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

AMICUS BRIEF FOR THE STATES OF TEXAS, ALABAMA, FLORIDA, GEORGIA, INDIANA, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, AND UTAH IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Certificate of Interested Parties

Under the third sentence of Eighth Circuit Internal Operating Procedure III(J)(3), Amici Curiae, as state governmental parties, need not furnish a certificate of interested persons.

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Interests of Amici

Amici are the States of Texas, Alabama, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, Montana, South Carolina, and Utah. Amici States retain near-plenary power to regulate elections under the Tenth Amendment. *Shelby County v. Holder*, 570 U.S. 529, 543 (2013). The Voting Rights Act of 1965 ("VRA") created narrow carveouts to that power to ensure that voters do not face discrimination on account of race or color. *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966). The carveouts respect the equal dignity of the States by authorizing suits under individual VRA sections only in certain venues by certain persons at certain times. For its part, section 2 of the VRA provides for enforcement only by the federal Department of Justice ("DOJ"), with no private right of action. Amici States have an interest in avoiding the atextual reading of section 2 that Appellants advance, which intrudes upon State sovereignty in a way that neither the Tenth Amendment nor the VRA can bear.

Amici States also have an economic interest in this case. For decades and despite the lack of a statutory right of action, private plaintiffs have filed most section 2 suits. Amici States incur heavy costs—often millions of dollars—to defend themselves against each suit, often in complex federal litigation that spans years if not decades. This is a straightforward pocketbook injury, which could largely be avoided were courts to dismiss private section 2 claims. Defending against improper private suits depletes States funds that could be used for other important efforts to protect voting rights. *Cf. Wisconsin Legislature v. Wis. Elec. Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam).

ARGUMENT

The Fifteenth Amendment played a transformative role in American democracy following the Civil War. That amendment placed restrictions on States' sovereign right under the Tenth Amendment to manage their own elections. No State was required to confer the right to vote upon anyone. *City of Mobile v. Bolden*, 446 U.S. 55, 61-62 (1980) (plurality op.); *United States v. Reese*, 92 U.S. [2 Otto.] 214, 217 (1875). But if it did, it could not deny or abridge that vote for anyone "on account of race, color, or previous condition of servitude." U.S. Const., amend. XV, § 1. Congress implemented that principle in the Civil Rights Acts of 1957, 1960, and 1964, and the Voting Rights Act of 1965. *See* Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 14-32 (2004).

For its part, the VRA gave the *federal* government a number of voting-rights enforcement tools. For instance, it authorized DOJ to assign federal election examiners and observers, VRA §§ 6, 8, Pub. L. No. 89-110, 79 Stat. 437; to preclear new election procedures and devices (albeit unconstitutionally for at least the reasons explained in *Shelby County*, 570 U.S. at 556-57), *id.* § 5; and to institute voting-rights suits in federal court against allegedly offending States and localities, *id.* §§ 3(a)-(b), 10, 12.

In stark contrast, Congress granted no private right of action to *individuals* to bring suit for alleged vote dilution under section 2 of the VRA. *Cf.* 52 U.S.C. § 10301(a). No one discounts the importance of ensuring that all qualified voters have equal access to the ballot, and Amici States take great pains to achieve that end. Yet even "a strong public desire to improve the public condition is not enough to

warrant achieving the desire by a shorter cut than the constitutional way." *Horne v. Dep't of Agric.*, 576 U.S. 350, 362 (2015). Nothing in the text, context, structure, statutory history, or legislative history of section 2 reveals a private right of action, and no controlling precedent demands a contrary result.

And with good reason. As NAACP and other voting-rights leaders recognized in the 1960s and when section 2 was amended in 1982, private suits under section 2 threaten to *inhibit*, rather than advance, the VRA's objective of furthering voting rights. This Court should reject Appellants' call for a private right of action, which not only would frustrate the VRA's objectives but also harm the Amici States.

