No. 16-___

IN THE

Supreme Court of the United States

NORTHEAST OHIO COALITION FOR THE HOMELESS, COLUMBUS COALITION FOR THE HOMELESS, AND OHIO DEMOCRATIC PARTY,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly permitted aggrieved individuals and groups to bring suit under federal statutes protecting the right to vote regardless of whether those statutes expressly authorize such suits. One such statute is 52 U.S.C. § 10101, enacted originally as part of the Act of May 31, 1870, 16 Stat. 140. This statute was enforced by private litigants for decades before a 1957 amendment also authorized enforcement by the Attorney General.

The courts of appeals are divided over the following important question:

Can private parties sue to enforce 52 U.S.C. § 10101?

PARTIES TO THE PROCEEDING

Petitioners Northeast Ohio Coalition for the Homeless (NEOCH), the Columbus Coalition for the Homeless (CCH), and Ohio Democratic Party (ODP) were the Plaintiff-Appellees/Cross-Appellants below. Respondents State of Ohio and Ohio Secretary of State Jon Husted were the Defendant-Appellants/Cross-Appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Northeast Ohio Coalition for the Homeless (NEOCH), the Columbus Coalition for the Homeless (CCH), and Ohio Democratic Party (ODP) ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is published at 837 F.3d 612. The district court opinion (Pet. App. 114a) is unpublished but available at 2016 U.S. Dist. LEXIS 74121.

JURISDICTION

The Sixth Circuit issued its opinion on September 13, 2016. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on October 6, 2016 (issuing an order with written dissents, recommended for publication, on October 13, 2016). Pet. App. 267a. On December 27, 2016, Justice Kagan extended the time to file this petition through March 3, 2016. No. 16A426. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

1. *42 U.S.C. § 1983* provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...."

2. The full text of 52 U.S.C. § 10101 is reproduced in Appendix D to this petition. Pet. App. 287a-298a. Relevant portions are also set forth below:

§ 10101(a)(2)(B):

"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."

§ 10101(c):

"Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) or (b), the Attorney General may institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventative relief, including an application for a permanent or temporary injunction, restraining order, or other order."

§ 10101(d):

"The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and 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."

§ 10101(e):

"In any proceeding instituted pursuant to subsection (c) in the event the court finds that any person has been deprived on account of race or color of any right or privilege secured by subsection (a), the court shall upon request of the Attorney General and after each party has been given notice and the opportunity to be heard make a finding whether such deprivation was or is pursuant to a pattern or practice."

§ 10101(g):

"In any proceeding brought under subsection (c) of this section to enforce subsection (b) of this section, or in the event neither the Attorney General nor any defendant files a request for a three-judge court in any proceeding authorized by this subsection, it shall be the duty of the chief judge of the district . . . immediately to designate a judge in such district to hear and determine the case . . . ."

3. Relevant portions of Ohio law include the following:

Ohio Rev. Code § 3509.06(D)(3):

"An identification envelope statement of voter shall be considered incomplete if it does not include all of the following:

(i) The voter's name;

(ii) The voter's residence address or, if the voter has a confidential voter registration record, as described in

section 111.44 of the Revised Code, the voter's program participant identification number;

(iii) The voter's date of birth. The requirements of this division are satisfied if the voter provided a date of birth and any of the following is true:

(I) The month and day of the voter's date of birth on the identification envelope statement of voter are not different from the month and day of the voter's date of birth contained in the statewide voter registration database.

(II) The voter's date of birth contained in the statewide voter registration database is January 1,1800.

(III) The board of elections has found, by a vote of at least three of its members, that the voter has met the requirements of divisions (D)(3)(a)(i), (ii), (iv), and (v) of this section,

(iv) The voter's signature; and

(v) One of the following forms of identification:

(1) [*sic*] The voter's driver's license number;

(II) The last four digits of the voter's social security number; or

(III) A copy of a current and valid photo identification, a military identification, or a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of voter registration mailed by a board of elections, that shows the voter's name and address.

(b) If the election officials find that the identification envelope statement of voter is incomplete or that the information contained in that statement does not conform to the information contained in the statewide voter registration database concerning the voter, . . . [and if the voter provides] the necessary information to the board of elections in writing and on a form prescribed by the secretary of state not later than the seventh day after the day of the election. . . . and the ballot is not successfully challenged on another basis, the voter's ballot shall be counted in accordance with this section."

Ohio Rev. Code § 3509.07:

If election officials find that any of the following are true concerning an absent voter's ballot or absent voter's presidential ballot and, if applicable, the person did not provide any required additional information to the board of elections not later than the seventh day after the day of the election, as permitted under division (D)(3)(b) or (E)(2) of section 3509.06 of the Revised Code, the ballot shall not be accepted or counted:

(A) The statement accompanying the ballot is incomplete as described in division (D)(3)(a) of section 3509.06 of the Revised Code or is insufficient;

(B) The signatures do not correspond with the person's registration signature;

(C) The applicant is not a qualified elector in the precinct;

(D) The ballot envelope contains more than one ballot of any one kind, or any voted ballot that the elector is not entitled to vote;

(E) Stub A is detached from the absent voter's ballot or absent voter's presidential ballot; or

(F) The elector has not included with the elector's ballot any identification required under section 3509.05 or 3511.09 of the Revised Code.

Ohio Rev. Code § 3505.183:

(B)(1) . . . The following information shall be included in the written affirmation in order for the provisional ballot to be eligible to be counted:

(a) The individual's printed name, signature, date of birth, and current address;

(b) A statement that the individual is a registered voter in the precinct in which the provisional ballot is being voted;

(c) A statement that the individual is eligible to vote in the election in which the provisional ballot is being voted.

(B)(4)(a) Except as otherwise provided in division (D) of this section, if, in examining a provisional ballot affirmation and additional information under divisions (B)(1) and (2) of this section and comparing the information required under division (B)(1) of this section with the elector's information in the statewide voter registration database, the board determines that any of the following applies, the provisional ballot envelope shall not be opened, and the ballot shall not be counted:

(i) The individual named on the affirmation is not qualified or is not properly registered to vote.

(ii) The individual named on the affirmation is not eligible to cast a ballot in the precinct or for the

election in which the individual cast the provisional ballot.

(iii) The individual did not provide all of the information required under division (B)(1) of this section in the affirmation that the individual executed at the time the individual cast the provisional ballot.

…

(viii) The last four digits of the elector's social security number or the elector's driver's license number or state identification card number are different from the last four digits of the elector's social security number or the elector's driver's license number or state identification card number contained in the statewide voter registration database.

(ix) Except as otherwise provided in this division, the month and day of the elector's date of birth are different from the day and month of the elector's date of birth contained in the statewide voter registration database.

