VOTING RIGHTS: LITIGATING MATERIALITY UNDER THE CIVIL RIGHTS ACT

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Abstract

In recent years, plaintiffs have frequently invoked the Civil Rights Act's "Materiality Provision" as a basis for challenging state election laws. The Provision prevents states from denying a person's right to vote based on certain types of immaterial errors or omissions in his voter registration application or other election-related filings. Historically, the Provision played an important role in combatting Jim Crow measures used to systematically disenfranchise African Americans. Today, it continues to protect voters from disenfranchisement based on minor, hypertechnical, "picayune" mistakes unrelated to their eligibility to vote. Some courts, however, have misinterpreted the Provision to prevent states from requiring voters to submit information for reasons other than determining whether they meet the state's qualifications for electors. Properly construed in light of its text, structure, legislative history, and purpose, as well as pragmatic considerations, the Materiality Provision applies only when the state is attempting to determine a person's eligibility to be recognized as a qualified elector. Even if a court applied the Provision more broadly, however, measures aimed at confirming a person's identity or the accuracy of information he provides should be deemed material to establishing his eligibility to vote.

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INTRODUCTION

The Voting Rights Act of 1965 (VRA)[1] is among our nation's most effective statutes.[2] Within a few years of its enactment, African American voter registration in southern states dramatically increased and racial disparities in turnout rates were substantially reduced.[3] The statute achieved these impressive results by "forc[ing] the removal of the open barriers to black registration" such as literacy tests and other

1. Pub. L. No. 89-110, 79 Stat. 445 (1965).

2. *See* Hugh Davis Graham, *Voting Rights and the American Regulatory State*, *in* CONTROVERSIES IN MINORITY VOTING 177, 177 (Bernard Grofman & Chandler Davidson eds., 1992) (calling the VRA "one of the most effective instruments of social legislation in the modern era of American reform"); *see also* Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1390 (2015) (noting that the VRA is "widely regarded as one of the most successful civil rights statutes ever enacted").

3. *See* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 464–65 (2008) ("Black registration in covered southern states increased from 29.3% to 52.1% within two years of the VRA's passage. . . . [T]he disparity in black-white turnout has often been smaller in the South than elsewhere in the country." (citing BERNARD GROFMAN, ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTER EQUALITY 21, 23 (1992))).

requirements that many southern states had intentionally administered in a racially discriminatory manner.[4]

Over the decades that followed, Congress amended the Act to expressly specify that it prohibited not only unconstitutional racial discrimination but also many other election procedures and requirements with racially disparate impacts.[5] Congress also re-authorized the Act on four occasions, including most recently in 2006.[6] In recent years, however, the Supreme Court has reassessed the VRA's scope.[7] For example, section 5 of the VRA requires covered jurisdictions to obtain preclearance from the U.S. Department of Justice or a three-judge panel of the U.S. District Court for the District of Columbia before changing any of their voting-related laws, policies, or procedures.[8] Section 4(b) of the VRA sets forth statutory formulas for identifying which states, counties, and municipalities qualify as covered jurisdictions based on their election laws and voter registration and turnout rates as of 1964, 1968, and 1972.[9]

In *Shelby County v. Holder*,[10] the Supreme Court held that, because imposing preclearance requirements on state and local

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4. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838–39 (1992). Many scholars refer to these successes as "first generation" voting rights cases. *See, e.g.*, LANI GUINIER, THE TYRANNY OF THE MAJORITY 7 (1994).

5. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (1982) (codified at 52 U.S.C. § 10301); *see also* William N. Eskridge, Jr. & Victoria Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1750 (2021) ("The 1982 Amendments added a different method to establish a violation [of the VRA] via disparate impact . . . .").

6. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; *see also* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

7. Some scholars have gone so far as to declare that the VRA "is dying." Charles & Fuentes-Rohwer, *supra* note 2, at 1390–91; *see also* Dale E. Ho, *Something Old, Something New, or Something* Really *Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 WM. & MARY L. REV. 1887, 1889 (2018) (noting that "liberals have frequently characterized [the Roberts Court] as hostile to voting rights").

8. 52 U.S.C. § 10304(a); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1973) ("Congress intended [section 5] to reach any state enactment which altered the election law of a covered State in even a minor way."). Section 5 prohibits covered jurisdictions from adopting changes which are predicted to lead to "retrogression," or a reduction in racial minority registration or turnout. Beer v. United States, 425 U.S. 130, 141 (1976).

9. 52 U.S.C. § 10303(b).

10. 570 U.S. 529 (2013).

governments is a major imposition on federalism and states' core sovereign powers,[11] it is unconstitutional for Congress to identify covered jurisdictions based solely on data from forty years ago.[12] By invalidating section 4(b), the Court placed section 5's preclearance requirements into abeyance until Congress adopts a new, updated formula.[13] A few years later, in *Brnovich v. Democratic National Committee*,[14] the Court went on to establish new "guideposts"[15] limiting the availability of "vote denial" claims[16] based on disparate impact under section 2 of the VRA.[17]

Over the past several decades, sections two and five have been the VRA's "two most important operative provisions."[18] However, due in part to *Shelby County* and *Brnovich*, plaintiffs

11. In particular, the Court noted that the Framers specifically considered and rejected the possibility of giving Congress the power to review and "negative" state laws before they take effect. *Id.* at 542–45 (first citing 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21, 164–68 (M. Farrand ed., 1911); and then citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27–29, 390–92 (M. Farrand ed., 1911)).

12. *Id.* at 556–57 (holding that it was "irrational for Congress to distinguish between States in a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story," rather than "updat[ing] the coverage formula" when it re-authorized the VRA in 2006); *see also* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) ("[T]he [VRA] imposes current burdens and must be justified by current needs. . . . The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.").

13. *See* Paige E. Richardson, *Preclearance and Politics: The Future of the Voting Rights Act*, 89 U. CIN. L. REV. 1089, 1089 (2021) ("Because the coverage formula was held unconstitutional, federal preclearance measures in Section 5 of the VRA could no longer be enforced . . . ."). Congressional Democrats proposed a sweeping new formula in the John Lewis Voting Rights Advancement Act of 2021, but the Senate did not pass it. John Lewis Voting Rights Advancement Act of 2021, H.R. 4, 117th Cong.

14. 594 U.S. 647 (2021).

15. *Id.* at 666.

16. Dean Daniel P. Tokaji explained the distinction between "vote denial" and "vote dilution" claims under section 2 of the VRA. He wrote that "'[v]ote denial' refers to practices that prevent people from voting or having their votes counted." Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006). Plaintiffs raise vote denial challenges against statutes, regulations, and other rules governing a jurisdiction's voter registration, electoral, or vote tallying processes. *Id.* "Vote dilution," in contrast, "refers to practices that diminish minorities' political influence in places where they are allowed to vote." *Id.* Vote dilution claims typically focus on the nature or boundaries of legislative districts.

17. 52 U.S.C. § 10301(a).

18. Erwin Chemerinsky, *How the Supreme Court Became a Threat to Democracy*, 69 LOY. L. REV. 351, 356 (2023).

have increasingly relied on other legal provisions for challenging election-related requirements.[19] For example, the "Materiality Provision" of the Civil Rights Act of 1964 (CRA),[20] as amended the following year by section 15 of the VRA,[21] states:

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is ***not material*** in determining whether such individual is qualified under State law to vote in such election . . . .[22]

Over the past few years, as plaintiffs have invoked the Materiality Provision more frequently, circuit splits concerning the Provision have proliferated. Various federal and state courts have adopted diametrically opposing views regarding, among other things, the Provision's scope,[23] the proper way to assess materiality under it,[24] whether plaintiffs must show intentional racial discrimination to state a valid claim,[25] and whether the Provision is enforceable by private plaintiffs.[26] Courts have likewise come to disparate conclusions concerning the "materiality" of various election-related requirements.[27]

This Article is among the only academic analyses of the Materiality Provision.[28] Part I begins by analyzing the

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19. *See* Pa. State Conf. of NAACP Branches v. Sec'y Pa., 97 F.4th 120, 127 (3d Cir. 2024) ("Until recently, the Materiality Provision received little attention from federal appellate courts."), *reh'g denied en banc*, No. 23-3166, 2024 WL 3085152 (3d Cir. Apr. 30, 2024).

20. Pub. L. No. 88-352, § 101(a), 78 Stat. 241, 241 (1964) (codified at 42 U.S.C. § 1971(a)(2)(B)).

21. *See infra* Section I.C.

22. 52 U.S.C. § 10101(a)(2)(B) (emphasis added). This provision was previously codified as 42 U.S.C. § 1971d(a)(2)(B).

23. *See infra* notes 222–53.

24. *See infra* notes 294–96.

25. *See infra* notes 270, 275, 277 and accompanying text.

26. *Compare* Vote.org v. Callanen, 89 F.4th 459, 478 (5th Cir. 2023) (recognizing that private plaintiffs may enforce the Materiality Provision through a § 1983 claim), *and* Schwier v. Cox, 340 F.3d 1284, 1297 (11th Cir. 2003) (same), *with* McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000) ("Section 1971 is enforceable by the Attorney General, not by private citizens.").

27. *See infra* notes 325–38

28. *See* Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 146–55 (2012) ("At the time when there is no

Provision's legislative history. It explores the various examples identified by the U.S. Commission on Civil Rights and other supporters of the legislation of people being prevented from voting due to immaterial mistakes on their voter registration forms.

Part II turns to the major disputes that have arisen concerning proper application of the Materiality Provision. It contends that, to prevail under the Provision, plaintiffs need not establish that a law was adopted with a discriminatory purpose or that election officials acted with discriminatory intent. Moreover, the Provision applies to all stages of the electoral process, not just to voter registration. Conversely, the Materiality Provision should not be construed to prevent states from confirming a person's identity, such as by requiring photo identification for in-person voting or mandating that voters provide personal identifying information when requesting or returning absentee ballots. Nor should the Provision bar states from verifying the accuracy of information a putative voter provides, for example by requiring that the information on a voter's registration form match data in extrinsic databases. Either the Materiality Provision should be deemed inapplicable to election-related rules that seek to achieve valid goals other than establishing a person's eligibility to vote, or such identification and verification requirements should generally be regarded as material to determining voter eligibility.

Part III circles back to the threshold issue of whether private plaintiffs may sue to enforce the Materiality Provision. This question has become particularly significant in light of the Eighth Circuit's recent determination that section 2 of the VRA does not create a private right of action.[29] Part III concludes that, while it is reasonably debatable whether the Materiality Provision creates a private right of action, it is almost certainly enforceable under 42 U.S.C. § 1983.[30] A brief conclusion follows.

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longer a doubt about the individual's qualifications, the earlier and newly immaterial error cannot be used as a procedural hitch to deprive the eligible individual of a vote."); *see also* RODNEY A. SMOLLA, 1 FEDERAL CIVIL RIGHTS ACT § 2:2 (3d ed. 2024); 3 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS ¶ 18.01 (2024).

29. *See* Ark. State Conf. of the NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206–07 (8th Cir. 2023) (holding that the "text and structure" of section 2 of the VRA do not "give private plaintiffs the ability to sue"), *reh'g denied en banc*, 91 F.4th 967 (8th Cir. 2024).

30. *See* 42 U.S.C. § 1983.

I. THE LEGISLATIVE HISTORY OF THE CRA'S MATERIALITY PROVISION

Congress first enacted the Materiality Provision in 1964 as part of the CRA.[31] It initially applied only to federal elections.[32] The following year, the VRA expanded the Materiality Provision to apply to all elections,[33] and the Provision's text has remained unchanged in the decades since.[34]

A. *The U.S. Commission on Civil Rights's Recommendations*

A 1959 report from the U.S. Commission on Civil Rights[35] contained an early proposal for legislation such as the Materiality Provision.[36] The Commission's report identified a range of barriers that African Americans faced in attempting to register to vote in some southern states. Many did not register due to fear of physical violence or losing their jobs.[37] Others who attempted to register were simply rejected by election officials,

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31. Pub. L. No. 88-352, § 101(a)(2)(B), 78 Stat. 241, 241 (1964) (codified at 42 U.S.C. § 1971(a)(2)(B)).

32. *Id.*

33. Voting Rights Act of 1965, Pub. L. No. 89-110, § 15, 79 Stat. 437, 445 (amending 42 U.S.C. § 1971(a), (c)).

34. *See* 52 U.S.C. § 10101(a)(2)(B).

35. The Civil Rights Act of 1957 established the bipartisan U.S. Commission on Civil Rights, Pub. L. No. 85-315, § 101(a), 71 Stat. 634, 634 (1957), and required it to "investigate allegations" that citizens were being deprived of their right to vote on account of "color, race, religion, or national origin," *id.* § 104(a)(1), 71 Stat. at 635. The Commission's "function is purely investigative and fact-finding," and its reports may "be used as the basis for legislative and executive action." Hannah v. Larche, 363 U.S. 420, 441 (1960). The publication of the Commission's 1959 report "was front-page news across the country." Jennifer Mason McAward, *The Civil Rights Legacy of Fr. Theodore M. Hesburgh, C.S.C.*, 28 NOTRE DAME J. L. ETHICS & PUB. POL'Y 309, 312 (2014). Following the report's release, Congress extended the Commission's duration, *see* Mutual Security Appropriation Act of 1960, Pub. L. No. 86-383, tit. IV, 73 Stat. 717, 724 (1959), and it continues to exist today, *see* U.S. COMM'N ON CIVIL RIGHTS, https://www.usccr.gov/ [https://perma.cc/FP76-RRD5]. Since the Commission's statutory authorization terminated on September 30, 1996, *see* 42 U.S.C. § 1975d, it has "survived as a creature only of annual appropriations." Kenneth L. Marcus, *The Right Frontier for Civil Rights Reform*, 19 GEO. MASON U. C.R. J. 77, 77 n.3 (2008). For a brief overview of the Commission's statutory history, see GARRINE P. LANEY, CONG. RSCH. SERV., RL34699, THE U.S. COMMISSION ON CIVIL RIGHTS: HISTORY, FUNDING, AND CURRENT ISSUES 1–9 (2008).

36. U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE U.S. COMM'N ON CIVIL RIGHTS 125–26 (1959) [hereinafter USCCR 1959 REPORT]; *see* 110 CONG. REC. 6970, 6998–99 (Apr. 6, 1964) (explaining the extent to which the Civil Rights Act of 1964 incorporated the Commission's recommendations).

37. USCCR 1959 REPORT, *supra* note 36, at 58, 60, 64.

who often failed to provide a reason.[38] Literacy tests administered in a discriminatory manner were another major obstacle.[39]

The Commission also delved into examples of voter registration applications being rejected due to applicants' supposed errors in completing them. In Macon County, Alabama, for example:

> An applicant was rejected because she had listed the county of her birth but not the State.
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> One rejected applicant . . . had failed to write in her name for the fourth time in question No. 3.
>
> An applicant who had indicated continuous residence in the State since 1930 (only 2 years is required for registration) was rejected for failure to give the month and the day.[40]

The Commission found that many black applicants in Macon County were "denied registration because of [such] inconsequential errors" on their registration forms, whereas many white applicants who had made similar errors were permitted to register.[41] In another Alabama county, white applicants—but not black applicants—were permitted to submit new forms if their applications contained errors.[42] A Louisiana parish removed 1,300 out of approximately 1,500 black voters from its registration rolls in a three-month period due to "alleged errors in spelling on the application forms."[43]

Based on these findings, the Commission recommended that Congress amend the Civil Rights Act of 1957[44] to make it illegal for anyone acting under color of law to "arbitrarily and without legal justification" act or fail to act in a way that "deprive[s] or threaten[s] to deprive any individual or group of individuals of the opportunity to register, vote and have that vote counted for any candidate" for federal office.[45]

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38. *Id.* at 60–61.
39. *Id.* at 59, 62, 65–67.
40. *Id.* at 87.
41. *Id.* at 91.
42. *See id.* at 90. The Commission concluded that voting registrars in those two counties had engaged in systematic racial discrimination with regard to voter registration. *Id.* at 138.
43. *Id.* at 103–04.
44. Pub. L. 85–315, 71 Stat. 634 (1957).
45. USCCR 1959 REPORT, *supra* note 36, at 138–39.

The Commission presented a materially identical version of its proposal in its 1961 report on voting rights.[46] After discussing the range of obstacles that African Americans in southern states continued to face when attempting to register or vote, the Commission found that voting rights had been "denied in some places . . . by the arbitrary or discriminatory application of various registration procedures."[47] Such discrimination included the "rejection of applicants for registration, or the removal of voters from the rolls, on grounds of minor technical errors in the completion of required forms."[48]

Some of the problems the Commission identified involved inconsistencies among different localities. For example, the Commission found that, in some Louisiana parishes, "persons who fail to qualify are advised what their errors were; in others, the applicants are not told this."[49] The Commission discovered numerous other applications that had been rejected due to blatant racial discrimination. For example, a Commission staff member testified that African Americans in one Louisiana parish "had been disqualified for errors similar to those which appeared on the cards of white registrants who were accepted."[50] Similarly, in a case brought under the Civil Rights Act of 1960,[51] a federal court found that in one Alabama county, "[n]o white applicants were rejected for errors in their application forms, but Negro applicants were rejected because of 'formal, technical, and inconsequential errors' despite the fact that white application forms showed the same errors."[52]

The Commission also heard testimony that some questions on registration forms were apparently crafted to maximize the likelihood that applicants would make mistakes. For example, Louisiana's form required applicants to specify their age in years, months, and days, and "an 'error' . . . in the computation

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46. 1 U.S. COMM'N ON CIVIL RIGHTS, VOTING: 1961 U.S. COMM'N ON CIVIL RIGHTS REPORT 133 (1961) [hereinafter USCCR 1961 REPORT]. The Commission's 1961 report was "instrumental in laying the groundwork for enacting the [VRA]." Marcus, *supra* note 35, at 120.

47. USCCR 1961 REPORT, *supra* note 46, at 137.

48. *Id.*

49. *Id.* at 57 (footnotes omitted) (first citing *Hearings in Louisiana Before the U.S. Commission on Civil Rights, Voting* 305, 406 (1961); and then citing *id.* at 225, 283, 361).

50. *Id.* at 66.

51. Pub. L. No. 86-449, § 601, 74 Stat. 86, 90–92 (1960).

52. USCCR 1961 REPORT, *supra* note 46, at 85–86 (quoting United States v. Alabama, 192 F. Supp. 677, 680 (M.D. Ala. 1961)).

of age would require denial of registration."[53] Even an election official was unable to correctly calculate her age in this manner while testifying before the Commission.[54]

Numerous instances of applicants being rejected due to scrivener's errors were also examined. In one Louisiana parish, election officials rejected applications containing "the county name in the space asking the State, and the State in the county slot; or similarly transposing day and month."[55] A black applicant in North Carolina was rejected because she wrote her name in the wrong spot on the form and election officials refused to give her a new form.[56] In another case, a Louisiana election official rejected a black applicant's registration form because he had misspelled "October" and "Democratic."[57] Still another registration was rejected because the applicant had written his birth year as "104" instead of "1904," even though he had written his correct birth year elsewhere on the form.[58]

A wide range of other types of errors were also discussed. For example, African Americans in one Louisiana parish were rejected because the registration form asked when they had started living in their parish, ward, or precinct, and they wrote "all my life" rather than inserting a date.[59] An election official in another parish testified that he had rejected an African American applicant who had not filled in the blank for his mother's maiden name.[60]

Some applicants, however, were rejected due to errors or omissions that, even today, some jurisdictions might regard as potentially valid grounds for rejecting an application. For example, African Americans in three parishes were rejected because they had failed to complete all the required fields on their registration forms or "failed or refused" to sign the forms.[61]

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53. *Id.* at 56.

54. *Id.* at 56–57.

