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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

MI FAMILIA VOTA, et al.
Plaintiffs,

v.

ADRIAN FONTES, in his official
capacity as Arizona Secretary of
State, et al.,

Defendants,
and

Case No. 22-00509-PHX-SRB
(Lead)

**PODER LATINX, CHICANOS POR LA
CAUSA, AND CHICANOS POR LA
CAUSA ACTION FUND'S COMBINED
CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT ON COUNTS
TWO AND SIX OF THEIR SECOND
AMENDED COMPLAINT AND**

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Speaker of the House Ben Toma and
Senate President Warren Petersen,
Intervenor-Defendants.

**RESPONSE TO ATTORNEY
GENERAL’S AND REPUBLICAN
NATIONAL COMMITTEE’S MOTIONS
FOR SUMMARY JUDGMENT**

LIVING UNITED FOR CHANGE IN
ARIZONA, et al.,
Plaintiffs,
v.
ADRIAN FONTES, in his official
capacity as Arizona Secretary of
State, et al.,
Defendant,
and
STATE OF ARIZONA, et al.,
Intervenor-Defendants,
and
Speaker of the House Ben Toma and
Senate President Warren Petersen,
Intervenor-Defendants.

Consolidated Cases
No. CV-22-00519-PHX-SRB
No. CV-22-01003-PHX-SRB
No. CV-22-01124-PHX-SRB
No. CV-22-01369-PHX-SRB
No. CV-22-01381-PHX-SRB
No. CV-22-01602-PHX-SRB
No. CV-22-01901-PHX-SRB

PODER LATINX, et al.
Plaintiff,
v.
ADRIAN FONTES, in his official
capacity as Arizona Secretary of
State, et al.,
Defendants,
and
Speaker of the House Ben Toma and
Senate President Warren Petersen,
Intervenor-Defendants.

UNITED STATES OF AMERICA,
Plaintiff,
v.
STATE OF ARIZONA, et al.,
Defendants,
and

1 Speaker of the House Ben Toma and
2 Senate President Warren Petersen,
Intervenor-Defendants.

3 DEMOCRATIC NATIONAL
4 COMMITTEE, et al.,
5 Plaintiffs,
6 v.
7 ADRIAN FONTES, in his official
8 capacity as Arizona Secretary of
9 State, et al.,
10 Defendants,
11 and
12 REPUBLICAN NATIONAL
13 COMMITTEE,
14 Intervenor-Defendant,
and
Speaker of the House Ben Toma and
Senate President Warren Petersen,
Intervenor-Defendants.

15 ARIZONA ASIAN AMERICAN NATIVE
16 HAWAIIAN AND PACIFIC ISLANDER
FOR EQUITY COALITION,
17 Plaintiff,
18 v.
19 ADRIAN FONTES, in his official
20 capacity as Arizona Secretary of
21 State, et al.,
22 Defendants,
23 and
Speaker of the House Ben Toma and
Senate President Warren Petersen,
Intervenor-Defendants.

24 PROMISE ARIZONA, et al.,
25 Plaintiffs,
26 v.
27 ADRIAN FONTES, in his official
28 capacity as Arizona Secretary of
State, et al.,
Defendants,

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and
Speaker of the House Ben Toma and
Senate President Warren Petersen,
Intervenor-Defendants.

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- I. A.R.S. § 16-165(I) violates 52 U.S.C. § 10101(a)(2)(A) as a matter of law because it requires county officials to subject voters to different standards, practices, and procedures. 1
- II. Poder Latinx and CPLC may enforce 52 U.S.C. § 10101(a)(2)(A) via 42 U.S.C. § 1983 or directly under the Civil Rights Act. 5
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 - A. NVRA Section 8(b) applies to all voter registration processes, including the challenged provisions, not only to voter removals. 9
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1 Plaintiffs Poder Latinx, Chicanos Por La Causa, and Chicanos Por La Causa Action
2 Fund (“Poder Latinx and CPLC”) hereby move for entry of partial summary judgment on
3 their Civil Rights Act claim under 52 U.S.C. § 10101(a)(2)(A) (Count II) and oppose the
4 Intervenor’s motion on the same count (ECF No. 367 at 15).

5 Additionally, Poder Latinx moves for partial summary judgment on Count Six,
6 which claims that HB 2492’s documentary proof of residence requirement cannot be
7 lawfully applied to the national mail voter registration form under Section 6 of the National
8 Voter Registration Act (“NVRA”), 52 U.S.C. § 20505, and *Arizona v. Inter Tribal Council*
9 *of Arizona, Inc. (ITCA)*, 570 U.S. 1 (2013). Poder Latinx joins and incorporates by
10 reference Section I of the Tohono O’odham Plaintiffs’ brief.

