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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mi Familia Vota, et al.,

Plaintiffs,

v.

Adrian Fontes, et al.,

Defendants.

AND CONSOLIDATED CASES

Case No: 2:22-cv-00509-SRB (Lead)

INTERVENOR REPUBLICAN NATIONAL COMMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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REQUEST FOR ORAL ARGUMENT

Intervenor the Republican National Committee respectfully requests oral argument on this motion.

INTRODUCTION

This case involves a variety of challenges to Arizona's voting laws brought by several plaintiffs. Intervenor agrees with the State that these voting laws do not violate the National Voter Registration Act by requiring submission of documents beyond the federal mail registration form to vote early by mail, by providing for processes to investigate the citizenship of potential voters, by barring the registration of known noncitizens, or by providing for the removal of noncitizens within 90 days of an election. Intervenor also agrees with the State that requiring individuals to affirm their citizenship, provide proof of citizenship, and list their State or country of birth does not violate 52 U.S.C. §10101(a)(2). Intervenor identifies four additional issues on which there is no dispute of material fact and summary judgment is warranted.[1] *See* Fed. R. Civ. P. 56.

First, the NVRA does not prohibit Arizona H.B. 2492's rule that an individual cannot be registered for presidential elections without verification of citizenship. The NVRA regulates only congressional elections, not presidential elections. The NVRA is an exercise of Congress's power to regulate the time, place, and manner of congressional elections. *See* U.S. Const. art. I, §4, cl. 1; *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 15 (2013). That power over congressional elections does not extend to presidential elections, where the Constitution gives Congress power over only the time of

[1] Intervenor agrees with the State that this Court should enter the following rulings at summary judgment: (1) to the extent the Arizona laws require voters to submit documents beyond the federal mail registration form to vote early by mail in federal elections, they are not preempted by 52 U.S.C. §20505(a)(1); (2) the Arizona laws do not facially violate §20507(b)(1); (3) the Arizona laws do not violate §20507(a)(3) or (4); (4) the Arizona laws do not violate §20507(c)(2)(a); (5) requiring voters to check a box affirming their citizenship does not violate §10101(a)(2)(B); (6) requiring voters to provide proof of citizenship does not violate §10101(a)(2); (7) requiring voters to list their state or country of birth does not violate §10101(a)(2); and (8) the Arizona laws are not unconstitutionally vague.

choosing electors. *See* U.S. Const. art. II, §1, cl. 4. Thus, States retain power over the manner of holding presidential elections, and the NVRA cannot extend to those elections.

Second, the NVRA does not bar H.B. 2492's disqualification from early mail-in voting those voters who do not provide proof of citizenship. The NVRA governs "procedures to register to vote in elections," not voting itself. 52 U.S.C. §20503(a). Early mail-in voting is a privilege that States make available to voters to various degrees. The NVRA does not apply to H.B. 2492's rules for this privilege.

Third, H.B. 2492's prohibition on registering known noncitizens does not violate the NVRA's requirement that a voter who submits a "valid" federal registration form at least 30 days before an election should be registered. This NVRA safe harbor establishes procedures for a State to process registration applications. *Id.* §20507(a)(1). It does not confer a right to vote on anyone, let alone on noncitizens. So this requirement to accept a "valid" federal registration form does not require Arizona to allow noncitizens to vote.

Fourth, the Private Plaintiffs' claims under 52 U.S.C. §10101 fail because they have no private right of action. Section 10101 includes a comprehensive enforcement regime that gives "the Attorney General" authority to bring "a civil action or other proper proceeding." *Id.* §10101(c). This comprehensive regime does not give individuals a private right to bring an action.

This Court should grant summary judgment on each of these grounds.

ARGUMENT

I. The NVRA does not preempt H.B. 2492's citizenship requirements.

The State does not argue that H.B. 2492's citizenship verification procedures for federal congressional elections violate the NVRA. *See* Doc. 364 at 3-4. Nor could it, because the NVRA "does not preclude States from denying registration based on information in their possession establishing the applicant's ineligibility." *Inter Tribal Council*, 570 U.S. at 15 (cleaned up). And H.B. 2492 permits election officials to reject applicants for congressional elections only if the official verifies that the applicant is not

a U.S. citizen. *See* Ariz. Rev. Stat. §16-121.01(D), (E). The Supreme Court recognized that system is consistent with the NVRA. *See Inter Tribal Council*, 570 U.S. at 15.

