No. 22-1395

In the United States Court of Appeals for the Eighth Circuit

ARKANSAS STATE CONFERENCE NAACP, et al.,

Plaintiffs-Appellants,

v.

ARKANSAS BOARD OF APPORTIONMENT, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Arkansas
No. 4:21-cv-01239-LPR

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AMICUS BRIEF OF HONEST ELECTIONS PROJECT IN SUPPORT OF APPELLEES & AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, the Honest Elections Project states it has no parent corporation, and no corporation owns 10% or more of its stock.

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Garner et al., *The Law of Judicial Precedent* (2016) 7, 9

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Pew Rsch. Ctr., *Deep Divisions in Views of the Election Process—and Whether It Will Be Clear Who Won* (Oct. 14, 2020), https://pewrsr.ch/3O8HyBV 15

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TRAC Reports, *More Voting Rights Lawsuits Filed in 2020 Than in 2016*, Syracuse Univ. (last visited June 14, 2022), https://trac.syr.edu/tracreports/civil/625/ 13

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Voting Rights Initiative, *The Evolution of Section 2: Numbers and Trends*, U. Mich. L. (last visited June 14, 2022), https://voting.law.umich.edu/findings/ 13

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INTEREST OF THE AMICUS CURIAE

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, as it implicates the legislature's preeminent role in setting the rules for elections and election-related litigation.

No party's counsel authored this brief in whole or in part; and no party, party's counsel, or person (other than amicus or its counsel) contributed money to fund the brief's preparation or submission. Counsel for all parties consent to the filing of this brief.

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SUMMARY OF THE ARGUMENT

The Voting Rights Act does not create a private cause of action to remedy violations of §2, 52 U.S.C. §10301. Section 2 doesn't contain a private remedy, nor does any other provision in the Voting Rights Act. This is the "'begin[ing]'" and the "'end[]'" of the analysis. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2380 (2020). And there's no reason for this Court to conjure up an *implied* private cause of action. Implying private causes of action is a thing of the past: we are "[n]ow long past 'the heady days in which [courts] assumed common-law powers to create causes of action.'" *Egbert v. Boule*, —S.Ct.—, 2022 WL 2056291, at *5 (U.S. June 8, 2022). And it's highly inappropriate after *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), where the Supreme Court clearly concluded that "private rights of action to enforce federal law must be created by Congress." *See also Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. ex. rel. Fed. Nat'l Mortg. Ass'n v. Raines*, 534 F.3d 779, 793 (D.C. Cir. 2008) (Kavanaugh, J.) ("[C]ourts today rarely create implied private rights of action; courts generally deem it Congress's prerogative to make that decision."), *abrogated on other grounds by Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82 (2017).

Nor is there any Supreme Court case requiring this Court to hold that §2 has a private cause of action. As Justice Gorsuch—joined by Justice Thomas—recently observed, it's still an "open question" whether §2 can be privately enforced. *Brnovich v. Democratic Nat'l Comm.*, 141 S.Ct. 2321, 2350 (2021) (Gorsuch, J., concurring). No matter how many §2 cases by private plaintiffs that courts may have decided over the

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years, *see* Aplt.Br.7-9, this Court isn't bound by untested assumptions or dicta. *See, e.g.*, *Van Buren v. United States*, 141 S.Ct. 1648, 1660 (2021); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). It is well established that those assumptions and dicta "ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821). Here, the question of whether §2 can be privately enforced is squarely presented for this Court to address with fresh eyes.

