IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

GET LOUD ARKANSAS, et al., Plaintiffs, *v.* JOHN THURSTON, et al., Defendants.	Civil Action Case No. 5:24-cv-05121-TLB

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In their opening brief, Plaintiffs Get Loud Arkansas ("GLA"), Vote.org ("VDO"), Nikki Pastor, and Blake Loper explained why election officials cannot lawfully reject a mail voter registration application simply because the applicant entered an electronic, rather than a handwritten, signature. The Civil Rights Act's materiality provision prohibits state and local election officials from rejecting a voter registration application due to errors or omissions that are "not material in determining whether such individual is qualified under State law." 52 U.S.C. § 10101(a)(2)(B). The instrument used to enter a signature has nothing to do with determining voter qualifications. Defendants barely dispute that point; *nowhere* in their oppositions do they explain how a wet signature—as compared to a digital or electronic signature—is material in determining whether a person is qualified to vote. Nor could they. In fact, the Pulaski County Clerk, for her part, *concedes* that Plaintiffs have a valid materiality provision claim.

Rather than grapple with the merits, Defendants chiefly dispute standing, but only in part. Each Defendant claims that *some* Plaintiffs have not suffered a cognizable injury, but none disputes that at least *one* Plaintiff has standing—which is all that Article III requires. Their arguments also distort the relevant facts. The SBEC adopted a wet signature requirement that by its own admission *requires* county clerks to reject any mail voter registration application that is signed electronically.[1] County clerks, including Defendants Harrell, Lewallen, and Hollingsworth, are constitutionally obligated to enforce this rule. And this enforcement prevents GLA and VDO from using their online tools to help register Arkansans to vote—a canonical injury-in-fact. Likewise, the rule has caused would-be Arkansas voters, including Plaintiffs Pastor and Loper, to have their voter

[1] Defendants Thurston, Brooks, Clemmer, Harris-Ritter, Luther, Smith, and Williams—sued in their official capacity as commissioners of the Arkansas State Board of Election Commissioners—are collectively referred herein as "the SBEC."

registration applications rejected. Enjoining Defendants' promulgation and enforcement of this arbitrary registration requirement will redress these harms. And while the SBEC alone contends that Plaintiffs may not sue to enforce the materiality provision, it ignores the overwhelming weight of precedent saying the exact opposite, as well as the plain rights-conferring language of the provision itself.

As for the remaining equitable factors, no Defendant refutes any of the extensive testimony establishing that Plaintiffs will suffer irreparable harm absent injunctive relief, or that election officials have no reason to differentiate between a handwritten and electronic signature when registering voters. Nor do Defendants dispute that the public interest favors enjoining the wet signature rule. Thus, for the purposes of Plaintiffs' motion, the critical facts are uncontested: The wet signature rule is a recent invention that denies Arkansans the right to vote based on paperwork errors or omissions that are irrelevant in determining whether an individual is qualified to vote. This arbitrary requirement plainly violates the materiality provision of the Civil Rights Act, and this Court should grant Plaintiffs' motion for preliminary injunction.

ARGUMENT

I. Plaintiffs are likely to succeed on the merits.

A. Plaintiffs have standing as to each Defendant.

At the outset, Defendants' fragmented standing arguments pose no barrier to preliminary relief because only a single plaintiff needs to have standing against any given defendant to obtain relief. *See, e.g.*, *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017). Each Defendant here has effectively conceded that at least one Plaintiff has standing against them. The SBEC, for example, contests standing as to organizational Plaintiffs GLA and VDO, but not the individual Plaintiffs, Pastor and Loper. *See* Resp. in Opp'n to Mot. for Prelim. Inj. at 6–9, ECF No. 53 ("SBEC Opp."). The Benton and Pulaski County Clerks claim the *individual* Plaintiffs lack

standing to sue *them* specifically but, as in their motions to dismiss, they ignore GLA and VDO altogether. *See* ECF No. 54 at 2 (incorporating Benton County Clerk's Motion to Dismiss, ECF No. 41); ECF No. 55 at 2–3 (incorporating Pulaski County Clerk's Motion to Dismiss, ECF Nos. 39–40). And the Washington County Clerk does not contest any Plaintiff's standing. *See* ECF Nos. 50–51. Accordingly, there is no dispute that "[a]t least one plaintiff . . . ha[s] standing to seek each form of relief requested in the complaint" as to each Defendant. *Town of Chester*, 581 U.S. at 439.

