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20 *Causa Action Fund*

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

23 MI FAMILIA VOTA, et al.  
24 Plaintiffs,  
25 v.  
26 ADRIAN FONTES, in his official  
27 capacity as Arizona Secretary of  
28 State, et al.,  
Defendants,  
and

Case No. 22-00509-PHX-SRB  
(Lead)

**PODER LATINX, CHICANOS POR LA  
CAUSA, AND CHICANOS POR LA  
CAUSA ACTION FUND’S REPLY  
BRIEF IN SUPPORT OF THEIR  
CROSS-MOTION FOR PARTIAL  
SUMMARY JUDGMENT ON COUNTS  
TWO AND SIX OF THEIR SECOND**

1 Speaker of the House Ben Toma and  
2 Senate President Warren Petersen,  
3 Intervenor-Defendants.

**AMENDED COMPLAINT**

4 LIVING UNITED FOR CHANGE IN  
5 ARIZONA, et al.,  
6 Plaintiffs,  
7 v.  
8 ADRIAN FONTES, in his official  
9 capacity as Arizona Secretary of  
10 State, et al.,  
11 Defendant,  
12 and  
13 STATE OF ARIZONA, et al.,  
14 Intervenor-Defendants,  
15 and  
16 Speaker of the House Ben Toma and  
17 Senate President Warren Petersen,  
18 Intervenor-Defendants.

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

14 PODER LATINX, et al.  
15 Plaintiff,  
16 v.  
17 ADRIAN FONTES, in his official  
18 capacity as Arizona Secretary of  
19 State, et al.,  
20 Defendants,  
21 and  
22 Speaker of the House Ben Toma and  
23 Senate President Warren Petersen,  
24 Intervenor-Defendants.

23 UNITED STATES OF AMERICA,  
24 Plaintiff,  
25 v.  
26 STATE OF ARIZONA, et al.,  
27 Defendants,  
28 and  
Speaker of the House Ben Toma and  
Senate President Warren Petersen,

1 Intervenor-Defendants.

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2 DEMOCRATIC NATIONAL  
3 COMMITTEE, et al.,

4 Plaintiffs,

5 v.

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

9 Defendants,

10 and

11 REPUBLICAN NATIONAL  
12 COMMITTEE,

13 Intervenor-Defendant,

14 and

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

17 Intervenor-Defendants.

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

21 Plaintiff,

22 v.

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

26 Defendants,

27 and

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

Intervenor-Defendants.

PROMISE ARIZONA, et al.,

Plaintiffs,

v.

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

Defendants,

and

1 Speaker of the House Ben Toma and  
2 Senate President Warren Petersen,  
3 Intervenor-Defendants.

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1           **I.       PODER LATINX AND CPLC CONTINUE TO HAVE STANDING.**

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

10           Poder Latinx and CPLC incorporate by reference their arguments concerning standing  
11 outlined in their Opposition to the State’s Consolidated Motion to Dismiss. *See* ECF No. 154 at  
12 7–9. To summarize, the Attorney General argues (again) that Poder Latinx and CPLC have not  
13 “articulated a plan to violate” A.R.S. § 16–165(I)<sup>2</sup> and that there has been no “threat to initiate  
14 proceedings.” ECF No. 436 at 43.<sup>3</sup> But that is beside the point. As Plaintiffs explained in opposing  
15 the motion to dismiss, A.R.S. § 16-165(I) requires county recorders to act on their subjective  
16 biases to divide registered voters into two classes based on an arbitrary “reason to believe”  
17 standard and then subject those whom they suspect lack citizenship to different “standards,  
18 practices, or procedures.” *See, e.g.*, ECF No. 154 at 11–12 (quoting 52 U.S.C. § 10101(a)(2)(A)).  
19 Where there is a “credible threat of enforcement,” plaintiffs have to bring a “preenforcement suit.”  
20

21 \_\_\_\_\_  
22 <sup>1</sup> Chicanos Por La Causa and Chicanos Por La Causa Action Fund are referred to collectively as  
“CPLC.”

23 <sup>2</sup> A.R.S. § 16-165(I) (eff. Jan. 1, 2023) was enacted as A.R.S. § 16-165(H) in HB 2243.