11 **I. A.R.S. § 16-165(I) VIOLATES 52 U.S.C. § 10101(A)(2)(A) AS A MATTER OF**
12 **LAW BECAUSE IT REQUIRES COUNTY OFFICIALS TO SUBJECT**
13 **VOTERS TO DIFFERENT STANDARDS, PRACTICES, AND**
14 **PROCEDURES.**

15 52 U.S.C. § 10101(a)(2)(A) prohibits election officials from subjecting voters to
16 different standards, practices, and procedures. It provides that:

17 No person acting under color of law shall--(A) in determining whether any
18 individual is qualified under State law or laws to vote in any election, apply
19 any standard, practice, or procedure different from the standards, practices,
20 or procedures applied under such law or laws to other individuals within the
21 same county, parish, or similar political subdivision who have been found by
22 State officials to be qualified to vote[.]

23 52 U.S.C. § 10101(a)(2)(A). As enacted by HB 2243, however, A.R.S. § 16-165(I) requires
24 Arizona county recorders to do what Section 10101(a)(2)(A) forbids. It directs county
25 recorders to subject registered voters whom a recorder has “reason to believe” are not
26 United States citizens—and only those voters—to an additional investigation using the
27 Systematic Alien Verification for Entitlements (“SAVE”) System and potential
28 cancellation.

Subsection 16-165(I) is the only provision in HB 2492 or HB 2243 that invokes this
inherently subjective and vague “reason to believe” standard. A.R.S. § 16-165(I)

1 commands the application of different “standard[s], practice[s], or procedure[s]” based on
2 nothing more than mere suspicion that a registered voter lacks U.S. citizenship.

3 The Secretary of State admits that A.R.S. § 16-165(I) “requires a different ‘standard,
4 practice, or procedure’ for determining a voter’s qualifications for voters who a county
5 recorder ‘has reason to believe are not United States citizens’ than for voters who a county
6 recorder does not have reason to believe are not United States citizens.” Non-U.S.
7 Plaintiffs’ Consolidated Statement of Material Facts (“CSOMF”) ECF No. 388 ¶ 44; ECF
8 No. 189 ¶ 102. The Secretary further admits that A.R.S. § 16-165(I) directs county
9 recorders to sort voters into two categories: those who will be subjected to the additional
10 SAVE System verification procedure and those who “are not suspected of lacking U.S.
11 citizenship [and] will not be subjected to the investigation and potential cancellations [*sic*]
12 provisions set forth in HB 2243.” CSOMF ¶ 45; ECF No. 189 ¶¶ 102–03. Crucially, this
13 sorting will be premised on any “reason to believe” a registered voter is not a U.S. citizen,
14 whether based on a private party’s accusation or someone’s biased perception of that
15 voter’s use of a language other than English, name, dress, or religion. Accordingly, on its
16 face, subsection 16-165(I) requires applying different standards, practices, and procedures
17 to eligible voters within the same county, because whenever recorder staff suspect a
18 registered voter is not a citizen, even without concrete or objective information, that voter
19 will be subject to a citizenship investigation and potential cancellation. This is what Section
20 10101(a)(2)(A) prohibits.

21 Congress enacted 52 U.S.C. § 10101(a)(2)(A) to prevent election officials from
22 subjecting would-be voters to different registration practices like the unequally applied
23 investigations A.R.S. § 16-165(I) requires. Congress “directed [Section 1010(a)(2)(A)]
24 primarily at discriminatory practices applied in the process of registering voters. It requires
25 the application of uniform practices in determining whether an individual is qualified to
26 vote.” 110 CONG. REC. H 1,695 (Feb. 3, 1964). Congress explicitly sought to prohibit
27 “arbitrary exercises of discretion on the part of” registrars. 110 CONG. REC. S 6,740 (Apr.
28

1 1, 1964). Noting that by 1964 “many of the more blatant forms of discrimination” had been
2 made “subject to judicial review and invalidation,” supporters of Title I worried that
3 registrars might “rel[y] on [their] discretionary powers” to carry out discrimination. 110
4 CONG. REC. S 6,734 (Apr. 1, 1964). Accordingly, Congress prohibited the “unequal
5 application of [a] rule” or the “prejudiced application of a standard.” 110 CONG. REC. S
6 5,004 (Mar. 11, 1964). Section 10101(a)(2)(A) prevents voters from being subjected to
7 different or discriminatory procedures in the process of determining whether they meet
8 voter qualification and registration requirements. The statute is explicitly intended to
9 prevent election officials from acting on standardless suspicions or biases or unbridled
10 discretion when deciding which voters to subject to which registration processes. By
11 requiring Arizona county recorders to subject any voter to investigation and other
12 additional procedures based on an undefined, arbitrary “reason to believe” the voter is not
13 a citizen, A.R.S. § 16-165(I) requires Arizona county recorders to use the unrestrained
14 discretion Congress barred in the voter registration process.