I. Section 2 of the VRA Lacks a Private Right of Action.

Nothing in the text, context, or history of the VRA or any of it amendments even hints that the VRA was originally understood to provide a private right of action. Appellants (at 14-16, 44-45) base their counterargument largely on a snippet of post-hoc legislative history, which in fact undermines Appellants' view.

The Court should reject any notion that precedent demands a different outcome. The Supreme Court sometimes has assumed in dicta that section 2 of the VRA contains a private right of action. *E.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186, 230-34 (1996) (plurality op.). But because it has never examined the question or based a holding on this purported right, statutory analysis should guide this Court in the first instance.

A. Nothing in the text, context, statutory history, or legislative history of section 2 suggests a private right of action.

Appellants concede (at 28) that the text of section 2 does not expressly grant a private right of action, though they assert the text contains an "implication of an intent to confer" such a right. Appellants thus proceed by urging an implied private right of action that relies heavily on legislative history.

As an initial matter, that is no longer the way the Court reads statutes in general or section 2 in particular. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2337 (2021). Rather, "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

Under *Sandoval*, section 2 does not confer a private right of action. Although section 2 refers to "the right . . . to vote," 52 U.S.C. § 10301(a), it does not contain any "'rights-creating' language." 532 U.S. at 288. The underlying right to vote to which section 2 refers is based on state law, *see Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982), and the Fifteenth Amendment. Section 2 does not *create* a federal right "in [the] clear and unambiguous terms" that precedent requires. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002); *see also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 332 (2015) (plurality op.) ("[A] private right of action under federal law . . . must be 'unambiguously conferred.'").

Moreover, the VRA makes clear that section 2 does not create a private remedy. Section 12 of the VRA authorizes civil and criminal enforcement actions by the federal government. *See* 52 U.S.C. § 10308. "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."

Sandoval, 532 U.S. at 290. "Courts should presume that Congress intended that the enforcement mechanism provided in the statute be exclusive." *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011 (8th Cir. 1999) (en banc).

Neither the text, nor the context, nor the statutory history of section 2 supports Appellants' contrary arguments. And legislative history provides no indication that such a private right of action is implied in section 2.

1. Text and context.

The statutory text provides the starting point for analysis. *Beal v. Outfield Brew House, LLC*, 29 F.4th 391, 394 (8th Cir. 2022). And words of a statute must be read in context rather than in isolation. *Guam v. United States*, 141 S. Ct. 1608, 1613 (2021); *Blanton v. Kansas City S. Ry. Co.*, 33 F.4th 979, 983 (8th Cir. 2022).

Under section 2,

> (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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

The text of section 2 is silent as to remedies. Neither the Supreme Court nor this Court reads statutory silence about remedies to imply a right of action that would intrude upon State sovereignty and State power. Rather, a federal statute that means to encroach on either State sovereignty or federalism must do so with a clear statement. *Sossamon v. Texas*, 563 U.S. 277, 284 (2011); *Bond v. United States*, 572 U.S. 844, 858 (2014). Because the reading of section 2 that Appellants advance would encroach on both State sovereignty and federalism, it is doubly presumed not to have been created absent a clear expression in the text. *Cf. Libr. of Cong. v. Shaw*, 478 U.S. 310, 318 (1986) (courts may not find waiver of State sovereign immunity in a statute by implication or in ambiguous language).

Statutory context confirms that section 2 contains no implied private right of action. *See* Appellees' Br. 35-50. Two canons of construction, under which Congress is presumed to legislate, *see Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2307 (2021); *DeBough v. Shulman*, 799 F.3d 1210, 1214 (8th Cir. 2015), further underscore the lack of textual support for Appellants' arguments. First, take the omitted-case canon, which provides that "a matter not covered is to be treated as not covered" by a statute. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020). Second, consider the negative-implication canon, which provides that when Congress includes particular language in one section of a statute but omits it elsewhere in the same Act, the choice is presumed intentional. *Badgerow v. Walters*, 142 S. Ct. 1310, 1318 (2022). The VRA's statutory text does not create a private right of action under section 2, which is

especially significant for two reasons: the statute *does* create an express right of action for the federal government, *see* 52 U.S.C. § 10308(d), and Congress knows how to create private rights of action when it wants to, including in the civil rights sphere. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, § 204(a), 78 Stat. 241 (codified at 42 U.S.C. § 2000a-3(a)). It follows that Congress's only remedial provision for section 2 violations would vest the Attorney General with sole enforcement authority.

