No. 24-1125

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CITY OF HAMMOND, ET AL.,

Plaintiffs-Appellants,

v.

LAKE COUNTY BOARD OF ELECTIONS, ET AL.,

Defendants-Appellees.

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

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Lake County Board of Elections whose true name is Lake County Board of Elections and Registration

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INTRODUCTION

After an independent commission found that partisan judicial elections were contributing to pervasive dissatisfaction with the judicial system in Lake County, Indiana switched from a system of popular elections to merit selection for the Lake County Superior Court. Under this system, a diverse, nonpartisan commission that reflects the composition of Lake County proposes a slate of judicial candidates to the Indiana Governor, who then appoints one to the county court. Sitting judges are later subject to retention elections by the Lake County electorate.

Plaintiffs challenge merit selection, arguing that § 2 of the Voting Rights Act (VRA) requires Lake County judges to be elected rather than appointed. By its terms, however, § 2 simply requires "political processes leading to *nomination or election*" to be equally open to all members of "the electorate." 52 U.S.C. § 10301(b) (emphasis added). "[N]o court has understood § 2 to require that any office be filled by election." *Quinn v. Illinois*, 887 F.3d 322, 324 (7th Cir. 2018). As this Court observed regarding a prior § 2 challenge to the merit-selection system for Lake County judges, a State may "avoid the Voting Rights Act altogether by using a system of appointed judges." *Bradley v. Work*, 154 F.3d 704, 709 (7th Cir. 1998).

Although plaintiffs discuss at length the Supreme Court's decision in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), *Brnovich* speaks to how § 2 applies to "voting rules" for elected positions. It nowhere disrupts the longstanding, textually grounded rule that a State "exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed."

Chisom v. Roemer, 501 U.S. 380, 401 (1991). Plaintiffs' argument that Lake County judges must be elected rather than appointed is a nonstarter.

Although this Court need not reach the issue, plaintiffs face another problem—they lack a private right of action. Plaintiffs brought their § 2 challenge to the Lake County judicial selection system under the VRA itself. The VRA, however, does not provide for private enforcement of § 2. It entrusts enforcement to "one plaintiff" only: "the Attorney General." *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1208 (8th Cir. 2023).

JURISDICTIONAL STATEMENT

Appellants' jurisdictional statement is not complete and correct. Plaintiffs City of Hammond, Mayor Thomas McDermott, and voters Eduardo Fontanez and Lonnie Randolph brought this suit against the State of Indiana, its Secretary of State, the Lake County Judicial Nominating Commission, and the Lake County Board of Elections alleging violations of § 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301, and the Indiana Constitution. Dkt. 58. The VRA claim presented a federal question under 28 U.S.C. § 1331. The district court, however, did not have jurisdiction over any of the claims brought by the City or McDermott in his official capacity. *See City of South Bend v. South Bend Common Council*, 865 F.3d 889, 892 (7th Cir. 2017); *City of Green Bay v. Bostelmann*, 2020 WL 1492975, at *2 (E.D. Wis. Mar. 27, 2020). Nor did it have jurisdiction over any state-law claims brought against any state entities. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). And as

defendant the Lake County Board of Elections contended, plaintiffs lacked standing to pursue any claims against it. Dkt. 90 at 2–3.

On February 21, 2023, the district court dismissed the Lake County Judicial Nominating Commission from the case. Dkt. 71. No party appealed that order. On January 4, 2024, the district court issued an order granting summary judgment for the remaining defendants on the VRA claim and dismissing plaintiffs' state-law claims without prejudice. A22–23. On January 12, 2024, the court entered final judgment. Dkt. 115. On January 26, 2024, plaintiffs timely filed a notice of appeal. Dkt. 116. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether § 2 of the Voting Rights Act requires Lake County Superior Court vacancies to be filled by election rather than merit selection.

2. Whether § 2 of the Voting Rights Act is privately enforceable.

STATEMENT OF THE CASE

I. Legal Background

A. The history of judicial selection in Indiana

Under the Indiana Constitution, the General Assembly has plenary power to create state courts. Ind. Const. art. 7, § 1. For much of Indiana's history, the General Assembly provided for all Indiana judges to be popularly elected. Dkt. 81-2 at 7–8 (Edward W. Najam, Jr., *Merit Selection in Indiana: The Foundation for a Fair and Impartial Judiciary*, 46 Ind. L. Rev. 15, 23, 27–28 (2013)). In the mid-to-late twentieth century, however, the Missouri Plan—under which an independent commission

recommends candidates for appointment by the governor—began to gain popularity in Indiana. *Id.* at 2–3 (Najam, *supra*, at 16–18); Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 Mo. L. Rev. 479, 486 (2009).

In 1966, the Indiana Judicial Study Commission recommended "merit selection" for all judges. Dkt. 81-3 at 14 (John G. Baker, *The History of the Indiana Trial Court System & Attempts at Renovation*, 30 Ind. L. Rev. 233, 257 (1997)). And one year later, the General Assembly proposed revisions to Article 7 of the Indiana Constitution—later ratified by voters—establishing a system of nomination by a commission and appointment by the Governor for all appellate judges. *Id.* (Baker, *supra*, at 258 (citing H. J. Res. 12, 96th Gen. Assemb. (Ind. 1969))); Dkt. 81-2 at 7–8 (Najam, *supra*, at 27–28).

The General Assembly has extended the nomination-and-appointment process to some trial-level positions as well. *See* Ind. Code §§ 33-33-45-27 to -37. Since the early twentieth century, some judges in Marion County, whose court system serves Indiana's largest city, have been appointed. Act of Mar. 12, 1925, Laws of the State of Indiana 457, 461 (1925); Pub. L. No. 433, § 6, 2 Laws of the State of Indiana 2047, 2050–51 (1971). And in the late 1960s and early 1970s, the General Assembly enacted laws providing for judicial appointments in Lake County, Allen County, St. Joseph County, and Vanderburgh County. Dkt. 81-3 at 14 (Baker, *supra*, at 258); *see* Pub. L. No. 429, § 1, 2 Laws of the State of Indiana 2007, 2014–24 (1971) (Allen Superior Court); Pub. L. No. 311, §§ 2–17, 2 Laws of the State of Indiana 1690, 1690–1702 (1973) (St. Joseph Superior Court); Act of Mar. 8, 1969, § 32, 1 Laws of the State of

Indiana 191, 200 (1969) (Vanderburgh Superior Court). During this period, these counties included Indiana's largest cities after Indianapolis. Dkt. 81-3 at 14 (Baker, *supra*, at 258).