15 In line with Congress’s intent, courts have applied Section 10101(a)(2)(A) to
16 prohibit registrars from requiring particular classes of registrants to provide more proof of
17 eligibility than other registrants. For example, in *Shivelhood v. Davis*, 336 F. Supp. 1111
18 (D. Vt. 1971), the court held that registrars could not require college students to provide
19 more proof of residence than non-students merely because they suspect college students
20 are not in fact residents of a town. *Id.* 1114–15. The court held that 52 U.S.C. §
21 10101(a)(2)(A) forbids registrars from forcing college students to fill out additional
22 residence questionnaires “unless all applicants are required to complete the same
23 questionnaire.” *Id.* at 1115.

24 Similarly, in *Frazier v. Callicutt*, 383 F. Supp. 15 (N.D. Miss. 1974), the plaintiffs
25 brought a Section 10101(a)(2)(A) claim against the county’s registrar and the board of
26 election commissioners, alleging “the registrar ha[d] applied one set of standards in
27 approving or disapproving applications for registration to applicants who are students at
28

1 Rust College or Mississippi Industrial College . . . and another set of standards” for “all
2 other applicants.” *Id.* at 17–18. The court found that the registrar had violated the Civil
3 Rights Act when he “summarily” rejected every college student’s voter registration
4 application and referred them to the board for further review but approved almost all non-
5 student registrants’ applications “on a subjective basis” without further investigation. *Id.*
6 at 18–20. The court found Section 10101(a)(2)(A) had been violated by the application of
7 “obviously different standard[s]” for students and non-students. *Id.* at 19.

8 As in *Frazier*, HB 2243 commands a wholly subjective evaluation of registered
9 voters’ eligibility. And, on its face, HB 2243 imposes differential standards, practices, and
10 procedures based on nothing more than the subjective impressions and guesses of county
11 recorders’ staff as to registered voters’ eligibility or ineligibility. A.R.S. § 16-165(I)’s
12 vague “reason to believe” language invites county recorders to make such guesses and
13 target voters for investigation based on race, ethnicity, dress, English proficiency,
14 languages spoken, or other characteristics. Singling out certain voters for additional voter
15 registration procedures based on nothing more than hunches and allegations, rather than
16 evidence, of ineligibility is prohibited by the Civil Rights Act. And Arizona’s practice of
17 requiring some voters but not others to undergo additional procedures based on an arbitrary
18 suspicion that they are not citizens is also forbidden by Section 10101(a)(2)(A).

19 It is also important to note that courts have long recognized that
20 Section 10101(a)(2)(A)’s protections extend beyond overt discrimination. *See Gonzalez v.*
21 *Ariz.*, No. CV 06-1268-PHX-ROS, 2008 WL 11395499, at *3–4 (D. Ariz. Feb. 5, 2008)
22 (considering plaintiffs’ claim of differential treatment of voters who moved within a county
23 and voters who moved between counties); *Shivelhood*, 336 F. Supp. at 1113–15; *Frazier*,
24 383 F. Supp. at 20. This is consistent with the provision’s text, which is not limited to
25 discrimination based on race or other characteristics. *Cf.* 52 U.S.C. § 10101(a)(1) (limited
26 to “race, color, or previous condition of servitude”).

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1 A.R.S. § 16-165(I) directs Arizona county recorders to subject some—but
2 indisputably not *all*—registered voters to additional procedures based on a subjective
3 “reason to believe” those voters are not citizens. On its face then, purely as a matter of law,
4 *any* application of this statute will violate Section 10101(a)(2)(A). Unless county recorders
5 and their staff intend to subject *all* of Arizona’s millions of registered voters to a citizenship
6 investigation and additional procedures, then *any* use of this provision will cause the
7 application of different standards, practices, and procedures to determine the voting
8 qualifications of only certain voters suspected of lacking U.S. citizenship.

9 Poder Latinx and CPLC thus respectfully request that this court find that A.R.S. §
10 16-165(I) violates 52 U.S.C. § 10101(a)(2)(A) and enter partial summary judgment on this
11 claim.¹ For both this claim (Count II) and Count VI, Poder Latinx and CPLC request entry
12 of a declaratory judgment but will not seek injunctive relief until the conclusion of this
13 case.

