No. 22-50536

In the United States Court of Appeals for the Fifth Circuit

Vote.org,
Plaintiff-Appellee,

v.

Jacquelyn Callanen, et al.,
Defendants-Appellants,

and

Ken Paxton, in his official capacity as the Attorney General of Texas; Lupe C. Torres, in his official capacity as the Medina County Elections Administrator; Terrie Pendley, in his official capacity as the Real County Tax Assessor-Collector,

Intervenor Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS
No. SA-21-CV-00649-JKP

BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that—in addition to the persons and entities identified in the party briefs in this case—the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici Curiae

American Civil Liberties Union Foundation

American Civil Liberties Union Foundation of Texas

I hereby certify that I am aware of no persons or entities with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and amicus briefs filed in this case.

Dated: November 4, 2022

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INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union Foundation (ACLU) is a nationwide, nonprofit, nonpartisan organization with 1.7 million members, dedicated to the principles of liberty and equality embodied in this nation's Constitution and civil rights laws, including the right to participate in the electoral process. The ACLU has frequently participated as counsel and/or *amicus curiae* in cases involving voting rights and electoral democracy, including *Merrill v. Milligan*, No. 21-1086 (U.S. argued Oct. 4, 2022); *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019); and *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

The ACLU Foundation of Texas ("ACLU of Texas") is a state affiliate of the ACLU with approximately 45,000 members statewide. Founded in 1938, ACLU of Texas is the State's foremost defender of civil liberties and civil rights of all Texans and has long advocated for protecting the right to participate in the electoral process.

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[1] All parties have consented to the filing of this amicus brief. No party's counsel authored this brief in any part and no person other than *amici* funded the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants contend that a prospective Texas voter who is qualified to vote, and who fills out, signs, and submits a voter registration form by fax and mailed copy, may nevertheless be denied registration merely because the mailed copy of the form has a scanned signature on it rather than a wet-ink one. Appellants contend that a voter may be denied the right to vote on this basis even though the scanned versus wet-ink distinction has no bearing on their qualifications, even though the wet-ink signature is not used by county registrars in any meaningful way, and even though scanned signatures are acceptable in myriad other legal contexts under Texas law, *including when signing a voter registration application through the Department of Public Safety* On those facts, denying a voter's application to register based on the wet-ink-copy requirement would violate the Civil Rights Act's Materiality Provision. *See* 52 U.S.C. § 10101(a)(2)(B).

The Materiality Provision protects qualified voters from being denied the right to vote based on minor, immaterial errors on voting-related paperwork. It prohibits the right to vote from being denied due to an error or omission on a "record or paper" related to registration or

voting where the error or omission "is not material in determining whether [a voter] is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Texas may not deny the vote by enforcing extraneous paperwork requirements that are unrelated to a voter's qualifications to vote, like the wet-ink-copy requirement here.

But in any case, whatever the Court does with the wet-ink-copy requirement at issue here, it should decide this case on narrow grounds, and reject Appellants' various suggestions to limit the Materiality Provision's enforceability, or to alter its scope—suggestions that contravene the statute as Congress wrote it.

Appellants' private-right-of-action arguments lack merit, and courts have repeatedly rejected them. The Materiality Provision is enforceable via 42 U.S.C. § 1983 because it contains quintessential rights-creating language—it guarantees "the right of any individual to vote in any election," 52 U.S.C. § 10101(a)(2)(B). *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). Moreover, the statute itself also provides an implied right of action, as demonstrated by its text, structure, and history. *See Alexander v. Sandoval*, 532 U.S. 275, 286-93 (2001). For example, the statutory text refers to private enforcement, conferring

federal jurisdiction over enforcement actions by a "party aggrieved." *See* 52 U.S.C. § 10101(d). And the legislative history could not be more explicit: The Attorney General, who drafted the 1957 Act that authorized public enforcement of Section 10101, told Congress that "private people will retain the right they have now to sue in their own name." *See Civil Rights Act of 1957: Hearings on S. 83*, 85th Cong. 67-73 (1957).

Appellants' arguments regarding the scope of the statute fail, too. They argue that the statute requires proof of racial discrimination, but no such requirement appears in the statutory text. Appellants' conspicuously rely on the inclusion of a discrimination requirement in *other subsections* of Section 10101—a mismatch that highlights the lack of any such requirement in the Materiality Provision. Nor is there any constitutional problem with this plain-text reading. Congress may enact prophylactic, race-neutral provisions that curb discrimination. *E.g.*, *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). Indeed, *City of Boerne* itself identified race-neutral federal voting rights protections as the paradigmatic example of permissible prophylactic legislation. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997).