This division does not apply to an elector's provisional ballot if either of the following is true:

(I) The elector's date of birth contained in the statewide voter registration database is January 1, 1800.

(II) The board of elections has found, by a vote of at least three of its members, that the elector has met all of the requirements of division (B)(3) of this section, other than the requirements of division (B)(3)(e) of this section.

(x) The elector's current address is different from the elector's address contained in the statewide voter registration database, unless the elector indicated that the elector is casting a provisional ballot because the elector has moved and has not submitted a notice of change of address, as described in division (A)(6) of section 3505.181 of the Revised Code.

Ohio Rev. Code § 3505.182:

Each individual who casts a provisional ballot under section 3505.181 of the Revised Code shall execute a written affirmation. The form of the written affirmation shall be printed upon the face of the provisional ballot envelope and shall be as follows:

…

I understand that, if the information I provide on this provisional ballot affirmation is not fully completed and correct, if the board of elections determines that I am not registered to vote, a resident of this precinct, or eligible to vote in this election, or if the board of elections determines that I have already voted in this election, my provisional ballot will not be counted.

STATEMENT OF THE CASE

The Materiality Provision of the Civil Rights Act of 1964, currently codified at 52 U.S.C. § 10101(a)(2)(B),[1] prohibits denying an individual the right to vote due to any "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." Petitioners have challenged Ohio statutes that either permit or require boards of elections to reject ballots cast by otherwise eligible voters who make such immaterial errors or omissions. The courts of appeals are in direct conflict over whether private plaintiffs, such as petitioners, can sue to enforce the Materiality Provision.

1. Section 10101 has its origins in section 1 of the Act of May 31, 1870,[2] enacted to "enforce the Right of Citizens of the United States to vote in the several States of this Union." 16 Stat. 140. That statute has

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[1] Section 10101 was initially codified as Rev. Stat. § 2004, and then recodified (as amended) at 8 U.S.C. § 31, and then (as amended) at 42 U.S.C. § 1971. The Materiality Provision was first added in 1964. *See* Pub. L. 88-352, § 101, 78 Stat. 241, 241. In 2014, the Office of the Law Revision Counsel transferred the voting-rights provisions of 42 U.S. Code to a new Title 52. *See* http://uscode.house.gov/editorialreclassification/t52/index.html. Petitioners will use the current statutory section number throughout the petition wherever possible.

[2] Act of May 31, 1870, ch. 114, 16 Stat. 140, 140-42 (1870) (partially repealed 28 Stat. 36 (1894)). Section 1 of the Act was not repealed.

been amended and recodified over the past century and a half, but it remains a central tool for safeguarding the right to vote.

During the first half of the twentieth century, affected citizens prevailed in numerous cases brought under predecessor versions of Section 10101. *See, e.g.*, *Smith v. Allwright*, 321 U.S. 649, 651 (1944); *Chapman v. King*, 154 F.2d 460, 464 (5th Cir. 1946); *Mitchell v. Wright*, 154 F.2d 924, 926 (5th Cir. 1946); *Rice v. Elmore*, 165 F.2d 387, 392 (4th Cir. 1947). But enforcement purely by private parties proved insufficient. Accordingly, Congress amended the statute in 1957 to authorize the United States Attorney General to file civil actions on behalf of the United States and seek injunctive relief.[3] That provision is currently codified at 52 U.S.C. § 10101(c).

The Attorney General, who introduced the legislation, testified before Congress that the new enforcement provision would not impair the ability of private individuals to bring suit under the Act: "We are not taking away the right of the individual to start his own action . . . . Under the laws amended if this program passes, private people will retain the right they have now to sue in their own name."[4]

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[3] *Civil Rights Act of 1957*, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637-38 (1957). *See also South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).

[4] *Civil Rights Act of 1957: Hearings on S. 83, an amendment to S. 83, S. 427, S. 428, S. 429, S. 468, S. 500, S. 501, S. 502, S. 504, S. 505, S. 508, S. 509, S. 510, S. Con. Res. 5 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong. 73, 203, 1; 60-61, 67-73 (1957) (statement and testimony of the Hon. Herbert Brownell, Jr., Attorney General of the United States).

Accordingly, private plaintiffs continued to sue under the Act following the 1957 amendment. *See, e.g.*, *Reddix v. Lucky*, 252 F.2d 930, 934 (5th Cir. 1958); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Coalition for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000); *Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm.*, No. 12-927, 2012 U.S. Dist. LEXIS 110681, *21-22 & n.3 (C.D. Cal. Aug. 7, 2012); *Davis v. Commonwealth Election Comm'n*, No. 1-14-002, 2014 U.S. Dist. LEXIS 69723, *31-34 (D. N. Mariana Isl. May 20, 2014), *aff'd*, 844 F.3d 1087 (9th Cir. 2016).

2. Ohio laws SB 205[5] and 216,[6] with one limited exception,[7] require county elections boards to reject absentee and provisional ballots unless the voters have perfectly filled in five fields of information on the forms accompanying the ballots: name, address, birthdate, identification, and signature. They do so even if elections boards can determine the voter's identification and eligibility to vote despite any errors

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[5] Act of Feb. 19, 2014, Ohio No. 64, ftp://sosftp.sos.state.oh.us/free/publications/SessionLaws/130/130-SB-205.pdf (codified in scattered sections of Title 35 of Ohio Rev. Code).

[6] Act of Feb. 28, 2014, Ohio No. 67, ftp://sosftp.sos.state.oh.us/free/publications/SessionLaws/130/130-SB-216.pdf (codified in scattered sections of Title 35 of Ohio Rev. Code).

[7] The exception is that elections boards have discretion to accept a provisional ballot where a voter writes in the wrong birth-month or day if the other fields are complete, but they are not required to accept it. Ohio Rev. Code § 3505.183(B)(4)(a)(ix)(II).

or omissions. *See* Ohio Rev. Code §§3509.06(D)(3), 3509.07, 3505.181, 3505.182, 3505.183. *See also, e.g.,* R.666, PageID#31148 (assistant Secretary of State testifying that "that's the law").

These "Perfect Form" requirements, enacted in 2014, have been in effect for three general elections held while this litigation has been pending. Evidence from the 2014 and 2015 general elections show that these Perfect Form requirements disenfranchised thousands of voters—for errors as trivial as using cursive writing rather than print (even where the cursive is legible), omitting a zip code from an otherwise accurate and ascertainable address, and writing the current date rather than a birthdate. *See* Pet. App. at 11a, 154a-155a; R.687-2, PageID#33549.