To be sure, that the text enacted by Congress contains no private cause of action should control this case. But it is also critical to note that §2 is '"a balm for racial minorities, not political ones."' *LULAC v. Clements*, 999 F.2d 831, 854 (5th Cir. 1993). "Running elections state-wide is extraordinarily complicated and difficult" as it is. *Merrill v. Milligan*, 142 S.Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stay). But there's been a significant increase in the number of §2 cases brought by private litigation groups to undermine the States' efforts to protect election integrity and to discharge their duties to draw electoral maps. *See, e.g.*, *La Union Del Puebloe Entero v. Texas*, No. 5:21-cv-844 (W.D. Tex. filed Sept. 3, 2021); *LULAC v. Abbott*, No. 3:21-cv-259 (W.D. Tex. filed Oct. 18, 2021); *In re Ga. S.B. 202*, No. 1:21-mi-55555 (N.D. Ga. consolidated Dec. Dec. 22, 2021); *Caster v. Merrill*, No. 2:21-cv-1536 (N.D. Ala. filed Nov. 4, 2021); *Milligan v. Merrill*, No. 2:21-cv-1530 (N.D. Ala. filed Nov. 15, 2021); *Mi Familia Vota v. Hobbs*, No. 2:21-cv-1423 (D. Ariz. filed Aug. 17, 2021).

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Although these §2 challenges are largely unsuccessful, the States still bear a heavy burden defending them. States—and voters' confidence in elections—suffer as a result. "Confidence in the integrity of our electoral processes" is "essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). It shouldn't be a surprise that, with such a constant barrage of attacks against the States' election laws, poll after poll show a drop in the public's confidence in election integrity, fairness, and outcomes.

Congress intended that §2 of the Voting Rights Act be used to root out invidious racial discrimination. It never intended for §2 to be used by litigation groups as a vehicle to undermine basic laws that improve election integrity. Nor did Congress "weigh the 'costs and benefits' of creating a cause of action" to burden the States in this manner. *Egbert*, 2022 WL 2056291, at *11 (Gorsuch, J., concurring in the judgment) (quoting *Ziglar v. Abbasi*, 137 S.Ct. 1843, 1858 (2017)).

Congress didn't create a private remedy for §2, and prior litigation under §2 cannot—in the nature of adverse possession—create one. The Court should affirm the district court.

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ARGUMENT

I. Section 2 of the Voting Rights Act does not create a private cause of action.

The district court was right: Section 2 of the Voting Rights Act does not create a private cause of action. Aplt. Add. 16; R. Doc. 100, at 16.

A. This Court should "start where [courts] always do: with the text of the statute." *Van Buren*, 141. S.Ct. at 1654. Section 2 does not expressly create a private cause of action. It states only a legal rule: "[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 … to vote on account of race or color." 52 U.S.C. §10301(a). It fails to expressly grant a right to sue by private, aggrieved persons. *See id.* There's nothing in §2—or the rest of the VRA—that accords private plaintiffs like Appellants the right to enforce §2. This omission is in stark contrast to the VRA's express grant of civil and criminal enforcement authority to the Attorney General . *See* §10308(a)-(d).

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As the district court keenly observed, there's "very little" of "the text and structure of the [VRA]" that can help Appellants. Aplt. Add. 24; R. Doc. 100, at 24. And despite going on for pages upon pages, Appellants continue to offer little to no meaningful textual analysis to support its claim that §2 creates a private right of action. Aplt.Br.30-43. Appellants point this Court to §3 and §14 of the VRA, but this is misdirection. Neither section creates a private right of action to enforce §2.

i. Start with §3, which concerns court-appointed federal observers, not private causes of action. It states: "Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers …." 52 U.S.C. §10302(a). Contrary to

Appellants' arguments, §3 does *not* "contain[] private remedies for Section 2 violations." Aplt.Br.30. And Appellants' myopic focus on just the phrase "aggrieved person" at the expense of the rest of the text violates the whole-text canon and fails to consider the full text that Congress actually passed. *See, e.g.*, *Mont v. United States*, 139 S.Ct. 1826, 1833-34 (2019) ("'[T]he whole-text canon' requires consideration of 'the entire text, in view of its structure' and 'logical relation of its many parts.'" (quoting Scalia & Garner, *Reading Law* 167 (2012)).