Defendants' standing arguments are wrong anyway. The wet signature requirement prevents GLA and VDO from deploying tools designed to help voters register using electronic signatures, and it harms voters—like Pastor and Loper—who used GLA's online tool and had their applications rejected. These harms are traceable to, and redressable by, the SBEC—which imposed this requirement—and the county clerk Defendants, who are tasked with enforcing it. These simple and undisputed facts readily satisfy the elements of standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

1. Plaintiffs have standing to sue the SBEC.

The SBEC's argument that GLA and VDO lack standing to sue its members is a non-starter. As the Supreme Court recently explained, "[g]overnment regulations that require or forbid some action by the plaintiff[s] almost invariably satisfy both the injury in fact and causation requirement." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024) (explaining that "standing is usually easy to establish" in such cases). There is no dispute that the SBEC's wet signature rule prevents GLA and VDO from using their preferred tools for voter registration. *See* Decl. of Kristin Foster ¶¶ 29–30, ECF No. 46-2 ("Foster Decl."); Decl. of Andrea Hailey ¶¶ 7–9, ECF No. 46-3 ("Hailey Decl."). That alone provides GLA and VDO standing to sue the SBEC. *See All. for Hippocratic Med.*, 602 U.S. at 382.

That conclusion is buttressed by the fact that the wet signature rule was expressly intended to stifle GLA's voter registration efforts, as the SBEC effectively admitted. *See* Decl. of Christopher D. Dodge, ECF No. 46-7 ("Dodge Decl."), Ex. E at 4–7 (repeatedly citing GLA's voter registration efforts as the basis for the wet signature rule). Where, as here, a law "is challenged by a party who is a target or object of the [law's] prohibitions, 'there is ordinarily little question that the [law] has caused him injury.'" *St. Paul Area Chamber of Com. v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006) (quoting *Minn. Citizens Concerned for Life v. Fed. Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997)). This unabashed targeting of GLA's and VDO's online tools also creates a separate basis for standing: The wet signature rule forces the organizations to pursue their voter registration goals in ways that are more costly yet less efficient, all of which diverts resources from other critical programs and imperils each organization's ability to accomplish its mission. *See* Foster Decl. ¶¶ 13–16, 32; Hailey Decl. ¶¶ 7–8, 10; *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding standing where petitioners' steering practices impaired organization's ability to provide counseling and referral services); *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2023 WL 6446015, at *10 (W.D. Ark. Sept. 29, 2023) (finding standing where new absentee voting rules forced voter outreach organization to divert resources to ballot efforts and away from redistricting efforts). Indeed, the Fifth Circuit, based on nearly identical facts, found that VDO established organizational standing to challenge Texas's legislatively-enacted wet signature rule. *Vote.org v. Callanen*, 89 F.4th 459, 470–71 (5th Cir. 2023).[2]

[2] *Callanen* addressed and reached conclusions on a wide range of issues. Many of those conclusions are based on sound reasoning and achieved unanimous support among the *Callanen* panel, including on threshold issues related to standing and the enforceability of the materiality provision. *See infra* Section I.C. However, as Plaintiffs explain in Section I.B, the panel majority's conception of "materiality" is deeply flawed, as the well-reasoned dissent on that issue explained.

The SBEC disputes little of this. Instead, it asserts that GLA's diversion of resources to more expensive and less efficient means of registering voters did not impair its mission because voter engagement is part of GLA's normal activities. SBEC Opp. at 8. That is simply wrong: Courts have not only rejected this argument repeatedly, but also explained why it makes no sense. As the Seventh Circuit explains, "[a]ny work to undo a frustrated mission is, by definition, something in furtherance of that mission . . . [i]ndeed, we have a hard time imagining . . . why it is that an organization would undertake any additional work if that work had nothing to do with its mission." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 954–55 (7th Cir. 2019); *see also Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1270 (N.D. Ga. 2021). GLA has described how its other mission-critical activities are suffering because of its diversion of resources towards less-effective voter registration activities. Foster Decl. ¶¶ 32–36. And despite its attempts to ameliorate the harm that the wet signature rule has had on its voter registration efforts, GLA is no longer on track to meet its annual voter registration targets—which seemed readily attainable until the SBEC banned GLA's tool. *Id.* ¶¶ 8, 31. These are concrete injuries and the SBEC identifies no persuasive authority that suggests otherwise.

As to VDO, the SBEC only argues that it is not suffering a *present* injury because it had not already deployed its online tool in Arkansas. SBEC Opp. at 7–8. That is incorrect. But for the wet signature rule, VDO intends to use its e-sign function in Arkansas. Hailey Decl. ¶ 9. But because the rule is in place, VDO is currently using less effective means of assisting voters to register by offering an online tool that requires the applicant to print, sign, and send their application to their county clerk, and in doing so VDO's ability to accomplish its mission through voter registration activities is impaired. *Id.* ¶¶ 7, 10. Because VDO would utilize its e-sign function in its online tool to assist "applicants in Arkansas, just as it has done successfully in several other

states," *id.* ¶ 9; *see also id.* ¶¶ 4–5, 7, and the wet signature rule prevent it from doing so, *id.* ¶¶ 8–10, the organization is suffering a present injury. *See All. for Hippocratic Med.*, 602 U.S. at 395.

While both GLA and VDO have standing to sue the SBEC, it bears emphasis that the SBEC does not dispute Pastor's and Loper's standing. That concession dooms the SBEC's reliance on jurisdictional arguments to contest Plaintiffs' likelihood of success on the merits because, "[i]n a multi-plaintiff suit, only one plaintiff need satisfy the constitutional standing requirements." *Ark. United v. Thurston*, 517 F. Supp. 3d 777, 792 (W.D. Ark. 2021) (citing *Horne v. Flores*, 557 U.S. 433, 446–47 (2009)).

