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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 CROSS-RESPONSE AND REPLY IN SUPPORT OF PARTIAL SUMMARY JUDGMENT

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I. Plaintiffs have not shown that the NVRA can preempt H.B. 2492's citizenship requirements.

"Article II, §1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020). Congress can regulate the "Manner" of congressional elections, but only the States can regulate the "Manner" of presidential elections. The "normal and ordinary" meaning of the Electors Clause resolves this case. *United States v. Sprague*, 282 U.S. 716, 731 (1931). And in eight response briefs, Plaintiffs fail to explain how the text of the Electors Clause supports their claim.

Instead, Plaintiffs attack strawmen. They point out that "the RNC cites no case holding that Congress *cannot* regulate presidential elections." Doc. 393 at 10. And their briefs are full of cases that "rejected the proposition that Congress has no power to regulate presidential elections," *Fish v. Kobach*, 840 F.3d 710, 719 n.7 (10th Cir. 2016), and cases that recognized Congress's "broad power" over presidential elections, *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995). But the RNC does not claim Congress has *no power* to regulate presidential elections. Rather, the argument is that "Congress does not have power to regulate the 'Places and Manner' of presidential elections." Doc. 367 at 4. That principle is evident on the face of the Constitution's text, but Plaintiffs obscure the text with irrelevant cases and vague invocations of "broad congressional power." Those arguments are futile, because this Court must apply the "normal and ordinary" meaning of the Electors Clause. *Sprague*, 282 U.S. at 731.

The few textual arguments Plaintiffs make expose the absurdity of their claim. First, Plaintiffs suggest there is a difference between regulating presidential *elections* and regulating the manner of choosing presidential *electors*. Doc. 391 at 12-14. That distinction makes no sense. An election is Arizona's chosen "Manner" of appointing presidential electors: it is the "method of securing party candidates in the general election," and thus "an exercise of the state's right to appoint electors in such manner,

subject to possible constitutional limitations, as it may choose." *Ray v. Blair*, 343 U.S. 214, 227 (1952) (citing U.S. Const., art. II, §1). Arizona, like most States, requires its presidential electors to "cast their electoral college votes for the candidate for president" who received the highest number of votes in the general election. Ariz. Rev. Stat. §16-212(B). In requiring presidential electors to abide by the outcome of a popular election, Arizona did not relinquish its power over the "Manner" of choosing presidential electors. *McPherson v. Blacker*, 146 U.S. 1, 36 (1892). It retains the "the broadest power of determination" over the appointment of presidential electors, which encompasses whether and how to conduct "a popular election." *Id.* at 7-8. Indeed, States need not hold a popular presidential election at all—during "the Nation's earliest elections, state legislatures mostly picked the electors, with the majority party sending a delegation of its choice to the Electoral College." *Chiafalo*, 140 S. Ct. at 2321.

Setting voter registration rules for presidential elections is part of the "plenary power [of] the state legislatures in the matter of the appointment of electors." *McPherson*, 146 U.S. at 35. Indeed, Plaintiffs concede that "[r]egistration is indivisible from election." Doc. 393 at 7 (quoting *ACORN v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995)). After all, "the power to appoint an elector (in any manner) includes power to condition his appointment." *Chiafalo*, 140 S. Ct. at 2324. In Arizona, voter qualifications and registration are part and parcel of the "condition[s]" of appointing Arizona's presidential electors. *Id.* Voter registration, just like primaries, are "an integral part of the general election," and their regulation thus falls under the States' power to appoint presidential electors. *Ray*, 343 U.S. at 226, 229. Because "[t]he constitution does not provide that the appointment of electors shall be by popular vote," States are under no obligation to conduct a popular presidential election *at all*, let alone conduct registration for that election in any particular manner. *McPherson*, 146 U.S. at 27. Subject to other constitutional constraints, they remain "free to conduct [their] elections and limit [their] electorate as [they] may deem wise." *Smith v. Allwright*, 321 U.S. 649, 657 (1944).

Arizona's "far-reaching authority over presidential electors" therefore includes the power to "condition [their] appointment" by setting registration rules for their selection. *Chiafalo*, 140 S. Ct. at 2324.

