a violation either through "intent" or through "objective factors." *Id.* "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

The Indiana Legislature has abridged the voting rights in Lake County, by only allowing votes on retaining superior court judges, while the vast majority of the state enjoys full voting rights. Ind. Code Articles 33-29, 33-33; Ind. Code § 33-33-45-42. The question then is whether this "abridgement [is] . . . on account of race or color." 52 U.S.C. 10301(a). In support of its motion for summary judgment, the State submitted the affidavit of the Jerold Bonnet, General Counsel of the Office of the Indiana Secretary of State. (ECF 81-1 ¶ 2.) The "Secretary of State 'is the state's chief election official.'" *Common Cause of Ind. v. Ind. Sec'y of State*, No. 1:12-cv-01603-RLY-DML, 2013 WL 12284648 *2 (S.D. Ind. Sep. 6, 2013) (quoting Ind. Code § 3-6-3.7-1). In his affidavit, Mr. Bonnet explained that voting rights are limited in Lake County ***because*** it is "highly diverse":

> 18. A merit selection process is essential in a highly populated and highly diverse jurisdiction like Lake County to provide safeguards for limiting political influence in Lake County superior courts.

(ECF 81-1 p.6) (highlighting added).

This is a stunning admission. Mr. Bonnet admits that the thirty-first judicial circuit has lesser voting rights to "limit[] political influence in Lake County" because it is "highly diverse." (ECF 81-1 p.6) (highlighting added). The VRA prohibits abridgment of voting rights "on account of race or color." 52 U.S.C. 10301(a). The State has expressly admitted that voting rights are limited in Lake County "on account of race or color" and this is a violation of the VRA. A statutory "change[] for the purpose of curtailing black voting" "would clearly violate § 2." *Frank*, 768 F.3d at 754. Given the State's blatant admission

that voting in Lake County was limited because it is "highly diverse," this Court should conclude that Indiana's intentional abridgment of voting rights "on account of race or color" violates the VRA. 52 U.S.C. 10301(a).

In its Reply Brief, the State contended that its use of the term "highly diverse" did "not solely pertain to a racial equivalency." (ECF 110 p.3.) The State contended that race was only part of the reason why voters in Lake County received lesser voting rights: "the populace of Lake County is 'highly diverse' because of its high population that is composed of, amongst other things, those with difference in 1) socioeconomic status; 2) cultural backgrounds; 3) ***ethnic backgrounds***; 4) academic or professional backgrounds; and/or 5) ***racial backgrounds***." (*Id.*) (emphases added). The State's reply confirms that race is part of the reason that lesser voting rights are maintained in judicial elections in Lake County. The State does not cite any authority to support that the VRA permits curtailing voting rights "on account of race or color," 52 U.S.C. 10301(a), so long as race is not the "sole[]" reason.

The State's admission that race is a factor in maintaining lesser voting rights in Lake County should be fatal to its defense of the challenged scheme. "Determining whether invidious discriminatory purpose was *a* motivating factor demands inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 266 (emphasis added). Here, there is direct evidence that race was "a motivating factor" in the challenged scheme because the State has admitted as much. As the district court concluded that "the State has *all but admitted* that there is a race-based

motivation behind this paradigm." (S.App.A10.) "Let's not beat around the bush: the reference to 'diversity' is a not so subtle reference to race." (*Id.* p.11.)

The district court then essentially found that the State's admission established a violation of the VRA: "In 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." (S.App.A11.) The district court, however, looked to case law interpreting the VRA and concluded that this Court's decision in *Quinn* mandated a decision in the State's favor. (*Id.* at pp.11-21.) But none of those cases involved a situation where the State admitted a racial motivation behind curtailing voting rights. As this Court has recognized, if a state made "changes for the purpose of curtailing black voting" this "would clearly violate § 2." *Frank*, 768 F.3d at 754. As a result, this Court should conclude that the State imposing lesser voting rights because Lake County is "highly diverse" violates the VRA.

Conclusion

For the reasons stated above, 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: March 11, 2024

Respectfully submitted,

s/ Bryan H. Babb

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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 Fed. R. App. P. 32(a)(7)(B), which requires a principal brief contain no more than 13,000 words, as supplemented by Circuit Rule 32, because it contains 12,295 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.

Dated: March 11, 2024

/s/ Bryan H. Babb
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Certificate of Service

I certify that on March 11, 2024, I caused the foregoing "Plaintiffs-Appellants' 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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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' APPENDIX

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TABLE OF CONTENTS

Page

Circuit Rule 30(d) Statement

The undersigned certifies that the appendix contains all the materials required by Circuit Rule 30(a) and (b).