2. Plaintiffs have standing to sue the county clerk Defendants.

The Benton and Pulaski County Clerks incorporate their arguments that Plaintiffs lack standing to sue them from their motions to dismiss. *See* ECF No. 54 at 2; ECF No. 55 at 2–3. These arguments are flawed for the reasons already explained in Plaintiffs' opposition to those motions to dismiss. *See generally* ECF No. 49. For one, they are focused exclusively on Pastor and Loper—they do not attack GLA's or VDO's standing. Nor could they. Under the Arkansas Constitution, county clerks are tasked with enforcing voter registration rules, *id.* at 2–4, and the clerks do not dispute that they are required to enforce the SBEC's wet signature rule, *id.* at 6–7. Enjoining such enforcement will redress GLA's and VDO's injuries. *Id.* at 8–9.

B. The use of a wet signature is immaterial in determining whether an individual is qualified to vote under Arkansas law.

Only two Defendants—the SBEC and the Washington County Clerk—dispute whether Plaintiffs are likely to succeed on their materiality provision claim. *See* SBEC Opp. at 9–13; ECF No. 51 at 2. The Pulaski County Clerk *agrees* that Plaintiffs are likely to succeed on the merits—she just claims Plaintiffs should not succeed against her, based on a flawed standing theory. ECF No. 55 at 2; *see also supra* Section I.A.2; ECF No. 49. But even the Defendants who dispute the

merits concede that Plaintiffs have satisfied most of the elements of a materiality provision claim—they dispute only whether a wet signature is "material in determining" a person's qualification to vote. But in doing so, they (1) misread the Civil Rights Act; (2) rely on a flawed reading of the Arkansas Constitution; and (3) point to distinguishable (and wrongly decided) out-of-circuit authority. These arguments fail.

1. Rather than grapple with the materiality provision's text, Defendants seek to construct a different statute than the one Congress wrote. They claim, for instance, that the wet signature rule is "material" because it "leads to statewide uniformity" and "promot[es] the integrity of the voter registration process." SBEC Opp. at 11. Neither of those purported policy rationales has anything to do with whether a wet signature is "material in determining" a person's qualification to vote, however.[3] Under the Civil Rights Act, it is not enough for a requirement to be "helpful" in some abstract sense; it must be "material *in determining whether [an] individual is qualified under [Arkansas] law to vote*." 52 U.S.C. § 10101(a)(2)(B) (emphasis added); *see also Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (holding preventing "fraud" did not render mandatory disclosure of social security number "material"), *aff'd*, 439 F.3d 1285 (11th Cir. 2006); *La Unión del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2023 WL 8263348, at *8–9 (W.D. Tex. Nov. 29, 2023) ("*LUPE*") (holding fraud prevention did not render identification number requirement material), *stayed pending appeal sub nom. United States v. Paxton*, No. 23-50885 (5th Cir. Dec. 15, 2023) (per curiam).

[3] Under Arkansas law, a voter is qualified to vote if they are: (1) a U.S. citizen, (2) an Arkansas resident, (3) at least eighteen years old, (4) have not been convicted of a felony, and (5) have not been adjudged mentally incompetent by a court. Ark. Const. art. 3, § 1(a); Ark. Const. amend. 51 § 11(a). *Cf. Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003) (noting "the only *qualifications* for voting in Georgia are U.S. Citizenship, Georgia residency, being at least eighteen years of age, not having been adjudged incompetent, and not having been convicted of a felony" (emphasis in original)).

Critically, Defendants fail to dispute that Arkansas county election officials do not consider the type of instrument used in signing a voter registration application in determining whether an applicant is qualified to vote. *See* Decl. of Susan Inman ¶¶ 15–20, ECF No. 46-6 ("Inman Decl."). The materiality provision prohibits such extraneous requirements. *See, e.g.*, *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *37 (D. Ariz. Feb. 29, 2024) (concluding that required information must be "more than useful or minimally relevant" to survive scrutiny under materiality provision); *LUPE*, 2023 WL 8263348, at *14; *In re Ga. Senate Bill 202*, No. 1:21-CV-01259-JPB, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023) ("[T]he fact that the [pen and ink signature] is not used to determine voter qualifications merely reinforces the immateriality of the [pen and ink rule]."). But even if state interests did play a role in a materiality provision analysis, Defendants offer no support for their assertion that the wet signature rule advances such interests. They offer no explanation, for example, as to how such a rule prevents fraud when many Arkansas voters already use electronic signatures to register at state agencies. *See* Ark. Const. amend. 51, § 5; *see also* Inman Decl. ¶ 18. Nor do they explain why the SBEC could not achieve uniformity by requiring clerks to *accept* electronic signatures on mail voter registration applications. Instead, they double down on their argument that the Arkansas Constitution requires a bifurcated voter registration regime, whereby voters who register at registration agencies are "authorize[d]" to use electronic signatures, but those who register in person, by mail, or via third-party services are not. SBEC Opp. at 10. That argument is wrong about Arkansas law. *See* Br. Supp. Mot. for Prelim. Inj. at 18–20, ECF No. 46-1 ("Opening Br."). And it is also far from self-evident how such a dual-track system "standardiz[es]" the state's voter registration procedure, "furthers Arkansas's interest in preventing fraud, verifying voter identity and eligibility," or "promot[es] the integrity of the voter registration process," SBEC Opp. at 11,

even if such goals had relevance to the materiality provision analysis. Defendants do not even attempt to draw a connection between the wet signature rule and these purported state interests.[4]

