No. 24-2810

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

GET LOUD ARKANSAS, et al.,

Plaintiffs-Appellees

v.

JOHN THURSTON, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

This case involves the Materiality Provision, Section 101 of the Civil Rights Act of 1964, 52 U.S.C. 10101(a)(2)(B), which the Attorney General is charged with enforcing, 52 U.S.C. 10101(c). Accordingly, the United States has a significant interest in the proper interpretation of the Provision, including whether private plaintiffs also can enforce it.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether the district court correctly held that private parties have a right of action under 42 U.S.C. 1983 to enforce the Materiality Provision.

Apposite Authority: *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166 (2023); *Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023); *Migliori v. Cohen*, 36 F.4th 153 (3d Cir.), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022); *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003).

2. Whether the district court correctly held (a) that theoretical fraud-prevention or uniformity interests cannot render a procedural

requirement material to determining qualifications to vote under the Materiality Provision, without evidence that officials actually use the requirement to pursue such purposes, and (b) that the Provision prohibits procedural requirements that are immaterial to determining whether someone is qualified to vote, even if mandated by state law.

Apposite Authority: *Vote.Org v. Callanen*, 89 F.4th 459 (5th Cir. 2023); *Migliori v. Cohen*, 36 F.4th 153 (3d Cir.), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022); *Florida State Conf. NAACP v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008).[1]

STATEMENT OF THE CASE

A. Statutory Background

What is now 52 U.S.C. 10101 traces its lineage to the Enforcement Act of 1870. There, Congress provided that any person otherwise qualified to vote "shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State . . . to the contrary notwithstanding." Act of May 31, 1870, Ch.

[1] The United States takes no position on any issue not addressed herein.

114, § 1, 16 Stat. 140 (as amended, 52 U.S.C. 10101(a)(1)). Until 1957, private parties alone could civilly enforce this law, typically via suits brought under 42 U.S.C. 1983. H.R. Rep. No. 291, 85th Cong., 1st Sess. 12, 15 (1957) (1957 House Report); *see, e.g.*, *Smith v. Allwright*, 321 U.S. 649, 650-651 & n.1 (1944); *Kellogg v. Warmouth*, 14 F. Cas. 257, 258 (C.C.D. La. 1872) (No. 7667).

The Civil Rights Act of 1957 added four subsections to Section 10101 and, for the first time, granted the Attorney General civil enforcement authority. Pub. L. No. 85-315, § 131(c), 71 Stat. 637-638 (52 U.S.C. 10101(b)-(d) and (f)). Further amendment in 1960 authorized the Attorney General to bring pattern-or-practice claims for racial discrimination in voting. Civil Rights Act of 1960, Pub. L. No. 86-449, § 601, 74 Stat. 90-92 (52 U.S.C. 10101(e)).

Section 101 of the Civil Rights Act of 1964 again amended the statute to "provide specific protections to the right to vote." H.R. Rep. No. 914, 88th Cong., 1st Sess. 19 (1963); *see* Pub. L. No. 88-352, § 101, 78 Stat. 241-242 (as amended, 52 U.S.C. 10101(a)(2)-(3), (c), and (g)). Among the additions is the Materiality Provision, which today states:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error

> or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

52 U.S.C. 10101(a)(2)(B). The statute defines "vote" to "include[] all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 52 U.S.C. 10101(a)(3)(A) and (e).

B. Factual Background

1. To be eligible to vote in Arkansas, one must be: (1) at least 18 years old; (2) an American citizen; (3) a legal resident of Arkansas; (4) someone who has not been adjudicated mentally incompetent or convicted of a felony; and (5) registered to vote. Ark. Const. Art. 3, § 1(a)(1)-(4); *id.* Amend. 51, § 11(a)(4)-(5). Amendment 51 to the Arkansas Constitution requires those registering to vote to "attest[]" that they meet every qualification to vote. *Id.* Amend. 51, § 6(a)(2)(B). Voter registration forms must contain the voter's "signature or mark" making this attestation. *Id.* Amend. 51, § 6(a)(3)(F). State agencies registering voters may use a "computer process" to do so. *Id.* Amend.

51, § 5(b)(2)-(4). Amendment 51 also prohibits "any requirement for notarization or other formal authentication" for all registration applications. *Id.* Amend. 51, § 6(a)(5) and (b)(2).

Plaintiff Get Loud Arkansas (GLA) developed an application in 2023 that allowed applicants to complete and sign voter registration forms digitally while authorizing GLA to print and submit the form to their county registrar on their behalf. Add.9/R.Doc.72, at 9.[2] The Arkansas Secretary of State's office informed GLA that it considered digital signatures on voter registration forms to be valid under state law. Add.10/R.Doc.72, at 10. GLA premiered its application in 2024 and began registering voters. Add.10-11/R.Doc.72, at 10-11. Plaintiff Vote.org also developed a similar digital signature tool which it intended to implement in Arkansas. Add.11/R.Doc.72, at 11.