14 **II. PODER LATINX AND CPLC MAY ENFORCE 52 U.S.C. § 10101(A)(2)(A)**
15 **VIA 42 U.S.C. § 1983 OR DIRECTLY UNDER THE CIVIL RIGHTS ACT.**

16 The RNC argues that there is no private right of action to enforce any claims brought
17 under 52 U.S.C. § 10101(a)(2) of the Civil Rights Act, ECF No. 367 at 11–15, but this
18 argument fails as a matter of law. Poder Latinx and CPLC join and incorporate Section II
19 of the Mi Familia Vota Plaintiffs’ (“MFV’s”) brief in support of their motion for partial
20 summary judgment, which concerns the enforceability of 52 U.S.C. § 10101(a)(2)(B) by
21 private litigants. Because the Standards, Practices, and Procedures Provision (§
22 10101(a)(2)(A)) and the Materiality Provision (§ 10101(a)(2)(B)) are part of the same
23 provision, almost all of the arguments in MFV’s brief—excluding only those specific to
24

25 ¹ If the Court finds a violation of 52 U.S.C. § 10101(a)(2)(A) and enters summary
26 judgment, then under the doctrine of constitutional avoidance, there is no need to adjudicate
27 Poder Latinx and CPLC’s alternative claim alleging A.R.S. § 16-165(I) violates
28 prohibitions against racial and national origin discrimination under the Fourteenth and
Fifteenth Amendments (Count Three, *see* Second Am. Compl., ECF No. 169 ¶¶ 108–18).

1 the text in subsection 10101(a)(2)(B)—apply to § 10101(a)(2)(A) with equal force and
2 support a finding of private enforceability here as well. In addition to the points MFV
3 raises, Poder Latinx and CPLC note the following additional points.²

4 Poder Latinx and CPLC may enforce 52 U.S.C. § 10101(a)(2)(A) through 42 U.S.C.
5 § 1983. Subsection 10101(a)(2)(A) of the Civil Rights Act “confers an individual right”
6 and is therefore “presumptively enforceable” by private plaintiffs under Section 1983.
7 *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). Plaintiffs only need to show that these
8 provisions create “specific, individually enforceable rights” that provide a “basis for
9 private enforcement.” *Id.* at 281. “Plaintiffs suing under § 1983 do not have the burden of
10 showing an intent to create a private remedy because § 1983 generally supplies a remedy
11 for the vindication of rights secured by federal statutes.” *Id.* at 284.

12 Under *Gonzaga*, a court must determine whether the federal statute contains
13 “explicit rights-creating” terms and “explicit ‘right- or duty-creating language.’” 536 U.S.
14 at 284 & n.3 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979)). Courts also
15 consider the three factors set forth in *Blessing v. Freestone*, 520 U.S. 329 (1997), which
16 were reaffirmed in *Gonzaga*, 536 U.S. at 282:

17 First, Congress must have intended that the provision in question benefit the
18 plaintiff. Second, the plaintiff must demonstrate that the right assertedly
19 protected by the statute is not so “vague and amorphous” that its enforcement
20 would strain judicial competence. Third, the statute must unambiguously
21 impose a binding obligation on the States. In other words, the provision
giving rise to the asserted right must be couched in mandatory, rather than
precatory, terms.

22 *Blessing*, 520 U.S. at 340–41 (citations and quotation marks omitted). Subsection
23 10101(a)(2)(A) shares the prototypical rights-creating language—“No person . . . shall”—
24 with the Materiality Provision. As explained in MFV’s brief, that prefatory phrase parallels
25 standard rights-creating language from other statutes, which courts have found confer an
26

27 ² The Court cannot avoid resolving the private right of action dispute as to 52 U.S.C.
28 § 10101(a)(2)(A), as only Poder Latinx and CPLC have asserted this particular claim.

1 enforceable private right via 42 U.S.C. § 1983. *Gonzaga*, 536 U.S. at 284. *Gonzaga* itself
2 contrasted the nondisclosure provisions of the Family Educational Rights and Privacy Act
3 with “the individually focused terminology of Titles VI and IX (‘No person . . . shall . . .
4 be subjected to discrimination’).” 536 U.S. at 287.³

5 Like the Materiality Provision, subsection 10101(a)(2)(A) creates an individually
6 enforceable right, specifically an individual right against discrimination in voter
7 qualification standards, practices, and procedures. It provides:

8 No person acting under color of law shall--(A) in determining whether any
9 individual is qualified under State law or laws to vote in any election, apply
10 any standard, practice, or procedure different from the standards, practices,
11 or procedures applied under such law or laws to other individuals within the
same county, parish, or similar political subdivision who have been found by
State officials to be qualified to vote[.]

12 The text of Subsection 10101(a)(2)(A) is likewise “phrased in terms of the persons
13 benefited,” *Gonzaga*, 536 U.S. at 274, and satisfies each of the *Blessing* factors.