Registration for presidential and mail-voting requires an additional step. If the election official is unable to verify an applicant's citizenship, the applicant is not registered for presidential elections or early mail-in voting. *See* Ariz. Rev. Stat. §16-121.01(D), (E). The State agrees with Plaintiffs that rejecting unverified applicants for presidential elections violates the NVRA's requirement that States must "accept and use" the federal registration form. *See* Doc. 364 at 3-4. But that ignores the constitutional constraints on Congress's power to regulate presidential elections.

The NVRA applies only to federal congressional elections, not to presidential elections. "Congress enacted the National Voter Registration Act under the authority granted it in [the Elections Clause]." *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997); *see also Inter Tribal Council*, 570 U.S. at 8. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of chusing Senators." U.S. Const. art. I, §4, cl. 1. The clause gives Congress power to regulate "[t]he Times, Places and Manner of holding Elections" *only* for "Senators and Representatives." *Id.* It does not extend to presidential elections.

Congress's constitutional power over presidential elections is more limited and does not permit extending the NVRA to them. For presidential elections, "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. Const. art II, §1, cl. 4. This Electors Clause gives Congress power over only the "Time" of choosing presidential electors. Congress's power does not extend to the "Places and Manner" of presidential elections, as it does with congressional elections. "That omission is telling," because when the Constitution "includes particular language in one section … but omits it in another section," courts "generally presume[]" the

drafters acted "intentionally and purposely in the disparate inclusion or exclusion." *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021); *see Pine Grove Twp. v. Talcott*, 86 U.S. 666, 674-75 (1873) (applying the rule to constitutional interpretation). If there were any doubt about this limit on Congress's authority over presidential elections, the Tenth Amendment resolves it: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

Congress does not have power to regulate the "Places and Manner" of presidential elections. The States do—and Arizona's laws do just that. H.B. 2492 sets citizenship verification rules for presidential and state elections. When an applicant uses the state registration form, he must provide proof of citizenship. *See* Ariz. Rev. Stat. §16-121.01(C). All parties agree the NVRA has nothing to say about that process, since the NVRA cannot apply to the requirements on the state voter registration form. When an applicant uses the federal registration form, he *need not* provide proof of citizenship. *See id.* §16-121.01(D). If he doesn't, an election official must verify the applicant's citizenship through other means. *Id.* If the election official cannot verify the applicant's citizenship, the applicant "will not be qualified to vote in a *presidential election* … until satisfactory evidence of citizenship is provided."[2] *Id.* §16-121.01(E) (emphasis added). If the federal registration form is otherwise satisfactory, nothing in H.B. 2492 prevents a federal form applicant from being registered to vote in congressional elections.

True, the NVRA itself does not distinguish between presidential and congressional elections. It applies to elections for "Federal office," 52 U.S.C. §20502(2), which include "the office of President or Vice President," *id.* §30101(3). But that text must be squared with the Electors Clause of Article II, which gives Congress power over only the "Time" of choosing presidential electors. U.S. Const. art II, §1, cl. 4. To the

[2] An applicant whose citizenship is unverifiable is also disqualified from voting "by mail with an early ballot in any election." Ariz. Rev. Stat. §16-121.01(E). But the NVRA governs voter registration, not mail-in ballot applications. *See infra* Section II.

extent the NVRA regulates the "Manner" of presidential elections by imposing registration requirements on States, it violates the Electors Clause. Plaintiffs would have the Court ignore the differences between Congress's election powers in Article I and Article II. But applying the NVRA only to congressional elections gives proper effect to Elections Clause, the Electors Clause, the NVRA, and H.B. 2492. None of the arguments Plaintiffs raised in prior briefing justify deviating from the plain text of the Constitution.