In late February 2024, however, Secretary of State John Thurston "strongly recommend[ed]" to county clerks that they not accept voter registration applications with digital signatures. Add.12/R.Doc.72, at 12. Secretary Thurston then sought a formal opinion from Arkansas Attorney General Tim Griffin on the legality of signing voter

[2] "Add." refers to appellants' addendum.

registration forms digitally when submitted via non-governmental organizations. *Ibid.* The Attorney General opined that Amendment 51 *does* allow for digital signatures, "given the historical acceptance of signatures produced through a variety of means, the widespread acceptance of electronic signatures" under Arkansas law, "and the fact that Amendment 51 does not contain any restrictions on how a 'signature or mark' may be made." *Ibid.* (citation omitted).

Nevertheless, the Arkansas State Board of Election Commissioners (SBEC) adopted an emergency rule (the Wet Signature Rule) prohibiting county clerks from accepting voter registration applications with digital signatures received from "individuals and third-party organizations." Add.12/R.Doc.72, at 12. The SBEC made the Rule permanent in summer 2024. Add.13/R.Doc.72, at 13. The Wet Signature Rule interprets the phrase "signature or mark" in Amendment 51 to require a handwritten, wet signature for mailed-in voter registration applications. *Ibid.* The new definition does not apply to forms submitted by a government agency. *Ibid.*

2. GLA and Vote.org, joined by two rejected applicants (collectively GLA), sued Secretary Thurston, the other members of the

SBEC, and certain county clerks (collectively, SBEC), claiming that the Wet Signature Rule violates the Materiality Provision. Add.3-5/R.Doc.72, at 3-5. The district court granted GLA's preliminary injunction motion and denied SBEC's motion to dismiss. Add.6/R.Doc.72, at 6.

The court held that private plaintiffs have a right of action to enforce the Materiality Provision via Section 1983. Add.16-25/R.Doc.72, at 16-25. The court then determined that GLA had a likelihood of success on the merits. Add.33-48/R.Doc.72, at 33-48. The court found no evidence that a wet signature requirement is material to determining voters' qualifications, as it does not improve clerks' ability to determine a voter's identification and clerks historically have accepted even illegible signatures or marks like "x" on registration forms. Add.37-38, 46-48/R.Doc.72, at 37-38, 46-48. Finally, the district court held that the other preliminary injunction factors weighed in favor of granting the injunction. Add.48-51/R.Doc.72, at 48-51.

3. SBEC appealed the court's ruling. Add.66/R.Doc.66.

SUMMARY OF ARGUMENT

This Court should affirm the Materiality Provision's enforceability under Section 1983 and the district court's application of the Provision to Arkansas' Wet Signature Rule.

The district court rightly concluded that private plaintiffs may enforce the Materiality Provision. The Provision creates a personal right to vote regardless of immaterial errors or omissions in voting records or papers. Because the statute confers an individual right, that right is presumptively enforceable via Section 1983. That the Attorney General also has a cause of action to enforce the Provision cannot rebut that presumption.

The district court also properly applied the Materiality Provision and rejected SBEC's arguments limiting its reach. First, theoretical fraud-prevention and uniformity rationales cannot render the Wet Signature Rule material where, as here, officials do not use the challenged rule for any fraud-prevention purposes and the rule does not further any uniformity interest. And second, procedural requirements are not material to determining voter qualifications simply because they are mandatory.

ARGUMENT

I. Private plaintiffs may enforce the Materiality Provision.

Private plaintiffs may sue under Section 1983 to enforce the Materiality Provision. A federal statute is "presumptively enforceable" under Section 1983 if it "unambiguously confer[s]" individual federal rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-284 (2002). Because the Materiality Provision unambiguously creates a personal right to vote, and because intervenors fail to rebut the presumption that such a right is privately enforceable, this Court should join the Third, Fifth, and Eleventh Circuits in holding that private plaintiffs may sue to enforce that right under Section 1983. *See Vote.Org v. Callanen*, 89 F.4th 459, 473-478 (5th Cir. 2023); *Migliori v. Cohen*, 36 F.4th 153, 159-162 (3d Cir.), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022); *Schwier v. Cox*, 340 F.3d 1284, 1297 (11th Cir. 2003).[3]

[3] Though later vacated as moot, *Migliori*'s substantive analysis remains persuasive. *See Simes v. Huckabee*, 354 F.3d 823, 829 n.4 (8th Cir. 2004). The only other circuit to address this issue never discussed Section 1983, merely stating without elaboration that the Materiality Provision "is enforceable by the Attorney General, not by private citizens." *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000).