Appellants are also wrong to suggest that a voter whose registration is rejected is not denied the right to vote. Under Section 10101, denial of the right to vote includes the denial of "registration." 52 U.S.C. §§ 10101(a)(3)(B), (e). Appellants argue that a voter can "cure" the rejection, but this supposed opportunity to cure only becomes available after "the registrar rejects an application" for registration, Tex. Elec. Code § 13.073(c), *i.e.*, after a voter's rights under the Materiality Provision have been denied. Nor in any case would this "cure" obviate the problem, because the "cure" Appellants point to is just resubmitting the form, which can be rejected again for the same immaterial paperwork error.

This Court should resolve this case on narrow grounds, consistent with the context-specific analysis the Materiality Provision requires. Here, on the record and findings below, the wet-ink-copy requirement is an immaterial paperwork requirement with no bearing on a person's qualifications to vote. It cannot serve as a basis for denying valid Texas voters their right to vote.

ARGUMENT

I. THE MATERIALITY PROVISION IS PRIVATELY ENFORCEABLE.

The Materiality Provision may be privately enforced in at least two ways—through an action under 42 U.S.C. § 1983, and directly via an implied private right of action under Section 10101 itself.

A. The Materiality Provision Is Enforceable Via a Section 1983 Action.

The question of Section 1983 enforceability begins—and typically ends—with a determination of "whether Congress intended to create a federal right." *Gonzaga*, 536 U.S. at 283. Enacted as part of the Reconstruction-Era Enforcement Acts, Section 1983 "opened the federal courts to private citizens," *Mitchum v. Foster*, 407 U.S. 225, 238 (1972), providing a right of action where a person has been "subjected … to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States, 42 U.S.C. § 1983. Accordingly, where federal law secures an individual right, "the right is presumptively enforceable by § 1983." *Gonzaga*, 536 U.S. at 284.

Congress plainly intended to create a personal, individual right with the Materiality Provision. The statute's mandatory language (*i.e.*, "No person … shall deny") and clear focus on individual, personal rights

(*i.e.*, "the right of any individual to vote") are strikingly similar to (if not more explicit than) the rights-creating language in other civil rights statutes that the Supreme Court has deemed privately enforceable. *See*, *e.g.*, *Gonzaga*, 536 U.S. at 284 & n.3 (language mandating that "[n]o person … shall be subject to discrimination" in federally-supported programs indicates an individual right).[2] The Materiality Provision's text is "clearly analogous to the right-creating language cited by the Supreme Court in *Gonzaga*." *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003); *see also, e.g.*, *La Union del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2022 WL 3045657, at *30 (W.D. Tex. Aug. 2, 2022).

Because the Materiality Provision "confers an individual right, the right is presumptively enforceable." *Gonzaga*, 536 U.S. at 284. Defendants can rebut that presumption by "showing that Congress

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[2] Contrary to Appellants' suggestion (at 25), the Materiality Provision is nothing like the statute at issue in *Alexander v. Sandoval*. That statute, Section 602 of Title VI, involved a grant of administrative rulemaking authority to the Department of Justice—an internal rule "focus[ing] on the person regulated" (*i.e.*, a federal department) rather than the beneficiaries of the eventual rulemaking. 532 U.S. at 288-89. By contrast, *Sandoval* expressly acknowledged that Title VI's substantive provisions (Section 601), to which the Materiality Provision is actually analogous, *do* create an enforceable individual right. *Id.* at 279.

'specifically foreclosed a remedy under § 1983.'" *Gonzaga*, 536 U.S at 284 n.4 (citation omitted). To do so, they must point either to "specific evidence from the statute itself," or to "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.*; *see also Blessing v. Freestone*, 520 U.S. 329, 341 (1997). That showing is difficult to make, and the presumption is rebutted only in "exceptional cases." *Cf. Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994).

The presumption of Section 1983 enforceability cannot be rebutted here—indeed, Appellants' brief does not even try. As discussed below, far from precluding Section 1983 enforcement, Section 10101's text affirmatively contemplates private suits, for example, by providing federal jurisdiction for actions by a "party aggrieved" by the denial of the right to vote. 52 U.S.C. § 10101(d); *Migliori v. Cohen*, 36 F.4th 153, 160 (3d Cir. 2022) (statute "specifically contemplates an aggrieved party (*i.e.*, private plaintiff) bringing this type of claim in court"), *vacated as moot*,

No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022); *see also id.* at 164-65 (Matey, J., concurring).[3] *See also infra* pp. 13-16.