14 As to *Blessing* factor 1, Section 10101(a)(2)(A) is focused on individual voters
15 (“any individual”). It was intended to benefit individual voters, *Blessing*, 520 U.S. at 340,
16 and does not have “an ‘aggregate’ focus.” *Gonzaga*, 536 U.S. at 288 (quoting *Blessing*,
17 520 U.S. at 343–44). Section 10101(a)(2)(A) also meets *Blessing* factor 2. Section
18 10101(a)(2)(A)’s prohibition of discrimination in voter qualification procedures is an
19 objective and administrable standard, which is “not so vague and amorphous that its
20 enforcement would strain judicial competence.” *Blessing*, 520 U.S. at 340–41 (quotation
21 marks omitted). And Section 10101(a)(2)(A) satisfies *Blessing* factor 3, as it
22 “unambiguously impose[s] a binding obligation on” state and local election officials and
23 is “couched in mandatory, rather than precatory, terms.” 520 U.S. at 341. Section
24 10101(a)(2) uses the mandatory “shall.”

25
26 ³ “No person acting under color of law shall” also echoes Section 1983 itself. *See* 42 U.S.C.
27 § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or
28 usage, of any State or Territory or the District of Columbia, subjects, or causes to be
subjected, any citizen of the United States . . .”).

1 It would be anomalous to single out subsection 10101(a)(2)(A) as only enforceable
2 by the federal government, given subsection 10101(a)(2), as a whole, gives individual
3 voters concrete rights against different types of discriminatory and arbitrary conduct. It is
4 well-established that “a section of a statute should not be read in isolation from the context
5 of the whole Act.” *Richards v. United States*, 369 U.S. 1, 11 (1962). Moreover, Intervenors
6 have not identified any basis for concluding that Congress intended to confer an
7 individually enforceable right for only some, but not all, subparts of subsection
8 10101(a)(2). *Gonzaga*, 536 U.S. at 281. The Supreme Court has frequently stated that the
9 “[s]urrounding provisions” in a statute “guide [its] interpretation.” *Esquivel-Quintana v.*
10 *Sessions*, 581 U.S. 385, 393 (2017); *see also Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505
11 U.S. 88, 99 (1992). Divergent results for intertwined or closely linked statutory provisions
12 would be illogical. *Cf. Johnson v. Hous. Auth. of Jefferson Parish*, 442 F.3d 356, 362 (5th
13 Cir. 2006) (“Logic prevents the conclusion that Congress could have intended to create
14 enforceable rights for one group of Housing Act rental assistance recipients but not the
15 other.”).

16 Accordingly, as with the Materiality Provision in subsection 10101(a)(2)(B), this
17 Court should find that subsection 10101(a)(2)(A) is presumptively enforceable by private
18 plaintiffs via 42 U.S.C. § 1983. And for reasons explained in MFV’s brief, the Intervenors
19 have failed to rebut this presumption of private enforceability. Alternatively, Poder Latinx
20 and CPLC may enforce subsection 10101(a)(2)(A) directly under the Civil Rights Act, as
21 Congress intended to create a private remedy, as explained in MFV’s brief.

22 **III. THE ATTORNEY GENERAL AND STATE OF ARIZONA’S MOTION ON**
23 **NVRA SECTION 8(B) SHOULD BE DENIED.**

24 Poder Latinx and several Consolidated Plaintiffs argue that because HB 2492 and
25 HB 2243 result in disparate treatment as between naturalized citizens and U.S.-born
26 citizens, as well as within and between Arizona counties, the Challenged Provisions are
27 nonuniform and discriminatory in violation of Section 8(b) of the NVRA. The DNC
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1 Plaintiffs argue HB 2492 violates Section 8(b) because it treats federal-only voters
2 differently than other Arizona voters. *See Democratic Nat’l Comm. v. Fontes*, Case No.
3 2:22-cv-01369-SRB, Complaint for Declaratory and Injunctive Relief, ECF No. 1 ¶¶ 73–
4 78.

5 Defendants Attorney General Kristin Mayes and the State of Arizona (“the Moving
6 Defendants”) have moved for summary judgment making two arguments. ECF No. 364 at
7 5–8. First, they contend that Section 8(b) applies only to voter removals, an argument that
8 is contrary to the statutory text and explicit legislative intent. Second, the Moving
9 Defendants argue that the remaining provisions regarding post-registration cancellations
10 are uniform and nondiscriminatory “on the face” of the laws, ignoring the outstanding
11 factual issues and the discrimination that will result from the Challenged Provisions. Both
12 arguments fail.

13 **A. NVRA Section 8(b) applies to all voter registration processes,**
14 **including the challenged provisions, not only to voter removals.**

15 Section 8(b)’s uniform and nondiscriminatory requirement (the “Uniformity
16 Requirement”) applies to “any State program or activity to protect the integrity of the
17 electoral process by ensuring the maintenance of an accurate and current voter registration
18 roll for elections for Federal office.” 52 U.S.C. § 20507(b). Contrary to Defendants’
19 position, Section 8(b)’s requirements apply to all stages of the voter registration process,
20 as the statutory language does not limit Section 8(b)’s reach only to voter cancellations or
21 removals. The processing of voter registration applications—including their acceptance
22 and rejection—is certainly necessary to “the maintenance of an accurate and current voter
23 registration roll.” *Id.* The Moving Defendants provide no contrary plain text argument. The
24 NVRA’s plain language must be enforced according to the ordinary meaning of its terms.
25 *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1045 (9th Cir. 2015) (citing *Hartford*
26 *Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Am. Tobacco*
27 *Co. v. Patterson*, 456 U.S. 63, 68 (1982)); *see also Arcia v. Fla. Sec’y of State*, 772 F.3d
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1 1335, 1347 (11th Cir. 2014) (“Our job is to honor the broad statutory language in the
2 [NVRA] . . .”).