Dated: March 11, 2024

/s/ Bryan H. Babb
Bryan H. Babb (#21535-49)
- COUNSEL OF RECORD –

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CITY OF HAMMOND, THOMAS McDERMOTT, EDUARDO FONTANEZ, and LONNIE RANDOLPH,	)	
Plaintiffs,	)	
v.	)	**2:21CV160-PPS**
LAKE COUNTY JUDICIAL NOMINATING COMMISSION, the STATE OF INDIANA, SECRETARY OF STATE DIEGO MORALES, and the LAKE COUNTY BOARD OF ELECTIONS,	)	
Defendants.	)	

OPINION AND ORDER

Here in Indiana, people in Marion, Lake, and St. Joseph Counties, where there is a high percentage of black voters, are unable to vote for superior court judges. By contrast, in the other 89 counties in Indiana where there is a comparatively low percentage of black voters, those folks are trusted with the franchise; they elect their superior court judges. Why does Indiana treat citizens in the three counties with a large percentage of black voters differently from everyone else in the State? That question is the principal subject of this litigation. In legal terms the issue is whether this construct violates the Voting Rights Act.

Thomas McDermott is the mayor of Hammond, Indiana, a resident of Lake County, Indiana, an attorney, and a registered voter. [DE 58 at ¶5; DE 97 at ¶2.] Lonnie Randolph is an attorney, registered voter, and a State Senator representing Lake County,

Indiana. [DE 58 at ¶6; DE 97 at ¶3.] Randolph is African-American. [DE 58 at ¶6.] Eduardo Fontanez is Hispanic and a registered voter in Lake County. [*Id*. at ¶7; DE 97 at ¶4.] He is also an attorney and previously served as an East Chicago City Court judge. [DE 58 at ¶8; DE 97 at ¶4.] Named as defendants are the Lake County Judicial Nominating Commission, the State of Indiana, the Indiana Secretary of State, and the Lake County Board of Elections. By agreement of the parties, the Judicial Nominating Commission was previously dismissed without prejudice. [DE 71.]

Count I of the Second Amended Complaint is a claim that the "lesser and unequal voting rights" of Lake County citizens violate Section 2 of the Voting Rights Act, 52 U.S.C. §10301. [DE 58 at 6.] Counts II, II and IV are state law claims for alleged violations of the Indiana Constitution.

There are three motions for summary judgment pending, one by the plaintiffs, one by the State/Secretary of State, and one by the County Board of Elections. While I have substantial doubts that the Voting Rights Act isn't being violated by the differential treatment of Lake County voters, I am bound by controlling authority from the Seventh Circuit that holds otherwise. I will therefore grant the State Defendants' summary judgment motion on the Voting Rights Act claim and will relinquish jurisdiction over the supplemental state law claims.

Summary Judgment Standards

Rule 56 of the Federal Rules of Civil Procedure provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any

material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A motion for summary judgment has been described as the time in a lawsuit to "put up or shut up." *Grant v. Trustees of Indiana University*, 870 F.3d 562, 568 (7th Cir. 2017). A genuine dispute of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "With cross summary judgment motions, we construe all facts and inferences therefrom in favor of the party against whom the motion under consideration is made." *Markel Ins. Co. v. Rau*, 954 F.3d 1012, 1016 (7th Cir. 2020) (internal quotation omitted).

The determination what material facts are undisputed is obviously critical in the summary judgment context, and the rule requires the parties to support facts, and disputes of fact, by "citing to particular parts of materials in the record," or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed.R.Civ.P. 56(c)(1).

The defendant Board of Elections is the local governmental unit that oversees elections in Lake County, Indiana, and administers the retention votes for Lake County Superior Court judges. [DE 109 at ¶42.] In response to plaintiffs' Statement of Material Facts, the Election Board repeatedly responds in a perplexing way as if it were answering the complaint instead of responding to a summary judgment. The Election Board tells me that "it is without sufficient knowledge to admit or dispute" the fact, but

asserts that the fact "has not been expressly pled against the Election Board." [DE 103 at ¶¶2, 4-38 .] Whatever else the Election Board intends by this assertion, it is not a dispute of the fact asserted by plaintiffs, and lacks either the citation to evidence required in support of each dispute of fact or a showing that plaintiffs have not cited admissible evidence to support the fact. Fed.R.Civ.P. 56(c)(1); N.D.Ind. L.R. 56-1(b)(2)(C). Neither does the Election Board seek relief under Rule 56(d) by attempting to show that, for specified reasons, it cannot present facts essential to justify its opposition to the facts plaintiffs assert. I will therefore consider each fact responded to in this way to be undisputed by the Election Board.

