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21 **UNITED STATES DISTRICT COURT**
 22 **DISTRICT OF ARIZONA**

23 Mi Familia Vota, et al.,
 24 Plaintiffs,

25 v.

26 Adrian Fontes, et al.,
 27 Defendants.

Case No: 2:22-cv-00509-SRB (Lead)

**INTERVENOR REPUBLICAN
 NATIONAL COMMITTEE'S
 CROSS-RESPONSE AND
 REPLY IN SUPPORT OF
 PARTIAL SUMMARY
 JUDGMENT**

AND CONSOLIDATED CASES

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ARGUMENT

I. Plaintiffs have not shown that the NVRA can preempt H.B. 2492's citizenship requirements.

“Article II, §1’s appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint.” *Chiafalo v. Washington*, 140 S. Ct. 2316, 2324 (2020). Congress can regulate the “Manner” of congressional elections, but only the States can regulate the “Manner” of presidential elections. The “normal and ordinary” meaning of the Electors Clause resolves this case. *United States v. Sprague*, 282 U.S. 716, 731 (1931). And in eight response briefs, Plaintiffs fail to explain how the text of the Electors Clause supports their claim.

Instead, Plaintiffs attack strawmen. They point out that “the RNC cites no case holding that Congress *cannot* regulate presidential elections.” Doc. 393 at 10. And their briefs are full of cases that “rejected the proposition that Congress has no power to regulate presidential elections,” *Fish v. Kobach*, 840 F.3d 710, 719 n.7 (10th Cir. 2016), and cases that recognized Congress’s “broad power” over presidential elections, *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995). But the RNC does not claim Congress has *no power* to regulate presidential elections. Rather, the argument is that “Congress does not have power to regulate the ‘Places and Manner’ of presidential elections.” Doc. 367 at 4. That principle is evident on the face of the Constitution’s text, but Plaintiffs obscure the text with irrelevant cases and vague invocations of “broad congressional power.” Those arguments are futile, because this Court must apply the “normal and ordinary” meaning of the Electors Clause. *Sprague*, 282 U.S. at 731.

The few textual arguments Plaintiffs make expose the absurdity of their claim. First, Plaintiffs suggest there is a difference between regulating presidential *elections* and regulating the manner of choosing presidential *electors*. Doc. 391 at 12-14. That distinction makes no sense. An election is Arizona’s chosen “Manner” of appointing presidential electors: it is the “method of securing party candidates in the general election,” and thus “an exercise of the state’s right to appoint electors in such manner,

1 subject to possible constitutional limitations, as it may choose.” *Ray v. Blair*, 343 U.S.
2 214, 227 (1952) (citing U.S. Const., art. II, §1). Arizona, like most States, requires its
3 presidential electors to “cast their electoral college votes for the candidate for president”
4 who received the highest number of votes in the general election. Ariz. Rev. Stat. §16-
5 212(B). In requiring presidential electors to abide by the outcome of a popular election,
6 Arizona did not relinquish its power over the “Manner” of choosing presidential electors.
7 *McPherson v. Blacker*, 146 U.S. 1, 36 (1892). It retains the “the broadest power of
8 determination” over the appointment of presidential electors, which encompasses
9 whether and how to conduct “a popular election.” *Id.* at 7-8. Indeed, States need not hold
10 a popular presidential election at all—during “the Nation’s earliest elections, state
11 legislatures mostly picked the electors, with the majority party sending a delegation of
12 its choice to the Electoral College.” *Chiafalo*, 140 S. Ct. at 2321.