B. Judicial selection in Lake County

1. History of judicial selection reform in Lake County

The General Assembly created the first Lake County Superior Court in 1895. Its judges were elected for four-year terms. Act of Mar. 9, 1895, §§ 1, 3, Laws of the State of Indiana 210, 210–11 (1895). In 1971, as interest in merit-based judicial selection systems grew, the General Assembly directed the Judicial Study Commission to evaluate the organization and administration of Lake County courts, including "judicial selection and tenure," and make recommendations to the General Assembly "as it deems advisable to improve the trial courts in Lake County." Pub. L. No. 497, 2 Laws of the State of Indiana 2272, 2272–73 (1971). The Commission contracted with the national non-profit Institute for Court Management to conduct the study. Dkt. 81-4 at 6 (Inst. for Ct. Mgmt., *Report: A Program for the Improved Administration of Justice in Lake County* 1 (1972)).

The Institute found Lake County's current system of judicial selection to be deeply unpopular. Of the "25 in-depth studies of courts throughout the country" the Institute had conducted, "none" had uncovered "such pervasive dissatisfaction with the functioning of the courts as . . . found in Lake County." Dkt. 81-4 at 7 (ICM Report at 2). The Institute noted that "most" Lake County judges and lawyers "expressed dissatisfaction" with the existing system of judicial selection, contended that moving

away from judicial elections would "improve the administration of justice," and recommended that the state adopt a merit selection procedure for Lake County courts. *Id.* at 10–12 (ICM Report at 5–7). The Institute concluded that "the problems plaguing the system and the strong need for change are intertwined with a need to reform the judicial selection process." *Id.* at 10 (ICM Report at 5).

During the 1973 legislative session, the General Assembly responded to these recommendations by adopting a merit selection system for Lake County Superior Court judges. Pub. L. No. 308, § 1, 2 Laws of the State of Indiana 1651, 1658–69 (1973). Under that system, the Lake County Judicial Nominating Commission (the "Commission") proposes nominees for Superior Court vacancies, the Governor appoints one of these nominees to the Superior Court, and the Lake County electorate periodically votes on the judges' retention. Though statutory amendments over the years have altered the original systems' details, such as by increasing the number of sitting judges or altering the Commission's composition, *see, e.g.*, Pub. L. No. 196, § 30, 1999 Ind. Acts 1242, 1250; Pub. L. No. 204, §§ 1–2, 2021 Ind. Acts 3058, 3058–60, the current selection model retains the essential features of the system established in 1973.

2. Details of the Lake County appointment process

Today, the Commission consists of seven voting members, six of whom are appointed. The Chief Justice of the Indiana Supreme Court (or her designee) serves as the chairperson ex officio and only votes when necessary to resolve a tie. Ind. Code § 33-33-45-28(a). Of the six remaining members, three are appointed by the Governor

of Indiana and three by the Lake County Board of Commissioners. § 33-33-45-28(b)(1)–(2). Indiana law requires the Commission to include both attorneys and non-attorneys, at least one woman, and at least one member of a "minority group." *Id.*; *see* § 5-28-20-5 (defining "minority group"). All six members must "reside in Lake County, have no prior felony conviction, and reflect the composition of the community." § 33-33-45-28(b). No member may hold elected public office (except a position in the judiciary) or any office in a political party or political organization. § 33-33-45-28(c).

When a judicial vacancy exists, the Commission accepts applications from persons wishing to fill the vacancy and nominates five applicants. Ind. Code § 33-33-45-34(a). To be eligible for nomination, a candidate must be "domiciled in" Lake County, "a citizen of the United States," and "admitted to the practice of law in Indiana." § 33-33-45-35(1). The Commission considers various factors in selecting nominees, including the candidate's "[l]aw school record," "[a]ctivities in public service," "[l]egal experience," "[p]robable judicial temperament," "[p]hysical condition," "[p]ersonality traits," and "any . . . consideration that might create conflict of interest with a judicial office." § 33-33-45-35(2). Indiana law also directs the Commission to "consider that racial and gender diversity enhances the quality of the judiciary." § 33-33-45-35(5).

After the Commission submits its nominations to the Governor, the Governor has sixty days to fill the vacancy. § 33-33-45-38(a). If the Governor fails to make the appointment within that time frame, the Chief Justice is authorized to choose a candidate from the list. *Id.* The Governor must make the appointment "without regard

to the political affiliation" of any nominee and "shall consider only those qualifications of the nominees" permitted under Indiana law. § 33-33-45-38(b).

3. Details of the Lake County retention process

After a judge serves an initial two-year term and every six years thereafter, the judge is up for a retention election. Ind. Code § 33-33-45-41(a)–(b); *see* § 33-33-45-42(f)–(g). Whether the judge is retained in office or rejected is decided on the general election ballot by "the electorate of Lake County." § 33-33-45-42(a)–(d). No political party may "directly or indirectly campaign for or against" any judge. § 33-33-45-44(c).

II. Procedural Background

In May 2021, the City of Hammond, its Mayor Thomas McDermott, and Eduardo Fontanez sued the Lake County Judicial Nominating Commission, alleging that the Indiana statutes providing for selection and retention of Lake County Superior Court judges violated federal and state constitutional provisions and § 2 of the Voting Rights Act. Dkt. 1 (Compl.). The State of Indiana intervened to defend the statutes' validity. Dkt. 15. Plaintiffs then amended their complaint twice, adding the State of Indiana, the Indiana Secretary of State, and the Lake County Board of Elections as defendants, Dkt. 30, and adding Lonnie Randolph as a plaintiff. Dkt. 58.[1]

The operative complaint challenges the State's decision to provide for the "appoint[ment]" of Lake County Superior Court judges "by the Indiana Governor" while retaining elected judicial offices in other counties. Dkt. 58 at 2 (Second Am. Compl.).

[1] The district court separately dismissed the Commission as a defendant. Dkt. 71.

According to the complaint, the decision to provide for judicial appointments in Lake County violates the VRA § 2 because "Lake County residents," including "minority residents," do not "have the right to elect Superior Court judges of their choice." *Id.* at 5 (¶¶ 26, 29). The complaint also alleges that providing for judicial appointments in Lake County violates two provisions of the Indiana Constitution. *Id.* at 9–11 (¶¶ 61–75). In the complaint, plaintiffs sought declaratory and injunctive relief, including an "order that future Lake County Superior Court openings will be filled by election, not selection and retention votes." *Id.* at 11–12.