55. *Id.* at 57.

56. *Id.* at 34.

57. *Id.* at 55.

58. *Id.* at 57.

59. *Id.* at 57 (quoting *Hearings in Louisiana Before the U.S. Commission on Civil Rights, Voting* 370 (1961)).

60. *Id.* at 59 (quoting *Hearings in Louisiana Before the U.S. Commission on Civil Rights, Voting* 408 (1961)); *see also id.* at 57 (stating that failure to fully complete a voter registration form warranted rejection in three additional parishes).

61. *Id.* at 57 (quoting *Hearings in Louisiana Before the U.S. Commission on Civil Rights, Voting* 845 Ex. AA–35 (1961)).

Based on the totality of the evidence, the Commission concluded that election officials in states such as Louisiana had "built a fortress against Negro registration with such procedural impediments as interpretation of the Constitution, identification, calculation of age, and filling in the application blanks."[62] Accordingly, the Commission again recommended, among other things, that Congress "prohibit any arbitrary action or (where there is a duty to act) arbitrary inaction, which deprives or threatens to deprive any person of the right to register, vote, and have that vote counted in any Federal election."[63]

B. *The Civil Rights Act of 1964's Materiality Provision*

1. Procedural History

On February 28, 1963, President John F. Kennedy called upon Congress to pass civil rights laws protecting African Americans' rights across a range of fields including voting, education, employment, and public accommodations.[64] He stated, among other things, "No one can rightfully contend that any voting registrar should be permitted to deny the vote to any qualified citizen . . . upon the basis of minor errors in filling out a complicated form which seeks only information."[65] The President's message went on to explain how the Department of Justice and the U.S. Commission on Civil Rights had found numerous examples of African Americans being "required to complete their applications with unreasonable precision."[66] It declared, "[U]niformity of treatment is required by the dictates of both the Constitution and fairplay."[67]

The civil rights community likewise advocated for federal legislation. That April, Dr. Martin Luther King, Jr. held a historic civil rights march in Birmingham[68] in violation of a temporary restraining order and was arrested,[69] leading to his

62. *Id.* at 71.

63. *Id.* at 141.

64. 109 CONG. REC. 3245–49 (Feb. 28, 1963) (letter from President John F. Kennedy), *reprinted in* H.R. DOC. NO. 88-75 (1st Sess. 1963).

65. *Id.* at 3246–47.

66. *Id.* at 3247.

67. *Id.*

68. *See* David Benjamin Oppenheimer, *Martin Luther King,* Walker v. City of Birmingham, *and the Letter from Birmingham Jail*, 26 U.C. DAVIS. L. REV. 791, 805–12 (1993).

69. *See* Walker v. City of Birmingham, 388 U.S. 307, 307, 320, 341 (1967) (affirming Dr. King's contempt conviction pursuant to the collateral order doctrine).

famous Letter from Birmingham Jail.[70] A few months later, in June, President Kennedy federalized the National Guard[71] to implement a court order allowing black students to attend the University of Alabama[72] after Governor George Wallace blocked the doorway to prevent them from entering.[73] That evening, in response to Wallace's intransigence, President Kennedy delivered a nationally televised address to announce that he was presenting a civil rights bill to Congress which, among other things, would provide "greater protection for the right to vote."[74] About a week after that, the President's civil rights bill was introduced in Congress.[75] Later that summer, King helped generate public support for the measure by leading the March on Washington for Jobs and Freedom[76] where he delivered his iconic "I Have a Dream" speech.[77]

The Civil Rights Act proposed by President Kennedy was introduced in the House on June 20, 1963, as H.R. 7152.[78] It contained a materiality provision substantially identical to the

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70. Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), *reprinted in* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 77–100 (1964).

71. Exec. Order No. 11,111, 3 C.F.R. § 182 (1964); *see also* Proclamation No. 3542, 3 C.F.R. § 67 (1964) (directing the Governor of Alabama to "cease and desist" from obstructing a federal court order desegregating the University of Alabama).

72. United States v. Wallace, 218 F. Supp. 290, 291–92 (N.D. Ala. 1963) (issuing a temporary injunction in response to Governor Wallace's announcement that he would personally block the door of the University of Alabama when black students tried to enroll there); Lucy v. Adams, 224 F. Supp. 79, 80, 82 (N.D. Ala. 1963) (holding that an earlier injunction ordering the desegregation of the University of Alabama remained in effect), *aff'd*, 328 F.2d 892 (5th Cir. 1964); *see also* Lucy v. Adams, 134 F. Supp. 235, 239 (N.D. Ala. 1955) (requiring the desegregation of the University of Alabama by prohibiting admissions officials from refusing to enroll applicants solely on account of race), *aff'd*, 228 F.2d 619 (5th Cir. 1955).

73. Debbie Elliot, *Wallace in the Schoolhouse Door*, NPR (June 11, 2003, 12:00 AM), https://www.npr.org/2003/06/11/1294680/wallace-in-the-schoolhouse-door [https://perma.cc/VT4L-VA33].

74. *Report to the American People on Civil Rights* (CBS television broadcast June 11, 1963).

75. 109 CONG. REC. 11075–81 (June 19, 1963) (introducing S. 1731); *id.* at 11252 (introducing H.R. 7152); *see also id.* at 11174–79 (relaying the President's message to Congress before the House).

76. Rebecca E. Zietlow, *"Where Do We Go From Here?" Dr. Martin Luther King, Jr. and Workers' Rights*, 14 HARV. L. & POL'Y REV. 47, 51, 68 (2019).

77. Martin Luther King Jr., I Have a Dream (Aug. 28, 1963), *in* MARTIN LUTHER KING JR., A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF DR. MARTIN LUTHER KING, JR. 217 (James M. Washington ed. 1986).

78. H.R. 7152, 88th Cong. (introduced June 20, 1963); *see* 109 CONG. REC. 11252 (June 20, 1963) (introducing H.R. 7152 in the House); *see also* S. 1731, 88th Cong. (introduced June 19, 1963).

current version, except it was limited to federal elections and alluded to poll taxes. It stated:

> No person acting under color of law shall . . . deny the right of any individual to vote in any Federal election because of an error or omission of such individual on any record or paper relating to any application, registration, payment of poll tax, 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 . . . .[79]

The House Judiciary Committee reported an amended version of H.R. 7152 to the full House without suggesting any changes to this language.[80] The House ultimately approved the bill on February 10, 1964, by a vote of 290 to 130 with 11 abstentions.[81]

The Senate debated the House's measure for nearly four months.[82] Majority Leader Mike Mansfeld and Minority Leader Everett McKinley Dirksen introduced an amendment in the nature of a substitute to the House bill that, in addition to making more substantive changes to other parts, omitted the Materiality Provision's reference to "payment of poll tax."[83] That language had been criticized as "superfluous"[84] because the Twenty-Fourth Amendment had abolished poll taxes for federal elections.[85] The Senate approved the deletion.[86]

During the Senate debates, Senator Samuel J. Ervin of North Carolina proposed two amendments that would have

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79. H.R. 7152, 88th Cong., § 101(a) (introduced June 20, 1963); *accord* S. 1731, 88th Cong., § 101(a) (introduced June 19, 1963).

80. *See* H.R. 7152, 88th Cong., § 101(a) (as reported by H. Judiciary Comm., Nov. 20, 1963); *see also* 109 CONG. REC. 22550-51 (Nov. 20, 1963).

81. 110 CONG. REC. 2804–05 (Feb. 10, 1964); *see also* H.R. 7152, 88th Cong., § 101(a) (as passed by House, Feb. 10, 1964).

82. *See* H.R. 7152, 88th Cong. (read for the second time and ordered to be placed on the calendar, Feb. 26, 1964); 110 CONG. REC. 3692 (1964).

83. 110 CONG. REC. 11897, 11926 (May 26, 1964) (statement of Sen. Dirksen) (introducing Amendment No. 656); *see also id.* at 12576 (June 3, 1964) (statement of Sen. Humphrey) (discussing Amendment No. 656). That Amendment was later replaced by another substitute which also omitted the poll tax language. *See id.* at 13310, 13420 (June 10, 1964) (statement of Sen. Dirksen) (introducing Amendment No. 1052); *see also* H.R. 7152, 88th Cong. § 101(a) (as amended by Senate June 19, 1964).

84. 110 CONG. REC. 6750, 6753–54 (Apr. 1, 1964) (statement of Sen. Ellender).

85. U.S. CONST. amend. XXIV, § 1.

86. 110 CONG. REC. 14239 (June 17, 1964) (adopting Amendment No. 1052).

eliminated the Materiality Provision.[87] Amendment No. 778 would have deleted Title I of the bill "in its entirety," while Amendment No. 779 would have omitted just the Materiality Provision and the bill's accompanying requirement that registration standards be uniform.[88] Senator Ervin argued that there was no need for any voting-related provisions because seven other federal laws existed that "any competent lawyer" could use to secure the right to vote for any qualified citizen anywhere in the country.[89] He further argued that the Materiality Provision exceeds Congress's power under the Fifteenth Amendment because "it contains no reference to denial or abridgement of the right to vote on account of race."[90] The Senate rejected both amendments by a vote of 16 to 69.[91]

The Senate later went on to pass its amended version of the House bill by a vote of 73 to 27.[92] The House adopted a resolution acceding to the Senate's amendments,[93] and President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law later that day.[94]

2. The Materiality Provision's Intended Meaning

The Materiality Provision received limited attention during debates over the CRA, and some Members of Congress disagreed about certain aspects of its meaning. The Provision's main focus appeared to be voter registration. Several Senators noted that it would ensure that "an applicant shall not be denied the right to vote merely because he has committed a minor error or omission on an application form" that was "not material to the applicant having met the State's qualification requirements."[95] Shortly before the CRA's final passage, House

87. *Id.*

88. *Id.*

89. *Id.* at 13703 (June 13, 1964) (statement of Sen. Ervin); *see also id.* at 5001 (Mar. 11, 1964) (statement of Sen. Ervin).

90. *Id.* at 13709 (June 13, 1964) (statement of Sen. Ervin); *see also id.* at 5001 (Mar. 11, 1964) (statement of Sen. Ervin); *id.* at 5273 (Mar. 14, 1964) (statement of Sen. Ervin).

91. *Id.* at 13703 (June 13, 1964) (Amendment No. 778); *id.* at 13709, 13722 (Amendment No. 779).

92. *Id.* at 14511 (June 19, 1964).

93. *Id.* at 15896–97 (July 2, 1964).

94. *See* Pub. L. No. 88-352, § 101(a), 78 Stat. 241, 241 (July 2, 1964) (codified at 42 U.S.C. § 1971(a)(2)(B)).

95. 110 CONG. REC. 9112–13 (Apr. 25, 1964) (statement of Sen. Keating); *see also id.* at 6530-31 (Mar. 30, 1964) (statement of Sen. Humphrey) (confirming that the

Judiciary Committee Chair Emanuel Celler of New York—echoing the House Judiciary Committee report accompanying the bill[96]—explained that the Materiality Provision "prohibits denial of registration because of immaterial errors or omissions in voting applications in Federal elections."[97] Some of the Provision's opponents echoed this understanding by arguing[98] that the Provision was unnecessary because some federal courts had already enjoined states from rejecting registration forms "for technical or inconsequential errors."[99] Senator Kenneth Keating identified the Provision's limits, explaining that it "will not permit an individual to vote if he does not otherwise meet the State's qualifications for voting such as age or residency requirements."[100]

A few weeks after the Civil Rights Act was adopted, Representative William Moore McCulloch prepared a comparative analysis of the House and Senate versions of the bill, stating that both had included a Materiality Provision with the following effect:

> No State or local government official shall ***in determining whether a person is qualified to vote in an election*** in which Federal officials are to

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Provision bars states from rejecting voter registration applications based on "errors which are not relevant to the question of whether or not an individual is actually qualified to vote"); *id.* at 6555 (statement of Sen. Kuchel) (explaining that the Materiality Provision prohibits state actors from "utilizing an immaterial error o[r] omission on the registration form . . . in order to deny the right to vote"); *id.* at 8343 (Apr. 18, 1964) (statement of Sen. Proxmire) ("[The bill] would prevent a denial of voting privilege because of immaterial error."); *id.* at 12689 (June 4, 1964) (statement of Sen. Saltonstall) ("Title I requires registration officials to apply uniform standards in registering voters and prohibits denial of registration because of immaterial errors or omissions . . . ."); *id.* at 13152 (June 9, 1964) (statement of Sen. Byrd) ("[D]isqualification of a qualified voter on the mere pretext of his having inadvertently made some omission or trivial error . . . would be patently unjust and unfair.").

96. H.R. REP. NO. 88-914, pt. 1, at 19 (1963).

97. 110 CONG. REC. 15895 (July 2, 1964) (statement of Rep. Celler); *see also id.* at 1694 (Feb. 3, 1964) (statement of Rep. Celler) ("[I]mmaterial errors in an application shall not be deemed fatal."); H. R. REP. NO. 88-914, pt. 2, at 5 (1963) (additional views of Rep. McCulloch et al.) (explaining that the Materiality Provision requires election officials to "disregard minor errors or omissions if they are not material in determining whether an individual is qualified to vote").

98. *See id.* at 8205 (Apr. 16, 1964) (statement of Sen. Talmadge); *id.* at 1691 (Feb. 3, 1964) (statement of Rep. Rogers).

99. *See, e.g.*, United States v. Penton, 212 F. Supp. 193, 200 (M.D. Ala. 1962); United States v. Alabama, 192 F. Supp. 677, 682 (D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962).

100. 110 CONG. REC. 9113 (Apr. 25, 1964) (statement of Sen. Keating).

> be elected . . . [u]tilize an immaterial error or omission committed by a person ***on any application or registration form*** as a basis for denying the person the right to vote.[101]

Throughout the debates, the Civil Rights Act's supporters identified the types of mistakes at which the Provision was aimed. Senator John J. Williams of Delaware explained, "Inconsequential errors in spelling, minor mistakes, such as underlining rather than circling a word . . . cannot be acceptable reasons" for rejecting a person's registration.[102] House Judiciary Chair Emanuel Celler discussed a case identified by the U.S. Commission on Civil Rights where an election official rejected a putative voter's application because the applicant "underlined 'Mr.' when [he] should have circled it."[103]

The bill's advocates also presented various instances of election officials "ask[ing] questions that have nothing to do with [an] applicant's qualifications to vote" and "apply[ing] irrelevantly strict standards to answers."[104] For example, some applicants' registrations had been rejected because they identified their race as "Negro" rather than "black" or "brown."[105] A Texan named Kathleen Harris was rejected "because she failed to cite the specific year she became a resident of Dallas County," even though her form revealed she had lived there for at least five years.[106] Senate Majority Whip Hubert Humphrey said the Materiality Provision would apply to immaterial defects "such as an error on a voter registration form as to one's age computed in years, months, and days."[107]

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101. *Id.* at 15999 (July 6, 1964) (statement of Sen. Dirksen) (emphasis added).

102. *Id.* at 12837 (June 5, 1964) (statement of Sen. Williams).

103. *Id.* at 1693–94 (Feb. 3, 1964) (statement of Rep. Celler); *accord id.* at 7708 (Apr. 11, 1964) (entering into the record excerpts from *Some Questions and Answers on the Civil Rights Bill*, a booklet written by the Leadership Conference on Civil Rights).

104. *Id.* at 6530 (Mar. 30, 1964) (statement of Sen. Humphrey).

105. *Id.*

106. *Id.* at 6743 (Apr. 1, 1964).

107. *Id.* at 6531 (Mar. 30, 1964) (statement of Sen. Humphrey); *accord id.* at 6530 ("A . . . technique for denying the Negroes the right to vote is to ask questions that have nothing to do with the applicant's qualifications to vote, or to apply irrelevantly strict standards to answers. One favorite method is asking the applicant's age in years, months, and days."); *see also id.* at 1547 (Jan. 31, 1964) (statement of Rep. Rogers) (explaining that a mistake would be deemed immaterial if a person is required to state her age partly in months and her response is off by a month); H.R. REP. NO. 88-914, pt. 1, at 5 (1963) (additional views of Rep. McCulloch, et al.) ("[R]egistrars will overlook minor misspelling errors [sic] or mistakes in age or length

Representative Byron G. Rogers of Colorado agreed, "[I]f you ask a picayune question or use some kind of an excuse that is not material to determine whether or not [a person] is qualified to vote, that is an immaterial question" and an invalid reason for rejecting an application.[108]

At least two of the examples that supporters mentioned, however, concerned mistakes that reasonably might be deemed material and thus a valid basis for declining to register a voter, even under the bill, until the problem was resolved. For example, Representative Rogers claimed that it would be immaterial if an applicant wrote the incorrect street number in his address.[109] An applicant's address, however, is a material part of an application. An incorrect address could result in a person being assigned to the wrong precinct and district, thereby enabling them to vote in the wrong elections and precluding them from voting in the correct ones. Moreover, it could similarly cause election officials to mail absentee ballots, voter registration cards, and election-related notices to the wrong place or a non-existent address. An incorrect address can also make it difficult or impossible to confirm a person's identity, match their personal information against other databases, and identify duplicative or outdated registrations. In short, a person's street address seems to be among the most material parts of her application.

Likewise, an exhibit introduced in the Senate referenced a person who had apparently failed to satisfy state law requirements for registering to vote because he stated on his form that he did not regard the "duties and obligations of citizenship" as higher than those he owed "other secular organization[s]."[110] To the extent that state law required such a certification and it was regarded as constitutionally permissible at the time, answering that question "no" would appear to have been a material and valid basis for rejecting an application. These examples of substantive defects on voter registration applications appear to be quite isolated and rare, however. There is little reason to believe that they reflected the intentions or understanding of the majority.

The Civil Rights Act's opponents complained that the Materiality Provision was too vague. For example,

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of residence of white applicants, while rejecting a Negro application for the same or more trivial reasons.").

108. 110 CONG. REC. 1691 (Feb. 3, 1964) (statement of Rep. Rogers).

109. *Id.*

110. *Id.* at 6743 (Apr. 1, 1964) (statement of Rep. Celler).

Representative Edwin Willis of Louisiana stated that "[t]here is no precise way of measuring how grave an error or omission must be before it is 'material' to the qualifications of a voter."[111] Echoing this, Representative Joe Waggoner, another Louisiana member, stated that materiality was too subjective of a standard for judges to meaningfully apply, particularly because the bill lacked "guidelines" to guide or limit their discretion.[112] Senator Robert Byrd of West Virginia added, "[T]he language creates opportunities for arbitrary determination of what may constitute an error or omission which is 'not material' in determining the qualifications of a voter."[113]

Opponents more broadly complained about empowering federal judges to review election officials' determinations regarding applicants' qualifications.[114] They saw no reason to believe that federal judges would be "wiser or more consistent" than local officials in determining whether a particular mistake was "material."[115] In their view, "[a] federal judge should not be given the right to challenge" an election official's determinations concerning an applicant's qualifications or declare that a particular requirement "is superfluous or that the registrars are not interpreting their State law correctly."[116] Several opponents added that granting federal judges such

111. *Id.* at 1533 (Jan. 31, 1964) (statement of Rep. Willis).

112. *Id.* at 1547 (statement of Rep. Waggoner); *accord id.* at 13152 (June 9, 1964) (statement of Sen. Byrd) ("There are absolutely no guidelines whatsoever provided as to what errors or omissions may be considered 'not material.'").