Undisputed Facts

For over a century, judges at all levels in Indiana were selected through partisan elections. [DE 97 at ¶5.] This system led to criticism regarding impartiality, judicial independence, and the continued ability to select high quality trial judges. [*Id.* at ¶6.] The system now in place in Indiana for selecting superior court judges is a bit of a hodgepodge. Essentially, each county has a state statute governing its judicial selection process. Ind. Code § 33-33, *et. seq.* Although the statute refers to them as "judicial circuits," the boundaries of each county are what define the circuits. *Id.* In an overwhelming number of counties, superior court judges are still selected by the franchise. *Id.* But in three of the most densely populated counties—Marion, Lake and St. Joseph Counties—superior court judges are appointed by the governor. *Id.*

According to 2020 Census data, 193,504 black residents 18 years old or older reside in Marion County, Indiana. [DE 101 at ¶8.] In Lake County, there are 89,806 black residents age 18 or older. [*Id.* at ¶9.] And in St. Joseph County, Indiana, there are 25,176 black residents age 18 or older. [*Id.* at ¶10.] These three counties make up nearly 66% of the total black residents in Indiana (308,486 out of Indiana's total of 467,861 black residents age 18 or older). [*Id.* at ¶¶11-13.] Put another way, two-thirds of black people of voting age in Indiana—those who reside in Lake, Marion and St. Joseph Counties—are unable to vote to elect the vast majority of their state court judges. [*Id.* at ¶13.] By contrast, 81% of whites who reside in Indiana live in one of the 89 Indiana counties other than Lake, Marion and St. Joseph Counties, and they *can* vote to elect all their superior court judges. [*Id.* at ¶¶34-37.]

To explain how we got to this patchwork of judicial selection in Indiana we need to go back in time for a bit of a history lesson. In 1965, the Indiana General Assembly established the Judicial Study Commission, and later initiated a constitutional amendment process that led to changes in the selection process for Indiana judges. [DE 97 at ¶8.] Plaintiffs do not dispute that the Commission was tasked with evaluating Indiana's judicial selection process (at that time through partisan political elections) and considering selection alternatives, as part of a state judicial reform movement. [DE 97 at ¶9.]

As part of the evaluation, the Commission sent questionnaires to Indiana attorneys and judges. [*Id.* at ¶10.] The questionnaire results showed that 79% of

Indiana attorneys surveyed believed the partisan election system "could not continue to provide...highly qualified trial judges," and 87% of Indiana attorney-respondents believed politics influenced judicial decisions to varying degrees. [*Id*. at ¶11, quoting the Affidavit of Jerold A. Bonnet, General Counsel of the Indiana Secretary of State, quoting Edward W. Najam, Jr., *Merit Selection in Indiana: The Foundation for a Fair and Impartial Judiciary*, 46 IND. L.REV. 15, at *19 (2013) (DE 81-2 at 4).][1]

The General Assembly subsequently initiated a constitutional amendment process that included revisions to Article 7 of the Indiana Constitution adopting merit selection for Supreme Court and Court of Appeals judges. [DE 97 at ¶12.]

In 1972, Senate Enrolled Act 22 directed the Judicial Study Commission to conduct a study specific to Lake County's court system and to report its findings during the 1973 legislative session. [DE 97 at ¶15.][2] A report purporting to be the Institute for Court Management's "A Program for the Improved Administration of Justice in Lake County" is submitted as Exhibit 4 to the State Defendants' motion for summary judgment, and the Plaintiffs do not challenge it per se. [DE 81-4.] Bonnet's Affidavit presents his synopsis of certain findings of the ICM report: "The majority of Lake

[1] The State Defendants repeat Mr. Bonnet's mis-quote of the Najam article and of the 1965 questionnaire, in that Bonnet (and the State Defendants) refer to political influence on judicial "selection" when the article quotes the survey as referring to judicial "decisions." [DE 81-2 at 4.] In the present context, the error is potentially significant. I have corrected the finding to refer to judicial "decisions."

[2] The State Defendants introduced the "Judicial Study Commission" into their statement of material facts, providing as a shorthand "the Commission." [DE 97 at ¶8.] The State Defendants thereafter repeatedly refer to "the JNC," which looks like it refers to the defendant "Judicial Nominating Commission" rather than "JSC" for "Judicial Study Commission." From context, however, each appearance of "JNC" appears to represent the Judicial Study Commission.

County attorneys and judges ICM interviewed were dissatisfied with partisan election of judges in Lake County, which ICM found contributed to an attorney-managed administration of justice, unequal caseloads among Lake County judges, inconsistent application of Indiana's trial rules and an excessive number of cases being sent by Lake County judges to venues in outside counties." [DE 81-1 at 5 (Bonnet Affidavit, ¶14).]

In 1973, the Indiana General Assembly adopted a hybrid appointment and retention merit system known as "The Missouri Plan" for selecting Lake County superior court judges in the civil, criminal and juvenile divisions. [DE 97 at ¶17.] A version of this hybrid system remains in effect today for Lake County Superior Court judges, in which merit selection is used to appoint judges, with retention elections for incumbents. [*Id*. at ¶18.] Here's how it works: under Indiana Code §33-33-45-38, a Lake County Superior Court vacancy "shall be filled by appointment of the governor from a list of five (5) nominees presented to the governor by the judicial nominating commission." [DE 97 at ¶19.] Appointees then face retention elections after two years, and, if retained, can serve successive 6-year terms, each subject to a retention vote, as prescribed in Ind. Code §33-33-45-41. [*Id*.]

