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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mi Familia Vota, et al., Plaintiffs, v. Adrian Fontes, in his official capacity as Arizona Secretary of State, et al., Defendants.	No. 2:22-cv-00509-SRB (Lead) **DEFENDANTS ATTORNEY GENERAL AND STATE OF ARIZONA'S CONSOLIDATED SUMMARY JUDGMENT RESPONSE AND REPLY BRIEF** (Before the Hon. Susan R. Bolton)
AND 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

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INTRODUCTION

In this consolidated brief, Defendants State of Arizona and Attorney General Kris Mayes (collectively "the State") reply in support of and respond to the following:

Doc. 364: State's motion for partial summary judgment

Doc. 390: Tohono O'odham Plaintiffs' cross-motion and response

Doc. 391: United States' cross-motion and response

Doc. 393: DNC/ADP's cross-motion and response

Doc. 394: LUCHA's cross-motion and response

Doc. 395: Promise AZ's response

Doc. 396: Equity Coalition's cross-motion and response

Doc. 397: Poder Latinx's cross-motion and response

Doc. 399: MFV's cross-motion and response[1]

Given the complexity of this action, the State continues to request that the Court issue legal rulings and then order the parties to submit a proposed order applying the rulings to each plaintiff's claims.

The Court should issue the rulings requested in the State's motion regarding (1) whether the Voting Laws violate certain NVRA provisions, (2) whether the Voting Laws violate the Materiality Provision of the Civil Rights Act, (3) whether the Voting Laws are unconstitutionally vague, and (4) how to interpret the proof of location of residence requirement in the Voting Laws. *See* Arg. §§ I, II, III, and V below. In addition, the Court should deny plaintiffs' cross-motions on whether the Voting Laws violate NVRA § 8(a)(1) and 52 U.S.C. § 10101(a)(2)(A). *See* Arg. §§ I.B and IV below. These issues all involve questions of law, and resolution will provide clarity and help focus trial.

[1] The State refers to the seven non-U.S. plaintiff groups using abbreviations they have given themselves. *See* Doc. 401, pg. 2. For simplicity, when responding or replying to a brief authored by one plaintiff and joined by one or more others, the State refers only to the authoring plaintiff. *See* Doc. 401-1 (listing non-U.S. plaintiff authors and joinders).

ARGUMENT

I. REQUESTED RULINGS ON NVRA CLAIMS

A. The Voting Laws are partially preempted by the NVRA requirement to "accept and use" the federal form.

NVRA § 6 requires states to "accept and use" the federal mail registration form when registering voters for federal elections. 52 U.S.C. § 20505(a)(1). This requirement preempts the Voting Laws in part, as the State has explained. Doc. 364, pgs. 2–4.[2] The Court should issue the State's requested rulings despite other parties' counter-arguments.

1. The "accept and use" provision preempts requiring proof of citizenship for federal forms to register for federal elections.

The Court should rule: To the extent the Voting Laws require voters to submit proof of citizenship beyond the federal mail registration form to *register* for federal presidential elections (as opposed to vote early by mail), they are preempted by the "accept and use" requirement of 52 U.S.C. § 20505(a)(1). *See* Doc. 364, pg. 4.

This is a question of law that the Court should resolve now, for one side or the other. The parties agree on that much. *See* Doc. 367, pgs. 1–2 (RNC); Doc. 369 (Legislators); Doc. 391-1, pg. 1 (United States); Doc. 393, pg. 2 (DNC/ADP).

2. The "accept and use" provision does not preempt requiring proof of citizenship for mail voting.

The Court should rule: To the extent the Voting Laws require voters to submit proof of citizenship beyond the federal mail registration form to *vote early by mail* in federal elections (rather than simply register), they are not preempted by the NVRA's "accept and use" requirement. *See* Doc. 364, pg. 4.

This, too, is a question of law that the Court should resolve now, for one side or the other. Several plaintiffs agree. *See* Doc. 393, pg. 2 (DNC/ADP).

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[2] The State cites briefs as "Doc. ___, pg. __," referring to page numbers assigned by the author at the bottom of the page. In contrast, the State cites exhibits as "Doc. ___ at __," referring to page numbers assigned by the court's docket system at the top of the page.

The United States, however, asks the Court to delay ruling on this question, arguing that the State's "ultimate ability to enforce" the restriction on mail voting will "remain unresolved" until the Court decides whether the Voting Laws' proof of citizenship requirements violate the Materiality Provision. Doc. 391-1, pgs. 15–16. The Court should decline this invitation for delay, for three reasons.

First, whether NVRA § 6 preempts proof of citizenship requirements for voting by mail turns on statutory interpretation and federal preemption, which are questions "of law." *Indus. Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997). Tellingly, the United States does not argue that discovery is necessary for its NVRA § 6 claim (as opposed to its Materiality Provision claim).

Second, contrary to the United States' suggestion, efficiency is best served by a decision now, while the Court is already analyzing NVRA § 6. This case is complex, and deciding legal questions will narrow and focus the issues for trial. *See* Fed. R. Civ. P. 56(a) (authorizing summary judgment on "part[s] of" claims).

Third, the State believes that the United States' Materiality Provision claim should be resolved now as well, as explained in Arg. § II below. Delay serves no good purpose.

On the merits, it is a close question whether the NVRA's "accept and use" requirement precludes Arizona from requiring proof of citizenship as a condition of voting by mail. The answer depends on what it means for states to "accept and use" the federal form "for the *registration* of voters." 52 U.S.C. § 20505(a)(1) (emphasis added).

Registering a voter is not (quite) the same as enabling the voter to use all methods of voting under state law. As the State previously explained, registration under the NVRA occurs (at least arguably) when a voter is "able to cast a ballot," *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 383–84 (6th Cir. 2008), whereas voting by mail is simply one method of voting in Arizona because "Arizonans may also choose to vote in the traditional manner—by voting in person at a polling place," *Mi Familia Vota v. Hobbs*, 608 F. Supp. 3d 827, 848 (D. Ariz. 2022). The distinction between registering and voting by mail is also reflected in the structure of Title 16 of the Arizona Revised Statutes, where

laws about voting by mail are generally in Chapter 4 ("Conduct of Elections"), not Chapter 1 ("Qualification and Registration of Electors"). *See* A.R.S. §§ 16-541 through -552. Thus, preventing an Arizonan from voting by mail is probably not a denial of "registration" under NVRA § 6.

The DNC/ADP strenuously object, but their objections are mostly based on policy concerns, not the text of NVRA § 6. They begin by citing broad language elsewhere in the NVRA extolling the importance of the right to vote, as well as similar language in case law. *See* Doc. 393, pg. 7. The State emphatically agrees with the importance of the right to vote. But when analyzing preemption, the focus must be on the text of NVRA § 6 because "the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013). The fact that Congress deemed the right to vote important does not answer whether "registration" in 52 U.S.C. § 20505(a)(1) includes voting by mail here.

The DNC/ADP next argue that the State's interpretation is absurd, because states could "register" voters but then "sharply limit" how they vote, such as only allowing voting in person at midnight. Doc. 393, pgs. 7–8. This argument is unpersuasive for two reasons. First, whether a state law unduly burdens the right to vote may be a fair inquiry under the Constitution or other statutes, but it is not the inquiry in NVRA § 6. Second, even assuming that an outrageous limit like midnight-only-voting could amount to a constructive denial of registration, the same cannot be said of restricting voting by mail in Arizona. Again, an Arizonan who cannot vote by mail may still vote "in the traditional manner—by voting in person at a polling place." *Mi Familia Vota*, 608 F. Supp. 3d at 848.

After expressing policy concerns, the DNC/ADP develop a textual argument. *See* Doc. 393, pgs. 8–9. This argument, however, is based not on the NVRA's "accept and use" requirement, but on the nearby "First-time voters" provision, which states:

> (c) ***First-time voters***
>
> (1) Subject to paragraph (2), a State ***may by law require a person to vote in person if--***
>
> (A) the person ***was registered to vote in a jurisdiction by mail; and***
>
> (B) the person ***has not previously voted*** in that jurisdiction.

52 U.S.C. § 20505(c)(1) (emphasis added).

Contrary to the DNC/ADP's interpretation, this provision does not preclude Arizona from requiring proof of citizenship as a condition of voting by mail in federal elections. For starters, the provision is permissive, not prohibitive. It identifies something states "may" do, not what states "may not" do. The DNC/ADP invoke the negative-implication canon, arguing that Congress, by allowing states to require in-person voting in a specific situation, impliedly prohibited states from requiring in-person voting in other situations. Doc. 393, pg. 9. But the negative-implication canon does not apply unless "it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (cleaned up).

Here, context indicates that Congress did not intend § 20505(c)(1) to be a broad presumptive "no" to states that wish to place limits on voting by mail in federal elections. The provision is narrower than that. It is titled "First-time voters," and the text merely addresses whether a state may require a first-time voter to vote in person even if the voter is already registered to vote by mail. (Answer: yes.) To interpret the provision as a broader restriction on states' power to regulate mail voting—which varies widely by state—would be unprecedented, and the DNC/ADP cite no case or legislative history supporting this view. The better view is that the provision simply does not address the question of whether a state may require proof of citizenship as a condition of voting by mail in federal elections. *Cf. Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 (2003) ("The better inference is that what we face here is nothing more than a case unprovided for.").

3. The "accept and use" provision preempts requiring proof of location of residence for federal forms for federal elections.

The Court should rule: To the extent the Voting Laws require voters to submit proof of location of residence beyond the federal mail registration form to register for federal elections, they are preempted by the NVRA's "accept and use" requirement. *See* Doc. 364, pg. 4.