2. Statutory history.

Even if the statutory text and context did not show that section 2 lacks an implied private right of action, statutory history would yield the same conclusion. Courts construe legislation in the light of the law as it existed before and after each amendment to it. *United States v. Wong Kim Ark*, 169 U.S. 649, 653-54 (1898). A significant statutory amendment is presumed to reflect statutory intent to make a real and substantial change to the legal status quo. *Van Buren v. United States*, 141 S. Ct. 1648, 1660 (2021); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 896-97 (8th Cir. 2012) (en banc). Conversely, Congress does not implicitly make radical changes to a statute through superficial, technical, or conforming amendments. *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071-72 (2018). Instead, Congress ordinarily provides a clear indication of its intent in the *text* of the amendment provision if it wants to effect a change in meaning. *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017).

Here, Congress did *not* clearly indicate an intent to create a private cause of action for Section 2 for the reasons described above. Nor did Congress do so when it amended the VRA in 1975. Voting Rights Act Amendments of 1975, Pub. L. No. 94-

73, 89 Stat. 400. Those amendments expanded the criteria triggering the VRA's protections. *Id.* §§ 101, 202, 205, 403. They extended the VRA to cover language minorities. *Id.* § 203. They mandated for the first time that the Attorney General of the United States initiate suits against States to enforce the new Twenty-sixth Amendment. *Id.* § 407. And they provided private parties with certain remedies in actions to enforce the Fourteenth and Fifteenth Amendments' voting guarantees. *Id.* §§ 401-402. They did not say anything about a private cause of action to enforce section 2.

Nor did Congress do so when it amended the VRA in 1982. That lack of change is especially noteworthy for several reasons. *First*, revisions to section 2 were the motivation behind the 1982 amendments, which sought to overturn the Supreme Court's decision in *Bolden*, which had established that section 2's coverage was "no different from that of the Fifteenth Amendment itself." 446 U.S. at 61. *Second*, the Senate Committee Report accompanying those amendments briefly raised the issue of a private right of action under that section, which shows that Congress was aware that section 2 could be read *not* to confer a private right of action. S. Rep. No. 97-417, 177 (1982). *Third*, Congress made *other* amendments to section 2 to clarify the scope of its prohibition.

Nor did Congress clearly create a private right of action under section 2 when it revisited the VRA in 1992 and in 2006. *See* Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Voting Rights Act Amendments of 2006, Pub. L. No. 109-246, 120 Stat. 577. The 2006 amendments in particular noted the

continuing importance of enforcing section 2—but never extended a private right of action under that section.

In reality, Congress has never mustered the votes to create a private cause of action to enforce section 2. The first post-2006 companion bills to propose any VRA amendment—H.R. 3899 of 2014 and S. 1945 of 2014—sought to alter the VRA to provide that any "aggrieved person" could seek relief. H.R. 3899 § 6, 113th Cong., 2d Sess. (2014); S. 1945 § 6, 113th Cong., 2d Sess. (2014). But it did not become law. A substantially identical House bill five years later died in committee. H.R. 1799 § 6(a)(2), 116th Cong., 1st Sess. (2019). None of those proposed amendments would have made sense if the existing statutory text implied a private right of action.

3. Legislative history.

Appellants rely heavily on two sentences in committee reports on the 1982 amendments to section 2. Specifically, the House Judiciary Committee declared, without citation, an intention for section 2 to be privately enforceable. H. Rep. No. 97-227, at 32 (1981). The Senate Judiciary Committee went further, boldly proclaiming that *every* congress for the prior seventeen years had clearly intended the same. S. Rep. No. 97-417, at 26-27 (1982). Appellants' reliance on these snippets, excavated from thousands of pages of VRA legislative history, is misplaced.