In 2008, the Judicial Conference of Indiana developed a Strategic Plan for the future of Indiana's judicial branch, steered by a Strategic Planning Committee organized by former Chief Justice Randall T. Shephard. [DE 97 at ¶20.] The plan describes a decades-long measure to reform Indiana's judicial branch, including moving towards a

unified court system, a state-centralized funding source, and merit selection of all trial court judges, among other things. [DE 97 at ¶21.]

By the affidavit of General Counsel Bonnet, the State Defendants express the following view: "A merit selection process is essential in a highly populated and highly diverse jurisdiction like Lake County to provide safeguards for limiting political influence in Lake County superior courts." [DE 81-1 at ¶18.] The State identifies the purposes of the Lake County selection process as "to ensure fairness, integrity, impartial administration of justice, and judicial accountability." [DE 81-1 at ¶21.] The State believes it "has a compelling interest in judicial independence, impartiality, fairness, and judicial accountability" that "has long required some specialization in Indiana counties to ensure the judicial selection process reflects the diversity of the jurisdiction." [DE 81-1 at ¶22.]

Discussion

The Voting Rights Act Claim – Count I

Section 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. §10301(a). Section 10301(b) provides that:

> [a] violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by

> subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Plaintiffs contend that the VRA is violated because in Lake County, due to its high minority population, residents are unable to vote for superior court judges, and instead "only retain the lesser and unequal right to vote in retention elections" for judges of the superior court. [DE 58 at ¶¶44-46.][3]

For starters, it is clear that the VRA applies to judicial elections. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991). But, of course, a state isn't required to elect judges. A state is permitted to pick judges through an electoral process or through an appointive process, and the VRA has nothing to say about that choice. *Id*. at 401. But can Indiana, consistent with the VRA, pick and choose on a county-by-county basis to appoint *state* judicial officers in some counties while electing them in others? That's the question to be answered in this case.

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[3] There is an initial question of whether there is a private right of action to enforce §2 of the VRA. The Eighth Circuit recently issued a rather surprising opinion concluding that there is not. *Arkansas State Conference NAACP v. Arkansas Board of Appointment, et al.*, No. 22-1395, ___ F.4th ___, 2023 WL 8011300, at *1 (8th Cir. Nov. 20, 2023). The decision was roundly criticized by Chief Judge Smith in dissent, *id*. at **12-15, citing the years of contrary precedent, including numerous cases of the United States Supreme Court in which a private plaintiff's right to bring §2 challenges has not been questioned, or even, as in *Morse v. Republican Party of Virginia*, 517 U.S 186, 232, 240 (1996), was expressly presumed to exist. "Furthermore, since the Court decided *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.'" *Id.* at *16, quoting *Coca v. City of Dodge City*, No. 22-1274-EFM, ___ F.Supp.3d at ___, 2023 WL 2987708, at *4 (D.Kan. June 12, 2023) (Melgren, C.J.). My analysis is unaffected by the Eighth Circuit's *Arkansas* decision, both because it is not binding in this Circuit and because, like Chief Judge Smith and Chief Judge Melgren, I recognize the "simple fact" that a majority of Supreme Court justices "explicitly recognized a private right of action under Section 2 in *Morse*," and the Court "has yet to overrule itself on that precise issue." *Coca*, 2023 WL 2987708, at *5. *See also Arkansas State Conference NAACP*, 2023 WL 8011300, at *16.

Plaintiffs argue that the differential judicial selection procedure used in Indiana is a standard, practice or procedure that abridges Lake County residents' right to vote on account of race or color, in violation of §10301(a). As Plaintiffs put it, "The State has designated evidence that it maintains the current voting scheme for the purpose of 'limiting political influence' in a 'highly diverse jurisdiction like Lake County.'" [DE 100 at 7, quoting DE 81-1 at ¶18.] In other words, the Plaintiffs seek summary judgment on the VRA claim because the State's reliance on "diversity" as a basis for the judicial selection system the State has constructed is tantamount to an *admission* of a violation of §10301(a) on its face. [DE 100 at 10-11.] In terms of §10301(b), the Plaintiffs' position is that the political process leading to nomination or election of superior court judges is not equally open to the participation of Lake County residents as it is to residents of most other judicial districts in Indiana, and this is so due to considerations of race or color.

Plaintiffs' theory for a violation of §2 seems sound to me. For starters, the statistics alone are jarring. How is it that 66% of blacks in Indiana are prevented from voting for superior court judge when more than 80% of whites can? More startling still is the fact that, as I just noted, the State has *all but admitted* that there is a race-based motivation behind this paradigm. Look no further than the affidavit submitted by the Secretary of State's General Counsel, Mr. Bonnet: "A merit selection process is *essential in a highly populated and highly diverse* jurisdiction like Lake County to provide safeguards for limiting political influence in Lake County superior courts." Affidavit of Jerold A. Bonnet, General Counsel to the Indiana Secretary of State [DE 81-1], ¶18 (emphasis

added). Let's not beat around the bush: the reference to "diversity" is a not so subtle reference to race. The State thus appears to acknowledge that the "diversity" of Lake County, meaning the significant presence of racial minorities among its electorate, is a reason that superior court judges are not chosen by election but by a merit selection process instead. In 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.