First, the Supreme Court has never held that Congress possesses power to regulate the "Places and Manner" of presidential elections. In *Oregon v. Mitchell*, the Supreme Court held that Congress had power to, among other things, lower the federal voting age to 18 with the Voting Rights Act. 400 U.S. 112, 117-18 (1970). Justice Black wrote a solo opinion "expressing his own view of the cases," in which he said he "would hold" that Congress could "oversee the conduct of presidential and vice-presidential elections and … set the qualifications for voters for electors for those offices" under the Electors Clause. *Id.* at 124 (op. of Black, J.). But the four other Justices supporting the judgment said the Voting Rights Act was an exercise of Congress's power under the Fourteenth and Fifteenth Amendments, not the Elections Clause or the Electors Clause. *Id.* at 135-36 (op. of Douglas, J.); *id.* at 231 (joint op. of Brennan, White, and Marshall, JJ.). Thus, "[f]ive Justices took the position that the Elections Clause did *not* confer upon Congress the power to regulate voter qualifications in federal elections." *Inter Tribal Council*, 570 U.S. at 16 n.8. And only Justice Black would have read that power into the *Electors* Clause.

Beyond that, Justice Black failed to support his unbounded view of the Electors Clause. The only support he cited was *Burroughs v. United States*, 290 U.S. 534 (1934). *See Mitchell*, 400 U.S. at 124 n.7 (op. of Black, J.). But in *Burroughs* the Court held that the Federal Corrupt Practices Act did not *violate* the Electors Clause because "[n]either in purpose nor in effect does [the act] interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." 290 U.S. at 544. That

was because the Federal Corrupt Practices Act set rules governing political campaign contributions—it had nothing to do with the appointment of presidential electors. *Id.* at 540-43. Indeed, the Court adopted the premise that if the statute *did* interfere with the "exclusive state power" over presidential elections, it would be unconstitutional. *Id.* at 544-45. That premise applies here: to the extent the NVRA interferes with Arizona's authority to regulate the manner of presidential elections, it is unconstitutional.

Justice Black also failed to address the textual differences between the Elections Clause and the Electors Clause. Justice Harlan, however, observed that "the power to control the 'Manner' of holding elections, given with respect to congressional elections by Art. I, §4, is absent with respect to the selection of presidential electors." *Mitchell*, 400 U.S. at 211 (Harlan, J., concurring in part and dissenting in part). And "the fact that it was deemed necessary to provide separately for congressional power to regulate the time of choosing presidential electors and the President himself demonstrates that the power over 'Times, Places and Manner' given by Art. I, §4, does not refer to presidential elections, but only to the elections for Congressmen." *Id.* at 211-12. No binding authority has held otherwise. *Cf. Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976) (citing *Burroughs* in passing for the proposition that the Constitution gives "broad congressional power" over presidential elections); *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) (same).

Second, the NVRA is not an exercise of Congress's remedial power under the Fourteenth and Fifteenth Amendments. *Inter Tribal Council of Arizona* forecloses any argument to the contrary. There, the Court analyzed the NVRA as "Elections Clause legislation," not Fourteenth Amendment legislation. *Inter Tribal Council*, 570 U.S. at 15. That is why even before the Court decided *Inter Tribal Council* courts recognized that "Congress enacted the National Voter Registration Act under the authority granted it in [the Elections Clause]." *Ass'n of Cmty. Orgs. for Reform Now*, 129 F.3d at 836.

Even if *Inter Tribal Council* hadn't resolved the constitutional basis for the NVRA, Plaintiffs would have to show that Congress enacted the NVRA to combat racial discrimination under its remedial power to enforce the Fourteenth and Fifteenth Amendments. To do so, Plaintiffs must demonstrate "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Congress must make legislative findings of past and present discrimination to justify its remedial authority. *Id.* at 530-31. Plaintiffs cannot make that showing. The only textual support in the NVRA for an exercise of remedial authority is a brief mention that "discriminatory and unfair registration laws and procedures can … disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. §20501(a)(3). And the NVRA's "legislative record lacks examples of modern instances" of discrimination on account of proof of citizenship required for registration. *City of Boerne*, 521 U.S. at 530. An exercise of Congress's remedial authority requires more than the mere recitation of a few words. *See id.* at 530-31. The absence of anything approaching adequate findings confirms that the NVRA was not an exercise of that authority.

