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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 TRIAL MEMORANDUM

INTRODUCTION

Intervenor Republican National Committee ("RNC") respectfully submits this trial memorandum with respect to the Plaintiffs' claims arising under 52 U.S.C. § 10101(a)(2)(A) and (a)(2)(B), Sections 6, 7, and 8 of the National Voter Registration Act of 1993, 52 U.S.C. § 20101, *et seq.* ("NVRA"), and Section 2 of the Voting Rights Act of 1965 ("VRA").[1] For the reasons presented below, the Court should find that:

1. Because birthplace has some probability of affecting an election official's determination of a voter's identity and eligibility, the provision of 2022 Ariz. Laws. ch. 99 ("H.B. 2492") that requires individuals using the Arizona voter registration form ("State Form") to provide their place of birth (the "Birthplace Requirement") does not violate 52 U.S.C. § 10101(a)(2)(B) (the "Materiality Provision");
2. The voter list maintenance programs established by H.B. 2492 and 2022 Ariz. Laws ch. 370 ("H.B. 2243") do not contain discriminatory standards, practices or procedures, and accordingly comply with 52 U.S.C. § 10101(a)(2)(A) (the "Discrimination Provision");
3. NVRA Section 6's requirement that States "accept and use" the federal voter registration form promulgated by the Election Assistance Commission ("EAC") does not preempt H.B. 2243's list maintenance programs;
4. H.B. 2492 and H.B. 2243's voter list maintenance programs are uniform and non-discriminatory, and hence comply with Section 8(b) of the NVRA;
5. Because information concerning registrants' citizenship, residency and birthplace are necessary to enable the verification of voters' eligibility and the administration of elections, the State Form is "equivalent" to the Federal Form, and thus may be distributed at public assistance agencies, pursuant to Section 7 of the NVRA;

[1] The RNC also joins and adopts the arguments contained in the respective trial memoranda of the Attorney General and the Legislative Intervenors.

6. Section 6 of the NVRA does not require Arizona to register an applicant in federal elections if the individual submits a State Form that lacks documentary proof of residency ("DPOR");
7. None of the challenged provisions of H.B. 2492 denies or abridges the right to vote on account of race or color, as prohibited by Section 2 of the VRA.

ARGUMENT

I. A Registrant's Place of Birth Is Material to Verifying the Validity of the Registration and the Registrant's Status as a Qualified Elector

The Birthplace Requirement is material to determining registrants' qualifications to vote under Arizona law because it enables county recorders to (1) locate and investigate proffered registrations that may be duplicative or falsified, and (2) verify the identity of a qualified elector—and thereby his or her eligibility to vote—in multiple facets of election administration, including updating existing registration records, processing requests for early ballots, and curing inconsistent signatures on early ballot affidavit envelopes.

The Materiality Provision provides that a state or political subdivision may not "deny the right of any individual to vote in any election because of 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 under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Five plaintiff groups, including the United States, allege that the Birthplace Requirement violates the Materiality Provision. The Court previously found that "[w]hether the Birthplace Requirement violates the Materiality Provision is an issue of fact inappropriate for summary judgment." Doc. 534 at 29. Evidence yielded in discovery corroborates the intuitive proposition that a registrant's place of birth can be a germane informational item in verifying that an individual attempting to obtain or cast a ballot is, in fact, a qualified elector, or in ascertaining the authenticity of a new voter registration submission.

A. The Non-U.S. Plaintiffs Lack Any Right of Action

A claim that H.B. 2492 or H.B. 2243 transgresses the Materiality Provision is unavailable to all Plaintiffs other than the United States because the statute is not enforceable by private parties. This Court previously deemed "moot" the question of whether Section 10101 confers a right of action because the United States undisputedly has standing to pursue its Materiality Provision claim. Doc. 534 at 35. But the non-U.S. Plaintiffs have confirmed that they seek an award of attorneys' fees and costs in connection with their Materiality Provision theories. Doc. 571 at 22. This innately individualized relief necessitates resolution of the antecedent question of whether Section 10101 authorizes their claims at all. *See Garnett v. Zeilinger*, 485 F. Supp. 3d 206, 215 (D.D.C. 2020) ("*each* plaintiff must have standing in order to recover attorney's fees.").[2]

The RNC previously presented arguments demonstrating the absence of a private right to enforce Section 10101, *see* Doc. 367 at 11-15; Doc. 442 at 12-14, and will recap them briefly here. When a plaintiff invokes Section 1983, it must show that the substantive statute it wishes to enforce "'unambiguously conferred' 'individual rights upon a class of beneficiaries' to which the plaintiff belongs." *Health and Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)). Even when Congress has fashioned such a right, however, a cause of action is foreclosed if it "creat[ed] a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983." *Gonzaga*, 536 U.S. at 284 n.4.

Section 10101 does not "in clear and unambiguous terms" beget any independent and freestanding individual "right." *Gonzaga*, 536 U.S. at 290. Rather, the statute equips the Attorney General with additional mechanisms to vindicate an antecedent right—to wit, "the right to vote," 52 U.S.C. § 10101(a)(2)(B). Courts have frequently concluded that the proscriptive formulation found in Section 10101 (*i.e.*, "No person acting under

[2] And as discussed *infra* Section II, there is a different claim under Section 10101 that is brought only by a Non-U.S. Plaintiff. Thus, the Court should resolve whether Section 10101 confers a right of action regardless of attorney's fees.

color of law shall...") denotes only 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) (reference to the "rights of any bona fide tenant" did not create private right of action for the benefit of such tenants); *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)).[3] Plaintiffs cannot clear the "demanding bar," *Talevski*, 143 S. Ct. at 180, necessary to excavate a private right from Section 10101.