For its part, the State Defendants seek summary judgment on the Voting Rights Act claim by arguing that "the VRA does not apply to judicial *appointments*, but rather to judicial elections." [DE 99 at 2 (emphasis in original); *see also* DE 82 at 9.] While that may be a correct statement of law, it's a straw man argument. It misses the whole point of the Plaintiffs' theory of the case, which I'll discuss in a moment. But before we get there, we need to first examine the cases in support of the State's undisputed legal proposition: *Sailors v. Bd. of Educ. of County of Kent*, 387 U.S. 105 (1967), *Bradley v. Work*, 154 F.3d 704 (7th Cir. 1998) and *Quinn v. Illinois*, 887 F.3d 322 (7th Cir. 2018).

Let's start with *Sailors.* The State's reliance on that case badly misses the mark, because it involved an Equal Protection challenge to the organization of school boards in Michigan and did not involve a claim under the VRA. What the Supreme Court held in *Sailors* was that "[a]t least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here." *Id*. at 111. Importantly, *Sailors* contained no claim of race discrimination. But

interestingly, in an aside, the Supreme Court noted that "[a] State cannot of course manipulate its political subdivisions so as to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race." *Id.*, 376 U.S. at 108. Plaintiffs would doubtless see an application of that dictum to this case.

The next case relied on by the Defendants—*Bradley v. Work*, 154 F.3d 704 (7th Cir. 1998)—is equally beside the point. The State claims that *Bradley* involved "the same claims as Plaintiffs make here," and the Court of Appeals "held that this same statutory scheme presented no violation of the VRA." [DE 99 at 4.] In *Bradley*, black Lake County voters appealed to the Seventh Circuit the issue "whether the system of appointment plus retention elections for the Superior Court judges...violates either the Voting Rights Act or the Constitution." *Id.* at 706. Characterizing the issue presented as "a §2 vote dilution claim," the court joined the district court in assuming that the voters had "satisfied the three preliminary [*Thornburg v.*] *Gingles* [478 U.S. 30, 50-51 (1986)] criteria, and moved directly to the totality of the circumstances inquiry."

Arriving at the meat of the matter, the district court had punted, deciding that, because the state legislature had amended the judicial nomination process during the course of the litigation, the court "should not issue a declaratory judgment on either the old, superseded electoral process, or the new, untested one." *Bradley*, 154 F.3d at 710. Without explaining the *Bradley* plaintiffs' theory as to why the Lake County process at that time violated the VRA, the Seventh Circuit agreed that the plaintiffs' challenge to

the former system was moot. *Id.* Rather than doom any VRA challenge to the new scheme, the Seventh Circuit said that "[f]uture litigation may prove that the 'totality of the circumstances' under the revised system shows a violation of the mandates of the Voting Rights Act." *Id.* So the *Bradley* decision decides nothing except that §2 applies to retention elections, and leaves the door open for precisely the claim the Plaintiffs make here.

Finally, the State relies on *Quinn v. Illinois*, 887 F.3d 322 (7th Cir. 2018), which in contrast to *Bradley* and *Sailors,* is much more supportive of the State's argument. *Quinn* involved an action by voters challenging the Illinois law providing that Chicago School Board members are appointed by the mayor. The voters contended that because school board members elsewhere in Illinois are elected, the lack of such a vote in Chicago disproportionately impacted minority voters. *Id.* at 323. Here's how the Seventh Circuit summarized the *Quinn* plaintiffs' position: "They observe that everyone in Rockford or Springfield or Peoria can vote for local school boards while black and Latino citizens in Chicago cannot; the political process in Illinois thus is not 'equally open' to minority voters." *Quinn*, 887 F.3d at 324. The court rejected this in summary fashion for two reasons. The first reason given was that "as far as we are aware no court has understood §2 to require that any office be filled by election," and §2 does not apply "unless an office is elected." *Id.* at 324 (citing cases), 325. The second reason blithely given for rejecting the plaintiffs' VRA claim was that in Chicago no one votes for the school board, so all are "treated identically, which is what §2 requires." *Id.*

In *Quinn*, the voter-plaintiffs' claim was not that a particular appointed position (school board member) should be elected instead, but that State law abridged only certain citizens' ability to vote for the position, based on race.[4] No explanation was given in *Quinn*, and none is offered by the State Defendants here, as to *why* §2 has no application to the voters' challenge, although it is expressly based on the lack of equal voting rights on account of race or color, which is the very heart of §2.