13 Setting voter registration rules for presidential elections is part of the “plenary
14 power [of] the state legislatures in the matter of the appointment of electors.” *McPherson*,
15 146 U.S. at 35. Indeed, Plaintiffs concede that “[r]egistration is indivisible from
16 election.” Doc. 393 at 7 (quoting *ACORN v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995)).
17 After all, “the power to appoint an elector (in any manner) includes power to condition
18 his appointment.” *Chiafalo*, 140 S. Ct. at 2324. In Arizona, voter qualifications and
19 registration are part and parcel of the “condition[s]” of appointing Arizona’s presidential
20 electors. *Id.* Voter registration, just like primaries, are “an integral part of the general
21 election,” and their regulation thus falls under the States’ power to appoint presidential
22 electors. *Ray*, 343 U.S. at 226, 229. Because “[t]he constitution does not provide that the
23 appointment of electors shall be by popular vote,” States are under no obligation to
24 conduct a popular presidential election *at all*, let alone conduct registration for that
25 election in any particular manner. *McPherson*, 146 U.S. at 27. Subject to other
26 constitutional constraints, they remain “free to conduct [their] elections and limit [their]
27 electorate as [they] may deem wise.” *Smith v. Allwright*, 321 U.S. 649, 657 (1944).

1 Arizona’s “far-reaching authority over presidential electors” therefore includes the power
2 to “condition [their] appointment” by setting registration rules for their selection.
3 *Chiafalo*, 140 S. Ct. at 2324.

4 Plaintiffs backpaddle from this conclusion by insisting Congress has a general
5 power “to regulate all federal elections.” Doc. 391-1 at 7. But there is no “federal
6 elections” clause. In search of a textual basis for their theory, Plaintiffs resort to the
7 Necessary and Proper Clause. They argue that applying the NVRA to presidential
8 elections is necessary and proper to regulating the “Manner” of congressional elections.
9 Doc. 393 at 12. But the Constitution puts presidential and congressional appointments on
10 separate tracks. Article II governs presidential appointment, and Article I governs
11 congressional appointment. “One cannot read the Elections Clause as treating implicitly
12 what these other constitutional provisions regulate explicitly.” *Arizona v. Inter Tribal*
13 *Council of Arizona, Inc. (ITCA)*, 570 U.S. 1, 16 (2013). Plaintiffs’ reliance on law review
14 articles betrays the lack of support for their argument, and the sparse caselaw they do cite
15 proves them wrong. *See Ex parte Coy*, 127 U.S. 731, 752 (1888) (discussing the power
16 of Congress “to make such provisions as are necessary to secure the fair and [honest]
17 conduct of an election *at which a member of congress is elected*” (emphasis added)).

18 Grasping for a link to Article II, Plaintiffs next argue that regulating registration
19 for presidential elections is necessary and proper to determine the “Time” of appointing
20 presidential electors. Doc. 393 at 12-13. This argument reads “Time” to mean “Time and
21 Manner.” But Article II vests the “Manner” of presidential appointment in the States, not
22 in Congress. In other words, voter registration is one of the “necessary step[s] in the
23 choice of candidates for election,” and thus pertains “to the manner of holding it.” *United*
24 *States v. Classic*, 313 U.S. 299, 320 (1941). Plaintiffs don’t even try to explain how
25 citizenship requirements for voter registration relate to the “Time” for choosing electors.
26 Nor could they, because voter registration requirements are “manner” regulations outside
27 the purview of Congress’s Electors Clause power. *See Cook v. Gralike*, 531 U.S. 510,

1 523-24 (2001) (The term “‘manner’ of elections” “encompasses matters like ‘notices,
2 registration, supervision of voting, protection of voters, prevention of fraud and corrupt
3 practices, counting of votes, duties of inspectors and canvassers, and making and
4 publication of election returns.’” (citation omitted)).

5 Precedent does not free Plaintiffs from the plain meaning of the Electors Clause.
6 Start with *Oregon v. Mitchell*, which failed to garner a majority opinion. Only one Justice
7 thought that Congress had authority to ban residency requirements under the Elections
8 Clause. *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970) (op. of Black, J.). Plaintiffs
9 nevertheless argue that because “eight Justices upheld Congress’s ban on residency
10 requirements *in presidential elections*,” the Court must accept all plurality theories that
11 upheld Congress’s ban, including the single vote for the Elections Clause. Doc. 391 at 8-
12 9. That is exactly how *not* to read split decisions from the Supreme Court. *See Marks v.*
13 *United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and
14 no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of
15 the Court may be viewed as that position taken by those Members who concurred in the
16 judgments on the narrowest grounds....’” (citation omitted)). And in *Mitchell*, “[f]ive
17 Justices took the position that the Elections Clause did not confer upon Congress the
18 power to regulate voter qualifications in federal elections.” *ITCA*, 570 U.S. at 16 n.8.