The plaintiffs agree that this is a question of law appropriate for resolution at this stage. *See* Doc. 390, pgs. 4–6 (Tohono O'odham Plaintiffs).

The Tohono O'odham Plaintiffs propose a slightly revised ruling: "Application of A.R.S. § 16-123 to people who register to vote using the Federal Form to register for federal elections is preempted by the requirement in Section 6 of the NVRA that states 'accept and use' the Federal Form." Doc. 390, pg. 6.

The State does not object to this revised ruling. As noted in the State's motion, A.R.S. § 16-123 "appear[s] to" require voters to submit documents beyond the federal mail registration form to register for federal elections. Doc. 364, pg. 4. And the State agrees that applying the statute in that way is preempted by NVRA § 6.

B. The Voting Laws do not violate the NVRA requirement to register eligible applicants who submit forms at least 30 days before the election.

NVRA § 8(a)(1) requires that states "ensure that any eligible applicant is registered to vote" in federal elections if their federal mail registration form (or other form) is submitted at least 30 days before the election (or lesser period under state law). 52 U.S.C. § 20507(a)(1). The State's motion did not seek a ruling on this provision. Doc. 364. However, MFV has now cross-moved for summary judgment on the issue. Doc. 399, pgs. 15–17. The Could should deny this cross-motion.

No one disputes that this is a question of law the Court should resolve now. *See* Doc. 367, pgs. 9–11 (RNC); Doc. 369 (Legislators); Doc. 399, pgs. 15–17 (MFV).

Contrary to MFV's interpretation of the statute, the purpose of NVRA § 8(a)(1) is to limit how far in advance of a federal election a state may require an applicant to submit

a registration form. Election officials often prefer early submission of registration forms so that they have time to process the forms, but many voters do not register until an election is near, which means an early submission deadline could cause voters to miss out. Congress struck a balance in NVRA § 8(a)(1). *See* H.R. Rep. 103-9, 103rd Cong., at 4 (1993) (considering argument that "most people don't become interested in elections until the last weeks of a campaign, and then discover it is too late to register," against the argument that same-day registration "would be very difficult to administer" and could cause "an overwhelming number of people to show up on election day").

Here, the Voting Laws do not change the date by which voters in Arizona must submit registration forms, so NVRA § 8(a)(1) is generally not implicated in this case at all. That said, if the Voting Laws were to have the effect of prolonging the time it takes for election officials to process registration forms for federal elections, such that an eligible voter who submits a valid form at least 30 days (or other applicable period) beforehand is not permitted to vote, the Voting Laws could be preempted—but only as applied in such cases (and MFV identifies no such case).

MFV specifically argues: NVRA § 8(a)(1) "does not permit Arizona to deny a Federal-Form applicant their right to vote by mail and in presidential elections, despite timely submitting a 'valid voter registration form,' simply because the county recorder cannot extrinsically verify the applicant's affirmation of citizenship before the coming election." Doc. 399, pg. 17 (emphasis omitted). This is true in a narrow sense: under NVRA § 8(a)(1), election officials may not exceed the usual *time limit* for processing a registration form just because an investigation of citizenship is ongoing.

But MFV appears to be making a broader claim: that NVRA § 8(a)(1) imposes a *substantive limit* on the information a state may require in the registration process and therefore preempts parts of the Voting Laws that require proof of citizenship. That argument is a poor fit for NVRA § 8(a)(1). It is really about other parts of the NVRA (such as the "accept and use" requirement in § 6), which govern how states gather information during the registration process. Implicitly recognizing this problem, MFV

admits that the Court "need not reach" its NVRA § 8(a)(1) claim regarding federal form applicants if the Court finds for plaintiffs under NVRA § 6. Doc. 399, pg. 15, n.12.

For clarity, the Court should deny MFV's cross-motion for summary judgment on NVRA § 8(a)(1), regardless of how it rules on NVRA § 6.

C. The Voting Laws do not, on their face, violate the NVRA requirement that state "maintenance" programs for federal registration lists be "uniform" and "nondiscriminatory."

NVRA § 8(b) requires that state programs or activities for "maintenance" of voter registration lists for federal elections be "uniform" and nondiscriminatory." 52 U.S.C. § 20507(b)(1). As the State has explained, this requirement applies only to the parts of the Voting Laws that are actually maintenance programs; and such programs are, at least on their face, uniform and nondiscriminatory. Doc. 364, pgs. 5–6. The Court should issue the State's requested rulings despite plaintiffs' counter-arguments.

1. A "maintenance" program identifies and removes ineligible voters from an existing list.

The Court should rule: To the extent the Voting Laws affect how voters are treated during initial registration, or refer some voters for investigation, such actions are not part of "maintenance" programs or activities for registration lists under 52 U.S.C. § 20507(b)(1). *See* Doc. 364, pg. 6.

How to define "maintenance" program is a question of statutory interpretation that the Court should resolve now, to provide clarity for trial. Although Poder Latinx does not cross-move for summary judgment, it agrees that the Court should issue a ruling. *See* Doc. 397, pg. 12 (asking Court to hold that NVRA § 8(b) "covers procedures to determine which new registrants will be added to the official list of eligible voters").

The term "maintenance" program in NVRA § 8(b) is best defined as a program for identifying and removing ineligible voters from an existing registration list. This is not a novel reading. The Supreme Court, for example, has described § 8(b) as a limit on "state removal programs." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1840 (2018).

Likewise, legislative history makes clear that § 8(b) was intended to regulate "purge programs." S. Rep. No 103-6, 103rd Cong., at 31 (1993); *see also, e.g.*, Naila S. Awan, *When Names Disappear: State Roll-Maintenance Practices*, 49 U. Mem. L. Rev. 1107, 1109 (2019) (distinguishing between rules governing "how individuals could register to vote" and processes for "maintaining registration lists and removing names from the voter rolls," and referring to the latter category as "voter-roll maintenance or purge laws").

Poder Latinx seeks to redefine the term "maintenance" program to include the process by which voters initially register. Doc. 397, pgs. 9–12. Its arguments are unpersuasive. It starts (at pg. 10) by citing a district court opinion that applied NVRA § 8(b)(1) in the context of voter registration activities, but that opinion merely assumed that § 8(b) applied—it did not actually analyze the meaning of "maintenance" programs. *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 703 (N.D. Ohio 2006). Finding no authority on point, Poder Latinx turns to case law interpreting a different provision: NVRA § 8(i). *See* Doc. 397, pg. 10. But that analogy fails because § 8(i) is expressly about "voter registration activities" (as stated in the heading) and is nowhere limited to "maintenance" of registration lists. 52 U.S.C. § 20507(i). Cases interpreting that provision therefore shed no light on how to define "maintenance" program in § 8(b).

Poder Latinx then turns to statutory context, to no avail. *See* Doc. 397, pg. 11. It is true that the overall title of NVRA § 8 includes "administration of voter registration" and that part of § 8—namely § 8(a)(1)—is about ensuring that applicants are timely registered. But that only proves that administration of voter registration has two components: (1) the process by which voters initially register, and (2) the process of identifying and removing ineligible voters from existing registration lists. The State does not dispute this basic dichotomy. As the Supreme Court has observed, the NVRA has "two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls." *Husted*, 138 S. Ct. at 1838. The question here is whether § 8(b) involves the former or the latter. The answer is the latter.

It is also true that the heading of NVRA § 8(b) does not include the specific word "removal." But the heading is "*Confirmation* of voter registration," 52 U.S.C. § 20507(b) (emphasis added), which demonstrates that the provision is about the process for reviewing an existing registration list, not the process by which voters initially register. Indeed, § 8(b)(2) goes on to prohibit maintenance programs that result in "removal" of voters for failure to vote in certain circumstances—further confirming that § 8(b) is about the process of identifying and removing ineligible voters from registration lists. The Court should clarify this scope in its ruling.

2. "Uniformity" and "nondiscrimination" are clearly defined, and the Voting Laws on their face violate neither.

The Court should rule: "Uniformity" is satisfied when a maintenance program applies to an entire jurisdiction. "Nondiscrimination" is satisfied when a maintenance program complies with the Voting Rights Act of 1965. And the Voting Laws, at least on their face, satisfy both. *See* Doc. 364, pg. 6.

How to define uniformity and nondiscrimination for purposes of NVRA § 8(b) are questions of statutory interpretation that the Court can and should resolve now. Although Poder Latinx does not cross-move for summary judgment, its opposition brief reveals that it defines these terms far more broadly than Congress intended, so judicial clarification is appropriate. Doc. 397, pgs. 13–14.

Start with "uniformity." Although not defined in the NVRA itself, legislative history makes clear: "The term 'uniform' is intended to mean that any purge program or activity must be applied to an entire jurisdiction." S. Rep. No. 103-6, 103rd Cong., at 31 (1993). These kinds of "legislative statements, particularly committee reports, can be extremely helpful in understanding what Congress intended—in determining what the statute means." *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1453 (9th Cir. 1992).

Poder Latinx, however, defines this term based on what merriam-webster.com says thirty years after the NVRA's passage. Doc. 397, pg. 13. And the difference is striking:

using the definition of "uniform" from merriam-webster.com, a maintenance program could violate NVRA § 8(b) if it is not "consistent in conduct or opinion," does not "always" have "the same form, manner, or degree," or is "varying or variable." *Id.* This theory of liability is nearly boundless. The Court should resolve this issue now using legislative history, not merriam-webster.com.

The same goes for "nondiscrimination." Here, too, legislative history is clear: "The term 'non-discriminatory' is intended to mean that the procedure complies with the requirements of the Voting Rights Act of 1965." S. Rep. No. 103-6, 103rd Cong., at 31 (1993). In contrast, Poder Latinx defines nondiscrimination to simply mean "not discriminatory," without elaboration. Doc. 397, pg. 13. That is not a definition. It adds nothing at all.