Reliance on the principle that the VRA does not require superior court judges to be elected seems a trick of misdirection based on a mischaracterization of Plaintiffs' actual claim, and it ignores the racial discrimination element of that claim. The Plaintiffs before me do not dispute that the VRA would not be violated if Indiana enacted a statewide system of appointment of all judges (or all judges of a certain type). [DE 106 at 1.] Their argument is not that all superior court judges must be elected rather than appointed. Instead, they posit that if Indiana law permits superior court judges to be elected in 89 judicial districts (which happen to be overwhelmingly white), then Indiana law should do the same thing in Lake County where there is a high percentage of black voters. In short, in the language of the VRA, if voters in Lake County are denied the right to elect superior court judges on account of the racial makeup of the county, §2 is violated because they "have less opportunity" to participate in the political process than other voters around the state.

[4] Note that §10301(a) prohibits the abridgement of any citizen's right to vote "on account of race or color," *not* "on account of *his or her* race or color." So §2 is concerned with any denial of a right to vote that is based on considerations of race, and is not limited to denial of voting rights to would-be voters of a particular race.

Similarly as to its second rationale, *Quinn* offers no explanation why the City of Chicago rather than the State of Illinois is the relevant jurisdiction for §2 analysis. In the recent VRA §2 case of *Brnovich v. Democratic National Committee*, 594 U.S. ___, 141 S.Ct. 2321 (2021), the United States Supreme Court advised that "courts must consider the opportunities provided by *a State's entire system of voting* when assessing the burden imposed by a challenged provision." *Id*. at 2339 (emphasis added.) Furthermore, the Indiana Supreme Court has observed that: "trial courts are units of the judicial branch of our state's constitutional system and thus state entities." *Lake County Board of Commissioners v. State*, 181 N.E.3d 960, 961 (2022). In a situation that involves 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, I'm at a loss to see why the appropriate comparison isn't the State's entire voting system.

In other words, why is the pertinent comparison not to other counties in which the State has granted the vote for selection of judges of the State? Suppose the evidence in this case were even more blunt than it already is, and there was legislative history indicating the Lake County procedure was enacted because the legislature believed Lake County had too many black people who couldn't be entrusted with electing qualified judges. Would the State still insist that §2 of the VRA was not implicated? Is racial bias immunized when it motivates exclusion of an electorate with a high minority population rather than a more overt exclusion of minority voters specifically?

With respect, I find the Seventh Circuit's reasoning in *Quinn,* and the cases in which it cites, to be unsatisfying, especially in light of *Brnovich*, as discussed below. Nonetheless, *Quinn* is controlling law and I am not free to disregard it where it plainly applies. And I agree with the State Defendants that *Quinn* is controlling here. The argument of both the Plaintiffs here and in *Quinn* is that state law deprives their political subdivision (and them) of the right to vote for a particular officeholder on account of race or color, and that the nomination or election of those officeholders is not equally open to participation of their electorate as compared to members of other political subdivisions of the state.

Plaintiffs attempt to distinguish *Quinn* by arguing that "it involved an appointed local position, and it may be appropriate in those circumstances to focus only on the locality." [DE 106 at 4.] By contrast, Plaintiffs suggest that "this case involves a state office that all voters across the state vote on." [*Id.*] The distinction, for which Plaintiffs cite no authority, is not persuasive. Both cases challenge a state law that treats one local political subdivision (a school board or a judicial district) differently from the vast majority of the state's other political subdivisions of the same type. The Superior Courts of Indiana, like the school boards of Illinois, derive their existence from and are governed by the State Constitution and State law. Plaintiffs don't succeed in establishing a meaningful distinction between the Chicago School Board on the one hand, and Lake County's Superior Court on the other, which appear to be analogous for purposes of the Seventh Circuit's analysis of similar claims under §2 of the VRA.

In short, whether or not I find *Quinn* persuasive, I must apply it here and grant the State Defendants summary judgment on Count I, finding as a matter of law that §2 of the VRA is not violated by the Lake County Superior Court judicial selection procedure provided in Article 33 Chapter 45 of the Indiana Code.

Plaintiffs argue that *Brnovich* has changed the landscape and mandates a different result here. [DE 100 at 11.] As discussed below, I think they're correct, but with *Quinn* in the way, that is a matter that only the Circuit can address. *Brnovich* involved a challenge under §2 of the VRA to several restrictions on "how ballots are collected and counted" in Arizona. *Brnovich*, 141 S.Ct. at 2330. The challenged regulations restricted the place of in-person voting on election day in some counties, and prohibited collection of mail-in ballots by anyone besides election officials, mail carriers, and a voter's caregiver or members of his household or family. *Id*. The Supreme Court considered the reach of §2:

> The key requirement is that the political processes leading to nomination and election (here, the process of voting) must be "equally open" to minority and non-minority groups alike, and the most relevant definition of the term "open," as used in §2(b), is "without restrictions as to who may participate," Random House Dictionary of the English Language 1008 (J. Stein ed. 1966), or "requiring no special status, identification, or permit for entry or participation," Webster's Third New International Dictionary 1579 (1976).