Further, even if a distinct "right" is embedded in Section 10101, at least two textual attributes extinguish private enforcement through Section 1983. First, 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. Second, Section 10101 does, in fact, contain a limited right of action. Private litigants may assert claims 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). The confines that cabin this limited cause of action—which none of the Plaintiffs can or do invoke in this case—cannot be circumvented simply by pleading the same claim under Section 1983 instead. *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."); *Talevski*, 143 S. Ct. at 1461 (a

[3] In this respect, Section 10101 stands in contrast to the statute at issue in *Talevski*, which in explicit terms vested directly in nursing home residents a "right to be free from" certain physical or chemical constraints. *See Talevski*, 143 S. Ct. at 1455.

"statute-specific right of action [that] offered fewer benefits than those available under § 1983" indicates an intent to preclude enforcement through Section 1983).

This Court should join its counterparts elsewhere that have found no private right of action in Section 10101. *See, e.g.*, *Ne. Ohio Coal. For the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016); *Democratic Congressional Campaign Comm. v. Kosinski*, 614 F. Supp. 3d 20, 48 (S.D.N.Y. 2022).

B. Place of Birth Information Is Used to Verify a Putative Voter's Identity and Lawful Registration Status

When conjoined with other items of identifying information, a registrant's place of birth can be a mechanism for confirming the identity and qualified elector status of individuals who wish to obtain or cast a ballot. This Court previously "infer[red] that Congress intended materiality to require some probability of actually impacting an official's eligibility determination." Doc. 534 at 26. Importantly, the Materiality Provision allows States to collect information that will assist election officials in verifying an individual's eligibility to cast a ballot in any election—not merely to register in the first instance. Plaintiffs may contend that, to be "material," information required on the State Form must pertain solely to a substantive qualification to vote—namely, age, citizenship, Arizona residency, and the absence of a felony conviction or adjudication of incapacitation. *See* A.R.S. § 16-101(A). This artificially constricted conception of "materiality," however, is dissonant with the statutory text, Congress' animating purpose, and the reasoning of other courts.

1. States Can Mandate the Provision of Information That Is Material to an Individual's Eligibility to Vote in Any Election

A state or political subdivision may, as a condition precedent to "vot[ing] in any election," require an individual to disclose an item of information that is "material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). For purposes of the Materiality Provision, "the word 'vote'

includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast with respect to candidates for public office." *Id.* § 10101(e), (a)(3)(A). In other words, the State can mandate in the registration form the provision of information that may be material in the future to ascertaining the individual's ability to "vote" in any "election"—even if that information is not necessarily used at the point of *registration*.

A corollary of this textually and logically sound proposition is that, because corroboration of a putative voter's identity is integral to determining his or her eligibility, identity-confirming information is "material." Indeed, the necessity of verifying a voter's identity (and hence eligibility) recurs at numerous temporal and participatory junctures in the election administration process. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006) ("By conceding, as they must, that verifying an individual's identity is a material requirement of voting, Plaintiffs have necessarily also conceded that the state may establish procedures to verify this requirement"), *aff'd sub nom. on other grounds Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). In the same vein, the State need not establish that the informational item is indispensable to identity verification. Rather, it is—as the Court held—sufficient that it has "some probability of impacting an election official's" determination [Doc. 534 at 26] that an individual attempting to participate in any aspect of the electoral process (*e.g.*, obtaining an early ballot or updating an existing registration) is, in fact, a qualified elector. *Cf. Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, 2007 WL 9724581, at *2 (D. Ariz. Aug. 28, 2007) ("Arizona's decision to require more proof [of citizenship] than simply affirmation by the voter is not prohibited" by the Materiality Provision.)

For similar reasons, a federal court whose prior analysis of the Materiality Provision this Court deemed "persuasive," *see* Doc. 534 at 25 (citing *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-05174, 2021 WL 5312640 (W.D. Ark. Nov. 15,

2021)), ultimately rejected a Materiality Provision challenge to Arkansas' requirement that the name, address, birthdate and signature information on an absentee ballot envelope must match the corresponding items on the voter's absentee ballot application. *See League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-05174, 2023 WL 6446015 (W.D. Ark. Sept. 29, 2023). Concluding that identity-verifying data "are material to a voter's qualifications even when requested at multiple points in the voting process," the court reasoned that a state may permissibly confirm not only that prospective voters are initially qualified, but also that they "remain qualified, and are the same people who have already been qualified. Identity, insofar as it can be established with otherwise material information, is not immaterial to a voter's qualifications." *Id.* at *17. While acknowledging that each item of mandated information may not always be necessary to verify a voter's identity, the court countered that "the Materiality Provision 'does not establish a least-restrictive-alternative test' for the material information required. The fact that [elections] officials can (and sometimes do) establish voters' identities with less information does not mean that they should be legally required to do so." *Id.* (quoting *Fla. State Conf. of the N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008)).

Other courts likewise have recognized that the Materiality Provision allows States to mandate the disclosure of information that facilitates identifying putative voters and thereby confirming their qualified elector status. *See, e.g.*, *Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020) (requirement that absentee ballot applications and envelopes include, *inter alia*, the voter's signature did not violate Materiality Provision); *Ind. Democratic Party*, 458 F. Supp. 2d at 851 ("Plaintiffs' assertion that voters should be able to prove their identity through means other than photo identification is a weak equivocation over the Indiana General Assembly's selection of the allegedly wrong method for determining a material requirement to vote. This court's role is not to impose Plaintiffs' policy preferences (or its own, for that matter) in the absence of any statutory or constitutional deficiency."); *Common Cause v. Thomsen*, 574

F. Supp. 3d 634, 636 (W.D. Wis. 2021) (rejecting argument that Materiality Provision confines States to requiring only information relevant to "*substantive* voting qualifications," such as citizenship, age and residency); *cf. Vote.org v. Callenen*, 39 F.4th 297, 306 (5th Cir. 2022) (requirement that registrations include a wet signature likely did not violate Materiality Provision, despite deposition testimony that elections officials did not rely on wet signature on application to determine a registrant's eligibility).