For example, 87-year-old Sally Miller, who has macular degeneration, missed one digit of her social-security number on her absentee envelope. All the other information on her ballot was correct, and her signature on the envelope matched the signature on her ballot application. Nonetheless, the elections board discarded her ballot, even though she had already provided the requisite information when she correctly filled in the absentee-ballot application, and even though board officials had enough information to verify her eligibility to vote. *See* R. 672-15, PageID#31510; R.753-3, PageID#49796-49798 (ballot form and application); R.657, PageID#29019-29020; *see also* Pet. App. 150a-154a.

3. Petitioners NEOCH, CCH, and ODP challenged the new laws on October 30, 2014, in a second supplemental complaint in their preexisting lawsuit against Respondents. Pet. App. 124a. The

basis for jurisdiction was 28 U.S.C. § 1331 (federal question).

NEOCH and CCH are non-profit organizations dedicated to improving the lives of homeless people, including through advocacy and organizing efforts to ensure homeless people can vote. ODP is a political party comprising 1.2 million members dedicated to, among other goals, advancing the interests of the Democratic Party. For all three organizations, protecting the right to vote for their members and other constituents, including the right to have one's vote be counted, is crucial. And homeless people, a high percentage of whom are illiterate, often have difficulty filling out forms. *See* Pet. App. 126a–134a.

The district court conducted a 12-day bench trial in March 2016 with lay, expert-witness, and disenfranchised voters' testimony. *See* Pet. App. 11a, 125a.

At trial, numerous officials on county elections boards testified that they were able to identify voters and confirm their eligibility to vote even when fewer than all five fields were filled out completely and correctly. *See, e.g.*, Pet. App. 214a-215a. *See also* R.657 (Manifold/Franklin), PageID#29017-29020;[8] R.656 (Burke/Hamilton), PageID#28856-28859; R.660 (Scott/Lucas), PageID#29832-29833; R.660 (Bucaro/Butler), PageID#29668; R.663 (Reed/Carroll), PageID#30299; R.663 (Larrick/Noble), PageID#30313–30414; R.663 (Bear/Harrison), PageID#30357-58, 30361–30362; R.663 (Osman/Adams), PageID#30448-30449; *see also* R.656

[8] The parentheticals indicate the witness and the relevant county.

(Perlatti/Cuyahoga), PageID#28755-28760; R.661 (Sauter/Summit), PageID#30031-30032, 30038; R.657 (Adams/ Lorain), PageID#29079-29080, 29103-29104, 29124; R.658 (Morgan/Miami), PageID#29255-29256, R.663 (Crawford/Paulding), PageID#30327; R.663 (Passet/Wyandot), PageID#30479; Edwards Dep., R.644, (Cuyahoga), PageID#27162, 27169-80.

Indeed, the fact that the State could in fact "determin[e]" that the voters whose ballots were discarded were "qualified under State law to vote," 52 U.S.C. § 10101(a)(2)(B), is further proved by the fact that elections boards—recognizing voters' eligibility—gave voters "credit" for having voted, to prevent them from being purged from voter lists because of inactivity. *See, e.g.*, PageID#30076 (Sauter); PageID#29838-29839 (Scott); PageID#30142 (Ward); *see also* R.751-1, Cuyahoga "Provisional Reasons and Flags Summary," PageID#48978-48979; Edwards Dep., R.644, PageID#27168.

Respondents struggled to identify a rationale that could justify disenfranchising eligible voters based upon immaterial errors or omissions. Respondent Husted's representative at trial, Assistant Secretary of State Matthew Damschroder, admitted that the risk of fraud was "infinitesimal" and did not justify the five-fields requirement as to either absentee ballots or to provisional ballots. *See* R.665, PageID#31051–31052. He also admitted that the State's proffered rationale for the perfection requirement on provisional-ballot forms—to promote voter registration—did not justify disenfranchising otherwise eligible already-registered voters. *See* R.665, PageID#31049.

On June 7, 2016, the District Court issued its Final Judgment. Regarding petitioners' claim under the Materiality Provision, 52 U.S.C. § 10101(a)(2)(B), it held that despite the "thorough reasoning" of the Eleventh Circuit decision in *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), it was bound by Sixth Circuit precedent holding that the statute contains no private right of action, s*ee McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), to dismiss petitioners' claim. Pet. App. at 260a. The court nonetheless entered judgment against respondents on two other claims (undue burden under the Fourteenth Amendment, and discriminatory impact under Section 2 of the Voting Rights Act). Pet. App. at 207a–221a, 238a-258a. It therefore enjoined Ohio's enforcement of its Perfect Form requirements "to the extent they require full and accurate completion" of the absentee-ID envelope and provisional-ballot affirmation form "before an otherwise qualified elector's ballot may be counted," and "to the extent they prohibit poll workers from completing voters' absentee or provisional ballot forms unless voters provide a specific reason for seeking assistance." Pet. App. 264a-265a.[9]

4. A divided Sixth Circuit panel largely reversed the district court's injunction. Pet. App. 3a. Regarding the Materiality Provision claim, the panel majority, like the district court, acknowledged *Schwier*'s reasoning, but held that circuit precedent bound it to hold that petitioners lacked a cause of action for violations of Section 10101. Pet. App. 30a-

[9] The court also ruled against Petitioners on their Equal Protection claim regarding election boards' widely different treatment across counties of identical errors. *Id.* at 224a-227a.

31a. The court left in place only the prohibition on requiring full and accurate completion of two fields (address and birthdate) by absentee voters. Pet. App. 35a-41a. By reversing the remainder, the court permitted elections boards to continue to disenfranchise voters for technical errors in the name and identification fields on the absentee form, as well as in any of the fields on the provisional-ballot form. This included discarding a ballot where the voter had written his or her name in legible cursive rather than in roman print. The court reached this result despite acknowledging that the State had no legitimate concern about fraud. Pet App. 37a-40a. The court did not address Defendants' admission that the voter-registration rationale they were touting did not justify disenfranchising *already-registered* otherwise eligible and identifiable voters. *See above,* at 19.

Judge Damon Keith wrote a 37-page dissent. Pet. App. 50a-113a.

5. Petitioners sought en banc review, including on the Materiality Provision issue, pointing to the conflict among the circuits. On October 6, 2016 (with an order recommending publication on October 13, 2016), the Sixth Circuit denied review on a nine-to-seven vote, over dissents by Chief Judge Cole and Judge Donald and panel Judge Keith's vote for a rehearing. Pet. App. 267a.[10] Petitioners' motion for a stay of the mandate pending final disposition of a

[10] Circuit Judge Alice Batchelder simultaneously denied, without explanation, Petitioners' motion for her recusal. *See* Pet. App. 267a. Her husband was Speaker of the Ohio House at the time the challenged legislation was enacted, co-sponsored SB 205, voted for both SB 205 and SB 216, and, as Speaker, shepherded the statutes into law.

certiorari petition from this Court was also denied. *NEOCH v. Husted*, 837 F.3d 612 (6th Cir. Oct. 14, 2016) (No. 16-3603), ECF No. 81-2.