3 The Moving Defendants do not cite any case law that supports their position.
4 Notably, at least one court has applied Section 8(b) to voter registration activities that do
5 not concern voter removals. *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 703 (N.D.
6 Ohio 2006) (Ohio restrictions on voter registration drives violated Section 8(b) as “neither
7 uniform nor non-discriminatory” by creating barriers to voter registration “only for a
8 selected class of persons”). And courts have consistently held that similar language in
9 another subsection of Section 8, Section 8(i)—which concerns the “accuracy and currency”
10 of the voter list⁴—applies to the entire voter registration process. Analyzing that provision,
11 courts have noted that the process of reviewing voter registration applications is a
12 “program” and “activity” that promotes the accuracy and currency of voter lists. *See*
13 *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012); *see also*
14 *Greater Birmingham Ministries v. Merrill*, No. 2:22CV205-MHT, 2022 WL 5027180, at
15 *3 (M.D. Ala. Oct. 4, 2022) (rejecting argument that Section 8(i)(1) should be read to
16 pertain only to records relating to removal of voters); *True the Vote v. Hosemann*, 43 F.
17 Supp. 3d 693, 720 (S.D. Miss. 2014) (under Section 8(i)(1), “activities geared towards
18 ensuring that a State’s official list of voters is errorless and up-to-date . . . generally relate
19 to voter registration and removal, the processes by which a State updates its lists to ensure
20 they reflect all eligible voters”).

21 Courts have also noted that the statutory term “‘current’ refers to something that is
22 ‘occurring in or belonging to the present time’ or is ‘most recent,’ while the term ‘accurate’
23 refers to something ‘free from error . . . esp[ecially] as the result of care’ or ‘in exact
24 conformity to truth or to some standard.’” *See Project Vote/Voting for Am., Inc. v. Long*,

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28 ⁴ Section 8(i)(1) requires public disclosure of “all records concerning the implementation
of programs and activities conducted for the purpose of ensuring the accuracy and currency
of official lists of eligible voters.” 52 U.S.C. § 20507(i)(1).

1 752 F. Supp. 2d 697, 706 (E.D. Va. 2010) (citing Webster’s *Third New International*
2 *Dictionary* 14, 557 (2002)); *see also Long*, 682 F.3d at 335. Maintaining a “current” voter
3 list or roll necessarily implicates review of registration applications. As the Fourth Circuit
4 reasoned, “[b]y registering eligible applicants and rejecting ineligible applicants, state
5 officials ‘ensure that the state is keeping a “most recent” and errorless account of which
6 persons are qualified or entitled to vote within the state.’” *Long*, 682 F.3d at 335 (citing
7 *Long*, 752 F. Supp. 2d at 706). Because evaluating voter registration applications is critical
8 for “ensuring the accuracy and currency of the official lists of eligible voters,” the process
9 of determining whether a voter registration applicant is added to the official voter list falls
10 within Section 8(b)’s plain language. *See Long*, 752 F. Supp. 2d at 705–06.

11 The statutory context further supports that Section 8(b) covers the entire application
12 process, not only removals. Section 8 itself is titled “Requirements with respect to
13 *administration of voter registration*,” 52 U.S.C. § 20507 (emphasis added), and its
14 requirements begin with the obligation to ensure that any applicant who timely submits a
15 valid registration form is registered to vote in an election. *Id.* § 20507(a)(1); *Long*, 752 F.
16 Supp. 2d at 708. Other Section 8 subsection headings and text expressly state that they
17 pertain only to “removal,” demonstrating that Congress was clear when it was referring
18 only to removals. *See* 52 U.S.C. § 20507(c)(2)(A) (subsection entitled “Voter removal
19 programs” specifically refers to programs designed to “systematically *remove* the names
20 of ineligible voters from the official lists of eligible voters”); *id.* § 20507(d) (“Removal of
21 names from voting rolls”). If Congress intended to limit Section 8(b) to “removals,” it
22 certainly could have referred to “removals” in Section 8(b)’s heading or text. *See also*
23 *Long*, 752 F. Supp. 2d at 708–09 (“[W]here Congress wanted to draw specific attention to
24 programs and activities designed to make lists of eligible voters accurate and current
25 through voter removal procedures, it specifically did so.”). This analysis further reflects
26 Section 8(b)’s application to the entire voter registration process.