Nor does Poder Latinx's purported definition work in practice, because it fails to identify the type of differential treatment that violates NVRA § 8(b). It cannot be that maintenance programs for voter registration lists must not include *any* differential treatment, because the whole point of such programs is to distinguish ineligible voters from eligible voters and remove the former.

Rather than grapple with the unworkability of its purported definition, Poder Latinx resorts to canons of interpretation. It argues that defining nondiscrimination by reference to the Voting Rights Act introduces surplusage, given that the Voting Rights Act is separately listed in NVRA § 8(b). But the interpretive canon against surplusage is not infallible. "Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176–77 (2012). The surplusage canon does not require this Court to reject an imperfectly written but sensible and supported reading in favor of an unworkable one.

Again, the Court should resolve this issue now, using legislative history, not tautology. *See Mt. Graham Red Squirrel*, 954 F.2d at 1453; Fed. R. Civ. P. 56(a).

After settling these definitions, the Court should decide whether the Voting Laws, at least on their face, are uniform and nondiscriminatory. Poder Latinx asks the Court not to reach this question, arguing that doing so "would not narrow the issues" and would be "unusual." Doc. 397, pg. 13. But evaluating whether a statute is lawful on its face, while saving for another day whether the statute is unlawful as applied, often helps advance a case. *Cf. Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 457–58 (2008) (rejecting First Amendment facial challenge to state law while observing that "factual determination must await an as-applied challenge").

And, at least on their face, the Voting Laws are indeed uniform (they apply to an entire jurisdiction) and nondiscriminatory (they do not discriminate against a class protected by the Voting Rights Act). Poder Latinx argues that discovery will show otherwise, but what it means is that discovery will show unlawful *applications* of the Voting Laws. For example, Poder Latinx claims that the Voting Laws will cause voting officials to use databases that contain "stale government data" about citizenship and will invite discrimination based on "race," "ethnicity," and other criteria. Doc. 397, pgs. 14–15. The State agrees that these as-applied claims would benefit from further discovery and generally does not seek a ruling on them at this time.

An exception is the DNC/ADP's claim (as described by Poder Latinx) that the Voting Laws are "nonuniform in their treatment of federal-only voters as compared with other Arizona voters." Doc. 397, pg. 15. The Court should rule for the State on that claim now, because it requires no discovery and rests on overbroad definitions of both "maintenance" program and "uniformity," as explained above.

D. The Voting Laws do not violate the NVRA limit on grounds for cancelling voter registrations.

NVRA § 8(a)(3) and (4) limit the grounds on which states may cancel voter registrations for federal elections. 52 U.S.C. § 20507(a)(3), (4). Although non-citizenship is not expressly listed as a ground for cancellation, courts have interpreted these provisions as permitting cancellation for non-citizens or other registrants who were

not eligible to register in the first place. *See Bell v. Marinko*, 367 F.3d 588, 591–92 (6th Cir. 2004); *United States v. Florida*, 870 F. Supp. 2d 1346, 1349–50 (N.D. Fla. 2012). This Court should follow suit.

The Court should rule: The Voting Laws do not violate NVRA § 8(a)(3) or (4). *See* Doc. 364, pgs. 6–8.

Whether NVRA § 8(a)(3) and (4) permit cancellation based on non-citizenship is a matter of statutory interpretation and federal preemption, which are questions "of law." *Henry*, 125 F.3d at 1309. This is a straightforward issue that the Court should resolve now, for one side or the other.

The Equity Coalition seeks to delay a ruling by suggesting there are fact issues to resolve. For example, the Equity Coalition claims that there is "no proof that Arizona registered any non-citizens," that there are "very real fact questions about voters' citizenship status and how successful the removal scheme will be," and that there are "numerous factual questions" about "how H.B. 2243 could possibly, definitively, identify non-citizens in the first place." Doc. 396, pgs. 11–13.

But these questions have nothing to do with whether a certain category of cancellation is permitted by NVRA § 8(a)(3) or (4). Again, the State is generally not seeking a ruling on constitutional claims, as such claims may involve fact questions. The State is seeking a ruling on whether the Voting Laws violate NVRA § 8(a)(3) and (4), which can be resolved simply by holding that these statutory provisions do not prohibit cancellation based on non-citizenship.

And the Court should so hold. These NVRA provisions do not bar removal of names of persons "who were ineligible and improperly registered to vote in the first place," *Bell*, 367 F.3d at 591–92, such as "an improperly registered noncitizen," *Florida*, 870 F. Supp. 2d at 1349–50. And interpreting these NVRA provisions as prohibiting states from removing ineligible voters would raise constitutional concerns, because the Elections Clause "empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Inter Tribal*, 570 U.S. at 16–17.

The Equity Coalition argues that the text of NVRA § 8(a)(3) and (4) does not mention citizenship. Doc. 396, pg. 10. But again, the text simply does not address voters who were ineligible in the first place. *Bell*, 367 F.3d at 591–92; *Florida*, 870 F. Supp. 2d at 1350. Legislative history confirms: "One of the purposes of this bill is to ensure that once *a citizen* is registered to vote, he or she should remain on the voting list so long as he or she *remains eligible* to vote in that jurisdiction." S. Rep. 103-6, 103rd Cong., at 17 (1993) (emphasis added).

The Equity Coalition says it is "common sense" that voter eligibility should be determined "when they apply," not after registration. Doc. 396, pg. 10. But that is not common sense, because errors can occur in the application process. Following the Equity Coalition's approach "would effectively grant, and then protect, the franchise of persons not eligible to vote." *Bell*, 367 F.3d at 592. That cannot be right.

The Equity Coalition also gives short shrift to the constitutional concern raised by the State, merely asserting that the State points to no evidence that there are non-citizens on the rolls. Doc. 396, pg. 11, n.6. That response misunderstands the nature of the concern. Under the Elections Clause, States decide who votes in elections, not Congress. So if the NVRA prohibits States from removing voters they deem ineligible, the NVRA may well exceed Congress' constitutional authority. That is a problem because "[i]f no enumerated power authorizes Congress to pass a certain law, that law may not be enacted"—full stop. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012).

The Equity Coalition cites *U.S. Student Association Foundation v. Land*, 546 F.3d 373 (6th Cir. 2008), but *Land* was not about NVRA § 8(a)(3) or (4) and did not disturb the Sixth Circuit's earlier opinion in *Bell*, which is on point. Moreover, *Land* is distinguishable because it involved a program that removed voter names without any "determination that the voters are ineligible." 546 F.3d at 386. Here, in contrast, the Voting Laws require removal when a county recorder "*confirms* that the person registered is not a United States citizen." A.R.S. § 16-165(A)(10) (emphasis added).

The Equity Coalition also cites *Arcia v. Florida Secretary of State*, 772 F.3d 1335 (11th Cir. 2014), but that case actually supports the State here. The *Arcia* majority expressly declined to consider whether NVRA § 8(a)(3) and (4) "allow for removals of non-citizens." *Id.* at 1346. And the majority expressed the same constitutional concern: "Certainly an interpretation of [NVRA § 8(a)(3) and (4)] that prevents Florida from removing non-citizens would raise constitutional concerns regarding Congress's power to determine the qualifications of eligible voters in federal elections." *Id.* at 1346–47.

This Court should avoid these constitutional concerns, follow *Bell* and *Florida*, and interpret 52 U.S.C. § 20507(a)(3) and (4) as permitting (or at least not prohibiting) cancellations due to non-citizenship.

E. The Voting Laws do not violate the NVRA requirement that states complete systematic cancellation programs 90 days before an election.

NVRA § 8(c)(2)(A) generally requires states to complete any program for systematically cancelling voter registrations at least 90 days before a federal election (the "quiet period"). 52 U.S.C. § 20507(c)(2)(A). As the State has explained, this quiet period does not preempt the Voting Laws at all—or alternatively, it should be harmonized with the Voting Laws. Doc. 364, pgs. 8–10. The Court should adopt the first requested ruling (or alternatively, the second) despite plaintiffs' counter-arguments.

1. The quiet period does not preempt the Voting Laws.

The Court should rule: The 90-day quiet period in 52 U.C.S. § 20507(c)(2)(A) does not preempt the Voting Laws at all. *See* Doc. 364, pgs. 9–10.

The parties agree that whether the Voting Laws violate the 90-day quiet period is a question of law that the Court should resolve now, for one side or the other. *See* Doc. 393, pgs. 16–17 (DNC/ADP); Doc. 396, pgs. 3–7 (Equity Coalition).

This Court should hold that the 90-day quiet period does not apply to cancellations based on non-citizenship, for the same reasons explained above regarding NVRA § 8(a)(3) and (4). As the *Florida* court explained: "[N]one of this applies to removing noncitizens who were not properly registered in the first place. . . . [T]he NVRA does not

require a state to allow a noncitizen to vote just because the state did not catch the error more than 90 days in advance." 870 F. Supp. 2d at 1350.

In response, the DNC/ADP and Equity Coalition cite the two-judge majority in *Arcia*, 772 F.3d at 1343–48, which held that the 90-day quiet period *does* apply to systematic cancellation programs based on non-citizenship. *See* Doc. 393, pg. 17; Doc. 396, p. 9. But the *Florida* court has the better argument, and both the dissenting panelist and the district judge in *Arcia* thought so. *See Arcia*, 772 F.3d at 1348–49 (dissenting opinion); *Arcia v. Detzner*, 908 F. Supp. 2d 1276, 1281–83 (S.D. Fla. 2012) (district judge opinion).