Appellants' approach is problematic at the threshold because legislative history is not the law, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019), especially in this context, *Sandoval*, 532 U.S. at 287-88 & n.7. The Supreme Court showed deep skepticism toward committee reports in the very term that overlapped with Congress's drafting of the 1982 report. *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982). That

skepticism has only grown with time. *E.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). When, as here, the statute's plain text, context, and history all point in the same direction, this Court rightly ignores legislative history. *See, e.g.*, *Iverson v. United States*, 973 F.3d 843, 854 (8th Cir. 2020).

Notwithstanding this bar, Appellants' legislative history argument fails. When applicable, legislative history is used solely to resolve ambiguity, not to create it. *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1749 (2020). This is especially true for statements—like the 1982 Senate committee report—that purport to state the intent of a prior Congress, which is "not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). And this Court has rejected the very type of post-hoc committee-report argument that Appellants frame here. *See Mo. Prot. & Advocacy Servs. v. Mo. Dep't of Mental Health*, 447 F.3d 1021, 1024 (8th Cir. 2006).

But most damning is that Appellants' legislative-history argument is built on a fiction. The Senate subcommittee in 1982 unanimously praised prior voting-rights bills' transferal of litigation to DOJ without a hint that it suspected the VRA had broken with that tradition. S. Rep. No. 97-417, at 103-07. And when the Senate committee report in 1982 *claimed* that it was reiterating the existence of a section 2 private right of action "as has been clearly intended by Congress since 1965," it did not offer a single citation to *anything* in the thousands of pages of legislative history from 1965 to support that claim. *Id.* at 26-27. The lack of a citation is not a testament to legislative laze; the rest of the 265-page Senate Report does a deep dive into the 1965 legislative history on almost every other factual or historical assertion it makes. The

committee appears to have struggled and failed to identify a single statement to support its conclusion.

An examination of the source material confirms as much. The floor debates, sponsor statements, and presidential remarks on the signing of the VRA in 1965 offer nothing to support the 1982 Senate committee's view of intent. The 1965 House committee majority recognizes the resource constraints that DOJ faces in shouldering the litigation burden for VRA enforcement, but the majority proposes appointment of federal examiners (not delegation to private parties) to lighten that load. *Id.* at 1-4. The 1965 Senate committee majority not only was silent about a section 2 private right of action but recognizes that private litigation had never moved the needle on voting rights. S. Rep. No. 89-162, at 6-9 (1965). None of this legislative history from 1965 makes sense if, as the Senate Judiciary Committee asserted for the first time nearly two decades later, every Congress starting in 1965 intended section 2 to create a private right of action.

The 1982 House Report rings just as hollow. *First*, the report discusses the 1982 amendments' purposes, but it does not mention a section 2 private right of action anywhere in that discussion. H. Rep. No. 97-227, at 2-3, 28-31, 45-47. *Second*, the report dissects *Bolden*, yet does not say the Court erred by leaving open the question of whether section 2 provides a private right of action. *Id.* at 2-3, 28-30. *Third*, it does not refer to a section 2 private right of action in a painstakingly thorough section-by-section analysis of the 1982 amendments' effects. *Id.* at 39-46. *Fourth*, it does not include any revisions or additions to the section 2 text to memorialize this purported intent despite extensive amendments to multiple VRA sections. *Id.* at 49-53.

If anything, the House Committee Report reflects a frenzy. The committee was in such a rush to report the amendments to the floor that committee staff failed to get summaries of hearing testimony to the committee members. *Id.* at 63, 71. Committee leaders largely negotiated the amendments behind closed doors, only to reveal major provisions to the rest of the committee the morning of the vote. *Id.* at 61-62. Some committee members who voted with the majority recount being presented with the core amendments to preclearance and vote dilution for the first time when the voting discussion was about to begin. *E.g.*, *id.* at 61. Debating those contentious provisions monopolized committee time to the exclusion of issues not actually mentioned in the text of the proposed amendments. This process was unlikely to result in much attention, let alone consensus, regarding a stray reference to private enforcement buried deep in the committee's seventy-four-page report.