In short, the Materiality Provision permits States to collect during the registration process information that enables election officials to later corroborate that an individual is who he says he is, and that he is a duly qualified elector on the registration rolls.

2. Place of Birth Is Material to Verifying Voters' Identity

The evidence will show that the compilation of birthplace information allows election officials to subsequently verify the identity—and, by extension, the eligibility—of voters in numerous facets of election administration. Preliminarily, the notion of eliciting prospective voters' birthplace is not a recent innovation. Arizona law has continuously included a birthplace field on the State Form since at least 1970, albeit as an optional item. *See* A.R.S. § 16-143(A) (1970), 1970 Ariz. Laws ch. 151, § 9. Use of this data point has, in turn, been incorporated into multiple components of Arizona's election law infrastructure. For example:

- The "pertinent pages" of a U.S. passport, when used to establish citizenship, include the holder's "place of birth." Ariz. Sec'y of State, 2019 Elections Procedures Manual ("EPM") at 5.
- When a voter provides as proof of citizenship a birth certificate that features a different last name, the recorder may use other items of personal information—including place of birth—to cross-check the individual's identity. *Id.* at 4-5.
- A voter applying for an early ballot must provide either his "state or country of birth" or some other item of identifying information to permit the county recorder to ascertain his registration status, *see* A.R.S. § 16-542(A); EPM at 47, 48.

- A voter who casts a provisional ballot may use her birthplace as identity confirmation when inquiring into the status of the ballot. *See* EPM at 206.
- At least some counties, including Maricopa, include in standard form letters a request that voters provide their birthplace to assist the county recorder in resolving apparent discrepancies between representations on a voter's registration application and data on file with the Department of Motor Vehicles [MC002984].
- Documentary and testimonial evidence adduced from the Secretary of State and multiple county recorders underscore that birthplace is utilized to establish identity in various voting-related transactions and list maintenance activities.[4]

C. The Birthplace Requirement Assists in Discovering and Disqualifying Duplicative or Falsified Registrations

Even if the Materiality Provision constrains States to mandate only information that is material to a substantive eligibility criterion, the Birthplace Requirement conforms to this standard. Birthplace can, in at least three situations, have "some probability of impacting an election official's" determination that an applicant is eligible to register.

First, a birthplace in the United States is highly correlated with, if not always dispositive of, citizenship status. In this vein, one of the Defendants' expert witnesses will testify that birthplace is typically recorded in the National Association for Public Health Statistics and Information System's database, which H.B. 2492 designates as a source for verifying citizenship status. *See* A.R.S. § 16-121.01(D)(4).[5]

[4] *See, e.g.*, Pima County Recorder's Office, *Voter Registration Data Entry Procedures*, Pima County0090 (instructing that, when processing a certificate of naturalization, staff should "compare the first and middle names, date of birth, country of birth and any other information that appears on both the Certificate and the Voter Registration form."); Ariz. Sec'y of State, *Guidance for Processing the ERIC Deceased Report* (Feb. 22, 2023), AZSOS-290315 (instructing that county recorders should use place of birth (among other data points) in identifying an canceling the registrations of deceased voters); Sec'y of State Dep. 266:8–267:23; 284:4–12 (agreeing that birthplace can be "useful . . . to corroborate information"); Maricopa Dep. 184:15–21.

[5] *See* Report of J. Richman, ¶ 122.

Second, as several county recorders confirmed, birthplace could, in conjunction with other items of identifying information, be used to flag a new registration as a duplicate of an existing registration.[6]

Finally, birthplace can (again, when coupled with other data points) alert the recorder to potentially fraudulent or falsified registration applications. For example, a congruity of name, address and birthplace information between a new ostensible registrant and an individual listed in the Social Security Death Index would signal a possible illicit registration. Similarly, a discrepancy between the birthplace indicated on a registration form and that denominated in an accompanying document used to verify citizenship (*e.g.*, birth certificate) could denote an improper registration submission.[7]

The Birthplace Requirement is not the type of malign machination to elicit "trivial information [that] serve[s] no purpose other than as a means of inducing voter-generated errors" that the Materiality Provision exists to prevent. *Browning*, 522 F.3d at 1173. Universal collection of birthplace information facilitates faster and more accurate verifications of a voter's identity—and, by extension, his or her eligibility—in a variety of electoral contexts, and can assist county recorders in thwarting potentially duplicative or unlawful registration submissions. That place of birth is not indispensably or invariably necessary to these ends cannot salvage the Plaintiffs' Materiality Provision claim. The evidence confirms what common sense suggests: birthplace, used with other identifying information, has "some probability of actually impacting an election official's" [Doc. 534 at 26] determination of eligibility to participate in Arizona elections.

[6] *See, e.g.*, Navajo Dep. 55:7-13 (agreeing that birthplace "help[s] us verify that that's the correct voter when registering"); Pima Dep. 301:2-304:6 (acknowledging that place of birth could be used to identify duplicate registrations); Cochise Dep. 130:21-131:7 (confirming potential use of birthplace for de-duplicating registrations).

[7] *See* Navajo Dep. 107:23-108:10 (agreeing that a discrepancy may be cause to investigate).