1 Additionally, the purpose of most of the NVRA’s provisions is to expand
2 opportunities to register to vote. In the NVRA, Congress found that “discriminatory and
3 unfair registration laws can have a direct and damaging effect on voter participation in
4 elections for Federal office and disproportionately harm voter participation by various
5 groups, including racial minorities.” 52 U.S.C. § 20501(a)(3). Two of the NVRA’s
6 specifically enumerated purposes are to “increase the number of eligible citizens who
7 register to vote” and “to make it possible for Federal, State, and local governments to
8 implement this chapter in a manner that enhances the participation of eligible citizens as
9 voters in elections.” 52 U.S.C. § 20501(b)(1) & (2). Some of the key provisions of the
10 statute require states to offer registration opportunities at motor vehicle agencies, (52
11 U.S.C. § 20504), public assistance agencies, (52 U.S.C. § 20506), and accept and use a
12 federal voter registration form, (52 U.S.C. § 20505). *See also Long*, 752 F. Supp. 2d at
13 708–09 (“[E]ach of the substantive provisions in [the NVRA], including [Section 8],
14 discuss methods to promote increased voter registration, with some subsections providing
15 added emphasis on voter registration programs to be conducted by the state.”). This broader
16 context further supports the conclusion that Section 8(b)’s uniformity and
17 nondiscriminatory requirements apply to the entire voter registration process. *See id.*

18 The Court here should hold that Section 8(b) applies to the Challenged Provisions
19 in their entirety because Section 8(b) covers procedures to determine which new registrants
20 will be added to the official list of eligible voters.

21 **B. The Challenged Provisions are neither uniform nor nondiscriminatory**
22 **on their face.**

23 The Moving Defendants concede that Section 8(b) applies to post-registration
24 removal procedures and, therefore, to at least some of the Challenged Provisions. ECF No.
25 364 at 6. Their motion is also premature; as they recognize, “[b]ecause discovery is
26 ongoing, the State takes no position at this time on whether the registration cancellation
27 provisions in the Voting Laws, *as applied*, result in a non-uniform or discriminatory
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1 program for maintaining accurate registration lists.” *Id.* at 6 n.12 (emphasis in original).
2 Under Rule 56(d), summary judgment on this claim would be improper until discovery is
3 completed. The Moving Defendants fail to explain why this Court should prejudge
4 Plaintiffs’ claims under Section 8(b) based solely on the face of the Challenged Provisions.
5 Because such a premature ruling would not narrow the issues or otherwise advance the
6 case, this Court should decline Defendants’ unusual invitation to do so.

7 Even if this Court were inclined to rule on Defendants’ assertions that the
8 Challenged Provisions are uniform and nondiscriminatory “[a]t least on the[ir] face,” ECF
9 No. 364 at 11—and it should not—Defendants’ arguments have no basis in the statutory
10 text or case law.

11 First, there is no textual basis to support Moving Defendants’ argument that the only
12 type of uniformity Section 8(b) requires is for a law to apply across a whole jurisdiction.
13 52 U.S.C. § 20507(b). “Uniform” means “consistent in conduct or opinion” or “having
14 always the same form, manner, or degree: not varying or variable.”⁵ Nor is there any textual
15 basis to support their argument that “nondiscriminatory”—the plain meaning of which is
16 simply “not discriminatory”—means solely that it does not violate the Voting Rights Act.
17 Defendants provide no basis for importing all of the requirements of the Voting Rights Act
18 into Section 8(b).⁶ Moreover, such a narrow definition would make the term
19 “nondiscriminatory” surplusage because the provision goes on to also specifically require
20 “compliance with the Voting Rights Act.” 52 U.S.C. § 20507(b); *see Dunn v. Commodity*
21 *Futures Trading Comm’n*, 519 U.S. 465, 472 (1997) (“[L]egislative enactments should not
22 be construed to render their provisions mere surplusage.”). And Section 8(b) applies to any
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24 ⁵ *Merriam-Webster Dictionary*, Definition of Uniform, [https://www.merriam-](https://www.merriam-webster.com/dictionary/uniform)
25 [webster.com/dictionary/uniform](https://www.merriam-webster.com/dictionary/uniform) (last visited June 1, 2023).

26 ⁶ In any event, LUCHA Plaintiffs allege that these provisions violate the Voting Rights
27 Act. ECF No. 67 ¶¶ 363–71. Defendants have not moved for summary judgment on this
28 claim and, therefore, even under Defendants’ narrow construction of Section 8(b), this
claim is not ripe for summary judgment.