B. No precedent requires holding that section 2 contains a private right of action.

Appellants and some of their amici insist that precedent established that section 2 provides an implied private right of action. Not so. Justices Gorsuch and Thomas were correct when they noted in *Brnovich* that this remains an open question. 141 S. Ct. at 2350 (Gorsuch and Thomas, JJ., concurring).

The Court has sometimes "[a]ssum[ed]" without deciding "that there exists a private right of action to enforce" section 2. *Bolden*, 446 U.S. at 60 (plurality op.). But it has never so held. Decisions that "never squarely addressed the issue," but "at most assumed" an answer, are not binding "by way of stare decisis." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*,

543 U.S. 157, 170 (2004). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Appellants focus on *Morse*, but that case's holding concerned section 10 of the VRA, not section 2. The most that can be said is that a two-justice opinion briefly pointed to the (discredited above) legislative history to suggest that private plaintiffs could enforce Section 2 and that a separate three-justice opinion did the same. *See Morse*, 517 U.S. at 232 (opinion of Stevens, J.) (citing S. Rep. No. 97-417, at 30); *id.* at 240 (Breyer, J., concurring in the judgment). As Appellees argue (at 26-31), *Morse*'s fractured opinion is nonbinding, its discussion of section 2 is dicta, and—as explained in Part I.A.3 *supra*—its assumption about Congress's intent is unsupported by the legislative history. In any event, relying on the legislative-history-focused dicta in the *Morse* opinions would be inconsistent with the later majority opinion in *Sandoval*, which limited its "search for Congress's intent [to] the text and structure of" the statute. 532 U.S. at 288.

This Court's precedent is equally unfavorable to Appellants, as Appellees explain (at 31-32). Amici States note further that other authority that Appellants invoke (at 8 n.5) to demonstrate a purported private right of action does not examine whether section 2 creates a private right. *See, e.g.*, *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 930 (8th Cir. 2018); *Cottier v. City of Martin*, 604 F.3d 553, 555 (8th Cir. 2010) (en banc). Because Appellants identify no

holding that section 2 creates a private right, they cannot show that this Court's precedent establishes a private remedy under section 2.

As Appellees explain (at 26-35), the various counterarguments advanced in support of Appellants' reading of the case law fail for several reasons. Amici States highlight four flaws here.

First, the counterarguments misunderstand the concept of precedent. For instance, former DOJ Attorneys argue that "it was so clear that Section 2 contained a right of action enforceable by private plaintiffs that the unanimous Supreme Court did not even question its existence." Former DOJ Attorneys Br. 18. But the Supreme Court does not vest unquestioning silence with precedential weight. *See, e.g.*, *Brown v. Davenport*, 142 S. Ct. 1510, 1526-28 (2022) (rejecting argument that Court implicitly adopted an argument the parties did not raise and the Court did not discuss).

Second, they confuse holdings and dicta, which do not constitute federal law. *Woods v. Donald*, 575 U.S. 312, 316 (2015) (per curiam); *United States v. Brown*, 5 F.4th 913, 915 (8th Cir. 2021). Even if the Court were to assign persuasive value to Appellants' case law, the cases contain no "considered" dicta that might hold potential persuasive value. *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1064 (8th Cir. 2017) (en banc). Not even Appellants or their amici so much as suggest that any court (other than the district court below) has undertaken the requisite analysis of whether there is a private right of action in section 2.

Third, they misunderstand the concept of congressional ratification. As Appellees note (at 32-35) there was no "consensus" to ratify the open question of whether section 2 is privately actionable. The United States argues (at 12-13) that Congress

"ratified" the section 2 dicta in Supreme Court caselaw by reenacting the text of section 2 multiple times even as it amended other parts of the VRA. But isolated amendments of other parts of a statute usually do not give any weight to an argument of ratification. *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1351 (2021). Even congressional failure to amend the specific statutory section at issue "lacks persuasive significance in most circumstances." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (internal marks omitted).