Nor does the reference to "an aggrieved person [who] institutes a proceeding … to enforce the voting guarantees of the fourteenth or fifteenth amendment" help Appellants. §10302(a). It's about suits brought to "enforce … the fourteenth or fifteenth amendment"; it says nothing about whether that person can sue to enforce §2 or the VRA. Contrast this to the Attorney General's right to enforce §2, which is expressly mentioned in the VRA. §10308(d) ("Attorney General may institute … an action" for violations of "section … 10302"); *see Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1617 (2018) (Congress "knows exactly how to specify" what it wants). And this difference matters, because as the district court correctly observed, "§2 protects a right different from, and broader than, the right secured by the Constitution." Aplt. Add. 19; R. Doc. 100, at 19. "[W]hile the Fourteenth Amendment and §2 of the [VRA] both prohibit vote dilution based on a race, a racially dilutive voting map violates the Fourteenth Amendment only if the map was enacted or maintained with discriminatory *intent*." Aplt. Add. 18; R. Doc. 100, at 18. "On the other hand, §2 is violated if the

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results of a map dilute Black voting strength, even if the purpose behind the map was entirely race-neutral." Aplt. Add. 18-19; R. Doc. 100, at 18-19. In other words, despite a passing reference to suits brought under the Constitution, §3 says nothing about a private cause of action for §2.[1]

ii. Appellants' reliance on §14 fails for the same reasons. Section 14 states that "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, ay allow the prevailing party, other than the United States a reasonable attorney's fee." 52 U.S.C. §10310(e). This falls woefully short of a clear and express grant of a right to private parties to enforce §2. All that Appellants can point to is the phrase "prevailing party, other than the United States"; however, this is in reference to suits brought to enforce the Fourteenth or Fifteenth Amendment. There's no mention of §2, much less a private causation of action for §2.

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B. There's also no warrant for this Court to imply a cause of action where Congress did not create one. The Supreme Court has made it clear that—notwithstanding its practice in the 1970s—implying private causes of action "is now a

[1] The district court correctly distinguished between binding holdings and non-binding dicta in *Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989). The holding of the case was that the unsuccessful candidate was "not an aggrieved voter suing to protect his right to vote" under the meaning of §3. *Id.* at 621. This Court, however, did not decide whether §3 created a cause of action for §2. *See id.* Its untested assumptions about §2's private cause of action are dicta, Aplt. Add. 28-29; R. Doc. 100, at 28-29, or statements that are "unnecessary to the cases' resolution," Garner et al., *The Law of Judicial Precedent* 46 (2016).

'disfavored' judicial activity." *Ziglar*, 137 S.Ct. at 1857. Implying causes of action is a thing of the past: we are "[n]ow long past 'the heady days in which [courts] assumed common-law powers to create causes of action.'" *Egbert*, 2022 WL 2056291, at *5. The Supreme Court has made it clear for two decades now that "private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286; *Pirelli*, 534 F.3d at 793 (Kavanaugh, J.) ("[C]ourts today rarely create implied private rights of action; courts generally deem it Cnogress's prerogative to make that decision.").

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* * *

Just as this Court should begin with the text, its analysis should also "'end[] with the text.'" *Little Sisters of the Poor*, 140 S.Ct. at 2380. "Statutory intent" on whether Congress intended to create "not just a private right but also a private remedy" is "determinative." *Sandoval*, 532 U.S. at 286. "Without it a cause of action does not exist and courts may not create one, no matter how desirable that might be as a public matter, or how compatible with the statute." *Id.* at 286-87. Congress's intent is based on what it actually wrote in the text of the VRA, because "intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment." *Murphy v. NCAA*, 138 S.Ct. 1461, 1487 (2018) (Thomas, J., concurring). There's no express—or implied—statement by Congress in the VRA intending to create a private cause of action for §2. Because Congress did not

create a private cause of action for §2, the Court should say the obvious: there's no private cause of action for §2.

II. This Court is not bound by precedent because the past cases simply assume, without deciding, that §2 has a private cause of action.

Here, the district court keenly observed that plaintiffs stood on arguments "about precedent" as they had little to stand on statutory "text and structure." Aplt. Add. 24; R. Doc. 100, at 24. But even Appellants' reliance on precedent is completely misplaced. *See* Aplt.Br.7-9. This Court is not bound by any Supreme Court or Eighth Circuit case holding that §2 can be privately enforced.