113. *Id.*

114. *See id.* at 1533 (Jan. 31, 1964) (statement of Rep. Willis); *id.* at 5250 (Mar. 13, 1964) (statement of Sen. Talmadge) (arguing that the Materiality Provision "provides for Federal—not State—determination as to whether an 'error or omission' on the voter's application is material to his qualifications as a voter"); *id.* at 8362 (Apr. 18, 1964) (statement of Sen. Eastland) (stating that the Materiality Provision would "provide for Federal determination as to whether errors or omissions in an application to register are material"); *id.* at 6642 (Mar. 31, 1964) (statement of Sen. Thurmond) ("Congress would first assert a power to tell the States what is and what is not material information in determining the qualifications of voters and what would be pertinent and material to be considered in applying a State statute.").

115. *Id.* at 1533 (Jan. 31, 1964) (statement of Rep. Willis); *see also id.* at 1691 (Feb. 3, 1964) (statement of Rep. Harris) ("Who is going to decide whether or not something is material?"); *id.* at 4999 (Mar. 11, 1964) (statement of Sen. Ellender) ("[W]e can only assume that the Attorney General seeks to insure that future presentations can be made before judges more favorably inclined to the Government's point of view."); *id.* at 5998 (Mar. 23, 1964) (statement of Sen. Smathers) (criticizing the CRA's grant of authority to federal courts to determine the materiality of voters' errors because the Attorney General could simply "find judges who would be satisfactory to him").

116. *Id.* at 6750 (Apr. 1, 1964) (statement of Sen. Ellender).

authority would infringe on states' constitutional prerogative[117] to set voter qualifications in federal elections for themselves.[118]

Congressional debates were somewhat contradictory as to whether the Materiality Provision would apply only where election officials were motivated by racial discrimination. Many explanations of the Provision lacked any express mention of racial discrimination.[119] Indeed, one of Representative Willis's asserted grounds for opposing the Provision was that it exceeded Congress's Fifteenth Amendment power by letting federal judges accept erroneous registration forms "without any showing that the purported 'immaterial' error or omission was used as a pretext for discrimination because of race or color."[120]

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117. The Constitution specifies that a person is entitled to vote in U.S. House and Senate elections if they are eligible to vote for the most populous house of their state legislature, U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII. Each state sets its own qualifications for voting in legislative elections subject to the U.S. Constitution's restrictions. *See* Carrington v. Rash, 380 U.S. 89, 89–90, 93–94, 96 (1965).

118. *See, e.g.*, 110 CONG. REC. 1532–33 (Jan. 31, 1964) (statement of Rep. Willis) ("But the import of the [Materiality Provision] is to permit an encroachment on the constitutional power of the States to establish qualification of voters."); *id.* at 1693 (Feb. 3, 1964) (statement of Rep. Harris) (arguing that the Materiality Provision is "a limitation of the State authority to establish voter qualifications"); *id.* at 5003 (Mar. 11, 1964) (statement of Sen. Ervin) (stating that the CRA is an attempt to "legislate with respect to the qualification of voters and in part with respect to how State elections are to be conducted—matters which the Constitution puts outside the province of Congress"); *id.* at 5878–79 (Mar. 21, 1964) (statement Sen. Byrd) (reading an analysis by the Virginia Commission on Constitutional Government stating that Congress lacks authority "to tell the States what is and what is not material information in determining the qualifications of voters"); *id.* at 6753 (Apr. 1, 1964) (statement of Sen. Ellender) (arguing that the Materiality Provision "attempts to confer upon the Federal Government the power to determine voter qualifications"); *id.* at 7259 (Apr. 8, 1964) (statement of Sen. Ellender) (stating that the Provision would "transfer to Congress the unconstitutional right to spell out [voter] qualifications").

Louisiana Senator Allen J. Ellender also dubiously claimed that the Materiality Provision was unnecessary. He stated, "[W]hile the Commission staff must have gone over thousands and thousands of voting forms to find one prospective voter whose registration was challenged because of error or omission, the best example they could come up with was of extremely doubtful veracity and significance." *Id.* at 4998 (Mar. 11, 1964) (statement of Sen. Ellender).

119. *See supra* notes 102–08; *see also* 110 CONG. REC. 1547 (Jan. 31, 1964) (statement of Rep. Joe Rogers) ("[I]f the election officials try to disqualify an individual because of an immaterial error or omission, then they should not disqualify him, but if it is a material error that has been made, then that is subject to proof before the court."); *id.* at 1691 (Feb. 3, 1964) (statement of Rep. Joe Rogers) ("[T]he registrar shall not discriminate against individuals or hold up his right to vote simply because he may have made an immaterial error in giving the information to the registrar.").

120. *Id.* at 1533 (Jan. 31, 1964) (statement of Rep. Willis).

Senator Byrd, another staunch opponent, similarly declared that the Materiality Provision prohibited "arbitrary action on the part of . . . election official[s]," thereby protecting the "voting rights of individuals of any color."[121]

Conversely, the House Judiciary Committee report accompanying the CRA stated, "Discriminatory use of literacy tests and other devices by registration officials is dealt with by requirements in title I . . . and by the prohibition against [officials] disqualifying an applicant for immaterial errors or omissions in papers requisite to voting in Federal elections."[122] Several of the bill's supporters likewise argued that the Materiality Provision was aimed at preventing racial discrimination.[123] Some went further by insisting that the Provision would apply only when such discrimination occurred.

Representative Rogers, for example, argued that the Materiality Provision and related portions of Title I of the Civil Rights Act applied only where there "was an unequal application of the State laws to the people who made the request to be registered."[124] A state would have "no trouble" if election officials ensured that the state's voting requirements "apply equally."[125]

> But if you do not apply them equally, if you have one standard for a white man and another standard for a black man, or if you require certain things of a

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121. *Id.* at 13152 (June 9, 1964) (statement of Sen. Byrd).

122. H.R. REP. NO. 88-914, pt. 1, at 19 (1963); *see also* H.R. REP. NO. 88-914, pt. 2, at 5 (1963) (additional views of Rep. McCulloch, et al.) (explaining that some states "defeat Negro registration" in a variety of ways, including "applying more rigid standards of accuracy to Negroes than whites, thereby rejecting Negro applications for minor errors or omissions").

123. House Judiciary Committee Chair Celler, for example, stated that the bill included the Materiality Provision because "[i]n certain sections of this country . . . minor errors are ballooned out of proportion, if a person happens to be of a certain race, and the final qualification is denied to him." 110 CONG. REC. 1694 (Feb. 3, 1964) (statement of Rep. Celler); *see also id.* at 1548 (Jan. 31, 1964) (statement of Rep. Rogers) (explaining that the Materiality Provision prohibits "discrimination . . . being exercised by . . . election officials"); *id.* at 1610 (Feb. 1, 1964) (statement of Rep. Shriver) ("Discriminatory practices by registration officials are dealt with by the requirements in title I that such officials apply uniform standards with respect to registration for Federal elections and by the prohibition against their disqualifying an applicant for immaterial errors or omissions in papers requisite to voting . . . ."); *id.* at 1695 (Feb. 3, 1964) (statement of Rep. MacGregor) (stating that "[t]itle I is directed primarily at discriminatory practices applied in the process of registering voters").

124. *Id.* at 1548 (Jan. 31, 1964) (statement of Rep. Rogers).

125. *Id.*

> black man in a literacy test and you require him to be exact in every particular, then we are giving to the Attorney General the authority [to sue].[126]

Rogers elaborated that a registrar would be liable if he "***discriminates against an applicant*** and fails to register him and gives some picayune excuse, some excuse that is not germane to the point whether this man is qualified."[127]

Other supporters explained that the Materiality Provision was one way in which the Civil Rights Act implemented the Fifteenth Amendment's prohibition on racial discrimination concerning the right to vote.[128] Senator William Proxmire stated that the Provision was part of the Civil Rights Act's definition of "discrimination."[129] Senator Humphrey, in discussing the Provision, declared that "if a State makes a determination that is discriminatory, that person may take his case to court."[130] Senator Keating made a similar observation: "In those States where election laws are administered without racial or religious discrimination, there will be no cause for the Federal Government . . . to apply the procedural safeguards established in title I."[131] Under this interpretation, the Materiality Provision would prevent a state from discriminatorily using minor or technical errors as a pretext for preventing African Americans (or members of some other particular race) from voting, but it would not necessarily prohibit election officials from consistently enforcing trivial requirements. While this may have been the intended meaning of the Materiality Provision, it is hard to square with the statutory text, which lacks any reference to racial discrimination.[132]

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126. *Id.*; *see also id.* (claiming that the Materiality Provision allows a state to enforce its voter qualifications so long as election officials "apply them equally to everybody").

127. *Id.* at 1547 (emphasis added); *cf. id.* at 1548 (arguing that a state may apply only "reasonable limitations" when determining a person's eligibility to vote).

128. *Id.* at 12837 (June 5, 1964) (statement of Sen. Williams); *see also id.* at 1600 (Feb. 1, 1964) (statement of Rep. Daniels) (stating that Congress's authority to pass Title I stems from the Fifteenth Amendment).

129. *Id.* at 10690 (May 12, 1964) (statement of Sen. Proxmire).

130. *Id.* at 5998 (Mar. 23, 1964) (statement of Sen. Humphrey).

131. *Id.* at 9113 (Apr. 25, 1964) (statement of Sen. Keating).

132. *See* Pub. L. No. 88-352, § 101(a), 78 Stat. 241, 241 (1964).

C. *The Voting Rights Act's Expansion of the Materiality Provision*

President Lyndon B. Johnson's 1965 State of the Union address encouraged Congress to "open opportunity to all our people," including "Negro Americans, through enforcement of the civil rights law and elimination of barriers to the right to vote."[133] Two months later, following the Bloody Sunday civil rights march in Selma, Alabama,[134] the President addressed a

133. 111 CONG. REC. 30 (Jan. 4, 1965) (statement of Pres. Lyndon B. Johnson).

134. The first march in Selma during this period occurred on March 7, 1965. *See* Roy Reed, *Alabama Police Use Gas and Clubs to Rout Negroes*, N.Y. TIMES, Mar. 8, 1965, at 1, https://www.nytimes.com/1965/03/08/archives/alabama-police-use-gas-and-clubs-to-rout-negroes-57-are-injured-at.html [https://perma.cc/4FFW-EAV7]. Approximately 525 protestors attempted to walk from Selma to Montgomery, Alabama, down Highway 80 and across the Edmund Pettus Bridge. *Id.* State troopers and county sheriffs attacked the protesters with clubs, tear gas, and smoke cannisters. *Id.* The event was labeled "Bloody Sunday." Ashutosh Bhagwat, *Judge Johnson and the Kaleidoscopic First Amendment*, 71 ALA. L. REV. 755, 758 (2020). Future Congressman John Lewis of the Student Nonviolent Coordinating Committee was among those injured. Reed, *supra*. The violence bolstered support for a stronger federal voting rights law. *See* Nan Robertson, *Johnson Pressed for a Voting Law*, N.Y. TIMES, Mar. 9, 1965, at 1, https://timesmachine.nytimes.com/timesmachine/1965/03/09/issue.html [https://perma.cc/MGD7-W5HN] ("Congressional pressure for a new voting rights law mounted today as members of both parties expressed anger and disgust at Alabama's violent repression of the Negro marchers in Selma, Ala[bama].").

On March 8, 1965, the day after the march, activists sought an injunction from the U.S. District Court for the Southern District of Alabama to protect future demonstrations. Williams v. Wallace, 240 F. Supp. 100, 102–03 (M.D. Ala. 1965). Instead, the court entered a temporary restraining order barring any further marches until it could hold a full hearing on March 11. *Id.* at 103. The following day, Tuesday, March 9, King led a symbolic march from Brown Chapel across the Edmund Pettus Bridge, where law enforcement officers ordered him to vacate the road and then immediately departed. Roy Reed, *Dr. King Leads March at Selma; State Police End It Peaceably Under a U.S.-Arranged Accord*, N.Y. TIMES, Mar. 10, 1965, at 1, https://archive.nytimes.com/www.nytimes.com/library/national/race/031065race-ra.html [https://perma.cc/4G23-ND3Z]. "King did not proceed with the march. Instead, he turned around and led the would-be marchers back across the bridge to the Brown Chapel." Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1419 (1995).

On March 17, after President Johnson presented the VRA to Congress, the Alabama district court entered a preliminary injunction barring Governor George C. Wallace, the state director of public safety, and the county sheriff from harassing protestors or interfering with any march commencing between March 19 and March 22. *Williams*, 240 F. Supp. at 110. The court's order further required the defendants to provide police protection for the protestors, rejecting Wallace's request that the court prohibit the march. *Id.* at 110–11. Pursuant to that order, roughly 25,000 people marched from Selma to Montgomery from March 21 through March

joint session of Congress where he proposed voting rights legislation.[135] He explained that, among other things, an African American attempting to register to vote "may be disqualified because he did not spell out his middle name or because he abbreviated a word on the application."[136]

The President also submitted a list of principles to guide voting rights legislation.[137] The list explained that "equal laws, unequally applied" prevented many African Americans from registering to vote.[138] One method the President discussed was election officials' rejection of African Americans' applications based on "technical 'errors' in . . . registration forms," such as "failure to write out middle names, abbreviating the words 'street' and 'avenue' in addresses, or failing to compute age exactly to the day."[139] In contrast, when white voters made such purported mistakes, election officials would nevertheless register them to vote.[140]

To address these problems, the President declared that legislation should "[s]trike down restrictions to voting in all elections—Federal, State, and local—which have been used to deny Negroes the right to vote" and "[p]rovide authority to insure that properly registered individuals will not be prohibited from voting."[141] On March 17, 1965, House Judiciary Committee Chair Celler introduced the Administration's proposal in the House as H.R. 6400 and it was referred to his committee.[142] Senate Majority Leader Mansfeld and Minority

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25. Roy Reed, *25,000 Go to Alabama's Capitol; Wallace Rebuffs Petitioners; White Rights Worker is Slain; Dr. King Cheered*, N.Y. TIMES, Mar. 26, 1965, at 1, https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0325.html [https://perma.cc/6MGQ-8YD8]; Jack Bass, *The Selma March and the Judge Who Made It Happen*, 67 ALA. L. REV. 537, 554 (2015).

135. 111 CONG. REC. 5059 (Mar. 15, 1965); *accord* H.R. DOC. NO. 89-117, at 3 (1965).

136. 111 CONG. REC. 5059 (Mar. 15, 1965); *accord* H.R. DOC. NO. 89-117, at 2 (1965).

137. 111 CONG. REC. 5059 (Mar. 15, 1965); *accord* H.R. DOC. NO. 89-117, at 8 (1965).

138. 111 CONG. REC. 5062 (Mar. 15, 1965); *accord* H.R. DOC. NO. 89-117, at 10 (1965).

139. 111 CONG. REC. 5062 (Mar. 15, 1965); *accord* H.R. DOC. NO. 89-117, at 8 (1965).

140. 111 CONG. REC. 5062 (Mar. 15, 1965); *accord* H.R. DOC. NO. 89-117, at 8 (1965).

141. 111 CONG. REC. 5063 (Mar. 15, 1965); *accord* H.R. DOC. NO. 89-117, at 12 (1965).

142. H.R. 6400, 89th Cong. (introduced in the House on Mar. 17, 1965); *see* 111 CONG. REC. 5325 (Mar. 17, 1965).

Leader Dirksen introduced the measure in the Senate as S.1564.[143] It was referred to the Senate Judiciary Committee with instructions to report back within 15 days.[144] As originally introduced, the Administration's proposal did not amend the Civil Rights Act's Materiality Provision.[145]

Attorney General Nicholas Katzenbach testified before the Senate Judiciary Committee that Congress had enacted the Civil Rights Act in part to defeat the "discriminatory use of application forms and literacy, or interpretation, tests by registrars."[146] He explained that the Act prohibited voter registrars from "disqualifying applicants for inconsequential errors or omission[s]; such as, crossing a 'T' or making an error in giving their age in years, month[s], and days."[147] The ban, however, had not "been effective" because county-by-county litigation was slow and some legislatures had "been inventive and ingenious in devising new voter requirements."[148] Similarly, a dozen members of the Senate Judiciary Committee issued a joint statement explaining that the Civil Rights Act had prohibited states from refusing to register applicants "because of immaterial errors or omissions . . . [on] registration forms."[149]

The Senate Judiciary Committee reported the draft Voting Rights Act on April 9, 1965.[150] Majority Leader Mansfeld and Minority Leader Dirksen introduced an amendment in the nature of a substitute which strengthened several provisions. The Senate adopted that amendment on May 25, 1965,[151] then

143. S. 1564, 89th Cong. (introduced in the Senate on Mar. 18, 1965); *see* 111 CONG. REC. 5387, 5403–04, 5411 (Mar. 18, 1965).

144. 111 CONG. REC. 5388, 5403 (Mar. 18, 1965).

145. *See generally* H.R. 6400, 89th Cong. (introduced in the House on Mar. 17, 1965); S. 1564, 89th Cong. (introduced in the Senate on Mar. 18, 1965).

146. *Voting Rights: Hearing on S. 1564 to Enforce the 15th Amendment to the Constitution of the United States Before the S. Comm. on the Judiciary*, 89th Cong. 190 (1965) (statement of Attorney General Katzenbach).

147. *Id.*

148. *Id.*

149. S. REP. NO. 89-162, pt. 3, at 6 (1965) (Joint Statement); *see also id.* at 10–11 (citing example cases); *accord* 111 CONG. REC. 11745 (May 26, 1965) (statement of Sen. Saltonstall) (explaining that, under the Civil Rights Act, "applications cannot be rejected for immaterial errors on registration forms," but that law had not proven "really effective").

150. *See* 111 CONG. REC. 7724 (Apr. 9, 1965).

151. *Id.* at 11494 (May 25, 1965).

went on to pass the bill as amended.[152] Neither version of the bill amended the Civil Rights Act's Materiality Provision.[153]

On the House side, Subcommittee Number 5 of the House Judiciary Committee held hearings on the Administration's proposal along with over a hundred other voting rights bills.[154] Among the witnesses was Commissioner Reverend Theodore M. Hesburgh of the U.S. Commission on Civil Rights, who was accompanied by the Commission's Staff Director-Designate William L. Taylor.[155] Representative William C. Cramer mentioned the Commission's finding from its 1963 report that some people had been barred from registering to vote through "arbitrary procedures," including "rejection for insignificant errors in filling out form[s] . . . and discrimination in giving assistance to applicants."[156] Commissioner Hesburgh explained that, notwithstanding the Civil Rights Act, registrars "have continued to disqualify Negroes for immaterial errors in applications and have refused to provide copies of applications."[157]

He submitted a filing from the Commission describing its earlier recommendation that Congress bar "any arbitrary

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152. *Id.* at 11751–52 (May 26, 1965).

153. *See* S. 1564, 89th Cong. (as reported by Senate Judiciary Committee on Apr. 9, 1965); S. 1564, 89th Cong. (as passed by Senate on May 26, 1965); *accord* 111 CONG. REC. 11752–55 (May 26, 1965) (bill as passed by Senate).

154. *See generally Voting Rights: Hearing on H.R. 6400 and Other Proposals to Enforce the 15th Amendment to the Constitution of the United States Before the H. Comm. on the Judiciary, Subcomm. No. 5*, 89th Cong. (1965) [hereinafter *House Subcomm. VRA Hearing*]. *See also* H.R. REP. NO. 89-439, at 7 (1965) ("A Judiciary Subcommittee conducted hearings on 122 bills dealing with voting rights . . . .").

155. *House Subcomm. VRA Hearing*, *supra* note 154, at 123 (statement of Commissioner Rev. Hesburgh).

156. *Id.* at 68 (statement of Rep. Cramer); *accord id.* at 287 (statement of Rep. Cramer).

157. *Id.* at 261 (statement of Commissioner Rev. Hesburgh). Other testimony focused on African Americans being rejected due to "immaterial errors" on literacy and supposed intelligence tests. *Id.* at 267 (statement of Director-Designate Taylor); *see also id.* at 297 (discussing applicants' errors on registration tests); *id.* at 763 (written statement of Rep. Cahill) ("A Negro citizen . . . will be turned down for the commission of minor errors or merely because the registrar does not like the answer supplied.").