Plaintiffs backpaddle from this conclusion by insisting Congress has a general power "to regulate all federal elections." Doc. 391-1 at 7. But there is no "federal elections" clause. In search of a textual basis for their theory, Plaintiffs resort to the Necessary and Proper Clause. They argue that applying the NVRA to presidential elections is necessary and proper to regulating the "Manner" of congressional elections. Doc. 393 at 12. But the Constitution puts presidential and congressional appointments on separate tracks. Article II governs presidential appointment, and Article I governs congressional appointment. "One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly." *Arizona v. Inter Tribal Council of Arizona, Inc.* (*ITCA*), 570 U.S. 1, 16 (2013). Plaintiffs' reliance on law review articles betrays the lack of support for their argument, and the sparse caselaw they do cite proves them wrong. *See Ex parte Coy*, 127 U.S. 731, 752 (1888) (discussing the power of Congress "to make such provisions as are necessary to secure the fair and [honest] conduct of an election *at which a member of congress is elected*" (emphasis added)).

Grasping for a link to Article II, Plaintiffs next argue that regulating registration for presidential elections is necessary and proper to determine the "Time" of appointing presidential electors. Doc. 393 at 12-13. This argument reads "Time" to mean "Time and Manner." But Article II vests the "Manner" of presidential appointment in the States, not in Congress. In other words, voter registration is one of the "necessary step[s] in the choice of candidates for election," and thus pertains "to the manner of holding it." *United States v. Classic*, 313 U.S. 299, 320 (1941). Plaintiffs don't even try to explain how citizenship requirements for voter registration relate to the "Time" for choosing electors. Nor could they, because voter registration requirements are "manner" regulations outside the purview of Congress's Electors Clause power. *See Cook v. Gralike*, 531 U.S. 510,

523-24 (2001) (The term "'manner' of elections" "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" (citation omitted)).

Precedent does not free Plaintiffs from the plain meaning of the Electors Clause. Start with *Oregon v. Mitchell*, which failed to garner a majority opinion. Only one Justice thought that Congress had authority to ban residency requirements under the Elections Clause. *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (op. of Black, J.). Plaintiffs nevertheless argue that because "eight Justices upheld Congress's ban on residency requirements *in presidential elections*," the Court must accept all plurality theories that upheld Congress's ban, including the single vote for the Elections Clause. Doc. 391 at 8-9. That is exactly how *not* to read split decisions from the Supreme Court. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds….'" (citation omitted)). And in *Mitchell*, "[f]ive Justices took the position that the Elections Clause did not confer upon Congress the power to regulate voter qualifications in federal elections." *ITCA*, 570 U.S. at 16 n.8.

Plaintiffs also misread *Burroughs*. That case did not discuss the source of Congress's authority to enact the Federal Corrupt Practices Act (FCPA). The Supreme Court later clarified that Congress had passed the FCPA under the General Welfare Clause "to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising." *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (citing *Burroughs v. United States*, 290 U.S. 534 (1934)). The Court in *Burroughs* decided whether Congress, notwithstanding its authority to *enact* the FCPA, had nonetheless *violated* the Electors Clause by intruding on the States' power to regulate the "Manner" of appointing

presidential electors. The FCPA dealt only with "political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees." *Burroughs*, 290 U.S. at 544. The Court thus held that "[n]either in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." *Id.* The Court had no occasion to decide the scope of the Electors Clause as a *source* of congressional power, and it recognized that a statute that interfered with the "exclusive state power" over presidential elections would be unconstitutional. *Id.* at 544-45. Thus, "*Burroughs* … reinforce[s] the principle that the manner of appointment is exclusive to the states." *In re Guerra*, 441 P.3d 807, 814 (Wash. 2019), *aff'd sub nom. Chiafalo v. Washington*, 140 S. Ct. 2316 (2020).

Left with no Supreme Court precedent supporting their arguments, Plaintiffs point to half a sentence of dicta in *Voting Rights Coalition v. Wilson*. In that case, the Ninth Circuit considered a challenge to the NVRA based on "[t]hree provisions of the Constitution"—the Electors Clause of Article II was not one of them. *Wilson*, 60 F.3d at 1413 (citing U.S. Const. article I, §4; article I, §2; and the Tenth Amendment). The Ninth Circuit did not cite—let alone discuss and *decide*—the scope of the Electors Clause. *Cf. Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022) ("Dicta that does not analyze the relevant statutory provision cannot be said to have resolved the statute's meaning."). The half of a sentence the panel included about presidential elections was neither essential to the judgment nor a proper interpretation of *Burroughs*. *See id.* at 1414.