The problem with the *Arcia* majority's interpretation is that the 90-day quiet period uses removal language that is similar to, and thus should be interpreted consistently with, the limit on grounds for cancelling registration in NVRA § 8(a)(3) and (4). *Compare* 52 U.S.C. § 20507(a)(3) and (4) *with* § 20507(c)(2)(A). But interpreting the limit in NVRA § 8(a)(3) and (4) as prohibiting states from removing non-citizens would, as explained above, yield an absurd result that raises constitutional concerns. The *Arcia* majority sidestepped this problem, reasoning that the problem "would only arise in a later case which squarely presents the question of whether [NVRA § 8(a)(3) and (4)] bars removal of noncitizens altogether." 772 F.3d at 1346–47. This is that case. The Court should follow *Florida*, the *Arcia* dissenting panelist, and the *Arcia* district judge, and interpret both NVRA § 8(a)(3) and (4) and the 90-day quiet period as permitting (or at least not prohibiting) cancellation of registration of non-citizens.

Even if this Court follows the *Arcia* majority's interpretation of the 90-day quiet period, however, parts of the Voting Laws could still be in effect during that period. The *Arcia* majority held that the quiet period prevents operation of programs to "systematically" remove non-citizens, but does not prevent "investigating potential non-citizens and removing them on the basis of *individualized* information." 772 F.3d at 1348 (emphasis added). And parts of the Voting Laws involve removals based on individualized information. *E.g.*, A.R.S. § 16-165(A)(10) (requiring county recorder to

send individualized 35-day cancellation notice upon receiving report from jury commissioner indicating that "a person who is registered to vote has stated that the person is not a United States citizen"). Thus, at a minimum, this Court should not adopt the unqualified conclusions of the DNC/ADP (that "removal under H.B. 2492 cannot be conducted during the 90-day period") or the Equity Coalition (that "H.B. 2243 violates the 90-Day Provision"). Doc. 393, pg. 17; Doc. 396, pg. 8.

2. Alternatively, the quiet period should be harmonized with the Voting Laws.

Alternatively, if the Court holds that the quiet period applies to removals based on non-citizenship, the Court should rule: The Voting Laws' programs to systematically cancel registrations of non-citizens for federal elections must not be in effect during the 90 days before federal elections. *See* Doc. 364, pg. 10.

This alternative ruling is based on the principle that "[s]tate and federal laws should be accommodated and harmonized where possible so that preemption can be avoided." *Unocal Corp. v. Kaabipour*, 177 F.3d 755, 769 (9th Cir. 1999).

The DNC/ADP object on the ground that the Court cannot rewrite the Voting Laws. Doc. 393, pg. 17. But this dispute is largely semantic. The ruling requested by the DNC/ADP is similar to the State's requested alternative ruling. In their view, "the proper course is to hold that, because of the NVRA's 90-day provision, removal under H.B. 2492 cannot be conducted during the 90-day period before any federal election." *Id.*

The State conditionally agrees in part. If this Court were to adopt the *Arcia* majority's interpretation of the quiet period (contrary to *Florida*, the *Arcia* dissent, and the *Arcia* district court) such that the quiet period can apply to removals based on non-citizenship, the State would not object to a ruling that systematic removal programs under

H.B. 2492 and H.B. 2243 for federal elections cannot be conducted during the 90-day period before federal elections.[3]

If the Court issues such a ruling, the Court may wish to order the parties to submit a proposed order specifying which parts of the Voting Laws constitute "systematic" removal programs for this purpose. The State acknowledges that parts of the Voting Laws constitute systematic removal programs, as noted by the Equity Coalition. *See* Doc. 396, pgs. 5–7. But other parts are more individualized, as noted above. *E.g.*, A.R.S. § 16-165(A)(10) (requiring county recorder to send individualized 35-day cancellation notice upon receiving report from jury commissioner indicating that "a person who is registered to vote has stated that the person is not a United States citizen"). The State believes this level of detail would be most efficiently handled by the parties in the first instance, after the benefit of a ruling from the Court.

II. REQUESTED RULINGS ON MATERIALITY PROVISION CLAIMS

The Materiality Provision prohibits states from denying the right to vote based on an error or omission in an application that is "not material in determining" the person's eligibility. 52 U.S.C. § 10101(a)(2)(B). The provision was deemed "necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008) (citation omitted). Here, the Voting Laws require registration applicants to check a box affirming citizenship, provide proof of citizenship, and list their state or country of birth—none of which is barred by the Materiality Provision. *See* Doc. 364, pgs. 10–14. The Court can and should rule in the State's favor on these issues as a matter of law.

[3] This ruling would be more precise than the sweeping remedy sought by the Equity Coalition: "a declaration that H.B. 2243 violates the 90-Day Provision of the NVRA." Doc. 396, pg. 8 & n.5.

A. The citizenship checkbox does not violate the Materiality Provision.

The Court should rule: Requiring voters to check a box affirming their citizenship does not violate the Materiality Provision. *See* Doc. 364, pg. 13.

1. The materiality of the checkbox is a legal question.

Whether the checkbox requirement violates the Materiality Provision is a question of law that should be resolved at this stage. Everyone agrees that citizenship is a requirement for voting, that the checkbox has long existed on both the state and federal forms, and that the state and federal forms seek additional citizenship-related information beyond the checkbox—as shown by the forms themselves, which the Court can review. *See* Doc. 388-3 at 9–12 (state form), 13–40 (federal mail registration form). No further discovery is needed for the Court to decide the dispositive legal question of whether the checkbox "is material to determining the eligibility of the applicant." *Browning*, 522 F.3d at 1175; *see also id.* at 1166–67, 1172–73 (reviewing district court's "legal conclusions" upon review of preliminary injunction, including whether state law violated Materiality Provision).

At least one plaintiff group agrees that the Court should resolve this question now. *See* Doc. 399, pgs. 6–8 (MFV cross-moving for summary judgment). However, the United States and LUCHA argue that the issue requires more fact development. Doc. 391-1, pgs. 17–21; Doc. 394, pgs. 5–7. This position is unpersuasive.

As an initial matter, LUCHA cites Ninth Circuit cases indicating that materiality can be a fact question in some (very different) contexts. *See, e.g.*, *Daniel v. Ford Motor Co.*, 806 F.3d 1217, 1225 (9th Cir. 2015) (whether omission is "material" for consumer fraud analysis is question of fact); *Carolina v. JPMorgan Chase Bank NA*, No. CV-19-05882-PHX-DWL, 2021 WL 5396066, at *12-13 (D. Ariz. Nov. 17, 2021) (whether employees are similarly situated in "material respects" is question of fact). That may well be true, but materiality is a legal question in other contexts. *See, e.g.*, *Chism v. Washington State*, 661 F.3d 380, 389 (9th Cir. 2011) (noting "inquiry into whether the false statements and omissions were material is a purely legal question"); *Dmitrienko v.*

Holder, 545 F. App'x 651, 651 (9th Cir. 2013) ("Materiality is a legal question . . . ."). LUCHA points to no case law suggesting that materiality is a fact question in *this* context.

In this case, the United States asserts that facts are needed to know whether the checkbox is "actually used" to determine citizenship status. Doc. 391-1, pg. 18. Similarly, LUCHA asserts that facts are needed to know whether election officials find the citizenship checkbox useful in determining eligibility. Doc. 394, pg. 6. But how election officials use the checkbox, and whether they find it useful, is not the question. The question is whether the checkbox is, objectively, "material to determining the eligibility of the applicant." *Browning*, 522 F.3d at 1175.

For example: If an applicant submits a form that is otherwise complete but does not (as required) mark "Yes" in the citizenship checkbox, *see* A.R.S. § 16-121.01(A), and if the county recorder (as required) notifies the applicant of the omission and states that registration cannot be completed until the omission is fixed, *see* A.R.S. § 16-134(B), is the applicant's continued failure to check "Yes" material in determining whether he or she is a citizen? The parties disagree on the answer, but the point is that the question is capable of judicial resolution now. [4]

2. The checkbox is material in determining eligibility.

The citizenship checkbox is material to determining voter eligibility because citizenship is a requirement for voting in Arizona. Ariz. Const. art. VII, § 2; A.R.S. § 16-101. The checkbox is also a commonsense method of making the citizenship requirement clear and salient to registration applicants.

The United States and MFV argue that the checkbox is immaterial because it is duplicative of other ways in which registration forms elicit citizenship information. Doc. 391-1, pgs. 19–20; Doc. 399, pgs. 6–7. LUCHA likewise disputes the materiality of the

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[4] This case is unlike others cited by LUCHA, which were at the motion to dismiss stage. *See Vote.org v. Georgia State Election Bd.*, No. 1:22-CV-01734-JPB, 2023 WL 2432011, at *7–8 (N.D. Ga. Mar. 9, 2023) (denying motion to dismiss); *League of Women Voters of Arkansas v. Thurston*, No. 5:20-CV-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) (denying motion to dismiss).

checkbox. Doc. 394, pgs. 9–10. The plaintiffs assert varying theories as to how the checkbox is duplicative. For example, MFV argues that the checkbox is duplicative on federal mail registration forms because those forms already require a signature near a statement that reads, among other things: "I swear/affirm that . . . I am a United States citizen." *See* Doc. 399, pg. 6; *see also* Doc. 388-3 at 17 (federal mail registration form). The United States does not go that far, but concurs with MFV that the checkbox is duplicative on state forms because those forms already require documentary proof of citizenship. *See* Doc. 391-1, pg. 17; *see also* Doc. 388-3 at 10 (state form).

As the State's motion explained, the plaintiffs' theories fail for several reasons. *See* Doc. 364, pg. 12.

First, "duplicative" is not the same as "immaterial." *See Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006) ("Even if the check-boxes were duplicative of the oath, failing to check one or more boxes would not be an immaterial omission . . . .").