On cross-motions for summary judgment, the district court ruled for defendants on the VRA claim and dismissed the state-law claims without prejudice. A23. The court observed that "a state isn't required to elect judges," and "the VRA has nothing to say" about a State's choice as to whether judges should be appointed or elected. A9 (citing *Chisom v. Roemer*, 501 U.S. 380, 401 (1991)). The court also observed that, in *Quinn v. Illinois*, 887 F.3d 332 (7th Cir. 2018), this Court rejected an argument that § 2 of the VRA "require[d] that any office be filled by election" solely because some voters in other political subdivisions had the opportunity to elect certain public officials. A13. Despite doubts about Lake County's judicial selection system, the district court deemed *Quinn* "controlling authority." A2, A17. It saw no "meaningful distinction" between this case and *Quinn*. A16.

In upholding Lake County's merit-selection system, the district court rejected the position recently taken by the Eighth Circuit that the VRA is not privately enforceable. A9 n.3. The district court reasoned that the VRA confers a private right of

action because *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), and other cases have "'proceeded under the assumption'" that a private right of action exists and Congress did not explicitly reject that assumption when it reenacted § 2. *Id.* (quoting *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1223 (8th Cir. 2023) (Smith, C.J., dissenting)).

SUMMARY OF THE ARGUMENT

I. As the district court ruled, Indiana's merit-selection system for Lake County Superior Court judges does not violate § 2 of the Voting Rights Act (VRA). Section 2 requires the "political processes leading to nomination or election" to be equally open to the electorate. 52 U.S.C. § 10301(b). It does not require any position to be elected. A State may "avoid the Voting Rights Act altogether by using a system of appointed judges." *Bradley v. Work*, 154 F.3d 704, 709 (7th Cir. 1998). Because Lake County Superior Court judges are appointed, § 2 does not apply.

As this Court held in *Quinn v. Illinois*, 887 F.3d 322 (7th Cir. 2018), it makes no difference that judicial positions in other counties are elected. Section 2 requires all members of the electorate to have an equal opportunity to participate in an election. It does not require that all counties have the same type or number of elected positions. Nor does *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), require States to convert appointed positions into elected ones. In *Brnovich*,

the Supreme Court merely explained what factors are relevant to voting for elected positions.

Contrary to plaintiffs' suggestion, a staff member in the Indiana Secretary of State's office did not admit that Indiana adopted merit selection for racial reasons. Instead, he stated that Indiana adopted merit selection to limit "political influence" on the judiciary. In any event, a single staff member's putative admission cannot overcome the presumption of good faith that must be afforded the General Assembly's decision to adopt merit selection 50 years earlier. There is ample evidence that the General Assembly adopted merit selection at the recommendation of an independent body to address profound dissatisfaction with the Lake County judicial system.

II. Although this Court could reject plaintiffs' § 2 claim, this Court alternatively could affirm on the ground that plaintiffs lack a private right of action under the VRA. No provision of the VRA provides for private enforcement. The VRA instead entrusts enforcement to the Attorney General. Congress's decision to provide for one method of enforcement suggests that Congress meant to preclude others.

Although some courts have assumed a private right of action exists, those assumptions provide no basis for reading a cause of action into the VRA. Precedent is clear that Congress itself must create causes of action. Nor can plaintiffs rely on 42 U.S.C. § 1983 where they did not plead a § 1983 claim in their operative complaint and § 2 does not unambiguously create a right enforceable through § 1983.

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed de novo. *See Hero v. Lake Cnty. Election Bd.*, 42 F.4th 768, 771 (7th Cir. 2022). Any genuinely disputed facts must be viewed in the light most favorable to the party opposing summary judgment, with all reasonable inferences drawn in that party's favor. *See id.*

ARGUMENT

I. The Voting Rights Act Does Not Require Lake County Judges To Be Elected Rather than Appointed

In our federal system, the authority to decide whether to elect or appoint state and county judges resides with the States. There is "no constitutional reason why state or local officers . . . may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election." *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 108 (1967). Section 2 of the Voting Rights Act (VRA) respects this sovereign prerogative. Although it requires elections to be conducted fairly, "no court has understood § 2 to require that any office be filled by election." *Quinn v. Illinois*, 887 F.3d 322, 324 (7th Cir. 2018). As the Supreme Court has observed, a State may "exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed." *Chisom v. Roemer*, 501 U.S. 380, 401 (1991).

Indiana has done exactly what the VRA allows. To enhance judicial quality, Indiana has decided that Lake County Superior Court judges should be appointed rather than elected. Some county judges in other parts of the State are still elected. In *Quinn*, however, this Court rejected the argument that the VRA puts States to the

choice of making all positions appointed or all elected. That decision controls here. And while plaintiffs invoke the Supreme Court's intervening decision in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), that decision speaks to a different issue—how to evaluate time, place, and manner rules for voting. Nothing in the VRA's text or precedent supports plaintiffs' bid for a judicial decree requiring "Lake County Superior Court openings" to be "filled by election." Dkt. 58 at 11–12.

A. As this Court has held, the Voting Rights Act does not require States to make any position an elected position

Plaintiffs brought their challenge to Indiana's merit-selection system for Lake County judges under VRA § 2. Section 2(a) 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 2(b), in turn, "explains what must be shown to establish a § 2 violation." *Brnovich*, 141 S. Ct. at 2337. It 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." 52 U.S.C. § 10301(b) (emphasis added).

As is plain from the text, § 2 governs only "political processes leading to nomination or election." It is silent on whether positions must be elected or appointed. As

this Court previously observed in rejecting another § 2 challenge to merit selection for Lake County judges, a State may "avoid the Voting Rights Act altogether by using a system of appointed judges." *Bradley v. Work*, 154 F.3d 704, 709 (7th Cir. 1998) (citing *Chisom*, 501 U.S. at 401). Or as this Court put it in *Quinn*, "no court has understood § 2 to require that any office be filled by election." 887 F.3d at 324; *accord Mixon v. Ohio*, 193 F.3d 389, 407 (6th Cir. 1999) ("[A]ll federal courts that have addressed this issue have determined that Section 2 only applies to elective, not appointive, systems."); *Afr.-Am. Citizens for Change v. St. Louis Bd. of Police Comm'rs*, 24 F.3d 1052, 1054 (8th Cir. 1994) ("Section 2 is expressly limited to 'the political processes leading to nomination or election' of state and local officials"); *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 251 n.12 (11th Cir. 1987) (similar). By its terms, § 2 does not require Lake County judges to be elected rather than appointed.