19 Plaintiffs also misread *Burroughs*. That case did not discuss the source of
20 Congress’s authority to enact the Federal Corrupt Practices Act (FCPA). The Supreme
21 Court later clarified that Congress had passed the FCPA under the General Welfare
22 Clause “to reduce the deleterious influence of large contributions on our political process,
23 to facilitate communication by candidates with the electorate, and to free candidates from
24 the rigors of fundraising.” *Buckley v. Valeo*, 424 U.S. 1, 91 (1976) (citing *Burroughs v.*
25 *United States*, 290 U.S. 534 (1934)). The Court in *Burroughs* decided whether Congress,
26 notwithstanding its authority to *enact* the FCPA, had nonetheless *violated* the Electors
27 Clause by intruding on the States’ power to regulate the “Manner” of appointing

1 presidential electors. The FCPA dealt only with “political committees organized for the
2 purpose of influencing elections in two or more states, and with branches or subsidiaries
3 of national committees, and excludes from its operation state or local committees.”
4 *Burroughs*, 290 U.S. at 544. The Court thus held that “[n]either in purpose nor in effect
5 does it interfere with the power of a state to appoint electors or the manner in which their
6 appointment shall be made.” *Id.* The Court had no occasion to decide the scope of the
7 Electors Clause as a *source* of congressional power, and it recognized that a statute that
8 interfered with the “exclusive state power” over presidential elections would be
9 unconstitutional. *Id.* at 544-45. Thus, “*Burroughs* ... reinforce[s] the principle that the
10 manner of appointment is exclusive to the states.” *In re Guerra*, 441 P.3d 807, 814
11 (Wash. 2019), *aff’d sub nom. Chiafalo v. Washington*, 140 S. Ct. 2316 (2020).

12 Left with no Supreme Court precedent supporting their arguments, Plaintiffs point
13 to half a sentence of dicta in *Voting Rights Coalition v. Wilson*. In that case, the Ninth
14 Circuit considered a challenge to the NVRA based on “[t]hree provisions of the
15 Constitution”—the Electors Clause of Article II was not one of them. *Wilson*, 60 F.3d at
16 1413 (citing U.S. Const. article I, §4; article I, §2; and the Tenth Amendment). The Ninth
17 Circuit did not cite—let alone discuss and *decide*—the scope of the Electors Clause. *Cf.*
18 *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022) (“Dicta that does not analyze
19 the relevant statutory provision cannot be said to have resolved the statute’s meaning.”).
20 The half of a sentence the panel included about presidential elections was neither
21 essential to the judgment nor a proper interpretation of *Burroughs*. *See id.* at 1414.

22 Finally, the NVRA is not remedial legislation under the Fourteenth or Fifteenth
23 Amendments. Those amendments could have been a valid source for the NVRA had
24 Congress invoked them. But it did not. Plaintiffs’ bold claim that three pages from
25 congressional committee reports forms an “extensive record of discrimination in voting
26 registration” disproves itself. Doc. 393 at 15 (citing S.Rep. No. 103-6, at 3; H.Rep. No.
27 103-9, at 3-4). And Plaintiffs rely on *South Carolina v. Katzenbach* to their peril. In

1 *Katzenbach*, the Supreme Court upheld the 1965 Voting Rights Act (VRA), “explaining
2 that it was justified to address ‘voting discrimination where it persists on a pervasive
3 scale.’” *Shelby Cnty. v. Holder*, 570 U.S. 529, 538 (2013) (quoting *South Carolina v.*
4 *Katzenbach*, 383 U.S. 301, 308 (1966)). After months of hearings and volumes of
5 findings, Congress had tailored the VRA to apply “where Congress found ‘evidence of
6 actual voting discrimination.’” *Id.* at 546. “Multiple decisions since have reaffirmed the
7 [VRA]’s ‘extraordinary’ nature.” *Id.* at 555. *Katzenbach* proves that the NVRA doesn’t
8 come close to the legislative findings necessary to enact remedial legislation.