2. Defendants erroneously assert that the wet signature rule is "material" simply because it "comports with what is permitted in the Arkansas Constitution." *Id.* at 9. Whether or not an administrative rule comports with the state constitution says nothing about its lawfulness under the Civil Rights Act—a federal statute. This is evident from the text of the Civil Rights Act itself. Subsection (a)(1) guarantees the right of citizens "who are otherwise qualified by law to vote" to exercise that right "notwithstanding" "any constitution, law, custom, usage, or regulation of any State or Territory." 52 U.S.C. § 10101(a)(1). Even if Defendants properly interpreted Arkansas law (and they do not), that would be no defense to a materiality provision claim. *See, e.g.*, *LUPE*, 2023 WL 8263348, at *14–18 (holding state statute requiring disclosure of ID number violated materiality provision); *Senate Bill 202*, 2023 WL 5334582, at *8 (finding plaintiffs established substantial likelihood of success on claim that state statute requiring date of birth on absentee ballot outer envelope violated materiality provision); *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1270–71 (W.D. Wash. 2006) (finding statute requiring state to match potential registrants' social security number or driver's license number prior to registration likely violated materiality provision); *Schwier*, 412 F. Supp. 2d at 1276 (holding state statute requiring social security number disclosure for voter registration violated materiality provision). Adopting Defendants' view would effectively repeal the materiality provision, declaring that states may wantonly adopt practices that violate its terms provided they enshrine such rules in state law. *But see LUPE*, 2023 WL 8263348,

[4] Moreover, while some Defendants argue that preserving integrity and preventing fraud in the election process could be reasons for the materiality of a wet signature, they offer no evidence that the SBEC adopted the wet signature rule for those reasons or thought those reasons important enough to even mention before adopting the rule.

at *14 (rejecting "tautological[]" argument that "*whatever* requirements might be imposed by state law in order to vote" are material, as such logic "would erase the Materiality Provision from existence" (quotations omitted)). Congress enacted the materiality provision to prevent exactly that. *See Callanen*, 89 F.4th at 487 (rejecting "that States may circumvent the Materiality Provision by defining all manner of requirements . . . as being a qualification to vote and therefore 'material'").

Defendants' reading of the Arkansas Constitution is also wrong on its own terms. They appear to suggest that because Amendment 51 permits the use of a "computer process" for voter registration applications submitted by certain registration agencies, the Arkansas Constitution prohibits the use of any "computer process" outside of those agencies. *See* SBEC Opp. at 2 (citing Ark. Const. amend. 51, § 5(b)(2)–(4)). But by Defendants' own admission, the wet signature rule is "targeted to just the signature part" of the voter registration application, and all individuals can "type their address in using a computer process." Dodge Decl., Ex. I at 39:9–40:8. There is no reason (and Defendants offer none) why the Arkansas Constitution would implicitly prohibit voters from using a computer to fill out one part of an application but not others. Indeed, the Arkansas Attorney General himself came to the (correct) conclusion that the Arkansas Constitution in no way imposes a requirement for any specific *kind* of signature. Dodge Decl., Ex. D at 1, 3.

3. Defendants also ask this Court to follow *Callanen*'s and *Byrd*'s flawed conclusions about the materiality of a wet signature on voter registration applications but ignore the distinctions between those cases and this one. *See* Opening Br. at 22–23. Most notably, nothing in Arkansas law reflects any "legislative judgment" that a wet signature is important—let alone material—in determining voter eligibility. *See Callanen*, 89 F.4th at 480. In fact, Arkansas law reflects the exact

opposite judgment—that "a signature marked by many means is valid." Dodge Decl., Ex. D at 3 (further determining "that an electronic signature satisfies Amendment 51").