Second, the checkbox is not duplicative; rather, it elicits citizenship information in a manner different from how registration forms otherwise seek similar content. The Materiality Provision is aimed at preventing a state from denying registration based on an immaterial error, not prohibiting a state from confirming material information. *See id.* ("Since the information conveyed by checking the check-boxes is different in nature from (albeit similar in content to) that conveyed by signing the oath, checking one or more check-boxes is not duplicative of signing the oath.").

Third, Congress placed the checkbox on the federal form and specified that, if the applicant fails to answer, the applicant must be notified and given an opportunity to complete it. 52 U.S.C. § 21083(b)(4)(A), (B); *see also Diaz*, 435 F. Supp. 2d at 1213–14 (explaining that Congress' actions "provide[] strong support for the information provided by the answer being material").

Indeed, in some ways, the checkbox is a more specific way of eliciting information. For example, unlike the signature line on the federal form, which is near a statement affirming several points including but not limited to citizenship, the checkbox

is a clear and direct question about citizenship alone. *See* Doc. 388-3 at 17 (federal mail registration form showing citizenship question and signature line).

The thrust of the plaintiffs' argument is that an applicant who otherwise completes a registration form but does not mark "Yes" in the citizenship checkbox (even after receiving notice of the deficiency from the county recorder) probably just made an inadvertent omission. But the Materiality Provision does not forbid Arizona from presuming otherwise. Indeed, the Materiality Provision "asks whether, accepting the error *as true and correct*, the information contained in the error is material to determining the eligibility of the applicant." *Browning*, 522 F.3d at 1175 (emphasis in original). Here, if a prospective voter is presented with a clear yes-or-no question about whether the voter is a citizen and does not mark "Yes," that information is material. The Materiality Provision "does not establish a least-restrictive-alternative test for voter registration applications." *Id.*

LUCHA and MFV point out that the Secretary of State previously concluded that the checkbox is immaterial. Doc. 394, pg. 8; Doc. 399, pg. 7. But the Court is the decision maker here. *Browning*, 522 F.3d at 1175.

Most of the cases cited by MFV (Doc. 399, pg. 6) do not involve a state requesting material information in more than one manner and, as a result, provide little guidance. *See La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 542 (W.D. Tex. 2022) (holding that Texas could not require driver's license identification numbers because that information was "not material to determining an individual's qualifications"); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018) (holding that voter's year of birth was not "material to determining a voter's eligibility when such information [was] not uniformly required across the State").[5]

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[5] MFV also cites an unreported district court case denying a motion to dismiss on the ground that requiring absentee voters to submit two distinct forms with identical information may violate the Materiality Provision. *League of Women Voters of Arkansas*, 2021 WL 5312640, at *4. This Court should follow the more persuasive reasoning of *Diaz* and *Browning*.

The *Diaz* case is the most analogous case cited by any party, holding that checkboxes were "not duplicative of signing the oath" and that even if they were duplicative, failing to check them "would not be an immaterial omission." 435 F. Supp. 2d at 1213. The United States, LUCHA, and MFV all attempt to distinguish *Diaz*. Doc. 391-1, pgs. 20–21; Doc. 394, pg. 10; Doc. 399, pgs. 7–8. These attempts fail. It is true that the *Diaz* court was not facing a situation where the same question was asked "twice in the same way." 435 F. Supp. 2d at 1213. But neither is this Court. The Voting Laws do not ask voters to confirm citizenship "twice in the same way," but instead ask them to confirm citizenship by checking a box, providing proof, and in some cases signing a statement. Citizenship has long been understood as an important requirement for voting, and Arizona's desire for assurance does not violate the Materiality Provision.

B. Requiring proof of citizenship does not violate the Materiality Provision.

The Court should rule: Requiring voters to provide proof of citizenship does not violate the Materiality Provision. *See* Doc. 364, pg. 13.

1. The materiality of proof of citizenship is a legal question.

Whether the proof of citizenship requirement violates the Materiality Provision is a question of law that should be resolved at this stage. In addition to the reasons explained above (regarding why the checkbox issue is a question of law), there are two more reasons why the proof of citizenship issue should be resolved now.

First, there is greater consensus among the parties that this is a question of law. At least one plaintiff group agrees that the Court should resolve this question now. *See* Doc. 399, pgs. 8–9 (MFV cross-moving for summary judgment). The only plaintiff that argues otherwise is the United States, which merely asserts that it is seeking discovery on "how exactly State and local election officials plan to use HB 2492's requirements to establish voters' qualifications." Doc. 391-1, pgs. 24–25. But as explained above, how election officials "plan to use" the Voting Laws is not the proper inquiry under the Materiality Provision.

Second, the last time this issue came up in the District of Arizona, Judge Silver needed no facts to conclude on summary judgment that a proof of citizenship requirement did not violate the Materiality Provision. *See Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, 2007 WL 9724581, at *2 (D. Ariz. Aug. 28, 2007).

2. Proof of citizenship is material in determining eligibility.

This Court should follow Judge Silver: "Citizenship is material in determining whether an individual may vote and Arizona's decision to require more proof than simply affirmation by the voter is not prohibited." *Gonzalez*, 2007 WL 9724581, at *2.

Indeed, this question is even clearer today because the Voting Laws make proof of citizenship a voter eligibility qualification, akin to citizenship itself. A.R.S. § 16-101(A)(1); *cf. Inter Tribal*, 570 U.S. at 17 n.9 (specifying that the Court was not considering situation where "registration is itself a qualification to vote").

Now that proof of citizenship is itself an eligibility qualification under A.R.S. § 16-101(A)(1), the United States is wrong to distinguish between citizenship as a "voter qualification" and proof of citizenship as a "way to enforce that qualification." Doc. 391-1, pg. 24. And in any event, the United States cites no authority for its view that a registration requirement aimed at "enforcing" a voter qualification is, for that reason, precluded by the Materiality Provision.

The United States and MFV argue that requiring proof of citizenship on the federal mail registration form is duplicative because the federal form already requires a signature near a statement that reads, among other things: "I swear/affirm that . . . I am a United States citizen." Doc. 391-1, pgs. 23–24; Doc. 399, pgs. 8–9; *see* Doc. 388-3 at 17 (federal mail registration form).[6] But the Materiality Provision does not prohibit Arizona from requiring "more proof than simply affirmation." *Gonzalez*, 2007 WL 9724581, at *2.

[6] As far as the State can tell, no plaintiff argues that requiring proof of citizenship on the *state* form violates the Materiality Provision.

MFV dismisses Judge Silver's analysis in *Gonzalez* as "cursory" and says she "did not address" whether a duplicative requirement is material. Doc. 399, pg. 9. But concise writing does not mean hasty thought. And Judge Silver did address the issue by holding that Arizona may require "*more* proof than simply affirmation." (Emphasis added.)

C. Requiring state or country of birth does not violate the Materiality Provision.

The Court should rule: Requiring voters to list their state or country of birth does not violate the Materiality Provision. *See* Doc. 364, pgs. 13–14.

1. The materiality of birth place is a legal question.

Whether the birth place requirement violates the Materiality Provision is a question of law that should be resolved at this stage. At least one plaintiff group agrees that the Court should resolve this question now. *See* Doc. 399, pgs. 2–6 (MFV cross-moving for summary judgment).

The United States and LUCHA argue that the issue requires fact development. Doc. 391-1, pgs. 21–23; Doc. 394, pgs. 5–7. They say they need discovery about whether election officials "actually use" birth place to confirm a voter's identity, whether election officials "could or would" use birth place information, and if so, "how." Doc. 391-1, pg. 22; Doc. 394, pg. 6. But again, how election officials use birth place information is not the question. The question is whether a person's state or country of birth is, objectively, "material to determining the eligibility of the applicant." *Browning*, 522 F.3d at 1175.

2. Birth place is material in determining eligibility.

Whether birth place is material in determining voter eligibility depends on its relevance to eligibility. *See Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 838 (10th Cir. 1988) (explaining, with respect to evidence, that "the concept of materiality is now embodied within the broader notion of relevance as defined in the federal rules"). And birth place is relevant in at least one sense: it can help confirm the voter's identity. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006) (explaining that "verifying an individual's identity is a material requirement of voting");

accord Common Cause v. Thomsen, 574 F. Supp. 3d 634 (W.D. Wis. 2021) (explaining that voter qualifications for purposes of Materiality Provision are not limited to substantive qualifications such as citizenship, residency, and age).

A person's state or country of birth is a nonintrusive datapoint elicited on a variety of forms. For example, as explained in the State's motion, the U.S. State Department requires passport applicants to provide their birth place because "it is an integral part of establishing an individual's identity." Doc. 365-1 at 107. The United States, LUCHA, and MFV argue that what the State Department does is irrelevant because the State Department is not subject to the Materiality Provision and faces different challenges and has more resources than Arizona election officials. *See* Doc. 391-1, pg. 23; Doc. 394, pg. 12; Doc. 399, pg. 5. But the plaintiffs do not dispute the basic fact that birth place is an "integral part of establishing an individual's identity" according to the State Department.

And it is not just the State Department that requests birth place. Nine other states include birth place on their registration forms. *See* Doc. 365, pg. 3, ¶ 12; Doc. 389, pg. 3, ¶ 12; Doc. 392, pg. 2 (showing no dispute on this point).[7] Even the District of Arizona asks attorneys to provide their birth place on the attorney admission form. *See* LRCiv 83.1(a) ("Every applicant must first file with the Clerk a statement on the form provided by the Clerk setting out the applicant's place of birth . . . .").