9 In sum, “Article II and the Twelfth Amendment give States broad power over
10 electors....” *Chiafalo*, 140 S. Ct. at 2328. Plaintiffs’ reading of the Elections Clause
11 “evade[s] important constitutional restraints” in Article II by nullifying States’ authority
12 over presidential elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995).
13 Because Congress has no authority to regulate the “Manner” of choosing presidential
14 electors, Defendants are entitled to summary judgment on Plaintiffs’ claims that the
15 NVRA preempts H.B. 2492’s citizenship requirements as applied to registration for
16 presidential elections.

17 **II. Nothing in the NVRA’s text discusses early mail-in voting rules.**

18 Plaintiffs cite no authority applying the NVRA to early mail-in voting rules.
19 Perhaps Congress could pass a statute like the NVRA that unifies registration for early
20 mail-in voting. Indeed, the Uniformed and Overseas Citizens Absentee Voting Act
21 (UOCAVA) does something similar (on a much smaller scale) by requiring States to
22 allow certain overseas voters to register and vote absentee in elections for federal office.
23 52 U.S.C. §§20302-20310. But there, Congress covered both “voter registration
24 application[s]” and “absentee ballot application[s],” repeatedly distinguishing between
25 the two. *Id.* §20302. In the NVRA, however, Congress only set “procedures to register to
26 vote in elections.” *Id.* §20503(a). Congress said nothing about absentee ballots, mail-in
27 ballots, or early voting. States can require, condition, or prohibit those privileges as they

1 see fit. *Compare* Cal. Elec. Code §3000.5 (all-mail elections), *with* Ga. Code §21-2-380
2 (no-excuse absentee voting) *and* Conn. Gen. Stat. §9-135 (permitting voting by mail only
3 if the voter provides an excuse approved by the Legislature).

4 Plaintiffs’ musings about the NVRA “enhanc[ing]” people’s participation in
5 elections are irrelevant. 52 U.S.C. §20501(b); *see* Doc. 393 at 7. Their resort to broad
6 notions of congressional intent papers over the gaping hole in the text: the NVRA does
7 not discuss absentee or mail-in voting rules. The one argument Plaintiffs make based on
8 a specific provision is a non sequitur. Section 20505 provides that a State can “require a
9 person to vote in person if—(A) the person was registered to vote in a jurisdiction by
10 mail; and (B) the person has not previously voted in that jurisdiction.” 52 U.S.C.
11 §20505(c). The legislative history confirms that Congress inserted this provision to
12 address “concerns regarding fraud,” and that the provision “demonstrates the concern of
13 the Committee that each State should develop mechanisms to ensure the integrity of the
14 voting rolls.” S. Rep. No. 103-6, at 13 (1993). Plaintiffs infer the opposite, arguing that
15 the provision restricts what information States can require of absentee voters. But that
16 provision says nothing—either explicitly or implicitly—about the information States can
17 require of voters before they can vote early by mail. Regardless, “state-developed forms
18 may require information the Federal Form does not.” *ITCA*, 570 U.S. at 12. Any contrary
19 interpretation would wipe out the many longstanding state laws that require additional
20 information and excuses to vote absentee. *E.g.*, Conn. Gen. Stat. §9-135; Del. Code tit.
21 15, §5502; N.Y. Election Law §8-400.