In any event, those decisions are based on erroneous reasoning. In *Byrd*, the district court erred by shifting the analysis away from whether the form of a signature is material in determining a voter's qualifications to whether "a copied, faxed, or otherwise non-original signature is equal in stature to an original, wet signature." *Vote.org v. Byrd*, 700 F. Supp. 3d 1047, 1055 (N.D. Fla. 2023). But the materiality provision does not include a safe harbor for non-material requirements that have some purported justification: It prohibits denial of the right to vote based on any error or omission unless the error or omission materially bears on the voter's qualifications. *See* 52 U.S.C. § 10101(a)(2)(B). Similarly, the majority opinion in *Callanen* contains significant legal errors as to the definition of "material," even as it appropriately rejected the same threshold arguments Defendants raise here. *See supra* note 2. As the dissent recognized, the majority opinion "invokes a line of constitutional vote-denial cases . . . for the proposition that states have considerable discretion in establishing rules for their own elections," but ignores the fact that the plain text of the materiality provision "expressly limits states' purported 'considerable discretion.'" *Callanen*, 89 F.4th at 491–92 (Higginson, J., dissenting) (cleaned up). "The considerable deference to be given to state election procedures thus has no place in a materiality analysis." *Id.* at 492 (cleaned up). The majority also erroneously injected "the multifactorial test in *Thornburg v. Gingles*—which applies to section 2 claims under the Voting Rights Act—in its materiality analysis." *Id.* (citing 478 U.S. 30 (1986)). But "reliance on the *Gingles* factors is inapposite in the materiality context" because plaintiffs bringing a claim under the materiality provision "need only demonstrate that the state's procedural requirement 'is not material in determining whether' they are 'qualified' to vote." *Id.* (quoting 52 U.S.C. § 10101(a)(2)(B)). The divided panel's majority

constructed this strained reading of "materiality" from whole cloth. And most importantly, the *Callanen* majority disregarded the undisputed fact that election officials *did not use* the wet signature in any capacity to determine a voter's qualifications, which should have "slam[med] the door shut on any argument that [a wet signature] is material." *Id.* at 493 (citation omitted). Indeed, if this Court were to follow the *Callanen* majority on the merits, it would need to cast aside the materiality provision's plain text, graft irrelevant legal frameworks onto the Civil Rights Act, and ignore factual evidence to arrive at an illogical conclusion. The Court should decline to do so.

C. Plaintiffs may sue to enforce the materiality provision.

Federal courts have overwhelmingly concluded that private plaintiffs may sue to enforce the materiality provision. *See, e.g.*, *Callanen*, 89 F.4th at 473–78; *Migliori v. Cohen*, 36 F.4th 153, 158–62 (3d Cir.), *vacated on other grounds sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022);[5] *Schwier*, 340 F.3d at 1294–97; *Mi Familia Vota*, 2024 WL 862406, at *33–36. Another judge from this same district is among this chorus of authority. *See League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) ("A private right of action exists to enforce the materiality provision of the Civil Rights Act 52 U.S.C. § 10101[.]"). Nonetheless, the SBEC argues that there is no mechanism to privately enforce the materiality provision. SBEC Opp. at 13–15. This argument not only ignores the well-reasoned line of cases holding the opposite, but it also fails to apply recent Supreme Court precedent establishing the framework for determining when federal statutes confer enforceable rights.

[5] Although *Migliori* was vacated by the U.S. Supreme Court on mootness grounds, a subsequent decision of the Third Circuit—in a similar lawsuit also brought by private plaintiffs—did not revisit the conclusion that the materiality provision may be privately enforced. *See Pa. State Conf. of NAACP Branches v. Sec'y Commonwealth of Pa.*, 97 F.4th 120, 139 (3d Cir. 2024) (holding materiality provision limited to voter qualification determinations and reversing district court order on those grounds only); *see also id.* at 143 n.3 (Shwartz, J., dissenting) (analyzing basis of plaintiffs' private right to enforce materiality provision).

1. Under the Supreme Court's *Gonzaga* test, a federal statute is privately enforceable under § 1983 "where the provision in question is phrased in terms of the persons benefited and contains rights-creating, individual-centric language with an unmistakable focus on the benefited class." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023) (cleaned up); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002). The materiality provision unmistakably satisfies this test. The first section of the statute makes clear that "[a]ll *citizens of the United States* who are otherwise qualified by law to vote . . . *shall be entitled and allowed to vote at all such elections*." 52 U.S.C. § 10101(a)(1) (emphases added). And the materiality provision specifically prohibits any "person acting under color of law [from] . . . deny[ing] th[at] *right of any individual*." *Id.* § 10101(a)(2)(B) (emphasis added). Thus, "the focus of the [materiality provision's] text is . . . the protection of each individual's right to vote," *Schwier*, 340 F.3d at 1296, and it "places all citizens qualified to vote at the center of its import," *Migliori*, 36 F.4th at 159 (cleaned up). That text is "decidedly more rights-focused than language the Court has held *not* to confer a private right." *Callanen*, 89 F.4th at 474–75.[6]

The SBEC ignores the "right of any individual" language, and instead argues that the materiality provision's text "focuses on the local official regulated, rather than individual voters." SBEC Opp. at 14. But it ignores that the Third, Fifth, and Eleventh Circuits have each rejected this precise theory when it comes to the materiality provision. *Callanen*, 89 F.4th at 473–75; *Migliori*, 36 F.4th at 159; *Schwier*, 340 F.3d at 1296–97. And the Supreme Court has since explained that it "would be strange to hold that a statutory provision fails to secure rights simply because it