Even if Congress had purported to pass the NVRA as an exercise of its remedial power, the NVRA is not tailored to remedying discrimination. Besides the inadequacy of the statutory text and findings discussed above, the NVRA ignores the "dramatic improvements" to racial disparities in voter registration and dismisses the "historic accomplishments of the Voting Rights Act." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 201-02 (2009); *see* S. Rep. 103-6, at 3, 17-18 (1993); H. Rep. 103-9, at 105, 106-07 (1993). Also, unlike the Voting Rights Act, the NVRA does not apply to state elections, indicating that Congress was not trying to remedy discrimination in voter registration—it was simply trying to regulate federal elections. The NVRA "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521

U.S. at 532. Defendants are thus entitled to summary judgment on Plaintiffs' claims that the NVRA preempts H.B. 2492's citizenship requirements.

II. The NVRA sets voter registration rules, not early mail-in voting rules.

The NVRA sets rules governing "procedures to register to vote in elections." 52 U.S.C. §20503(a). One of those rules is that States must "accept and use" the federal registration form "for the registration of voters in elections for Federal office." *Id.* §20505(a). The NVRA says nothing about the *mechanisms* for early voting, absentee voting, or mail-in voting. Several Plaintiffs nevertheless allege that H.B. 2492 violates the NVRA by disqualifying from early mail-in voting those applicants who fail to provide documentary proof of citizenship.[3] *See, e.g.*, LUFC Compl., ¶360; DOJ Compl. ¶64. But that argument adds words to the NVRA that Congress did not write.

Congress enacted the NVRA to ensure uniform voter registration for federal elections. The essential qualifications to vote in federal elections are the same throughout the country: the voter must be a citizen, over eighteen years of age, a resident of the State, and not a felon. The NVRA provides uniform registration for those uniform qualifications. But an array of different rules governs early and mail-in voting throughout the States. Some States, such as New York and Connecticut, permit voters to submit absentee ballots by mail only if the voter has a qualifying reason to do so. *See* N.Y. Elec. Law §8-400(1); Conn. Gen. Stat. §9-135(a). Other States, such as Arizona, have no-excuse absentee voting and do not require anything more to vote by mail. *See* Ariz. Rev. Stat. §16-541. The details of those systems—applications, required documents, deadlines, record handling, active early voter lists—differ wildly from State to State. Demanding uniformity among mail-in ballot applications would be a fool's errand. If Congress meant to upset each State's individual, carefully tailored mail-in voting rules in the NVRA, it would have said so.

[3] The State agrees that the mail-in voting provisions "are likely not preempted" by the NVRA. *See* Doc. 364 at 3-4.

Plaintiffs can marshal no authority indicating that the NVRA restricts early mail-in ballot applications. That is unsurprising, because "voting by absentee ballot" is a "privilege" that "make[s] voting easier," not a right. *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020); *see also McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809 (1969) (upholding a state statute denying certain inmates mail-in ballots because the statute restricted only the receipt of an absentee ballot and the inmates were thus not "absolutely prohibited from voting by the State"). And the NVRA sets rules in pursuit of "the right of citizens of the United States to vote." 52 U.S.C. §20501(a)(1). It says little about the "privilege" of "voting by absentee ballot." *Luft*, 963 F.3d at 672; *cf.* 52 U.S.C. §20505(c) (permitting States to require first-time voters to vote in person and providing a carve-out for absentee voters under federal law). Arizona thus retains "wide leeway … to enact legislation" demanding documentary proof of citizenship to vote early by mail, even if the legislation "appears to affect similarly situated people differently." *McDonald*, 394 U.S. at 808. Defendants are thus entitled to summary judgment on Plaintiffs' claims that H.B. 2492 violates the NVRA by disqualifying from early mail-in voting those applicants who fail to provide documentary proof of citizenship.