Fourth, they appear to misunderstand the difference between a court order and a brief. Former DOJ Attorneys urge the Court to consider the question of a private right of action under section 2 to be conclusively closed because DOJ argued in a brief in 1986 that it has "*primary* responsibility" for enforcing section 2. Former DOJ Attorneys Br. at 13. But it is the job of the courts to "apply the law" as they "find it," not simply "defer to some conflicting reading the government might advance." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021).

II. Recognizing a Section 2 Private Right of Action Runs Counter to the VRA's Policy Goals and Harms States.

The Court should also reject any notion that policy concerns dictate a different result. As an initial matter, not even the most formidable policy arguments can trump the laws passed by Congress, which possesses exclusive legislative authority. *See Badgerow*, 142 S. Ct. at 1321; *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 778 (2020). Courts' "limited role is to read and apply the law" as Congress has written it. *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1497 (2020). They have no "license to disregard clear language based on an intuition that Congress must

have intended something broader." *Cyan*, 138 S. Ct. at 1078. Rather, it is the function of the federal courts "to give the statute the effect its language suggests, however modest that may be." *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 780 (2018).

This rule applies with special force when courts consider the existence of a private cause of action. Absent congressional "intent to create not just a private right but also a private remedy," "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." *Sandoval*, 532 U.S. at 286-87. Even if construing the VRA as written posed adverse policy results, that would not provide license to recognize an atextual private right of action in section 2.

In reality, however, rejecting a private right of action reinforces the policy aims of the VRA while also avoiding harms to the States. The statutory purpose that Congress laid out was to ensure that voting rights are not abridged on account of race or color. VRA § 2. History reveals that Congress intended section 2 of the VRA to be enforced by federal officials, not private parties. Courts that assumed a private right of action exists in section 2 have always misinterpreted the law, but the error has amplified the ways in which long-recognized litigation-capacity problems interact with the burdens of section 2 private suits that displace funding for other State efforts to ensure equal access to the vote. This Court should repudiate an interpretation of the VRA that exacerbates those harms.

A. Congress entrusted the federal government, not private parties, with managing voting-rights litigation.

As the history animating the VRA reveals, Congress and President Johnson in the mid-1960s saw DOJ as the only party appropriate to manage voting-rights litigation. The need was unmistakable.

The decades after Reconstruction had seen interference with voting rights. Klarman, *supra*, at 30-32. The Supreme Court struck down the Civil Rights Act of 1870. *United States v. Cruikshank*, 92 U.S. [2 Otto.] 542, 551-55 (1875); *Reese*, 92 U.S. at 215-18. Eight years later, the Court invalidated a federal law aimed at preventing the KKK from lynching African-Americans who wished to vote. *United States v. Harris*, 106 U.S. [16 Otto.] 629, 636-37 (1883). The *Civil Rights Cases*, 109 U.S. 3 (1883), restricted federal power to protect African-American civil rights. As the century ended, the Court upheld state literacy tests and poll taxes despite the discriminatory intent behind them. *Williams v. Mississippi*, 170 U.S. 213, 224-25 (1898). And by the time the civil rights movement was reborn in the 1950s, Jim Crow frustrated voter-registration drives. Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* 46-53 (2011); 3 Robert A. Caro, *Master of the Senate, The Years of Lyndon Johnson* 685-94 (2002).

Civil rights organizations, however, were buckling under the burden of school desegregation litigation. A decade after *Brown v. Board of Education*, 347 U.S. 483 (1954), resistance to school integration remained strong. John Dittmer, *Local People: The Struggle for Civil Rights in Mississippi* 34, 70-72 (1995); J. Anthony Lukas, *Common Ground: A Turbulent Decade in the Lives of Three American Families* 231-36 (1986).

The NAACP Legal Defense Fund was overextended and often overwhelmed. Gilbert King, *Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America* 44-51 (2012). Its capacity constraints progressively worsened as alliances with other civil rights organizations began to fracture. Dittmer, *supra*, at 341-42. These constraints provided the immediate backdrop for the Civil Rights Act of 1964 and the VRA. *Id.* at 173-77.