A. The Materiality Provision grants personal rights.

The Materiality Provision creates a personal right to vote notwithstanding immaterial paperwork errors. Statutes unambiguously create individual rights when they "use clear rights-creating language, speak in terms of the persons benefited, and have an unmistakable focus on the benefited class." *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 186 (2023) (citation and internal quotation marks omitted). The Materiality Provision meets these standards.

To start, the Provision resides in 52 U.S.C. 10101, whose title is "Voting *rights*." (emphasis added); *see* Pub. L. No. 85-315, § 131(a), 71 Stat. 637 (so titling the section). "This framing is indicative of an individual 'rights-creating' focus." *Talevski*, 599 U.S. at 184 (quoting *Gonzaga*, 536 U.S. at 284). The Provision itself then prohibits state actors from denying "the *right* of *any individual* to vote" based on paperwork errors or omissions that are not "material in determining whether *such individual* is qualified under State law to vote." 52 U.S.C. 10101(a)(2)(B) (emphases added). This language "unambiguously confers rights upon" voters in federal elections.

Talevski, 599 U.S. at 184. It explicitly references a right and just as explicitly grants that right on an individualized basis.

Finally, the Provision commands that "[n]o" state actor "shall . . . deny" any voter their right to vote based on immaterial paperwork errors. 52 U.S.C. 10101(a)(2) and (a)(2)(B). "Statutory language such as 'must' and 'shall' is mandatory" and suffices "to evince a congressional intent to create individually-enforceable federal rights." *Center for Special Needs Tr. Admin., Inc. v. Olson*, 676 F.3d 688, 700 (8th Cir. 2012) (citations omitted). It does not matter that, through this language, the Materiality Provision "also establish[es] who it is that must respect and honor these statutory rights." *Talevski*, 599 U.S. at 185. To the contrary, "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights." *Ibid.*

B. SBEC cannot rebut the strong presumption that plaintiffs may enforce the Materiality Provision via Section 1983.

Because the Materiality Provision confers an individual right, it is SBEC's "burden" to "'defeat t[he] presumption [of enforceability] by demonstrating that Congress did not intend' that § 1983 be available to

enforce" the right the Provision protects. *Talevski*, 599 U.S. at 186 & n.13 (alterations in original; citation omitted). SBEC has not met that burden. It has not even attempted to show that the Provision "expressly forbid[s] § 1983's use." *Id.* at 186. Nor could SBEC do so—no such language exists. Likewise, SBEC has not "ma[d]e the difficult showing" that the statute contains a "carefully tailored scheme" inconsistent with Section 1983 remedies. *Blessing v. Freestone*, 520 U.S. 329, 346 (1997) (citation omitted). There is no such scheme.

1. SBEC argues (Br. 20-21) only that by including a right of action for the Attorney General, 52 U.S.C. 10101(c), Congress precluded a right of action for private plaintiffs. Not so. *See Vote.Org*, 89 F.4th at 476-477 (rejecting this argument); *Migliori*, 36 F.4th at 161-162 (same); *Schwier*, 340 F.3d at 1296 (same). Congress added these "specific references to the Attorney General" not to displace private enforcement but rather "to give the Attorney General power to bring suit to enforce what might otherwise be viewed as 'private' rights." *Allen v. State Bd.*

of Elections, 393 U.S. 544, 555 n.18 (1969) (discussing near-identical provision of Voting Rights Act and citing Section 10101 case).

SBEC therefore cannot show "incompatibility between enforcement under § 1983 and the enforcement scheme that Congress has enacted." *Talevski*, 599 U.S. at 187. As the Supreme Court recently reiterated in *Talevski*, rights-creating statutes only preclude Section 1983 enforcement if they include "a private judicial right of action, a private federal administrative remedy, or any carefu[l] congressional tailor[ing] that § 1983 actions would distort." *Id.* at 183-184, 190 (alterations in original; internal citations and quotation marks omitted). The Materiality Provision includes none of these things. Section 10101's public right of action—exercised at the Attorney General's discretion—"complement[s]," rather than "supplant[s], § 1983." *Id.* at 190 (citation omitted); *see, e.g.*, *Blessing*, 520 U.S. at 348 (holding that the government's purported "authority to sue for specific performance" was not an "administrative enforcement arsenal" that

could displace Section 1983, especially if "no private actor would have standing to force the Secretary to bring suit for specific performance").[4]

2. Surrounding statutory language confirms that Congress did not make the Attorney General's right of action exclusive. Section 10101(d) provides district courts with "jurisdiction of proceedings instituted pursuant to this section" and states that they "shall exercise the same without regard to whether *the party aggrieved* shall have exhausted any administrative or other remedies that may be provided by law." 52 U.S.C. 10101(d) (emphasis added). Congress added this provision in 1957, to overturn cases holding that private plaintiffs must exhaust state-law remedies before bringing civil rights suits. 1957 House Report 10-12; *see Vote.Org*, 89 F.4th at 475-476 (discussing the 1957 House Report).