The VRA's structure and history support that conclusion. Originally enacted in 1965 to address suppression of "the right of African-Americans to vote," the VRA is focused on the conduct of elections for elected positions. *Brnovich*, 141 S. Ct. at 2330–31. Several provisions of the VRA forbid "some of the practices" historically "used to suppress black voting." *Id.* at 2331; *see* 52 U.S.C. §§ 10302(b), 10303(a), (c), 10306, 10307, 10501. Similarly, VRA Sections 4 and 5 impose "special requirements for States and subdivisions where violations of the right to vote had been severe." *Brnovich*, 141 S. Ct. at 2331. Those provisions impose preclearance requirements relating to "voting qualification[s]," "prerequisite[s] to voting," and "standard[s], practice[s], or procedure[s] with respect to voting." 52 U.S.C. § 10304(a); *see* § 10303.

Construing VRA § 2—a provision that "attracted relatively little attention during . . . congressional debates" and that was "little-used for more than a decade after"—to require previously appointed positions to be elected would be surpassingly odd. *Brnovich*, 141 S. Ct. at 2331. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

In fact, it would raise serious constitutional questions to require States to make judges elected rather than appointed. In *Sailors v. Board of Education*, 387 U.S. 105 (1967), the Supreme Court rejected the notion that the Fourteenth Amendment requires States to provide for elected rather than appointed positions. *Id.* at 108; *see Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) ("we have previously rejected claims that the Constitution compels a fixed method of choosing state or local officers"). Consequently, it would exceed Congress's enforcement powers to "attempt a substantive change in constitutional protections" by requiring States to switch from appointments to elections. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). Section 2 of the VRA should not be construed to mandate a rule that would be beyond Congress's authority to impose. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (courts should "not lightly assume that Congress intended to . . . usurp power constitutionally forbidden it").

B. Plaintiffs cannot sidestep this Court's holdings

Plaintiffs' efforts to avoid this Court's holdings lack merit. First, plaintiffs argue that they are "not challenging how the Governor appoints judges," but rather challenging the decision to use "retention votes" for trial judges in some counties and

"open elections" in some counties. Br. 17. That is a distinction without a difference. Plaintiffs do not argue that "voting qualification[s]," "prerequisite[s] to voting," or electoral "standard[s], practice[s], or procedure[s]" in a retention election in Lake County violate § 2. Nor have they argued that it violates § 2 to, for example, limit participation in retention elections to "the electorate of Lake County" or to require retention ballots to contain certain language. Ind. Code § 33-33-45-42(a)–(b). Nor do plaintiffs seek to end retention elections while leaving the nomination and appointment process for Lake County judges intact. Rather, plaintiffs have demanded that "future openings on Lake County Superior Court" be "filled by election." Dkt. 58 at 11–12 (Second Am. Compl.). Their complaint is that "Lake County residents" do not "have the right to elect Superior Court judges of their choice." *Id.* at 5 (¶¶ 26, 29). However worded, plaintiffs' challenge amounts to a challenge to the process by which Lake County judges are *initially* selected—the nomination and appointment process.

Bradley v. Work, 154 F.3d 704 (7th Cir. 1998), does not suggest that plaintiffs' challenge can be viewed otherwise. *Contra* Br. 12–13. In that decision, the Court held that the VRA applied to "the retention election phase" of Lake County's process for selecting and retaining judges, but that there was no violation of § 2. *Bradley*, 154 F.3d at 709. The Court commented in passing that it was not foreclosing all "[f]uture" challenges to the "*retention* process." *Id.* at 710 (emphasis added). The Court, however, brushed off the implication that it was endorsing challenges to the Lake County "*nomination* process," explaining that "the Supreme Court commented in *Chisom v. Roemer*, 501 U.S. 380 (1991), that a state could avoid the Voting Rights Act altogether

by using a system of appointed judges." *Bradley*, 154 F.3d at 709 (emphasis added). Plaintiffs cannot achieve indirectly what they cannot do directly.

Second, plaintiffs emphasize that trial judges in some—but not all—Indiana counties are elected. *See* Br. 17, 35. This Court's decision in *Quinn* disposes of that objection too. In that case, Chicago voters challenged an Illinois law requiring that the Mayor of Chicago appoint school board members. 887 F.3d at 323. School board members elsewhere in Illinois were elected rather than appointed. *Id.* But this Court rejected the argument that meant the political processes subject to the VRA were not "equally open" to "minority voters" in Chicago. *Id.* at 324. "Unless an office is elected," the Court explained, "§ 2 as a whole does not apply." *Id.* at 324–25. That holding controls here: "What is true of . . . school boards" is "true of judges." *Id.* at 324. The state statutory provisions providing for the appointment of Lake County Superior Court judges, Ind. Code §§ 33-33-45-34, 33-33-45-35, 33-33-45-38, do not impose any "voting qualification or prerequisite to voting." 52 U.S.C. § 10301(a).

None of plaintiffs' attempts to sidestep *Quinn* succeed. Plaintiffs are simply wrong to argue that "*Quinn* did not address selective reduction of voting rights only in high minority areas." Br. 35. It expressly rejected the position that Illinois had abridged the rights of minority voters by making board members in Chicago, a high-minority area, appointed and board members in the rest of Illinois, which has lower minority populations, elected. *Quinn*, 887 F.3d at 324–25. Nor can plaintiffs distinguish *Quinn* by saying "state superior court judges in Lake County" are subject to

"retention votes." Br. 36. As *Bradley* shows, plaintiffs' problem is that the VRA does not apply to the appointment and nomination process by which judges are selected.

Section 2, moreover, forecloses any suggestion that voters in one locality must be able to vote on the same number and type of officeholders as voters in another locality. Section 2 requires the political processes for "the State" (if the office is statewide) or the "political subdivision" (if the office is local) to be "equally open" to all "members of the electorate." 52 U.S.C. § 10301(b). The relevant electorate here is the "electorate of Lake County." Ind. Code § 33-33-45-42(a). So it suffices that every voter in Lake County has an equal opportunity to vote on the retention of Lake County judges. *See Quinn*, 887 F.3d at 325; *Roberts v. Indiana*, No. 1:23-cv-828-JRS-KMB, 2024 WL 1466530, at *2 (S.D. Ind. Apr. 3, 2024) (rejecting § 2 challenge to Marion County judicial appointments). Section 2 does not require all county judgeships to be elected any more than it requires all local school boards to be elected.