6. Petitioners timely filed a motion for emergency stay in this Court on October 25, 2016, which was denied on October 31, 2016. *See* Ord. Denying Stay, No. 16A405.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision below further entrenched an existing conflict between the Sixth and Eleventh Circuits on the issue of whether private plaintiffs can sue to enforce their rights under 52 U.S.C. § 10101. This question implicates not only enforcement of the Materiality Provision, *id.* § 10101(a)(2)(B), but also enforcement of the longest-standing statutory prohibition on denying or abridging the right to vote, *id.* § 10101(a)(1), and the central civil provision prohibiting interfering with the right to vote through intimidation, threat, or coercion, *id.* § 10101(b).

Given the fundamental right to vote at stake, including the right to have one's ballot be counted, the issue is an important and recurring one, particularly in light of the range of recently enacted state laws restricting the counting of ballots.

This case also presents an ideal vehicle for resolving the Circuit split. The evidence presented at trial established that thousands of Ohio voters were disenfranchised solely because of immaterial errors or omissions on "a paper relating to" their ballots, directly contravening Section 10101(a)(2)(B). Because the Attorney General has not filed a civil action, Ohio voters will continue to be disenfranchised in future elections in violation of federal law if this case cannot go forward.

Finally, the court of appeals erred in refusing to recognize a private right of action to enforce Section 10101. 42 U.S.C. § 1983 provides petitioners with a private right of action to sue under Section 10101's rights-creating provisions when, as here, the putative

defendants were acting under color of state law. Petitioners could also sue directly under Section 10101. The text and structure of Section 10101 show that the Attorney General is not the statute's sole enforcer. This Court's decisions involving implied private rights of action under statutes protecting voting rights reinforce the conclusion that a right of action to enforce Section 10101 furthers Congress's purpose. The legislative history of the 1957 amendment providing for enforcement by the Attorney General, and the doctrine against implied repeal, also reinforce the conclusion that the preexisting private right of action continued unabated after the amendment.

I. There is a mature, entrenched conflict over whether private parties can sue to enforce Section 10101.

The courts of appeals are split on the question of whether private parties can sue to enforce their rights under Section 10101.

1. The Sixth Circuit's analysis of the issue is so cursory that it is easier to quote than to summarize:

> The district court correctly dismissed this claim [under 42 U.S.C. § 1971(a)(2)(B)] for lack of standing. Section 1971 is enforceable by the Attorney General, not by private citizens. *See* 42 U.S.C. § 1971(c); *Willing v. Lake Orion Community Sch. Bd. of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996).

McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000). *Willing*, in turn, relied on a sole district court decision, *Good v. Roy*, 459 F. Supp. 403 (D. Kan.

1978), which asserted without explanation or citation to any authority that "the unambiguous language of Section 1971 will not permit us to imply a private right of action." *Id.* at 406. *Good* was the first decision to suggest that the 1957 amendment adding Attorney General enforcement somehow stripped private plaintiffs of a right to sue they had previously exercised for decades because the new provision contained "no mention of enforcement by private persons." *Id. Willing* was only the second decision to take that approach. *Good* and *Willing* took that position despite the fact that for twenty years after the 1957 amendments other courts had entertained private suits to enforce Section 10101. *See above,* at 15–16 (citing cases). Neither *McKay*, *Good* nor *Willing* considered whether a private right of action existed to bring suit under Section 1971.

2. The Eleventh Circuit, by contrast, has held that private plaintiffs can sue to enforce Section 10101. Its analysis is laid out most fully in *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003). There, it explicitly rejected the Sixth Circuit's contrary conclusion. *See id.* at 1294.

The Eleventh Circuit began its analysis by noting that this Court had twice held that private parties could enforce other provisions of the Voting Rights Act despite the express authorization for enforcement by the Attorney General. *See id.* at 1294, citing *Allen v. State Board of Elections*, 393 U.S. 544 (1969), and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality opinion).

Turning to Section 10101, the Eleventh Circuit pointed to the long history of private enforcement prior to the 1957 authorization of suits by the

Attorney General, during which "plaintiffs could and did enforce the provisions of § 1971 under § 1983." *Schwier*, 340 F.3d at 1295 (citations omitted). The court found that the 1957 amendment's legislative history provided no support for eliminating this private right of action; to the contrary, the bill's purpose was "'to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States.'" *Schwier*, 340 F.3d at 1295 (quoting H.R. Rep. No. 85-291 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1977) (emphasis in *Schwier*).

The Eleventh Circuit also pointed out that Congress also amended the statute in 1957 to eliminate any requirement to exhaust administrative remedies. The court reasoned that this change could only have impacted lawsuits filed by private plaintiffs, and not civil actions filed by the Attorney General, to which administrative exhaustion would not have applied in any event. *Id.* at 1296. On these bases, the Eleventh Circuit held that "neither § 1971's provision for enforcement by the Attorney General nor Congress's failure to provide for a private right of action expressly in § 1971 *require* the conclusion that Congress did not intend such a right to exist." 340 F.3d at 1296 (emphasis in original).

Using the frameworks set forth in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) and *Blessing v. Freestone*, 520 U.S. 329 (1997) for determining whether plaintiffs could use 42 U.S.C. § 1983 to enforce Section 10101, the Eleventh Circuit held that they could. The court pointed to "the right-creating language" contained in Section 10101: "the focus of the text," it explained, is "the protection of each

individual's right to vote." *Schwier*, 340 F.3d at 1296. That language was both sufficiently specific and sufficiently mandatory to support a private right of action. *See id.* at 1296-97. "Thus, we hold that the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under § 1983." *Id.* at 1297.

3. In addition to the Eleventh Circuit, the Second, Fifth, and Eighth Circuits have adjudicated private claims brought under Section 10101 without expressly addressing the issue whether that section permits a private right of action. *See, e.g., Coalition for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Reddix v. Lucky*, 252 F.2d 930, 934 (5th Cir. 1958); *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000).

When the many conflicting district-court decisions are also taken into account,[11] it is clear that there is a mature and entrenched split over whether private parties can bring suit to enforce Section 10101's protections.

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[11] *Compare, e.g., Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm.,* 2012 U.S. Dist. LEXIS 110681, *21-22 & n.3 (C.D. Cal. Aug. 7, 2012)*; Brooks v. Nacrelli*, 331 F. Supp. 1350, 1351-52 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3rd Cir. 1973); *Davis v. Commonwealth Election Comm'n,* 2014 U.S. Dist. LEXIS 69723, *31-34 (D. N. Mariana Isl. May 20, 2014), *aff'd*, 844 F.3d 1087 (9th Cir. 2016) (all holding that private parties can sue to enforce the guarantees of Section 10101) *with McKay v. Altobello,* 1996 U.S. Dist. LEXIS 16651, *3-4 (E.D. La. Oct. 31, 1996) and *Estes v. Gaston,* 2012 U.S. Dist. LEXIS 180214, *14 (D. Nev. Nov. 26, 2012) (each holding that private parties cannot sue to enforce Section 10101).