22 **III. Plaintiffs have not shown that H.B. 2492 violates the NVRA’s registration**
23 **“safe harbor.”**

24 If an individual submits a valid voter registration application at least 29 days prior
25 to a federal election, she will be eligible under Arizona law to cast a ballot in that election
26 in all races to which the NVRA applies, even if the county recorder is unable to verify the
27 applicant’s citizenship. *See* Ariz. Rev. Stat. §16-121.01(E). H.B. 2492 thus is fully
consistent with Section 8 of the NVRA. *See* 52 U.S.C. §20507(a)(1) (providing that if a

1 “valid voter registration form” is received (or, in the case of an application submitted by
2 mail, postmarked) “not later than the lesser of 30 days, or the period provided by State
3 law, before the date of” a federal election, the applicant must be registered to vote in that
4 election); *see also* Ariz. Rev. Stat. §16-120(A) (requiring that registration forms must be
5 received at least 29 days prior to an election to qualify the applicant to vote in that
6 election).

7 Plaintiffs allege that H.B. 2492’s proof of citizenship and proof of residency
8 requirements transgress this “safe harbor” provision. Their theories, however, misread
9 H.B. 2492 and misapprehend Section 8’s limited scope.

10 **A. H.B. 2492 ensures that federal form applicants will be timely**
11 **registered to vote in all federal elections covered by the NVRA, even if**
12 **their citizenship cannot be verified.**

13 The MFV Plaintiffs advance two flawed arguments in support of their Section 8
14 claims.

15 *First*, they contend that “H.B. 2492 violates [Section 8] by barring the county
16 recorders from placing an eligible Federal-Form applicant who submits their application
17 29 days or more before an election on the list of qualified electors for that election if they
18 cannot independently verify the applicant’s citizenship in the time before the election.”
19 Doc. 399 at 15. H.B. 2492’s text, however, directly refutes this statement. If a county
20 recorder receives a completed Federal Form application and “is unable to match the
21 applicant with appropriate citizenship information,” then the recorder must “notify the
22 applicant” and “the applicant will not be qualified to vote in a presidential election or by
23 mail with an early ballot in any election until satisfactory evidence of citizenship is
24 provided.” Ariz. Rev. Stat. §16-121.01(E). But that means that the applicant will be
25 registered to vote, and may cast a regular ballot or an early ballot (by any means other
26 than by mail) in congressional elections—which is all the NVRA requires.

27 A lack of proof of citizenship will preclude a Federal Form applicant from voting
in congressional elections if, and only if, the county recorder “matches the applicant with

1 information that the applicant is *not* a United States citizen.” Ariz. Rev. Stat. §16-
2 121.01(E) (emphasis added). As the MFV Plaintiffs acknowledge, “‘barring *known*
3 noncitizens from voting does not conflict with’ the NVRA.” Doc. 399 at 17; *see also*
4 *ITCA*, 570 U.S. at 15 (noting that the NVRA “does not preclude States from ‘deny[ing]
5 registration based on information in their possession establishing the applicant’s
6 ineligibility’” and that it “clearly contemplates that not every submitted Federal Form will
7 result in registration” (cleaned up)). It follows that H.B. 2492 does not run afoul of Section
8 8’s safe harbor.

9 ***Second***, the MFV Plaintiffs assert that H.B. 2492 is preempted because Section 8
10 “does not permit Arizona to deny a Federal-Form applicant their right to vote by mail and
11 in presidential elections” if the applicant’s citizenship status cannot be ascertained. Doc.
12 399 at 17. This theory, though, is wholly dependent on the same invalid premise that
13 undergirds their claims under Section 6 (i.e., the “accept and use” provision) of the
14 NVRA. The NVRA cannot, consistent with Article II, §1 of the U.S. Constitution,
15 displace state laws establishing qualifications to vote for presidential electors. Further,
16 the NVRA is confined exclusively to matters of voter registration. It does not—and has
17 never been construed to—constrain state laws concerning the manner or method of
18 casting a ballot. *See supra* Sections II and III.

