No. 16-1068

In the Supreme Court of the United States

NORTHEAST OHIO COALITION FOR THE HOMELESS AND OHIO DEMOCRATIC PARTY, ET AL.,

Petitioners,

v.

JON HUSTED AND THE STATE OF OHIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Title I of the Civil Rights Act of 1964 added a provision to 52 U.S.C. § 10101 (formerly 42 U.S.C. § 1971) that prohibits officials from denying an individual the right to vote based on "an error or omission on any record or paper relating to any application, registration, or other act requisite to voting" if the error or omission was not "material" in determining an individual's qualification to vote. *See* 52 U.S.C. § 10101(a)(2)(B). The petition involves only this "Materiality Provision" in § 10101. Further, the petition is not brought by individual voters, but by three organizations. The question presented is:

May private organizations bring a private suit to enforce claims of individual voters under the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B)?

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INTRODUCTION

The Court should deny certiorari over whether private organizations may sue to enforce the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), both because that question has little practical importance today and because it raises an academic debate in the context of this procedurally messy case.

First, Petitioners—the Northeast Ohio Coalition for the Homeless ("NEOCH"), the Columbus Coalition for the Homeless ("CCH"), and the Ohio Democratic Party—can identify only a shallow, stale circuit conflict because this question has little practical significance today. Developments since the Materiality Provision's passage have made claims under that provision duplicative of other claims, including claims under the Fourteenth Amendment and Section 2 of the Voting Rights Act. Thus, no other circuit has confronted this question since the Eleventh Circuit created the split fourteen years ago, *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), despite the substantial amount of voting litigation during that time. *Cf. Beaulieu v. United States*, 497 U.S. 1038, 1039 (1990) (White, J., dissenting from denial of certiorari) (noting that the Court has routinely denied certiorari when split is narrow). In cases where the Materiality Provision has been invoked, moreover, it has taken a backseat to other federal claims.

Second, this case provides a bad vehicle to decide the question. To begin with, Petitioners have secured all of the relief that they could achieve under a constitutional theory that mirrors their statutory one. The Sixth Circuit invalidated some of the provisions at issue here on its understanding that they mandated "technical precision," but upheld others

because they serve important interests in identifying voters. Pet. App. 36a-41a. The Sixth Circuit's mixed decision under the Constitution would be no different under the Materiality Provision.

Even apart from that decision, any concern that voters must complete "perfect" ballots ignores the Secretary's recent Directives clarifying that technical mistakes in birthdates and addresses are "not valid reasons to reject a ballot" "[a]s long as a board can still identify the voter." Ohio Sec'y State Dir. No. 2016-38, at 1 (Oct. 14, 2016), *available at* https://goo.gl/EzGVgF. If officials fail to heed these instructions, any potential remedy lies in state court, not in this federal case. For these reasons, whether private parties may sue to enforce the Materiality Provision will not affect the judgment. And because this "Court does not sit to satisfy a scholarly interest," the case does not provide a proper vehicle to consider this question. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955).

As yet another problem, this case is a procedural tangle and the Court might never reach the question presented. Before doing so, it would have to assure itself of Article III standing. And the Sixth Circuit's holding that NEOCH had standing is debatable; it rested on NEOCH's alleged voluntary change in conduct. *Cf. Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151-52 (2013). The fact that *organizations*, rather than *voters*, seek review complicates things further. The Court would have to resolve *not just* whether the Materiality Provision includes a private cause of action, *but also* whether that cause of action is broad enough to reach the injuries alleged by the organizations to give them standing. *Cf. Bank of*

Am. Corp. v. City of Miami, Nos. 15-1111, 15-1112, __ U.S. __, 2017 WL 1540509, at *6 (May 1, 2017). As another hurdle, the Ohio Democratic Party participated in an earlier trial in a different case that *upheld* the laws challenged here, so review would raise preclusion questions. Finally, this case mistakenly arose from a supplemental complaint filed eight years after an initial complaint and four years after a final judgment. All told, it is hard to imagine a procedurally worse way to address the question presented.

Third, the Sixth Circuit has the better of the academic debate. To support a private cause of action, this Court *now* requires nothing "short of an unambiguously conferred right" in the text. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). Even when such language exists, a statute's other remedies may still "foreclose" a private one. *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001). The statute here fails both inquiries. When Congress adopted the provision in 1964, it included no private right of action even though neighboring titles of the same Act did. And the Materiality Provision contains a different remedy—suits by the Attorney General.

COUNTERSTATEMENT

Ohio voters must register to vote thirty days before an election. Ohio Rev. Code § 3503.06(A). They must provide five pieces of information: name, address, birthdate, signature, and identification. *Id.* § 3503.14(A). Acceptable identification includes, for example, a driver's license number, the last four digits of a social security number, or a recent utility bill. *Id.* Once registered, voters have many voting op-

tions. This case concerns two nontraditional options—provisional and absentee voting.

A. The Provisional-Ballot Law Sought To Increase The Number Of Counted Ballots

Election Day voters must provide their name, address, proof of identity, and signature. Ohio Rev. Code § 3505.18. Ohio does not require photo identification. These voters may instead use any of the identification forms that are available for registering, except the last four digits of their social security number. *Id.* Voters whose eligibility is in doubt may cast a provisional ballot. *Id.*

1. Before 2014, boards of elections rejected many provisional ballots because voters were unregistered

Historically, when questions arose about a voter's eligibility (for example, if the voter's name did not appear in the rolls), the voter could not vote. Provisional voting arose only in recent decades. Nat'l Comm'n on Fed. Election Reform, To Assure Pride and Confidence in the Electoral Process 35 (2001), *available at* http://web1.millercenter.org/commissions/comm_2001.pdf. Today, it has become a "failsafe" that gives voters whose eligibility is in question a second chance to cast a ballot. Election Manual, R.698-2, PageID#34216.

To vote, provisional voters must complete "affirmation forms" that help boards of elections confirm their eligibility. Ohio Rev. Code § 3505.182. Voters without proper identification on Election Day may cast a provisional ballot simply by writing the last four digits of their social security number on this form. *Id.* Before 2014, if voters did not choose that

option, they could appear at the board with proper identification within ten days after the election. Ohio Rev. Code § 3505.181(B)(8) (2013).