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

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

9 The Attorney General also (again) argues that Poder Latinx and CPLC lack standing  
10 because they have not identified a specific county recorder who will initiate a citizenship  
11 investigation based on improper and subjective concerns. *Compare* ECF No. 436 at 43–44  
12 (quoting ECF No. 397 at 2) *with* ECF No. 127 at 24–25. Poder Latinx and CPLC previously  
13 addressed that concern by amending their complaint to name county recorders as defendants. *See*  
14 ECF No. 65 ¶¶ 24–39, ECF No. 169 ¶¶ 23–26; *see also* Order, ECF No. 304 at 14 n.8, 17 n.9. And  
15 in any event, such identification is unnecessary. As explained in Poder Latinx and CPLC’s cross-  
16 motion, A.R.S. § 16-165(I)’s inherent subjectivity violates 52 U.S.C. § 10101(a)(2)(A) as a matter  
17 of law. *See* ECF No. 397 at 9–10. As a result, every county recorder who implements A.R.S. § 16-  
18 165(I) violates § 10101(a)(2)(A)’s ban on subjecting voters to different standards, practices, and  
19 procedures. Accordingly, Plaintiffs have standing to sue.

## 20 **II. THE ATTORNEY GENERAL’S MERITS ARGUMENTS FAIL.<sup>4</sup>**

21 The Attorney General’s arguments on the merits of 52 U.S.C. § 10101(a)(2)(A), ECF No.  
22 436 at 44–45, are also wrong. A.R.S. § 16-165(I) requires County Recorders to subject *currently*  
23 *registered* voters to differential voter qualification practices and procedures (specifically, an  
24 additional citizenship verification) based on a purely subjective “reason to believe” standard. The  
25

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26 <sup>4</sup> This brief focuses on Poder Latinx and CPLC’s 52 U.S.C. § 10101(a)(2)(A) claim. In support of  
27 its claim under Section 6 of the National Voter Registration Act (“NVRA”), 52 U.S.C. § 20505,  
28 Poder Latinx joins and incorporates the relevant portions of the Tohono O’odham Plaintiffs’ reply  
brief.

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

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

9 Citing *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 839–40 (S.D. Ind. 2006),  
10 the Attorney General contends that Section 10101(a)(2)(A) is “aimed at preventing differential  
11 treatment based on race,” ECF No. 436 at 44, and “does not require states to ‘abolish[] all  
12 requirements which uniquely apply to only one set of voters.’” ECF No. 436 at 45 (quoting *Rokita*,  
13 458 F. Supp. 2d at 840). What the Civil Rights Act prohibits is basing the application of  
14 differential voter qualification practices and procedures on a subjective standard, unfettered  
15 discretion, or mere suspicion. For this reason, *Rokita* is wholly inapposite: That case concerned a  
16 Section 10101(a)(2)(A) challenge to Indiana’s voter identification requirement, which relied upon  
17 the law’s exemption of mail-in absentee and nursing home voters. But the criteria used to  
18 differentiate voters in that context were categorical and objective—whether the exempt voters had  
19 cast mail-in absentee ballots or voted from a nursing home. *See Rokita*, 458 F. Supp. 2d at 786.  
20 That is very different from the subjective basis for applying differential voter qualification  
21 procedures that was at issue in *Shivelhood* and *Frazier* and is presented by A.R.S. § 16-165(I)’s  
22 “reason to believe” standard.

23 With regard to the Attorney General’s contention that Section 10101(a)(2)(A) is limited to  
24 racial discrimination, neither of the classifications struck down in *Shivelhood* or *Frazier*  
25 concerned racial classifications. Indeed, beyond *Shivelhood* and *Frazier*, courts have long  
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27 <sup>5</sup> The Attorney General may not change this federal statutory claim into a constitutional void-for-  
28 vagueness claim. ECF No. 436 at 45 n.11.

