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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 REPLY BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS TWO AND SIX OF THEIR SECOND

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Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

AMENDED COMPLAINT

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

Speaker of the House Ben Toma and Senate President Warren Petersen,

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Intervenor-Defendants.

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Plaintiffs,

v.

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

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendant,

and

Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN AND PACIFIC ISLANDER FOR EQUITY COALITION,

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.

PROMISE ARIZONA, et al.,

Plaintiffs,

v.

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

Defendants,

and

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Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

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I. PODER LATINX AND CPLC CONTINUE TO HAVE STANDING.

The Attorney General's attempt to relitigate her standing challenge to Poder Latinx, Chicanos Por La Causa, and Chicanos Por La Causa Action Fund's[1] Civil Rights Act claims, previously raised and denied as a Rule 12 motion, should again be denied. *Compare* ECF No. 127 at 25–27, ECF No. 180 at 17–19 *with* ECF No. 436 at 43–44; *see also* Order, ECF No. 304 at 17–19. The Attorney General fails to acknowledge that this Court unequivocally held that "Plaintiffs have standing to sue," ECF No. 304 at 15–17, and cites no evidence or reason why this Court should revisit its prior ruling. ECF No. 436 at 43–44. The Court should once again reject this argument.

Poder Latinx and CPLC incorporate by reference their arguments concerning standing outlined in their Opposition to the State's Consolidated Motion to Dismiss. *See* ECF No. 154 at 7–9. To summarize, the Attorney General argues (again) that Poder Latinx and CPLC have not "articulated a plan to violate" A.R.S. § 16–165(I)[2] and that there has been no "threat to initiate proceedings." ECF No. 436 at 43.[3] But that is beside the point. As Plaintiffs explained in opposing the motion to dismiss, A.R.S. § 16-165(I) requires county recorders to act on their subjective biases to divide registered voters into two classes based on an arbitrary "reason to believe" standard and then subject those whom they suspect lack citizenship to different "standards, practices, or procedures." *See, e.g.*, ECF No. 154 at 11–12 (quoting 52 U.S.C. § 10101(a)(2)(A)). Where there is a "credible threat of enforcement," plaintiffs have to bring a "preenforcement suit."

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[1] Chicanos Por La Causa and Chicanos Por La Causa Action Fund are referred to collectively as "CPLC."

[2] A.R.S. § 16-165(I) (eff. Jan. 1, 2023) was enacted as A.R.S. § 16-165(H) in HB 2243.

[3] Defendants appear to conflate the standards for standing and ripeness. *See* ECF No. 436 at 43. While standing requires there to be an "injury in fact" that is "actual or imminent," *see* Order, ECF No. 304 at 15–16, the issues of whether there is an "articulated [] concrete plan to violate the law in question" and a "specific warning or threat to initiate proceedings" are related to ripeness, *see id.* at 17–18 (citing *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)). The Court has already ruled that Plaintiffs' claims are ripe for review. *See* Order, ECF No. 304 at 17–19.

See Susan B. Anthony List v. Driehaus, 573 U.S. 149, 159–61, 167 (2014); *id*. at 158 ("[A]n actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law."); *see also Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008) ("The Supreme Court has long since held that where the enforcement of a statute is certain, *a preenforcement challenge will not be rejected on ripeness grounds*.") (emphasis added). Here, the threat of enforcement is certainly credible, as the provision in question is *mandatory*. The application of these arbitrary and discriminatory laws will thwart Poder Latinx and CPLC's missions and deprive their constituents of their right to vote.

The Attorney General also (again) argues that Poder Latinx and CPLC lack standing because they have not identified a specific county recorder who will initiate a citizenship investigation based on improper and subjective concerns. *Compare* ECF No. 436 at 43–44 (quoting ECF No. 397 at 2) *with* ECF No. 127 at 24–25. Poder Latinx and CPLC previously addressed that concern by amending their complaint to name county recorders as defendants. *See* ECF No. 65 ¶¶ 24–39, ECF No. 169 ¶¶ 23-26; *see also* Order, ECF No. 304 at 14 n.8, 17 n.9. And in any event, such identification is unnecessary. As explained in Poder Latinx and CPLC's cross-motion, A.R.S. § 16-165(I)'s inherent subjectivity violates 52 U.S.C. § 10101(a)(2)(A) as a matter of law. *See* ECF No. 397 at 9–10. As a result, every county recorder who implements A.R.S. § 16-165(I) violates § 10101(a)(2)(A)'s ban on subjecting voters to different standards, practices, and procedures. Accordingly, Plaintiffs have standing to sue.