One North Carolina election official, in contrast, claimed that his county's literacy test was "completely fair" and administered in the same manner to all voters regardless of race. *Id.* at 769 (affidavit of Lenoir County, N.C., Board of Elections Chair F.E. Wallace, Jr.). He added, "Registration is not refused for errors in spelling or for poor handwriting . . . ." *Id.*; *accord id.* at 770 (affidavit of Alice P. Hannibal) (attesting that Lenior County has "not disqualified applicants because of minor errors").

action" or "inaction" that "threatens to deprive any person of the right to register, vote, and have that vote counted in any Federal election."[158] The filing explained that the Civil Rights Act had not fully implemented that recommendation because the Act prohibited only "[c]ertain types of arbitrary action by State officials, such as refusal to register voters for immaterial errors on application forms."[159] Reverend Hesburgh suggested that federal registrars be empowered to register voters in certain jurisdictions to circumvent state and local officials' obstruction.[160]

The subcommittee reported to the full Judiciary Committee an amendment in the nature of a substitute for the Administration's bill.[161] The substitute contained most of H.R. 6400's original provisions along with additional protections such as section 15, which extended the Civil Rights Act's voting protections—including its Materiality Provision—to all elections.[162] Section 15 deleted the term "Federal" in both the Materiality Provision as well as an accompanying subsection of the Civil Rights Act.[163] "As a result, the Civil Rights Act of 1964 would apply to State and local as well as Federal elections by . . . prohibiting disqualification for immaterial errors or omissions . . . ."[164] The House Judiciary Committee, in turn, reported yet another substitute measure that retained most of the subcommittee's proposals—including section 15's extension of the Civil Rights Act—and added further, unrelated protections.[165]

The Judiciary Committee report explained that the committee supported section 15 because state "laws requiring that application forms be completed perfectly, without errors, omissions, or assistance, are patently arbitrary and could not be fairly applied in any sense."[166] Judiciary Committee Chair Celler explained to the House that section 15 would "make title I of the 1964 Civil Rights Act apply to all elections, by

158. *Id.* at 126 (reprinting U.S. Comm'n on Civil Rights, *Recommendations on Voting Legislation and Summary of Resulting or Related Statutes*).

159. *Id.*

160. *Id.* at 261 (statement of Commissioner Rev. Hesburgh).

161. H.R. REP. NO. 89-439, at 7 (1965).

162. *Id.*

163. *Id.*

164. *Id.*; *accord id.* at 33.

165. *Id.* at 1, 6; H.R. 6400, 89th Cong., § 15(a) (as reported by H. Comm. on the Judiciary, June 1, 1965); *see also* H.R. REP. NO. 89-439, at 8 (1965) (discussing the substitute).

166. H.R. REP. NO. 89-439, at 15 (1965).

repealing any limiting reference therein to 'Federal elections.'"[167] He declared, "[I]t is a plain violation of due process to disfranchise a person for making an immaterial error on an application form, and this, too, is as true with respect to local and State is [sic] well as Federal elections."[168] During the debates in both houses, several other Members similarly expressed concern over immaterial mistakes on registration forms.[169]

After the House passed the Judiciary Committee's version of the bill,[170] the Senate requested a conference.[171] Noting among other things that the House bill amended the Civil Rights Act's Materiality Provision while the Senate bill did not, the conference committee recommended that Congress adopt the House version.[172] The conference report explained that the House's provision "amends title I of the Civil Rights Act of 1964 by striking out all limiting references therein to 'Federal'

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167. 111 CONG. REC. 15646–47 (July 6, 1965) (statement of Rep. Celler); *accord id.* at 15651–52 (written statement of Rep. Celler) ("Section 15 extends to State and local elections the provisions of title I of the 1964 Civil Rights Act, which . . . prohibits rejections for immaterial errors . . . ."); *id.* at 15643 (statement of Rep. Madden); *id.* at 16027 (statement of Rep. Kastenmeier); *see also id.* at 16000 (July 8, 1965) (statement of Rep. Conyers) (arguing that Congress had constitutional power to extend the Materiality Provision to state and local elections); *id.* at 16217 (July 9, 1965) (statement of Rep. Poff) (supporting a substitute to the Cellar bill because "the Cellar bill makes all of the Federal election titles of the Civil Rights Act of 1964 applicable to state and local elections as well"); *House Subcomm. VRA Hearing*, *supra* note 154, at 10 (statement of Rep. Celler) ("[T]he bill would also make Title I of the 1964 Civil Rights Act apply to all elections by repealing any limiting reference therein to federal elections.").

168. 111 CONG. REC. 15652 (July 6, (1965) (statement of Rep. Celler); *see also id.* at 15643 (statement of Rep. Madden) ("[The] bill is designed to prevent practices used generally in certain localities of frustrating the 15th amendment by using unfair tactics and devices for the purpose of disfranchising citizens by reason of race, color, or religion."); *id.* at 16030 (July 8, 1965) (statement of Rep. Ryan) ("Disqualification for immaterial errors . . . would be prohibited.").

169. *See, e.g.*, *id.* at 5362 (Mar. 18, 1965) (statement of Rep. Goodell); *id.* at 16228 (July 9, 1965) (statement of Rep. Thompson) (noting that some states "use the application form itself as a literacy test" by "requir[ing] the applicant to fill out a long, complex, and confusing form without assistance and without errors or omissions"); *accord id.* at 11402 (May 24, 1965) (statement of Sen. Hart).

170. Specifically, the House accepted the Committee's amendment in the nature of a substitute, *id.* at 16283 (July 9, 1965), then passed that bill by a vote of 333 to 85, with 15 abstentions, *id.* at 16285. It then called up S. 1564, which by that time had passed the Senate, replaced that bill's text with the contents of H.R. 6400, and passed that amended version of S. 1564. *Id.* at 16286.

171. *Id.* at 16485 (July 12, 1965).

172. H.R. REP. NO. 89-711, at 15 (1965) (conference report); *accord* 111 CONG. REC. 19192 (Aug. 3, 1965) (statement of Rep. Celler).

elections."[173] Both chambers agreed to the conference committee's proposed resolution applying the Materiality Provision to all elections.[174]

II. INTERPRETING THE MATERIALITY PROVISION

The Materiality Provision's main purpose was to prevent racial discrimination in voter registration by barring election officials from relying on minor, technical, and ultimately irrelevant mistakes to selectively reject African Americans' registration forms.[175] The Provision's language is much broader, however, and not limited to that paradigm case.[176]

Some of the Provision's boundaries are explicit. For example, the Provision's restrictions apply only when a state "den[ies] the right of any individual to vote."[177] Consequently, it does not

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173. H.R. REP. NO. 89-711, at 15 (conference report).

174. 111 CONG. REC. 19378 (Aug. 4, 1965) (reflecting Senate adoption); *id.* at 19201 (Aug. 3, 1965) (reflecting House adoption).

175. *See supra* Part I; *see also* Thrasher v. Ill. Republican Party, No. 4:12-cv-04071, 2013 WL 442832, at *2–3 (C.D. Ill. Feb. 5, 2013) (stating that the Materiality Provision prohibits requirements intended to "increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential minority voters"); McKay v. Altobello, No. 2:96-cv-03458, 1996 WL 635987, at *1 (E.D. La. Oct. 31, 1996) ("[The Materiality Provision] is . . . designed to eliminate the discriminatory practices of registrars through arbitrary enforcement of registration requirements.").

176. *See* Ball v. Chapman, 289 A.3d 1, 24–25 (Pa. 2023) (three-Justice opinion).

177. 52 U.S.C. § 10101(a)(2)(B); *see, e.g.*, Raskin v. Jenkins, No. 3:22-cv-2012, 2023 WL 5918789, at *9–10 (N.D. Tex. Aug. 25, 2023) (recommending dismissal of a challenge under the Materiality Provision to a jurisdiction's voting equipment because the plaintiff had not been prevented from voting), *report and recommendations adopted*, No. 3:22-cv-2012, 2023 WL 5918940 (N.D. Tex. Sept. 11, 2023), *aff'd in part, vacated in part, remanded by*, No. 23-10960, 2024 WL 3508051 (5th Cir. July 23, 2024) (holding the plaintiff lacked standing); Towers v. Unified Gov't of Wyandotte Cnty., No. 5:21-cv-04089, 2022 WL 21778528, at *4 (D. Kan. Mar. 9, 2022) (recommending dismissal because the plaintiff, a failed candidate, did not allege "that she was denied the right to vote because of an immaterial paperwork error or omission").

A few judges have interpreted this requirement stringently, contending that the Materiality Provision does not limit a state's ability to reject a ballot based on a voter's failure to follow state-law requirements or other official directions. *See, e.g.*, Ritter v. Migliori, 142 S. Ct. 1824, 1825 (2022) (Alito, J., dissenting from denial of stay); Pa. State Conf. of NAACP Branches v. Sec'y Pa., 97 F.4th 120, 133 (3d Cir. 2024) (holding that the "right to vote" is not "denied" for purposes of the Materiality Provision when election officials decline to count a ballot "because the voter failed to follow the rules"), *reh'g denied en banc*, No. 23-3166, 2024 WL 3085152 (3d Cir. 2024). Justice Samuel Alito, for example, opined that "[w]hen a mail-in ballot is not counted because it was not filled out correctly, the voter is not denied 'the right to vote.'

govern states' requirements for petitions for candidate ballot

Rather, that individual's vote is not counted because he or she did not follow the rules for casting a ballot." *Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from denial of stay). He added, "[F]ailure to follow those rules constitutes the forfeiture of the right to vote, not a denial of that right." *Id.*

This literal interpretation of "right to vote" is initially persuasive. If this logic were applied consistently, however, it would render the Materiality Provision a nullity. Whenever a person is prevented from registering or voting, a state could say that his right to vote is not being violated, but rather that he simply forfeited it by failing to follow the applicable rules. *Ball*, 289 A.3d at 25. The whole point of the Materiality Provision was to require states to overlook or forgive certain failures to follow irrelevant, hyper-technical rules and permit people to vote notwithstanding minor mistakes. Accordingly, the phrase "right to vote" in this context should be construed broadly to mean "ability to cast a ballot and have it counted," rather than referring to the constitutional right to vote or some other narrower concept. For purposes of the Materiality Provision, a defendant should be deemed to deny a person's right to vote if it refuses to register a person, give them a ballot, or count his ballot. *See, e.g.*, Vote.org v. Ga. State Election Bd., 661 F. Supp. 3d 1329, 1339 (N.D. Ga. 2023) (allowing plaintiffs to challenge Georgia's requirement for wet-ink signatures on absentee ballot applications under the Materiality Provision); *In re* Ga. Senate Bill 202, No. 1:21-mi-55555, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023) (allowing challenge under the Materiality Provision to a requirement that voters include their birthdate on their absentee ballot return envelopes). Of course, a state may adopt election-related rules for a wide range of valid reasons, and a plaintiff would have to satisfy all of the Materiality Provision's other elements to state a valid claim under it.

The Court in *Common Cause v. Thomsen*, 574 F. Supp. 3d 634, 634 (W.D. Wis. 2021), adopted a variation of Justice Alito's overly stringent interpretation of the Materiality Provision. It concluded that the Provision did not invalidate Wisconsin's voter identification requirement because such identification is material to a person's eligibility to vote. *Id.* at 639. The court explained that, under Wisconsin law, "an individual is not qualified to vote without a compliant ID." *Id.* Under this reasoning, it is difficult to see how the Provision could excuse any violations of a state's election-related requirements or procedures. Additionally, the court's reasoning conflates a state's requirements for being recognized as an eligible elector, to which the Provision applies, with rules that an eligible elector must follow to be able to vote in a particular election—such as showing valid identification—which promote valid goals other than determining a person's eligibity to vote. *See infra* notes 216–221 and accompanying text.

access[178] or public referenda[179]—even though a person generally cannot vote for candidates or participate in referenda which do not appear on the ballot. The Provision is likewise inapplicable to the "inner workings and negotiations of a state political party convention" at which the party nominates candidates.[180] Nor may it be used to challenge a ballot's layout[181] or the adequacy of information election officials distribute to voters.[182]

The Provision applies only to errors or omissions on "***record[s] or paper[s]*** relating to any application, registration, or other act requisite to voting."[183] This language restricts a state's ability to refuse to register a person or otherwise bar them from voting due to some problem with the manner in which they complete a document, filing, or other

178. Dekom v. New York, No. 2:12-cv-01318, 2013 WL 3095010, at *18 (E.D.N.Y. June 18, 2013) (rejecting a Materiality Provision challenge to New York's requirements for candidate petitions because such petitions "do not qualify or limit an individual's ability to vote in any election"), *aff'd*, 583 F. App'x 15 (2d Cir. 2014); *In re* Nader, 858 A.2d 1167, 1183 (Pa. 2004) (explaining that requirements for candidate petitions "do not concern the right of an individual to vote" but, rather, "the steps that a candidate must take in order to be properly placed on the ballot"), *overruled in part on other grounds*, *In re* Vodvarka, 140 A.3d 639, 650 (Pa. 2016) (overturning precedents requiring that the address a voter writes on a candidate nominating petition match the address in her voter registration record), *superseded by statute*, Act of Oct. 31, 2019, P.L. 552, No. 77, *codified at* 25 PA. CONS. STAT. § 2868, *as recognized in In re* Major, 248 A.3d 445, 447 (Pa. 2021) ("[T]he statute as amended plainly and unambiguously imposes a mandatory duty on a signer of a nominating petition to add the address where he or she is duly registered and enrolled . . . ."); *see also* Malinou v. Bd. of Elections, 271 A.2d 798, 803 (R.I. 1970) (rejecting challenge under the Materiality Provision to an election board's invalidation of signatures on a putative candidate's nomination petition because the plaintiff had failed to establish that the board's acts involved racial discrimination). *But see* Farquharson v. Click, No. 6:08-cv-00989, 2008 WL 11335112, at *3 n.6 (M.D. Fla. July 10, 2008) ("[I]t seems incongruous to suggest that an immaterial error or omission can invalidate a petition but not the right to vote . . . .").

179. *See, e.g.,* Hoyle v. Priest, 265 F.3d 699, 704–05 (8th Cir. 2001) (rejecting a Materiality Provision challenge to a requirement that signatories of referendum petitions be "qualified electors"). *But see* Howlette v. City of Richmond, 485 F. Supp. 17, 22–23 (E.D. Va. 1978) (applying—likely erroneously—the Materiality Provision to a state's notarization requirement for signatures on a petition to hold a vote on a bond referendum), *aff'd*, 580 F.2d 704 (4th Cir. 1978).

180. *Thrasher*, 2013 WL 442832, at *3.

181. *See* Dicks v. Hawaii, Off. of Elections, No. 1:22-cv-00347, 2022 WL 3786808, at *6–7 (D. Haw. Aug. 30, 2022).

182. Voting Rts. Def. Project v. Padilla, No. 3:16-cv-02739, 2016 WL 3092079, at *2–3 (N.D. Cal. June 2, 2016).

183. 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

submission.[184] Courts have declined to apply the Provision to other types of mistakes such as attempting to vote at the wrong polling place,[185] failing to show statutorily required photo identification,[186] and returning absentee ballots too late for election officials to receive them by the statutory deadline.[187] Additionally, the Materiality Provision does not empower federal courts to review states' substantive voter eligibility requirements, including restrictions on felon voting.[188]

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184. *See* Friedman v. Snipes, 345 F. Supp. 2d 1356, 1371 (S.D. Fla. 2004).

185. Democratic Cong. Campaign Comm. v. Kosinski, 614 F. Supp. 3d 20, 54–55 (S.D.N.Y. 2022) ("[I]t would stretch the law well beyond its plain meaning to hold that the error of casting a ballot from an incorrect polling place is an error 'on any record or paper . . . relating to any . . . act requisite to voting' of the kind that the statute contemplates."); *see also* Ball v. Chapman, 289 A.3d 1, 27 (Pa. 2023) (three-Justice opinion) ("[A]rriving at the wrong polling place, for instance, [does] not implicate an error or omission on any record or paper." (quotation marks omitted)).

186. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006) ("[T]he act of presenting photo identification in order to prove one's identity is by definition not an 'error or omission on any record or paper.'"), *aff'd sub nom.*, Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *accord* Gonzalez v. Arizona, No. 2:06-cv-01268, 2007 WL 9724581, at *2 (D. Ariz. Aug. 28, 2007); Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1357–59 (N.D. Ga. 2006) (quoting 42 U.S.C. § 1971(a)(2)(B)) (granting preliminary injunction on other grounds); *accord* Gonzalez v. Arizona, No. 2:06-cv-01268, 2006 WL 8431038, at *8 (D. Ariz. Oct. 11, 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007); *see also* League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) (suggesting that requiring a voter to provide photo identification would not violate the Materiality Provision), *complaint dismissed*, 2023 WL 6446015 (W.D. Ark. Sept. 29, 2023); *infra* notes 338–40 and accompanying text (explaining why the absence of certain statutorily required components from an identification card is material when determining a voter's eligibility).

187. *Friedman*, 345 F. Supp. 2d at 1373 (holding that the plaintiffs had not stated a valid claim under the Materiality Provision based on election officials' rejection of their late-received absentee ballots because "the error and omission alleged here did not occur on any record or paper and did not occur in relationship to a determination of the Plaintiffs' eligibility to vote").

188. Hayden v. Pataki, No. 1:00-cv-08586, 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004) (rejecting a Materiality Provision challenge to a state's felon disenfranchisement mandates because felons are not "otherwise qualified to vote" under state law), *aff'd on other grounds*, 449 F.3d 305 (2d Cir. 2006) (en banc), *clarified by*, 449 F.3d 305 (2d Cir. 2006) (en banc); *cf.* Johnson v. Byrd, 429 S.E.2d 923, 925 (Ga. 1993) (rejecting a Materiality Provision claim because, "[b]y failing to sign their registration cards, the 43 individuals never took the oath required to qualify them as voters in this state and, therefore, they never became lawfully registered voters who were authorized to cast ballots").

The Provision's scope is unclear, however, in other important respects.[189] This Part discusses the various disputes that have arisen over its proper interpretation. Section A begins by considering the issues to which the Materiality Provision applies, offering three possible interpretations. ***First***, the best reading of the Provision's text is that it applies at any stage of the electoral process in which election officials attempt to determine whether a person possesses the qualifications required under state law to be an eligible elector. Election officials may have valid reasons other than an individual's ineligibility for declining to send or give someone a ballot or to reject a particular ballot that they cast. The Materiality Provision should not be construed to categorically invalidate election requirements and procedures that seek to promote such important goals other than confirming a voter's eligibility.[190]

Second, in the alternative, if a court applies the Materiality Provision to rules and procedures concerning issues other than voter eligibility—such as voter identification laws or requirements that people provide identifying information when requesting or submitting an absentee ballot—then the court should determine whether a particular error or omission is material in light of that other purpose.[191] Again, ensuring that a person is eligible to vote is not a state's only valid or permissible purpose for adopting and enforcing election-related rules and procedures. As a policy matter, this interpretation would almost certainly be the best possible outcome and help to achieve the Materiality Provision's broad purposes. But this interpretation conflicts with the Materiality Provision's text.