MFV disputes whether birth place is useful for verifying identity, citing the previously expressed view of the Secretary of State and certain county representatives. Doc. 399, pgs. 4–5. LUCHA similarly cites the previously expressed view of the Secretary of State. Doc. 394, pg. 11. But these views are not dispositive. Again, it is for the Court to say whether birth place "is material to determining the eligibility of the applicant." *Browning*, 522 F.3d at 1175. Here, birth place is at least material in the sense

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[7] The State previously made the additional statement that four of these nine states "appear to require" place of birth for registration. Doc. 365, pg. 3, ¶ 13. The plaintiffs dispute this statement. Doc. 389, pg. 3–4, ¶ 13; Doc. 392, pgs. 2–3. Having reviewed plaintiffs' filings, the State agrees that, at a minimum, there is a genuine dispute of fact about this statement and no longer relies on it for the present motion.

that "verifying an individual's identity is a material requirement of voting." *Rokita*, 458 F. Supp. 2d at 841.

LUCHA also argues that the State has provided "shifting rationales" for the birth place requirement, because the State argued at the motion to dismiss stage that birth place is material in determining citizenship. *See* Doc. 394, pg. 11. But the State's choice to affirmatively seek summary judgment on one theory does not mean it has "shifted" from others. The State continues to maintain that birth place is material in determining citizenship too, in the sense that persons born in the United States are citizens. U.S. Const. amend. XIV, § 1; *see also* 8 U.S.C. § 1401. The State recognizes, of course, that the inverse does not hold. Many persons born outside the United States become citizens, as MFV explains. Doc. 399, pg. 3. Thus, birthplace is a sufficient but not necessary condition for citizenship, making it material in determining whether a given person is a citizen.

III. REQUESTED RULING ON VAGUENESS CLAIM

Promise AZ claims that two parts of the Voting Laws—A.R.S. §§ 16-165(A)(10) and (I)—"run afoul of the vagueness doctrine." Doc. 395, pg. 2. But federal courts are limited to cases where injury is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). Promise AZ's vagueness claim is not such a case.

Even if it were, the challenged statutory provisions are not unconstitutionally vague. The provisions direct county recorders to (1) consult a database if they have "reason to believe" a registered voter is not a citizen, and (2) if they "confirm" a registered voter is not a citizen, notify the registrant, wait for 35 days, and if the registrant does not respond, cancel registration and refer the matter for possible investigation. A.R.S. §§ 16-165(A)(10), (I). These are ordinary delegations of authority.

A. Promise AZ lacks standing.

The Court should rule: Promise AZ and its co-plaintiff, Southwest Voter Registration Education Project, lack standing to challenge A.R.S. §§ 16-165(A)(10) and (I) as unconstitutionally vague. *See* Doc. 364, pg. 15.

"Standing is a question of law for the district court to decide." *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 747 (9th Cir. 2012). Promise AZ acknowledges (Doc. 395, pg. 13) that standing requires "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," and although the injury need not have occurred quite yet, it must be at least "certainly impending." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979).

The problem for Promise AZ is that there is no indication that A.R.S. §§ 16-165(A)(10) and (I) have been enforced against it, its co-plaintiff, or anyone they represent. And in pre-enforcement cases, the Ninth Circuit considers three factors to determine whether injury is sufficiently imminent for standing: (1) whether the plaintiff has articulated a "concrete plan" to violate the law, (2) whether enforcing authorities have communicated a "specific warning or threat" to initiate proceedings, and (3) the "history of past prosecution or enforcement" under the challenged law. *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc); *see also Lopez v. Candaele*, 630 F.3d 775, 786 (9th Cir. 2010) (considering similar factors in context of vagueness challenge).

Here, none of these factors is present. Neither Promise AZ nor its co-plaintiff (nor anyone they represent) has articulated a plan to violate (or otherwise be subjected to) the challenged law. Nor do the plaintiffs assert that any enforcing authority has communicated a threat to initiate proceedings under the law. Nor is there history of past enforcement here. As a result, Promise AZ's asserted injury is "conjectural or hypothetical," not "actual or imminent." *Lujan*, 504 U.S. at 560.

Promise AZ tries to fill the gap by arguing that it and its co-plaintiff have direct organizational standing, as recognized in *Havens Realty Corp. v. Coleman*, 455 U.S. 363,

378–79 (1982).[8] But this argument makes a category error. In pre-enforcement cases, the *Thomas* factors are considered regardless of whether the plaintiff is an individual or an organization, because the factors determine whether the plaintiff's asserted injury is sufficiently imminent—regardless of who they are. *See, e.g.*, *Humanitarian L. Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1142 (9th Cir. 2009) (applying *Thomas* factors to organizational plaintiff). Promise AZ implicitly acknowledges this by stating that the imminence requirement expressed in *Babbitt* is "[i]n addition" to establishing direct organizational standing. Doc. 395, pg. 13.

And it is the imminence requirement that Promise AZ fails. Promise AZ argues that the challenged statutory provisions "will most likely" harm Latino voters and that Promise AZ and its co-plaintiff "will have to devote their money, time, and resources to identify and combat the effects." Doc. 395, pgs. 13–14. These vague assertions about possible future harm confirm that any injury is "conjectural or hypothetical," not "actual or imminent." *Lujan*, 504 U.S. at 560.

Case in point: In Indiana, organizations challenged a voter ID law and asserted organizational standing, arguing that "if the law is upheld, it will require them to shift resources away from their existing programs and into efforts aimed at helping voters comply with [the law's] requirements." *Rokita*, 458 F. Supp. 2d at 815. The district court rejected this standing theory for several reasons, including that (1) the plaintiffs had not "already expended resources" but instead "vaguely assert[ed] that, as a result of [the law], they will, under undefined circumstances in the future, be required to divert unspecified resources to various outreach efforts," (2) the injury asserted by the plaintiffs was "entirely of their own making since any future reallocation of resources would be initiated at [their] sole and voluntary discretion," and (3) the plaintiffs' standing theory, "if

[8] Promise AZ does not cite *Havens*, but *Havens* is the origin of the standing theory it articulates, which requires "frustration of organizational mission" and "diversion of resources." Doc. 395, pg. 12.

accepted, would completely eviscerate the standing doctrine." *Id.* at 815–17. This Court should likewise conclude that Promise AZ and its co-plaintiff lack standing here.

B. The Voting Laws are not unconstitutionally vague.

Alternatively, the Court should rule: A.R.S. §§ 16-165(A)(10) and (I) are not unconstitutionally vague. *See* Doc. 364, pgs. 15–16.

Whether a statute is unconstitutionally vague "is a question of law." *Cal. Pac. Banks v. Fed. Deposit Ins. Corp.*, 885 F.3d 560, 569 (9th Cir. 2018) (citation omitted). Promise AZ is therefore wrong to suggest that the State's motion is premature. *See* Doc. 395, pg. 3 n.3. Promise AZ does not identify any specific fact dispute; it merely asserts that the State's arguments "implicate facts that are the subject of ongoing discovery" and adds a general citation to the rest of its response brief. *Id.* But there are no genuine fact disputes here. The State's arguments are legal, as shown below.[9]

Here, one of the challenged statutory provisions directs county recorders to consult a database if they have "reason to believe" a registered voter is not a U.S. citizen:

> To the extent practicable, each month the county recorder shall compare persons who are registered to vote in that county and who the county recorder has ***reason to believe*** are not United States citizens and persons who are registered to vote without satisfactory evidence of citizenship as prescribed by § 16-166 with the systematic alien verification for entitlements program maintained by the United States citizenship and immigration services to verify the citizenship status of the persons registered.

A.R.S. § 16-165(I) (emphasis added). The other challenged provision directs county recorders, if they "confirm" a registered voter is not a U.S. citizen, to notify the registrant, wait for 35 days, and then if the registrant does not provide proof of citizenship, cancel registration and refer the matter for possible investigation:

> The county recorder shall cancel a registration . . . When the county recorder obtains information pursuant to this section and ***confirms*** that the person registered is not a United States citizen, including when the county recorder receives a summary report from the jury commissioner or jury manager pursuant to § 21-314 indicating that a person who is registered to vote has

[9] Even if there were a genuine fact dispute (despite not being identified by Promise AZ), the Court could resolve the dispute in Promise AZ's favor and grant the State's motion.

> stated that the person is not a United States citizen. Before the county recorder cancels a registration pursuant to this paragraph, the county recorder shall send the person notice by forwardable mail that the person's registration will be canceled in thirty-five days unless the person provides satisfactory evidence of United States citizenship pursuant to § 16-166. The notice shall include a list of documents the person may provide and a postage prepaid preaddressed return envelope. If the person registered does not provide satisfactory evidence within thirty-five days, the county recorder shall cancel the registration and notify the county attorney and attorney general for possible investigation.

A.R.S. § 16-165(A)(10) (emphasis added).

Promise AZ argues that these provisions are vague in two ways. First, Promise AZ invokes the due process principle that individuals deserve "fair notice of whether their conduct is prohibited" so that they "can choose whether or not to comply." *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000). Promise AZ says the challenged provisions do not provide "ordinary voters" fair notice of the "type of information that would trigger a county recorder's subjective judgment." Doc. 395, pg. 4.

This vagueness theory fails for a simple reason: the challenged provisions do not regulate voter conduct at all. Rather, they regulate county recorder conduct. And "there is no need for legislation to give fair warning except to those potentially subject to it." Wayne R. LaFave, 1 *Substantive Criminal Law* § 2.3(b) (3d ed., Westlaw, Oct. 2022 update).

To illustrate the difference, consider A.R.S. § 16-182(A), which states that a person who knowingly registers to vote despite being ineligible is guilty of a class 6 felony. *That* statute regulates voter conduct. Due process requires that it provide "fair notice" of what is prohibited so that voters can choose whether to comply. *Forbes*, 236 F.3d at 1011.