Finally, the NVRA is not remedial legislation under the Fourteenth or Fifteenth Amendments. Those amendments could have been a valid source for the NVRA had Congress invoked them. But it did not. Plaintiffs' bold claim that three pages from congressional committee reports forms an "extensive record of discrimination in voting registration" disproves itself. Doc. 393 at 15 (citing S.Rep. No. 103-6, at 3; H.Rep. No. 103-9, at 3-4). And Plaintiffs rely on *South Carolina v. Katzenbach* to their peril. In

Katzenbach, the Supreme Court upheld the 1965 Voting Rights Act (VRA), "explaining that it was justified to address 'voting discrimination where it persists on a pervasive scale.'" *Shelby Cnty. v. Holder*, 570 U.S. 529, 538 (2013) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). After months of hearings and volumes of findings, Congress had tailored the VRA to apply "where Congress found 'evidence of actual voting discrimination.'" *Id.* at 546. "Multiple decisions since have reaffirmed the [VRA]'s 'extraordinary' nature." *Id.* at 555. *Katzenbach* proves that the NVRA doesn't come close to the legislative findings necessary to enact remedial legislation.

In sum, "Article II and the Twelfth Amendment give States broad power over electors…." *Chiafalo*, 140 S. Ct. at 2328. Plaintiffs' reading of the Elections Clause "evade[s] important constitutional restraints" in Article II by nullifying States' authority over presidential elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995). Because Congress has no authority to regulate the "Manner" of choosing presidential electors, Defendants are entitled to summary judgment on Plaintiffs' claims that the NVRA preempts H.B. 2492's citizenship requirements as applied to registration for presidential elections.

II. Nothing in the NVRA's text discusses early mail-in voting rules.

Plaintiffs cite no authority applying the NVRA to early mail-in voting rules. Perhaps Congress could pass a statute like the NVRA that unifies registration for early mail-in voting. Indeed, the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) does something similar (on a much smaller scale) by requiring States to allow certain overseas voters to register and vote absentee in elections for federal office. 52 U.S.C. §§20302-20310. But there, Congress covered both "voter registration application[s]" and "absentee ballot application[s]," repeatedly distinguishing between the two. *Id.* §20302. In the NVRA, however, Congress only set "procedures to register to vote in elections." *Id.* §20503(a). Congress said nothing about absentee ballots, mail-in ballots, or early voting. States can require, condition, or prohibit those privileges as they

see fit. *Compare* Cal. Elec. Code §3000.5 (all-mail elections), *with* Ga. Code §21-2-380 (no-excuse absentee voting) *and* Conn. Gen. Stat. §9-135 (permitting voting by mail only if the voter provides an excuse approved by the Legislature).

Plaintiffs' musings about the NVRA "enhanc[ing]" people's participation in elections are irrelevant. 52 U.S.C. §20501(b); *see* Doc. 393 at 7. Their resort to broad notions of congressional intent papers over the gaping hole in the text: the NVRA does not discuss absentee or mail-in voting rules. The one argument Plaintiffs make based on a specific provision is a non sequitur. Section 20505 provides that a State can "require a person to vote in person if—(A) the person was registered to vote in a jurisdiction by mail; and (B) the person has not previously voted in that jurisdiction." 52 U.S.C. §20505(c). The legislative history confirms that Congress inserted this provision to address "concerns regarding fraud," and that the provision "demonstrates the concern of the Committee that each State should develop mechanisms to ensure the integrity of the voting rolls." S. Rep. No. 103-6, at 13 (1993). Plaintiffs infer the opposite, arguing that the provision restricts what information States can require of absentee voters. But that provision says nothing—either explicitly or implicitly—about the information States can require of voters before they can vote early by mail. Regardless, "state-developed forms may require information the Federal Form does not." *ITCA*, 570 U.S. at 12. Any contrary interpretation would wipe out the many longstanding state laws that require additional information and excuses to vote absentee. *E.g.*, Conn. Gen. Stat. §9-135; Del. Code tit. 15, §5502; N.Y. Election Law §8-400.