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189. Justice Alito and a handful of courts have held that the Provision is likely inapplicable to the manner in which a ballot or its accompanying paperwork (for absentee ballots) is filled out. They contend that the Provision regulates only voter registration and other acts *requisite* to voting, while "the casting of a ballot constitutes *the act* of voting" itself. Ritter v. Migliori, 142 S. Ct. 1824, 1826 n.2 (2022) (Alito, J., dissenting from denial of stay) (emphasis added); *see also* Pa. State Conf. of NAACP Branches v. Sec'y Pa., 97 F.4th 120, 135 (3d Cir. 2024) (holding that the Provision is inapplicable to a state's rules concerning "the act of casting a ballot"), *reh'g denied en banc*, No. 23-3166, 2024 WL 3085152 (3d Cir. Apr. 30, 2024); Liebert v. Millis, No. 3:23-cv-00672, 2024 WL 2078216, at *11 (W.D. Wis. May 9, 2024) ("The same act cannot be both 'voting' and 'something necessary for voting' at the same time.").

190. *See infra* notes 200–01 and accompanying text.

191. *See Liebert*, 2024 WL 2078216, at *18 (explaining that, if "the Materiality Provision applies to all aspects of voting, then it follows that information could be material even when it is not actually used to determine [voter] qualifications").

Third, at the very least, information that a state requests in order to confirm either (i) a person's identity or (ii) the accuracy of the information a person submits when registering to vote, requesting a ballot, or returning a ballot should be regarded as material to that person's eligibility to vote under state law.[192] Even when a state has information suggesting that a particular person is eligible to vote, confirming the accuracy of that information against other databases remains material to establishing that person's initial or continuing eligibility. And requiring a registered voter to re-submit identifying information at a later time, such as when requesting or casting an absentee ballot, can be material to confirming that the individual attempting to vote ***actually is*** that eligible voter.

Section B shows that, despite the Materiality Provision's underlying purpose of preventing racial discrimination, plaintiffs do not need to show that the state adopted a challenged requirement for a discriminatory purpose or that election officials are enforcing it in a discriminatory manner. The Materiality Provision's text contains no such discrimination requirement. And inferring one would both narrow the Provision's scope and render it duplicative of other protections in federal law.

Section C surveys the disputes that have arisen over the materiality of various voter errors. It contends that materiality should be assessed based on the type of information election officials seek rather than the nature of a particular voter's mistake. Likewise, "materiality" should be interpreted to mean "reasonably relevant"; the term does not impose a more demanding standard. This Section concludes by identifying and applying various principles to guide materiality determinations.

A. *The Materiality Provision's Applicability*

The Materiality Provision prohibits anyone acting under color of law from

> deny[ing] 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

192. *See infra* notes 269, 336–38.

> whether such individual is qualified under State law to vote in such election.[193]

The Provision requires states to overlook mistakes and omissions that are "not material" in determining whether a person meets state law qualifications for voting.[194] Its main focus—and clearest case of applicability—is an election official's decision about whether to accept a voter registration application.[195] The Provision's text is not explicitly limited to such determinations, however. Rather, it extends to papers concerning any "act requisite to voting."[196] And the Civil Rights Act of 1957 defines the term "vote" in this context to include "all action necessary to make a vote effective including, but not limited to," registering, casting a ballot, and having that ballot counted and included in official tallies.[197]

In light of this expansive definition, some courts have held that the Materiality Provision bars states from enforcing any rule or requirement to prevent someone from voting for reasons other than their ineligibility under the state's qualifications for electors.[198] For example, a panel of the Third Circuit recently suggested that the Materiality Provision generally prohibits states from enforcing election-related requirements solely to deter or prevent fraud because "[f]raud deterrence and

193. 52 U.S.C. § 10101(a)(2)(B).

194. *See* Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1181 (11th Cir. 2008).

195. *Id.*; Thrasher v. Ill. Republican Party, No. 4:12-cv-04071, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013) ("Courts that have applied the [Materiality Provision] have done so in the context of voter registration . . . ."); Schwier v. Cox, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (holding that the Materiality Provision bars the state from requiring a person to provide his Social Security number to register to vote because the federal Privacy Act prohibits states from requesting that information), *aff'd*, 439 F.3d 1285 (11th Cir. 2006); *see also* Condon v. Reno, 913 F. Supp. 946, 966 (D.S.C. 1995) (stating that the Materiality Provision "forbid[s] states from denying registration for federal elections because of errors that were not material in determining eligibility to vote"); *cf.* Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1357–58 (N.D. Ga. 2006) (rejecting a Materiality Provision challenge to a voter identification requirement in part because the Provision "was intended to address the practice of requiring unnecessary information for voter registration" which led to more applicant errors and "provid[ed] an excuse to disqualify potential voters" (quoting *Schwier*, 340 F.3d at 1294)).

196. 52 U.S.C. § 10101(a)(2)(B).

197. *Id.* § 10101(a)(3)(A), (e).

198. *See infra* notes 227–29 and accompanying text.

prevention are at best tangentially related to determining whether someone is qualified to vote."[199]

States' election codes, however, frequently promote valid, important objectives beyond merely determining whether a person is an eligible elector.[200] For example, states generally need to confirm an individual's identity at various stages of the electoral process; verify the accuracy of the information a person provides; provide each voter with the correct ballot; ensure votes are cast in a timely manner; preserve confidentiality; prevent a person from voting multiple times in the same election; minimize opportunities for potential mistake, fraud, or irregularity; apply objective, consistent ballot-counting standards; and promote public confidence in the electoral system. The Provision's text need not be read to invalidate the broad swaths of state election codes that promote such goals on the grounds they are unrelated to confirming a putative voter's eligibility or qualifications.[201] Indeed, had

199. Migliori v. Cohen, 36 F.4th 153, 163 (3d Cir. 2022), *stay denied sub nom.*, 142 S. Ct. 1824 (2022), *judgment vacated and remanded sub nom.*, Ritter v. Migliori, 143 S. Ct. 297 (2022). *But see* Pa. State Conf. of NAACP Branches v. Sec'y Pa., 97 F.4th 120, 134 (3d Cir. 2024) ("[I]t makes no sense to read the Materiality Provision to prohibit enforcement of vote-casting rules that are divorced from the process of ascertaining whether an individual is qualified to vote."), *reh'g denied en banc*, 2024 WL 3085152 (3d Cir. Apr. 30, 2024).

200. Ball v. Chapman, 289 A.3d 1, 38 (Pa. 2023) (Brobson, J., concurring in part and dissenting in part) (recognizing that many provisions in state election codes "indisputably do not at all relate to voter qualification[s]"); *see also Pa. State Conf. of NAACP Branches*, 97 F.4th at 134 ("Unless we cabin the Materiality Provision's reach to rules governing voter qualification, we tie state legislatures' hands in setting voting rules unrelated to voter eligibility.").

201. *See* Ritter v. Migliori, 142 S. Ct. 1824, 1826 (2022) (Alito, J., dissenting from denial of stay) (explaining that, when election-related rules have nothing "to do with the requirements that must be met in order to establish eligibility to vote, . . . it would be absurd to judge [their] validity . . . based on whether they are material to [such] eligibility"); *Pa. State Conf. of NAACP Branches*, 97 F.4th at 134 ("[I]t makes no sense to read the Materiality Provision to prohibit enforcement of vote-casting rules that are divorced from the process of ascertaining whether an individual is qualified to vote."); Liebert v. Millis, No. 3:23-cv-00672, 2024 WL 2078216, at *2 (W.D. Wis. May 9, 2024) (holding that, because the Materiality Provision "applies only in the context of an official's determination whether a person is qualified to vote," it was inapplicable to witness requirements for absentee ballots); Friedman v. Snipes, 345 F. Supp. 2d 1356, 1372 (S.D. Fla. 2004) (holding that the Materiality Provision was inapplicable to election officials' rejection of absentee ballots they received after the deadline in part because "[t]he error and omission alleged here did not pertain to determining eligibility to vote"); *Ball*, 289 A.3d at 39 (Brobson, J., concurring in part and dissenting in part) (stating that the Materiality Provision applies only to requirements adopted to "determine *whether* the elector, in fact and

Congress wished to bar states from adopting voting requirements or restrictions based on concerns other than voter eligibility, it could have drafted the Provision to make that point much more clearly and directly.[202] Such an absurd result reflects neither the purpose nor the congressional intent underlying the Materiality Provision.[203]

Accordingly, the best reading of the Materiality Provision is that it applies only "***in determining*** whether [an] individual is qualified under State law to vote in [an] election"—that is, when election officials are assessing whether a person satisfies the state's voter eligibility requirements.[204] Under the Provision, a state may not refuse to add a person to the voter registration rolls, or otherwise refuse to recognize them as an eligible elector who meets the state's qualifications, based on minor, technical, immaterial errors or omissions in their filings when such mistakes do not prevent the state from ascertaining the person's eligibility. Conversely, the Materiality Provision is inapplicable when election officials are making other, unrelated determinations—such as whether to transmit an absentee

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law, is qualified" to vote, and not to statutory provisions that establish "requirements on *how* a qualified elector may cast valid absentee or mail-in ballot" (emphasis added)); Ritter v. Lehigh Cnty. Bd. of Elections, 272 A.3d 989, No. 1322 C.D. 2021, 2022 WL 16577, at *9 (Pa. Commw. Ct. Jan. 3, 2022) (holding that the Materiality Provision was inapplicable to a state's refusal to count undated absentee ballots because that statutory requirement "dictates the validity of a mail-in vote that has been cast by an elector who is otherwise qualified to vote, and does not, in any way, relate to the [sic] whether that elector has met the qualifications necessary to vote in the first place"), *petition for appeal denied*, 271 A.3d 1285 (Pa. 2022) (per curiam); *see also* Hoyle v. Priest, 265 F.3d 699, 704–05 (8th Cir. 2001) ("Requiring that petition signers be qualified electors simply protects the state and its citizens against fraud and caprice" and is therefore "material."); Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006) (rejecting a challenge under the Materiality Provision to a photo identification requirement for voting because "verifying an individual's identity is a material requirement of voting, . . . [and] the state may establish procedures to verify this requirement"), *aff'd sub nom.*, Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008).

202. *Liebert*, 2024 WL 2078216, at *16; *cf.* Whitfield v. United States, 543 U.S. 209, 215 (2005) ("[I]f Congress had intended to create the scheme petitioners envision, it would have done so in clearer terms."); NLRB v. Dant, 344 U.S. 375, 379 (1953) ("If Congress had intended to enact such a requirement for the filing of the charge, it would have been a simple matter to have stated that 'no charge shall be entertained.'"); Sandberg v. McDonald, 248 U.S. 185, 195 (1918) ("Had Congress intended to make void such contracts and payments a few words would have stated the intention, not leaving such an important regulation to be gathered from implication.").

203. *See supra* Section I.B.2.

204. 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

ballot or accept a particular vote as valid—based on considerations ***other*** than an individual's eligibility to vote under that jurisdiction's qualification standards.[205]

This interpretation is consistent with the Provision's legislative history, which focused on election officials' refusal to register African Americans due to technical, substantively irrelevant mistakes on their voter registration forms.[206] Had Congress intended to eliminate states' ability to regulate elections for purposes other than determining voter eligibility, such a remarkable and controversial objective likely would have been debated—or at least mentioned—at some point in the Provision's legislative history.[207] Indeed, there is good reason to believe that Congress did not wish to prevent states from enforcing election rules to achieve important goals such as preventing fraud, bolstering public confidence, promoting efficiency, and facilitating accurate results. The Supreme Court has recognized that, "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and

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205. *See supra* notes 200–01 and accompanying text; *see also Ritter*, 142 S. Ct. at 1825 (Alito, J., dissenting from denial of stay) ("[I]t would be absurd to judge the validity of *voting* rules based on whether they are material to [a putative voter's] *eligibility*." (emphasis added)); *Ball*, 289 A.3d at 38 (Brobson, J., concurring in part and dissenting in part) ("[I]t is not enough that the error or omission be immaterial *to* whether the individual is qualified to vote; the paper or record must also be used 'in determining' the voter's qualifications.").

A court might disagree, however, and apply the Materiality Provision regardless of whether a state is attempting to determine a person's eligibility to vote. In that case, the court should determine whether a particular error or omission is material relative to the purpose for which the state imposed the challenged procedure or sought the information at issue. It is non-sensical to bar a state from enforcing certain requirements on the grounds that a voter's mistake is immaterial to establishing his eligibility to vote, when the challenged requirement was adopted to achieve some valid, legitimate goal other than confirming a person's eligibility. For example, a state might require a voter to fill in a circle on an absentee ballot in order to vote for a particular candidate. If the voter instead draws a giant heart around the candidate's name, the state may properly reject that ballot as invalid even though the voter's error was unrelated to his eligibility to vote.

206. *See supra* notes 40–63, 102–08, 139 and accompanying text.

207. *See* Dep't of Com. v. U.S. House of Representatives, 525 U.S. 316, 343 (1999) (rejecting the notion that, despite their "silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in the method of conducting the decennial census since its inception"); Chisom v. Roemer, 501 U.S. 380, 396 (1991) ("[I]f Congress had such an intent, . . . at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment.").

honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'"[208]

This approach to the Materiality Provision is further supported by the structure of the statutory scheme of which it is a part.[209] 52 U.S.C. § 10101(a)(2), in which the Provision is codified, focuses on voter qualifications and eligibility.[210] It contains three subparagraphs, all of which were adopted at the same time in the Civil Rights Act of 1964.[211] Subparagraph (A) prohibits election officials from selectively applying different "standard[s], practice[s], or procedure[s]" to only certain individuals within the jurisdiction when determining whether they are "qualified under State law or laws to vote."[212] Subparagraph (B)—the Materiality Provision—bars election officials from denying anyone the right to vote based on an error or omission that is "not material in determining whether such individual is qualified under State law to vote."[213] Subparagraph (C) forbids election officials from using "literacy test[s] as a qualification for voting," with certain obsolete exceptions.[214] Read in this context, the Materiality Provision should be interpreted as applying only to decisions regarding voters' eligibility and qualifications, rather than other aspects of the electoral process such as the procedures for requesting and casting ballots. "It is unlikely that Congress would 'sandwich' a broad provision governing all aspects of voting in between two provisions focusing on determining voter qualifications."[215]

This dichotomy between voter eligibility and qualification determinations (to which the Materiality Provision applies) on the one hand, and the rules governing the procedures for requesting, casting, and returning absentee ballots and for voting in person (to which the Provision is inapplicable) on the other, is well-established. The U.S. Constitution, for example,

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208. Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

209. *See Ball*, 289 A.3d at 37–38 (Brobson, J., concurring in part and dissenting in part).

210. 52 U.S.C. § 10101(a)(2).

211. Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241, 241 (originally codified at 42 U.S.C. § 1971(a)(2)(A)-(C) and recodified at 52 U.S.C. § 10101(a)(2)(A)-(C)).

212. 52 U.S.C. § 10101(a)(2)(A).

213. *Id.* § 10101(a)(2)(B).

214. *Id.* § 10101(a)(2)(C).

215. Liebert v. Millis, No. 3:23-cv-00672, 2024 WL 2078216, at *13 (W.D. Wis. May 9, 2024) (citation omitted).

establishes voter qualifications for U.S. House and Senate elections.[216] In contrast, it grants state legislatures and Congress authority to determine the "Times, Places, and Manner" of congressional elections,[217] including the procedures for requesting and casting ballots.[218] State constitutions[219] and election codes[220] likewise distinguish between voter qualifications, which are often specified in the constitution itself, and other rules governing the electoral process, which legislatures are generally free to establish and modify.[221]

Courts have come to differing conclusions on this issue. In *Friedman v. Snipes*,[222] the U.S. District Court for the Southern District of Florida held that the Materiality Provision applies only to states' determinations concerning a person's qualifications as a voter.[223] Under the Provision, a state may not bar a person from voting based on errors or omissions that are immaterial "to the determination of [that] individual's qualification to vote."[224] However, the Provision was not "intended to apply to the counting of ballots by individuals already deemed qualified to vote."[225] Applying the Materiality Provision to mistakes concerning issues other than voter qualifications, the court concluded, would render the Provision's language concerning a person's "qualification to vote" a nullity.[226]

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216. U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII, cl. 1; *see* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16 (2013).

217. U.S. CONST. art. I, § 4, cl. 1.

218. Smiley v. Holm, 285 U.S. 355, 366 (1932) (explaining that the Elections Clause gives state legislatures and Congress authority to "provide a complete code for congressional elections," including rules governing the "supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, [and] duties of inspectors and canvassers").

219. *Compare* FLA. CONST. art. VI, §§ 2, 4(a)–(b) (setting forth voter eligibility requirements), *with id.* at art. VI, § 1 (specifying that "[r]egistration and elections shall, and political party functions may, be regulated by law").

220. *Compare* FLA. STAT. § 97.041 (reiterating the state constitution's voter eligibilty requirements), *with* FLA. STAT. §§ 101.001–101.75 (setting forth procedures for conducting elections, including requirements voters must follow to receive ballots, cast them, and have them counted).

221. Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 194–98 (2014).

222. 345 F. Supp. 2d 1356 (S.D. Fla. 2004).

223. *Id.* at 1371–72 (holding that the Materiality Provision did not bar a state from rejecting absentee ballots that election officials received after the deadline).

224. *Id.* at 1372–73.

225. *Id.* at 1371–72.

226. *Id.*

Other courts, in contrast, have insisted that the Materiality Provision does not allow a state to decline to register a person, give her an absentee ballot, or count her vote for any reason other than her ineligibility as an elector.[227] As a Georgia district court declared, "[I]f the error is not material to determining whether the voter is eligible to vote, the law or procedure violates the Materiality Provision."[228] Many of these

227. Migliori v. Cohen, 36 F.4th 153, 162–63 (3d Cir. 2022) (holding that Pennsylvania's requirement that voters date the affidavits accompanying their absentee ballots violates the Materiality Provision because the state "cannot offer a persuasive reason for how this requirement helped determine any of [a voter's] qualifications"), *stay denied sub nom.*, 142 S. Ct. 1824 (2022), *judgment vacated and remanded sub nom.*, Ritter v. Migliori, 143 S. Ct. 297 (2022); Schwier v. Cox, 412 F. Supp. 2d 1266, 1275–76 (11th Cir. 2005) (holding that a state law requiring voter registration applicants to disclose their Social Security numbers violated the Materiality Provision because the numbers are immaterial to determining a person's eligibility to vote), *aff'd*, 439 F.3d 1285 (11th Cir. 2006); La Union del Pueblo Entero v. Abbott, 705 F. Supp. 3d 725, 765 (W.D. Tex. 2023) (holding that limiting the Materiality Provision to determinations concerning voter eligibility would "do[] violence not only to the clear text of the Materiality Provision but to the civil rights of every qualified voter . . . and to the fundamental premise of our democracy"); *In re* Ga. Senate Bill 202, No. 1:21-mi-55555, 2023 WL 5334582, at *8 (N.D. Ga. Aug. 18, 2023) (holding that Georgia's requirement that the return envelope for an absentee ballot must contain the voter's birthdate violates the Materiality Provision because "that information is not used to determine whether the individual is qualified to vote"); Ford v. Tenn. Senate, No. 2:06-cv-02031, 2006 WL 8435145, at *10 (W.D. Tenn. Feb. 1, 2006) (holding that a requirement that voters at polling places sign both the ballot application and poll book violates the Materiality Provision because "failure to sign . . . is not material in determining whether an individual is qualified to vote"); Vote.org v. Ga. State Election Bd., 661 F. Supp. 3d 1329, 1339–40 (N.D. Ga. 2023) (holding that plaintiffs had stated a valid claim under the Materiality Provision against Georgia's requirement for a wet-ink signature on absentee ballot applications because such a signature was not material to determining a person's eligibility to vote); Martin v. Crittenden, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) ("[A] voter's ability to correctly recite his or her year of birth on the absentee ballot envelope is not material to determining said voter's qualifications under Georgia law."); Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 1270–71 (W.D. Wash. 2006) (issuing a preliminary injunction barring the state from rejecting voter registrations where the information they contained did not match the applicants' records in Social Security Administration or Department of Labor databases); *see also* Mi Familia Vota v. Fontes, 719 F. Supp. 3d. 929, 994 (D. Ariz. 2024) (holding that a state may not require people to provide their place of birth on voter registration forms because it is immaterial to their "eligibility to vote"); Sixth Dist. of the Afr. Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260, 1282 (N.D. Ga. 2021) (holding that plaintiffs had stated a valid claim under the Materiality Provision against a state law requiring voters to write their birthday on absentee ballot applications and completed absentee ballots because such information allegedly was "not material in determining whether such individual is qualified . . . to vote in such election").