II. Whether private parties can sue to enforce Section 10101's protections is a recurring and important question.

Section 10101 protects the right to vote against a variety of infringements, ranging from intentional racial discrimination by state actors, 52 U.S.C. § 10101(a)(1), to intimidation or coercion, whether accomplished "under color of law or otherwise," *id.* § 10101(b), to disqualification of a registration application or a ballot for immaterial errors under the Materiality Provision, *id.* § 10101(a)(2)(B). The right to vote includes the right to have one's ballot "counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." *Id.* § 10310(c)(1). For decades, what is now Section 10101 provided the *only* federal statutory protection of the right to vote; today, although there are a number of other federal statutory protections, Section 10101 continues to prohibit several forms of exclusion that are not fully addressed elsewhere in federal law.

That being said, petitioners have been unable to find a single reported case in which the Attorney General brought suit to remedy a violation of the Materiality Provision. Despite Ohio's "Perfect Form" requirements, the Attorney General has never sought to enforce the Materiality Provision against Ohio. And there are many reasons the Attorney General may not bring suit: as this Court recognized in *Allen v. State Board of Elections*, 393 U.S. 544, 556 (1969), "[t]he Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state

government." Put simply, if private parties cannot enforce the Materiality Provision, it seems likely that no one will. Given the fact that these laws have disenfranchised thousands of Ohio voters since 2014, and given the certainty that Ohio voters will continue to be so disenfranchised if petitioners' claim cannot go forward (and it cannot go forward without a private right of action), this case raises an important question that merits this Court's review now.

Indeed, both this Court and Congress have repeatedly recognized that full vindication of the right to vote "could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen*, 393 U.S. at 556; *see also Morse v. Republican Party of Va.*, 517 U.S. 186, 231 (1996) (plurality op.). Thus, "Congress depends heavily upon private citizens" to enforce voting guarantees, even with respect to statutes that do not contain express private rights of action. S. Rep. 94-295, 94th Cong., 1st Sess. 40 (1975).

Whether that general principle applies to Section 10101 is an important issue that has recurred repeatedly over the 60 years since the 1957 amendments to the predecessor version of the statute first authorized suit by the Attorney General. There are more than three-dozen reported decisions in which private plaintiffs have invoked Section 10101's protections,[12] and the Ohio litigation of which this

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[12] *Reddix v. Lucky*, 252 F.2d 930 (5th Cir. 1958); *Anderson v. Courson*, 203 F. Supp. 806 (M.D. Ga. 1962); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968);

Mexican-Am. Fed.-Wash. State v. Naff, 299 F. Supp. 587 (E.D. Wash. 1969); *Brooks v. Nacrelli*, 331 F. Supp. 1350 (E.D. Pa. 1971), *aff'd*, 473 F.2d 955 (3rd Cir. 1973); *Shivelhood v. Davis*, 336 F. Supp. 1111 (D. Vt. 1971); *Ramey v. Rockefeller*, 348 F. Supp. 780 (E.D.N.Y. 1972); *Brier v. Luger*, 351 F. Supp. 313 (M.D. Pa. 1972); *Ballas v. Symm*, 351 F. Supp. 876 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974); *Toney v. White*, 476 F.2d 203 (5th Cir. 1973), *vacated in part* 488 F.2d 310 (5th Cir. 1973) (en banc rehearing); *Coalition for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090 (2d Cir. 1974); *Frazier v. Callicutt*, 383 F. Supp. 15 (N.D. Miss. 1974); *Ball v. Brown*, 450 F. Supp. 4 (N.D. Ohio 1977); *Good v. Roy*, 459 F. Supp. 403 (D. Kan. 1978); *Marks v. Stinson*, No. 93-6157, 1994 U.S. Dist. LEXIS 5273 (E.D. Pa. Apr. 26, 1994); *Willing v. Lake Orion Community Sch. Bd. of Trustees*, 924 F. Supp. 815 (E.D. Mich. 1996); *Cartagena v. Crew*, No. CV-96-3399, 1996 U.S. Dist. LEXIS 20178 (E.D.N.Y. Sept. 10, 1996); *McKay v. Altobello*, N. 96-3458, 1996 U.S. Dist. LEXIS 16651 (E.D. La. Oct. 31, 1996); *Spivey v. Ohio*, 999 F. Supp. 987 (N.D. Ohio 1998), *aff'd sub. nom. Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999); *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000); *Taylor v. Howe*, No. J-C-96-458 (E.D. Ark. filed Mar. 31, 1999) (Lexis/Westlaw citation pending), *aff'd*, 225 F.3d 993 (8th Cir. 2000); *Hoyle v. Priest*, 265 F.3d 699 (8th Cir. 2001); *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003); *Gilmore v. Amityville Union Free Sch. Dist.*, 305 F. Supp. 2d 271 (E.D.N.Y. 2004); *Hayden v. Pataki*, No. 00-8586, 2004 U.S. Dist. LEXIS 10863 (S.D.N.Y. June 14, 2004), *aff'd*, 449 F.3d 305 (2d Cir. 2006); *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004); *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005); *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cty. Elec. Bd.*, 472 F.3d 949 (7th Cir. 2007); *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006); *Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264 (W.D. Wash. 2006); *Gonzalez v. Arizona*, No. 06-1268, 2006 U.S. Dist. LEXIS 76638 (D. Ariz. Oct. 11, 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007); *Ray v. Abbott*, No. 06-41573, 261 Fed. Appx. 716, 2008 U.S. App. LEXIS 403 (5th Cir. Jan. 9, 2008); *Broyles v. Texas*, 618 F. Supp. 2d 661 (S.D. Tex. 2009), *aff'd*, 381 Fed. Appx. 370 (5th Cir. 2010); *Williams v. Shelby Cty. Elec. Comm'n*, No. 08-2506, 2009 U.S. Dist. LEXIS 80844 (W.D. Tenn. Sept. 4, 2009);

case is one example shows that private plaintiffs are continuing to claim its protections.

III. This case is an ideal vehicle for resolving the question presented.

The question whether private plaintiffs can sue to enforce Section 10101 and its Materiality Provision was squarely presented, and passed upon, by both courts below. *See* Pet. App. 30a-31a, 258a-260a; 267a.