Third, plaintiffs observe that "[s]uperior courts in Indiana are state courts with state-wide jurisdiction." Br. 13; *see id.* at 36–37. But that county judges may have broad jurisdiction does not mean that all county judges in Indiana hold a single, statewide office. To the contrary, the Indiana Code dedicates a separate chapter of code to court systems in each of Indiana's 92 counties. *See* Ind. Code §§ 33-33-1-1 to 33-33-92-6. For example, the chapter on Lake County establishes the Lake County Superior Court as a distinct judicial body, *see* § 33-33-45-4, whose judges are drawn from Lake County to hear cases arising in Lake County, *see* §§ 33-33-45-28(b), 33-33-45-3, 33-33-45-21. Consistent with the code's county-centric focus, each county selects

its own judges using the method provided in statute. § 33-29-1-3(a) (providing for superior court judges to be "elected at the general election every six (6) years in the county in which the court is located"); § 33-29-1-3(b) (a superior court judge must be "a resident of the county in which the court is located"); § 33-28-2-1 (circuit court judges are elected "by the voters of each circuit"). County court facilities are maintained by the county executive and maintained by appropriations of the county fiscal body as well. § 33-29-1-7. And though some counties have superior courts, not all do. *See, e.g.*, § 33-33-4-1 (Benton County); § 33-33-7-1 (Brown County).

In any event, the scope of jurisdiction is beside the point. Under the VRA, the threshold question is whether the office—here, the office of judge of the Lake County Superior Court—is elected. *Quinn*, 887 F.3d at 325. "Plaintiffs beg the question by assuming that § 2 requires each [locality] to choose [judges] by voting." *Id.* Section 2 nowhere requires States to make the drastic choice of holding elections for all local offices—school board, city manager, town treasurer, county judge—or none of them. The VRA's plain text and this Court's precedent forecloses plaintiffs' claim.

C. Plaintiffs' analysis of *Brnovich* is fundamentally flawed

The Supreme Court's intervening decision in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), does not "'foreclose[]'" the conclusions this Court reached in *Bradley* and *Quinn*. *Contra* Br. 38–39. In *Brnovich*, the Supreme Court addressed VRA § 2's application to "regulations that govern how ballots are collected and counted." 141 S. Ct. at 2330. It had no occasion to address whether § 2 applies to appointed offices. Nor did the Supreme Court examine the arguments from text, history, and precedent that would be relevant to whether § 2 applies. Simply put, the

Supreme Court nowhere rejected the textually rooted principle that a State may "exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed." *Chisom*, 501 U.S. at 401.

At length, plaintiffs discuss *Brnovich*'s explanation of various factors relevant to evaluating electoral regulations under VRA § 2. Br. 17–35. But plaintiffs overlook what those factors are relevant to evaluating—what it means for "the political processes leading to *nomination and election (here, the process of voting*)" to be "equally open" to members of the electorate. 141 S. Ct. at 2337. *Brnovich*'s discussion presumes that the claims relate to political processes for elected positions, just like this Court's pre-*Brnovich* cases that discussed similar factors. *See, e.g.*, *Frank v. Walker*, 768 F.3d 744, 752–53 (7th Cir. 2014) (cited in *Brnovich*, 141 S. Ct. at 2339, 2345). As this Court perceived in *Quinn*, considerations relevant to deciding whether election processes are equally open as required by § 2 have no relevance in the absence of an election subject to § 2. *See* 887 F.3d at 325. "Plaintiffs beg the question by assuming that § 2 requires" Lake County "to choose" its judges "by voting." *Id.*

Close examination of the *Brnovich* factors underscores the point. Factor one is "the size of the burden imposed by a challenged voting rule." *Brnovich*, 141 S. Ct. at 2338. As the Supreme Court's examples of "voting" rules make manifest—rules that require voting in a voter's own precinct or that prescribe "directions for using a voting machine or completing a paper ballot"—the factor is focused on election rules that impact the casting of ballots. *Id.* at 2338, 2344. By contrast, plaintiffs do not challenge any rules governing the time, place, and manner of voting. Their objection is that

Indiana law authorizes the "Governor [to] appoint[] a . . . person of the Governor's choosing to fill [a] vacancy," which means that voters cannot popularly elect judges. Br. 19. But that amounts to an argument that positions should be elected rather than appointed, not one that the rules for voting on elected positions impose obstacles that exceed "the 'usual burdens of voting.'" *Brnovich*, 141 S. Ct. at 2338 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.)).

Under *Brnovich*, a second factor is the "degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982." 141 S. Ct. at 2338. This factor, too, focuses on voting for elected positions. As the Supreme Court explained, "it is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared" because it is "doubt[ful] that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States." *Id.* at 2338–39. Plaintiffs, however, do not challenge any "voting rules," such as rules that "require[] nearly all voters to cast their ballots in person on election day and allow[] only narrow and tightly defined categories of voters to cast absentee ballots." *Id.* at 2339. Their objection is to the absence of any open election for Lake County judges—the appointment process.

To the extent that Indiana's decision to appoint judges rather than elect them can be characterized as a voting rule, plaintiffs can point to no consensus—either in 1982 or in the present day—that forbids States from using merit selection. Merit selection has a "long pedigree" in America. Dkt. 81-2 at 2–3 (Najam, *supra*, at 16–17). As plaintiffs themselves admit, at least fourteen States had "implemented some

version of the Missouri Plan (appointment followed by a retention vote)" in 1982. Br. 29. Plaintiffs quibble that Indiana does not use merit selection for all trial judges "statewide." *Id.* But that overlooks that the burden Lake County voters allegedly face—being unable "to elect a representative of choice," Br. 22—is the same as the burden faced by voters under any version of a merit-selection system in which judges are initially appointed and later face a retention vote. It cannot be that VRA § 2 forbids a non-discriminatory practice with a long pedigree that was used by more than a quarter of all States at the time of its adoption. *See Brnovich*, 141 S. Ct. at 2339.

The third factor concerns the "size of any disparities in a rule's impact on members of different racial or ethnic groups." *Brnovich*, 141 S. Ct. at 2339. Disparity alone is never dispositive: the "touchstone" under § 2 is whether political processes are "equally open." *Id.* at 2337–38; *see id.* at 2339–40. In this case, however, plaintiffs point to no voting rule that impacts minority voters in Lake County differently than non-minority voters in Lake County. Rather, plaintiffs challenge a merit-selection process that affects every member of the Lake County electorate equally regardless of race or ethnicity. Minorities may "not get to vote for [Lake] County judges, but neither do any other [Lake] County residents." *Roberts*, 2024 WL 1466530, at *2.