19 **B. Section 8’s safe harbor does not apply to state form applications that**
20 **are not valid under state law.**

21 The LUCHA Plaintiffs venture even farther from Section 8’s text and the relevant
22 case law. They attack H.B. 2492’s requirement that county recorders must reject State
23 Form applications submitted by mail or through public assistance agencies that are not
24 accompanied by documentary proof of citizenship or documentary proof of residence.
25 *See* Doc. 394 at 19. Although they acknowledge that Section 8’s safe harbor protects only
26 “valid” voter registration forms, the LUCHA Plaintiffs assert that “whether such [proof
27 of citizenship or proof of residence] records are ‘necessary to enable the appropriate State

1 election official to assess the eligibility of the applicant and to administer voter
2 registration’ is a factual question.” *Id.* That argument is incorrect for two reasons.

3 **First**, and most fundamentally, the “valid[ity]” of a State Form for Section 8
4 purposes is determined by reference to state law. *See Ass’n of Cmty. Orgs. For Reform*
5 *Now v. Miller*, 912 F. Supp. 976, 987 (W.D. Mich. 1995) (“[U]nder the NVRA, the states
6 are still left the task of determining that an applicant is eligible, and that the registration
7 form as submitted complies with state law.”); *U.S. Student Ass’n Found. v. Land*, 546
8 F.3d 373, 385 (6th Cir. 2008) (agreeing that a State “is still free to set eligibility standards
9 and to evaluate whether each applicant meets those standards”). While States may not
10 condition the validity of a Federal Form application on compliance with supplementary
11 state law mandates, they may formulate “state-developed forms [that] may require
12 information the Federal Form does not.” *ITCA*, 570 U.S. at 12. A submitted state
13 registration form that does not conform to these state-specific criteria is not a “valid
14 registration form,” and hence is not protected by Section 8’s safe harbor.

15 **Second**, nothing in the NVRA precludes Arizona from requiring that State Form
16 applications submitted by mail or through public assistance agencies to include
17 documentary proof of citizenship and residence. *See Gonzalez v. Arizona*, 435 F. Supp.
18 2d 997, 1001-02 (D. Ariz. 2006). Section 8’s safe harbor provision applies to the
19 following application submissions:

- 20 (A) ... registration with a motor vehicle application under section 20504...
21 (B) ... registration by mail under section 20505...
22 (C) ... registration at a voter registration agency...
23 (D) ... [any other] valid registration form ... received by the appropriate State
24 election official....

24 In arguing that the Voting Laws contravene subparagraphs (B) and (C) of Section
25 8, the LUCHA Plaintiffs rely heavily on *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016).
26 *Fish*, however, pertained to motor vehicle applications submitted under subparagraph (A)
27 of Section 8, which governs the contents of motor vehicle applications under Section
20504. Section 20504 (i.e., Section 5 of the NVRA) permits States to require “only the

1 minimum amount of information necessary to” prevent duplicate registrations and enable
2 officials to assess applicants’ eligibility and otherwise administer elections. 52 U.S.C.
3 §20504(c)(2)(B). The *Fish* court held that Kansas was required to make a factual showing
4 that its proof of citizenship requirement for motor vehicle applications was necessary to
5 remedy a substantial incidence of voter registrations by non-citizens. *See Fish*, 840 F.3d
6 at 742-46.

7 Even assuming that *Fish* was correct, it is of no help to Plaintiffs here. *Fish*’s
8 reasoning was predicated entirely on the text of Section 5, which governs *only* motor
9 vehicle applications submitted under subparagraph (A) of Section 8. Here, by contrast,
10 the LUCHA Plaintiffs construct their Section 8 claim solely on subparagraph (B), relating
11 to State Form mail-in applications under section 20505 (i.e., Section 9 of the NVRA), and
12 subparagraph (C), relating to State Form registrations submitted at public assistance
13 agencies. The provision of Section 5 that was dispositive in *Fish* is inapplicable to both
14 mail-in State Forms and State Form submissions at public assistance agencies.