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Courts are bound by the *holding* of a decision. For something to constitute a holding, it must be "'a point necessarily decided'" in a case. *CSX Transp., Inc. v. Gen. Mills, Inc.*, 846 F.3d 1333, 1337 (11th Cir. 2017) (quoting Garner et al., *The Law of Judicial Precedent* 44 (2016)). The "focus" is "on the legal questions actually presented to and decided by the court." Garner 44.

On the other hand, courts are not bound by dicta—"'remarks made in the course of a decision but not essential to the reasoning behind that decision.'" *CSX Transp.*, 846 F.3d at 1337 (quoting Garner 44); *see also, e.g.*, *Van Buren*, 141 S.Ct. at 1660 (court not "'not bound to follow' any dicta" not addressing "the 'point now at issue'" (quoting *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006)); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007) (plurality) (same); *Cohens*, 19 U.S. at 399 ("[G]eneral expressions, in every opinion, are to be taken with the case in

which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."). And Courts are "especially" "not bound by … dicta that have been repudiated by the holdings of … subsequent cases." *Kerry v. Din*, 576 U.S. 86, 94 (2015) (op. of Scalia, J.). Critically, courts are not bound by untested assumptions either. *See Brecht*, 507 U.S. at 631 (court not bound where it "never squarely addressed the issue" and "at most assumed" an issue).

Thus far, as Justice Gorsuch correctly and recently observed, the Supreme Court has "assumed—without deciding—that [the VRA] furnishes an implied cause of action under §2." *Brnovich*, 141 S.Ct. at 2350 (Gorsuch, J., concurring); *see also City of Mobile v. Bolden*, 446 U.S. 55, 60 (1980) (plurality) ("[a]ssuming, for present purposes, that there exists a private right of action to enforce [§2]"). There's never been a *holding* of this Court or the Supreme Court concluding that §2 can be privately enforced, and Appellants do not cite one. The most they suggest is that the Supreme Court and this Court have decided §2 cases brought by private plaintiffs on the merits. Aplt.Br.7-8. But under basic rules of common law, neither this Court nor the Supreme Court has had the occasion of "being presented" the "legal question[]" of—and actually deciding—whether §2 can be privately enforced. Garner 44. Such untested assumptions cannot bind this Court, *Brecht*, 507 U.S. at 631, especially here when "the very point is presented for decision," *Cohens*, 19 U.S. at 399.

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In each one of the Supreme Court case offered in a string-cite by plaintiffs, the "legal questions actually presented to and decided by the [Supreme Court]" was always something other than whether §2 can be privately enforced. Garner 44.[2] Whether §2 can be privately enforced thus remains "an open question." *Brnovich*, 141 S.Ct. at 2350 (Gorsuch, J., concurring).

And contrary to Appellants' assertion, the Supreme Court in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), did not decide that the VRA creates a private

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[2] *See, e.g.*, *Brnovich*, 141 S. Ct. 2333 (addressing "how §2 applies to generally applicable time, place, or manner voting rules"); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) ("primar[ily]" deciding whether states are required "to show that [a] legislature somehow purged the 'taint' that the court attributed to the defunct and never-used plans enacted by a prior legislature"); *Bartlett v. Strickland*, 556 U.S. 1, 6 (2009) (op. of Kenney, J.) (assessing "whether [Secton 2] … require[s] state officials to draw election-district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice, even where the racial minority is less than 50 percent of the voting-age population in the district to be drawn"); *LULAC v. Perry*, 548 U.S. 399, 414 (2006) (whether the challengers offered "a manageable, reliable measure of fairness for determining whether a partisan gerrymander [was] unconstitutional"); *Holder v. Hall*, 512 U.S. 874, 876 (1994) (op. of Kennedy, J.) (deciding "whether the size of a governing authority is subject to a vote-dilution challenge under §2"); *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (examining whether a "a violation of §2 can be found … where … minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population"); *Growe v. Emison*, 507 U.S. 25, 27 (1993) (addressing "the propriety of the District Court's pursuing reapportionment … in the face of [the] state-court litigation" and "conclusion that the [Minnesota] state court's legislative plan violated §2"); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (whether "the creation of majority-minority districts … invariably minimize[s] or maximize[s] minority voting strength"); *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991) ("whether [§2] also applies to election of trial judges in Texas"); *Chisom v. Roemer*, 501 U.S. 380 (1991) (whether judicial elections in Louisiana are covered by §2); *Thornburg v. Gingles*, 478 U.S. 30, 61 (1986) (what the "proper legal standard" is for applying §2).