In response, plaintiffs cite statistics regarding the percentage of voting-age minorities in different counties throughout Indiana. Br. 31–33. Under § 2, however, the focus must be on how a rule impacts "members of the electorate" entitled to participate in the political processes leading to an election. 52 U.S.C. § 10301(b). The electorate entitled to vote on the retention of Lake County judges is the "electorate of

Lake County." Ind. Code § 33-33-45-42(a). Regardless of whether county judges are appointed or elected, voting for county judges occurs county by county. Lake County voters do not get to vote on judges in other counties, but neither do voters in other counties get to vote on judges in Lake County. "It is [thus] misleading to say that political processes . . . are not equally open to participation by persons of all races." *Quinn*, 887 F.3d at 325; *see Roberts*, 2024 WL 1466530, at *2.

Plaintiffs' general statistics do not tell the whole story for another reason too: Far from excluding Lake County minorities from participating in judicial selection, Indiana's merit-selection system empowers them. By statute, the Lake County Judicial Nominating Commission must include at least one woman, must include at least one member of a "minority group," and must "reflect the composition of the community." Ind. Code § 33-33-45-28(b). In selecting nominees, moreover, the Commission must choose from among Lake County residents and must "consider that racial and gender diversity enhances the quality of the judiciary." § 33-33-45-35(1), (5). This system "can hardly be painted as a ploy to allow hinterland interference with [Lake] County affairs." *Roberts*, 2024 WL 1466530, at *3. In fact, it has allowed "African-American candidates" to attain the Lake County bench and be retained with support from a "majority of white voters" in Lake County. *Bradley*, 154 F.3d at 710–11; *accord* Dkt. 81-1 at 6 (Bonnet Aff. ¶ 22) (merit selection in Lake County "ensure[s] the judicial selection process reflects the diversity of the jurisdiction").

The fourth *Brnovich* factor concerns "the opportunities provided by a State's entire system of voting." *Brnovich*, 141 S. Ct. at 2339. Once again, this factor

presumes the challenged rule governs the political processes governing voting for an elected position. Only in that context does it make sense to ask whether a "State provides multiple ways to vote," such as by affording voters the option of casting "an early ballot without excuse," being "placed on the permanent early voter list," or "drop[ping] off their early ballots at any voting place." *Id.* at 2339, 2344. And once again, plaintiffs do not dispute that Lake County affords all voters the same range of voting opportunities for a given position. Plaintiffs' argument is with the decision to appoint Lake County judges rather than elect them, not with any time, place, and manner rules applying to the casting of ballots. *Cf. Brnovich*, 141 S. Ct. at 2344.

Plaintiffs return to their theme that, compared to voters in other counties, voters in Lake County vote for fewer elected positions. Br. 23. But *Brnovich*'s reference to "a State's entire system of voting" does not imply that every voter in a State is entitled to vote on the same number and type of candidates for local positions. *Contra* Br. 23, 25. Rather, the Supreme Court's point was that "political processes" impacting elections must be evaluated "as a whole." *Brnovich*, 141 S. Ct. at 2339. In *Brnovich*, the Supreme Court asked about the *State's* system of voting because the challenge was to statewide rules. Where a case involves political processes for a county election, however, the focus must be on the county's political processes. *See Johnson v. Waller Cnty.*, 593 F. Supp. 3d 540, 598–99 (S.D. Tex. 2022) (comparing opportunities afforded to different Waller County voters); *Hernandez v. Woodard*, 714 F. Supp. 963, 968–69 (N.D. Ill. 1989) (comparing "the registration rates of Hispanics

and non-Hispanics in Will County" to determine whether § 2 prohibits English-only local elections under the VRA).

Redistricting cases are unhelpful to plaintiffs for similar reasons. *Contra* Br. 24. The merit-selection process for county judges is a nonpartisan process that relies on existing county lines in the selection and retention phases. During the nomination phase, Lake County judges are chosen by the Governor from among Lake County residents nominated by a nonpartisan commission drawn from Lake County. Ind. Code §§ 33-33-45-28, 33-33-45-38. Concomitantly, during the retention phase, Lake County judges are voted on by the Lake County electorate. § 33-33-45-42. This case is a far cry from a situation in which minorities were "lumped into" a newly redrawn district through "clever district-line drawing." *Frank*, 768 F.3d at 753.

Lastly, *Brnovich* explains that "the strength of the state interests served by a challenged voting rule . . . must be taken into account." 141 S. Ct. at 2339. Leaving aside that providing for the appointment of Lake County judges is not a "voting rule," several state interests support use of a merit-selection process. Merit selection can enhance "judicial independence," "fairness, integrity, impartial administration of justice, and judicial accountability." Dkt. 81-1 at 5 (Bonnet Aff. ¶¶ 21–22); *see* Dkt. 81-6 at 1 (Frank Sullivan, Jr., Lecture, *"What I've Learned About Judging"*, 48 Val. U. L. Rev. 195, 196 (2013)) (observing that judges chosen through merit selection "are highly qualified and well-trained, come from diverse backgrounds, and enjoy superior reputations for fairness, integrity, and efficiency"); O'Connor, *supra*, at 485–86 (describing goals of merit selection). It can also "ensure[] that courts can remain largely

independent arbiters of legal disputes" and "bolster[] long-term democratic legitimacy" by limiting partisan influence on the judiciary. Dkt 81-7 at 19 (Zachary Reger, *The Power of Attorneys: Addressing the Equal Protection Challenge to Merit-Based Judicial Selection*, 89 U. Chi. L. Rev. 253, 297 (2022)). Before merit selection, Lake County suffered from "an uncoordinated, unmanaged court system" in part because campaigning distracted judges from "an overall regard for the administration of justice." Dkt. 81-4 at 10–11 (ICM Report at 5–6).

Plaintiffs cannot deny that various policy arguments favor merit selection. They instead fault Indiana for not using merit selection for all courts. Br. 34. As an initial matter, plaintiffs overstate the differences between judicial selection in Lake County and elsewhere in the State. Indiana uses merit selection for all appellate and tax court judges throughout the State, Ind. Code §§ 33-27-3-1 to -6, and for trial judges in other high-population counties, §§ 33-33-49-13.1 to -13.7 (Marion County); §§ 33-33-71-29 to -43 (St. Joseph County). It also places restrictions on judicial elections in certain counties, such as prohibitions on judicial candidates declaring a party affiliation or accepting certain campaign contributions. § 33-33-82-31 (Vanderburgh County); §§ 33-33-2-9 to -11 (Allen County). More to the point, what variation in court systems exists across Indiana simply demonstrates that multiple considerations bear on what structure best serves local needs.