[6] The materiality provision's text also parallels the rights-conferring language in Titles VI and IX, which the Supreme Court held confers an enforceable private right of action. *Gonzaga*, 536 U.S. at 284. Specifically, the materiality provision's "[n]o person . . . shall" formulation targets "the denial of rights to individuals" and is "clearly analogous to the rights-creating language [in Titles VI and IX] cited by the Supreme Court in *Gonzaga*." *Schwier*, 340 F.3d at 1291, 1296.

considers, alongside the rights bearers, the actors that might threaten those rights (and we have never so held)." *Talevski*, 599 U.S. at 185 (holding that similar language in the Medicaid Act conferred a federal right); *see also Grammer v. John J. Kane Reg'l Ctrs.-Glen Hazel*, 570 F.3d 520, 530 (3d Cir. 2009) (finding it irrelevant that the statute was framed in terms of "responsibilities imposed on the state").[7] What matters is that the provision contains "rights-creating language" and speaks "in terms of the persons benefited." *Talevski*, 599 U.S. at 186 (citations omitted). The materiality provision meets that test.

2. The SBEC ignores the authority above, choosing instead to rely on a small (and increasingly isolated) number of cases concluding that the materiality provision can only be enforced by the U.S. Attorney General. SBEC Opp. at 13 (collecting cases). But these cases offer threadbare analysis, and not one conducts the requisite analysis under *Gonzaga* to determine whether the materiality provision may be privately enforced through § 1983. For example, in *McKay v. Thompson*, the Sixth Circuit held (prior to *Gonzaga*) in *one sentence* that the materiality provision "is enforceable by the Attorney General, not by private citizens." 226 F.3d 752, 756 (6th Cir. 2000). That was the sum of its analysis; a stark contrast to the extensive treatment the issue received in *Schwier*, *Migliori*, and *Callanen*, each of which post-date *McKay* (and two of which reject it expressly). *See Callanen*, 89 F.4th at 473–78; *Migliori*, 36 F.4th at 159–62; *Schwier*, 340 F.3d at 1294–97.[8] A subsequent decision from the Sixth Circuit acknowledged that the Eleventh

[7] In finding the provision privately enforceable, the Third, Fifth, and Eleventh Circuits detailed the extensive legislative history showing that Congress desired such private enforcement. *See Callanen*, 89 F.4th at 474–78; *Schwier*, 340 F.3d at 1294–97; *see also Migliori*, 36 F.4th at 161–62. That extensive history also weighs strongly in favor of finding private enforcement.

[8] The Sixth Circuit also relied on nothing more than a single district court decision that similarly offered no real analysis of the issue. *See McKay*, 226 F.3d at 756 (citing *Willing v. Lake Orion Cmty. Sch. Bd. of Trs.*, 924 F. Supp. 815, 820 (E.D. Mich. 1996)). That decision, in turn, relied solely upon an earlier district court case that did not even involve the materiality provision and

Circuit had broken with *McKay* but recognized that it could not revisit the matter because "[*McKay*] binds this panel." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016). Since then, every court considering the issue—at both the appellate and trial level, including in this district—has concluded that the materiality provision may be enforced by private parties.

The SBEC next resorts to irrelevant authority. In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, the plaintiffs did not bring their claim under § 1983 and chose to proceed exclusively on the theory that the Voting Rights Act supplies its own implied cause of action. 86 F.4th 1204, 1208–09 (8th Cir. 2023) (recognizing the question of "*who* can sue under § 2" is the "centerpiece" of the case); *see also id.* at 1212–13 ("[W]e already know that private plaintiffs can bring proceedings to enforce voting guarantees that the Attorney General cannot. The most prominent example is 42 U.S.C. § 1983." (cleaned up)). The Court accordingly did not analyze whether that claim could have been brought through § 1983, nor did it discuss the Supreme Court's decision in *Talevski*. *See id.* at 1217–18 (rejecting plaintiffs' "belated request to add a § 1983 claim to their complaint" and "declin[ing] to say anything further about what would have happened if the advocacy groups had acted sooner"). The decision is therefore doubly irrelevant here: (1) it did not concern Plaintiffs who chose to proceed under § 1983, as Plaintiffs do here, *see* Compl. at 3, 23, ECF No. 2; and (2) because it concerned the Voting Rights Act—not the Civil Rights Act—it offers no insight into whether the relevant statutory text *here* satisfies *Gonzaga*. Also irrelevant are *Osher v. City of St. Louis*, 903 F.3d 698, 702 (8th Cir. 2018), and *Does v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017). Those cases concerned statutes—42 U.S.C. §

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that concluded with little analysis that the Attorney General's right to enforce a statute implicitly precludes a private right. *See Good v. Roy*, 459 F. Supp. 403, 405–06 (D. Kan. 1978). Its suggestion predates *Gonzaga* and is squarely rejected by the various other courts to consider this issue in the context of the materiality provision.

4622(a) and 42 U.S.C. § 1396a(a)(23)(A), respectively—that lack the "explicit rights-creating terms" and "unmistakable focus on the benefited class" that are clearly present in the materiality provision. *Gonzaga*, 536 U.S. at 284 (quotation omitted).