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cause of action for §2. To start, the precise question before the *Morse* Course was whether §***10***—not §2—could be privately enforced. The district court correctly concluded that *Morse* had no majority opinion. Aplt. Add. 26; R. Doc. 100, at 26. Five Justices in two separate opinions simply agreed that §10 could be privately enforced. Whatever references that these opinions may have made to §2 in passing are mere "'remarks made in the course of a decision but not essential to the reasoning behind that decision.'" *CSX Transp.*, 846 F.3d at 1337 (quoting Garner 44). In other words, they are non-biding dicta. In assessing §2, this Court is bound by the analytical framework contained in the majority opinion in *Sandoval*, not some combination of dicta from two separate opinions in *Morse*.

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III. The district court's reading of §2 not only comports with the statutory text but furthers important public policy interests.

Because the statutory text makes it clear that Congress did not intend §2 to be privately enforced, that is the end of this matter. But this Court should rest assured that Congress had good reasons to make that choice from a public-policy standpoint. Section 2 has been misused by private plaintiffs. The increase of §2 cases also corresponds with increased burdens on the States that have to not only administer redistricting and elections but also protect the integrity of those elections. The increase of §2 litigation also correlates to a precipitous drop in the public's confidence in the elections. Congress did not intend to allow litigation groups to use §2 to burden States and to cast doubt over our elections.

A. A Syracuse University database estimates an 82% increase in "voting rights" lawsuits in the leadup to the 2020 Presidential election (155 lawsuits) when compared to the previous presidential election cycle (85 lawsuits), and nearly a 330% increase when compared to 2018 (47 lawsuits). TRAC Reports, *More Voting Rights Lawsuits Filed in 2020 Than in 2016*, Syracuse Univ. (last visited June 14, 2022), https://trac.syr.edu/tracreports/civil/625/. According to the same database, 59 out of 90 federal district courts had at least one "voting rights" lawsuit during 2020—with the largest number of suits being filed in key battleground States like Georgia, Michigan, and Arizona. *Id.* Similarly, according to the Michigan Law Voting Rights Initiative, "[t]he proportion of cases challenging state practices has increased over time. Voting Rights Initiative, *The Evolution of Section 2: Numbers and Trends*, U. Mich. L. (last visited June 14, 2022), https://voting.law.umich.edu/findings/.

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Much of this increase has been driven by private plaintiffs. Between January and June 2021, an additional 58 garden-variety "voting rights" suits were filed, only one of which was filed by the federal government. TRAC Reports, *Civil Voting Rights Lawsuits Filed in June 2021*, Syracuse Univ. (last visited June 14, 2022), https://trac.syr.edu/tracreports/civil/656/. According to the U.S. Department of Justice, only *six* §2 cases have been brought by the federal government against State and local elections since 2017. Dep't of Just., *Cases Raising Claims under Section 2 of the Voting Rights Act* (last visited June 14, 2022), https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0. Congress understood that leaving

the enforcement of §2 to the federal government would be a moderating influence, and experience shows it was right.