In adopting merit selection for Lake County, the Indiana General Assembly hardly acted arbitrarily. When the General Assembly first adopted merit selection for Lake County, Lake County was among the State's five most populous counties. Dkt.

81-3 at 14 (Baker, *supra*, at 258). At the 2020 census, it was Indiana's second-largest county. *See Population Estimates for Indiana Counties, 2020–2023*, https://www.stats.indiana.edu/population/popTotals/2023_cntyest.asp. Large population centers face "different issues than those faced in rural counties," making it reasonable to use merit selection for more populous counties. *Roberts*, 2024 WL 1466530, at *3. Additionally, in the 1970s, "dissatisfaction with the functioning of the courts . . . in Lake County" was uniquely high. Dkt. 81-4 at 7 (ICM Report at 2). Adopting merit selection for Lake County was consistent with the General Assembly's decision to adopt merit selection for other large counties, which need well qualified judges to efficiently handle significant caseloads. *See, e.g.*, Ind. Code §§ 33-33-49-13.1 to -13.7 (Marion County); §§ 33-33-71-29 to -43 (St. Joseph County); *see also* Dkt. 81-1 at 7–8 (Bonnet Aff. ¶ 25) (listing trial court caseloads in large counties).

Plaintiffs point out that two high-population counties, Allen County and Hamilton County, still elect trial judges. Br. 34. That is only partially correct. In Allen County, Indiana uses a merit-based appointment process to fill vacancies arising during a judicial term. *See* Ind. Code §§ 33-33-2-32 to -45. And whatever population sizes may be today, when Indiana first instituted appointments for trial judges in Marion, Allen, Lake, St. Joseph, and Vanderburgh counties, those counties were among the largest in Indiana. Dkt. 81-3 at 14 (Baker, *supra*, at 258); pp. 4–5, *supra*. That legislative action may not have caught up to population shifts in no way suggests that Indiana's interests are unimportant. "Section 2 does not require [Indiana] to show that its chosen policy is absolutely necessary or that a less restrictive means would

not adequately serve [its] objectives." *Brnovich*, 141 S. Ct. at 2345–46; *see id.* at 2342–43.

D. A putative concession cannot sustain plaintiffs' challenge

Plaintiffs fall back on allegations of discriminatory intent, arguing "the State has admitted that it limits voting rights based on race." Br. 40; *see id.* at 31–32. The State admitted no such thing. In an affidavit, a member of the Indiana Secretary of State's Office explained why he thinks merit-selection process is important: "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." Dkt. 81-1 at 5 (Bonnet Aff. ¶ 18). He did not say the State adopted merit selection for Lake County *because* it was "diverse"—much less that the term "diverse" refers only to *racial* diversity. Rather, he expressed his opinion that merit selection is beneficial because it limits "political influence" on the state judiciary.

There are other problems with plaintiffs' reliance on the staff member's putative admission. For one thing, plaintiffs brought a disparate-impact claim under § 2, alleging electoral processes are not "equally open." Dkt. 58 at 6–9 (Second Am. Compl. ¶¶ 47, 57). An equal-openness claim requires a showing that members of a protected group "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(b) (emphasis added). The focus is on "opportunity to participate," not intent. *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020); *see Brnovich*, 141 S. Ct. at 2337. It is too late for plaintiffs—who twice amended their complaint—to switch to a discriminatory-

intent claim that was not pleaded in their operative complaint. *See Thomason v. Nachtrieb*, 88 F.2d 1202, 1205 (7th Cir. 1989).

For another, "legislative good faith" must be "presum[ed]." *Abbott v. Perez*, 585 U.S. 579, 603 (2018). It is plaintiffs' burden to overcome that presumption by providing proof of invidious discrimination, which can come from "historical background." *Id.* at 603–04; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977). But plaintiffs have presented *no* evidence that the Indiana General Assembly acted with improper motives when it adopted merit selection more than 50 years ago. They ignore that the General Assembly adopted merit selection for Lake County as part of a series of judicial reforms across the State. *See* pp. 4–5, *supra*. And they overlook that the General Assembly adopted merit selection for Lake County only after an independent study reported "pervasive dissatisfaction" with the Lake County judicial system, identified problems with partisan judicial elections, and recommended "the non-political merit selection of judges" to improve the administration of justice. Dkt. 81-4 at 7, 10–12 (ICM Report at 2, 5–7); *see* pp. 5–6, *supra*.

As this Court previously observed, moreover, "it is hard to imagine" how someone could prove that the merit-selection system for Lake County was the product of "intentional discrimination" where that system seeks to include minorities. *Bradley*, 154 F.3d at 711. As mentioned above, Indiana law seeks to be sensitive to the concerns of minorities by requiring at least one member of the nominating Commission to be from a "minority group," requiring the Commission's membership to "reflect the composition of the community," and directing the Commission to "consider that racial

and gender diversity enhances the quality of the judiciary." Ind. Code §§ 33-33-45-28(b), 33-33-45-35(5). It is "simply too great a stretch" to say that an "ostensibly neutral" system evinces racial discrimination simply because Lake County happens to have a high-minority population. *Hearne v. Bd. of Educ. of City of Chi.*, 185 F.3d 770, 776 (7th Cir. 1999); *see Roberts*, 2024 WL 1466530, at *3.

II. Plaintiffs Lack a Private Right of Action under the Voting Rights Act

This Court can and should affirm on the basis that VRA § 2 does not require any position to be elected rather than appointed. This Court alternatively could affirm on the ground that plaintiffs lack a private right of action to enforce § 2. *See Nature Conservancy v. Wilder Corp. of Del.*, 656 F.3d 646 (7th Cir. 2011) (the Court may affirm a grant of summary judgment on any basis supported by the record). As the Eighth Circuit recently explained, "[t]he Voting Rights Act lists only one plaintiff who can enforce § 2: the Attorney General." *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1208 (8th Cir. 2023). That express commitment of authority prevents courts from implying a right of private enforcement. *Id.* 1211.[2]

A. The Voting Rights Act does not provide for private actions

As the Supreme Court has repeatedly emphasized in recent years, the power to create "private rights of action to enforce federal law" belongs to "Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see, e.g.*, *Egbert v. Boule*, 596 U.S. 482,

[2] The district court sua sponte decided "whether there is a private right of action to enforce § 2 of the VRA." A9 n.3. Where "the district court raises an issue sua sponte," a party may address the issue for the first time in an "appellate brief." *Duncan Place Owners Ass'n v. Danze, Inc.*, 927 F.3d 970, 974 (7th Cir. 2019) (citing *Prop. & Cas. Ins. Ltd. v. Cent. Nat'l Ins. Co. of Omaha*, 936 F. 2d 319, 323 n.7 (7th Cir. 1991)).