228. *In re Ga. Senate Bill*, 2023 WL 5334582, at *8.

jurisdictions have gone even further, declaring that legal provisions and requirements aimed at confirming a voter's identity are not related to ascertaining that voter's qualifications, and thus are categorically prohibited by the Materiality Provision.[229]

This dispute concerning the Materiality Provision recently came to a head in Pennsylvania regarding the state's requirement that each absentee voter write the date on which they completed their absentee ballot on the pre-printed declaration accompanying the ballot.[230] Pennsylvania law directed election officials to reject an absentee ballot unless the voter had signed and correctly dated the accompanying declaration to memorialize when the ballot had been completed.[231] The Pennsylvania Supreme Court split on the validity of this provision in *Ball v. Chapman*[232] and declined to issue an order regarding it.[233] Three Justices concluded that the Materiality Provision required election officials to accept and

229. *Migliori*, 36 F.4th at 163–64 (holding that Pennsylvania's requirement that voters date the affidavits accompanying their absentee ballots violates the Materiality Provision, regardless of "whatever sort of fraud deterrence or prevention this requirement may serve"); *In re Ga. Senate Bill 202*, 2023 WL 5334582, at *8 (holding that Georgia's law requiring voters to include birthdates on their absentee ballots' return envelopes violated the Materiality Provision even though that information was "used to verify the voter's identity"); *La Union del Pueblo Entero*, 705 F. Supp. 3d at 754–55 (holding that Texas's law requiring voters to include their driver's license number or Social Security number (if they have one) on their absentee ballot request form and return envelope for absentee ballots violated the Materiality Provision even though it was part of the state's "methodology for identifying voters in order to administer an election"); *Ford*, 2006 WL 8435145, at *10 (holding that a requirement that voters at polling places sign both the ballot application and poll book violates the Materiality Provision even though it is "helpful but not essential to determining whether an individual was qualified to vote"); *Schwier*, 412 F. Supp. 2d at 1276 (holding that a state law requiring people to include their Social Security number on their voter registration applications violated the Materiality Provision even though it "could help to prevent voter fraud"); *Mi Familia Vota*, 719 F. Supp. 3d at 994 (holding that a state may not require people to provide their place of birth on voter registration forms because it is immaterial to their "eligibility to vote," even though election officials used that information as a "security question[] to verify the identity of a registered voter"); *Martin*, 347 F. Supp. 3d at 1309 (holding that Georgia's law requiring voters to include their birthdate on their absentee ballot return envelope likely violated the Materiality Provision even though election officials in one county used such information to "verify a voter's identity").

230. Ball v. Chapman, 289 A.3d 1, 9 (Pa. 2023).

231. *Id.* at 21–22 (quoting 25 PA. STAT. §§ 3146.6(a), 3150.16(a)).

232. 289 A.3d 1 (Pa. 2023).

233. *Id.* at 28 (three-Justice opinion).

count both undated ballots as well as ballots containing incorrect dates.[234]

The Petitioners, urging a different interpretation, had argued that the Materiality Provision was inapplicable to the ballot-dating requirement because the legislature had adopted it for reasons other than confirming a person's eligibility to vote.[235] Rejecting that argument, the three-Justice opinion declared that, "rather than demonstrating that the materiality provision is inapplicable to the date requirement, Petitioners' logic in fact establishes that the date requirement is simply 'not material in determining whether such individual is qualified' to vote."[236] The Justices emphasized that the Materiality Provision's text "draws no distinction between an [immaterial] 'error or omission' that would justify denying the right to vote and one that would not. It does not differentiate between a requirement that has a valid purpose and one that does not."[237]

Among the other opinions in *Ball* was Justice Brobson's partial concurrence and dissent, which Justice Sallie Updyke Mundy joined.[238] Justice Brobson emphasized that the Provision applies only to state laws and requirements "used '*in determining* whether [an] individual is qualified under State law to vote.'"[239] Accordingly, statutory requirements which seek to further other purposes are not subject to the Provision. The broader interpretation advocated by the three-Justice opinion, Justice Brobson noted, would require invalidation of many important provisions of the Pennsylvania Election Code.[240]

The U.S. Court of Appeals for the Third Circuit has reached similarly disparate conclusions concerning Pennsylvania's ballot-dating requirement. In *Migliori v. Cohen*,[241] a three-judge panel concluded that the requirement violated the Materiality Provision.[242] It declared, "[W]hatever sort of fraud

234. *Id.*

235. *Id.* at 24 n.139.

236. *Id.* (quoting 52 U.S.C. § 10101(a)(2)(B)).

237. *Id.* at 25.

238. *Id.* at 35–40 (Brobson, J., concurring in part and dissenting in part).

239. *Id.* at 38 (emphasis added) (quoting 52 U.S.C. § 10101(a)(2)(B)).

240. *See id.* at 38–39.

241. 36 F.4th 153 (3d Cir. 2022), *stay denied sub nom.*, 142 S. Ct. 1824 (2022), *judgment vacated and remanded sub nom.*, Ritter v. Migliori, 143 S. Ct. 297 (2022).

242. *Migliori*, 36 F.4th at 164; *see also* McCormick v. Chapman, No. 286 M.D. 2022, 2022 WL 2900112, at *12, 15 (Pa. Commw. Ct. June 2, 2022) (agreeing with the Third Circuit's ruling in *Migliori v. Cohen* and holding that the omission of the date from absentee ballots that election officials received prior to Election Day was

deterrence or prevention this requirement may serve, it in no way helps the Commonwealth determine" a voter's eligibility.[243] The Supreme Court declined to stay the Third Circuit's ruling.[244] Justice Alito led a three-Justice dissent, declaring that "the Third Circuit's interpretation is very likely wrong."[245] A few months later, the Court vacated the Third Circuit's ruling and ordered that the case be dismissed as moot.[246]

In 2024, in *Pennsylvania State Conference of NAACP Branches v. Secretary of Pennsylvania*,[247] a subsequent Third Circuit panel construed the Materiality Provision differently.[248] In a 2–1 ruling, Judge Thomas Ambro held that the Provision's plain language "targets laws that restrict who may vote. It does not preempt state requirements on how qualified voters may cast a valid ballot."[249] Echoing Justice Brobson of the Pennsylvania Supreme Court, Judge Ambro explained that the Provision applies to errors and omissions which are not "material *in determining* whether [an] individual is qualified

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not material); Chapman v. Berks Cnty. Bd of Elections, No. 355 M.D. 2022, 2022 WL 4100998, at *27 (Pa Commw. Ct. Aug. 19, 2022) (agreeing with *Migliori v. Cohen*); Eakin v. Adams Cnty. Bd. of Elections, 676 F. Supp. 3d 449, 457–58 (W.D. Pa. 2023) (declining to dismiss a Materiality Provision challenge to the requirement that voters date their absentee ballots).

243. *Migliori*, 36 F.4th at 163. In adjudicating this issue, the *Migliori* panel followed the Secretary of the Commonwealth's interpretation that Pennsylvania's dating requirement simply required a voter to include *any* date on her declaration, including an obviously incorrect date or future date. *Id.* at 164. The Third Circuit mocked the notion that the Commonwealth would reject a ballot where the date field was blank but accept one with a completely fabricated and obviously false date. *Id.* at 163 ("We are at a loss to understand how the date on the outside envelope could be material when incorrect dates—including future dates—are allowable but envelopes where the voter simply did not fill in a date are not."). Such a requirement would almost certainly fail rational basis scrutiny.

A few months later, in *Ball*, the Pennsylvania Supreme Court clarified in the precedential portion of its opinion that state law requires voters to correctly specify the date on which they signed their declarations. *Ball*, 289 A.3d at 22 ("[W]hen an instruction to 'date' something appears in close quarters with other actions—here, filling out and signing the declaration—it is evident that the instruction refers to the day upon which those actions are completed, and not one selected at random."). Thus, the Third Circuit's interpretation of the challenged Pennsylvania law was erroneous.

244. *Ritter*, 142 S. Ct. at 1824.

245. *Id.* at 1824 (Alito, J., dissenting from denial of stay).

246. *Ritter*, 143 S. Ct. at 298.

247. 97 F.4th 120 (3d Cir. 2024), *reh'g denied*, 2024 WL 3085152 (3d Cir. Apr. 30, 2024) (en banc).

248. *Id.* at 130.

249. *Id.* at 131.

under State law to vote."[250] The statute's use of the words "'in determining' . . . must mean something."[251] Judge Ambro interpreted that language to mean that the Materiality Provision's restrictions apply only when a state is attempting to determine a person's eligibility to be recognized as a qualified elector.[252] He went on to note that the Provision's legislative history bolstered this interpretation: "Congress was concerned with discriminatory practices during voter registration . . . ."[253]

Perhaps the strongest argument against this interpretation of the Materiality Provision is that it is fairly narrow, allowing states to deny people the right to vote for trivial reasons after they have been registered on grounds unrelated to their eligibility.[254] But rather than seeking to achieve at all costs a single broad purpose framed at the highest level of generality, the Materiality Provision—like most federal statutes—should instead be read as reflecting a balance among multiple competing congressional purposes.[255] One of those purposes is allowing states to continue enforcing reasonable requirements to promote valid goals beyond determining a person's eligibility to vote. Moreover, "not every statute is intended to cover every problem."[256] The Materiality Provision is merely one of myriad protections the VRA imposes upon the electoral process. And, regardless of the Materiality Provision, the Fourteenth Amendment acts as a constitutional backstop to protect people from unduly burdensome requirements and restrictions on their right to vote.[257] Thus, the Materiality Provision need not be applied when a state is pursuing objectives other than determining a person's qualifications as an elector.

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250. *Id.* (quoting 52 U.S.C. § 10101(a)(2)(B)).

251. *Id.*

252. *Id.*

253. *Id.* at 133.

254. *In re* Ga. Senate Bill 202, No. 1:21-mi-55555, 2023 WL 5334582, at *10 (N.D. Ga. Aug. 18, 2023) (construing the Materiality Provision broadly so that states are unable to "impose immaterial voting requirements yet escape liability each time by arguing" that the requirements were adopted for reasons other than confirming a person's eligibility to be recognized as a qualified elector).

255. *See* Victoria Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1623–24 (2014); *see also* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1188 (1958).

256. Liebert v. Millis, No. 3:23-cv-00672, 2024 WL 2078216, at *16 (W.D. Wis. May 9, 2024).

257. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

Conversely, some courts have interpreted the Provision too narrowly, holding that it regulates only the voter registration process. As noted earlier, the Provision applies to "application, registration, [and] other act[s] requisite to voting."[258] Applying the ejusdem generis canon,[259] some courts have concluded that the phrase "other act[s] requisite to voting" should be construed as including only preliminary stages of the electoral process which are similar to registering or otherwise applying to become a voter.[260] This reasoning both misapplies the ejusdem canon and misconstrues the Materiality Provision.

The ejusdem canon applies only when elements in a statutory list share a common characteristic.[261] While the term "registration" expressly applies to the voter registration process, the term "application" is broader and may refer not only to a voter registration application, but also to an application for an absentee or vote-by-mail ballot[262] or even to a request to vote in person at a polling location.[263] Because the terms in the statutory list preceding the Materiality Provision's broad catch-all term do not share a common narrowing element, the ejusdem canon is inapplicable.[264] Thus, the phrase "other act[s] requisite to voting" should be given its plain-meaning construction. As such, it includes stages of the electoral process subsequent to voter registration such as attempts to obtain and

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258. 52 U.S.C. § 10101(a)(2)(B).

259. The ejusdem generis canon provides that "where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Yates v. United States, 574 U.S. 528, 545 (2015) (alteration in original) (quoting Wash. State Dep't. of Soc. & Health Servs. v. Guardianship Est. of Keffeler, 537 U.S. 371, 384 (2003)).

260. *Liebert*, 2024 WL 2078216, at *12; Pa. State Conf. of NAACP Branches v. Sec'y Pa., 97 F.4th 120, 131–32 (3d Cir. 2024), *reh'g denied en banc*, 2024 WL 3085152 (3d Cir. Apr. 30, 2024). This argument has been raised unsuccessfully in other cases as well. *See, e.g.*, La Union del Pueblo Entero v. Abbott, 705 F. Supp. 3d 725, 757, 760 (W.D. Tex. 2023).

261. *Yates*, 574 U.S. at 545.

262. *See, e.g.*, KAN. STAT. ANN. § 25-1122(a) (2023) ("Any registered voter may file with the county election officer . . . an *application* for an advance voting ballot." (emphasis added)); MISS. CODE ANN. § 23-15-625(1) (2024) ("The registrar shall be responsible for providing *applications* for absentee voting as provided in this section." (emphasis added)).

263. *See, e.g.*, NEV. REV. STAT. ANN. § 293.285(1)(a) (2023) ("A registered voter applying to vote [in person at a polling location] shall state his or her name to the election board officer in charge of the roster . . . .").

264. *Cf. Yates*, 574 U.S. at 564 (Kagan, J., dissenting) (noting that the ejusdem canon "require[s] identifying a common trait that links all the words in [the] statutory phrase").

cast a ballot in a particular election and the ballot-counting process.[265]

This conclusion is bolstered by the statutory definition of "vote" in this context. When that definition is incorporated into the Materiality Provision, the Provision applies to "any . . . act[s] . . . necessary to make a vote effective including . . . casting a ballot, and having such ballot counted and included in the appropriate totals of votes."[266] By its plain text—which the ejusdem canon does not supersede—the Materiality Provision applies at any stage of the electoral process, not just initial voter registration.

Thus, correctly interpretated in light of statutory text, structure, legislative history, and pragmatic considerations, the Materiality Provision applies at any stage of the electoral process where election officials seek to determine a person's eligibility to be recognized as a qualified elector. Accordingly, it does not apply where a state seeks information or adopts other requirements for other purposes, including confirming either a person's identity or the accuracy of information he provides to election officials.[267] Alternatively, as discussed below,[268] even if the Materiality Provision applies in such contexts, information to confirm a person's identity or the accuracy of the information he provides should be deemed material to establishing his eligibility to vote.[269]

B. *Racial Discrimination Requirement*

Courts also disagree about whether the Materiality Provision applies only when a state has adopted an election-related requirement for a racially discriminatory purpose or

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265. *See* Ford v. Tenn. Senate, No. 2:06-cv-02031, 2006 WL 8435145, at *10 (W.D. Tenn. Feb. 1, 2006).

266. 52 U.S.C. §§ 10101(a)(2)(B), (a)(3)(A), (e).

267. *See supra* notes 200–01 (collecting cases).

268. *See infra* Section II.C.

269. *See, e.g.*, League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2023 WL 6446015, at *17 (W.D. Ark. Sept. 29, 2023) ("Identity, insofar as it can be established with otherwise material information, is not immaterial to an absentee voter's qualifications."); Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006) (rejecting a challenge under the Materiality Provision to a photo identification requirement for voting because "verifying an individual's identity is a material requirement of voting" and "the state may establish procedures to verify this requirement"), *aff'd sub nom.*, Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *see also* Gonzalez v. Arizona, 2:06-cv-01268, 2007 WL 9724581, at *2 (D. Ariz. Aug. 28, 2007) (holding that proof of citizenship "is material in determining whether an individual may vote").

election officials apply it in a discriminatory manner. Several courts have rejected Materiality Provision claims because the plaintiffs failed to allege or prove such invidious racial discrimination was involved.[270] These courts have generally emphasized that Congress adopted the Materiality Provision to advance the Civil Rights Act's overall purpose of preventing racial discrimination against African American voters, who had been systematically excluded from many states' electoral processes.[271]

Moreover, Congress included the Provision in a section of the federal code which targeted racial discrimination with regard to federal elections.[272] Furthermore, Congress adopted the Provision under the Fifteenth Amendment,[273] which prohibits intentional racial discrimination regarding voting rights.[274]

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270. Thrasher v. Ill. Republican Party, No. 4:12-cv-04071, 2013 WL 442832, at *3 (C.D. Ill. Feb. 5, 2013) (dismissing a Materiality Provision challenge to state party convention procedures because the plaintiff's "claimed injury . . . is far afield of the actual harms the statute protects against: discrimination in the registration of voters"); *Ind. Democratic Party*, 458 F. Supp. 2d at 839 (rejecting a challenge under the Materiality Provision to a voter identification requirement because "Plaintiffs have not alleged, much less proven, any discrimination based on race"); Malinou v. Bd. of Elections, 271 A.2d 798, 803 (R.I. 1970) (rejecting a Materiality Provision challenge due to the lack of evidence that "the state board disallowed the disputed [candidate petition] signatures because of the 'race, color, or previous condition of servitude' of either the signatories or the candidate whose nomination papers they signed"); Broyles v. Texas, 618 F. Supp. 2d 661, 697 (S.D. Tex. 2009), *aff'd on other grounds sub nom.*, Broyles v. Texas *ex rel.* Abbott, 381 F. App'x 370 (5th Cir. 2010); Ballas v. Symm, 351 F. Supp. 876, 888 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974), *abrogated on other grounds as recognized in* Johnson v. Waller Cnty., 593 F. Supp. 3d 540, 615 (S.D. Tex. 2022); Taylor v. Howe, No. 3:96-cv-00458, 1999 WL 35793770, at *7–8 (E.D. Ark. Mar. 31, 1999), *aff'd in part and rev'd in part on other grounds*, 225 F.3d 993 (8th Cir. 2000); *see also* Isabel v. Reagan, No. 2:18-cv-03217, 2019 WL 5684195, at *9 (D. Ariz. Nov. 1, 2019) (identifying the Materiality Provision as a statute "that specifically prohibit[s] race-based discrimination"), *aff'd on other grounds*, 987 F.3d 1220 (9th Cir. 2021); Clark v. Marengo Cnty., 469 F. Supp. 1150, 1176 (S.D. Ala. 1979) ("The Court views [Section 10101] as a statutory embodiment of the Fifteenth Amendment intended only to preclude denials by persons acting under color of state law of the right to vote to other persons where such denial is based upon race, color, or previous condition of servitude."); United States v. South Dakota, 491 F. Supp. 1349, 1351 (D.S.D. 1980) (holding that proof of racial discrimination is necessary under [Section 10101]), *rev'd on other grounds*, 636 F.2d 241 (8th Cir. 1980).

271. *See, e.g.*, *Ind. Democratic Party*, 458 F. Supp. 2d at 839.

272. *Ballas*, 351 F. Supp. at 888–89.

273. *See supra* note 128.

274. *See* City of Mobile v. Bolden, 446 U.S. 55, 61–62 (1979) (plurality opinion); *see also* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 223 (2009)

Some courts have concluded that the Materiality Provision therefore applies only when a plaintiff claims that racial discrimination has occurred.[275]

None of these rationales warrant incorporating a racial discrimination requirement into the Materiality Provision. Most obviously, unlike other adjacent provisions of the Civil Rights Act, the Materiality Provision lacks any textual reference to racial discrimination.[276] Indeed, Congress's selective inclusion of a racial discrimination requirement in some subsections of § 10101 but not others should be presumed to be significant and given legal effect.[277] Moreover, while combatting racial discrimination was Congress's main impetus for adopting the Civil Rights Act, courts need not manufacture artificial restrictions to limit the Provision to those particular circumstances.[278] The Materiality Provision's text, "[a]nd not the historically motivating examples of intentional and overt racial discrimination, is . . . the appropriate starting point of inquiry."[279]

Nor does the constitutional avoidance canon require a narrowing interpretation of the Provision in this context. Even

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(Thomas, J., concurring in part and dissenting in part) ("The explicit command of the Fifteenth Amendment is a prohibition on state practices that in fact deny individuals the right to vote 'on account of' race, color, or previous servitude.").