15 The content of mail-in registration applications is addressed in Section 9 of the
16 NVRA. Under Section 9, a State may require in its mail-in State Form any “information
17 ... as is necessary to enable the appropriate State election official to assess the eligibility
18 of the applicant.” 52 U.S.C. §20508(b)(1); *see also id.* §20505(a)(2). This Court has
19 previously confirmed that “[p]roviding proof of citizenship undoubtedly assists Arizona
20 in assessing the eligibility of applicants,” and thus is consistent with Section 9. *Gonzalez*,
21 435 F. Supp. 2d at 1002. Indeed, the *Fish* court contrasted the restrictive language of
22 Section 5 with the substantially broader discretion conferred on States by Section 9. *See*
23 *Fish*, 840 F.3d at 733-34 (rejecting the argument that the relevant provisions in Section 5
24 and Section 9 “mean ‘substantially the same thing’”); *see generally Bare v. Barr*, 975
25 F.3d 952, 968 (9th Cir. 2020) (“It is a well-established canon of statutory interpretation
26 that the use of different words or terms within a statute demonstrates that Congress
27 intended to convey a different meaning for those words.” (cleaned up)). Finally, the

1 NVRA imposes no additional conditions or restrictions at all on the contents of State
 2 Forms that are submitted via public assistance agencies pursuant to subparagraph (C) of
 3 Section 8. *See* 52 U.S.C. §20506.

4 In short, Section 8’s safe harbor does not protect submitted State Form applications
 5 that are not “valid” under Arizona law. The inclusion of documentary proof of citizenship
 6 and residence components in Arizona’s mail-in State Form does not conflict with or
 7 contravene Section 9 of the NVRA because, as this Court has held, confirmation of
 8 citizenship is necessary to assessing the eligibility of an applicant. *Gonzalez*, 435 F. Supp.
 9 2d at 1001-02.

10 **IV. Section 10101 creates no private rights enforceable by Plaintiffs.**

11 Only the United States can assert a challenge to the voting laws under 52 U.S.C.
 12 §10101(a)(2). Several private Plaintiff groups¹ join the United States in raising claims
 13 under subsection (a)(2)(B)—the so-called “materiality provision”—and others² raise
 14 claims under subsection (a)(2)(A), which prohibits disparate registration standards,
 15 practices or procedures within a single voting jurisdiction.

16 When a plaintiff invokes 42 U.S.C. §1983 as a vehicle for a claim arising out of
 17 some other statute, “the plaintiff must demonstrate that the federal statute creates an
 18 individually enforceable right in the class of beneficiaries to which he belongs.” *City of*
 19 *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). Even if an individual right is
 20 embedded in the statute, however, it is not vindicable through Section 1983 if the statute
 21 is devoid of a “private *remedy*” because Congress “creat[ed] a comprehensive
 22 enforcement scheme that is incompatible with individual enforcement under §1983.”
 23 *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 & n.4 (2002).

24
 25 ¹ Arizona Asian American Native Hawaiian and Pacific Islander for Equity Coalition
 26 (Compl. ¶¶152-155, Doc. 1, No. 2:22-cv-1381); Democratic National Committee (*see*
 27 Compl. ¶¶87-190, Doc. 1, No. 2:22-cv-1369); MFV (2d Am. Compl. ¶¶100-106, Doc.
 65, No. 2:22-cv-509); and LUCHA (1st Am. Compl. ¶¶342-50, Doc. 67, No. 2:22-cv-
 509).

² Poder Latinx (*see* 2d Am. Compl. ¶¶99-106, Doc. 169, No. 2:22-cv-509).