Section 10101(d)'s text mirrors its purpose. This subsection's reference to "the party aggrieved" rather than only to "the United

[4] Indeed, when Congress first added public enforcement authority for Section 10101, it recognized—and did nothing to alter—the statute's three-quarter-century long history of private enforcement via Section 1983. *See* 1957 House Report 12; *Schwier*, 340 F.3d at 1295; pp. 2-3, *supra*.

States" or "the Attorney General"—and its language releasing plaintiffs from exhaustion requirements—clearly contemplates private enforcement. *See Vote.Org*, 89 F.4th at 475-476; *Migliori*, 36 F.4th at 160-161; *Schwier*, 340 F.3d at 1296. Indeed, Section 10101(d)'s language is sufficiently express in permitting private suits that it may eliminate the need even to rely on Section 1983 in the first place. *See Allen*, 393 U.S. at 555 n.18.

Likewise, Section 10101(d) applies to all "proceedings" brought "pursuant to this section," meaning the entirety of Section 10101. 52 U.S.C. 10101(d). When Congress instead wished to limit certain claims or procedures to cases brought by the Attorney General, it said so expressly. *See* 52 U.S.C. 10101(e) (making pattern-or-practice claims available only in cases "instituted pursuant to subsection (c)"); 52 U.S.C. 10101(g) (allowing for three-judge courts only in certain "proceeding[s] instituted by the United States").

3. SBEC's scant additional arguments get it no further. The Materiality Provision need not itself contain an explicit cause of action to meet *Gonzaga*'s test for private enforceability. *Contra* Br. 20. Congress chose another, perfectly acceptable route: It created a

personal right in one statute and in another provided a presumptive remedy for all "rights . . . secured by the Constitution and laws." 42 U.S.C. 1983; *see Talevski*, 599 U.S. at 172. By acknowledging as much, the district court was not "recognizing [an] implied cause[] of action" in 52 U.S.C. 10101 itself. Br. 21 (citation omitted); *see Gonzaga*, 536 U.S. at 284 (noting that "[p]laintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy").

Unlike implying a private right of action, which raises concerns about allowing "the judiciary" to "decide who can sue," *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1208-1209 (8th Cir. 2023); *see* Br. 19-20, it is a typical act of interpretation to determine that a statute's text creates a personal right for which Section 1983 can provide a remedy, *see Talevski*, 599 U.S. at 183. Here, a textual analysis makes clear that the Materiality Provision creates a personal right to vote free of immaterial paperwork errors, which private parties may enforce via Section 1983.

II. SBEC's arguments limiting the Materiality Provision's reach lack merit.

This Court should join the district court in rejecting two additional arguments that SBEC has made about the Materiality Provision's

application. First, hypothetical fraud-prevention or uniformity interests cannot render material a procedural requirement that serves no such interest. And second, States cannot evade the Materiality Provision's reach just by mandating that voters meet whatever procedural requirements the State prefers to register or vote.[5]

A. Fraud-prevention or uniformity concerns cannot justify Arkansas' Wet Signature Rule.

Principally, SBEC relies (Br. 21-27) on theoretical anti-fraud and uniformity rationales to justify the Wet Signature Rule. These rationales lack merit. The Materiality Provision's text provides for no burden-interest balancing or state-interest-based affirmative defenses. Procedural requirements pass muster under the Provision only if they are "material in determining whether" voters are "qualified"—whatever other freestanding rationales States may provide. 52 U.S.C. 10101(a)(2)(B). Measures like voter-ID or signature requirements can

[5] The district court also considered and rejected the argument that a State does not deny the Provision's statutorily defined "right to vote" when it rejects a registration or vote for an immaterial error but lets applicants cure the error or try again. Add.33-35/R.Doc.72, at 33-35. SBEC has not repeated this argument on appeal. *See* Br. 21-27. Regardless, the ability to cure an error or register via other means does not prevent the Provision from applying. *See Vote.Org*, 89 F.4th at 487.

meet this test, if they determine would-be registrants' or voters' qualifications indirectly by verifying their identities or ensuring that they report their qualifications truthfully. But the measures must be *needed* for this purpose—duplicative or irrelevant requirements, by definition, are not material. SBEC's invocation of fraud or uniformity concerns cannot render a wet-signature requirement material where, as here, the form of signature makes no difference to the State.