II. THE ATTORNEY GENERAL'S MERITS ARGUMENTS FAIL.[4]

The Attorney General's arguments on the merits of 52 U.S.C. § 10101(a)(2)(A), ECF No. 436 at 44–45, are also wrong. A.R.S. § 16-165(I) requires County Recorders to subject *currently registered* voters to differential voter qualification practices and procedures (specifically, an additional citizenship verification) based on a purely subjective "reason to believe" standard. The

[4] This brief focuses on Poder Latinx and CPLC's 52 U.S.C. § 10101(a)(2)(A) claim. In support of its claim under Section 6 of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20505, Poder Latinx joins and incorporates the relevant portions of the Tohono O'odham Plaintiffs' reply brief.

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subjectivity of the standard necessarily gives rise to varying interpretations and applications—*i.e.*, different standards—across and within counties and commands county recorders to act on their mere suspicion that a voter lacks citizenship. The Civil Rights Act forbids such a scheme.[5]

The Attorney General fails to acknowledge or otherwise address the case law Poder Latinx and CPLC cited in the opening brief holding Section 10101(a)(2)(A) forbids the application of differential standards, practices, or procedures to voters based on a mere suspicion of ineligibility. *See* ECF No. 397 at 11–12 (citing *Shivelhood v. Davis*, 336 F. Supp. 1111 (D. Vt. 1971), and *Frazier v. Callicutt*, 383 F. Supp. 15 (N.D. Miss. 1974)).

Citing *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839–40 (S.D. Ind. 2006), the Attorney General contends that Section 10101(a)(2)(A) is "aimed at preventing differential treatment based on race," ECF No. 436 at 44, and "does not require states to 'abolish[] all requirements which uniquely apply to only one set of voters.'" ECF No. 436 at 45 (quoting *Rokita*, 458 F. Supp. 2d at 840). What the Civil Rights Act prohibits is basing the application of differential voter qualification practices and procedures on a subjective standard, unfettered discretion, or mere suspicion. For this reason, *Rokita* is wholly inapposite: That case concerned a Section 10101(a)(2)(A) challenge to Indiana's voter identification requirement, which relied upon the law's exemption of mail-in absentee and nursing home voters. But the criteria used to differentiate voters in that context were categorical and objective—whether the exempt voters had cast mail-in absentee ballots or voted from a nursing home. *See Rokita*, 458 F. Supp. 2d at 786. That is very different from the subjective basis for applying differential voter qualification procedures that was at issue in *Shivelhood* and *Frazier* and is presented by A.R.S. § 16-165(I)'s "reason to believe" standard.

With regard to the Attorney General's contention that Section 10101(a)(2)(A) is limited to racial discrimination, neither of the classifications struck down in *Shivelhood* or *Frazier* concerned racial classifications. Indeed, beyond *Shivelhood* and *Frazier*, courts have long

[5] The Attorney General may not change this federal statutory claim into a constitutional void-for-vagueness claim. ECF No. 436 at 45 n.11.