1 “program or activity,” not only to “laws.” Thus, Section 8(b) applies to any program or
2 activity, including implementation of the Challenged Provisions, that is inconsistent in
3 conduct or that is variable or discriminatory. The Challenged Provisions do not apply
4 uniformly across each jurisdiction and instead subject voters to differential and
5 discriminatory treatment even within counties. *See* Controverting Statement of Facts
6 (“CSOF”), ECF No. 389 at 13 ¶¶ 13–16.⁷

7 As Consolidated Plaintiffs allege, by their nature, the Challenged Provisions target
8 naturalized citizens because they require the investigation of registration applicants and
9 registered voters using databases that inevitably contain stale government data showing an
10 individual was not a U.S. citizen at some time in the past, while no database of any kind
11 would indicate a native-born voter previously lacked U.S. citizenship, resulting in
12 differential treatment of naturalized citizens. *See* Second Am. Compl., ECF No. 169 ¶¶ 91–
13 92; *see also id.* ¶¶ 89–94; Sec’y of State Ans. to Second Am. Compl., ECF No. 189 ¶¶ 5,
14 51; CSOF, ECF No. 389 at 13 ¶¶ 13–16; LUCHA Plaintiffs’ Am. Compl., Doc. 67 ¶¶ 100–
15 16, 361; *cf. United States v. Fla.*, 870 F. Supp. 2d 1346, 1350-51 (N.D. Fla. 2012) (state
16 purge program “probably ran afoul of [NVRA section 8(b)]” because its methodology
17 made it likely that newly naturalized citizens were the primary individuals who would have
18 to respond and provide documentation). Defendants do not address these factual allegations
19 about the nature of the databases at issue, and the Court cannot do so either at this stage.
20 Furthermore, the Challenged Provisions also fail to inform Arizona state and local officials
21 as to how they should review and evaluate outdated citizenship status information
22 contained in government databases. As a result, different county recorders and different
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25 ⁷ The Senate Report cited by the Moving Defendants (ECF No. 364 at 6), does not justify
26 their narrow reading of Section 8(b), since the report does not state that it describes the
27 provision’s sole or only impact or intent. In any event, even if the report does support their
28 reading, it cannot override the NVRA’s statutory language. *Hearn v. W. Conf. of Teamsters
Pension Tr. Fund*, 68 F.3d 301, 304 (9th Cir. 1995) (“[L]egislative history—no matter how
clear—can’t override statutory text.”).

1 staff members within a county recorder's office will inevitably apply varying rules,
2 standards, and procedures in comparing voter registration applicants and registered voters
3 to the enumerated databases. *See* Second Am. Compl., ECF No. 189 ¶¶ 91–92. As several
4 Plaintiffs argue, the Challenged Provisions further divide registered voters into two groups:
5 those who are suspected of lacking U.S. citizenship and those who are not. This openly
6 invites county recorders to treat registered voters in a nonuniform and/or discriminatory
7 manner based on their race, ethnicity, national origin, dress, English proficiency, and other
8 impermissible criteria, in violation of Section 8(b). *See id.* ¶ 94. In addition, the DNC
9 Plaintiffs argue that the Challenged Provisions are nonuniform in their treatment of federal-
10 only voters as compared with other Arizona voters by (1) excluding them from voting early
11 and in presidential elections and (2) singling them out for investigation and possible
12 prosecution. *See Democratic Nat'l Comm. v. Fontes*, Case No. 2:22-cv-01369-SRB,
13 Complaint for Declaratory and Injunctive Relief, ECF No. 1 ¶¶ 73–78.

14 Finally, there are disputed issues of material fact as to whether the Challenged
15 Provisions will cause the nonuniform and discriminatory treatment of voter registration
16 applicants and registered voters and thereby violate Section 8(b). These questions cannot
17 be resolved while discovery is ongoing and depositions have not yet begun. Consistent
18 with this Court's order denying the Moving Defendants' motion to dismiss this necessarily
19 fact-intensive claim under the NVRA, ECF No. 304 at 30, Plaintiffs are entitled to complete
20 discovery and obtain evidence to prove their claims at trial. Plaintiffs are currently awaiting
21 outstanding document and other written discovery, including from state officials. *See, e.g.*,
22 Notices of Service of Discovery, ECF Nos. 366, 372 & 383. In addition, following
23 document discovery, Plaintiffs intend to depose state and county defendants to establish
24 that the Challenged Provisions will cause nonuniform and discriminatory treatment of voter
25 registration applicants and registered voters. Plaintiffs also intend to offer expert testimony
26 that will elucidate the nonuniform and discriminatory nature of the Challenged Provisions.

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1 As a result, it would be inappropriate to grant summary judgment on Plaintiffs' Section
2 8(b) claims.

3 For the foregoing reasons, the Moving Defendants' motion for summary judgment
4 as to Section 8(b) of the NVRA must be denied.

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1 RESPECTFULLY SUBMITTED this 5th day of June, 2023.

2
3 /s/ Jon Sherman

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