In contrast, A.R.S. §§ 16-165(A)(10) and (I) do not prohibit or require any voter conduct. They simply require county recorders, in some situations, to (1) consult a database, and (2) take steps toward registration cancellation and investigation referral. Voters do not decide whether to comply with these laws at all. Thus, voters have no due process right to fair notice of what the law prohibits.

To clarify, this is not a conclusion about procedural due process—i.e., whether voters can be removed from voter rolls without notice and an opportunity to be heard. Procedural due process is not the basis of Promise AZ's vagueness claim. And in any event, the challenged statutory provisions require county recorders to notify voters and give them an opportunity to provide proof of citizenship before they can be removed, thereby providing due process.

Promise AZ's second vagueness theory is that the challenged statutory provisions are so standardless that they "encourage arbitrary or discriminatory enforcement." Doc. 395, pg. 8 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972)). This theory fails for several reasons.

First, the statutory provisions at issue do not define any offenses or sentences. The Supreme Court has invalidated only two kinds of criminal laws as void for vagueness: "laws that define criminal offenses and laws that fix the permissible sentences for criminal offenses." *Beckles v. United States*, 580 U.S. 256, 262 (2017) (emphasis omitted). In contrast, for example, the Supreme Court has deemed the vagueness doctrine inapplicable to the advisory Sentencing Guidelines, observing that the Guidelines "do not regulate the public by prohibiting any conduct or by establishing minimum and maximum penalties." *Id.* at 266 (citation omitted). Here, too, A.R.S. §§ 16-165(A)(10) and (I) do not regulate the public. Promise AZ does not explain how the vagueness doctrine is applicable.

Second, even assuming the vagueness doctrine is applicable, Promise AZ does not argue that the challenged statutory provisions have been misapplied in any real situation. This Court should be reluctant "to invalidate legislation on the basis of its hypothetical application to situations not before the Court." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) (citation omitted). Indeed, "[o]utside the First Amendment context, a plaintiff alleging facial vagueness must show that the enactment is impermissibly vague in *all* its applications." *Humanitarian L. Project*, 578 F.3d at 1146 (emphasis added) (citation omitted).

Promise AZ argues that this "in all applications" standard should not apply because the statutory provisions at issue implicate "the right to vote." Doc. 395, pgs. 10–11. But the statutory provisions do not directly implicate the right to vote; they merely direct recorders, in some situations, to consult a database and take steps toward confirming whether a voter is a citizen. That is a far cry from the cases cited by Promise AZ, where the challenged statutes directly regulated constitutionally protected activity. *See City of Chicago v. Morales*, 527 U.S. 41, 51–64 (1999) (anti-loitering ordinance regulated freedom of movement); *Kolender v. Lawson*, 461 U.S. 352, 355–62 (1983) (statute requiring loiterers to provide identification regulated freedom of movement). In any event, even if Promise AZ is correct that a lesser standard applies, Promise AZ still must show that a "substantial number of [the provisions'] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Knox v. Brnovich*, 907 F.3d 1167, 1180 (9th Cir. 2018). Promise AZ cannot make that showing either. Its claim fails under either standard.

Third, the language in these statutory provisions is not unconstitutionally vague. Promise AZ protests that it is unclear what constitutes "reason to believe" a registered voter is not a citizen, such that a county recorder would consult a database per A.R.S. § 16-165(I). Doc. 395, pgs. 5–6. But "reason to believe" is a common term in the law, often used as a standard for investigative or enforcement decisions. *See, e.g.*, A.R.S. § 13-3016(D)(2), (F) (statute governing stored oral, wire and electronic communications); 42 U.S.C. § 2000aa(a)(2), (b)(2), (b)(3), (b)(4) (statute governing certain searches and seizures). Promise AZ cites no authority suggesting this term is unconstitutionally vague.

Likewise, Promise AZ protests that it is unclear how a county recorder "confirms" that a registered voter is not a citizen for purposes of A.R.S. § 16-165(A)(10). Doc. 395, pg. 6. But the statute itself gives a potential example: when the recorder receives a report from a jury commissioner indicating that a registered voter stated that the voter is not a citizen. A.R.S. § 16-165(A)(10). Promise AZ suggests that the word "confirms" in this statute just means "believes," but this redefinition is pure speculation. Doc. 395, pg. 6.

Again, Promise AZ cites no authority suggesting that the term "confirms" is unconstitutionally vague.

Fourth, "the mere fact that close cases can be envisioned" does not render statutory language unconstitutionally vague. *United States v. Williams*, 553 U.S. 285, 305–06 (2008). Promise AZ's argument boils down to speculation that there may be situations where a county recorder is mistaken about whether a registered voter is a citizen. *See* Doc. 395, pgs. 6–7 (offering a "hypothetical"). That is not enough. After all, "[s]ome risk of arbitrary enforcement is present . . . even with the most carefully drafted statute." Wayne R. LaFave, 1 *Substantive Criminal Law* § 2.3(c) (3d ed., Westlaw, Oct. 2022 update).

Fifth, the alternative implied by Promise AZ's argument—that the Legislature should have identified in advance all information that could constitute "reason to believe" a registered voter is not a citizen and all ways in which a county recorder might "confirm" this—would be unworkable. "Uncertain statutory language has been upheld when the subject matter would not allow more exactness and when greater specificity in language would interfere with practical administration." Wayne R. LaFave, 1 *Substantive Criminal Law* § 2.3(c) (3d ed., Westlaw, Oct. 2022 update). Here, the Legislature chose general language to allow application in multiple situations. Due process does not require more specificity.

The Court should rule that A.R.S. §§ 16-165(A)(10) and (I) are not unconstitutionally vague.

IV. REQUESTED RULING ON 52 U.S.C. § 10101(a)(2)(A)

Poder Latinx makes an argument similar to Promise AZ's vagueness argument. According to Poder Latinx, A.R.S. § 16-165(I)—the provision that directs county recorders to consult a database if they have "reason to believe" a registered voter is not a citizen—violates part of the Civil Rights Act, specifically 52 U.S.C. § 10101(a)(2)(A). *See* Doc. 397, pgs. 1–5.

Section § 10101(a)(2)(A) prohibits election officials from subjecting voters to different standards, practices, or procedures when determining voting qualifications:

> No person acting under color of law shall . . . in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote . . . .

52 U.S.C. § 10101(a)(2)(A). The State's motion did not seek a ruling on this provision. Doc. 364. Now that Poder Latinx has cross-moved on the issue, the State responds.

The Court should deny Poder Latinx's cross-motion for two reasons. First, like Promise AZ, Poder Latinx lacks standing to challenge A.R.S. § 16-165(I). Second, A.R.S. § 16-165(I) does not require use of different standards, practices, or procedures in determining whether persons are qualified to vote.

A. Poder Latinx lacks standing.

Poder Latinx and its co-plaintiffs, Chicanos Por La Causa and Chicanos Por La Causa Action Fund, lack standing to challenge A.R.S. § 16-165(I). Like Promise AZ, they have no "actual or imminent" injury; rather, any asserted injury is "conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

Again, this is a pre-enforcement challenge. Neither Poder Latinx nor its co-plaintiffs (nor anyone they represent) have articulated a plan to violate (or otherwise be subjected to) A.R.S. § 16-165(I). Nor has any enforcing authority communicated a threat to initiate proceedings. Nor is there a history of enforcement here. Thus, no injury is imminent. *See Thomas*, 220 F.3d at 1139; *see also* Arg. § III.A above (discussing *Thomas*).

Poder Latinx fears that county recorders might, under the challenged provision, develop an improper "reason to believe" a voter is not a citizen, such as the voter's "race, ethnicity, dress, English proficiency, languages spoken, or other characteristics." Doc. 397, pg. 2. But Poder Latinx does not identify which county recorders might supposedly

engage in this conduct, which voters might be subjected to this conduct, or provide other details. These vague assertions confirm that Poder Latinx's claim rests on speculation, not "actual or imminent" injury as required by Article III. *Lujan*, 504 U.S. at 560.

B. The challenged statutory provision does not violate 52 U.S.C. § 10101(a)(2)(A).

Even setting aside standing, the Court should reject Poder Latinx's claim that A.R.S. § 16-165(I) violates 52 U.S.C. § 10101(a)(2)(A), for several reasons.

First, as with Promise AZ, Poder Latinx does not argue that the challenged statutory provision has been misapplied in any real situation. Again, this Court should be reluctant "to invalidate legislation on the basis of its hypothetical application to situations not before the Court." *Nat'l Endowment for the Arts*, 524 U.S. at 584.

Second, 52 U.S.C. § 10101(a)(2)(A) appears aimed at preventing differential treatment based on race. *See Rokita*, 458 F. Supp. 2d at 839 (stating that "well-settled law establishes that [this federal statute] was enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements"); *but see Gonzalez v. Arizona*, No. CV 06-1268-PHX-ROS, 2006 WL 3627297, at *8 n.9 (D. Ariz. Sept. 11, 2006) (noting that it is "not clear" whether this federal statute applies to "non-race based" claims).[10] Here, A.R.S. § 16-165(I) does not impose or even suggest any differential treatment based on race. Rather, Poder Latinx argues that it gives recorders discretion that *could* be used to differentiate based on race. *See* Doc. 397, pgs. 2–5. But a theoretical possibility of race-based differential treatment is not a violation of 52 U.S.C. § 10101(a)(2)(A). *See Rokita*, 458 F. Supp. 2d at 839 (observing that "Plaintiffs have not alleged, much less proven, any discrimination based on race").