B. Despite the explosion of "voting rights" cases largely driven by private plaintiffs, Michigan Law also observes that these cases are mostly without merit—concluding that "Section 2 challenges … have been largely unsuccessful." Voting Rights Initiative, *supra*. Nevertheless, the States still must defend every one of these lawsuits. *See, e.g.*, *La Union Del Puebloe Entero v. Texas*, No. 5:21-cv-844 (W.D. Tex. filed Sept. 3, 2021) (challenging Texas's election-integrity law); *LULAC v. Abbott*, No. 3:21-cv-259 (W.D. Tex. filed Oct. 18, 2021) (challenging Texas's redistricting legislation); *In re Ga. S.B. 202*, No. 1:21-mi-55555 (N.D. Ga. consolidated Dec. Dec. 22, 2021) (challenging Georgia's election integrity law); *Caster v. Merrill*, No. 2:21-cv-1536 (N.D. Ala. filed Nov. 4, 2021) (challenging Alabama's electoral maps); *Milligan v. Merrill*, No. 2:21-cv-1530 (N.D. Ala. filed Nov. 15, 2021) (challenging Alabama's congressional map); *Mi Familia Vota v. Hobbs*, No. 2:21-cv-1423 (D. Ariz. filed Aug. 17, 2021) (challenging Arizona's election integrity law). Some of these lawsuits are initially successful, requiring emergency requests for stays on appeal. "Running elections state-wide is extraordinarily complicated and difficult" by itself. *Merrill*, 142 S.Ct. at 880 (Kavanaugh, J., concurring in grant of applications for stay). It is only more complicated and difficult when States must do it while also fending off a barrage of private litigation and navigating a flurry of contradictory court orders.

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C. "Confidence in the integrity of our electoral processes" is "essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4; *see also Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 925 (7th Cir. 2020), *cert. denied*, 141 S.Ct. 1516 (2021). It should be no surprise that a sustained barrage of legal challenges against election integrity measures and redistricting efforts—charging *racial discrimination*, no less—undermine the public's confidence in our electoral system. Public trust in elections has eroded in recent years. A recent Pew poll shows that the percentage of voters believing that the elections nationwide could be run "very well" or "well" went from 81% in 2018 to 62% in 2020. *See* Pew Rsch. Ctr., *Deep Divisions in Views of the Election Process—and Whether It Will Be Clear Who Won* (Oct. 14, 2020), https://pewrsr.ch/3O8HyBV. By contrast, the percentage of voters believing that the elections nationwide would be run "not too well" or "not at all well" increased from 19% in 2018 to 38% in 2020. Similarly, at the beginning of 2021, the State Policy Network reported that only 45% of Americans have "complete" or "a great deal of confidence" in the fairness of elections, and nearly 33% of Americans "just a little" or "no" confidence in the fairness of the national elections. State Pol'y Network, *Polling Spotlight* (Jan. 4, 2021), https://spn.org/blog/polling-spotlight-election-integrity/. And according to an ABC News/Ipsos poll from late 2021, 41% of Americans have little or no confidence in the integrity of the U.S. electoral system, and only 20% were "very confident" in U.S. election integrity. Ipsos, *Topline & Methodology* (last visited June 14, 2022), https://bit.ly/39dmXh2.

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These trends are troubling. This fast decline in the confidence in elections has coincided with, and is correlated to, the increase in the so-called "voting rights" cases brought under §2 by private groups. These suits are typically paired with over-the-top rhetoric accusing States of suppressing minority votes. To the extent that Congress's intent in enacting §2 was to promote confidence in our electoral system by rooting out racial discrimination, the propagation of meritless suits by private groups has not furthered this intent. Nor did Congress have the opportunity to "weigh the 'costs and benefits' of creating a cause of action" to burden the States in this manner. *Egbert*, 2022 WL 2056291, at *11 (Gorsuch, J., concurring in the judgment) (quoting *Ziglar*, 137 S.Ct. at 1858). Congress should make that choice, not the federal courts or private litigants.

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CONCLUSION

For all these reasons, this Court should affirm the district court's order dismissing Plaintiffs' complaint.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 4,248 words, excluding the parts exempted by Rule 32(f). This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

The electronic version of the brief and addendum have been scanned for viruses and are virus-free.

Dated: June 14, 2022 *<u>/s/ Cameron T. Norris</u>*

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CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

Dated: June 14, 2022 *<u>/s/ Cameron T. Norris</u>*

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