Id. at 2337. The majority held that §2 can be violated by a facially neutral law or practice, and proof of discriminatory purpose is not required. *Id*. at 2341. The Supreme Court held that "neither Arizona's out-of-precinct rule nor its ballot-collection law violates §2 of the VRA." *Id*. at 2343-44.

Brnovich highlights five important "guideposts" relevant to the required consideration of "the totality of circumstances" under §2(b). *Id*. at 2336. These are: (1) the size of the burden imposed by a challenged voting rule, (2) whether a voting rule departs from what was standard practice in 1982 when §2 was amended, (3) the size of any disparate impact on different racial or ethnic groups, (4) "the opportunities provided by a State's entire system of voting," and (5) the strength of the State's interests served by the challenged voting rule. *Id*. at 2338-39. In my view, these five factors weigh heavily in favor of Plaintiffs' §2 claim here.

Applying the five *Brnovich* factors requires consideration of "a State's entire system of voting when assessing the burden imposed by a challenged provision." *Id*. at 2339. As I've noted, the State asserts, without any supporting explanation or cite to any authority, that "the correct electorate to compare Lake County minority voters to is other Lake County registered voters and not Indiana as a whole." [DE 99 at 5.] This makes little sense to me. As I noted above, the superior courts in Indiana are State-created entities and State law has created the procedure that is challenged as violating §2. Why is our comparison limited to Lake County? What's more, *Brnovich* observes that the required consideration of a State's entire system of voting "follows from §2(b)'s reference to the collective concept of a State's 'political processes' and its 'political process' as a whole." This language appears to support comparison of Lake County voters' rights with those of other counties across the State of Indiana.

Plaintiffs contend that the *Brnovich* substantial burden factor favors their argument, because they would have to move to a different county in order to be able vote for superior court judges – a substantial burden in order to enjoy the same voting privileges as residents of most other Indiana counties. [DE 85 at 14.] By limiting consideration just to Lake County's citizens, the State Defendants contend there is no burden associated with the challenged law because all Lake County residents are treated the same. [DE 99 at 5-6.] As I've indicated, I don't find Defendants' analysis limiting consideration to just the Lake County electorate to be a fair characterization of Plaintiffs' theory or to be supported by a cogent legal explanation.

As for the factor of widespread currency in 1982, Plaintiffs argue that the hybrid Indiana system was not in widespread use, pointing out that in 1982 only two other states besides Indiana (Missouri and Arizona) had such systems in which only certain portions of the state had trial judges selected by nomination rather than election. [DE 85 at 16.] Applying this factor, the State Defendants would consider only the process in place *in Lake County* in 1982. [DE 99 at 6-7.] They cite the *Quinn* decision for that limitation, but *Quinn* preceded *Brnovich* and engages in no consideration of what was standard practice in 1982 when §2 was amended. Finally, *Brnovich* itself shows that this factor is concerned with what was standard practice in 1982 not just in a particular jurisdiction, but across multiple States or other political subdivisions across the United States. *Brnovich*, 141 S.Ct. at 2338-39.

The next *Brnovich* factor is the size of the disparities in the challenged rule's impact on different racial and ethnic groups. Based on the undisputed statistics, more than 80% of white Hoosiers of voting age live in judicial circuits where all state court judges are elected. [DE 101 at ¶¶34-37.] By comparison, the three counties (including Lake County) in which superior court judges are appointed subject to retention votes are home to 66% of Indiana's black voting age residents. [DE 101 at ¶13.] To say the least, as it relates to choosing judges, there's a huge disparity between how Indiana's white and black citizens are treated.

Next, *Brnovich* considers the opportunities provided by the State's entire system of voting. This factor clearly militates in favor of a finding that §2 is violated, in that state law overtly treats Lake County differently than most of Indiana's other counties, and the State has admitted that the motivation for the difference is, in part, the racial and ethnic "diversity" of Lake County. The State Defendants again attempt to moot both the racial disparity and relative opportunities factors by assuming that there are no relevant disparities because only Lake County citizens are considered, an analysis I have found wanting. [DE 99 at 7-8.]

The fifth and final *Brnovich* factor is the strength of the State's interests served by the challenged voting rule. The State Defendants identify a number of interests they say support the merit selection of trial court judges "in a highly populated, heavy caseload area where the public has expressed concern regarding partisan bias." [DE 99 at 8.] These are "maintaining public confidence, judicial independence, impartiality, fairness,

and judicial accountability." [*Id.*] The State Defendants do not offer evidence to support that the Lake County selection process is particularly suited to meet any of those interests, or that the identified interests are somehow especially associated with a judicial district because it is "highly populated" and has a "heavy caseload." [By the way, note the convenient omission here of Mr. Bonnet's use of "highly diverse" as a pertinent descriptor of why Lake County requires a merit selection process.]