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recognized that Section 10101(a)(2)(A)'s protections extend beyond overt racial discrimination. *See, e.g*., *Ball v. Brown*, 450 F. Supp. 4, 7 (N.D. Ohio 1977) (applying Section 10101(a)(2)(A) to claim of gender discrimination and noting it "permits . . . actions to redress non-racial discrimination"); *Worden v. Mercer Cnty. Bd. of Elections*, 294 A.2d 233, 237 (N.J. 1972) ("[Section 10101(a)(2)(A)'s] sweeping terminology suggests application to discrimination in student and other nonracial contexts."); *Brier v. Luger*, 351 F. Supp. 313, 316 (M.D. Penn. 1972) (allegations that Democrats were purged from voter rolls at higher rates than Republicans were "properly brought" under Section 10101(a)(2)(A)); *Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, 2008 WL 11395499, at *3–4 (D. Ariz. Feb. 5, 2008) (considering plaintiffs' claim of differential treatment of voters who moved within a county and voters who moved between counties); *U.S. Student Ass'n Found. v. Land*, 585 F. Supp. 2d 925, 949–50 (E.D. Mich. 2008) (considering Section 10101(a)(2)(A) claim against Michigan's practice of canceling registrations for undeliverable original voter ID cards, but not undeliverable duplicate IDs).

Moreover, there is no language that indicates Section 10101(a)(2)(A) is limited to racial classifications. *Cf. Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 639 (W.D. Wis. 2021) (noting text of adjacent provision 52 U.S.C. § 10101(a)(2)(B) "isn't limited to race discrimination"). Rather, the plain language of Section 10101(a)(2)(A) extends beyond overt racial discrimination; notably, while Section 10101(a)(1) forbids discrimination in voting based on "race, color, or previous condition of servitude," Section 10101(a)(2)(A) contains no such limiting language. "Where Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion." *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021).[6]

[6] In reaching the opposite conclusion, *Rokita* cited to historical motivations rather than the actual statutory text. 458 F. Supp. 2d at 839 & n.106. But courts routinely distinguish between the historical *motivations* for enacting a statute and the plain text. For example, in applying 52 U.S.C. § 10101(a)(2)(B), the Materiality Provision, to Florida's voter registration procedures, the Eleventh Circuit noted that "[t]he text of the . . . statute, and not the historically motivating examples of intentional and overt racial discrimination, is . . . the appropriate starting point of inquiry in discerning congressional intent." *Fla. State Conf. of N.A.A.C.P.*, 522 F.3d at 1173; *id.*

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The Attorney General also cites to *Ballas v. Symm*, 494 F.2d 1167, 1171–72 (5th Cir. 1974) for the "holding that [an] election official who required only a subset of registration applicants to submit a residency questionnaire did not violate federal law." ECF No. 436 at 45. But *Ballas v. Symm* has not been good law since 1979. The Texas statute at issue in *Ballas*, which presumed non-residency of college students, and the Waller County registrar's practice of requiring students to complete a residency questionnaire, were both subsequently enjoined. *See Whatley v. Clark*, 482 F.2d 1230, 1234 (5th Cir. 1973) (enjoining statute); *Symm v. United States*, 439 U.S. 1105 (1979) (summarily affirming *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (three-judge panel)). *See generally Johnson v. Waller Cnty.*, 593 F. Supp. 3d 540, 615 (S.D. Tex. 2022) (summarizing history).

Beyond citing inapposite and overruled cases, the Attorney General tries to recast the "reason to believe" standard in A.R.S. § 16-165(I) as an objective test. ECF No. 436 at 44–45. By its plain terms, the phrase "reason to believe" is subjective and susceptible to varying interpretations and applications. It is no answer to say that all "recorders are subject to the same standard," *id.* at 45, because that standard requires the registrars to subjectively and selectively subject voters to an additional citizenship verification procedure based on nothing more than a subjective "reason to believe."

The Attorney General posits that there could be objective sources of information that *give* county recorders or their staff "reason to believe" that a registered voter is not a U.S. citizen, citing information provided by law enforcement or a voter's self-reporting. *Id.* But the county recorders' obligation to conduct an extra citizenship check under A.R.S. § 16-165(I) is not limited to receipt of this subset of objective information, but provides that the additional procedures are triggered by a far broader range of considerations including subjective beliefs and impressions.[7] While

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at 1173 ("Congress in combating specific evils might choose a broader remedy."). Similarly, the Ninth Circuit has found that 42 U.S.C. § 1985(3) is not "limited exclusively to racial situations." *Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 719–20 & n.15 (9th Cir. 1981).