Third, 52 U.S.C. § 10101(a)(2)(A) is specifically aimed at prohibiting the use of different standards, practices, or procedures in determining whether persons are qualified to vote. But here, no such difference exists. All voters in Arizona are required to be

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[10] *Rokita* and *Gonzalez* cite 42 U.S.C. § 1971(a)(2)(A), which is the previous codification of 52 U.S.C. § 10101(a)(2)(A).

citizens. And, if a county recorder develops a "reason to believe" a registered voter is not a citizen, the recorder is directed to consult a database for verification. A.R.S. § 16-165(I). All county recorders are subject to the same standard and are directed to consult the same database.

Poder Latinx argues that the "reason to believe" standard will inherently lead to different standards, practices, or procedures. Doc. 397, pgs. 3–5. But it is not unlawful for an election official to verify eligibility only in situations where the official has reason to believe a voter is ineligible. *See, e.g.*, *Ballas v. Symm*, 494 F.2d 1167, 1171–72 (5th Cir. 1974) (holding that election official who required only a subset of registration applicants to submit a residency questionnaire did not violate federal law, where election official already had information indicating that the other applicants were residents). In other words, 52 U.S.C. § 10101(a)(2)(A) does not require states to "abolish[] all requirements which uniquely apply to only one set of voters." *Rokita*, 458 F. Supp. 2d at 840. Here, the citizenship verification process in A.R.S. § 16-165(I) applies equally to an entire set of voters: those who a county recorder has reason to believe are not citizens.[11]

Fourth, Poder Latinx's interpretation of 52 U.S.C. § 10101(a)(2)(A) would be unworkable. Suppose a law enforcement office notifies a county recorder that a certain registered voter is not a citizen. Would federal law prohibit the recorder from following up just because the situation involves one voter rather than all? What if a family member of the voter reports that the voter is not a citizen? What if the voter self-reports? The point is that there may be a variety of situations where recorders receive information worthy of further investigation or other next steps. As a result, Poder Latinx's assertion that the only option permitted by federal law is for recorders to "subject ***all*** of Arizona's millions of registered voters to a citizenship investigation" (Doc. 397, pg. 5) is unrealistic.

[11] To the extent Poder Latinx is arguing that the "reason to believe" standard is imprecise, that is a vagueness claim, which fails for the reasons explained in Arg. § III above.

The Court should deny Poder Latinx's cross-motion regarding whether A.R.S. § 16-165(I) violates 52 U.S.C. § 10101(a)(2)(A).

V. REQUESTED RULINGS ON PROOF OF LOCATION OF RESIDENCE

The Voting Laws require prospective voters to provide "an identifying document that establishes proof of location of residence." A.R.S. § 16-123. Likewise, a voter is presumed registered upon completing a registration form that contains, among other things, "proof of location of residence." A.R.S. § 16-121.01(A). The Voting Laws specify that "[a]ny of the identifying documents prescribed [in A.R.S. § 16-579(A)(1)] constitutes satisfactory proof of location residence." A.R.S. § 16-123. Section 16-579(A)(1), in turn, specifies documents that voters use to prove identity when voting in person.

The State has asked the Court to issue three rulings interpreting these requirements, to clarify the legal dispute underlying some of plaintiffs' claims. Doc. 364, pgs. 16–17. The Tohono O'odham Plaintiffs agree that statutory interpretation is appropriate at this stage and would provide clarity. Doc. 390, pg. 6. The Tohono O'odham Plaintiffs have requested revisions to the State's requested rulings, and the State replies below.

A. Requested ruling #1

The State originally requested that the Court rule: "Although the Voting Laws state that any identifying document listed in A.R.S. § 16-579(A)(1) constitutes satisfactory proof of location of residence, the Voting Laws do not specify that such documents are the *only* acceptable proof." Doc. 364, pg. 17.

The Tohono O'odham Plaintiffs have requested the following revised ruling: "A.R.S. § 16-123 references A.R.S. § 16-579(A)(1) for a list of documents that satisfy the documentary proof of location of residence requirement in A.R.S. § 16-123. The reference to [§] 16-579(A)(1) provides examples of documents, but is not an exhaustive list of the documents that can be used to satisfy A.R.S. § 16-123." Doc. 390, pg. 7.

The State agrees with the revised requested ruling.

B. Requested ruling #2

The State originally requested that the Court rule: "The Voting Laws do not require tribal members to obtain a standard street address for their home." Doc. 364, pg. 17.

The Tohono O'odham Plaintiffs have requested the following revised ruling: "A.R.S. § 16-123 does not require tribal members or other Arizona residents to have a standard street address for their home to satisfy A.R.S. § 16-123." Doc. 390, pg. 8.

The State agrees with the revised requested ruling.

C. Requested ruling #3

The State originally requested that the Court rule: "The chart made by the Secretary of State's office (at SOF Ex. J [in Doc. 365-1]) accurately explains documents that could constitute satisfactory proof of location of residence under the Voting Laws." Doc. 364, pg. 17.

The Tohono O'odham Plaintiffs have requested the following revised ruling: "In addition to the documents listed in A.R.S. § 16-579(A)(1), the following documents satisfy the requirement in A.R.S. § 16-123:

[a] A valid unexpired Arizona driver license or nonoperating ID ("AZ-issued ID"), regardless of whether the address on the AZ-issued ID matches the address on the ID-holder's voter registration form and even if the AZ-issued ID lists only a P.O. box.

[b] Any Tribal identification document, including but not limited to a census card, an identification card issued by a tribal government, or a tribal enrollment card, regardless of whether the Tribal identification document contains a photo, a physical address, a P.O. box, or no address.

[c] Written confirmation signed by the registrant that they quality to register pursuant to A.R.S. § 16-121(B), regarding registration of persons who do not reside at a fixed, permanent, or private structure."

Doc. 390, pgs. 9–10.

The State generally does not oppose these revised requested rulings, as explained below:

[a] The State agrees with this revised requested ruling. A valid unexpired Arizona driver license number or nonoperating identification number verified by the county recorder satisfies the requirement in A.R.S. § 16-123. This is because the last sentence of § 16-123 states: "A valid and unexpired Arizona driver license or nonoperating identification number that is properly verified by the county recorder satisfies the requirements of this section."

The last sentence of A.R.S. § 16-123 does not state that the Arizona driver license number or nonoperating identification number must be associated with an address that matches the address on the applicant's voter registration form or is something other than a P.O. box. The State does not read those requirements into that sentence.

Consistent with this interpretation, if a registration applicant provides a copy of a valid unexpired Arizona driver license or nonoperating identification, A.R.S. § 16-123 does not require that the address on the license or identification match the address on the applicant's registration form or that the address be something other than a P.O. box.

[b] The State generally does not oppose this revised requested ruling. As stated above, A.R.S. § 16-123 references § 16-579(A)(1) for a non-exhaustive list of documents that satisfy the requirement in § 16-123. The list in § 16-579(A)(1) includes:

- "A valid form of identification that bears the photograph, name and address of the elector that reasonably appear to be the same as the name and address in the precinct register, including . . . a tribal enrollment card or other form of tribal identification," § 16-579(A)(1)(a),

- "Two different items that contain the name and address of the elector that reasonably appear to be the same as the name and address in the precinct register, including . . . an Indian census card, tribal enrollment card or other form of tribal identification," § 16-579(A)(1)(b), or

- "A valid form of identification that bears the photograph, name and address of the elector except that if the address on the identification does not reasonably appear to be the same as the address in the precinct register . . . , the identification

> must be accompanied by one of the items listed in subsection (b) of this paragraph," § 16-579(A)(1)(c).

Although § 16-579(A)(1)(b) contemplates "[t]wo different items" that contain the voter's name and address, § 16-123 uses singular language: "*Any* of the identifying documents prescribed in [§ 16-579(A)(1)] constitutes satisfactory proof of location of residence." (Emphasis added.) Thus, any document listed in § 16-579(A)(1)(b) can satisfy the requirement in § 16-123, including an Indian census card, tribal enrollment card, or other form of tribal identification. Further, because § 16-579(A)(1)(b) does not require that these documents contain a photo, neither does § 16-123.

In 2008 the Secretary of State entered into a stipulation, which the Court approved, regarding acceptable forms of tribal identification for voting in person under A.R.S. § 16-579. *See Gonzalez v. Arizona*, No. CV-06-1268-PHX-ROS, Docs. 749, 754, 775, 776 (D. Ariz. 2008); *see also* Doc. 388-4 at 29–38 (copy of stipulation). Again, § 16-123 allows voter registration applicants to prove location of residence using the forms of identification listed in § 16-579 for voting in person. That includes the forms of tribal identification that the State (through the Secretary) stipulated could be used to comply with § 16-579 in *Gonzalez*.

[c] The State generally does not oppose this revised requested ruling. Under A.R.S. § 16-121(C), "[a] person who is otherwise qualified to register to vote shall not be refused registration . . . because the person does not live in a permanent, private or fixed structure." Under § 16-121(B), a person who "does not reside at a fixed, permanent or private structure" shall be properly registered if the person is qualified pursuant to § 16-101 and if the person's registration address is, among other things, a homeless shelter, county courthouse, or general delivery address for a post office.

In the State's view, A.R.S. § 16-123 should be interpreted in harmony with § 16-121(B) and (C) such that a person who does not reside at a fixed, permanent, or private structure may satisfy the requirement in § 16-123 by providing some form of written confirmation that the person qualifies to register pursuant to § 16-121(B). However, a

mere signature probably does not suffice to "establish[]" proof of location of residence for purposes of § 16-123, and something further such as attestation or signature under penalty of perjury is likely required. The State does not interpret the revised requested ruling as foreclosing this possibility.

RESPECTFULLY SUBMITTED this 5th day of July, 2023.

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