To confirm a provisional voter's eligibility, boards try to locate the voter within county-level databases. Sleeth Tr., R.660, PageID#29898-99. If that search fails, boards turn to the statewide database to confirm that the voter is registered and has not voted elsewhere. *Id.*; Larrick/Passet Tr., R.663, PageID#30403-05, 30469. If a board cannot locate a voter there, it generally must reject the voter as unregistered. Poland Tr., R.664, PageID#30780.

Provisional ballots represent a small percentage of the vote. In 2008, some 206,000 Ohio voters (out of over 5.7 million) cast provisional ballots; in 2010, around 105,000 voters (out of over 3.9 million) did so; and in 2012, just over 208,000 (out of over 5.6 million) did so. Provisional Reps., R.698-13 to R.698-15, PageID#34720-26; Hood Rep., R.698-8, PageID#34651. Of these, boards rejected a fraction: 39,989 in 2008, 11,772 in 2010, and 34,299 in 2012. Provisional Reps., R.698-13 to R.698-15, PageID#34720-26.

The most common reason for rejecting ballots was that the voters were not registered (18,860 in 2008, 4,790 in 2010, and 20,120 in 2012). *Id.* The second most common reason was that the voters voted at the wrong polling place and/or precinct (14,335 in 2008, 5,309 in 2010, and 9,520 in 2012). *Id.* These numbers reflected recurring eligibility issues.

Lack of Registration. In 2008, 2010, and 2012, boards rejected over 40,000 provisional ballots for lack of registration—accounting for over half of all

rejections. *Id.* Before 2014, Ohio did not adequately confront this problem: The affirmation form did not require birthdate and address, and so did not register these voters for future elections. Poland Tr., R.664, PageID#30728-30. While it included a separate registration application on the back, many voters, "tired of filling out paperwork," would not complete it. Ward Tr., R.661, PageID#30115. Thus, many voters would complete the form, be rejected, and remain unregistered for the next election (perhaps destined to cast failed ballots again). Poland Tr., R.664, PageID#30728-30.

Identifying Voters. Boards often could not locate some voters in databases using names and signatures alone. Ward Tr., R.661, PageID#30106-11; Poland Tr., R.664, PageID#30780-82; Terry Tr., R.665, PageID#30885-86. Boards had trouble locating voters who had changed names (such as newlyweds). Larrick Tr., R.663, PageID#30425; Terry Tr., R.665, PageID#30885-86. Many voters also shared similar names. Ward Tr., R.661, PageID#30106-11; Poland Tr., R.664, PageID#30780-82. Ohio's statewide database, for example, includes 368 Daniel Browns and about 650 John Smiths. Poland Tr., R.664, PageID#30719-21; Damschroder Tr., R.665, PageID#30995. Officials often could not identify these voters, adding to the unregistered rejections. Ward Tr., R.661, PageID#30106-11.

Voters Who Moved. Boards also rejected many provisional ballots for voting in the wrong place, even though many of these voters may have been eligible. Voters often cast provisional ballots because they moved without updating their registration with their new address. Poland Tr., R.664, PageID#30711; Ter-

ry Tr., R.665, PageID#30888. These voters, while eligible, must vote at the polling location for their *new* address. Ohio Rev. Code § 3505.183(B)(3)(f); Perlatti Tr., R.656, PageID#28831. Yet the old affirmation form did not require voters to provide their address. Poland Tr., R.664, PageID#30773. This created a problem. These voters may have arrived at the correct location, told poll workers their new address, and supplied the required information. Poland Tr., R.664, PageID#30713. Unless voters wrote the *unrequired* new address on affirmation forms, however, it appeared that they had voted at the wrong place (because the database listed their old addresses). Poland Tr., R.664, PageID#307112-14; Terry/Damschroder Tr., R.665, PageID#30887-89, 30996-97. Boards rejected these ballots as "wrong place" votes because voters did not provide new addresses on the forms. Poland Tr., R.664, PageID#30712-14; Terry/Damschroder Tr., R.665, PageID#30887-89, 30996-98.

2. The Provisional-Ballot Law addressed these concerns

The Ohio Association of Election Officials ("OAEO")—a bipartisan group of local officials—sought to resolve these issues. Ward Tr., R.661, PageID#30103-07; Terry Tr., R.665, PageID#30903-05. Its leadership stressed the importance of requiring voters to list their birthdates and addresses so that the affirmation form could "double" as a registration and account for voters who had moved. Terry Testimony, R.698-100, PageID#35381.

The result was the Provisional-Ballot Law. It did three relevant things. First, the law added two fields to the affirmation form: birthdate and address (in

addition to name, signature, and identification form). Ohio Rev. Code § 3505.183(B)(1)(a). Second, the law gave voters who lack identification seven days after Election Day to show that identification (rather than the ten days provided in prior law). *Id.* § 3505.182(D). Third, the law repealed provisions requiring poll workers to complete portions of the affirmation form, minimizing risks of poll-worker error. S.B. 216, R.698-5, PageID#34570-71.

With this new law in 2014, voters cast 49,262 provisional ballots. EAC Election Rep., R.698-25, PageID#35023. Ohio counted 90.4%, giving it the nation's fifth-highest acceptance rate. *Id.* PageID#35022-23. Of 4,734 rejected ballots, over half were for lack of registration. Provisional Rep., R.698-16, PageID#34728. Only 188 were rejected for address inconsistencies, and only 59 for birthdate inconsistencies. *Id.*

B. The Absentee-Ballot Law Helped Confirm Eligibility, Increased Uniformity, And Gave A Statutory "Cure" Period

Since 2006, Ohio has offered expansive absentee voting. To apply for an absentee ballot, voters must provide the five fields required for registration or provisional voting: name, address, birthdate, signature, and identification. Ohio Rev. Code § 3509.03(B). Boards mail absentee ballots on the first day of the absentee-voting period. Election Manual, R.698-2, PageID#34183. Voters must return mailed-in ballots in "identification envelopes." Ohio Rev. Code § 3509.05(A). They may provide a copy of an identification form that would be acceptable on Election Day, or, like provisional voters, list the last four digits of their social security number as

their identification. *Id.* Absentee voters may vote in person or by mail. *Id.* They (or an authorized relative) must personally deliver ballots to boards by Election Day, or have them postmarked before the election and received by the tenth day thereafter. *Id.* § 3509.05(A)-(B)(1).