[7] A.R.S. § 16-165(I) also applies to "persons who are registered to vote without satisfactory evidence of citizenship as prescribed by § 16-166." Whether a registered voter has satisfied the

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A.R.S. § 16-165(I) certainly could have limited the trigger for further investigation to the sort of objective information cited by the Attorney General, it does not.[8] While the Attorney General's attempt to rewrite the statute as one that contains an objective trigger is understandable, this Court lacks the power to rewrite A.R.S. § 16-165(I). *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004) (noting that court "may not . . . 'rewrite' the statute to save it") (citation omitted). As written, the statute's reliance on a subjective "reason to believe" standard thereby violates the Civil Rights Act.

III. 52 U.S.C. § 10101(a)(2)(A) IS ENFORCEABLE BY PRIVATE LITIGANTS.

The Republican National Committee continues to wrongly assert that private plaintiffs cannot bring suit to enforce 52 U.S.C. § 10101(a)(2)(A). ECF No. 442 at 17–19. Poder Latinx and CPLC join and incorporate by reference the relevant section of Mi Familia Vota's reply brief and will only add the following points.

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First, the Ninth Circuit has repeatedly highlighted the importance of the phrase "No person shall"—which Section 10101(a)(2)(A) contains—in affirming privately enforceable rights. For example, *Watson v. Weeks* explained that Titles VI and XI, which the Supreme Court in *Gonzaga University v. Doe,* 536 U.S. 273 (2002) considered "exemplars of statutory provisions that create section 1983 rights," both "use the wording 'no person . . . shall . . . .'" 436 F.3d 1152, 1159 (9th Cir. 2006) (citing *Gonzaga*, 536 U.S. at 284 & n.3). The *Watson* court concluded that a provision of the Medicaid Act containing the phrase "a State plan must provide" created individually enforceable rights under 42 U.S.C. § 1983 in part because it was "difficult, if not impossible" to distinguish the import of that mandatory language from "No person shall" in Titles VI and IX. *Id.* at 1160 (quoting *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004)). Similarly, in *Sanchez v. Johnson*, 416 F. 3d 1051 (9th Cir. 2005), the Ninth Circuit applied a similar analysis

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DPOC requirement is an objective fact, and Poder Latinx and CPLC's Civil Rights Act claim does not extend to this portion of subsection (I).

[8] By way of comparison, the documentary proof of citizenship requirement itself, A.R.S. § 16-166(F), includes an itemized list of objective items that can satisfy the requirement.

to determine that a separate provision of the Medicaid Act was not rights-creating. Noting the absence of the key phrase "No person shall," the *Sanchez* Court wrote that "statutory language *less direct* than the individually-focused 'No person shall . . .' must be supported by other indicia." *Id.* at 1058 (emphasis added). Thus, *Sanchez* implied that the phrase "No person shall"—which it called "paradigmatic rights-creating language"—may by itself unambiguously establish that "Congress intended to create an individual, enforceable right remediable under § 1983." *Id.* Here, 52 U.S.C. § 10101(a)(2)(A) begins with that "paradigmatic rights-creating language."

Second, the RNC's arguments concerning 42 U.S.C. § 1983 are foreclosed by the Supreme Court's recent decision in *Health and Hospital Corporation of Marion County v. Talevski*, 143 S. Ct. 1444 (2023), which emphasizes Section 1983's broad authorization to allow plaintiffs to vindicate federal statutory rights. *Id*. at 1462. "By its terms, § 1983 is available to enforce every right that Congress validly and unambiguously creates", *id*., and 52 U.S.C. § 10101(a)(2)(A) unambiguously gives "any individual" the right against the application of differential voter qualification standards, practices, or procedures based on arbitrary, subjective criteria. *Talevski* explains that "the *sine qua non* of a finding that Congress implicitly intended to preclude a private right of action under § 1983 is incompatibility between enforcement under § 1983 and the enforcement scheme that Congress has enacted." 143 S. Ct. at 1459. Here, Defendants cite no evidence and there is nothing in the text or legislative history that demonstrates such incompatibility. Rather, all of the evidence points to Congressional intent to give the Attorney General concurrent authority to enforce these provisions of the Civil Rights Act.

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RESPECTFULLY SUBMITTED this 19th day of July, 2023.

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