Moreover, the ability of private plaintiffs to sue for violations of the Materiality Provision is a dispositive question in this case. Ohio laws led elections boards to discard absentee or provisional ballots if the form accompanying those ballots had *any* error or omission—even if that error or omission was immaterial because it did not prevent the board from confirming the voter's identity or the voter's eligibility to vote. Election officials from both political parties testified that they were required to disenfranchise voters they knew to be eligible to vote solely because of an immaterial error or omission on the forms accompanying the ballots. *See above,* at 18.

Ohio's practice flatly violates the Materiality Provision. *See* 52 U.S.C. § 10101(a)(2)(B). Thus, if

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Delegates to the Republican Nat'l Convention v. Republican Nat'l Comm., No. 12-927, 2012 U.S. Dist. LEXIS 110681 (C.D. Cal. Aug. 7, 2012); *Estes v. Gaston*, No. 2:12-1853, 2012 U.S. Dist. LEXIS 180214 (D. Nev. Nov. 26, 2012); *Thrasher v. Illinois Republican Party*, No. 4:12-4071, 2013 U.S. Dist. LEXIS 15564 (C.D. Ill. Feb. 5, 2013); *Dekom v. New York*, No. 12-1318, 2013 U.S. Dist. LEXIS 85360 (E.D.N.Y. June 18, 2013), *aff'd*, 583 Fed. Appx. 15 (2d Cir. 2014); *Davis v. Commonwealth Election Comm'n*, No. 1-14-002, 2014 U.S. Dist. LEXIS 69723 (D. N. Mariana Isl. May 20, 2014), *aff'd*, 844 F.3d 1087 (9th Cir. 2016).

private plaintiffs can bring suit to enforce Section 10101(a)(2)(B), petitioners here will have no difficulty establishing a violation of federal law. At the same time, the Sixth Circuit's decision establishes that no alternative avenue exists that can provide petitioners with the relief they seek. Thus, this case provides the Court with an ideal case in which to resolve the question presented.

IV. Private plaintiffs can bring suit to enforce Section 10101's protections.

The Sixth Circuit erred in holding that private plaintiffs cannot bring suit to enforce Section 10101's voting-rights protections, including the Materiality Provision.

First, 42 U.S.C. § 1983 expressly authorizes private suits in cases, like this one, where the deprivation of rights secured by Section 10101 is perpetrated by government officials.

Second, petitioners can rely on Section 10101 directly to bring suit. The statute's text and structure support the conclusion that private plaintiffs can enforce the rights it provides. This Court's precedent finding an implied right of action under other voting-rights provisions underscores this conclusion. And the legislative history of the 1957 amendment—which gave the Attorney General the right to enforce these protections—shows that his authority supplements, and does not supplant, the longstanding preexisting private right of action. The doctrine against implied repeal confirms that conclusion.

The Sixth Circuit's decision should thus be reversed.

A. Private plaintiffs can use 42 U.S.C. § 1983 to enforce Section 10101's voting-rights provisions.

Private plaintiffs can use 42 U.S.C. § 1983 to enforce federal rights like those protected by the Materiality Provision, when persons acting under color of state law deprive the rights.

This Court has established a two-part test to determine whether Section 1983 can be used. First, "the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005). The plaintiff must show that "Congress *intended to create a federal right*," and this right must be "unambiguously conferred." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) (emphasis in original).

Second, if the plaintiff makes such a showing, the defendant may rebut the presumption of enforceability under Section 1983 by showing that Congress expressly or impliedly "shut the door to private enforcement." *Id.* at 284 n.4. The most common way for a defendant to make this showing is to prove that Congress "creat[ed] a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing v. Freestone*, 520 U.S. 329, 341 (1997).

Applying this test here compels the conclusion that a private right of action exists under Section

1983 to enforce Section 10101's provisions that provide for individual rights. First, Congress intended to confer an unambiguous right on private persons when it enacted the Materiality Provision, which expressly recognizes "the right of any individual to vote in any election" despite "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).

Second, as discussed below, Congress's decision to authorize the Attorney General to *also* file civil lawsuits under this statute did nothing to suggest that Congress meant to preclude Section 1983 actions. To the contrary, as discussed next, the text, structure, purpose, and history of Section 10101 support the conclusion that Section 1983 can be used to enforce the private rights Section 10101 protects.

B. Section 10101's text and context demonstrate that both private litigants and the Attorney General may sue to enforce Section 10101's provisions.

Beyond Section 1983's express authorization, private litigants may also rely on Section 10101 directly to protect their rights under that statute. While Section 10101 provides for Attorney General enforcement, nothing in Section 10101 bars private litigants from suing. To the contrary, the language of Section 10101 presupposes that there will be lawsuits brought by parties other than the Attorney General.

Section 10101(a) lays out the primary protections provided by Section 10101, and it does so in language that "focus[es]" on the "individual's right to vote." *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003). In particular, the Materiality Provision protects "the right of any individual to vote" without regard to immaterial mistakes on election-related forms. 52 U.S.C. § 10101(a)(2)(B).

Section 10101(d), which confers jurisdiction on federal district courts to conduct "proceedings instituted pursuant to this section," then directs that the district courts shall exercise that jurisdiction "without regard to whether *the party aggrieved* shall have exhausted any administrative or other remedies that may be provided by law." (Emphasis added). In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court examined similar language in section 12(f) of the Voting Rights Act (now codified at 52 U.S.C. § 10308(f)) and described it as "compatible" with "authorizing private actions." *Id.* at 555 n.18. The Court saw "some force" in the *Allen* plaintiffs' "relying on the language 'a person'" to support the assertion that "private parties may bring suit." *Id.* The same force should apply here to the term "party aggrieved" in Section 10101(d).

But the stronger point focuses not simply on the term "party aggrieved." Rather, that term should be read in conjunction with the directive about exhaustion. Since the Attorney General would never be required to exhaust administrative remedies, this language shows that Congress assumed there would be lawsuits in which the party aggrieved—that is, the voter whose rights under Section 10101(a) were denied—is the plaintiff. And legislative history

supports this understanding. Congress eliminated the administrative-remedy-exhaustion requirement as part of the same 1957 legislation authorizing the Attorney General to file suit—to address a decision that had earlier *required* private plaintiffs to exhaust such remedies. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637-38; H.R. Rep. No. 85-291, at 10-11 (citing *Peay v. Cox*, 190 F.3d 123 (5th Cir. 1951)).

The understanding that private plaintiffs may sue to enforce their rights under Section 10101 is reinforced by the language of Sections 10101(e) and 10101(g). Section 10101(e) begins with the phrase "In any proceeding instituted pursuant to subsection (c)," and goes on to identify a set of specific remedies for certain pattern and practice cases. That language presupposes that there will be proceedings under Section 10101 *not* "instituted pursuant to subsection (c)"—that is, lawsuits brought by parties other than the Attorney General. Had Congress restricted enforcement of Section 10101 solely to the Attorney General, Section 10101(e) would have stated simply "In any proceeding instituted under this section." A statute should be read to give effect to every word. S*ee, e.g.*, *Lowe v. SEC,* 472 U.S. 181, 207 n.53 (1985). Congress's modifying language in Section 10101(e) reinforces the conclusion that Attorney General-initiated lawsuits under Section 10101(c) are only a subset of the entire universe of potential actions to enforce Section 10101.

Subsection 10101(g) underscores this point with its reference to "any proceeding instituted by the United States in any district court of the United States under this section in which the Attorney

General requests a finding of a pattern or practice of discrimination pursuant to subsection (e)." Here, too, if suits by the Attorney General were the *only* potential suits under Section 10101, Congress would have referred simply to "any proceeding in any district court of the United States under this section in which the Attorney General requests a finding of a pattern or practice of discrimination pursuant to subsection (e)," without referring to proceedings "instituted by the United States."

Thus, the most plausible textual reading of Section 10101 is that Congress expected dual enforcement of the provision by both the Attorney General and aggrieved private parties like the petitioners here.

C. This Court has consistently held that private parties can enforce their rights under statutes protecting voting rights despite the fact that the Attorney General, and not private parties, were expressly authorized to bring suit.

This Court has repeatedly recognized private rights of action with respect to the provisions now codified in Subtitle I of Title 52, which expressly permit the Attorney General to file suit but do not expressly permit private parties to file suit. The same analysis this Court applied to Sections 5, 2, and 10 of the Voting Rights Act of 1965 should apply here.

Allen, 393 U.S. 544, concerned Section 5 of the Voting Rights Act of 1965 (now codified at 52 U.S.C. § 10304). The private plaintiffs in *Allen* filed suit to compel the states to seek preclearance of changes in their election laws. Although Section 5 "does not

explicitly grant or deny private parties authorization to seek a declaratory judgment that a State has failed to comply with the provisions of the Act" and the Act does expressly authorize the Attorney General to bring suit, *see* 52 U.S.C. § 10308(d),(e) (then codified at 42 U.S.C. § 1973j(d), (e)), this Court found that private parties could bring suit. *See Allen*, 393 U.S. at 554-58.

Noting that the Act's purpose was "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens," the Court explained that this purpose would be frustrated if the only party who could enforce the Act was the Attorney General:

> The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General.... The guarantee of § 5 that no person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition.

Allen, 393 U.S. at 556-57; *see also id.* at 555 (1969) (finding private right of action "in light of the major purpose" of Voting Rights Act). Thus, this Court did not merely hold that a private right of action can exist alongside an Attorney General right of action—it also explained that having both enforcement mechanisms furthered Congress's purpose.

This Court has also repeatedly held in favor of private plaintiffs in cases brought under Section 2 of

the Voting Rights Act (now codified at 52 U.S.C. § 10301). *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Chisom v. Roemer*, 501 U.S. 380 (1991); *LULAC v. Perry*, 548 U.S. 399 (2006). As with Section 5, Section 2 provides no express cause of action for individual citizens whose right to vote has been denied or diluted. Nonetheless, this Court has stated that "'the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965,'" and this Court has accordingly "entertained cases brought by private litigants to enforce § 2." *Morse*, 517 U.S. at 232 (plurality opinion) (quoting S. Rep. No. 97–417, at 30).

Finally, *Morse* concerned Section 10 of the Voting Rights Act (now codified at 52 U.S.C. § 10306), which condemns poll taxes. Section 10 contains an express authorization for suits by the Attorney General, *id.* § 10306(b), but no mention of a right for affected individuals to sue. Nevertheless, this Court held that private individuals could bring suit under Section 10 to challenge poll taxes. *See Morse*, 517 U.S. at 230-34.

Pointing to precedent holding that in evaluating congressional action, the Court "must take into account [the action's] contemporary legal context," *id.* at 230 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 698–99 (1979)), the Court noted that the Voting Rights Act had been enacted during a period in the 1960s (a year after the Materiality Provision was enacted) when this Court had consistently found private rights of action "notwithstanding the absence of an express direction from Congress." *Morse,* 517 U.S. at at 230. Congress, it noted, acted against the "backdrop" of those decisions. *Id.* at 231 (citations omitted).

The Court further explained that the rationale set forth in *Allen*—namely, that the law's purpose would be frustrated if the Attorney General were the only party permitted to sue to enforce the law—applied equally to Section 10. *Id*. at 231.

The Court also pointed out that in 1975, Congress explicitly added language to the Voting Rights Act making it clear that not only the Attorney General, but also "an aggrieved person" could sue under *any statute* meant to enforce the Fifteenth Amendment. Because Section 10 was designed to enforce the guarantees of the Fourteenth and Fifteenth Amendments, the Court reasoned, Congress must have intended it to provide private remedies. *Id.* at 233–34 & n.45 (citing S. Rep. No. 94-295, at 40) ("In enacting remedial legislation, Congress has regularly established a dual enforcement mechanism. . . . The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing private rights.").

The Court found it similarly compelling that Congress added an attorneys'-fees provision, to be awarded to the "'prevailing party, *other than the United States*,' in any action 'to enforce the voting gurantees of the fourteenth or fifteenth amendment.'" *Id.* at 234 (emphasis in original); *see also id.* at 234 n.46 (citing S. Rep. No. 94-295 at 40, stating that "in voting rights cases . . . , Congress depends heavily upon private citizens to enforce the fundamental rights involved").

The Sixth Circuit never identified any reason why the approach this Court has taken with respect to Sections 2, 5, and 10 should not apply equally to

Section 10101.[13] The "contemporary legal context," *Morse*, 517 U.S. at 230, surrounding Section 10101's enforcement provision was the same as the Voting Rights Act's. Section 10101's amendments had the same purpose as the Voting Rights Act—namely, to fortify the Fifteenth Amendment's guarantees in the wake of "unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966); *id.* at 313 (chronicling Congress's efforts to "cope with the problem by facilitating case-by-case litigation against voting discrimination," such as by authorizing suits by the Attorney General and outlawing disqualification tactics). And Congress's 1975 amendments adding the "an aggrieved person" and attorneys'-fees language to the Voting Rights Act apply to Section 10101 just as *Morse* found they did for Section 10 of the Voting Rights Act.

As with the provisions of the Voting Rights Act of 1965, it would frustrate Section 10101's purpose to preclude a private right of action. And just as "[i]t would be anomalous . . . to hold that both § 2 and § 5 are enforceable by private action but § 10 is not, when all lack the same express authorizing language," *Morse,* 517 U.S. at 232, so here, it would be anomalous to hold that private parties can sue to enforce rights-creating provisions of the Voting

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[13] *See also* Daniel P. Tokaji, *Symposium: Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 140 (2010) ("Without exception, the decisions [assuming private parties cannot sue under Section 10101] fail to apply the tests established by the Supreme Court, either for an implied right of action or for a § 1983 right of action").