1. The Materiality Provision prohibits denial of the statutory right to vote based on errors or omissions that do not help determine whether someone is qualified to vote.

a. The Materiality Provision prevents States from "requiring unnecessary information for voter registration" and then using errors or omissions in providing that information as "an excuse to disqualify potential voters." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). For a law or an official's action to violate the Provision, it must (1) deny the right of "any individual" to vote in an election, as defined by the statute, (2) for an "error or omission" (3) on a "record or paper" (4) "relating to any application, registration, or other act requisite to voting" that (5) is not "material in determining whether" that "individual is qualified under State law to vote in such election." 52

U.S.C. 10101(a)(2)(B). The principal inquiry is whether the state-law error—here, providing a digital rather than a wet ink signature—is material to determining whether a voter is qualified.

To answer this question, a court first must identify the State's voter qualifications, as determined at the stage of the voting process at which the error or omission occurs—here, eligibility requirements to register. *See Schwier*, 340 F.3d at 1297; *Migliori*, 36 F.4th at 156. Second, the court must ascertain which of these qualifications the challenged rule or action purportedly enforces, and how. Third, the court must "ask[] whether, accepting the error *as true and correct*, the information contained in the error is material to determining the eligibility of the applicant." *Florida State Conf. NAACP v. Browning*, 522 F.3d 1153, 1175 (11th Cir. 2008).

While the statute does not define "material," the word's meaning is easily determined by looking to its "ordinary meaning at the time Congress enacted the statute." *Iverson v. United States*, 973 F.3d 843, 849 (8th Cir. 2020) (citation omitted). Both contemporaneous legal and popular dictionaries defined "material" as "of real importance or great consequence: substantial," or—as applied to law—"requiring serious

consideration by reason of having a certain or probable bearing on" an "unsettled matter." *Webster's Third New International Dictionary* 1392 (1966); *see Black's Law Dictionary* 1128 (4th ed. 1966) (defining "material" as "[i]mportant; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form"). This "simple dictionary definition from the time of the statute's enactment," *Sanzone v. Mercy Health*, 954 F.3d 1031, 1041 (8th Cir. 2020), provides strong evidence that "material" errors are those important enough to possibly change officials' determination of whether a voter is qualified.

The surrounding "statutory context suggests the same result." *United States v. Moreira-Bravo*, 56 F.4th 568, 574 (8th Cir. 2022), *cert. denied*, 144 S. Ct. 301 (2023). State actors cannot deny one's right to vote if an error or omission is "material" only in the abstract. Rather, the Provision forbids denying the right to vote because of any paperwork error or omission that is "not material *in determining whether* such individual is qualified." 52 U.S.C. 10101(a)(2)(B) (emphasis added). The statutory text thus focuses the inquiry on whether the erroneous or missing information would tend to make a

difference to officials when they determine a voter's qualifications. *Cf. Browning*, 522 F.3d at 1175.

b. The Fifth Circuit recently adopted a similar definition of "material." *Vote.Org*, 89 F.4th at 478. Yet instead of following the statutory text where it leads, that court then applied a convoluted analytical framework to uphold Texas's wet-signature requirement. *See id.* at 487-489. This framework relied heavily on the panel majority's view that courts owe "considerable deference" to States' election measures and must give "weight" to their abstract "justification" for those measures. *Id.* at 481, 485. SBEC urges this Court to take a similar path. *See* Br. 24-25. But the Fifth Circuit's approach makes two principal errors that this Court should refrain from repeating.

First, the Fifth Circuit's standard is profoundly atextual. The panel plucked its statements about deference from constitutional right-to-vote cases, including *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). *See Vote.Org*, 89 F.4th at 480-481, 485. As the dissent noted, however, this right-to-vote doctrine "involves a different analytical framework than what we use for [statutory] claims." *Id.* at 492 (Higginson, J., dissenting) (alteration in original; citation omitted).

Unlike the open-ended language of the First and Fourteenth Amendments, the Materiality Provision's text imposes a highly specific mandate that "expressly limits states' purported 'considerable discretion.'" *Ibid.* (citation omitted). That text neither inquires into the strength of the government's interest nor adopts means-ends scrutiny, *see, e.g.*, *Migliori*, 36 F.4th at 163—things Congress knows how to incorporate into statutes if it wishes, *e.g.*, 42 U.S.C. 2000bb-1(b) (Religious Freedom Restoration Act). Yet the Fifth Circuit borrowed these concepts from constitutional law and grafted them onto the Materiality Provision. *See Vote.Org*, 89 F.4th at 485 (majority opinion); *see also* Br. 22 (urging this Court to find the Wet Signature Rule material based on state interests credited in a constitutional challenge).[6]

Second, the Fifth Circuit granted such extreme deference to the State's interest that it ignored the record evidence. "[A]s the district court" in *Vote.Org* "carefully found, factually, [Texas's] wet-signature