After the introduction of universal absentee voting, concerns prompted the OAEO to focus on absentee-voting issues. The 2005 law authorizing universal absentee voting, for example, required identification envelopes to include spaces for address and birthdate. 151 Ohio Laws (Part III) 5267, 5282-84 (2005) (amending Ohio Rev. Code § 3509.04(B)); Identification Envelopes, R.698-49 to R.698-53, PageID#35169-77. Yet an earlier provision barred boards from counting "insufficient" envelopes and arguably required only the signature and identification fields. *See* Ohio Rev. Code § 3509.07 (2013). The differences between these provisions created confusion within the boards as to which fields were required to count ballots. Damschroder Tr., R.665, PageID#31026-27.

The OAEO formed bipartisan task forces to tackle absentee-voting issues. Ward Tr., R.661, PageID#30096-98; Terry Tr., R.665, PageID#30874-77. To increase uniformity, it suggested that identification envelopes require five fields, including birthdate and address. OAEO Rep., R.698-62, PageID#35193; Ward Tr., R.661, PageID#30100. These fields would help "ensur[e] that they are the correct voter" without being "too exorbitant." Terry Tr., R.665, PageID#30879. This idea was "very noncontroversial." *Id.* Kenneth Terry, a Democrat from Allen County, recalled no opposition. *Id.*, PageID#30871, 30880. The OAEO also recommended that Ohio codify a cure

period for envelope mistakes. Ward Tr., R.661, PageID#30100-02.

In response, Ohio passed the Absentee-Ballot Law. It required voters to list birthdates and addresses (in addition to names, signatures, and identification) on identification envelopes. Ohio Rev. Code §§ 3509.06(D)(3)(a), 3509.07(A). This unified the identifiers for registering, applying for an absentee ballot, casting an absentee ballot, and casting a provisional ballot. *Id.* §§ 3503.14, 3509.03, 3509.06(D)(3), 3505.181-.183. The law also permitted boards to preprint two of the fields (name and address) on identification envelopes. Ohio Rev. Code § 3509.04(B). The Secretary has since made that preprinting mandatory. Election Manual, R.698-2, PageID#34203. The law also codified a voter's right to receive notice of, and cure, mistakes. Ohio Rev. Code § 3509.06(D)(3)(b). Voters must do so by seven days after the election. *Id.*

Since the law's passage, Ohio's absentee-ballot acceptance rate remains around 98%. In 2014, Ohio counted 98.8% of the 864,562 absentee ballots cast. Absentee Rep., R.698-21, PageID#34757. In 2015, it counted 98.2% of 427,633 absentee ballots. Absentee Rep., R.698-23, PageID#34769. Rejections due to birthdate or address deficiencies accounted for little of the total: 0.16% (about 1,380) in 2014, and 0.08% (about 330) in 2015. *See* Absentee Supp. Reps., R.698-22 & R.698-24, PageID#34761-34768, 34773-34793; 2014-2015 Tables, R.686-1, PageID#33407, 33411. Most absentee-ballot rejections occurred because voters did not timely return ballots. *See* EAC Election Rep., R.698-25, PageID#35015.

C. Petitioners Challenged The Provisional-Ballot And Absentee-Ballot Laws On Many Grounds

The Ohio Democratic Party challenged the Provisional-Ballot Law and the Absentee-Ballot Law in two lawsuits. In *Ohio Organizing Collaborative v. Husted*, 189 F. Supp. 3d 708 (S.D. Ohio 2016) ("*ODP*"), it challenged, among others, the Absentee-Ballot Law, the Provisional-Ballot Law, and the law adjusting Ohio's voting calendar. After a ten-day trial, the district court enjoined *only* the law adjusting Ohio's calendar. *Id.* at 729, 739, 762. The Sixth Circuit reversed that part of the order. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 623 (6th Cir. 2016). Yet the *ODP* district court *upheld* the two laws at issue here. *Ohio Organizing Collaborative*, 189 F. Supp. 3d at 748-55. The court found that these laws comported with the Fourteenth Amendment because they imposed minimal burdens and served governmental interests. *Id.* It also rejected a claim under the Materiality Provision on the ground that the provision did not create a private cause of action. *Id.* at 767. The Ohio Democratic Party did not appeal these rulings, and the *ODP* judgment is now final.

In this case, Petitioners (NEOCH, CCH, and the Ohio Democratic Party) challenged the Absentee-Ballot and Provisional-Ballot Laws. Two weeks after the *ODP* district court upheld these laws, the district court here enjoined them. Pet. App. 221a, 264a-65a. It held that three components violated the Fourteenth Amendment: (1) the requirement that voters complete five fields on the affirmation forms (for provisional ballots) and identification envelopes (for ab-

sentee ballots); (2) the prohibition against poll workers completing those forms; and (3) the reduction in the cure period. *Id.* Alternatively, the court held that these three components violated Section 2 of the Voting Rights Act. Pet. App. 258a.

The district court, by contrast, rejected Petitioners' claim under the Materiality Provision on the ground that it did not create a private cause of action. Pet. App. 258a-60a. The court also rejected their claim under 52 U.S.C. § 10501—which bars citizens from being denied the right to vote because of their "failure to comply with any test or device"—on the merits. Pet. App. 262a-64a.

The Sixth Circuit mostly reversed the injunction. It reversed the district court's judgment under Section 2 because the challenged laws did not disparately affect minority voters. Pet. App. 24a-28a. Turning to the Fourteenth Amendment, the court noted that the relevant balancing test required it to compare the laws' justifications against their burdens. Pet. App. 32a-35a. The court held that the Provisional-Ballot Law's five "field" requirements were constitutional because the additional fields (birthdate and address) served Ohio's interests in registering and identifying voters. Pet. App. 35a-37a. With respect to the Absentee-Ballot Law, however, the court partially affirmed the injunction to the extent state law required voters to complete address and birthdate fields with "technical precision." Pet. App. 37a.

As for Petitioners' cross-appeal claims, the court affirmed. It agreed that circuit precedent foreclosed any argument that private parties may enforce the Materiality Provision. Pet. App. 30a-31a. And it agreed that the challenged laws "do not impose a

'test or device' on Ohio voters" within the meaning of § 10501. Pet. App. 28a.

Judge Keith dissented. He criticized the majority for using what he viewed as the wrong legal standards under the Constitution and Section 2. Pet. App. 52a. He did not, however, dispute the majority's resolution of the Materiality Provision. Pet. App. 50a-113a.

Petitioners sought en banc review, which the Sixth Circuit declined over written dissents. Chief Judge Cole listed "four reasons" for his dissent: disagreement about the standard of review, conflicts with other courts about Section 2's meaning, a "fundamental" misunderstanding of the Voting Rights Act, and disagreement about the test under the Constitution. Pet. App. 268a. Judge Donald dissented separately, again under the Constitution and Section 2. Pet. App. 282a-84a. Neither dissent referenced the Materiality Provision. Pet. App. 268a-86a.

Petitioners asked this Court to stay the Sixth Circuit's judgment. The Court denied a stay.

D. The Secretary Issued A Directive Clarifying State Law On Counting Ballots

Before this Court denied Petitioners' requested stay, the Secretary instructed Ohio's boards about counting absentee and provisional ballots containing technical errors. The Secretary explained his view of state law regarding the mistakes that can serve as a basis to reject a ballot. Ohio Sec'y State Dir. No. 2016-38, at 1-2 (Oct. 14, 2016), *available at* https://goo.gl/EzGVgF. This Directive told local boards to count ballots "as long as a board can still identify [a] voter," and warned them that technical

mistakes in birthdates or addresses are "not valid reasons to reject a ballot." *Id.* at 1-2.

It further reminded officials to follow the requirements set forth in an earlier directive (Directive 2008-80) "[i]n all other matters relative to voter identification." *Id.* at 3. That earlier instruction clarified the standards to verify a voter's identity. It noted that a voter's name should be deemed to "conform" to the registration record for identification purposes when it contains "the same last name and the same first name or derivative of the first name as the first and last names appearing in the poll list or signature poll book," and clarified that "[m]inor misspellings shall not preclude the use of a proffered ID for purposes of voting." Ohio Sec'y State Dir. 2008-80, at 3 (Sept. 5, 2008), *available at* https://goo.gl/tqGgmx.

REASONS FOR DENYING THE PETITION

I. THE COURT SHOULD DENY CERTIORARI BECAUSE THE QUESTION PRESENTED IS OF LITTLE PRACTICAL CONSEQUENCE, AND IMPLICATES ONLY A STALE AND SHALLOW CIRCUIT SPLIT

Petitioners suggest that the Court should grant certiorari because the circuits are split on the question presented. Pet. 19-22. For two reasons, however, the question is not worthy of this Court's attention at this time. *First*, this question is largely inconsequential for voting litigation today because claims under the Materiality Provision will usually duplicate other claims. *Second*, perhaps for that reason, the 1-1 circuit conflict is as shallow and old as they come.

A. The Narrow Conflict Has Little Practical Importance Because Claims Under The Materiality Provision Now Almost Always Repeat Other Claims

1. The question presented has little practical consequence because claims under the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), almost always replicate other claims. That provision was part of Title I of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241—a law better known for its other Titles, such as Title II (public accommodations) or Title VII (employment). *Id.* § 101, 78 Stat. at 241. The provision was *then* "necessary to sweep away such tactics as disqualifying an applicant who failed to list the *exact* number of months and days in his age," and other unnecessary information imposed as a voting prerequisite. *Condon v. Reno*, 913 F. Supp. 946, 950 (D.S.C. 1995) (emphasis added). "Such trivial information served no purpose other than as a means of *inducing* voter-generated errors that could be used to justify rejecting applicants." *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008) (emphasis added); *Thrasher v. Ill. Republican Party*, No. 4:12-cv-4071, 2013 WL 442832, at *3 (N.D. Ill. Feb. 5, 2013). But this Materiality Provision has been overshadowed by two significant legal developments since its passage.

First, the Materiality Provision was immediately overshadowed by the Voting Rights Act of 1965. "In the Civil Rights Acts of 1957, 1960, and 1964, Congress authorized and then expanded the power of 'the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds.'" *Shelby Cty. v. Holder*, 133 S. Ct. 2612,

2633 (2013) (Ginsburg, J., dissenting) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966)). But this "series of enforcement statutes in the 1950s and 1960s"—including the Materiality Provision—"depended on individual lawsuits filed by the Department of Justice." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009). When that litigation proved "slow and expensive," *id.*, Congress responded with the broader Voting Rights Act.

Claims under the Voting Rights Act—especially under Section 2—now greatly outpace claims under this Materiality Provision. As one court suggested when summarizing voting litigation, "[t]he record shows that between 1982 and 2005, minority plaintiffs obtained favorable outcomes in some *653 section 2 suits* filed in *covered jurisdictions*, providing relief from discriminatory voting practices in at least *825 counties*." *Shelby Cty. v. Holder*, 679 F.3d 848, 868 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013) (emphases added).

Second, the Materiality Provision was soon overshadowed by this Court's cases interpreting the Fourteenth Amendment to adopt a balancing test for voting regulations. *E.g.*, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189-91 (2008) (Stevens, J., op.); *Burdick v. Takushi,* 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under this test, "[h]owever slight [a] burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford*, 553 U.S. at 191 (Stevens, J., op.) (citation omitted). This *Anderson-Burdick* test dates to a case from 1966—only two years *after* the Materiality Pro-

vision. *See id.*, 553 U.S. at 189 (discussing *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966)).

Today, this balancing test governs *all* voting laws, including those addressing "'the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself.'" *Burdick*, 504 U.S. at 433 (citation omitted). Under current doctrine, therefore, the Constitution is a sensitive instrument for sorting valid and invalid voting regulations. In a prior stage of this case, for example, the Sixth Circuit upheld an injunction against a law that invalidated ballots cast at the right polling place, but at the wrong table in that polling place. *Ne. Ohio Coal. for the Homeless v. Husted*, 696 F.3d 580, 597 (6th Cir. 2012). Weeks later, it stayed an injunction against a law that invalidated ballots cast in the altogether wrong polling place. *Serv. Emps. Int'l. Union Local 1 v. Husted*, 698 F.3d 341, 344 (6th Cir. 2012); *cf. Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 666 (6th Cir. 2016). Today, it is hard to imagine any voting requirement that would be deemed "immaterial" under the Materiality Provision yet would survive the balancing that courts regularly apply under the constitutional test.

2. In light of the developments since the Materiality Provision's passage, the provision is itself almost never material to modern litigation. Petitioners appear to have found every case mentioning the provision (as well as many others mentioning statutory neighbors in § 10101 that are irrelevant here). Pet. 19-26. But Petitioners cannot escape that the Materiality Provision almost never *matters* to the outcomes of these cases. If a court has found a violation of that provision, it has *additionally* found that

the disputed voting regulation violated some other federal constitutional or statutory provision.

Consider the few circuit cases that have addressed the Materiality Provision's substance. A pair of Eleventh Circuit cases reached the unsurprising result that the provision permits a voting regulation that requests information *mandated* by other federal law, but bars a regulation that requests information *prohibited* by other federal law. In one case, the Eleventh Circuit affirmed an injunction against a Georgia regulation that required voters to reveal their full social security number. *Schwier v. Cox*, 439 F.3d 1285, 1286 (11th Cir. 2006). This requirement, the court reasoned, violated the Materiality Provision because a different statute, the Privacy Act, "made it illegal" to mandate the nine-digit disclosure. *Browning*, 522 F.3d at 1174 n.22 (describing *Schwier*). A Florida statute, by contrast, required certain registrants to include either a driver's license number or the last four digits of a social security number on a registration form. *Id.* at 1156. The Eleventh Circuit upheld this requirement because another statute—the Help America Vote Act—made the information "automatically material." *Id.* at 1174; *see also Hoyle v. Priest*, 265 F.3d 699, 704-05 (8th Cir. 2001) (holding that a requirement that petition signers be qualified electors was material because it "protects the state and its citizens against both fraud and caprice").

The pattern holds in the few district-court cases that have considered the provision. District courts that have upheld photo-identification laws under the Constitution have likewise upheld them under the Materiality Provision. *Ind. Democratic Party v.*

Rokita, 458 F. Supp. 2d 775, 842 (S.D. Ind. 2006), *aff'd*, *Crawford*, 553 U.S. 181; *Gonzalez v. Arizona*, Nos. cv-06-1268; cv-06-1362; cv-06-1575, 2006 WL 3627297, at *9 (D. Ariz. Sept. 11, 2006), *aff'd* 485 F.3d 1041 (9th Cir. 2007). District courts that have invalidated voting regulations under the Materiality Provision, by contrast, have found that the regulations violated some other federal law. *See Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1271 (W.D. Wash. 2006) (voting regulation incompatible with *both* Help America Vote Act and the Materiality Provision); *Boustani v. Blackwell*, 460 F. Supp. 2d 822, 826 (N.D. Ohio 2006) (citing Materiality Provision as part of court's "[c]onstitutional scrutiny" of regulation). Finally, if anything, these cases show that the Materiality Provision has *less* rigor than the constitutional test. For example, a Georgia court enjoined a voter-ID law after concluding that it violated the Fourteenth Amendment, but that court found that the law *survived* the Materiality Provision. *Common Cause/Ga. League of Women Voters of Ga., Inc. v. Billups*, 439 F. Supp. 2d 1294, 1352, 1358 (N.D. Ga. 2006).

The pattern is reflected in this very litigation. Although the Sixth Circuit's panel and en banc decisions drew dissents under Section 2 and the Fourteenth Amendment, none even mentioned the Materiality Provision, let alone suggested that it could be dispositive. At the panel stage, Judge Keith would have "affirm[ed] the district court in full," Pet. App. 52a, including its judgment rejecting the claim under the Materiality Provision. At the en banc stage, even though the Court was no longer bound by circuit precedent, both Chief Judge Cole's dissent and Judge

Donald's separate dissent said nothing about the Materiality Provision. Pet. App. 268a-86a.

In sum, the question presented has little practical consequence for modern voting litigation.

B. No Circuit Court Has Added To The Conflict Since 2003, Which Confirms Its Lack Of Ongoing Significance

In the 50-plus years since the Materiality Provision's passage, only two circuits have considered whether private parties may enforce it. *Compare Schwier v. Cox*, 340 F.3d 1284, 1294-97 (11th Cir. 2003), *with McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000). This 1-1 disagreement between the Sixth and Eleventh Circuits has not spread to other circuits, even though the Eleventh Circuit created the conflict fourteen years ago. The few circuit cases that have considered this question over these many years confirm that the Materiality Provision now duplicates other claims.

Petitioners, by contrast, wrongly assert a broader conflict. They point to four circuit cases outside the Sixth and the Eleventh Circuits that allegedly *silently* addressed this question. Pet. 22. None did so. Three of those cases involved a *different* part of § 10101, passed in 1870 to "implement[] the Fifteenth Amendment," *Reddix v. Lucky*, 252 F.2d 930, 933 (5th Cir. 1958); they did not address the Materiality Provision *at all*. *See id.*; *Bell v. Southwell*, 376 F.2d 659, 664 (5th Cir. 1967) (describing claim in terms of "demands of the Constitution"); *Coal. for Educ. in Dist. One v. Bd. of Elections of City of N.Y.*, 495 F.2d 1090, 1091 (2d Cir. 1974) (describing claims under Fourteenth Amendment and Voting Rights

Act). The fourth case did cite the Materiality Provision *once*, *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000), but it too involved "allegations of discriminating against black citizens on the basis of their race," *id.* at 1002. It said nothing else about the provision. Furthermore, as explained below, *see infra* Part III, whether private parties may sue to enforce the Materiality Provision presents a different question from whether they may sue to enforce the original provision of § 10101 that dates to 1870 (which codified the Fifteenth Amendment).

Even accounting for district courts, moreover, no ripe split exists. Petitioners list five district cases. Pet. 22 n.11. Only one involved the question whether a private plaintiff may sue to enforce the Materiality Provision. *McKay v. Altobello*, No. 96-3458, 1996 WL 635987 (E.D. La. Oct. 31, 1996) (no private cause of action). But that court later granted relief under the Privacy Act for the same alleged harm. *See McKay v. Altobello*, No. 96-3458, 1997 WL 266717, at *3 (E.D. La. May 16, 1997). That reaffirms that the Materiality Provision has little consequence today.

The other cases collected in Petitioners' footnote involved different questions. *E.g.*, *Davis v. Commonwealth Election Comm'n*, No. 1-14-CV-00002, 2014 WL 2111065, *24 (D. N. Mar. I. May 20, 2014) (holding that law violated what is now 52 U.S.C. § 10101(a)(1) and the Fifteenth Amendment); *Estes v. Gaston*, No. 2:12-cv-01853, 2012 WL 6645609, at *5 (D. Nev. Nov. 26, 2012) (no private damages remedy for unspecified denial of right to vote) (pro se complaint); *Delegates to Republican Nat'l Convention v. Republican Nat'l Comm.*, No. SACV 12-00927, 2012 WL 3239903, at *5 n.3 (C.D. Cal. Aug. 7, 2012)

(granting motion to dismiss allegation that defendants violated what is now 52 U.S.C. § 10101(b) by intimidating convention delegates); *Brooks v. Nacrelli*, 331 F. Supp. 1350, 1352 (E.D. Pa. 1971) (concluding that what is now § 10101(b) was "not applicable").

Finally, Petitioners list dozens of cases where a private plaintiff "invoked" what is now some portion of 52 U.S.C. § 10101. Pet. 22 & n.12. As with the cases discussed above, nearly every one either did not address the private-remedy question, or addressed parts of § 10101 other than the Materiality Provision. If anything, these cases illustrate the petition's shortcomings: While voting cases have been prolific, cases under the Materiality Provision have been rare. That is not a recipe for certiorari.

II. THE COURT SHOULD DENY CERTIORARI BECAUSE THIS CASE PRESENTS A BAD VEHICLE TO RESOLVE THE QUESTION PRESENTED

Even if the question were otherwise cert-worthy, this case provides a bad vehicle to resolve it. *First*, the question is not outcome dispositive. Petitioners' claim under the Materiality Provision would fail on the merits for the same reasons that the Sixth Circuit provided to partially reject their constitutional claim, and they have not sought review of that constitutional ruling here. *Second*, the Secretary's Directives show that Petitioners' "perfect" ballot claim rests on a misreading of state law. *Third*, this petition comes to the Court in a messy procedural posture involving a decade-old case that the district court described as "byzantine." Pet. App. 115a.

A. Petitioners Seek An Advisory Opinion, As They Litigated (And Largely Lost) Their Constitutional Claim On The Merits

The Court should deny review because Petitioners seek an advisory opinion on a question that is not outcome dispositive in this case. Whether or not they could sue to enforce the Materiality Provision, their claim under that provision largely overlaps their claim under the Fourteenth Amendment. And Petitioners have had their day in court (the Ohio Democratic Party has had two days) to prove the alleged "immateriality" of the challenged laws under the Constitution; they won on some narrow grounds but lost on all the rest. The Sixth Circuit would have "reached the same conclusion" if it analyzed those laws through the lens of the Materiality Provision. *Hittson v. Chatman*, 135 S. Ct. 2126, 2128 (2015) (Ginsburg, J., concurring in denial of certiorari). Thus, because "this Court does not sit to satisfy a scholarly interest," it should wait to answer the question in a case where it matters. *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). Comparing the Sixth Circuit's constitutional holding to the Materiality Provision confirms this point.

1. Applying the constitutional balancing test, the Sixth Circuit found that most of the voting regulations in the Absentee-Ballot and Provisional-Ballot Laws were justified by Ohio's important interests, but that some were not. Pet. App. 35a-41a, 49a-50a. Starting with the address and birthdate fields in provisional-ballot affirmation forms, the court held that Ohio's concerns with "registering provisional voters" and "positively identify[ing] provisional vot-

ers" were "important interests" that overcame the minor burdens on voters. Pet. App. 36a-37a.

The Sixth Circuit reached the opposite result, however, with respect to the birthdate and address fields in absentee-ballot identification envelopes—enjoining any requirement for "*technical* precision" in those fields. Pet. App. 37a (emphasis added). At the same time, the court clarified that (unlike the district court's injunction) the "remaining injunction" permitted Ohio to reject "absentee ballots whose identification envelopes contain 'insufficient' information" to determine whether the voter is qualified. Pet. App. 49a (citation omitted). In short, the court found that the provisions that it upheld served Ohio's important interests in *identifying* qualified voters.

2. The Materiality Provision provides that no person 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). Under this provision, "verifying an individual's identity is a material requirement of voting." *Rokita*, 458 F. Supp. 2d at 841. And because this provision uses the word "material," it cannot be read to "establish a least-restrictive-alternative test" or require States to adopt the most "error-tolerant ways of verifying identity." *Browning*, 522 F.3d at 1175. Under this framework, then, courts have upheld requirements designed to verify a voter's identity against Materiality Provision claims. *See id.*;; *Gonzalez,* 2006 WL 3627297, at *9; *Diaz v. Cobb*, 435

F. Supp. 2d 1206, 1213 (S.D. Fla. 2006); *Rokita*, 458 F. Supp. 2d at 842.

As the Sixth Circuit found, the laws here seek to achieve the same ends. Officials can use the relevant fields to match a ballot with a qualified voter. Pet. App. 36a-37a, 49a. Errors in that information are material because they "directly relate[] to the material requirement of establishing an individual voter's identity" or qualifications. *Rokita*, 458 F. Supp. 2d at 841. It is hard to see how the sanctioned provisions of Ohio law can serve Ohio's important interests in identifying qualified voters under the Fourteenth Amendment, but not serve those interests under the Materiality Provision. In this case (as in many others), the two claims rise or fall together. And Petitioners do *not* challenge the Sixth Circuit's resolution of the constitutional issue. That Ohio has "important interests" here, Pet. App. 36a-37a, thus is the law of the case for any future proceedings. *E.g.*, 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4478 (2d ed. 2002).

In response, Petitioners assert that they would have "no difficulty" proving violations of the Materiality Provision. Pet. 27. What matters here, however, is whether they could succeed *beyond* what they achieved in the Sixth Circuit. Petitioners offer no reason to accept that unsupported claim. If, as the Sixth Circuit held, the requirement to include identifying information on an affirmation form or identification envelope is legitimate under *Anderson-Burdick*, it is material under the statute. And, as the Sixth Circuit ruled when it invalidated some state laws on the understanding that they required "technical precision," Pet. App. 49a, Petitioners have al-

ready blocked any features of Ohio law that might be read to reject ballots for *immaterial* reasons.

In sum, even if private parties could enforce the Materiality Provision, the Sixth Circuit would not invalidate (or validate) Ohio's laws under that provision for the same reasons that it held that the laws satisfied (or, to some extent, did not satisfy) the constitutional balancing test. Thus, Petitioners raise an academic question that will not affect the judgment.

B. The Secretary's Directives Further Show That The Question Presented Has Little Importance In This Case

In their petition, Petitioners insist that Ohio law "require[s]" officials to reject any ballot unless the identifying information is "perfect[]." Pet. 11. They also claim that Ohio law compels a board of elections to "disenfranchise" a voter, even when the board knows the voter is "eligible," if the voter makes an "immaterial error" on a ballot form. Pet. 26. Whether or not those statements had any truth in the past, Ohio's Secretary of State has since issued Directives that both implement the Sixth Circuit's ruling and clarify that this perfect-form argument misreads state law even apart from that ruling.

To implement the Sixth Circuit's decision for absentee ballots, the Secretary's instructions to boards modified the list of "minimum" requirements on an identification envelope to include only name, signature, and identification; specified that "[i]f a board of elections must use address to confirm a voter's eligibility, it must not require technical precision in a voter's completion of the address field"; and instructed that "[a] board of elections may never reject an

absentee ballot for the sole reason that the date of birth is missing, insufficient, or incomplete." Ohio Sec'y St., Election Official Manual, at 5-35, 5-36, 5-39, 5-40 (Jan. 31, 2017), *available at* https://goo.gl/lkuKGR. The directions later reiterate that point: "Technical mistakes in providing one's date of birth . . . may not be cited as reasons to reject an absentee ballot." *Id.* at 5-40.

Not only that, before the 2016 election the Secretary issued a Directive explaining Ohio law regarding the mistakes that can serve as a basis to reject a ballot. Ohio Sec'y State Dir. No. 2016-38, at 1 (Oct. 14, 2016), *available at* https://goo.gl/EzGVgF. This Directive told boards to count ballots "as long as a board can still identify the voter," and warned them that "technical mistakes" in birthdates or addresses are "not valid reasons to reject a ballot"—even in the context of the provisional ballots *unaffected* by the Sixth Circuit's decision. *Id.* at 1-2. It also directed officials to follow the requirements set forth in an earlier directive "[i]n all other matters relative to voter identification." *Id.* at 3. That Directive had clarified that a voter's name suffices for identification if it contains "the same last name and the same first name or derivative of the first name as the first and last names appearing in the poll list or signature poll book," and that "[m]inor misspellings shall not preclude the use of a proffered ID for purposes of voting." Ohio Sec'y State Dir. 2008-80, at 3 (Sept. 5, 2008), *available at* https://goo.gl/tqGgmx.

These Directives show that the question presented has even less relevance to this case, and make the petition even more a request for an advisory opinion. Going forward, to the extent that a party believes

that a particular board's decision to reject a particular ballot violates state law as clarified by these Directives, that party should attempt to seek state-law mandamus relief in state courts.

C. This Case Contains Procedural Obstacles To Review, And The Litigation Has Gone On Long Enough Already

Aside from the fact that Petitioners seek an advisory opinion on an issue with little practical consequence, other vehicle problems exist. There is serious doubt as to whether any Petitioner has standing. At the least, claim preclusion should apply to the Ohio Democratic Party, since it lost on the same questions in another trial. What is more, this case, which has been ongoing since 2006, never should have morphed into the current challenge. In short, even if the question presented were "important," the "convoluted history of this case makes it a poor vehicle for reviewing" it. *Taylor v. Yee*, 136 S. Ct. 929, 930 (2016) (Alito, J., concurring in denial of certiorari). The Secretary expressly preserves these arguments here, Sup. Ct. R. 15.2, because he would reraise them at any merits stage.

First, if the Court grants review, it would confront its "*independent* obligation to assure that standing exists." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (emphasis added). That obligation might dwarf the actual question presented.

The Sixth Circuit found that NEOCH suffered its own Article III injury, so it did not address the standing of any other party. Pet. App. 16a-18a. The court reasoned that, as a result of the challenged laws, NEOCH switched resources from encouraging voters

to vote through *mail-in* absentee voting to encouraging voters to vote through *in-person* absentee voting. Pet. App. 17a. Its holding was, at the least, debatable. For starters, in the past, this Court has looked with a skeptical eye on allegations that a party's *voluntary* change in conduct created an Article III injury. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151-52 (2013); *see also Summers*, 555 U.S. at 497-500 (rejecting probabilistic theory of standing); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976) (holding that organizations do not have standing based merely on interest in a subject). In addition, standing is claim specific; it is not "'dispensed in gross.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (citation omitted). Thus, NEOCH's standing theory about *absentee* voting offers no basis to challenge laws governing *provisional* voting. And since the Sixth Circuit enjoined a portion of the Absentee-Ballot Law, the Provisional-Ballot Law would be the main focus now.

Second, NEOCH's standing theory makes this case a poor vehicle to consider the question. Of the few cases that have arisen under the Materiality Provision, many involve *individual* voters asserting their *own* claims under that provision. *E.g.*, *Schwier*, 340 F.3d 1284; *Thrasher*, 2013 WL 442832; *Diaz*, 435 F. Supp. 2d 1206. NEOCH, an organization, does not assert an injury in having *its* vote disqualified because of an error. Thus, this case would require the Court to consider *not just* whether a private cause of action exists under the Materiality Provision, *but also* whether that cause of action is broad enough to encompass the alleged injuries asserted by NEOCH. *Cf. Bank of Am. Corp. v. City of Miami*, Nos. 15-1111, 15-1112, __ U.S. __, 2017 WL 1540509, at *6 (May 1,

2017) (discussing "zone of interests" test); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (same). It would be far better for the Court to consider this question in the context of a case brought by voters under the Materiality Provision.

Third, the Secretary invoked claim preclusion against the Ohio Democratic Party in the Sixth Circuit appeal. The Ohio Democratic Party lost these claims in the *ODP* case, and its time to appeal there ran while the appeal was pending here. *Ohio Organizing Collaborative*, 189 F. Supp. 3d at 748-53, 767; Pet. App. 13a-14a. If the Court found that NEOCH and CCH lacked standing but that the Ohio Democratic Party did not, it would confront this claim-preclusion issue. Because the Ohio Democratic Party did not cross appeal the identical issue raised here in the parallel suit, it should now be bound by the claim-preclusive effect of that judgment. *See, e.g.*, *Montana v. United States*, 440 U.S. 147, 152-53 (1979). Even apart from claim preclusion, the *ODP* trial shows that these state laws have received sufficient scrutiny by the federal courts. The Secretary defended the laws against *two* multi-week trials in the same district court. Additional litigation now, repackaged as a Materiality Provision claim, would serve little purpose.

Fourth, Petitioners' complaint should never have moved forward in the first place. The Materiality Provision, as raised here, was invoked in a supplemental complaint filed in 2014, eight years after the initial complaint was filed in 2006 and four years after this case reached a final judgment through a consent decree (now expired). *Ne. Ohio Coal.*, 696 F. 3d

at 583-84; R.429-1, Supp. Compl., PageID#15281. When Ohio sought to challenge that decree in 2012, moreover, it was rebuffed by the Sixth Circuit on the ground that it could not meet the demanding standards for reopening a final judgment in Fed. R. Civ. P 60(b). *Ne. Ohio Coal.*, 696 F. 2d at 600-03. Here, however, the Sixth Circuit allowed Petitioners to reopen this old case without meeting those demanding standards. Pet. App. 18a-20a. A supplemental complaint should not have been a vehicle for raising a new case in an old one. As some Petitioners themselves said at the time of the supplementing, they "raise[d] new claims" attacking "a different set of efforts to [allegedly] deny the vote." Mot., R.429, PageID#15275-76.

At day's end, it is unlikely the Court will confront a more procedurally complicated case. To the extent it has any interest in the question presented, it will see far better vehicles.

III. THE SIXTH CIRCUIT CORRECTLY INTERPRETED THE MATERIALITY PROVISION

The Court should deny certiorari lastly because the Sixth Circuit correctly resolved this issue here.

A. In recent years, this Court has been reluctant to discover implied causes of action under 42 U.S.C. § 1983 or other statutes—even in the voting context. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5, 6 (2008) (statute); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (§ 1983). That reluctance should extend to the entities that sue here for three reasons.

First, Congress's *inclusion* of private causes of action in some parts of the Civil Rights Act of 1964 and its *exclusion* of such an action for the Materiality

Provision undercuts the claim that it is privately enforceable. The provision, added to what is now 52 U.S.C. § 10101, was located in Title I of Civil Rights Act, which contained no language authorizing private actions. 78 Stat. at 241-42. In contrast, Title II, addressing public accommodations, authorized "a civil action" by a "person aggrieved." *Id.* at 244. And Title VII, regulating private employers, created a "civil action" in favor of persons "aggrieved." *Id.* at 260. "[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotation marks omitted). That presumption is "'strongest'" when "the provisions were considered simultaneously when the language raising the implication was inserted." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (citation omitted).

To be sure, the Court has earlier suggested that one section of another title of the Civil Rights Act (Title VI) contained an implied right of action. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 697-98 (1979). But the Court has since questioned the broad approach taken there, even in the context of Title VI. *See Thompson v. Thompson*, 484 U.S. 174, 189-91 (1988) (Scalia, J., concurring in judgment) (describing the Court's legal developments); *see also Sandoval*, 532 U.S. at 288-290.

Second, the language authorizing the Attorney General to enforce the Materiality Provision shows that private parties do not have the same right. As

this Court has more recently said, the "'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) (citation omitted); *Sandoval* 532 U.S. at 290. When Congress passed the Materiality Provision, it added the prohibition to a statute that already contained an existing enforcement mechanism—suits by the Department of Justice. *See* 52 U.S.C. § 10101(c). Indeed, it is precisely because these "individual lawsuits filed by the Department of Justice" proved ineffective that Congress later passed the broader Voting Rights Act. *Nw. Austin*, 557 U.S. at 197; *Riley v. Kennedy*, 553 U.S. 406, 411 (2008). This remedy shows that Congress did not intend for others to be on the table. *See Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 457 (1974).

Third, at the least, any private cause of action should not extend to the organizations that sue here. The Sixth Circuit held only that NEOCH suffered a sufficient Article III injury because, in light of the challenged laws, it "redirect[ed]" its focus to early in-person absentee voting from mail-in absentee voting. Pet. App. 17a. But "changed resources" are not the type of injuries against which the Materiality Provision protects. And this Court has rejected any notion that an entity "within the general zone of interest that [a] statute is intended to protect" may sue to enforce it under § 1983. *Gonzaga*, 536 U.S. at 283.

B. Petitioners' contrary arguments lack merit. As a general matter, they repeatedly treat this question as an all-or-nothing proposition for all of § 10101, including its provision from 1870 codifying

the Fifteenth Amendment's ban on racial voting discrimination. 52 U.S.C. § 10101(a)(1); Act of May 31, 1870, 16 Stat. 140. Yet whether or not that provision (or the Fifteenth Amendment) is privately enforceable says nothing about whether subsections added much later are. Indeed, the Court rejected a similar one-size-fits-all test in *Sandoval*. There, the Court held that one section of Title VI contains no private right of action, even though it had earlier held that a statutory neighbor did. 532 U.S. at 288-90; *see also, e.g.*, *Piper v. Chris-Craft Indus., Inc.,* 430 U.S. 1, 42 (1977) (no private right of action under one subsection despite earlier holding that other subsection implied private right of action).

With analysis confined to the Materiality Provision, Petitioners' arguments fall apart. They, for example, cite language in § 10101 suggesting that district courts have jurisdiction over suits filed by a "party aggrieved" regardless of exhaustion. Pet. 30 (discussing 52 U.S.C. § 10101(d)). But their own legislative history clarifies that this language was directed at § 10101(a)(1)—the provision codifying the Fifteenth Amendment. Pet. 37-39. It provides no support for the argument that a private cause of action exists under the Materiality Provision as well.

The Court's other cases likewise do not help Petitioners. Pet. 32-37 (discussing *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996), and *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969)). The private cause of action recognized in *Allen* was narrow—to *declare* that a change was subject to preclearance, *not* to have a court evaluate the *substance* of the law against Section 5's standards. *See Cannon*, 441 U.S. at 728-29 (White, J., dissenting). More fundamental-

ly, *Allen* applied the framework that this Court has since rejected to determine whether private causes of action exist. *See* 393 U.S. at 557; *cf. Thompson*, 484 U.S. at 190 (Scalia, J., concurring in judgment).

As for *Morse*, the lead opinion relied heavily on the notion "that our evaluation of congressional action 'must take into account its contemporary legal context'" when the applicable statute was passed. 517 U.S. at 231 (Stevens, J., op.) (citation omitted). But the Court has since expressly rejected that approach too. In *Sandoval*, it noted: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink" merely because Congress passed Title VI at a time when the Court broadly inferred causes of action. 532 U.S. at 287; *see also Morse*, 517 U.S. at 288 (Thomas, J., dissenting) ("I am unpersuaded by the maxim that Congress is presumed to legislate against the backdrop of our 'implied cause of action' jurisprudence." (citation omitted)).

CONCLUSION

The petition for a writ of certiorari should be denied.

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