* * *

Whether appointing superior court judges is a better system then electing them is neither here nor there for present purposes. The question instead is whether under the VRA the General Assembly can withhold the right to vote for a state judicial office in counties with a high percentage of black voters while conferring the right in counties with overwhelmingly white voters. In my view, *Brnovich* requires that question to be answered "no." But because *Quinn* stands in the way, summary judgment will be granted in favor of the Defendants.

State Law Claims

The remaining claims, Counts II, III and IV of the Second Amended Complaint, assert that the Lake County judicial selection and retention process violates various articles of the Indiana Constitution. [DE 58 at 9-11.] Having disposed of the only federal claim, I will decline to exercise supplemental jurisdiction over the state law claims asserted in Plaintiffs' Second Amended Complaint. Under 28 U.S.C. §1367(c)(1) and (3), I may decline to exercise supplemental jurisdiction over these state constitutional claims

because they raise novel or complex issues of State law, and because I am dismissing all claims over which I had original jurisdiction. The "usual practice" and the "presumption" in this circuit is that a district court will relinquish supplemental jurisdiction over any state law claims when all federal claims are dismissed prior to trial. *Hagan v. Quinn*, 867 F.3d 816, 830 (7th Cir. 2017). *See also Al's Service Center v. BP Products North America, Inc.*, 599 F.3d 720, 727 (7th Cir. 2010); *Phillips v. Baxter*, 768 Fed.Appx. 555, 560 (7th Cir. 2019). To the extent the motions for summary judgment address the merits of any of the state law claims, the motions will be denied without prejudice.

Lake County Board of Elections

The Lake County Board of Elections is named as a defendant in this case. As expressed in its own summary judgment motion and in its responses to the motions of the parties, the Board's position amounts to an assertion that it shouldn't be here. Given the disposition of Count I on the merits and the determination not to exercise supplemental jurisdiction over the remaining state law claims, I dispose of the case without needing to reach the question whether the Board is an appropriate defendant. The Board's motion for summary judgment will be denied without prejudice.

ACCORDINGLY:

Plaintiffs' Motion for Summary Judgment [DE 84] is DENIED IN PART as to Count I of Plaintiffs' Second Amended Complaint.

The Motion for Summary Judgment of Defendants State of Indiana and Secretary of State Diego Morales [DE 81] is GRANTED IN PART as to Count I of Plaintiffs' Second Amended Complaint.

In all other respects, the pending motions for summary judgment [DE 81, 84, 87] are DENIED WITHOUT PREJUDICE.

Counts II, III and IV of the Plaintiffs' Second Amended Complaint are DISMISSED WITHOUT PREJUDICE pursuant to 28 U.S.C. §1367(c)(1) and (3), as the court declines to exercise supplemental jurisdiction over those claims.

The Clerk shall enter judgment in favor of Defendants State of Indiana and Secretary of State Diego Morales and against all Plaintiffs on Count I of Plaintiffs' Second Amended Complaint. The judgment shall reflect the dismissal without prejudice of Counts II, III and IV of Plaintiffs' Second Amended Complaint pursuant to 28 U.S.C. 1367(c)(1) and (3). The case will thereby be CLOSED.

SO ORDERED.

ENTERED: January 4, 2024.

/s/ Philip P. Simon
UNITED STATES DISTRICT JUDGE

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Indiana

HAMMOND CITY OF,

THOMAS MCDERMOTT
in his official and personal capacities,

EDUARDO FONTANEZ,

LONNIE RANDOLPH
in his personal capacity

Plaintiffs

v. **Civil Action No.** 2:21-cv-160

LAKE COUNTY JUDICIAL NOMINATING COMMISSION
Terminated: 02/21/2023,

HOLLY SULLIVAN
Secretary of State, in her official capacity
Terminated: 06/01/2023,

LAKE COUNTY BOARD OF ELECTIONS,

DIEGO MORALES
Secretary of State, in his official capacity

Defendants

v.

STATE OF INDIANA

Intervenor Defendant

AMENDED JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one):*

☐ the Plaintiff(s),_____recover from the Defendant(s)_____ damages in the amount of _____, plus post-judgment interest at the rate of ____ %

☐ the plaintiff recover nothing, the action is dismissed on the merits, and the defendant _____ recover costs from the plaintiff _____.

X Other: Judgment is ENTERED in favor of defendants State of Indiana and Secretary of State Diego Morales and against plaintiffs Hammond City of, Thomas McDermott, Eduardo Fontanez and Lonnie Randolph on Count I of Plaintiffs' Second Amended Complaint. This case is DISMISSED WITHOUT PREJUDICE of Counts II, III and IV of Plaintiffs' Second Amended Complaint pursuant to 28 U.S.C. §1367(c)(1) and (3).

This action was (*check one):*

☐ tried to a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

X decided by Judge Philip P. Simon on Motions for Summary Judgment.

DATE: January 12, 2024

CHANDA J. BERTA, CLERK

by s/N. Long
Signature of Clerk or Deputy Clerk