[6] The panel majority likewise borrowed various standards from the Supreme Court's jurisprudence on Section 2 of the Voting Rights Act, *Vote.Org*, 89 F.4th at 482-485, for which the Materiality Provision also lacks any textual hook, *see id.* at 492 (Higginson, J., dissenting).

requirement is *undisputedly* pointless." 89 F.4th at 492 (Higginson, J., dissenting) (discussing evidence). Yet, relying only on its determination that "what Texas [was] arguing" on appeal was "a reasonable understanding of the legislative judgment," the majority "accept[ed]" that "physically signing [a registration] form with the warnings in front of the applicant . . . has some prospect of getting the attention of many applicants and dissuading false statements that an electronic signature, without these warnings, does not." *Id.* at 488-489 (majority opinion). Based on this fact-free justification—and despite the undisputed evidence that Texas's wet-signature rule did not even serve that purpose—the court upheld the rule as "meaningfully, even if quite imperfectly, correspond[ing] to" the State's interest in voter integrity. *Id.* at 489.

Such extraordinary deference to States' abstract interests substitutes States' post hoc litigation justifications for the Materiality Provision's statutory text and the evidence presented to district courts. Materiality can sometimes be a legal, *per se* determination, such as when another federal law either requires or prohibits collection of the challenged information, or when a State provides no explanation of how

a requirement relates to determining voter qualifications. *E.g.*, *Browning*, 522 F.3d at 1174 & n.22. But materiality usually is a fact-dependent determination that depends upon the *evidence* of whether the state requirement is material to officials' determination of voters' qualifications. *See, e.g.*, *Migliori*, 36 F.4th at 163-164; *id.* at 165 (Matey, J., concurring in the judgment); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-1309 (N.D. Ga. 2018).

Deferring to States' interests in lieu of the facts is entirely at cross-purposes with the statutory text. *See* pp. 17-22, *supra*. And it would allow States to justify with hypothetical interests a law that in fact does not serve those interests—something that even constitutional election-law doctrine, which is highly fact-dependent, does not permit. *See, e.g.*, *SD Voice v. Noem*, 60 F.4th 1071, 1081 (8th Cir. 2023); *Libertarian Party of Ark. v. Thurston*, 962 F.3d 390, 403 (8th Cir. 2020); *Gill v. Scholz*, 962 F.3d 360, 365 (7th Cir. 2020). Such deference also would essentially allow States to define the scope of federal law, frustrating Congress's intent. *But see* Part II.B, *infra*. The district court rightly rejected the Fifth Circuit's "rather strained test" for

determining materiality. Add.40/R.Doc.72, at 40; *see* Add.39-45/R.Doc.72, at 39-45.

2. The district court correctly analyzed GLA's Materiality Provision claim.

The district court applied the correct materiality standard, and it made unchallenged factual findings that the form of an applicant's signature makes no difference to Arkansas officials' determination of whether a voter is qualified to vote. Add.37-38, 45-48/R.Doc.72, at 37-38, 45-48. There was thus no error in the district court's judgment that the Wet Signature Rule likely violates the Materiality Provision. SBEC's argument to the contrary relies on the theoretical possibility that wet signatures could prevent fraud, and a desire to impose uniformity among counties. This reasoning brushes aside the evidence GLA presented and conflates the Wet Signature Rule with a more generalized signature mandate.

a. Signature mandates may be "material in determining whether [an] individual is qualified" to vote, 52 U.S.C. 10101(a)(2)(B), because they ensure that voters consider the State's eligibility requirements and attest that they meet them. However, GLA does not challenge Arkansas' requirement that registration forms include the applicant's

"signature or mark." Ark. Const. Amend. 51, § 6(a)(3)(F). GLA challenges only SBEC's additional mandate that registrants include a *wet* signature on their registration forms. Add.3/R.Doc.72, at 3. And SBEC provided no evidence to suggest that digital signatures are worse than wet signatures at confirming that applicants have considered and attested to "meet[ing]" the State's "requirement[s] for voter registration." Ark. Const. Amend. 51, § 6(a)(3)(F); *see* Add.37-38, 45-48/R.Doc.72, at 37-38, 45-48.

As the district court noted, Arkansas law still allows for digitized signatures on registration forms completed at certain state offices, like the Department of Motor Vehicles. Add.46-47/R.Doc.72, at 46-47. The Arkansas Constitution also prohibits notarization or authentication requirements for all voter registration applications. Add.7-8, 38/R.Doc.72, at 7-8, 38; *see* Ark. Const. Amend. 51, § 6(a)(5) and (b)(2). Likewise, state law authorizes electronic signatures on vital documents like insurance policies and commercial contracts. *See* Add.48 n.20/R.Doc.72, at 48 n.20; *Barwick v. Government Emp. Ins. Co.*, 2011 Ark. 128, at 7, 2011 WL 1198830, at *3. And unlike the app at issue in *Vote.Org*, 89 F.4th at 488-489, GLA's registration tool displays the same

required warnings and explanations that would be seen when signing a physical form (Add.47-48/R.Doc.72, at 47-48). These facts fatally undercut SBEC's claim that a wet signature carries a "different weight" (Br. 27 (citation omitted)) than electronic ones, or that it otherwise materially aids in verifying applicants' identity or solemnizing the registration submission process. *See Migliori*, 36 F.4th at 163.