Nor is there any incompatible remedial scheme that makes Section 1983 enforcement impossible. *See, e.g.*, *Blessing*, 520 U.S. at 341. As Justice Alito explained (in a unanimous opinion), it is "the existence of a more restrictive private remedy," which is necessarily incompatible with Section 1983's broader private remedy scheme, that is "the dividing line" between those cases where a Section 1983 action will lie, and those where the presumption of Section 1983 enforceability is rebutted. *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 256 (2009). More restrictive *private* remedies define the "dividing line" because they typically require private plaintiffs "to comply with particular procedures and/or to exhaust particular administrative remedies prior to filing suit," restrictions which

[3] The Supreme Court vacated *Migliori* as moot pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See Ritter v. Migliori*, No. 22-30, 2022 WL 6571686 (U.S. Oct. 11, 2022). Decisions vacated as moot are still "persuasive" authority. *Polychrome Int'l Corp. v. Krigger*, 5 F.3d 1522, 1534 (3d Cir. 1993); *see also Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 328 (4th Cir. 2021). Especially when considering out-of-circuit precedent, vacatur is "irrelevant" in assessing a decision's persuasive force. *Barrett v. Harrington*, 130 F.3d 246, 258 n.18 (6th Cir. 1997).

could be "circumvent[ed]" if broader Section 1983 relief was available. *Id.* at 254 (citation omitted).

By contrast, "the mere existence" of a parallel *public* remedy "is inadequate, without more, to rebut the presumption" of private Section 1983 enforceability. *Migliori*, 36 F.4th at 162 (citing *Fitzgerald*, 555 U.S. at 256). Here, Appellants' gesture (at 25-26) at the parallel public remedy of Attorney General enforcement in subsection 10101(c)—and nothing else—cannot rebut the presumption of Section 1983 enforceability.[4]

B. The Materiality Provision Is Enforceable Via an Implied Private Right of Action.

The Materiality Provision is also enforceable via an implied private right of action, even setting aside Section 1983. A statute is enforceable via an implied right of action where (1) Congress intended to create an individual right, and (2) Congress intended a private remedy to enforce

[4] Appellants argue (at 22-24) that Vote.org as an entity cannot sue under Section 1983. But "a business … may properly assert its … customers' … rights where the violation of those rights adversely affects the financial interests or patronage of the business." *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252 (5th Cir. 1995) (citing *Craig v. Boren,* 429 U.S. 190 (1976)). The wet-ink-copy rule affects Vote.org's patronage by rendering its platform ineffective.

that right. *See Sandoval*, 532 U.S. at 286; *S.D. ex rel. Dickson v. Hood,* 391 F.3d 581, 588-90 (5th Cir. 2004).

The *Sandoval* test's first part (the existence of a private right) is identical to the Section 1983 enforceability analysis under *Gonzaga*, 536 U.S. at 283. *See supra* pp. 6-10. As to the second part (the private remedy), the structure, text, and legislative history of the statute demonstrate that Congress contemplated private lawsuits to enforce the rights guaranteed in Section 10101.

1. The statutory structure shows that Congress intended a private remedy.

The way Congress constructed Section 10101 demonstrates its intention to continue a longstanding scheme of private enforcement. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("evolution" of statutory provisions at issue is relevant to textual meaning); *see also, e.g.*, *Chamber of Com. v. Dep't of Lab.*, 885 F.3d 360, 372 (5th Cir. 2018).

Section 10101 (formerly 42 U.S.C. § 1971) was originally part of the civil rights laws passed by Congress in the Reconstruction Era. In particular, current Section 10101(a)(1), which provides that all citizens "who are otherwise qualified by law to vote … shall be entitled and allowed to vote … without distinction of race, color, or previous condition

of servitude," was adopted as part of the Enforcement Act of 1870. *See* Act of May 31, 1870, ch. 114, 16 Stat. 140, 140-42.

Those original civil rights laws were always enforced by private parties. Indeed, "from the enactment of § 1983 in 1871 until 1957, plaintiffs could and did enforce the provisions of § 1971 under § 1983." *Schwier*, 340 F.3d at 1295. Such private actions included, for example, *Smith v. Allwright*, 321 U.S. 649 (1944), which invalidated white primary laws in a suit brought under the Enforcement Acts. *Id.* at 658; *see also, e.g.*, *Chapman v. King*, 154 F.2d 460, 464 (5th Cir. 1946); *Mitchell v. Wright*, 154 F.2d 924, 926 (5th Cir. 1946); *Brown v. Baskin*, 78 F. Supp. 933 (E.D.S.C. 1948).

In 1957, Congress codified the original, privately-enforced voting rights statute from the Enforcement Act at what is now subsection 10101(a)(1). It also added new provisions: subsection 10101(b), prohibiting voter intimidation; subsection 10101(c), granting the Attorney General new authority to bring civil enforcement actions; and subsection 10101(d), confirming the federal courts' jurisdiction in *all* actions brought "pursuant to this section," to be exercised "without regard to whether the party aggrieved shall have exhausted any

administrative or other remedies that may be provided by law." 52 U.S.C. § 10101(c), (d); *see* Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 637. In 1964, Congress further added the Materiality Provision to subsection 10101(a)(2), alongside the original provision from the 1870 Act. Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241.

Congress engineered Section 10101 with the privately-enforced voting rights guarantee from the 1870 Enforcement Act as its foundation. It then added additional substantive voting rights guarantees to subsection 10101(a) (including the Materiality Provision), indicating that those guarantees would similarly be privately enforced.[5]

2. The statutory text shows that Congress intended a private remedy.

Two subsections of Section 10101 specifically discuss *who* may sue to enforce those rights. One makes clear private parties may do so; the

[5] Appellants' statement that "the materiality provision was not enacted until 1964, some seven years after the enforcement provision" (Br. 27-28) is neither here nor there. Congress in 1964 placed the Materiality Provision in subsection 10101(a), alongside rights that had been privately enforceable for decades and subject to enforcement provisions expressly contemplating private enforcement by aggrieved parties. That is clear evidence that Congress intended a private remedy.

other provides for parallel Attorney General enforcement. The statutory text thus supports a private remedy.

Subsection 10101(d) confers federal jurisdiction over "proceedings instituted pursuant to this section," *i.e.*, pursuant to Section 10101. 52 U.S.C. § 10101(d). It then directs that such jurisdiction shall be assumed "without regard to whether the *party aggrieved* shall have exhausted any administrative or other remedies that may be provided by law." *Id.* (emphasis added).

Such "party aggrieved" language is "universally understood to mean the persons whose rights are being violated, *not* the Attorney General." *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 859 (W.D. Tex. 2020) (citing *Schwier*, 340 F.3d at 1296), *rev'd and remanded on other grounds*, 860 F. App'x 874 (5th Cir. 2021) (emphasis added). Congress's use of this term of art in describing who may institute "proceedings" under Section 10101 strongly indicates its intention to maintain a private remedy. *See Migliori*, 36 F.4th at 160; *Schwier*, 340 F.3d at 1296; *see also, e.g.*, *Lincoln v. Case*, 340 F.3d 283, 289 (5th Cir. 2003) ("The [Fair Housing Act] affords a private cause of action to any 'aggrieved person.'").

And Congress went further: It also authorized district courts to entertain suits brought by a "party aggrieved" *whether or not* they have exhausted administrative remedies. 52 U.S.C. § 10101(d). Such a specification would make no sense unless Congress contemplated private enforcement. The Attorney General could not be required to exhaust administrative remedies before bringing suit in federal court, but private litigants often face exhaustion requirements. Indeed, in the period before subsection 10101(d)'s enactment, federal courts had imposed just such an exhaustion requirement on private plaintiffs. *See Peay v. Cox*, 190 F.3d 123 (5th Cir. 1951) (cited in H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1966, 1975-1976). Subsection 10101(d)'s elimination of exhaustion requirements for actions brought "under this section" only makes sense as an effort to remove "procedural roadblocks" to private lawsuits. *See, e.g.*, *Schwier*, 340 F.3d at 1296.

The addition of parallel Attorney General enforcement is not to the contrary. Subsection 10101(c) provides that the Attorney General "may institute for the United States … a civil action" to enforce the substantive rights set forth in subsections 10101(a) and (b). That language—"may institute"—is not exclusive. Congress often grants the Attorney General

a right of action while also allowing private enforcement, especially in the civil rights and voting rights contexts. *See, e.g.*, *Sandoval*, 532 U.S. at 279-80; *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996); *see also Fitzgerald*, 555 U.S. at 252-59. That is precisely what Congress did here. *See Migliori*, 36 F.4th at 160; *Schwier*, 340 F.3d at 1296.

Other provisions in Section 10101 further evidence this parallel private/public enforcement scheme. The statute sets forth certain special remedies (like federal monitoring and "voting referees") that may apply in a "proceeding instituted by the United States," 52 U.S.C. § 10101(g); *see also* 52 U.S.C. § 10101(e) (remedies in a "proceeding instituted pursuant to [§ 10101(c)]"). If Congress had intended Attorney General civil actions to be the *exclusive* means of enforcement, it could have referred simply to proceedings "pursuant to this section"—the language it used in subsection 10101(d). Congress's decision to specify Attorney General actions in some places, but to speak more expansively in others, corroborates that it intended parallel private/public enforcement. *See Russello*, 464 U.S. at 23 (rejecting the conclusion "that the differing language in the two subsections has the same meaning in each.").

3. Legislative history shows that Congress intended a private remedy.

The legislative history further supports the conclusion. For instance: The sitting Attorney General, whose office wrote the 1957 Act, explicitly testified that the legislation, by adding parallel government enforcement, would "not tak[e] away the right of the individual to start his own action ... Under the laws amended if this program passes, private people will retain the right they have now to sue in their own name." *See Civil Rights Act of 1957: Hearings on S. 83*, 85th Cong. 67-73 (1957); *accord id.* at 59-61; *see also id.* at 203 (noting Department of Justice "drafted th[e] legislation").

The House Report accompanying the 1957 Act is in accord. It explains that, in adding Attorney General enforcement of Section 10101, Congress sought to "*supplement* existing law." H.R. Rep. No. 85-291, at 1976 (emphasis added). The "existing law" to be "supplement[ed]" was the system of private enforcement, including under Section 1983, which had long "been used to enforce the rights … as contained in section 1971." *Id.* at 1977 (collecting cases). Congress sought to strengthen private enforcement actions by "chang[ing] existing laws" to statutorily overrule court decisions requiring that private plaintiffs exhaust administrative

remedies, so that private enforcement suits could proceed "regardless of whether or not *the party thereto* shall have any administrative or other remedies provided by law." *See* H.R. Rep. No. 85-291, at 1975-1976 (emphasis added). Congress's evident concern that a "party" in a civil rights case might face exhaustion requirements further confirms that Congress contemplated private enforcement of Section 10101.

4. The case law supports a private remedy.

The weight of the case law supports the same conclusion. Two comprehensive appellate court decisions address the issue—the Third Circuit's recent decision in *Migliori*, and the Eleventh Circuit's in *Schwier*. Both held that the Materiality Provision is enforceable under Section 1983, after exploring the extensive evidence that Congress intended private enforcement. *Migliori*, 36 F.4th at 159-162; *Schwier*, 340 F.3d at 1295-96. Other recent decisions agree a private right of action exists to enforce the Materiality Provision. *See, e.g.*, *League of Women Voters of Ark. v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021); *Hughs*, 474 F. Supp. 3d at 859. And many courts (including this one) have adjudicated materiality claims brought by private parties. *See, e.g.*, *Taylor v. Howe*, 225 F.3d 993, 996

(8th Cir. 2000); *Coal. for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1371 (N.D. Ga. 2005).

Contrary authority is scant. Most prominently, in 2000, before *Gonzaga* or *Sandoval*, the Sixth Circuit held that the Materiality Provision "is enforceable by the Attorney General, not by private citizens." *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000). Those ten words (plus a citation to an equally conclusory district court opinion) comprised the entirety of the *McKay* court's analysis. More recently, the Sixth Circuit reaffirmed that holding, but solely because the *McKay* precedent "binds this panel." *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 629-30 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017). Unlike in *Migliori* or *Schwier*, the Sixth Circuit never even tried to apply the rigorous analysis required under the modern private-right-of-action standard.[6] Properly applied, that analysis can only yield one result: Section 10101 is privately enforceable, as Congress intended.

[6] The other cases Appellants cite (at 27) likewise lack any analysis other than a cursory reference to 52 U.S.C. § 10101(c).

II. THE MATERIALITY PROVISION APPLIES TO IMMATERIAL ERRORS OR OMISSIONS ON VOTING-RELATED PAPERWORK.

The Materiality Provision prohibits denying "the right of any individual to vote in any election" based on 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). In plain terms, it applies where a state actor denies the right to vote based on a minor paperwork error, if that error is unrelated to a voter's eligibility. 52 U.S.C. § 10101(a)(2)(B); *see also, e.g.*, *Browning*, 522 F.3d at 1175; H.R. Rep. No. 88-914 (1963), *reprinted at* 1964 U.S.C.C.A.N. 2391, 2491 ("state registration officials" must "disregard minor errors or omissions if they are not material in determining whether an individual is qualified to vote").

The Materiality Provision does not apply to the vast majority of rules governing the voting process. It does not apply to what days or hours the polls are open, where they are located, when or how a mail ballot must be sent or delivered, whether voting is held in person or by

mail or online, or how candidates appear on the ballot.[7] It *does* apply where voters are denied the right to vote based on legally inconsequential errors or omissions on voting- or registration-related paperwork.

The statute is implicated here because the challenged wet-ink-copy rule means that voters' registrations will be rejected:

(1) based on an "error or omission" (here, providing a scanned rather than wet-ink signature);

(2) on a "record or paper" that is made "requisite to voting" (here, the mailed copy of the registration form, which Texas purports to require to accept a voter's registration);

(3) that is immaterial to whether the voter "is qualified under State law to vote in [the] election" (which it is here, because the record demonstrates that a scanned signature validly attests to a voter's qualifications and that registrars do not use the wet-ink-copy to verify those qualifications[8]).

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[7] It certainly does not apply to "virtually every rule governing how citizens vote." *Vote.org v. Callanen*, 39 F.4th 297, 305 n.6 (5th Cir. 2022).

[8] *See Vote.org v. Callanen*, No. SA-21-CV-00649-JKP, 2022 WL 2181867, at *8 (W.D. Tex. June 16, 2022); Appellee's Br. 6-7, 38-39 (collecting ROA citations).

52 U.S.C. § 10101(a)(2)(B).

Appellants' suggested reasons why the wet-ink-copy requirement might be material (at 34-37) do not pass muster.

First, Appellants tautologically suggest that the wet-ink-copy requirement is material to a voter's qualifications because a voter must meet all of the voter registration requirements in order to be qualified. Appellants' Br. 34-35 (citing *Vote.org v. Callanen*, 39 F.4th 297, 307 (5th Cir. 2022)). That logic would erase the Materiality Provision from existence, by defining *whatever* requirements might be imposed for voter registration, no matter how trivial (using green ink; writing the day of the week on which one was born; circling gerunds in the Declaration of Independence), as being "material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). *Cf. United States v. Mississippi*, 380 U.S. 128, 137-38 (1965) (phrase "otherwise qualified by law" in Section 10101(a)(1) cannot include unconstitutional laws; Congress "obviously" meant "qualifications required of all voters by valid state or federal laws"). The common-sense reading of the statute is that "qualified under State law

to vote in such election" refers to the characteristics that make one eligible to register and vote, such as age, residence, and the like.[9]

Second, Appellants argue that the wet-ink copy requirement is material because it might help "deter voting fraud." Appellants' Br. 36. But general anti-fraud purposes are irrelevant for purposes of the Materiality Provision: If an error or omission is not "material in determining whether [a mail ballot voter] is qualified under State law to vote," 52 U.S.C. § 10101(a)(2)(B), it may not be used to disenfranchise voters based on some freestanding anti-fraud rationale. *See Schwier v. Cox*, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (agreeing that requiring social security numbers "could help to prevent voter fraud" but holding that doing so violated the Materiality Provision), *aff'd*, 439 F.3d 1285 (11th Cir. 2006); *accord Migliori*, 36 F.4th at 163. Nor does the factual record support any fraud-deterrence rationale here. The record instead

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[9] *E.g.*, *Schwier*, 340 F.3d at 1297 (stating that "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" and citing O.C.G.A. § 21-2-216 (2020), which lists those as well as the requirement that a voter be "[r]egistered as an elector in the manner prescribed by law").

demonstrates that when county officials investigate violations of the election code, "the investigating official uses a scanned image of the registration signatures, not the original, wet signature," and that "[a]t no time is an original, wet signature used to conduct a voter-fraud investigation." *Vote.org v. Callanen*, No. SA-21-CV-00649-JKP, 2022 WL 2181867, at *10 (W.D. Tex. June 16, 2022).

Appellants' best argument is the suggestion that a physically signed, wet-ink form is required to properly attest to a voter's qualifications. Appellants' Br. 35-37. That might be a close question on a different set of state laws, or even a different factual record. But here, the record shows, and the trial court found, that Texas state and county officials do not use the wet-ink copy to verify a voter's attestation in the registration form. *See Vote.org*, 2022 WL 2181867, at *10-*11; *see supra* p. 21 n.8. The record also shows, and the trial court also found, that Texas law otherwise accepts scanned or digitally-reproduced signatures as sufficient for attestation purposes in numerous legal contexts, *including when a voter registers to vote at the Department of Public Safety*. *Vote.org*, 2022 WL 2181867, at *8; Appellee's Br. 5-7, 39-40, 49, 53-54 (collecting ROA citations).

The fact that counties accept scanned signatures for some voter registration forms but require handwritten ink signatures for others highlights the immateriality of the wet-ink-copy requirement. On this record, the wet-ink-copy requirement is little different than one concerning "the color of ink to use in filling out the form." *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006).

On this record, the Court should affirm. But, no matter how the Court resolves the narrow merits question of whether the wet-ink copy is material in verifying a voter's qualifications, it should not entertain Appellants' invitation to misinterpret the statute and impose broad-based limitations on the Materiality Provision that Congress never contemplated.

A. The Materiality Provision Applies Without Regard to Racial Discrimination.

Appellants misread the statute to argue that the Materiality Provision requires a showing of racial discrimination. Appellants' Br. 29-31. In interpreting an unambiguous statute, a court's "inquiry begins with the statutory text, and ends there as well." *E.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citations omitted). Here, the relevant statutory text is unambiguous: Nothing in the Materiality

Provision's language mentions race or racial animus. *See* 52 U.S.C. § 10101(a)(2)(B). Rather, the statute specifies that the right to vote may not be denied "because of an error or omission" on voting-related paperwork that "is not material in determining" a voter's qualifications. *Id.* Appellants' proposed new discrimination requirement has no basis in the statute's plain text.

Appellants point out (at 30) that *other* subprovisions of Section 10101 (namely subsection 10101(a)(1)) *do* mention race and racial animus, but that does not help them. But "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *E.g.*, *Russello*, 464 U.S. at 23 (citations omitted); *see also, e.g.*, *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 441 & n.44-45 (5th Cir. 2021). Here, Congress prohibited denial of the right to vote on the basis of "race, color, or previous condition of servitude" in subsection 10101(a)(1), but with the Materiality Provision, it prohibited vote denial on a different basis. Congress knew how to make racial discrimination an element of a statutory violation, but did not do so with the Materiality Provision.

Appellants do not propose "[r]eading the materiality provision within its statutory context" (Appellants' Br. 30); they ask this Court to write into the statute substantive language that Congress deliberately left out. *See, e.g.*, *Migliori*, 36 F.4th at 162 n.56 (statute "does not mention racial discrimination" and therefore "we cannot find that Congress intended to limit this statute to either instances of racial discrimination or registration"); *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 639 (W.D. Wis. 2021) (statutory text "isn't limited to race discrimination or voter registration").[10]

Nor does this plain-text reading result in any "constitutional problems," as Appellants suggest (at 30-31). Congress added the Materiality Provision to Section 10101 in 1964 in response to the practice of rejecting Black voters' registrations for typos and other "trivial

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[10] Nor does the Materiality Provision apply "only [to] voter registration specifically and not to all acts that constitute casting a ballot," *Vote.org*, 39 F.4th at 306 & n.6. The statute applies to immaterial errors "on any record or paper relating to any application, registration, *or other act requisite to voting*." 52 U.S.C. § 10101(a)(2)(B) (emphasis added). Limiting the provision's scope to records or papers relating to "registration" would render the specification of records or papers related to "any … other act requisite to voting" a dead letter. *See Migliori*, 36 F.4th at 162 n.56; *see also*, *e.g.*, *Thomsen*, 574 F. Supp. 3d at 636; *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018).

reasons" in filling out the requisite forms. H.R. Rep. No. 88-914, 1964 U.S.C.C.A.N. at 2491. Notwithstanding the urgent aim of addressing disenfranchisement in the Jim Crow South, Congress used race-neutral terms to provide more broadly for a prophylactic against unfair disenfranchisement, the better to protect the fundamental right to vote for all. *See Browning*, 522 F.3d at 1173 ("in combating specific evils," Congress may "choose a broader remedy"); *see also, e.g.*, *Hibbs*, 538 U.S. at 727-28 ("Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."); *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (upholding ban on literacy tests).

Assuming that (as Appellants suggest) the "congruent and proportional" rubric from *City of Boerne v. Flores* applies, the voting rights measures in the 1964 Civil Rights Act and 1965 Voting Rights Act, which include the Materiality Provision, are paradigmatic examples of valid remedial legislation, as *City of Boerne* itself said. *See* 521 U.S. at 518 (noting the validity of Congress's "suspension of literacy tests and similar voting requirements" as well as "other measures protecting voting rights" and collecting cases); *see also, e.g.*, *Hibbs*, 538 U.S. at 738

(Voting Rights Act was a "valid exercise[] of Congress' § 5 power"); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 373 (2001) (similar).[11] Moreover, the legislative record Congress amassed in passing the Materiality Provision contained substantial evidence that minor paperwork errors were being arbitrarily used to deny voting rights to Black citizens. *See, e.g.*, H.R. Rep. No. 88-914, 1964 U.S.C.C.A.N. at 2491.

B. The Materiality Provision Applies to a Denial of Registration Even Though a Voter Can Try Again.

Appellants also argue that, even though this case involves the outright rejection of qualified Texans' voter registrations, there has been no denial of the right to vote within the meaning of the Materiality Provision. Appellants' Br. 32-34. That argument fails, too.

The Materiality Provision's definition of vote denial includes the rejection of a voter registration application. The statute defines "vot[ing]" as including "all action necessary to make a vote effective including, but not limited to, *registration* or other action required by

[11] That is in addition to Congress's power to regulate federal elections pursuant to the Elections Clause, U.S. Const. Art I, § 4, cl. 1.

State law prerequisite to voting." 52 U.S.C. § 10101(e) (emphasis added); *see also id.* § 10101(a)(2)(B) (errors or omissions "on any record or paper relating to any application [or] registration" covered). The statute thus expressly defines the denial of voter registration as a denial of the protected right to vote. *See Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021). Meanwhile, Texas law unambiguously provides that, when a voter registration application does not comply with any requirement, the county registrar "shall reject the application" for registration, Tex. Elec. Code § 13.072, leaving the voter unable to vote. The rejection triggers the Materiality Provision.

Appellants argue (at 32) that the option of faxing or electronically sending registration applications was only added a decade ago, but that is irrelevant. While there may be no constitutional right to return a voter registration form by fax, *all* voter registration forms, however submitted, are still subject to the same basic federal law requirements—including the requirement that voters may not be rejected for immaterial paperwork errors. Likewise, it does not matter that Texas law provides other modes of registration not subject to the wet-ink-copy requirement. *See* Appellants' Br. 33-34. *Any and all* modes of registration offered by

the State must comply with federal law, and may not result in qualified Texas voters' registration applications being rejected based on immaterial paperwork errors.

Appellants' main argument is that a "cure provision" in the Texas Election Code "prevents the signature requirement from causing any qualified Texan to be deprived of his right to vote." Appellants' Br. 32-33; *see also Vote.org*, 39 F.4th at 305-06. But the existence of that purported cure process changes nothing.

The cure process to which Appellants point merely allows a voter to re-submit a new "completed application" for registration, Tex. Elec. Code § 13.073(c). And this "cure" only becomes available once "the registrar *rejects* an application" for registration. *Id.* (emphasis added). Under Appellants' logic, any paperwork requirement, no matter how immaterial, could be used to deny a voter the right to vote. Texas could require that voters correctly list the license plate number of their car or the name of their kindergarten teacher on their voter registration application, reject voters' applications for failure to do so, and then avoid application of the Materiality Provision by pointing to the fact that voters may yet be able to comply with the patently immaterial requirements.

That is not how this works: If an error or omission is immaterial, then the registration form must be *accepted*, not rejected with an invitation to try again.[12] *See, e.g.*, *La Union del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2022 WL 1651215, at *21 (W.D. Tex. May 24, 2022) (Materiality Provision "does not say that state actors may initially deny the right to vote based on errors or omissions that are not material as long as they institute cure processes").

Courts have rejected Appellants' argument before. For example, in *Washington Association of Churches v. Reed*, which involved a challenge to Washington's registration requirement that the driver's license number or social security number from a voter's registration application must match information contained in a state database, the court found it irrelevant that, in the event of a mismatch, the voter would be provisionally registered to vote and contacted by the county. 492 F. Supp.

[12] Nor is there any reason to think that the "cure" process will actually be used by all or most voters. As the district court acknowledged, prospective voters must overcome multiple barriers to "cure" their purported error. *Vote.org*, 2022 WL 2181867, at *12-*13. A voter does not "forfeit[]" their voting rights, as Appellants suggest (at 34), merely because they were unable to find a workaround after trying to register and being unlawfully denied.

2d 1264, 1266, 1271 (W.D. Wash. 2006); *see also* Defs.' Resp. to Mot. for Prelim. Inj. at 3, 5-6, 10-11, 15, *Washington Ass'n of Churches v. Reed*, Case No. 2:06-cv-00726-RSM, Dkt. 37 (W.D. Wash. July 12, 2006) (setting forth this argument). And the "cure" Appellants point to here is significantly less protective of the right to vote than that in *Reed*.

Rejecting qualified Texas voters' registration applications based on an immaterial paperwork error regarding the ink used to print their signature is a denial of the right to vote and a violation of federal law.

CONCLUSION

The Court should affirm.

Respectfully submitted,

Dated: November 4, 2022

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CERTIFICATE OF SERVICE

I, Ari J. Savitzky, hereby certify that a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by electronic mail to all parties by the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

SO CERTIFIED, this 4th day of November, 2022.

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