III. H.B. 2492 does not violate the NVRA's registration "safe harbor."

The NVRA provides that if a "valid" Federal Form voter registration application is received (or, in the case of an application submitted by mail, postmarked) "not later than the lesser of 30 days, or the period provided by State law, before the date of" a federal election, the applicant must be registered to vote in that election. 52 U.S.C. §20507(a)(1).[4] Plaintiffs Mi Familia Vota and Voto Latino allege that "by not placing voters who complete a Federal Form on the list of qualified electors under A.R.S. §16-122 within this timeframe," H.B. 2492's citizenship verification provision "violates the NVRA." MFV 2d Am. Compl. ¶96, Doc. 65.

[4] Arizona law requires that completed registration forms must be received by the county recorder before midnight of the 29th day preceding an election, if the registrant wishes to establish eligibility to vote in that election. *See* Ariz. Rev. Stat. §16-120(A).

Plaintiffs' argument misreads the NVRA's safe-harbor provision. The safe-harbor provision does not confer a categorical right to vote in an upcoming federal election merely upon submitting a federal registration form regardless of whether a voter is qualified. The safe harbor demarcates a period of time in which the State must process a federal form application; it "does not mean that an applicant is registered upon filling out the form." *Ass'n of Cmty. Orgs. for Reform Now*, 912 F. Supp. 976, 987 (W.D. Mich. 1995), *aff'd* 129 F.3d 833 (6th Cir. 1997). Importantly, "the states are still left the task of determining that an applicant is eligible," *id.* and may "deny[] registration based on information in their possession establishing the applicant's ineligibility," *Inter Tribal Council*, 570 U.S. at 15 (cleaned up). *See also U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 385 (6th Cir. 2008). Indeed, §20507(a)(1) expressly conditions its application upon confirmation of the applicant's eligibility: the registration will be effectuated only if it is substantively "valid." *See Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1331 n.10 (S.D. Fla. 2008) (noting that Congress in the NVRA "recognized the right of States to demand a 'valid' form prior to the registration deadline.").

H.B. 2492's provision barring known noncitizens from voting does not conflict with this safe harbor. Upon receiving a Federal Form application that is not accompanied by documentary proof of citizenship, the county recorder must within ten days search specified official databases to try to verify the applicant's citizenship. *See* Ariz. Rev. Stat. §16-121.01(D). If the county recorder is unable to verify citizenship status, the applicant still will be registered to vote in congressional elections. *See id.* §16-121.01(E). The application will be rejected if the county recorder finds that the applicant is not a United States citizen. *See id.* §16-121.01(E). This rejection would not transgress the NVRA because the safe harbor does not compel the States to let noncitizens vote. *See Gonzalez v. Arizona*, 435 F. Supp. 2d 997, 1002 (D. Ariz. 2006) (pointing out that "the NVRA recognizes that states may have to reject some submitted forms"); *United States v. Florida*, 870 F. Supp. 2d 1346, 1350 (N.D. Fla. 2012) ("For noncitizens, the state's duty

is to maintain an accurate voting list. A state can and should do that on the front end, blocking a noncitizen from registering in the first place." (citation omitted)). The safe harbor provides only that voters who submit a "valid" Federal Form at least 29 days before a federal election will be allowed to vote in congressional elections. It has no application to H.B. 2492's rejection of a Federal Form that is invalid because it was submitted by a noncitizen.

IV. There is no private right of action to enforce §10101.

The Private Plaintiffs' claims based on 52 U.S.C. §10101(a)(2) are not viable because there is no private right of action to enforce the statute's terms.[5] The materiality provision of §10101 provides that a person should not be denied the right to vote based on an "error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified." 52 U.S.C. §10101(a)(2)(B). Section 10101 also prohibits applying "any standard, practice, or procedure" as part of determining whether an individual is "qualified to vote" that is "different from the standards, practices, or procedures applied … to other individuals" in the same jurisdiction. *Id.* §10101(a)(2)(A). It permits "the Attorney General" to bring "a civil action or other proper proceeding for preventive relief." *Id.* §10101(c). The statute does not provide for private civil actions.