Testimony from election officials confirmed that the Wet Signature Rule does not serve SBEC's proffered purposes. Rather than being used to check for fraud or to verify identity, registrars testified that they treat signatures or marks solely "as an attestation under penalty of perjury to the accuracy of the information provided." Add.38/R.Doc.72, at 38. Thus, "county clerks 'are advised to accept voter registration applications with any type of signature or mark,' regardless of legibility or whether the applicant in fact makes a mark rather than a signature." Add.46/R.Doc.72, at 46 (citation omitted); *see* Add.38/R.Doc.72, at 38. Then, no matter the method of registration, clerks enter *electronic* versions of voters' information and signatures into a statewide database. Add.38/R.Doc.72, at 38. And even when comparing signatures from registration forms to voters' absentee ballot

signatures, officials rely on PDF scans of voters' signatures—including of electronic signatures provided at state registration agencies—which makes it "unlikely that a clerk would be able to distinguish between a wet signature" and a digital one. Add.46/R.Doc.72, at 46. These facts show that the Wet Signature Rule is not material to determining voters' qualifications.

b. Likewise, SBEC's purported concerns (Br. 3, 5-7, 11, 25, 29-30) about lack of "uniformity" in counties' implementation of the state constitution's signature requirement cannot shield from the Materiality Provision's scrutiny SBEC's decision about how to fulfill that goal. Again, the Provision's text contains no free-floating "state interest" defense. *See* pp. 17-22, *supra*. Rather, SBEC must prove—and has not to this point proven (Add.48/R.Doc.72, at 48)—that a wet signature is material to determining Arkansas voters' qualifications, *see Migliori*, 36 F.4th at 163-164. But even assuming that state interests could be considered in the materiality analysis, SBEC's proffered uniformity interest deserves no deference.

For one thing, the Wet Signature Rule does not create uniformity. To the contrary, it reads the uniform phrase "signature or mark" in

Amendment 51 differently depending on how the State receives the same form. The Wet Signature Rule directs counties to reject digital signatures on mailed-in registration forms, but it does not require wet signatures on forms filled out at certain state agencies. *See* Add.13/R.Doc.72, at 13. It thereby solves one purported form of dis-uniformity—that between counties—by creating another dis-uniformity (between registration methods) that is at odds with Amendment 51's text.

Yet even if the Wet Signature Rule *did* serve a uniformity interest, the district court found that "uniformity could have been better achieved" by requiring all counties to count digital or photocopied signatures "in all contexts," as many counties already did, rather than by choosing to restrict all counties to counting only wet signatures on mailed-in forms while still allowing digital signatures at some state agencies. Add.45/R.Doc.72, at 45. Such an approach also would have conformed to the opinion that the Arkansas Attorney General already had issued, which told all counties that digital signatures fulfill the state constitution's signature requirement. *See* Add.12/R.Doc.72, at 12. SBEC's purported interest in uniformity, therefore, cannot justify

imposing a wet-signature requirement that makes no difference to officials' determination of whether applicants meet Arkansas' voter qualifications.

c. Finally, that GLA challenges the requirement of a *wet* signature, rather than a requirement of any signature at all, does not somehow impose "a least-restrictive-alternative test" or take GLA's challenge "beyond the statutory language of the Materiality Provision." Br. 23-24. SBEC in essence asserts that state-law requirements become immune from scrutiny under the Materiality Provision if they are sufficiently picayune. But the Provision was written precisely to forbid States from either imposing "needlessly technical instructions, such as the color of ink to use in filling out the [registration] form," *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D Fla. 2006), or "requiring unnecessary information for voter registration," like States' tactic of rejecting "an applicant who failed to list the exact number of months and days in his age," *Schwier*, 340 F.3d at 1294 (citation omitted); 110 Cong. Rec. 6715-6716 (1964) (statement of Sen. Keating) (discussing the day-and-month-of-age example and other immaterial bases for disqualifying voters that Congress sought to prohibit).

To be sure, SBEC could present evidence at summary judgment or trial demonstrating that its Wet Signature Rule is material to ensuring that voters are qualified. But at this stage, GLA has shown that it is likely to succeed in proving that Arkansas' requirement of a *wet* signature for some registrants is not material to determining their eligibility to register and vote.