1 Neither condition for enforcement under Section 1983 can be found in Section
2 10101(a)(2).³ First, Congress did not “in clear and unambiguous terms” endow new
3 individual “rights” in the statute. *Id.* at 290. Plaintiffs emphasize the materiality
4 provision’s explicit reference to the “right of any individual to vote,” which is coupled
5 with a prohibition against certain practices and procedures that may abridge it. *See* Doc.
6 399 at 10-11; Doc. 397 at 6-7. But these textual attributes undermine Plaintiffs’ theory.
7 Specifically, by referencing the existing “right of any individual to vote,” Section
8 10101(a)(2) confirms that it does not itself fashion any new “right” at all; rather, it
9 furnishes a mechanism for the federal government to enforce a right (*i.e.*, the franchise)
10 established by extrinsic sources of law. Additionally, the proscriptive formulation (*i.e.*,
11 “No person acting under color of law shall...”) denotes a regulatory restraint on state
12 actors. *See, e.g., Lil’ Man in the Boat, Inc. v. City and Cnty. of San Francisco*, 5 F.4th
13 952, 959-60 (9th Cir. 2021) (federal statute that prohibited non-federal entities from
14 imposing certain fees or charges on vessels did not create a private right); *Logan v. U.S.*
15 *Bank Nat’l Ass’n*, 722 F.3d 1163, 1170-71 (9th Cir. 2013) (statute’s reference to the
16 “rights of any bona fide tenant” did not create private right of action for the benefit of
17 such tenants); *UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d 695, 699 (9th Cir.
18 2018) (the proscriptive phrase, “[n]o investment company’ shall” was not “rights-
19 creating language”).

20 Second, even if Section 10101(a)(2) created some freestanding “right,” Congress
21 explicitly charged the Attorney General with enforcing its terms. *See* 52 U.S.C.
22 §10101(c). “Where a statutory scheme contains a particular express remedy or remedies,
23 ‘a court must be chary of reading others into it.’” *Logan*, 722 F.3d at 1172 (citation
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25 ³ The MFV Plaintiffs’ exertion to draw inferences from the legislative history ignores that
26 such “context matters only to the extent it clarifies text.” *Alexander v. Sandoval*, 532 U.S.
27 275, 288 (2001). Accordingly, the Court can begin and end its “search for Congress’
intent with the text and structure of” Section 10101(a)(2) itself. *Id.*; *see also Logan*, 722
F.3d at 1171 (when deciding whether there is an implied right of action, “[w]e presume
that Congress expressed its intent through the statutory language it chose”).

1 omitted). In scouring the statutory text for any indicia of broad private remedies, Plaintiffs
2 point out that subsection (d) “contemplates claims by non-US litigants.” Doc. 399 at 10.
3 Indeed, Section 10101 authorizes private litigants to assert claims—but only in a narrow
4 set of circumstances that require a prior judicial finding in a proceeding brought by the
5 Attorney General of a “pattern or practice” of violations. 52 U.S.C. §10101(e). If, as
6 Plaintiffs contend, any putatively injured individual can enforce any provision of Section
7 10101(a)(2), these carefully tailored prerequisites for private remedies detailed in
8 subsection (e) would be superfluous. *See Stilwell v. City of Williams*, 831 F.3d 1234, 1244
9 (9th Cir. 2016) (“[W]hen Congress creates a right by enacting a statute but at the same
10 time limits enforcement of that right through a specific remedial scheme that is narrower
11 than §1983, a §1983 remedy is precluded. This makes sense because the limits on
12 enforcement of the right were part and parcel to its creation.”).

13 In sum, Section 10101(a)(2) does not create any private “right.” Rather, it equips
14 the Attorney General with remedial instruments to wield against States or political
15 subdivisions that engage in certain prohibited practices impairing the franchise. This
16 Court should join the Sixth Circuit and multiple district courts in holding that it is not
17 privately enforceable through Section 1983. *See* Doc. 366 at 13 (citing cases).

18 CONCLUSION

19 For the foregoing reasons, this Court should grant summary judgment in favor of
20 Intervenors on these claims.
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RESPECTFULLY SUBMITTED this 5th day of July, 2023.

By: /s/ Kory Langhofer

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2023, I caused the foregoing document to be electronically transmitted to the Clerk’s Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

/s/ Kory Langhofer