On the other hand, DOJ had substantial capacity to bear the burden of voting-rights litigation. The Civil Rights Act of 1957 had given the Attorney General authority to sue anyone interfering or likely to imminently interfere with the exercise of voting rights. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131(c), 71 Stat. 634. To meet this and other new civil rights mandates, DOJ septupled the number of attorneys in its Civil Rights Division in the next eight years. Brian K. Landsberg, *Enforcing Civil Rights: Race Discrimination and the Department of Justice* 78 fig.6.1 (1997). But a congressional blue-ribbon panel in 1965 found that DOJ was "unduly and unwisely narrow and limited" in the enforcement of voting rights. Dittmer, *supra*, at 196-99. The panel encouraged civil rights leaders to funnel information about alleged voting-rights violations through DOJ. *Id.* Congress thus sought to centralize civil rights litigation in the hands of DOJ.

Notably, this government-focused solution arose in a decade of the discovery of personal and private rights both in the realm of voting and beyond. In 1962, the Supreme Court recognized the one-man-one-vote principle. *See generally Reynolds v. Sims*, 377 U.S. 533, 558 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). More widely, the Court found in quick succession enforceable private rights against state actors

related to contraception, peaceful protest, and prayer in public schools. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). It was truly, as one historian has called it, the "high tide of American liberalism in the postwar era." James T. Patterson, *Grand Expectations: The United States, 1945-1974*, at 588 (1996).

But a pell-mell approach to civil rights litigation—whether it pertained to school desegregation or voting rights—would not do. At a major speech delivered at Howard University shortly before signing the VRA into law, President Johnson recognized that the bill offered America "'the glorious opportunity . . . to end the one huge wrong of the American nation.'" Taylor Branch, *At Canaan's Edge: America in the King Years, 1965-68*, at 234 (2006) (quoting President Johnson). And during the bill signing ceremony itself, he praised the vote as the most powerful instrument ever devised by man for breaking the back of injustice and prejudice. *Id.* at 276. He commanded Attorney General Katzenbach to take the reins the evening the VRA became law. Lyndon B. Johnson, Presidential Remarks on the Signing of the Voting Rights Act of 1965, at 10:02-11:51, https://millercenter.org/the-presidency/presidential-speeches/august-6-1965-remarks-signing-voting-rights-act (Aug. 6, 1965). Within a week, the Civil Rights Division had contacted every registrar in Mississippi and had initiated three suits. Leadership Conference on Civil Rights Education Fund, *Long Road to Justice: The Civil Rights Division at 50*, at 9 (Sept. 2007).

In sum, the choice to make the enforcement mechanisms different—and more narrowly centered on the Attorney General—within the VRA was intentional.

Recognizing a private right of action in section 2 notwithstanding this history runs counter to the principles animating the VRA.

B. A private right of action under section 2 of the VRA harms Amici States.

States face real-world harms from Appellants' atextual reading of section 2. States have limited resources to expend on protecting voting rights alongside their other constitutional and statutory commitments. So States have a compelling interest in using their limited funds to maximize the opportunity for all their qualified citizens to enjoy open access to the franchise and an equal opportunity to elect their favored government officials. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800-01 (2017). Maximizing access and opportunity in that way requires States to allocate funding efficiently across a complicated scheme of election law and both federal and State requirements. *See Abbott v. Perez*, 138 S. Ct. 2305, 2314-15 (2018); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 259 (2015).

Take Texas, for instance. The National Voter Registration Act of 1993 requires all States to provide voter registration opportunities through various State agencies. Pub. L. No. 103-31 § 7, 107 Stat. 77. But Texas has gone above those requirements to designate every public healthcare center, unemployment office, DMV, public library, and welfare office in the State a voter registration site. Tex. Elec. Code § 20.001. It then makes it easy to vote. Texas was one of the first States to offer early voting, which now extends to seventeen days before election day. *Id.* § 85.001(a). It has allowed voting by mail for certain individuals for up to sixty days before an election. *Id.* §§ 86.0015(b-2)(2), .005(b). It even offers curbside voting and allows voters

to choose an assistant other than an employer or an election officer to help them fill out their ballot. *Id.* §§ 64.009(a), .032.