B. States cannot define away the Materiality Provision's protections.

SBEC also briefly asserts (Br. 2-3, 22; R.Doc.53, at 11) that because compliance with the Wet Signature Rule is necessary to register, it must be material. As the district court recognized (Add.35 n.14/R.Doc.72, at 35 n.14), that reading turns the Materiality Provision on its head. It would let States control the content of a federal statute, simply by adding procedural requirements to their state codes. Instead, the Provision sets a federal standard for reviewing States' voting-related paperwork mandates, measuring them against only a small number of state voter qualifications.

The Materiality Provision distinguishes between the few prerequisites that one must meet to be "qualified" to vote and the many additional procedural requirements that merely enforce, measure, or

confirm those underlying qualifications. 52 U.S.C. 10101(a)(2)(B). The category of qualifications is limited to certain substantive characteristics, like age and citizenship, that are "germane to one's ability to participate intelligently in the electoral process." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966); *see* Ark. Const. Art. 3, § 1(a)(1)-(4). All other regulations—including those around "registration" and "counting of votes," *Smiley v. Holm*, 285 U.S. 355, 366 (1932)—fall outside that category. While such procedural requirements might help officials enforce the States' qualifications, they do not themselves *become* voter qualifications simply because state law mandates them. *See, e.g.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (distinguishing between setting qualifications and "obtaining the information necessary to enforce" those "qualifications").

Contemporaneous definitions of "qualified" support this understanding, focusing on whether someone has certain qualities or characteristics rather than on whether they follow particular procedures. *See, e.g.*, 2 *New Century Dictionary of the English Language* 1443 (H.G. Emery et al. eds., 1963) ("Furnished with qualities; also, possessed of qualities or accomplishments which fit one

for some function or office."); *Random House Dictionary of the English Language* 1174 (1966) (second definition) ("[H]aving the qualities, accomplishments, etc., required by law or custom for getting, having, or exercising a right.").

And statutory context provides final confirmation: The neighboring subparagraph, added to Section 10101 at the same time as the Materiality Provision, prohibits States "in determining whether any individual is *qualified* under State law or laws to vote in any election" from "apply[ing] any standard, practice, or *procedure*" different from that applied to others in the jurisdiction who are found qualified to vote. 52 U.S.C. 10101(a)(2)(A) (emphases added). Congress thus knew how to, and did, distinguish between *qualifications* to vote and the *procedures* used for determining those qualifications.

Materiality thus turns not merely on whether the error or omission violates a state-law requirement, but rather on whether an error or omission affects "whether such individual is qualified under State law to vote," 52 U.S.C. 10101(a)(2)(B)—here, whether that individual possesses the characteristics needed for "registration," 52 U.S.C. 10101(a)(2)(C) and (e). The Fifth Circuit recently agreed,

"reject[ing]" the idea "that States may circumvent the Materiality Provision by defining all manner of requirements, no matter how trivial, as being a qualification to vote and therefore 'material.'" *Vote.Org*, 89 F.4th at 487.

SBEC's contrary interpretation would nullify the Materiality Provision. If any procedural requirement a legislature imposes becomes a voter qualification, then errors or omissions in meeting *any* aspect of state election law automatically would be material to determining voter qualifications. No denial of the right to vote could violate the Provision. Though the Provision applies solely to errors or omissions "on any record or paper," SBEC's interpretation would allow States to deny the right to vote for the minutest errors on the clearest examples of such papers—such as voter "registration[s]" and mail ballot "application[s]"—because any error necessarily would violate state procedural rules around filling out the forms. 52 U.S.C. 10101(a)(2)(B).

Indeed, under SBEC's interpretation, the Materiality Provision would not have covered the very mechanisms of vote denial that Congress passed the Provision to override. For instance, while the Louisiana Constitution allowed anyone age 21 or over to vote at the

time, it also required registrants to list their age not only in years but also in days and months. *See* Comm'n on C.R., Voting: 1961 Commission on Civil Rights Report, Book 1, at 56 (1961), https://perma.cc/GW6M-V3GP. Congress sought to prohibit registrars from refusing to register voters merely for incorrectly calculating the days and months of their age. *See Browning*, 522 F.3d at 1173; 110 Cong. Rec. 6715 (1964) (statement of Sen. Keating). Yet if every requirement that States set to register or vote were deemed a "qualification," then errors in calculating even the days of one's age would be material to determining voter qualifications, and so would fall outside the Provision's reach. Congress did not enact such "a self-defeating statute." *Quarles v. United States*, 587 U.S. 645, 654 (2019).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment below on the issues addressed herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6451 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft 365.

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CERTIFICATE OF SERVICE

On January 17, 2025, I filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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