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

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

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24 <sup>6</sup> In reaching the opposite conclusion, *Rokita* cited to historical motivations rather than the actual  
25 statutory text. 458 F. Supp. 2d at 839 & n.106. But courts routinely distinguish between the  
26 historical *motivations* for enacting a statute and the plain text. For example, in applying 52 U.S.C.  
27 § 10101(a)(2)(B), the Materiality Provision, to Florida’s voter registration procedures, the  
28 Eleventh Circuit noted that “[t]he text of the . . . statute, and not the historically motivating  
examples of intentional and overt racial discrimination, is . . . the appropriate starting point of  
inquiry in discerning congressional intent.” *Fla. State Conf. of N.A.A.C.P.*, 522 F.3d at 1173; *id.*

1 The Attorney General also cites to *Ballas v. Symm*, 494 F.2d 1167, 1171–72 (5th Cir. 1974)  
2 for the “holding that [an] election official who required only a subset of registration applicants to  
3 submit a residency questionnaire did not violate federal law.” ECF No. 436 at 45. But *Ballas v.*  
4 *Symm* has not been good law since 1979. The Texas statute at issue in *Ballas*, which presumed  
5 non-residency of college students, and the Waller County registrar’s practice of requiring students  
6 to complete a residency questionnaire, were both subsequently enjoined. *See Whatley v. Clark*,  
7 482 F.2d 1230, 1234 (5th Cir. 1973) (enjoining statute); *Symm v. United States*, 439 U.S. 1105  
8 (1979) (summarily affirming *United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978) (three-  
9 judge panel)). *See generally Johnson v. Waller Cnty.*, 593 F. Supp. 3d 540, 615 (S.D. Tex. 2022)  
10 (summarizing history).

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

18 The Attorney General posits that there could be objective sources of information that *give*  
19 county recorders or their staff “reason to believe” that a registered voter is not a U.S. citizen, citing  
20 information provided by law enforcement or a voter’s self-reporting. *Id.* But the county recorders’  
21 obligation to conduct an extra citizenship check under A.R.S. § 16-165(I) is not limited to receipt  
22 of this subset of objective information, but provides that the additional procedures are triggered  
23 by a far broader range of considerations including subjective beliefs and impressions.<sup>7</sup> While  
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25  
26 at 1173 (“Congress in combating specific evils might choose a broader remedy.”). Similarly, the  
27 Ninth Circuit has found that 42 U.S.C. § 1985(3) is not “limited exclusively to racial situations.”  
28 *Canlis v. San Joaquin Sheriff’s Posse Comitatus*, 641 F.2d 711, 719–20 & n.15 (9th Cir. 1981).  
<sup>7</sup> A.R.S. § 16-165(I) also applies to “persons who are registered to vote without satisfactory  
evidence of citizenship as prescribed by § 16-166.” Whether a registered voter has satisfied the

1 A.R.S. § 16-165(I) certainly could have limited the trigger for further investigation to the sort of  
 2 objective information cited by the Attorney General, it does not.<sup>8</sup> While the Attorney General’s  
 3 attempt to rewrite the statute as one that contains an objective trigger is understandable, this Court  
 4 lacks the power to rewrite A.R.S. § 16-165(I). *See Planned Parenthood of Idaho, Inc. v. Wasden*,  
 5 376 F.3d 908, 925 (9th Cir. 2004) (noting that court “may not . . . ‘rewrite’ the statute to save it”)  
 6 (citation omitted). As written, the statute’s reliance on a subjective “reason to believe” standard  
 7 thereby violates the Civil Rights Act.

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

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

13 First, the Ninth Circuit has repeatedly highlighted the importance of the phrase “No person  
 14 shall”—which Section 10101(a)(2)(A) contains—in affirming privately enforceable rights. For  
 15 example, *Watson v. Weeks* explained that Titles VI and XI, which the Supreme Court in *Gonzaga*  
 16 *University v. Doe*, 536 U.S. 273 (2002) considered “exemplars of statutory provisions that create  
 17 section 1983 rights,” both “use the wording ‘no person . . . shall . . . .’” 436 F.3d 1152, 1159 (9th  
 18 Cir. 2006) (citing *Gonzaga*, 536 U.S. at 284 & n.3). The *Watson* court concluded that a provision  
 19 of the Medicaid Act containing the phrase “a State plan must provide” created individually  
 20 enforceable rights under 42 U.S.C. § 1983 in part because it was “difficult, if not impossible” to  
 21 distinguish the import of that mandatory language from “No person shall” in Titles VI and IX. *Id.*  
 22 at 1160 (quoting *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004)). Similarly,  
 23 in *Sanchez v. Johnson*, 416 F. 3d 1051 (9th Cir. 2005), the Ninth Circuit applied a similar analysis  
 24

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

27 <sup>8</sup> By way of comparison, the documentary proof of citizenship requirement itself, A.R.S. § 16-  
 28 166(F), includes an itemized list of objective items that can satisfy the requirement.



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