According to the U.S. Census Bureau, a greater percentage of African-American and Hispanic Texas citizens were registered to vote in 2020 than their peer demographics in New York, California, Massachusetts, Illinois, and many other States. U.S. Census Bureau, *Voting and Registration in the Election of November 2020*, at tbl.4b (Apr. 2021), https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-585.html (last revised Oct. 8, 2021). Roughly eighty-five percent of those Texas registered voters of color in fact voted in the 2020 presidential election. *Id.* But voter-registration and election-day efforts cost money. And except for federal grants disbursed through the National Voter Registration Act and serial congressional appropriations bills, that money is fungible and must be moved from elsewhere in State coffers.

By siphoning resources away from such worthy causes, private section 2 suits threaten to impair the very goals that the VRA sought to achieve. "[L]itigating section 2 cases [is] expensive and unpredictable," and "well-funded actors" may "finance section 2 cases when the political stakes are high." Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 Colum. L. Rev. 2143, 2158 (2015). Scholars estimate that fewer than five percent of section 2 plaintiffs win preliminary relief. *Id.* at 2145 & nn.7-8. And the cases "are like snowflakes," with little overlapping direction, because the evidentiary basis for claims "var[ies] so much from case to case." *Id.* at 2148. States face heavy expenditures in litigating these unique cases, the tab for which can run into the

millions of dollars. In Texas, for example, the last successful section 2 suit against any entity in the State required devoting State resources to nearly a decade of litigating in federal court and resulted in a claim to reimburse more than $11.6 million litigation expenses. *See generally* Motions for Attorney Fees and Bill of Costs, *Perez v. Perry*, 5:11-cv-00360-OLG (W.D. Tex. 2021), ECF Nos. 1689-97. That is more than 1.5 times the Texas Secretary of State's election-administration budget for 2020. Tex. H.B. 1, General Appropriations Act, 86th Leg., R.S., at I-87 (2020).

Notably, the vast majority of section 2 suits find that no violation of section 2 in fact occurred. According to the same comprehensive database of section 2 suits upon which the former DOJ attorneys rely in their amicus brief, only one in four cases ever brought in the courts of the Eighth Circuit ultimately found a violation. University of Michigan Law, Voting Rights Initiative, Section 2 Cases Database, https://voting.law.umich.edu/database/ (last updated Dec. 31, 2021). The numbers nationwide are even worse, especially of late: since 2013, courts ultimately have found no violation in more than six of every seven section 2 suits. *Id.*

Money spent defending section 2 litigation could be spent elsewhere to achieve the VRA's statutory purpose to increasing registration and turnout of voters of color. For example, since it only costs Texas twenty-five *cents* to reimburse localities for each additional voter they register, *see* Tex. Elec. Code § 19.002(1), that same amount of money from just the example case described above would have been more than enough to cover the cost of registering *every* non-white Texan. *See* U.S. Census Bureau, *2020 Census State Profile: Texas* (Aug. 25, 2021),

https://www.census.gov/library/stories/state-by-state/texas-population-change-between-census-decade.html.

Conclusion

The Court should affirm the judgment below.

Respectfully submitted.

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Certificate of Service

On June 16, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Eighth Circuit Rule 25A(j); (2) the electronic submission has been generated by printing to PDF from the original word processing file so that the text of the digital version of the brief may be searched and copied in compliance with Eighth Circuit Rule 25A(g); and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses in compliance with Eighth Circuit Rule 28A(h)(2).

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express next-day mail to the Clerk of the Court (ten copies) and to the party counsel of record (one copy each) pursuant to Eighth Circuit Rule 28A(d).

/s/ Ari Cuenin
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Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,308 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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