III. Plaintiffs have not shown that H.B. 2492 violates the NVRA's registration "safe harbor."

If an individual submits a valid voter registration application at least 29 days prior to a federal election, she will be eligible under Arizona law to cast a ballot in that election in all races to which the NVRA applies, even if the county recorder is unable to verify the applicant's citizenship. *See* Ariz. Rev. Stat. §16-121.01(E). H.B. 2492 thus is fully consistent with Section 8 of the NVRA. *See* 52 U.S.C. §20507(a)(1) (providing that if a

"valid voter registration form" 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); *see also* Ariz. Rev. Stat. §16-120(A) (requiring that registration forms must be received at least 29 days prior to an election to qualify the applicant to vote in that election).

Plaintiffs allege that H.B. 2492's proof of citizenship and proof of residency requirements transgress this "safe harbor" provision. Their theories, however, misread H.B. 2492 and misapprehend Section 8's limited scope.

A. H.B. 2492 ensures that federal form applicants will be timely registered to vote in all federal elections covered by the NVRA, even if their citizenship cannot be verified.

The MFV Plaintiffs advance two flawed arguments in support of their Section 8 claims.

First, they contend that "H.B. 2492 violates [Section 8] by barring the county recorders from placing an eligible Federal-Form applicant who submits their application 29 days or more before an election on the list of qualified electors for that election if they cannot independently verify the applicant's citizenship in the time before the election." Doc. 399 at 15. H.B. 2492's text, however, directly refutes this statement. If a county recorder receives a completed Federal Form application and "is unable to match the applicant with appropriate citizenship information," then the recorder must "notify the applicant" and "the applicant will not be qualified to vote in a presidential election or by mail with an early ballot in any election until satisfactory evidence of citizenship is provided." Ariz. Rev. Stat. §16-121.01(E). But that means that the applicant will be registered to vote, and may cast a regular ballot or an early ballot (by any means other than by mail) in congressional elections—which is all the NVRA requires.

A lack of proof of citizenship will preclude a Federal Form applicant from voting in congressional elections if, and only if, the county recorder "matches the applicant with

information that the applicant is *not* a United States citizen." Ariz. Rev. Stat. §16-121.01(E) (emphasis added). As the MFV Plaintiffs acknowledge, "'barring *known* noncitizens from voting does not conflict with' the NVRA." Doc. 399 at 17; *see also ITCA*, 570 U.S. at 15 (noting that the NVRA "does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility'" and that it "clearly contemplates that not every submitted Federal Form will result in registration" (cleaned up)). It follows that H.B. 2492 does not run afoul of Section 8's safe harbor.

Second, the MFV Plaintiffs assert that H.B. 2492 is preempted because Section 8 "does not permit Arizona to deny a Federal-Form applicant their right to vote by mail and in presidential elections" if the applicant's citizenship status cannot be ascertained. Doc. 399 at 17. This theory, though, is wholly dependent on the same invalid premise that undergirds their claims under Section 6 (i.e., the "accept and use" provision) of the NVRA. The NVRA cannot, consistent with Article II, §1 of the U.S. Constitution, displace state laws establishing qualifications to vote for presidential electors. Further, the NVRA is confined exclusively to matters of voter registration. It does not—and has never been construed to—constrain state laws concerning the manner or method of casting a ballot. *See supra* Sections II and III.

B. Section 8's safe harbor does not apply to state form applications that are not valid under state law.

The LUCHA Plaintiffs venture even farther from Section 8's text and the relevant case law. They attack H.B. 2492's requirement that county recorders must reject State Form applications submitted by mail or through public assistance agencies that are not accompanied by documentary proof of citizenship or documentary proof of residence. *See* Doc. 394 at 19. Although they acknowledge that Section 8's safe harbor protects only "valid" voter registration forms, the LUCHA Plaintiffs assert that "whether such [proof of citizenship or proof of residence] records are 'necessary to enable the appropriate State

election official to assess the eligibility of the applicant and to administer voter registration' is a factual question." *Id*. That argument is incorrect for two reasons.

First, and most fundamentally, the "valid[ity]" of a State Form for Section 8 purposes is determined by reference to state law. *See Ass'n of Cmty. Orgs. For Reform Now v. Miller*, 912 F. Supp. 976, 987 (W.D. Mich. 1995) ("[U]nder the NVRA, the states are still left the task of determining that an applicant is eligible, and that the registration form as submitted complies with state law."); *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 385 (6th Cir. 2008) (agreeing that a State "is still free to set eligibility standards and to evaluate whether each applicant meets those standards"). While States may not condition the validity of a Federal Form application on compliance with supplementary state law mandates, they may formulate "state-developed forms [that] may require information the Federal Form does not." *ITCA*, 570 U.S. at 12. A submitted state registration form that does not conform to these state-specific criteria is not a "valid registration form," and hence is not protected by Section 8's safe harbor.