II. H.B. 2492 and H.B. 2243 Do Not Establish Discriminatory Standards, Practices or Procedures

The Poder Latinx Plaintiffs' claim under the Discrimination Provision is similarly infirm. That subsection prohibits state or county officials from applying to any individual "any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same" jurisdiction when making voter qualification determinations. 52 U.S.C. § 10101(a)(2)(A). The gravamen of Poder Latinx's theory is that H.B. 2243 violates the statute by directing county recorders to search the Systematic Alien Verification for Entitlements ("SAVE") system, a repository of immigration status information (including confirmation of naturalized or acquired citizenship), if (1) the voter has not previously provided documentary proof of citizenship, in accordance with A.R.S. § 16-166(F) ("DPOC"), or (2) the county recorder has "reason to believe" that the voter is not a U.S. citizen. *See* H.B. 2243, § 2, A.R.S. § 16-165(I); Doc. 169 at ¶¶ 99–106.[8] There are three defects in this argument, each of which is independently sufficient to defeat the claim.

A. Section 10101(a)(2)(A) Is Not Privately Enforceable

First, Section 10101does not confer a right of action on private parties. *Supra* I.A.

B. Section 10101(a)(2)(A) Does Not Prohibit Neutral Inquires Tailored to Verifying Voting Qualifications

A.R.S. § 16-165(I) does not bear any hallmarks of a discriminatory standard, procedure or practice. Consider each component of the provision. As this Court recognized, nothing invidious inheres in the "reason to believe" standard. It "is common in statutory drafting," Doc. 534 at 31 n.20, and is entrenched in numerous areas of the law, including electoral contexts. *See, e.g.*, 52 U.S.C. § 30109(a)(2) (Federal Election Commission can investigate persons if "it has reason to believe that a person has

[8] The recorder also must cross-check voters who have not furnished DPOC against the "vital events system maintained by a national association for public health statistics and information systems, if accessible." A.R.S. § 16-165(J).

committed, or is about to commit," a campaign finance violation); A.R.S. § 16-938(C) (campaign finance filing officer may refer a person for an investigation if there is "reasonable cause" to believe a violation has occurred).

Next, A.R.S. § 16-165(I) does not regulate or exact any demands on voters; it simply establishes criteria for additional research by a county recorder. *See* Doc. 534 at 31. And even if a recorder determines that a particular individual is not a U.S. citizen, the voter is afforded written notice and an opportunity to submit curative information, if he actually is eligible to register to vote. *See* A.R.S. § 16-165(A)(10), (K).

C. The "Reason to Believe" Standard Is Tied Specifically and Solely to an Objective Substantive Qualification for Voting

Finally, and more fundamentally, the statutory "reason to believe" standard is tethered directly to the verification of an undisputedly valid voting qualification—*i.e.*, United States citizenship. This point is important. The Discrimination Provision does not impose an inelastic and unqualified mandate of absolute equality that prohibits election officials from making individualized inquiries to verify voting qualifications. *See generally Gonzalez v. Arizona*, CV 06-1268-PHX-ROS, 2006 WL 8431038, at *8 (D. Ariz. Oct. 12, 2006) ("It is not a violation of subsection (A) for a state to apply different standards to two inherently different procedures."). To the contrary, the statute permits tailored research of specific voters when the investigation is triggered by criteria or information that pertain directly to a voter's qualifications. *Contrast Ballas v. Symm*, 494 F.2d 1167, 1171 (5th Cir. 1974) (registrar's policy of issuing a questionnaire to voter when registrar was uncertain of voter's residency status did not violate Section 10101(a)(2)(A), reasoning that "[t]he standard for registration is the same for all applicants") *and Davis v. Commonwealth Election Comm'n*, No. 1-14-cv-00002, 2014 WL 2111065, at *25 (D.N.M.I. May 20, 2014) (requirement that voters seeking to vote in certain elections sign an affidavit attesting that they are native Islanders and hence eligible to vote in that election did not violate Section 10101(a)(2)(A)), *with Frazier v.*

Callicutt, 383 F. Supp. 15, 20 (N.D. Miss. 1974) (finding violation where official consistently rejected only registrations from black students living on college campuses).

Finally, there is no evidence either that SAVE searches will regularly misidentify naturalized citizens or that county recorders will arbitrarily target certain groups. Poder Latinx's pleading proclamation that SAVE is "notoriously unreliable," Doc. 169, ¶ 101, has found little sustenance in discovery. The U.S. Citizenship and Immigration Service testified through its designees that SAVE is "continuously updated," USCIS Dep. 35:20-25, and fresh data for newly naturalized citizens is typically processed "very quickly"—usually within "a day or two," *id.* 41:1-6. The incidence of similar names leading to false matches in the SAVE system is "low," *id.* 114:18-25, and data feed errors generally are identified "quickly" and fixed within just "hours to days," *id.* 38:19-39:6. The county recorders have used SAVE since 2018 to assist in verifying the citizenship of newly registered voters who provide an alien registration number or naturalization certificate number as DPOC, and multiple recorders testified that they regard SAVE as generally reliable. *See, e.g.*, Pima Dep. 278:14-16; Gila Dep. 102:2-4; La Paz Dep. 121:4-5.

The notion that the recorders will exercise any discretion vested by A.R.S. § 16-165(I) in an abusive, arbitrary or discriminatory manner lacks record support. While the recorders understandably hesitated during their depositions to articulate or commit to any particular definition of the "reason to believe" standard, several emphasized that they would seek advice from their respective county attorneys to ensure compliant practices. *See, e.g.*, Santa Cruz Dep. 61:4-12; Graham Dep. 103:21-104:2. None responded in a manner that suggests he or she will undertake investigations that are predicated on anything other than good faith uncertainty concerning a voter's citizenship status.

In sum, A.R.S. § 16-165(I) demands nothing of voters. Rather, it employs a ubiquitous legal rubric (*i.e.*, "reason to believe") to trigger narrow investigations that relate directly to a substantive qualification for voting (*i.e.*, U.S. citizenship). Plaintiffs are unable to prove that the county recorders will wield this limited authority in an

arbitrary or discriminatory manner. Even if they had statutory standing to bring a claim under Section 10101, the Poder Latinx Plaintiffs cannot discharge their burden of proof.

III. Inquiries into the Citizenship Status of "Federal-Only" Voters Does Not Violate Section 6 of the NVRA

H.B. 2243's directive that the county recorders must investigate the citizenship status of "federal-only" voters—*i.e.*, individuals who have not provided DPOC and whose citizenship status has not been otherwise confirmed by the county recorder—is not in conflict with, or preempted by, Section 6 of the NVRA. Section 6 requires that, when an individual submits a properly completed Federal Form, the State must register her to vote in all federal elections to which the NVRA applies, even if the registrant has not satisfied any additional prerequisites imposed by state law as a condition of voting in state or local elections. *See* 52 U.S.C. § 20505(a)(1) ("Each State shall accept and use" the Federal Form); *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1 (2013). The Plaintiffs, however, distend that narrow principle into a sweeping mandate that would prohibit States from engaging in list maintenance programs to verify that Federal Form applicants actually are U.S. citizens. This novel exertion to expand the NVRA's preemptive scope is disconnected from both the statutory language and applicable case law.

At the crux of the Plaintiffs' misconstruction of Section 6 is a conflation of *documentary* attributes of a facially sufficient registration with *substantive* qualifications for registration eligibility. Section 6 governs only the former. The EAC has determined that U.S. citizenship—an undisputed qualification for voting in either federal or state elections—may, for purposes of voting in federal elections, be properly documented by signing a sworn attestation on the Federal Form. Section 6, in turn, requires only that States accept that variant of documentation as sufficient to register the individual for federal elections. *See Inter Tribal Council*, 570 U.S. at 15.

H.B. 2492 and H.B. 2243 maintain fidelity to that framework. If an applicant submits a completed Federal Form and the county recorder is unable to verify his or her

citizenship status, the applicant will be registered as a "federal only" voter. *See* H.B. 2492, § 4 (codified at A.R.S. § 16-121.01(E)).[9] That is all that Section 6 requires.

Straining against the statutory text, Plaintiffs apparently insist that registering with a Federal Form immunizes these registrants against subsequent attempts to verify that they actually possess the substantive qualifications—including U.S. citizenship—requisite to registered voter status. That is simply incorrect. While holding that Section 6 obligates States to accept the Federal Form as presumptive, prima facie proof of eligibility to vote in federal elections, the court emphasized that Section 6 "does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'" *Inter Tribal Council*, 570 U.S. at 15; *see also id.* at 15 n.7 (the NVRA "only requires a State to register an '*eligible* applicant' who submits a timely Federal Form"). For this reason, courts have always recognized that "under the NVRA the states are still left the task of determining that an applicant is eligible." *Ass'n. of Cmty. Orgs. for Reform Now v. Miller*, 912 F. Supp. 976, 987 (W.D. Mich. 1995); *see also U.S. Student Ass'n. v. Land*, 546 F.3d 373, 385 (6th Cir. 2008) (agreeing that, under the NVRA, states are "still free to set eligibility standards and to evaluate whether each applicant meets those standards"); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014) (The NVRA "is premised on the assumption that citizenship is one of the requirements for eligibility to vote."); *see also Gonzalez v. State of Arizona*, 435 F. Supp. 2d 997, 1002 (D. Ariz. 2006) ("Determining whether an individual is a United States citizen is of paramount importance when determining his or her eligibility to vote.").

It also bears noting that the LULAC Consent Decree entered in 2018 required the Secretary to register as "federal-only" voters State Form applicants whose citizenship could not be verified. *See* Doc. 534 at 3. These voters likewise will be subject to database checks by the county recorders. The text of A.R.S. § 16-165(I) applies uniformly with

[9] While H.B. 2492 prohibits such registrants from voting in presidential elections or by mail, the Court already addressed those provisions. *See* Doc. 534 at 9-15.

respect to all voters whose citizenship is unconfirmed, irrespective of whether they registered with the Federal Form or the State Form.

Because Section 6 does not apply to post-registration inquiries to verify a voter's substantive qualifications to participate in federal elections, Plaintiffs' challenge to H.B. 2243, § 2 on this basis is not sustainable.

IV. H.B. 2492 and H.B. 2243's List Maintenance Provisions Apply on a Uniform and Non-Discriminatory Basis

H.B. 2492 and H.B. 2243's criteria for triggering inquiries are (1) tied directly to substantive voting qualifications (citizenship and residency) and (2) apply on equal terms to all registered voters in the State. They accordingly conform to Section 8(b) of the NVRA, which requires that list maintenance programs and activities be "uniform, nondiscriminatory, and in compliance with the [VRA]." 52 U.S.C. § 20507(b)(1). H.B. 2492 and H.B. 2243 provide that county recorders must conduct additional database checks to verify a voter's citizenship status if (1) the voter's citizenship has not already been confirmed (through, *e.g.*, DPOC), (2) information transmitted through jury questionnaires or the Department of Transportation indicates that the voter is a non-citizen, or (3) the recorder has "reason to believe" the voter is not a U.S. citizen. *See* A.R.S. § 16-165(A)(10), (H)-(K); *see also id.* § 16-143 (directing the Attorney General to investigate the citizenship status of existing voters whose citizenship has not been verified). Eligibility inquiries also must occur when information received through other official records or repositories (*e.g.*, Department of Health death records or MVD records) indicate that a voter is deceased or has moved out of state. *See id.* § 16-165(E), (F).

These investigatory triggers apply on a statewide basis and are conditioned on the receipt of information implicating a voter's substantive qualifications. They hence are uniform and non-discriminatory. It appears the Plaintiffs will contend that a list maintenance program contravenes Section 8(b) if it has a disparate effect on any group of registered voters, such as naturalized citizens. This conception of Section 8(b), though,

dissipates upon closer analysis. A list maintenance program inevitably will not affect every registered voter in the same way at the same time; by definition, these initiatives are designed to identify those specific voters whose eligibility is in question. As long as the conditions precedent for instigating such inquiries apply uniformly across the jurisdiction and correspond to substantive voting qualifications (such as age, citizenship or residency), they conform to Section 8(b).

The NVRA itself is illustrative. Subject to certain limitations, it explicitly requires elections officials to identify and (if appropriate) cancel the registrations of individuals who have died or who no longer reside in the electoral jurisdiction. *See* 52 U.S.C. § 20507(a)(4); *Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, 301 F. Supp. 3d 612, 619 (E.D.N.C. 2017) (while a State is not obligated to use an available "tool," its failure to do so, "along with other evidence, may be relevant to determine the reasonableness of [its] efforts at voter list maintenance").[10] The Help America Vote Act of 2002 supplements these safeguards with a mandate that statewide voter registration databases systems "shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including . . . [a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 52 U.S.C. § 20183(a)(4); *see also Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1275 (D. Colo. 2010) (rejecting challenge to law requiring new registrants to confirm addresses, reasoning that "'eligibility' is the linchpin of a state's obligations regarding voter registration and list maintenance programs").

In this vein, Arizona law has for years allowed the county recorders to rely on data from the National Change of Address service and the Electronic Registration Information Center to locate and send notices to voters who appear to have moved out of the county. *See* A.R.S. § 16-166(E); EPM at 37. It would surprise no one if, in practice, these list maintenance programs incidentally affect certain discrete demographic

[10] The NVRA outlines a "safe harbor" to satisfy that obligation. 52 U.S.C. § 20507(c).

segments (for example, recent college graduates) at a higher rate than others.[11] But if that distinction rendered these programs non-uniform or "discriminatory," then no list maintenance activity could ever pass NVRA muster.

H.B. 2492 and H.B. 2243's list maintenance provisions prescribe informational triggers (*e.g.*, "federal only" status or notations in government databases) that have a direct and immediate nexus to a voter's substantive qualifications, such as citizenship or residency. All voters in the State who meet one or more of these criteria are subject to an eligibility check. The list maintenance programs accordingly are uniform and non-discriminatory, within the meaning of Section 8(b).

V. The State Form, as Modified by H.B. 2492, is "Equivalent" to the Federal Form Because the Required Information Is Necessary to Confirm Voters' Eligibility and to Administer Elections

Because sufficient corroboration of U.S. citizenship, Arizona residency and birthplace are necessary to verify a registrant's eligibility and to administer the election process, the State may permissibly distribute the State Form at public assistance agencies. Plaintiffs' claim under Section 7 of the NVRA accordingly fails.

Section 7 requires "voter registration agencies" that also provide public assistance to distribute either the Federal Form or "the office's own form if it is equivalent to" the Federal Form. 52 U.S.C. § 20506(a)(6). Equivalency, in turn, is defined by reference to the statutory standard that governs the contents of the Federal Form, as set forth in Section 9 of the NVRA. Specifically, the Federal Form may include any information "necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1); *see also id.* § 20505(a)(2) ("a State may develop and use a mail voter registration form that meets all of the criteria stated in section 20508(b) of this title for

[11] It is also wholly unclear how Plaintiffs' disparate impact theory would define a cognizable "group." For example, are young people a "group"? If so, what age range denotes this "group"?

the registration of voters in elections for Federal office").

DPOC, DPOR and birthplace all are necessary to assess applicants' eligibility and to administer voter registration or other electoral processes. Evaluating the same statutory rubric more than a decade ago, this Court recognized that "[d]etermining whether an individual is a United States citizen is of paramount importance when determining his or her eligibility to vote." *Gonzalez*, 435 F. Supp. 2d at 1002. While the Supreme Court in *Inter Tribal Council* held that the EAC is exclusively empowered to determine the contents of the Federal Form, it never expressed disagreement with the finding that DPOC may be a "necessary" determinant of eligibility in the equivalent State Form. To the contrary, the court, citing what is now Section 20505(a)(2), emphasized that "state-developed forms may require information the Federal Form does not," and pointed to Arizona's DPOC requirement as an example. *See* 570 U.S. at 12.

The same analysis transposes easily onto H.B. 2492's DPOR requirement. Arizona residency—like U.S. citizenship—is an indispensable prerequisite to qualified elector status. *See* A.R.S. § 16-101(A)(3). Indeed, the NVRA itself underscores the importance of accurate residency information to the integrity of the voter rolls by mandating States to undertake list maintenance programs that identify individuals who no longer reside in the jurisdiction. *See* 52 U.S.C. § 20507(a)(4)(B).

Finally, as discussed at length *supra* Section I(B) and I(C), birthplace information can be and is used by the county recorders to confirm voters' identity (and, by extension, their eligibility to vote) in various electoral settings, and also to flag potentially duplicative or unlawful registration submissions.