491 (2022); *Ziglar v. Abbasi*, 582 U.S. 120, 131–32 (2017); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 331 (2015). "Now long past [are] 'the heady days in which this Court assumed common-law powers to create causes of action.'" *Egbert*, 596 U.S. at 491 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (Scalia, J., concurring)); *see E. Cent. Ill. Pipe Trades Health & Welfare Fund v. Prather Plumbing & Heating, Inc.*, 3 F.4th 954, 961 (7th Cir. 2021) ("we decline to create a private right of action where the statute has not"). For a cause of action to exist under a statute, Congress itself must have "displayed an intent to create not just a private right but also a private remedy." *Alexander*, 532 U.S. at 288–89.

In the VRA, Congress did not provide for private enforcement. "The statute is silent on the existence of a private right of action." *Ark. State Conf.*, 86 F.4th at 1213. Neither § 2 nor any other provision authorizes private enforcement of § 2's prohibition on denying or abridging the right to vote. Silence, however, does not evince a "congressional intent to create a private right of action." *Armstrong*, 575 U.S. at 331 (quoting *Alexander*, 532 U.S. at 289); *see Ark. State Conf.*, 86 F.4th at 1213.

Congress's decision to charge the Attorney General with enforcing § 2 reinforces that no private right of action exists. Providing for one method of enforcement "'suggests that Congress intended to preclude others.'" *Teamsters Loc. Union No. 705 v. Burlington N. Santa Fe, LLC*, 741 F.3d 819, 824 (7th Cir. 2014) (quoting *Alexander*, 532 U.S. at 290); *see Armstrong*, 575 U.S. at 331–32. Here, Congress provided two paths for enforcing the VRA: the appointment of federal observers backed by the Attorney General, 52 U.S.C. §§ 10302(a), 10305, and for actions brought directly by "the

Attorney General," § 10308(d). "Any mention of private plaintiffs or private remedies, however, is missing." *Ark. State Conf.*, 86 F.4th at 1213.

B. The district court's reliance on "assumptions" was misplaced

Despite Congress's express vesting of enforcement authority in the Attorney General, the district court ruled that a private cause of action must exist because *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), and other cases have "proceeded under the *assumption* that Section 2 provides a private right of action." A9 (emphasis added). As two Justices observed in *Brnovich*, however, assumptions are not holdings. *See* 141 S. Ct. at 2350 (Gorsuch, J., concurring). And whatever may have been the approach in past eras, it is now beyond question that courts cannot "'assume[] common-law powers to create causes of action.'" *Egbert*, 596 U.S. at 491. Unless the text of a statute creates a cause of action, "a cause of action does not exist, and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander*, 532 U.S. at 286.

It makes no difference that Congress has "reenacted the VRA without making substantive changes." A9 n.3. In *Armstrong*, the Supreme Court rejected a similar argument. The Supreme Court held that Congress had not ratified lower-court decisions "interpret[ing] the Boren Amendment to be privately enforceable" because the Supreme Court "had not yet decided" whether that provision was so enforceable. 575 U.S. at 330. That holding controls here. The Supreme Court has never decided whether § 2 is privately enforceable, and by the district court's own admission, lower courts have merely "assumed[]" a right of private enforcement exists. A9 n3; *see, e.g.*,

Washington v. Finlay, 664 F.2d 913, 926 (4th Cir. 1981) ("assuming without deciding that . . . there is a private right of action"). So nothing can be inferred from Congress's silence on an issue the courts had never squarely "settled." *Armstrong*, 575 U.S. at 331. Thus, there is no basis for implying a private cause of action into the VRA.[3]

Plaintiffs cannot prevail in the absence of a private cause of action under § 2. In their second amended complaint, plaintiffs elected to proceed under § 2 only; they dropped a separate claim asserted under 42 U.S.C. § 1983. *See* Dkt. 58 at 6–9 (Second Am. Compl. ¶¶ 40–60); *cf.* Dkt. 1 at 6–7 (Compl. ¶¶ 44–47). Nor would have asserting a § 1983 claim helped them. "Although federal statutes have the potential to create § 1983-enforceable rights, they do not do so as a matter of course." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023). A party must show that Congress has "unambiguously conferred" "individual rights upon a class of beneficiaries" to which the plaintiff belongs. *Id.* (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002)). This requires demonstrating that the statutory provision sought to be enforced through § 1983 is "phrased in terms of the persons benefited and contains rights-creating, individual-centric language with an unmistakable focus on the benefited class." *Id.* (cleaned up).

Section 2 of the VRA does not "unambiguously" confer individual rights. It starts with a prohibition directed to "State[s] and political subdivision[s]," providing

[3] It would be particularly odd to hold that political subdivisions like the City of Hammond can enforce § 2. Section 2 imposes obligations on "political subdivision[s]"; it does not give them any rights against their States. 52 U.S.C. § 10301. Indeed, political subdivisions lack Article III standing to sue their States in federal court. *See City of South Bend v. South Bend Common Council*, 865 F.3d 889, 892 (7th Cir. 2017).

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). Then, subsection (b) explains what it meant by that direction: a violation is established if "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by "members of a [protected] class of citizens." § 10301(b). The focus is "on what states and political subdivisions cannot do" and how their actions affect "class[es]" of persons. *Ark. State Conf.*, 86 F.4th at 1209; *see Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 857–58 (7th Cir. 2017) (no right established by statute that "only prohibits certain activities and mandates others").

Even if more than one reading of § 2's focus is possible, that would not rise to the level of an "unambiguous" individual right. *Talevski*, 599 U.S. at 183. The Court should not reach to find an enforceable right where plaintiffs dropped a § 1983 claim in their latest complaint, elected to proceed under the VRA alone, and did not argue that § 1983 provides a right of action in their opening brief on appeal.

CONCLUSION

This Court should affirm the district judge's grant of summary judgment and the disposition of all claims brought by the plaintiffs.

Respectfully submitted,

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May 13, 2024

/s/ James A. Barta
JAMES A. BARTA
Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2024, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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