275. *See, e.g.*, *Ind. Democratic Party*, 458 F. Supp. 2d at 839 ("[Section] 1971 was enacted pursuant to the Fifteenth Amendment for the purpose of eliminating racial discrimination in voting requirements."); *Malinou*, 271 A.2d at 803 (holding that the Materiality Provision "was passed by Congress under the authority granted it by the fifteenth amendment to bar any type of racial discrimination in voting"); *Broyles*, 618 F. Supp. 2d at 697.

276. *Compare* 52 U.S.C. § 10101(a)(2)(B) (Materiality Provision), *with id.* §§ 10101(a)(1), (e) (other related provisions with express racial discrimination requirements).

277. League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2023 WL 6446015, at *16 (W.D. Ark. Sept. 29, 2023) ("The fact that Congress specified a racial motivation in some portions of the statute, but not in others, indicates that Congress did not intend to impose a racial motive qualifier uniformly across Section 10101."); *see* Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here 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." (citation omitted)).

278. Vote.org v. Byrd, 700 F. Supp. 3d 1047, 1054–55 (N.D. Fla. 2023).

279. Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1173 (11th Cir. 2008); *see also* Vote.org v. Callanen, 89 F.4th 459, 486 (5th Cir. 2023) ("[T]he Materiality Provision is not textually limited to protecting only one race of voters in order to more effectively reach subtle forms of racial discrimination . . . ."); Common Cause v. Thomsen, 574 F. Supp. 3d 634, 639 (W.D. Wis. 2021) ("[T]he text of § 10101(a)(2)(B) isn't limited to race discrimination or voter registration.").

without an express discrimination requirement, the Provision likely falls within Congress's power to enforce the Fifteenth Amendment's prohibition on racial discrimination[280] in light of several states' long history of rejecting black citizens' voter registration applications based on hyper-technical, substantively irrelevant defects.[281] And Congress is not limited to its Fifteenth Amendment enforcement authority. Regardless of the particular provisions Congress invoked at the time it adopted a statute, the federal government may defend its validity based on any source of congressional authority.[282] Accordingly, the federal government could easily defend the Materiality Provision as an exercise of Congress's authority under section 5 of the Fourteenth Amendment to protect the constitutional right to vote.[283]

The Supreme Court has recognized that section 1 of the Fourteenth Amendment protects the fundamental right to vote.[284] Section 5 allows Congress to pass laws that are "congruent" and "proportional" to preventing actual violations of the rights created by section 1, as the Court has defined them, based on evidence in the legislative record before Congress.[285] Here, Congress assembled an extensive record of people being denied their right to vote based on immaterial mistakes in voter registration applications and other related filings.[286] The Court has historically been deferential to the need for prophylactic federal laws—particularly race-neutral measures—to protect

280. U.S. CONST. amend. XV, § 2; *see Vote.org*, 89 F.4th at 487; La Union del Pueblo Entero v. Abbott, 705 F. Supp. 3d. 725, 759 (W.D. Tex. 2023).

The scope of Congress's authority under the Fifteenth Amendment's Enforcement Clause may be subject to some uncertainty. *See* Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2072–88 (2018); Allen v. Milligan, 599 U.S. 1, 80 n.19 (2023) (Thomas, J., dissenting). However, a recent ruling appears to reaffirm that Congress has broad discretion to adopt any measures it deems "appropriate" to enforce the Fifteenth Amendment's restrictions. *See Allen*, 599 U.S. at 41 (quoting City of Rome v. United States, 446 U.S. 156, 173 (1980)); *see also* South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) ("Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.").

281. *See supra* notes 40–63, 102–08, 139 and accompanying text.

282. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012) (quoting Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948)).

283. *See* U.S. CONST. amend. XIV, § 5.

284. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–90 (2008); Reynolds v. Sims, 377 U.S. 533, 554–55 (1964).

285. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

286. *See supra* notes 40–63, 102–08, 139 and accompanying text.

voting rights.[287] Accordingly, section 5 easily empowers Congress to prevent such conduct by state and local officials, regardless of whether it involves intentional racial discrimination.

C. *Determining Materiality*

After determining that the Materiality Provision applies to a particular requirement,[288] it is necessary to assess whether that requirement is "material in determining whether [an] individual is qualified under State law to vote."[289] As the Eleventh Circuit has emphasized, the Materiality Provision "does not establish a least-restrictive-alternative test for voter registration applications."[290] Thus, the question of whether particular information is "material" is a distinct inquiry from whether that requirement is unduly burdensome—an issue addressed through an independent constitutional analysis.[291]

This Section begins by explaining why materiality determinations should be based on the nature of the requirement at issue or information sought, rather than the magnitude of any particular voter's mistake. It goes on to show that courts have construed the term "materiality" to mean different things in different contexts. As used in the Materiality Provision, it should be interpreted as meaning "reasonably relevant," rather than "essential." This Section concludes by reviewing principles courts have applied in making materiality determinations. In particular, the Materiality Provision allows states to request information or impose other requirements aimed at confirming a person's identity or ensuring the accuracy of the identifying information a person provides.

1. The Object of Materiality

A threshold matter which few courts have expressly addressed is identifying the appropriate target of a materiality

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287. Nev. Dep't of Human Res. v. Gibbs, 538 U.S. 721, 737-38 (2003) (noting that the Court "has upheld certain prophylactic provisions of the Voting Rights Act as valid exercises of Congress' § 5 power"); *City of Boerne*, 521 U.S at 518 (discussing "Congress' power to enforce the Fourteenth and Fifteenth Amendments" by adopting "measures protecting voting rights . . . despite the burdens those measures placed on the States").

288. *See supra* Section II.A.

289. 52 U.S.C. § 10101(a)(2)(B).

290. Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1175 (11th Cir. 2008).

291. *See supra* note 257 and accompanying text.

inquiry. On the one hand, a court may focus on the state's mandates, assessing whether a particular piece of information that an election-related form requires or other instruction that the form contains is "material." From this perspective, the materiality of each instruction or requirement can be determined in the abstract, without regard to any particular person's response.

On the other hand, a court may instead consider whether the particular mistake a putative voter made in completing a form or the manner in which she violated an instruction is material. Under this approach, a court's main focus is not the reason for the state's request or instructions, but rather the nature, magnitude, or consequences of an applicant's error.[292] Of course, a court could also choose to construe the Provision broadly to encompass both inquiries.

The Eleventh Circuit has adopted the former interpretation, asking only whether "the information [sought] . . . is material to determining the eligibility of the applicant."[293] A state may reject an application if it contains even a minor mistake—such as omitted or transposed letters or digits—in material information the applicant is required to provide. Even seemingly small errors such as an incorrect street address or driver's license number could make it difficult or impossible for the state to confirm someone's identity by cross-referencing her voter registration data with other databases, lead someone to be registered at the wrong (or a non-existent) address, or make it difficult or impossible for election officials to contact the registrant. Moreover, if a potential voter has provided erroneous material information, the proper remedy seems to be for election officials to notify her of the error and ask her to correct it, rather than simply registering her despite lacking accurate information about a material matter. Thus, the Eleventh Circuit seems correct that the proper focus of a claim under the Materiality Provision is the nature of the information

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292. *See, e.g.*, *Fla. State Conf. of the NAACP*, 522 F.3d at 1181 (Barkett, J., dissenting) (arguing that the Materiality Provision is concerned not only with requests for irrelevant information but also with "requirements that ask for relevant information but disproportionately penalize applicants for trivial mistakes").

293. *Id.* at 1175 (majority opinion); *see also* League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2023 WL 6446015, at *17 (W.D. Ark. Sept. 29, 2023) (rejecting a Materiality Provision challenge to a state's requirement that voters submit their address and other identifying information when requesting or returning absentee ballots because such information is material to confirming their eligibility to vote, regardless of whether particular "errors or omissions" were minor).

requested rather than the magnitude of a particular voter's error.

2. Degree of Materiality

Another fundamental issue in applying the Materiality Provision is the ***degree*** of materiality that the statute requires. In other words, how important must a particular requirement be in determining a person's eligibility to vote? The term "material" is ambiguous and has been construed differently in various contexts.[294] Sometimes, as in constitutional criminal procedure and securities law, the bar is fairly high: information is material only if there is a "reasonable probability"[295] or "substantial likelihood"[296] that it would affect a particular decision. In other contexts, however, the term's meaning is much closer to mere relevance: information must simply be capable of influencing a determination to be material.[297]

Based on the Materiality Provision's legislative history and purpose,[298] the meaning of "materiality" in this context is much closer to the latter sense of the term. Congress adopted this Provision to eliminate irrelevant, hyper-technical, "picayune" requirements that southern states adopted pretextually or applied selectively to block African Americans from voting.[299] The examples Congress repeatedly discussed included requiring voters to circle certain terms instead of underlining them, use ink of a particular color, or calculate their exact age in months and days.[300] The Provision's legislative history does not suggest that Congress intended to allow states to request information or adopt other voting-related procedures only if they were absolutely essential to determining a person's

294. *See Fla. State Conf. of the NAACP*, 522 F.3d at 1173–74 ("Roughly speaking, there appears to be two kinds of 'materiality,' one similar to minimal relevance and the other similar to outcome-determinative."); Mi Familia Vota v. Fontes, 691 F. Supp. 3d 1077, 1098–99 (D. Ariz. 2023).

295. *Fla. State Conf. of the NAACP*, 522 F.3d at 1173 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)).

296. *Id.* (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)).

297. *Id.* (first quoting United States v. Gray, 367 F.3d 1263, 1272 n.19 (11th Cir. 2004); and then quoting United States v. Dedeker, 961 F.2d 164, 167 (11th Cir. 1992)).

298. *See* Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011) ("[C]lear evidence of congressional intent may illuminate ambiguous text."); *see also* Abramski v. United States, 573 U.S. 169, 188 n.10 (2014) (recognizing that a statute's "text, structure, history and purpose" can be used to resolve "ambiguity" within it).

299. *See supra* notes 102–08 and accompanying text.

300. *See supra* notes 103, 107 and accompanying text.

eligibility. Thus, the term "material" in this section of the Civil Rights Act most likely means "reasonably relevant."

3. Principles Governing Materiality

The Materiality Provision's text, structure, legislative history, and purpose, as well as many of the precedents that have applied it, suggest some general principles about its applicability. Most basically, any information which federal law requires a person to include on his voter registration form is deemed *per se* material for purposes of the Materiality Provision; states need not ignore errors or omissions on registration forms concerning such information.[301] As the Eleventh Circuit stated, Congress would not "mandate the gathering of information . . . that it also deems immaterial."[302] Applying that principle, the Eleventh Circuit held in *Florida State Conference of the NAACP v. Browning*[303] that a registrant's failure to provide his accurate drivers' license number, state identification card number, or the last four digits of his Social Security number on his voter registration form is a material mistake because the Help America Vote Act expressly requires states to collect that information from registrants.[304] The Materiality Provision should be read harmoniously with other provisions of federal law mandating that states collect certain information from people registering to vote.[305]

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301. *See Fla. State Conf. of the NAACP*, 522 F.3d at 1174 ("The fact that [the Help America Vote Act of 2002] requires states to obtain the applicant's identification numbers before accepting a registration application . . . indicates that Congress deemed the identification numbers material to determining eligibility to register and to vote."); Mi Familia Vota v. Fontes, 691 F. Supp. 3d 1077, 1100 (D. Ariz. 2023); League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2023 WL 6446015, at *16 (W.D. Ark. Sept. 29, 2023) (holding that a signature on a voter registration application is "material" because it is required by federal law).

302. *Fla. State Conf. of the NAACP*, 522 F.3d at 1174.

303. 522 F.3d 1153 (11th Cir. 2008).

304. *Id.* at 1174.

305. Some courts have gone further by suggesting that any violation of *state law* registration requirements must likewise be deemed *per se* material. *See* Vote.Org v. Callanen, 39 F.4th 297, 307 (5th Cir. 2022); *cf.* Vote.org v. Byrd, 700 F. Supp. 3d 1047, 1056 n.8 (N.D. Fla. 2023) (declining to reach the issue). Such reasoning goes too far. The point of the Materiality Provision is to ban states from preventing people from registering or voting based on irrelevant, technical errors. Admittedly, the Materiality Provision does not limit states' authority to establish the substantive eligibility requirements that people must satisfy to qualify as electors. *See supra* note 188 and accompanying text. These requirements, generally set forth in the state

Conversely, if a federal statute such as the Privacy Act prohibit states from requesting certain information on voter registration forms, then such information is necessarily immaterial.[306] In such cases, of course, the Materiality Provision provides alternate grounds for challenging a state requirement that is already prohibited on some other basis.

Another basic principle is that the Materiality Provision does not limit a state's ability to require people who wish to register to identify themselves accurately, attest that they satisfy each valid eligibility requirement established by state law, and provide supporting evidence concerning their eligibility.[307] Accordingly, a state generally may decline to register a person who fails to check one or more boxes on the registration form to affirm that he satisfies the state's eligibility requirements, such as being a U.S. citizen or not having been adjudicated mentally incompetent.[308] Such individual checkmarks may be required even when the person has signed a certification generally attesting to his overall eligibility.[309] One district court explained that "checking one or more check-boxes is not duplicative of signing the oath" because "the information conveyed" by individual, specific checkboxes "is

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constitution, concern a putative voter's personal characteristics such as citizenship, age, residency, mental capacity, felon status, and registration status. A state cannot use that authority to immunize procedural or other technical requirements for registering from scrutiny under the Materiality Provision simply by designating them voter eligibility "qualifications." *Vote.org*, 89 F.4th at 487 ("We reject that States may circumvent the Materiality Provision by defining all manner of requirements, no matter how trivial, as being a qualification to vote and therefore 'material.'").

306. Schwier v. Cox, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005) (holding that the Materiality Provision bars the state from requiring a person to provide her complete Social Security number to register to vote because the federal Privacy Act prohibits states from requesting that information), *aff'd*, 439 F.3d 1285 (11th Cir. 2006); *see also* Democratic Party of Va. v. Brink, 599 F. Supp. 3d 346, 356 (E.D. Va. 2022) ("Plaintiffs have alleged that the full SSN requirement may be unlawful under the U.S. Constitution or the Privacy Act. . . . If Plaintiffs prevail on those claims, then a voter's full SSN could not be considered material.").

307. States may likewise require voters to provide their name and address when requesting absentee ballots. Org. for Black Struggle v. Ashcroft, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020), *stay granted*, 978 F.3d 603 (8th Cir. 2020).

308. Mi Familia Vota v. Fontes, 961 F. Supp. 3d 1077, 1103 (D. Ariz. 2023) ("The Checkbox requirement does not violate the Materiality Provision as applied to individuals who submit a registration without [documentary proof of citizenship]."); Diaz v. Cobb, 435 F. Supp. 2d 1206, 1212, 1214 (S.D. Fla. 2006).

309. *Diaz*, 435 F. Supp. 2d at 1212–13; *see also Mi Familia Vota*, 691 F. Supp 3d at 1100 ("[E]ven assuming the checkbox on the Federal Form is duplicative of the oath, an applicant's failure to complete the checkbox is not an immaterial omission.").

different in nature from (albeit similar in content to) that conveyed" by a general signed certification.[310] Since the information sought by the checkboxes in that case directly related to voter eligibility, a voter's failure to mark them was "material as a matter of law."[311]

Moreover, the Materiality Provision does not require states to accept an applicant's self-certifications as conclusive. Rather, states may require people to prove that they satisfy each eligibility requirement, such as U.S. citizenship, to register.[312] "Requiring an individual to present proof of citizenship allows the State to determine if that individual is qualified to vote. Citizenship is material in determining whether an individual may vote and[,] . . . requir[ing] more proof than simply affirmation by the voter is not prohibited."[313] Accordingly, a Social Security number "likely is material to determining whether [an applicant is] qualified to vote because a full [Social Security number] can confirm a person's citizenship status."[314]

Procedurally, states may require an applicant to not only provide her correct, complete name on an application form but also sign the form to attest to its accuracy.[315] States may even require applicants to provide original, wet-ink signatures rather than allowing them to leave the signature space blank, type their name, or provide only a digital or other electronic

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310. *Diaz*, 435 F. Supp. 2d at 1212–13.

311. *Id.* at 1213.

312. Gonzalez v. Arizona, No. 2:06-cv-01268, 2007 WL 9724581, at *2 (D. Ariz. Aug. 28, 2007).

313. *Id.* at *2. Conversely, as discussed below, another Arizona federal court held that when a person provides documentary proof of citizenship with her application, the state may not reject it on the grounds that she failed to check the citizenship checkbox. *Mi Familia Vota*, 691 F. Supp 3d at 1100 ("The Checkbox Requirement violates the Materiality Provision when an applicant provides satisfactory evidence of citizenship."); *cf.* Boustani v. Blackwell, 460 F. Supp. 2d 822, 826–27 (N.D. Ohio 2006) (implying that the Materiality Provision bars states from requiring naturalized citizens to present their naturalization certificates when voting but invalidating such requirement on constitutional grounds instead).

314. Democratic Party of Va. v. Brink, 599 F. Supp. 3d 346, 356 (E.D. Va. 2022). The *Brink* Court went on to note, however, that the plaintiffs had nevertheless stated a valid claim under the Materiality Provision by alleging that the Privacy Act bars states from requiring people to provide their full Social Security number when registering to vote. *Id.*; *see also supra* note 306.

315. Johnson v. Byrd, 429 S.E.2d 923, 925 (Ga. 1993) ("By failing to sign their registration cards, the 43 individuals never took the oath required to qualify them as voters in this state and, therefore, they never became lawfully registered voters who were authorized to cast ballots."); *see also* League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2023 WL 6446015, at *17 (W.D. Ark. Sept. 29, 2023) (holding that states may require voters to sign their requests for absentee ballots).

signature.[316] As one court explained, "Physically signing a voter registration form and thereby attesting, under penalty of perjury, that one satisfies the requirements to vote carries a solemn weight that merely submitting an electronic image of one's signature via a web application does not."[317]

Conversely, courts have also identified principles for identifying immaterial requirements that the Civil Rights Act prohibits. For example, a state cannot refuse to register an applicant based on their "failure to provide information . . . that is not directly relevant to the question of eligibility."[318] Thus, the Provision bars states from requiring people to disclose where they were born as a condition of registering; such information—distinct from a person's citizenship status and the duration of their residency within the state—is irrelevant to their eligibility to vote.[319] As discussed in the next Subsection, courts have unfortunately disagreed over how this principle applies to state requirements aimed at confirming voters' identities or the accuracy of information voters supply.[320]

Courts have also held that the Materiality Provision prohibits states from asking for the same information in multiple places in the same submission.[321] Finally, some courts

316. Vote.org v. Callanen, 89 F.4th 459, 489 (5th Cir. 2023) (holding that Texas's requirement for an original signature on voter registration applications is "material" because it may deter fraudulent signatures in a way that an electronic signature may not); Vote.org v. Byrd, 700 F. Supp. 3d 1047, 1055–56 (N.D. Fla. 2023).

317. *Vote.org*, 700 F. Supp. 3d at 1055–56 (quoting Vote.Org v. Callanen, 39 F.4th 297, 308 (5th Cir. 2022)).