Since §10101 does not provide for private enforcement, Plaintiffs instead invoke 42 U.S.C. §1983 as a vehicle for their §10101 claims. But §1983 does not provide an avenue for the private enforcement of §10101. To support a §1983 action, Private Plaintiffs must show both that "Congress *intended to create a federal right*" and that "the statute manifests an intent 'to create not just a private right but also a private remedy.'"

[5] The following Private Plaintiff groups plead claims under 52 U.S.C. §10101(a)(2)(A) or (a)(2)(B): Mi Familia Vota, *et al.* (2d Am. Compl. ¶¶100-06, Doc. 65); Living United for Change in Ariz., *et al.* (1st Am. Compl. ¶¶342-50, Doc. 67); Poder Latinx, *et al.* (2d Am. Compl. ¶¶99-106, Doc. 169); Ariz. Asian Am. Native Haw. and Pac. Islander for Equity Coal. (Compl. ¶¶152-55, Doc. 1, No. 2:22-cv-1381); and Democratic Nat'l Comm., *et al.* (Compl. ¶¶87-90, Doc. 1, No. 2:22-cv-1369).

Gonzaga Univ. v. Doe, 536 U.S. 273, 283-84 (2002) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)).

Section 10101 neither directly confers any individual right nor delegates its enforcement to private actors. Starting with an individual right, "the court considers whether the statute: (1) is intended to benefit a class of individuals of which the Plaintiff is a member; (2) sets forth a standard, clarifying the nature of the right, that makes the right capable of enforcement by the judiciary; and (3) is mandatory, rather than precatory in nature." *Crowley v. Nevada ex rel. Nev. Sec'y of State*, 678 F.3d 730, 735 (9th Cir. 2012) (citing *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997)). The Supreme Court has "reject[ed] the notion" that "anything short of an unambiguously conferred right" can "support a cause of action." *Gonzaga Univ.*, 536 U.S. at 283. And it is not sufficient that "the plaintiff falls within the general zone of interest that the statute is intended to protect." *Id.*

Section 10101 does not meet these requirements for a statute to create an individual right. True, the statute buttresses an antecedent "right" conferred by other laws. But §10101 is a prohibition on certain acts and practices by state or local government officials. While these safeguards might benefit some individuals, they are not freestanding "rights." *See Schilling v. Washburne*, 592 F. Supp. 3d 492, 498 (W.D. Va. 2022) (concluding that there is no private right of action to enforce provision of the Voting Rights Act prohibiting voter intimidation, reasoning that "the '[n]o person . . . shall' language . . . is directed to the regulated party, not the party to be protected," which "clearly prohibits voter intimidation" but "does not, under the Supreme Court's precedents, confer any new right on voters"); *cf. All. of Nonprofits for Ins. Risk Retention Grp. v. Kipper*, 712 F.3d 1316, 1326 (9th Cir. 2013) ("All three statutes are phrased in terms of the benefited party. Yet, even if such language is *necessary* to the conclusion that Congress intended to create an enforceable right, that does not mean it is *sufficient* to do so." (citation omitted)).

Even if §10101 created an individual "right," the statute entrusts its enforcement exclusively to the Attorney General, not to private individuals. Section 1983 claims are foreclosed when "Congress shut the door to private enforcement … by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Gonzaga Univ.*, 536 U.S. at 284 n.4 (citation omitted). Here, Congress has done just that. Subsection (c) authorizes claims for prospective relief only by "the Attorney General." 52 U.S.C. §10101(c). Subsection (e) further provides that "upon request of the Attorney General," the court may "make a finding" with respect to whether an alleged violation of §10101(a) constitutes a "pattern or practice." *Id*. §10101(e). Only after a court issues such a finding is "any person" in the affected jurisdiction entitled to apply to the court for an order verifying his or her qualifications to vote. *Id.* This elaborate and exhaustive remedial scheme confirms that any private right created by §10101 must be vindicated by the Attorney General.

Heeding the textual and structural attributes of §10101, multiple courts have concluded that it does not confer a private right of action enforceable via §1983. *See, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016) ("We have held that the negative implication of Congress's provision for enforcement by the Attorney General is that the statute does not permit private rights of action."); *Democratic Cong. Campaign Comm. v. Kosinski*, 614 F. Supp. 3d 20, 48 (S.D.N.Y. 2022) (noting that "several district courts in this circuit have concluded that the statute does not confer" a right of action); *Willing v. Lake Orion Cmty. Schs. Bd. of Trs.*, 924 F. Supp. 815, 820 (E.D. Mich. 1996) (holding that §10101 "is intended to prevent racial discrimination at the polls and is enforceable by the Attorney General, not by private citizens"). *But see Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003). This Court should do likewise.

The Court previously determined that it "need not decide" this issue "on a motion to dismiss." Doc. 304 at 32. But resolving it on summary judgment is warranted, and would aid in the advancement of this case. True, the United States brings claims premised

on the materiality provision, and its ability to do so is uncontested. When "one of the plaintiffs has standing" and all plaintiffs seek the same non-monetary relief, the Court "need not decide the standing of the others." *Melendres v. Arpaio*, 695 F.3d 990, 999 (9th Cir. 2012) (citation omitted). Here, however, that principle does not apply for at least two reasons.[6]

First, the 'standing as to one, standing as to all' precept presupposes that the plaintiffs whose standing is controverted seek remedies that are fully congruent with those requested by the plaintiff that has established its standing. *See Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint."). While the Private Plaintiffs join the United States' requests for declaratory and injunctive relief, they also demand awards of attorneys' fees, apparently in connection with all claims on which they prevail. These requests are innately individualized; the Private Plaintiffs' ability to pursue them is contingent upon the existence of a private right of action in §10101, and cannot be derived from or subsumed within the Attorney General's statutory cause of action. *See Garnett v. Zeilinger*, 485 F. Supp. 3d 206, 215 (D.D.C. 2020) ("[C]ourts have held that *each* plaintiff must have standing in order to recover attorney's fees." (citing *Shaw v. Hunt*, 154 F.3d 161 (4th Cir. 1998))); *Women's Med. Ctr. of Providence, Inc. v. Roberts*, 512 F. Supp. 316, 320 n.4 (D.R.I. 1981) (reasoning that "the potential availability of fees virtually mandates that a court decide at the outset whether all of the plaintiffs in a case are properly before the Court, and, if they are, which issues they have standing to raise"). Thus, if the Private Plaintiffs wish to pursue their §10101 claims and requests for attorneys' fees, they must establish a private right of action to do so.

[6] Whether a statute affords a plaintiff a cognizable right of action is conceptually distinct from the question of whether the same plaintiff has Article III standing to invoke the Court's subject matter jurisdiction. In practice, however, the absence of statutory standing is just as fatal to a claim as a lack of Article III standing. *See DB Healthcare, LLC v. Blue Cross Blue Shield of Ariz., Inc.*, 852 F.3d 868, 873-74 (9th Cir. 2017) (clarifying the distinction between statutory standing and constitutional standing).

Second, Plaintiffs Poder Latinx, Chicanos Por La Causa, and Chicanos Por La Causa Action Fund (collectively, "Poder Latinx") are unique among the various plaintiff groups in alleging that H.B. 2492 and H.B. 2243 contain "discriminatory and arbitrary registration practices" in violation of 52 U.S.C. §10101(a)(2)(A)—as distinguished from the materiality provision in subsection (a)(2)(B). *See* Poder Latinx 2d Am. Compl. ¶¶100, Doc. 169. The United States does not advance this theory. So even if the Court were to conclude that the United States' subsection (a)(2)(B) claim obviates the need to determine whether Private Plaintiffs can do so, it still must decide whether Poder Latinx has a private right of action to pursue its claim under subsection (a)(2)(A). Because that provision and the materiality provision are two complementary subcomponents of the same statutory scheme, a finding that Poder Latinx has no right of action under subsection (a)(2)(A) would also dispose of the same question with respect to the other Private Plaintiffs' subsection (a)(2)(B) claims.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment on these claims.

Respectfully submitted this 15th day of May, 2023.

By: */s/ Kory Langhofer*

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2023, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

/s/ Kory Langhofer