3. Because Plaintiffs have "demonstrat[ed] that [the materiality provision] confers rights on a particular class of persons, the right is presumptively enforceable by § 1983." *Id.* at 274 (citation omitted). This presumption can only be overcome if Defendants show that Congress *expressly* forbids proceeding under § 1983 or does so *implicitly* by creating a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Talevski*, 599 U.S. at 186. The Civil Rights Act does not expressly forbid the use of § 1983 to enforce the materiality provision, nor does it expressly grant the Attorney General exclusive enforcement power. *See Migliori*, 36 F.4th at 160–61. While the SBEC briefly contends that the Attorney General's right to enforce the materiality provision creates *implicit* incompatibility with private enforcement, SBEC Opp. at 14, it fails to say much as to why. Contrary to that bare claim, the statute itself contemplates private enforcement, authorizing suits in federal court "without regard to whether the party aggrieved shall have exhausted" any remedies provided by law. 52 U.S.C. § 10101(d); *see also Schwier*, 340 F.3d at 1296 (explaining this language was intended to "remove roadblocks" for suits by private plaintiffs (cleaned up)). The legislative history of the Civil Rights Act further makes clear that Congress *desired* such concurrent enforcement. *Callanen*, 89 F.4th at 475–76 (interpreting "the[] 1957 amendments as augmenting the implied but established private right to sue with an explicit right in the Attorney General"). In fact, "the first part of what is now Section 10101 was routinely enforced through Section 1983. That means there is a long history of *compatibility* between at least parts of Section 10101 and Section 1983 that predates the addition of the Attorney General enforcement in 1957." *Id.* at 476 (citing *Schwier*, 340 F.3d at 1295).

Finally, there is nothing "comprehensive" about enforcement by the Attorney General. *Talevski*, 599 U.S. at 186. The Supreme Court has found "implicit preclusion" in only three cases, each of which "concerned statutes with self-contained enforcement schemes that included statute-specific rights of action." *Talevski*, 599 U.S. at 189 (collecting cases). The materiality provision, in contrast, "lacks any specific 'private judicial right of action' or 'private federal administrative remedy' that requires plaintiffs to comply with particular procedures." *Callanen*, 89 F.4th at 476 (quoting *Talevski*, 599 U.S. at 190). Nor does it contain an administrative exhaustion requirement or a more restrictive private remedy. *Migliori*, 36 F.4th at 160, 162. "Thus, this exception to using Section 1983 is inapplicable." *Callanen*, 89 F.4th at 476.[9]

II. Defendants' ongoing rejection of mail voter registration applications signed with electronic signatures causes Plaintiffs irreparable harm.

The SBEC presents three arguments on irreparable harm, but otherwise ignores the remaining equitable factors, conceding that the public interest weighs in favor of preliminary relief and that the harm faced by Plaintiffs outweighs any faced by Defendants. *See* Opening Br. at 26–27; *see also Schnuck Mkts., Inc. v. First Data Merch. Servs. Corp.*, 852 F.3d 732, 737 (8th Cir. 2017) (concluding that defendants forfeit the arguments they do not raise).[10] This Court should swiftly reject the SBEC's novel attempts to minimize the irreparable harm that the wet signature requirement continues to cause Plaintiffs.

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[9] Furthermore, the text, structure, and legislative history exhibits "affirmative evidence" that Congress intended to independently supply a private remedy through the Civil Rights Act. *Alexander v. Sandoval*, 532 U.S. 275, 293 n.8 (2001). For one, the statute establishes jurisdiction for any "proceedings instituted" by a "party aggrieved" to enforce the law. 52 U.S.C. § 10101(d). In addition, private litigants obtained equitable remedies under the Civil Rights Act for decades before Congress amended the statute to provide for enforcement by the Attorney General. *Schwier*, 340 F.3d at 1295. And "[a]fter the 1957 amendment . . . private plaintiffs continued to bring their own causes of action under other provisions of the Act, including the Materiality Provision." *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 858 (W.D. Tex. 2020) (collecting cases).

[10] No county clerk Defendant disputes that each of the equitable factors weigh in Plaintiffs' favor.

1. The SBEC contends Plaintiffs are not harmed by its emergency rule because it will soon lapse. SBEC Opp. at 15. But that argument is flawed in two key respects. To begin, the irreparable harm Plaintiffs are experiencing is not caused only by that emergency rule. As Plaintiffs have made clear, they challenge *any* requirement that mail voter registration forms contain wet signatures, not merely the emergency rule expiring on September 1, 2024. *See, e.g.*, Compl. at 2 n.1 ("The phrase 'wet signature rule' refers to the State Board of Election Commissioners' emergency rule, and any other regulations or procedures that county clerks have applied to reject applications with electronic or digital signatures."), 24–25 (requesting injunctive relief against enforcement of "any other requirement that applicants sign their voter registration applications by hand or with a wet signature" and rejection "on the grounds that the application contains an electronic or digital signature"); *see also* Opening Br. at 8 & n.5, 27 (recognizing ongoing final rulemaking process and requesting this Court "enter a preliminary injunction enjoining Defendants . . . from refusing to accept any voter registration application simply because it was signed with a digital or electronic signature").