In short, the State Form retains its "equivalency" to the Federal Form for NVRA purposes as long as the informational items it requires are necessary to ascertaining voters' qualifications and administering elections—even if the EAC has opted not to include the same fields in the Federal Form. Because DPOC, DPOR, and birthplace information all satisfy this standard, Arizona may distribute the State Form (rather than

the Federal Form) at public assistance agencies, in compliance with Section 7.

VI. Arizona May Reject State Form Applications That Lack DPOR

The same principle defeats the Plaintiffs' claim that H.B. 2492 violates Section 6 and Section 8(a) by mandating the rejection of State Form applications that are not accompanied by DPOR. This claim pivots on two points of law. First, under Section 6 of the NVRA, States registering voters in federal elections must "accept and use" either the Federal Form **or** their own form "that meets all of the criteria stated in section 20508(b) [*i.e.*, Section 9]." 52 U.S.C. § 20505(a). Section 9, in turn, allows States to include in their mail-in registration form any information that is "necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 20508(b)(1). Second, Section 8(a) entitles an applicant to vote in the next ensuing federal election if s/he submits a "valid" Federal Form or State Form at least 29 days prior to that election. *See id.* § 20507(a)(1); A.R.S. § 16-120(A). Section 8(a) does not prescribe any limitations with respect to the contents of the Federal Form or State Form. Put another way, a mail-in State Form that complies with Section 9 *ipso facto* complies with Section 8(a).

Section 9 "gives a state more options" by permitting it to add mandatory fields or information items that the EAC has chosen not to include in the Federal Form. *See Gonzalez v. Arizona*, 677 F.3d 383, 399 (9th Cir. 2012); *see also Inter Tribal Council*, 570 U.S. at 12 (noting that "state-developed forms may require information the Federal Form does not" and that "[t]his permission works in tandem with the requirement that States 'accept and use' the Federal Form"). For all the reasons outlined in section V above, the State Form's DPOR mandate is consistent with Section 9 because that information is necessary to enable the assessment of registrants' eligibility. A submitted State Form that does not include DPOR is not "valid" within the meaning of Section 8(a). *See Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1331 n.10 (S.D. Fla. 2008) (Section 8(a) "recognized the right of states to demand a 'valid' form prior to the registration

deadline."). It follows that Arizona may, consistent with Section 6 and Section 8(a), reject State Form applications that omit DPOR.[12]

VII. No Provision of H.B. 2492 or H.B. 2243 Violates Section 2 of the VRA

The LUCHA Plaintiffs will not come close to proving that any provision of H.B. 2492 or H.B. 2243 "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race of color," in violation of Section 2 of the VRA. 52 U.S.C. § 10301. Section 2 is breached if, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial or ethnic group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). The parties agree that the standard announced in *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), controls the adjudication of this claim. Doc. 571 at 26. *Brnovich* highlighted five "guideposts," *id.* at 2336:

A. Size of the Burden

H.B. 2492's DPOC and birthplace requirements[13] exact, at most, a minimal

[12] One critical distinction bears emphasis, lest the Plaintiffs again invoke *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016), to buttress this claim. *See* LUCHA Pls.' Resp. to Def. Mot. for Summary Judgment, Doc. 394 at 14. At issue in *Fish* was Kansas' motor vehicle registration form. *See* 840 F.3d at 722. The content of "motor voter" forms is governed by Section 5 of the NVRA, which allows States to require "only the minimum amount of information necessary to" prevent duplicate registrations and enable officials to verify eligibility. 52 U.S.C. § 20504(c)(2)(B). By contrast, the Plaintiffs' claims here appear directed to Arizona's mail-in State Form, the content of which is subject to Section 9 of the NVRA (if used to register voters in federal elections). These two statutory standards are not equivalent. As the *Fish* court observed, "section 5's 'only the minimum amount of information necessary' is a stricter principle than section 9's 'such identifying information . . . as is necessary.'" 840 F.3d at 734.

[13] The Court's adoption of the Tohono O'odham Plaintiffs' limiting construction of the DPOR requirement, *see* Doc. 534 at 9 n.4 & 33–34, effectively moots any Section 2 challenge to the DPOR requirement.

burden. Simply providing on the State Form one's Arizona driver's license or state ID number (or, in the case of a naturalized citizen, one's alien registration number) is an easy—and the most common—method of fulfilling the DPOC mandate. *See* A.R.S. § 16-166(F)(1); Petty Dep. 70:4–21 (driver's license number is most common form of DPOC). Even in the relatively rare instances in which a voter may need to locate and provide a passport or birth certificate, such incidental chores do not bespeak a substantial burden on the franchise. *See Crawford*, 553 U.S. at 198 ("For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote."); *Brnovich*, 141 S. Ct. at 2344 ("Having to identify one's own polling place and then travel there to vote" is not a significant burden).

To the extent Plaintiffs contend that the DPOC requirement exudes a chilling effect on voter registration or turnout, that theory quickly deflates upon scrutiny. Defendants' experts will testify that existing literature and data simply do not corroborate the supposition that putative "voting costs," such as DPOC, negatively affect voter turnout or participation.[14] Similarly, the Birthplace Requirement entails nothing more than writing down a basic item of information known by all or virtually all registrants. *Cf. Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 730–31 (9th Cir. 2015) (statute that required minor party registrants to write their preferred affiliation in a blank line, while major party registrants could check a print a pre-printed box, imposed only a "de minimis burden").

A dearth of record evidence also afflicts the notion that H.B. 2243's list maintenance programs substantially burden voters. Preliminarily, as this Court observed, those provisions regulate the county recorders—not voters. *See* Doc. 534 at 31. Further, even if a voter is identified during a list maintenance check as a potential non-citizen or non-resident, she is entitled to notice and an opportunity to confirm her eligibility. *See Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1221–22, 1242 (N.D. Ga.

[14] *See, e.g.*, Report of M. Hoekstra Rebutting Portions of T. Burch Report, ¶¶ 6-14.

2022) (citizenship verification did not impose substantial burden under Section 2 where, *inter alia*, "registrants flagged as noncitizens are provided with notice of their pending status and informed of the documents they need to show that they are citizens").

B. Standard Practices in 1982

The LUCHA Plaintiffs have not disclosed evidence concerning relevant state laws, regulations or practices in 1982, when the Section 2 was reincarnated in its current form. *See Brnovich*, 141 S. Ct. at 2338 ("[T]he degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982 is a relevant consideration."). But citizenship and residency are longstanding and entrenched prerequisites to qualified elector status. The Arizona Constitution limits the franchise only to individuals who are citizens of the United States and residents of Arizona. *See* Ariz. Const. art. VII, § 2; *see also Fair Fight Action*, 634 F. Supp. 3d at 1243 ("The Georgia Constitution makes United States citizenship a requirement of voter registration. This requirement existed in the 1976 Constitution. The use of a birth certificate as a means of establishing identification—and citizenship—speaks to the State's policy of trying to enforce the citizenship requirement prior to 1982." (cleaned up)).

Similarly, Arizona has collected birthplace information during the voter registration process (albeit not always as a mandatory item) since the inception of statehood. *See* 1913 Revised Statutes of Ariz. § 2885 (county recorder must record a registrant's "country of nativity," and, "if naturalized," documentation of the same); *see also Rivera v. Lynch*, 816 F.3d 1064, 1073 (9th Cir. 2016) ("Indeed, one's name and birthplace may serve 'as a basis for an investigation of qualifications of a person who registers,' including citizenship" (quoting *People v. Darcy*, 139 P.2d 113 (Cal. App. 1943) (California statute that required birthplace on voter registrations)). The long legal lineage of citizenship requirements and the aggregation of birthplace information during voter registration further erodes the LUCHA Plaintiffs' Section 2 claim.

C. Disparate Impact on Minority Groups

The LUCHA Plaintiffs cannot demonstrate that any of the challenged provisions of H.B. 2492 or H.B. 2243 will inflict a disproportionate burden on an identifiable racial or ethnic minority group. *See Brnovich*, 141 S. Ct. at 1239 (cautioning that "the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. The size of any disparity matters."). The weight of available data cannot support an inference that H.B. 2492 or H.B. 2243 will disproportionately and adversely affect racial minorities. Defendants' expert witnesses will testify that, by way of analogy, "research on the turnout effect of voter ID requirements have produced null results or weak and non-consequential effects on turnout for all voters and for under-represented groups . . . Other researchers report a positive turnout effect for under represented voters from the adoption of voter ID requirements."[15] In the same vein, studies show that imposition of a citizenship requirement on Medicaid participants did not affect participation, efforts in Florida to remove suspected non-citizen voters led to increased turnout among (primarily Hispanic) voters whose citizenship was challenged, and naturalized citizens in fact tend to be more economically advantaged than other citizens.[16] Plaintiffs cannot clear the "high standard" of delineating a significant disparate impact on minority voters. *See League of Women Voters of Fla. v. Fla. Sec'y. of State*, 66 F.4th 905, 943 (11th Cir. 2023); *Fair Fight Action*, 634 F. Supp. 3d at 1244 ("the disparate impact of citizenship matching is small").

D. Overall System of Voting

"Arizona law generally makes it very easy to vote." *Brnovich*, 141 S. Ct. at 2330. In this context, registrants can choose from an array of methods to corroborate their U.S. citizenship, including a driver's license number, birth certificate, U.S. passport, naturalization documents, or a tribal enrollment number. *See* A.R.S. § 16-166(F). If, in the course of a routine list maintenance inquiry a county recorder locates information

[15] Report of R. Stein at 9–10.
[16] Report of M. Hoekstra Rebutting Portions of R. Burch Report, ¶¶ 20–36.

indicating a voter may be a non-citizen, the voter is entitled to written notice and a 35-day opportunity to supply curative or clarifying information. *See id.* § 16-165(A)(10). Even if that individual's registration is ultimately canceled, he will receive a notification, along with instructions for submitting a compliant registration form. *See id.* § 16-165(L).

E. State Interests

Arizona has a vital interest in detecting and preventing registrations by individuals who are not United States citizens or *bona fide* residents of the State. *See Crawford*, 553 U.S. at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process."). Since 2010, the Attorney General's Office has brought 38 prosecutions for illegal voting offenses, *see* Joint Stip. #156, and there are two known instances of potential non-citizen voting, *see* AG Dep. 233:18-234:2. Further, one of Defendants' experts will testify that non-citizen voting is difficult to detect and prove; a relatively small number of prosecutions may belie a much higher incidence of actual wrongdoing.[17] And "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich*, 141 S. Ct. at 2348. This compelling state interest extinguishes the LUCHA Plaintiffs' already unviable Section 2 claim.

CONCLUSION

The Court should find that none of the challenged provisions of H.B. 2492 or H.B. 2243 violates Section 10101(a)(2)(B) or (a)(2)(A), Sections 6, 7 or 8 of the NVRA, or Section 2 of the VRA, and enter judgment for the Defendants accordingly.

[17] *See* Report of M. Hoekstra Rebutting Portions of K. Minnite Report, ¶¶ 6–9; *see also* AG Dep. 273:17-22 (agreeing that "the number of [voter fraud] cases with probable cause would be greater than the number of cases in which there's a…readily provable offense").

RESPECTFULLY SUBMITTED this 19th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 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/ Thomas Basile