Second, nothing in the NVRA precludes Arizona from requiring that State Form applications submitted by mail or through public assistance agencies to include documentary proof of citizenship and residence. *See Gonzalez v. Arizona*, 435 F. Supp. 2d 997, 1001-02 (D. Ariz. 2006). Section 8's safe harbor provision applies to the following application submissions:

> (A) … registration with a motor vehicle application under section 20504…
> (B) … registration by mail under section 20505…
> (C) … registration at a voter registration agency…
> (D) … [any other] valid registration form … received by the appropriate State election official….

In arguing that the Voting Laws contravene subparagraphs (B) and (C) of Section 8, the LUCHA Plaintiffs rely heavily on *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016). *Fish*, however, pertained to motor vehicle applications submitted under subparagraph (A) of Section 8, which governs the contents of motor vehicle applications under Section 20504. Section 20504 (i.e., Section 5 of the NVRA) permits States to require "only the

minimum amount of information necessary to" prevent duplicate registrations and enable officials to assess applicants' eligibility and otherwise administer elections. 52 U.S.C. §20504(c)(2)(B). The *Fish* court held that Kansas was required to make a factual showing that its proof of citizenship requirement for motor vehicle applications was necessary to remedy a substantial incidence of voter registrations by non-citizens. *See Fish*, 840 F.3d at 742-46.

Even assuming that *Fish* was correct, it is of no help to Plaintiffs here. *Fish*'s reasoning was predicated entirely on the text of Section 5, which governs *only* motor vehicle applications submitted under subparagraph (A) of Section 8. Here, by contrast, the LUCHA Plaintiffs construct their Section 8 claim solely on subparagraph (B), relating to State Form mail-in applications under section 20505 (i.e., Section 9 of the NVRA), and subparagraph (C), relating to State Form registrations submitted at public assistance agencies. The provision of Section 5 that was dispositive in *Fish* is inapplicable to both mail-in State Forms and State Form submissions at public assistance agencies.

The content of mail-in registration applications is addressed in Section 9 of the NVRA. Under Section 9, a State may require in its mail-in State Form any "information … as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 52 U.S.C. §20508(b)(1); *see also id.* §20505(a)(2). This Court has previously confirmed that "[p]roviding proof of citizenship undoubtedly assists Arizona in assessing the eligibility of applicants," and thus is consistent with Section 9. *Gonzalez*, 435 F. Supp. 2d at 1002. Indeed, the *Fish* court contrasted the restrictive language of Section 5 with the substantially broader discretion conferred on States by Section 9. *See Fish*, 840 F.3d at 733-34 (rejecting the argument that the relevant provisions in Section 5 and Section 9 "mean 'substantially the same thing'"); *see generally Bare v. Barr*, 975 F.3d 952, 968 (9th Cir. 2020) ("It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." (cleaned up)). Finally, the

NVRA imposes no additional conditions or restrictions at all on the contents of State Forms that are submitted via public assistance agencies pursuant to subparagraph (C) of Section 8. *See* 52 U.S.C. §20506.

In short, Section 8's safe harbor does not protect submitted State Form applications that are not "valid" under Arizona law. The inclusion of documentary proof of citizenship and residence components in Arizona's mail-in State Form does not conflict with or contravene Section 9 of the NVRA because, as this Court has held, confirmation of citizenship is necessary to assessing the eligibility of an applicant. *Gonzalez*, 435 F. Supp. 2d at 1001-02.

IV. Section 10101 creates no private rights enforceable by Plaintiffs.

Only the United States can assert a challenge to the voting laws under 52 U.S.C. §10101(a)(2). Several private Plaintiff groups[1] join the United States in raising claims under subsection (a)(2)(B)—the so-called "materiality provision"—and others[2] raise claims under subsection (a)(2)(A), which prohibits disparate registration standards, practices or procedures within a single voting jurisdiction.

When a plaintiff invokes 42 U.S.C. §1983 as a vehicle for a claim arising out of some other statute, "the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). Even if an individual right is embedded in the statute, however, it is not vindicable through Section 1983 if the statute is devoid of a "private *remedy*" because Congress "creat[ed] a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 & n.4 (2002).

[1] Arizona Asian American Native Hawaiian and Pacific Islander for Equity Coalition (Compl. ¶¶152-155, Doc. 1, No. 2:22-cv-1381); Democratic National Committee (*see* Compl. ¶¶87-190, Doc. 1, No. 2:22-cv-1369); MFV (2d Am. Compl. ¶¶100-106, Doc. 65, No. 2:22-cv-509); and LUCHA (1st Am. Compl. ¶¶342-50, Doc. 67, No. 2:22-cv-509).

[2] Poder Latinx (*see* 2d Am. Compl. ¶¶99-106, Doc. 169, No. 2:22-cv-509).

Neither condition for enforcement under Section 1983 can be found in Section 10101(a)(2).[3] First, Congress did not "in clear and unambiguous terms" endow new individual "rights" in the statute. *Id.* at 290. Plaintiffs emphasize the materiality provision's explicit reference to the "right of any individual to vote," which is coupled with a prohibition against certain practices and procedures that may abridge it. *See* Doc. 399 at 10-11; Doc. 397 at 6-7. But these textual attributes undermine Plaintiffs' theory. Specifically, by referencing the existing "right of any individual to vote," Section 10101(a)(2) confirms that it does not itself fashion any new "right" at all; rather, it furnishes a mechanism for the federal government to enforce a right (*i.e.*, the franchise) established by extrinsic sources of law. Additionally, the proscriptive formulation (*i.e.*, "No person acting under color of law shall...") denotes a regulatory restraint on state actors. *See, e.g.*, *Lil' Man in the Boat, Inc. v. City and Cnty. of San Francisco*, 5 F.4th 952, 959-60 (9th Cir. 2021) (federal statute that prohibited non-federal entities from imposing certain fees or charges on vessels did not create a private right); *Logan v. U.S. Bank Nat'l Ass'n*, 722 F.3d 1163, 1170-71 (9th Cir. 2013) (statute's reference to the "rights of any bona fide tenant" did not create private right of action for the benefit of such tenants); *UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d 695, 699 (9th Cir. 2018) (the proscriptive phrase, "'[n]o investment company' shall" was not "rights-creating language").

Second, even if Section 10101(a)(2) created some freestanding "right," Congress explicitly charged the Attorney General with enforcing its terms. *See* 52 U.S.C. §10101(c). "Where a statutory scheme contains a particular express remedy or remedies, 'a court must be chary of reading others into it.'" *Logan*, 722 F.3d at 1172 (citation

[3] The MFV Plaintiffs' exertion to draw inferences from the legislative history ignores that such "context matters only to the extent it clarifies text." *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). Accordingly, the Court can begin and end its "search for Congress' intent with the text and structure of" Section 10101(a)(2) itself. *Id.*; *see also Logan*, 722 F.3d at 1171 (when deciding whether there is an implied right of action, "[w]e presume that Congress expressed its intent through the statutory language it chose").

omitted). In scouring the statutory text for any indicia of broad private remedies, Plaintiffs point out that subsection (d) "contemplates claims by non-US litigants." Doc. 399 at 10. Indeed, Section 10101 authorizes private litigants to assert claims—but only in a narrow set of circumstances that require a prior judicial finding in a proceeding brought by the Attorney General of a "pattern or practice" of violations. 52 U.S.C. §10101(e). If, as Plaintiffs contend, any putatively injured individual can enforce any provision of Section 10101(a)(2), these carefully tailored prerequisites for private remedies detailed in subsection (e) would be superfluous. *See Stilwell v. City of Williams*, 831 F.3d 1234, 1244 (9th Cir. 2016) ("[W]hen Congress creates a right by enacting a statute but at the same time limits enforcement of that right through a specific remedial scheme that is narrower than §1983, a §1983 remedy is precluded. This makes sense because the limits on enforcement of the right were part and parcel to its creation.").

In sum, Section10101(a)(2) does not create any private "right." Rather, it equips the Attorney General with remedial instruments to wield against States or political subdivisions that engage in certain prohibited practices impairing the franchise. This Court should join the Sixth Circuit and multiple district courts in holding that it is not privately enforceable through Section 1983. *See* Doc. 366 at 13 (citing cases).

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of Intervenors on these claims.

RESPECTFULLY SUBMITTED this 5th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 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