Further, the SBEC's argument cynically ignores that, ten days *before* filing its opposition, it adopted a *permanent* rule that is *identical* to the emergency rule. *See* ECF No. 53-1 at 1 (recognizing that the SBEC "proceeded with adopting the Rule for permanent promulgation").[11] Although the permanent rule does not go into effect until it is reviewed by the Arkansas Legislative Council, *see* Ark. Code Ann. § 10-3-309(c), Plaintiffs are not required to suffer silently until the

[11] *See also* Mary Hennigan, *Arkansas election board approves voter registration rule*, Arkansas Advocate (July 15, 2024), *available at* https://arkansasadvocate.com/2024/07/15/arkansas-election-board-approves-voter-registration-rule/ (reporting that the SBEC approved permanent wet signature rule).

very same requirement at issue is made permanent. And Plaintiffs can, of course, supplement their complaint to account for any such factual developments. *See* Fed. R. Civ. P. 15(d).

2. The SBEC's suggestion that organizations cannot suffer irreparable harm in the voting context is simply wrong. "Courts routinely recognize that organizations suffer irreparable harm when a defendant's conduct causes them to lose opportunities to conduct election-related activities, such as voter registration and education." *League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018) (collecting cases). GLA's and VDO's irreparable harm here includes "mobilization opportunities [that] cannot be remedied once lost." *Senate Bill 202*, 2023 WL 5334582, at *11 (quotation omitted); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("once the election occurs, there can be no do-over and no redress"); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138, 1142 (D.N.D. 2012) ("Elections are, by nature, time sensitive and finite. While there will be other elections, no future election will be *this* election."). And it further includes diversion of resources that cannot be recouped. *See Louisiana v. Biden*, 55 F.4th 1017, 1033 (5th Cir. 2022) (affirming preliminary injunction based on "diversion of resources" resulting from "nonrecoverable compliance costs"); *Senate Bill 202*, 2023 WL 5334582, at *11 (similar); *see also* Foster Decl. ¶¶ 32–36; Hailey Decl. ¶ 10.

The SBEC's insistence to the contrary—that Plaintiffs could simply comply to avoid harm—gets it backwards. SBEC Opp. at 15–16. "[I]t is no answer to say that [a plaintiff] may avoid [irreparable] harm by complying with an unlawful agency rule." *VanDerStok v. Garland*, 625 F. Supp. 3d 570, 584 (N.D. Tex. 2022). GLA's and VDO's irreparable injuries cannot be remedied by compliance with the wet signature rule, because those injuries are *caused* by their ongoing compliance. *See supra* Section I.A. Thus, the injuries inflicted upon GLA and VDO are irreparable. *See* Opening Br. at 24–26.

3. Lastly, Plaintiffs Pastor and Loper have been irreparably harmed because they have been "deprived of a right guaranteed by the Civil Rights Act." Opening Br. at 26. In attempting to dismiss their irreparable harm, the SBEC appears to conflate the opportunity to register to vote in the abstract with the opportunity to register to vote consistent with the guarantees of federal law. *Compare* SBEC Opp. at 16, *with* Opening Br. at 26. The SBEC's argument that Pastor and Loper could avoid injury by simply complying with the wet signature rule, *see* SBEC Opp. at 16, would undermine the very premise of federal voting protections: that enforced compliance with extraneous requirements violates the civil rights of voters entitled to register to vote, cast a ballot, and have that ballot counted. 52 U.S.C. § 10101; *see also United States v. Georgia*, 892 F. Supp. 2d 1367, 1375 (N.D. Ga. 2012).

CONCLUSION

The Court should enter a preliminary injunction enjoining Defendants from enforcing the wet signature rule and from refusing to accept any voter registration application because it contains a digital or electronic signature.

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Respectfully submitted,

/s/ Uzoma N. Nkwonta

SHULTS LAW FIRM LLP
Peter Shults (Ark. 2019021)
Amanda G. Orcutt (Ark. 2019102)
Steven Shults (Ark. 78139)
200 West Capitol Ave., Suite 1600
Little Rock, AR 72201
T: (501) 375-2301
F: (501) 375-6861
pshults@shultslaw.com
aorcutt@shultslaw.com
sshults@shultslaw.com

ELIAS LAW GROUP LLP
Uzoma N. Nkwonta* (DC 975323)
Christopher D. Dodge* (DC 90011587)
Omeed Alerasool* (DC 90006578)
Julie Zuckerbrod* (DC 1781133)
250 Massachusetts Ave. NW, Suite 400
Washington, DC 20001
T: (202) 968-4490
F: (202) 968-4498
unkwonta@elias.law
cdodge@elias.law
oalerasool@elias.law
jzuckerbrod@elias.law

*Admitted *pro hac vice*

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 5th day of August, 2024, with a copy of this document via the Court's CM/ECF system.

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta