Marc E. Elias*
Elisabeth C. Frost*
Christopher D. Dodge*
Mollie DiBrell*
Alexander F. Atkins*
Daniela Lorenzo*
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW
Suite 400
Washington, DC 20001
Phone: (202) 968-4513
Facsimile: (202) 968-4498
melias@elias.law
efrost@elias.law
cdodge@elias.law
mdibrell@elias.law
aatkins@elias.law
dlorenzo@elias.law

Roy Herrera (Bar No. 032901)
Daniel A. Arellano (Bar No. 032304)
Jillian L. Andrews (Bar No. 034611)
HERRERA ARELLANO LLP
530 East McDowell Road
Suite 107-150
Phoenix, Arizona 85004-1500
Phone: (602) 567-4820
roy@ha-firm.com
daniel@ha-firm.com
jillian@ha-firm.com

Attorneys for Plaintiffs Mi Familia Vota and Voto Latino
**Admitted Pro Hac Vice*

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)

MFV PLAINTIFFS' REPLY IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

No. CV-22-00519-PHX-SRB
No. CV-22-01003-PHX-SRB
No. CV-22-01124-PHX-SRB
No. CV-22-01369-PHX-SRB
No. CV-22-01381-PHX-SRB
No. CV-22-01602-PHX-SRB
No. CV-22-01901-PHX-SRB

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As established in its motion for partial summary judgment, ECF No. 399 ("MFV Mot."), MFV is entitled to summary judgment on its claims under the Materiality Provision and NVRA Section 8(a). MFV is also entitled to summary judgment on its NVRA Section 6 claim and joins in DNC's motion. None of the officials actually responsible for running elections in Arizona—the Secretary of State and County Recorders—oppose. And nothing in the oppositions from the Attorney General and State (together, the "State") or the RNC provide reason to deny MFV summary judgment. MFV's motion should be granted.

ARGUMENT

I. The Materiality Provision may be enforced by non-United States plaintiffs via Section 1983 and directly under the Civil Rights Act.

As a matter of law, the non-US Plaintiffs may enforce the Materiality Provision via § 1983 and under the Civil Rights Act. The RNC alone contends otherwise, but its limited arguments fail. First, the RNC's contention that Congress did not, "in clear and unambiguous terms," create any rights in the Materiality Provision, RNC Resp. 12, is wrong. The Provision guarantees "the right of any individual to vote," specifically by protecting against the denial of that right "because of an error or omission on any record or paper relating to," among other things, a registration form, where the "error or omission is not material in determining whether" the person is "qualified" to vote. 52 U.S.C. § 10101(a)(2)(B). This language is unambiguous and "clearly analogous to the rights-creating language cited by the Supreme Court in *Gonzaga*." *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003). Indeed, it is remarkably similar to rights-creating language that the Supreme Court found sufficient in *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1458 (2023), just a month ago, a decision that the RNC ignores.

Rather than grapple with this clear rights-creating text, the RNC makes the curious assertion that the Materiality Provision does not "fashion any new 'right' at all" because the right to vote is preexisting. RNC Resp. 13. But it cites no authority for the proposition that Congress may only confer novel, previously unheard-of rights in a statute. In many cases, Congress protects constitutional rights with statutory rights. Moreover, the RNC

ignores that the Materiality Provision does not confer an unqualified and abstract "right to vote," but a specific statutory right not to be denied the right "*because of an [immaterial] error or omission* 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). Congress created this novel statutory right because of a well-documented history of election officials imposing burdensome registration requirements on Black voters to deny them access to the franchise. *See Schwier*, 340 F.3d at 1294; *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008); 10 Cong. Rec. 6715 (1964).[1]

The RNC next argues that "a regulatory restraint on state actors" cannot confer a private right, RNC Resp. 13, but this argument was rejected by long-standing Ninth Circuit precedent the RNC again ignores. *See* MFV Mot. 11-12 (collecting cases). The RNC also ignores that the Supreme Court, too, rejected this argument in *Talevski*, explaining that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." 143 S. Ct. at 1458. The Court emphasized that it has "never so held." *Id*.[2]

The RNC is wrong to suggest the Attorney General's enforcement power precludes private enforcement. Defeating the presumption of private enforcement via § 1983 requires "*incompatibility* between enforcement under § 1983 and the enforcement scheme that Congress has enacted." *Talevski*, 143 S. Ct. at 1459 (emphasis added). The Supreme Court has found such "implicit preclusion" in only three cases, each of which "concerned statutes with self-contained enforcement schemes that included statute-specific rights of action." *Id.* at 1460-61 (collecting cases). The Materiality Provision contains no such scheme.

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[1] The Provision's text alone confers a private right. *See* RNC Resp. 13 n.3. But "contemporary legal context" can "buttress[]" conclusions supported by statutory text, *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001), as it does here, MFV Mot. 12-13.

[2] The cases the RNC cites to support its contention pre-date *Talevski* and are irrelevant because each statute at issue "lack[ed] rights-creating language." *Lil' Man in the Boat, Inc. v. City & Cnty. of S.F.*, 5 F.4th 952, 959-60 (9th Cir. 2021) (discussing cases). The Materiality Provision does not. *E.g.*, *Migliori v. Cohen*, 36 F.4th 153, 159 (3d Cir. 2022).

The RNC also argues that private enforcement of the Materiality Provision would render "superfluous" 52 U.S.C. § 10101(e), which it claims "authorize[s] private litigants to assert claims." RNC Resp. 14. Both the premise and the conclusion are wrong. First, what subsection (e) allows for is a special procedure in litigation initiated "upon request of the Attorney General," where the court finds a "pattern or practice" of vote denial "on account of race or color," for affected members of the targeted racial group to "appl[y]" for an "order declaring [the applicant] qualified to vote." 52 U.S.C. § 10101(e). This is nothing like a "comprehensive enforcement scheme" for the entire Civil Rights Act that is "incompatible with" private enforcement of the Materiality Provision. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). Nor is subsection (e)'s narrow application "incompatible with" private enforcement of the Materiality Provision. *Id.* "In focusing on what [§ 10101] contains, [the RNC] ignore[s] what it lacks—a private judicial right of action, a private federal administrative remedy, or any carefu[l] congressional tailor[ing] that § 1983 actions would distort." *Talevski*, 143 S. Ct. at 1461 (cleaned up).

The RNC also nowhere disputes that the Materiality Provision creates a private remedy. It does. MFV Mot. 14-15. If the Court finds the Provision creates a private right, it should hold it may be enforced through § 1983—because it creates a private right, *see Gonzaga*, 536 U.S. at 284—as well as directly under the Civil Rights Act—because it creates a private right *and* a private remedy, *id.* (quoting *Sandoval*, 532 U.S. at 292 n.8). The Court should grant MFV judgment on these points and deny the RNC's motion.

II. MFV is entitled to summary judgment on its Materiality Provision claims.

The record uniformly establishes that the officials that administer elections in Arizona do not deem HB 2492's Birthplace, Citizenship Checkbox, or Federal-Form DPOC Requirements material to determining whether an applicant is qualified to vote. The State does not dispute this evidence. State CSOF § 1 ¶¶ 35-47. As a result, there is no factual dispute as to whether these requirements are material to determining voter qualifications in Arizona: they are not. The Court should grant MFV summary judgment on these claims and deny the State's motion for judgment on the same.

A. The Materiality Provision looks to State election officials' actual means of qualifying voters.

Absent any evidence supporting its position, the State relies on a deeply flawed premise—that materiality is an isolated legal question turning on whether the information is objectively "relevant" to confirming voter eligibility, regardless of whether election officials actually use, or even *could* use, the information for this purpose. *See* State Resp. 27-28. That is not what the Materiality Provision says. It prohibits denying the right to vote for an error or omission if it "*is not* ***material*** *in* ***determining*** whether" a person "is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

And the cases applying the Materiality Provision look to what state election officials actually do, finding invalid laws that reject applications or ballots for errors or omissions that are not truly material to determining voter qualifications. *E.g.*, *Migliori*, 36 F.4th at 164 (3d Cir. 2022) (holding omission of dates on ballot envelopes immaterial in part because state accepted materials with wrong dates); *Ford v. Tenn. S.*, 2006 WL 8435145, at *10-11 (W.D. Tenn. Feb. 1, 2006) (requiring voters sign applications and poll books immaterial where state previously treated failure to sign as immaterial); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018) (finding birth year not material because "other Georgia counties do not require absentee voters to furnish such information *at all*"). Indeed, Congress enacted the Materiality Provision precisely to prohibit requiring information "relevant" to eligibility in the abstract, but immaterial in practice, such as demanding applicants provide their age in days. *Schwier*, 340 F.3d at 1294.

The State has no answer except to claim that "how election officials use [this] information is not the question." State Resp. 33. But under the plain language of the Materiality Provision, it absolutely is a relevant question. And even since MFV filed its motion, additional County Recorders have confirmed what the record already uniformly reflected—that no official responsible for administering elections in Arizona claims the information at issue is material to determining voter qualifications. (*See* Exhibit 1). The State attempts to avoid the clear consequence of this evidence, characterizing it as "not

dispositive," because the Court has the ultimate say on materiality. State Resp. 34. But these are not simply assertions about what these individuals think the law means, they are assertions by election officials charged with determining voter eligibility in Arizona about *whether or how this information is useful for this purpose*.

An examination of each of the requirements further illustrates the absurdity of the State's position, which asks the Court to ignore the evidence about the practical use of this information in favor of a flawed legal theory divorced from both the concerns of the Materiality Provision and the practical application of these new requirements.

B. The Birthplace Requirement is not material.

First, the State's argument that "a voter's place of birth . . . can help confirm the voter's identity," State Mot. 14, is pure speculation. The State points to no evidence showing that Arizona's election officials could use birthplace for this purpose; the only evidence on this point is that they cannot. MFV Mot. 4-5. The State's reliance on the alleged materiality of birthplace in *other contexts* only highlights the absence of any evidence showing it is material *here*. State Resp. 34. And while the State initially asserted that a few *other* states appear to require birthplace information for voter registration, it has now abandoned even that contention. *Id.* at 34 n.7. The undisputed record is that Arizona is the only state that will reject a person's registration for failure to include birthplace information. Non-U.S. Pls.' CSOF § 2 ¶¶ 9-11. The State's reliance on the suggestion of an out-of-circuit district court that "verifying an individual's identity is a material requirement," *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006), does not remedy the State's failure to explain *how the Birthplace Requirement* aids in confirming a voter registration applicant's identity, which is the key question here.

Perhaps sensing its identity-confirmation theory has fallen flat, the State shifts gears and revives its pleading-stage argument that birthplace is material to determining citizenship "in the sense that persons born in the United States are citizens," State Resp. 35—an argument it did not make in its opening motion and hence waived. *See, e.g.*, *Smith*

v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999). But the argument is undermined in any event by the State's own admission that that "[m]any persons born outside the United States become citizens." State Resp. 35. The State thus concludes that "birthplace is a sufficient but not necessary condition for citizenship," *id.*—hardly a persuasive rationale when "information that is unnecessary [is] not material." *La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 542 (W.D. Tex. 2022); *Martin*, 347 F. Supp. 3d at 1309 (similar). And the State does not even attempt to explain how birthplace could be material for purposes of identity *or* citizenship verification when Arizona's state registration form *already* requires DPOC (in addition to their name, address, and birthdate).

The State suggests that the Secretary's repeated admission that birthplace is *not* material to determining voter qualifications under state law, MFV Mot. 10 (collecting cites), should be discounted as merely the "previously expressed view" of that office. State Resp. 34. Not so. As an official capacity defendant, prior statements of the Secretary or his office remain "conclusively binding" on him unless affirmatively amended. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). The Secretary has not amended these admissions, or (to MFV's knowledge) ever even expressed a different view. Nor does the Secretary oppose MFV's motion. And in the Joint Rule 26(f) Report to which the State cites, the Secretary refers to the prior filings in the case as his own, stating he "has answered the complaints in all of the consolidated actions." ECF No. 281 at 10. Those include the Secretary's prior statements that birthplace is not material. MFV Mot. 4. If anything, that both the prior and current Secretaries admit that the Birthplace Requirement is immaterial to determining voter qualifications provides further reason to find in MFV's favor.

C. The Citizenship Checkbox Requirement is not material.

The Citizenship Checkbox Requirement is also immaterial to determining a voter's qualifications, and the State provides no reason to find otherwise. The State's argument that even if the checkbox is duplicative—which it is—that does not make it immaterial, State Resp. 29, ignores both logic and the Materiality Provision's text. If an election official

has already "determine[d]" that an applicant has satisfied a state-law qualification to vote, additional demands for the same information are, by definition, "not material" and can only serve to reject voters already found to be qualified. *See, e.g.*, *League of Women Voters of Ark. v. Thurston*, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) (finding immateriality "where State law requires absentee voters to provide some [] information several times and . . . they have correctly provided that information at least once"). The decision in *Diaz v. Cobb* supports MFV, not the State. There, the court found that Florida's citizenship checkbox was "*not* duplicative of signing [an] oath" because the oath did not include an affirmation of citizenship. 435 F. Supp. 2d 1206, 1212-13 (S.D. Fla. 2006). Here, in contrast, Arizona's redundant Citizenship Checkbox Requirement conveys the exact same information conveyed by the citizenship affirmation or DPOC.

The State has no real response except to assert that the Checkbox Requirement seeks duplicative information but in a "different manner." State Resp. 29. But this is the problem. Once an election official "determines" a person is "qualified under state law" based on the voter's provision of information in one manner, they may not deny them the right to vote for an error or omission in providing that same information in a different manner. 52 U.S.C. § 10101(a)(2)(B). The Materiality Provision was intended to prohibit exactly this. *Schwier*, 340 F.3d at 1294. The State's unsupported view that "in some ways" the "checkbox is a more specific way of eliciting information" is irrelevant—once an official has determined a registrant is a citizen, they need not reconfirm the point at the State's caprice.

Finally, the State suggests that procedures under HAVA pertaining to the citizenship checkbox on the Federal Form support finding materiality here. State Resp. 29. But HAVA says nothing about whether completing the checkbox is material to determining a voter's qualifications where they have already affirmed their citizenship, nor does it require rejection of applications due to failure to check a box. 52 U.S.C. § 21083(b)(4)(B). Moreover, the Election Assistance Commission ("EAC")—which HAVA created to advise states on compliance with the law—"advised the states" that because "[t]his subsection is

'subject to state law,'" they "may choose to honor the affirmation of citizenship [] that goes with the signing of the registration form and register a person who did not check the 'yes' box." *Edelman v. State*, 248 P.3d 581, 591 (Wash. App. 2011) (quoting EAC guidance).[3]

At bottom, the Citizenship Checkbox Requirement merely serves to trip up applicants who have already attested to their citizenship under penalty of perjury and threat of deportation or provided "*satisfactory evidence of United States citizenship*," A.R.S. § 16-166(F). No evidence shows it is material to determining an applicant's qualification to vote, whereas successive Secretaries of State have confirmed it is not. MFV Mot. 7.

D. The DPOC Requirement for Federal-Form Applicants is not material.

Requiring DPOC from Federal-Form applicants (even those already registered), who affirm their citizenship under penalty of perjury and threat of deportation, violates the Materiality Provision for the reasons above—once a recorder has determined an applicant is qualified, they may not reject them for failure to provide duplicative information. *Supra* §§ II(B)-(C); MFV Mot. 8-9. The State repeatedly relies on the decision in *Gonzalez*, State Resp. 32-33 (quoting *Gonzalez v. Arizona*, 2007 WL 9724581, at *2 (D. Ariz. Aug. 28, 2007)), but *Gonzalez* was cursory not just because it was "concise," *id*. at 33, but because it relied on no evidence, authority, or analysis in reaching its unaffirmed conclusion. Nor did it address whether Arizona may layer duplicative requests for citizenship information atop one another, including for those *already registered*. It may not.

The State also argues that, because DPOC is now a registration requirement under HB 2492, it is "akin to citizenship itself." *Id.* (citing A.R.S. § 16-101(A)(1)). This reasoning is not only circular; it is at odds with the Arizona Constitution, which, in listing the "[q]ualifications of voters" in addition to age, residency, capacity, and rights-restoration,

[3] The State's reliance on *Browning* is misplaced. Even "accepting the error" of failing to check the box "as true and correct," 522 F.3d at 1175, Arizonans must either swear to their citizenship or present documentary proof of it—a situation *Browning* did not address. Nor do Plaintiffs' Materiality Provision claims concern the scenario where a registration affirmatively checks the "no" box as to their citizenship. *Cf. Edelman*, 248 P.3d at 591.

provides only that a "person *be* a citizen of the United States." Ariz. Const. art. VII, § 2(A) (emphasis added). Arizona may not smuggle immaterial requirements past the Materiality Provision merely by labeling them voter qualifications. *Schwier*, 439 F.3d at 1286 (affirming registration requirement violated Materiality Provision even though registration was a qualification for voting under state law); *cf. Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (distinguishing qualifications from compliance with poll tax).

* * *

The law and record cut entirely in MFV's favor on its Materiality Provision claims. The State asks the Court to ignore the actual evidence—which uniformly establishes that the challenged requirements are immaterial. And because no one contends that further factual development will show otherwise, no dispute of *material* fact exists and resolution of these important claims should not be deferred until after an unset trial date. *See Fam. Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp.*, 525 F.3d 822, 827 (9th Cir. 2008) (finding no abuse of discretion to deny request to defer ruling on summary judgment when requesting party "failed to show how the evidence is 'essential' to oppose summary judgment").[4] In the alternative, the Court should deny the State's motion and hold open MFV's cross-motion until the close of fact discovery, provided MFV is permitted to renew its motion then and any supplemental briefing is limited to addressing new evidence bearing on the Materiality Provision claims.[5]

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[4] While the United States and LUCHA claim additional discovery is necessary under Rule 56(d), U.S. Mot. 21-23; LUCHA Mot. 6-7, they acknowledge that they anticipate that further discovery would only "further confirm" what the record already shows, *id.* As a result, it "will not yield information that creates a genuine dispute of material fact." *Tillman v. Everett*, 2020 WL 1904637, at *3 (D. Ariz. Apr. 17, 2020); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment."). Moreover, resolving *MFV's* claims now in no way precludes other plaintiffs with similar claims in their separate operative complaints from seeking judgment later.

[5] MFV recognizes the Court indicated at the case management conference that there would be no further summary judgment briefing after this round, and that the Court would hold

III. HB 2492 violates Section 8(a) of the NVRA.

Finally, MFV is also entitled to judgment on its NVRA Section 8(a) claim. HB 2492 prohibits county recorders from registering applicants to vote in all federal elections, or to vote by mail, if they cannot independently verify the applicant's sworn affirmation of citizenship on the Federal Form. HB 2492 § 4 (enacting A.R.S. § 16-121.01(D)-(E)). That violates Section 8(a)'s command that States "*shall* . . . ensure that any eligible applicant is registered to vote" in "elections for Federal office" if the Federal Form or other "valid voter registration form" is submitted or received at least 29 days before an election. 52 U.S.C. § 20507(a)(1); *see also* A.R.S. § 16-120(A) (setting Arizona's voter registration deadline 29 days before an election). Section 8(a) does not permit the State to deprive an eligible applicant who submits a timely Federal Form the opportunity to vote "in elections for Federal office" simply because the State wishes to further investigate the applicant's citizenship but cannot reach a conclusive determination. "[T]he unambiguous terms of the NVRA require[] Arizona to ensure that a qualified voter who submit[s] their [federal] registration application twenty-nine days before [an election] be registered to vote in that election." *Isabel v. Reagan*, 987 F.3d 1220, 1230 (9th Cir. 2021) (citing § 20507(a)).

The State does not disagree. It concedes it "is true" that under Section 8(a) recorders cannot refuse to register eligible Federal Form applicants simply because they failed to separately confirm that person's citizenship ahead of an election. State Br. 15. Because HB 2492 directly conflicts with Section 8, it is preempted. As the State itself explains, HB 2492 "could be preempted" to the extent "an eligible voter who submits a valid form at least [29]

"a trial on the merits of whatever's left after fact discovery." CMC Tr. 45:15-18. Here, however, summary judgment briefing on the Materiality Provision claims is essentially complete and resolving the claims after fact discovery would require, at most, limited supplemental briefing on new record evidence, allowing this matter to be expeditiously resolved before trial, without delaying setting a trial date. Moreover, MFV is not aware of a single Materiality Provision case that has been decided at trial; such claims are well-suited to resolution on summary judgment. That is particularly true here where the parties have fully briefed the relevant legal issues and dispute no material facts.

days . . . beforehand is not permitted to vote" in presidential elections or by mail, *id.*, the exact penalty HB 2492 imposes on registrants whose citizenship cannot be independently confirmed by county recorders. That is precisely the relief MFV seeks—an order requiring the County Recorders to register eligible Federal Form applicants for all Federal offices and to vote by mail even if the Recorder cannot independently verify their citizenship.

Despite these admissions, the State opposes summary judgment for abstract—and legally baseless—reasons. It charges that MFV has "identifie[d] no such case" in which a person has been deprived the right to vote in all Federal elections because of HB 2492. State Br. 15. But that is unsurprising—HB 2492 is not currently being enforced. More importantly, the State fundamentally misunderstands the law of federal preemption. It argues that HB 2492 can only be preempted "as applied" to *specific* voters who, despite submitting timely and valid applications, are not registered because county recorders cannot independently verify their citizenship. State Br. 15. But whether a state law is preempted by federal laws like the NVRA is not assessed on a case-by-case basis. Rather, courts answer "[t]he straightforward textual question" of whether the statute, *on its face*, "conflicts with the NVRA's mandate." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013). Where a state's election regulation is "inconsistent with" the NVRA, it must "give way." *Id.* at 15. On its face, HB 2492 is inconsistent with Section 8(a) because it forbids recorders to properly register timely and valid voter federal form applicants despite the NVRA's mandate that these voters be registered. HB 2492 is therefore preempted by, and must "give way" to, the NVRA, *Inter Tribal*, *id*. at 1, 15—Plaintiffs need not wait until a voter is denied their right to vote in a federal election before challenging a state law that, on its face, violates the NVRA's command.[6]

CONCLUSION

The Court should grant MFV's cross-motion for partial summary judgment.

[6] The RNC says HB 2492 complies with Section 8(a) because it does not regulate mail voting or presidential elections. RNC Br. 8-9. It does. DNC Mot. 7-15; DNC Reply 1-9.

Dated: July 19, 2023

Respectfully submitted,

/s/ Christopher D. Dodge
Roy Herrera (Bar No. 032901)
Daniel A. Arellano (Bar. No. 032304)
Jillian L. Andrews (Bar No. 034611)
HERRERA ARELLANO LLP
530 East McDowell Road
Suite 107-150
Phoenix, Arizona 85004-1500
Phone: (602) 567-4820
roy@ha-firm.com
daniel@ha-firm.com
jillian@ha-firm.com

Marc E. Elias*
Elisabeth C. Frost*
Christopher D. Dodge*
Mollie DiBrell*
Alexander F. Atkins*
Daniela Lorenzo*
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW
Suite 400
Washington, DC 20001
Phone: (202) 968-4513
Facsimile: (202) 968-4498
melias@elias.law
efrost@elias.law
cdodge@elias.law
mdibrell@elias.law
aatkins@elias.law
dlorenzo@elias.law

Attorneys for Plaintiffs Mi Familia Vota and Voto Latino
** Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

On this day, July 19, 2023, I caused the foregoing to be filed and served electronically via the Court's CM/ECF system upon all counsel of record.

/s/ Christopher D. Dodge
Christopher D. Dodge