Rights Act but not rights-creating provisions of Section 10101.

D. Section 10101's legislative history confirms the availability of a private right to enforce its provisions.

The Sixth Circuit's entire analysis hinges on the 1957 amendment that authorized the Attorney General to bring suit to enforce the guarantees of Section 10101. *See McKay v. Thompson,* 226 F.3d 752, 756 (6th Cir. 2000). But nothing about that amendment provides support for the Sixth Circuit's decision to wipe out the preexisting ability of private parties to bring suit.

1. To the contrary, the legislative history makes clear that Congress intended to keep, rather than eliminate, private individuals' existing ability to sue under Section 10101. Then-Attorney General Brownell—whose department proposed the legislation—testified to exactly this point:

> [S]ome of these actions can be brought by private individuals. *That stays in the law*. . . . We are not taking away the right of the individual to start his own action. . . . Under the laws amended if this program passes, *private people will retain the right they have now to sue in their own name.*

Civil Rights Act of 1957: Hearings on S. 83, an amendment to S. 83, S. 427, S. 428, S. 429, S. 468, S. 500, S. 501, S. 502, S. 504, S. 505, S. 508, S. 509, S. 510, S. Con. Res. 5 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 85th Cong. 73, 203, 1; 60-61, 67-73 (statement and testimony of the Hon. Herbert

Brownell, Jr., Attorney General of the United States) (emphasis added); *see also id.* at 3 ("Congress passed many years ago statutes, now title 42, United States Code, sections 1971 and 1983, under which private persons claiming that they had been deprived of the right to vote on account of race or color by persons acting under color of State law have been able to bring civil suits for damages and preventive relief.").

Indeed, between the statute's original enactment in 1870 and its 1957 amendment, private plaintiffs had filed numerous lawsuits to enforce its provisions and protect their right to vote. *E.g.*, *Kellogg v. Warmouth*, 14 F. Cas. 257, 1872 U.S. App. LEXIS 1362 (C.C.D. La. 1872); *Anderson v. Myers*, 182 F. 223 (C.C.D. Md. 1910), *aff'd*, 238 U.S. 368 (1915); *Smith v. Allwright*, 321 U.S. 649 (1944); *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946); *Mitchell v. Wright*, 154 F.2d 924 (5th Cir. 1946); *Rice v. Elmore*, 165 F.2d 387 (4th Cir. 1947); *Brown v. Baskin*, 78 F. Supp. 933 (E.D.S.C. 1948).

And when Congress amended the statute, it acknowledged these suits:

> Under the present language of section 1971 of title 42 United States Code, provision is made for a legislative declaration of the right to vote at any election without distinction as to race, color, or previous condition of servitude. However, there is no sanction expressed. *Section 1983 of title 42 United States Code has been used to enforce the rights, legislatively declared in the existing law, as contained in Section 1971 of the same title.* . . . Recoveries have been made pursuant to that remedy for deprivation of the right to vote (*Chapman v. King* (154 F.2d 460)).

> An injunctive relief was secured in *Brown v. Baskin* (78 F. Supp. 933) (1948, 80 F. Supp. 1017 (1948), affirmed 74 F.2d 391 (1949).

H.R. Rep. No. 85-291, at 12 (1957) (emphasis added). Later Congresses confirmed that understanding. A House Report accompanying the 1982 amendments to the Voting Rights Act explained not only that "citizens have a private cause of action to enforce their rights under Section 2," but went on to explain that that cause of action was "not intended to be an exclusive remedy for voting rights violations, *since such violations may also be challenged by citizens under 42 U.S.C. §§ 1971*, *1983,* and other voting rights statutes." H.R. Rep. No. 97-227, at 32 (1981) (emphasis added).

2. This Court should not read into the 1957 amendment an implied repeal of the preexisting private right to bring suit. "The cardinal rule is that repeals by implication are not favored." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *see also Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 132-33 (2003) ("Inferring repeal from legislative silence is hazardous at best. . . ."). A later act will only repeal an earlier act by implication if their provisions are "in irreconcilable conflict" with each other, or if the later act "is clearly intended as a substitute." *Posadas*, 296 U.S. at 503. Even then, the earlier act will only be repealed if Congress clearly and manifestly intended to do so. *Id*.

None of these requirements is met here. As explained above, this Court's decisions regarding private rights of action under the Voting Rights Act each recognize that private rights of action and

Attorney General enforcement actions actually complement one another. The 1957 amendments plainly were intended as a supplement to, not a substitute for, the statute, including the existing ability of private parties to bring suit. Nothing in the legislative history suggests that Congress intended to eliminate the existing private right of action, much less that it "clearly and manifestly intended to do so." To the contrary, Congress stated that its intention was to "strengthen[] ... the enforcement of existing rights." H.R. Rep. No. 85-291, at 5 (1957); *see also id.* at 1 (stating that the bill's purpose was "to provide means of *further* securing and protecting the civil rights of persons within the jurisdiction of the United States") (emphasis added).

It is not plausible that Congress intended to take away this right of action but simply neglected to make any statement to that effect. *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("[W]e are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history .... Congress' silence in this regard can be likened to the dog that did not bark.").

The fact that Congress authorized the Attorney General to seek only injunctive relief, *see* 52 U.S.C. § 10101(c), further shows that it did not intend to eliminate the existing private right of action, under which private plaintiffs had recovered damages.[14] In

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[14] *See, e.g.,* H.R. Rep. No. 85-291, at 12 (1957) (citing *Chapman v. King*, 154 F.2d 460 (5th Cir. 1946)).

fact, as part of the same legislation, Congress amended 28 U.S.C. § 1343(a)(4) to provide district courts with jurisdiction over actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." Civil Rights Act of 1957, Pub. L. No. 85-315, § 121, 71 Stat. 634, 637. It would be senseless for Congress to include this provision if it intended to eliminate the existing private right of action and the ability to recover damages.

And given that the statute's purpose is to protect the fundamental right to vote, it would further be anomalous to conclude that Congress intended to impliedly repeal an existing means of enforcing that right when it was passing legislation to strengthen that right. *See, e.g., Chisom*, 501 U.S. at 404 ("It is difficult to believe that Congress, in an express effort to broaden the protection afforded by the Voting Rights Act, withdrew, without comment, an important category of elections from that protection. Today we reject such an anomalous view . . . . "); *Morton v. Mancari*, 417 U.S. 535, 548 (1974) ("It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment . . . at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference.").

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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