318. Diaz v. Cobb, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006); *see also* Fla. State Conf. of the NAACP v. Browning, 522 F.3d 1153, 1173 (11th Cir. 2008) (holding that the Materiality Provision prevents states from mandating submission of "trivial information" which "serve[s] no purpose other than as a means of inducing voter-generated errors that could be used to justify rejecting applicants").

319. Mi Familia Vota v. Fontes, No. 2:22-cv-00509, 2024 WL 2244338, at *2 (D. Ariz. May 2, 2024); Mi Familia Vota v. Fontes, 719 F. Supp. 3d 929, 994 (D. Ariz. 2024) ("The Court concludes that an individual's birthplace is not material to determining her eligibility to vote.").

320. *See infra* Section II.C.4.

321. *See* Mi Familia Vota v. Fontes, 691 F. Supp. 3d 1077, 1100 (D. Ariz. 2023) (holding that a state may not decline to register a person to vote on the grounds that he declined to check a box on his registration form attesting to U.S. citizenship where his application included documentary proof of citizenship); Ford v. Tenn. Senate, No. 2:06-cv-02031, 2006 WL 8435145, at *11 (W.D. Tenn. Feb. 1, 2006) (holding that requiring voters to sign both a ballot application and the poll book at a polling location violates the Materiality Provision due to redundancy); League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021) (holding that plaintiffs stated a valid claim under the Materiality

have suggested that a requirement likely cannot qualify as material if it does not apply to all voters.[322] Such a principle would make it impossible for states to change their voter registration forms to request new information that it does not also require all existing voters to provide in order to stay registered. Materiality is distinct from uniformity, however. Information may be relevant without being absolutely essential. The fact that a state does not retroactively impose a requirement on existing voters should not make it illegal for the state to seek such information from new registrants.[323]

4. Materiality as Applied to Voter Identification and Confirmation

The most serious disputes under the Materiality Provision, which have led to conflicting court rulings, involve states' attempts to confirm: (i) the accuracy of information that putative voters provide by matching it against outside

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Provision where state law required absentee voters to provide certain information multiple times and their ballots were rejected "on the basis of a mismatch or omission in one of the multiple documents they ha[d] provided"), *complaint dismissed*, 2023 WL 6446015 (W.D. Ark. Sept. 29, 2023); *see also In re* Canvass of Absentee & Mail-In Ballots of Nov. 3, 2000 Gen. Election, 241 A.3d 1058, 1074 n.5 (Pa. 2020) (three-Justice opinion) (stating that the Materiality Provision might prohibit a state from requiring voters to write their name and address on the declaration accompanying their absentee ballot if that information is already pre-printed on the outer return envelope).

322. *See Mi Familia Vota*, 719 F. Supp. 3d at 994 (holding that a person's place of birth was immaterial in part because the state did not require people who were already registered to retroactively provide that information); Martin v. Crittenden, 347 F. Supp. 3d 1302, 1308–09 (N.D. Ga. 2018) (holding that a county's practice of requiring voters to place their birthdate on absentee ballot envelopes was not material in part because "other Georgia counties [did] not require absentee voters to furnish such information"); *Ford*, 2006 WL 8435145, at *10–11 (holding that requiring voters at polling places to sign both a ballot application and the poll book violates the Materiality Provision in part because the law "has not been uniformly applied" by election officials in various counties); La Union del Pueblo Entero v. Abbott, 705 F. Supp. 3d 725, 755 (W.D. Tex. 2023) (holding that a requirement for new registrants to provide driver's license numbers or the last four digits of their Social Security numbers was not material in part because federal law did not require election officials to acquire such information from already-registered voters).

323. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 841 n.111 (S.D. Ind. 2006) (stating that the Materiality Provision does not require that a rule "be applied to all voters equally in order to be deemed 'material'"), *aff'd sub nom.*, Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *see also* Common Cause v. Thomsen, 574 F. Supp. 3d 634, 640 (W.D. Wis. 2021) (rejecting the argument "that information on an ID that is required by state law to vote isn't material to a voter's eligibility unless every form of voter ID requires the same information").

databases and (ii) voters' identities by requiring them to provide identifying information—potentially including information not directly related to voter eligibility—at multiple stages during the voting process to ensure that the person who registered is the same person who is requesting or casting a ballot.

As discussed earlier, the Materiality Provision is inapplicable to requests for information and other procedural requirements that a state adopts for reasons other than determining a person's voter qualifications.[324] Even if a court rejects that notion, however, information used to establish or confirm either a person's identity or the accuracy of the information he provides should be deemed material to establishing his eligibility to vote. The Materiality Provision should not categorically bar states from requiring potential voters to provide reasonable identifying information, mandating that such information match data contained within the voter registration database or other outside databases as appropriate, or requiring people to provide such information when requesting or returning a ballot to ensure that the person engaging in such activities actually is the eligible voter he claims to be.

Some courts have nevertheless held that, under the Materiality Provision, a state cannot require registered, eligible voters to include identifying information like their birthdate when returning their completed absentee ballots because, at that late stage in the electoral process, such information is not used to determine their eligibility to vote.[325] As a threshold matter, such holdings are likely erroneous because a birthdate is material to whether a voter meets the state's age requirements for voting, regardless of whether the state uses the information in that manner. Even aside from such

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324. *See supra* Section II.A.

325. *Martin*, 347 F. Supp. 3d at 1308–09 ("[A] voter's ability to correctly recite his or her year of birth on the absentee ballot envelope is not material to determining said voter's qualifications under Georgia law."); *see also id.* at 1309 ("[T]he qualifications of the absentee voters are not at issue because Gwinnett County elections officials have already confirmed such voters' eligibility through the absentee ballot application process."); Sixth Dist. of the Afr. Methodist Episcopal Church v. Kemp, 574 F. Supp. 3d 1260, 1282 (N.D. Ga. 2021) (holding that the plaintiffs had stated a valid claim under the Materiality Provision against a state law requiring voters to write their birthdates on absentee ballot applications and completed absentee ballots because such information allegedly was "not material in determining whether [an] individual is qualified . . . to vote in [a specific] election" (quoting 52 U.S.C. § 10101(a)(2)(B))).

technicalities, such information is relevant for a broader reason: a birthdate is a piece of personal identifying information that a state reasonably may use to confirm that the person who completed and returned the absentee ballot actually is the eligible voter she is claiming to be.

Some courts have similarly barred states from enforcing "matching" requirements. They have invalidated laws allowing election officials to accept voter registration applications only if the applicants' identifying information can be matched against databases from outside agencies such as the Social Security Administration, state department of motor vehicles, or state licensure boards.[326] Matching requirements have also been invalidated in the context of absentee ballot requests. In *La Union del Pueblo Entero v. Abbott*,[327] a Texas federal district court held that the Materiality Provision barred Texas from enforcing a state law requiring that a person correctly write his driver's license number, non-driver identification number, or the last four digits of his Social Security number on both the envelope of his application for a mail ballot in order to receive such a ballot, as well as the envelope of his completed mail ballot in order to have it accepted as valid and be counted.[328]

Again, these jurisdictions have erroneously reasoned that the Materiality Provision prohibits such requirements because the existence of such a match is not a substantive qualification that makes a person eligible to vote under state law.[329] The Texas court, for example, recognized that the numbers could be used to confirm a person's identity.[330] It nevertheless held that such a use is distinguishable from ascertaining "voters' substantive qualifications," which is the only thing the Materiality Provision permits states to do.[331] The court declared

326. Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 1270–71 (W.D. Wash. 2006) (holding that the Materiality Provision bars a state from requiring that information on a person's voter registration form match information in other databases because such matches are not "material in determining whether that person is qualified to vote under [state] law").

327. 705 F. Supp. 3d 725 (W.D. Tex. 2023).

328. *Id.* at 761–62.

329. *See, e.g.*, *id.* at 751–52 (holding that a voter identification number written on the envelope of an application for a mail-in ballot is not material to determining a person's eligibility to vote).

330. *Id.* at 754.

331. *Id.* The court further reasoned that possession of a driver's license or other identification number could not be a voter qualification because state law did not require a person to have such a number to register to vote or cast a ballot in person. *Id.* at 752. Moreover, individuals retain those numbers even if they later become disqualified from voting. *Id.*

that "confirm[ing]" a person's "identity [is] not material to determining whether the applicant or voter is qualified to vote or vote by mail."[332] Identity is intrinsically material to eligibility, however; the state has a substantial interest in ensuring that the particular person requesting or casting a ballot is the same person whom the state previously deemed eligible to vote.

Courts sometimes approach the issue from a different angle. They contend that the Materiality Provision bars states from requiring voters to provide identifying information on their absentee ballot request forms or with their completed ballots because they already provided that information with their voter registration applications. From this perspective, the information is not material to a person's eligibility to vote because the state already possesses the information and has already determined the voter's eligibility.[333] For example, in *La Union del Pueblo Entero*, for example, the Texas federal district court held that the Materiality Provision barred the state from requiring people to write identifying numbers on their applications for mail ballots because the state already had that information in its voter registration records.[334] The court explained that the state cannot "require voters to recite redundant information that confirms a known identity, even as a prophylactic against voter impersonation."[335] Opinions such as *La Union del Pueblo Entero* are based on inaccurately narrow conceptions of "materiality" and "eligibility."

A driver's license or other identifying number is typically not a voter eligibility requirement under state law. However, such numbers enable election officials to confirm that the person seeking to obtain or return a mail ballot actually is the eligible person who previously registered to vote.[336] In that sense, such information *is* material to determining the eligibility of the individual requesting or returning a ballot. The eligibility determination is not made directly, by assessing whether that individual satisfies the state's voter qualification standards.

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332. *Id.* at 755.

333. *See supra* note 321 and accompanying text (discussing the Materiality Provision's anti-redundancy principle).

334. *La Union del Pueblo Entero*, 705 F. Supp. 3d at 754.

335. *Id.* at 755; *see also id*. ("[T]he provision of the ballot itself indicates that the voter has already been identified and found qualified by an election official.").

336. *Cf.* Vote.org v. Callanen, 89 F.4th 459, 489 (5th Cir. 2023) (rejecting a Materiality Provision challenge to Texas's requirement for a wet-ink signature when registering to vote due in part to the "substantial State interest in assuring that those applying to vote are who they say they are").

Instead, the eligibility determination is made indirectly, by confirming that the individual is the same person who previously satisfied the state's voter qualification standards.

Accordingly, when the state requests the same identifying information—such as a driver's license or other such number—at multiple points in time, the information does not become immaterial or redundant simply because the state already possesses it. To the contrary, the state's possession of such information is what enables the state to indirectly confirm the eligibility of a person wishing to vote. Thus, a request for identifying information is material to determining a person's eligibility on each distinct occasion on which election officials must confirm that person's identity.[337]

For these same reasons, states may similarly require voters to provide photo identification to confirm their identity[338] and limit the types of identification cards permitted.[339] As one

337. *See* League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2023 WL 6446015, at *17 (W.D. Ark. Sept. 29, 2023) (holding that the state may require voters to provide their names, addresses, and birthdates "at multiple stages in the absentee voting process to confirm that voters are qualified, remain qualified, and are the same people who have already been qualified"), *complaint dismissed*, 2023 WL 6446015 (W.D. Ark. Sept. 29, 2023); Ball v. Chapman, 289 A.3d 1, 28 (Pa. 2023) (three-Justice opinion) (stating that signature requirements for absentee ballots "likely could be upheld" under the Materiality Provision because a signature "serves as a means of verifying that the individual who fills out information on a ballot or record is indeed the individual who is qualified and registered to vote"); *see also* Liebert v. Millis, No. 3:23-cv-672, 2024 WL 2078216, at *18 (W.D. Wis. May 9, 2024) (holding that a witness requirement for absentee ballots is material to ensuring that the voter is qualified because it "is one reasonable method" of "ensur[ing] that absentee voters are who they say they are . . . . in a setting where no election officials or poll workers are present to monitor the process"); Martin v. Crittenden, 347 F. Supp. 3d 1302, 1308 n.4 (N.D. Ga. 2018) (holding that the state may require voters to write their names and addresses on the return envelopes for completed absentee ballots to confirm their eligibility); *cf.* Howlette v. City of Richmond, 485 F. Supp. 17, 22–23 (E.D. Va. 1978) (holding that the Materiality Provision allows states to require that signatures on petitions for bond referenda be notarized because notarization "provide[s] an additional, neutral witness to the signing, further aiding the [government] in discouraging and prosecuting fraud and misrepresentation"), *aff'd*, 580 F.2d 704 (4th Cir. 1978).

338. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006) (holding that the Materiality Provision does not ban states from requiring photo identification to vote because "verifying an individual's identity is a material requirement of voting" and "the state may establish procedures to verify this requirement"), *aff'd sub nom.*, Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *see also League of Women Voters of Ark.*, 2023 WL 6446015, at *17 ("Identity, insofar as it can be established with otherwise material information, is not immaterial to an absentee voter's qualifications.").

339. *Ind. Democratic Party*, 458 F. Supp. at 842; *Crawford*, 472 F.3d at 954.

district court explained, each feature of a photo identification card performs an important function:

> The photo allows poll workers to compare the individual's face to the identification tendered to ensure the individual is who he/she professes to be; the expiration date is relevant to the reliability of the identification presented; and the governmental limitations on the sources of permissible identification also help[] ensure that the identification card utilized by a voter is reliable.[340]

Thus, if courts broadly apply the Materiality Provision throughout all stages of the electoral process, they should adopt similarly broad—and accurate—conceptions of "materiality" and "eligibility." They should recognize that, when a person registers to vote, a state's ability to match their identifying information against other databases is material to confirming the accuracy of the information provided and, therefore, their eligibility. Likewise, when a person requests or returns a ballot, the identifying information she provides is material to confirming that she is the eligible voter she claims to be—even though the state already possesses it.

III. SUING FOR MATERIALITY VIOLATIONS

A threshold issue implicated in all private litigation under the Materiality Provision is whether plaintiffs other than the United States may sue to enforce it. In recent years, the Supreme Court has greatly limited private enforcement of federal statutes.[341] This doctrinal shift has become particularly salient in the context of voting rights. After decades of nearly unquestioned private enforcement of section 2 of the VRA, the U.S. Court of Appeals for the Eighth Circuit recently held that it does not give rise to a private right of action.[342] Accordingly,

340. *Ind. Democratic Party*, 458 F. Supp. 2d at 841–42.

341. *See* Gonzaga Univ. v. Doe, 536 U.S. 273, 284–85 (2002); Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

342. Ark. State Conf. of the NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206 (8th Cir. 2023), *reh'g den'd en banc*, 91 F.4th 967 (8th Cir. 2024). The ruling did not address whether plaintiffs may sue to enforce section 2 under 42 U.S.C. § 1983. *Id.* Many other courts, in contrast, have held that private plaintiffs may enforce section 2 either through an implied right of action or pursuant to § 1983. *See, e.g.*, Robinson v. Ardoin, 86 F.4th 574, 588 (5th Cir. 2023); Ala. State Conf. of the NAACP v. Alabama 949 F.3d 647, 651–52 (11th Cir. 2020), *vacated as moot*, 141 S. Ct. 2618 (2021); Ford v. Strange, 580 F. App'x 701, 705 n.6 (11th Cir. 2014) (per curiam); Mixon v. Ohio, 193 F.3d 389, 406 (6th Cir. 1999).

private plaintiffs in that circuit may not sue directly under section 2 for alleged violations.[343] It is reasonably debatable whether the Materiality Provision gives rise to an implied private right of action. Private plaintiffs may enforce it, however, by suing under 42 U.S.C. § 1983.[344]

A. *Private Rights of Action*

It is doubtful that the Materiality Provision creates an implied private right of action. While some courts have been willing to allow private plaintiffs to sue directly under the Provision,[345] numerous others have barred them from doing so.[346] One federal court contends that "[t]he majority of courts to address this issue have held that private plaintiffs . . . lack standing to enforce such suits."[347]

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343. *Ark. State Conf. of the NAACP*, 86 F.4th at 1206.

344. *See infra* Section III.B.

345. *See, e.g.*, Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1371 (N.D. Ga. 2005) ("Plaintiffs may assert a private right of action under § 1971 for the alleged voting rights violations at issue.").

346. *See, e.g.*, McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000) ("Section 1971 is enforceable by the Attorney General, not by private citizens."); Ne. Ohio Coal. for the Homeless v. Husted, No. 2:06-cv-00896, 2016 WL 3166251, at *53 (S.D. Ohio June 7, 2016), *aff'd in relevant part and rev'd in part on other grounds*, 837 F.3d 612 (6th Cir. 2016); Dekom v. New York, No. 2:12-cv-01318, 2013 WL 3095010, at *18 (E.D.N.Y. June 18, 2013), *aff'd*, 583 F. App'x 15 (2d Cir. 2014); Hayden v. Pataki, No. 1:00-cv-08586, 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004) (holding that the Materiality Provision "does not provide for a private right of action"), *aff'd on other grounds*, 449 F.3d 305 (2d Cir. 2006) (en banc), *clarified by*, 449 F.3d 305 (2d Cir. 2006) (en banc); McKay v. Altobello, No. 2:96-cv-03458, 1996 WL 635987, at *2 (E.D. La. Oct. 31, 1996); Williams v. Shelby Cnty. Election Comm'n, No. 2:08-cv-02506, 2009 WL 2905919, at *3 (W.D. Tenn. Sept. 4, 2009) (holding that § 1971(a)(2) does not create a private right of action and is enforceable only by the Attorney General).

347. Thrasher v. Ill. Republican Party, No. 4:12-cv-04071, 2013 WL 442832, at *4 n.2 (C.D. Ill. Feb. 4, 2013) (recognizing that a majority of courts have failed to recognize a private right of action, but not ruling on the question). Many other courts have noted the issue without resolving it. *See, e.g.*, Pa. State Conf. of NAACP Branches v. Sec'y Pa., 97 F.4th 120, 129 n.5 (3d Cir. 2024) (assuming without deciding that the Materiality Provision creates an implied private right of action), *reh'g denied en banc*, No. 23-3166, 2024 WL 3085152, at *1 (3d Cir. Apr. 30, 2024); Ray v. Abbott, 261 F. App'x 716, 718 n.1 (5th Cir. 2008); Broyles v. Texas, 618 F. Supp. 2d 661, 697 n.11 (S.D. Tex. 2009), *aff'd on other grounds sub nom.*, Broyles v. Texas *ex rel.* Abbott, 381 F. App'x 370 (5th Cir. 2010); Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 842 n.112 (S.D. Ind. 2006), *aff'd sub nom.*, Crawford v. Marion Cnty. Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); Towers v. Unified Gov't of Wyandotte Cnty., No. 5:21-cv-04089, 2022 WL 21778528, at *4 (D. Kan. Mar. 9, 2022), *adopted by* 2022 WL 21778525 (D. Kan. Apr. 7, 2022); Dicks v. Hawaii Off. of Elections, No. 1:22-cv-00347, 2022 WL 3786808, at *6 (D. Haw. Aug. 30, 2022).

When Congress adopted the Materiality Provision in 1964, the Court was quite willing to recognize implied rights of action and Congress likely legislated against that backdrop.[348] Under that liberal standard, the Court held that Sections 5[349] and 10[350] of the VRA created implied rights of action. In the 1969 case *Allen v. State Board of Elections*,[351] the Court recognized an implied right of action to sue for violations of section 5's preclearance requirements because relying solely on the Department of Justice's limited enforcement staff would undermine the VRA's broad remedial purpose of preventing racial discrimination in voting.[352] Of course, this logic would likely apply to virtually any federal law.

In 1996, a majority of Justices on the Court extended this reasoning to section 10 of the VRA in *Morse v. Republican Party*.[353] The *Morse* Court further pointed out that the Attorney General did not oppose private enforcement of that provision.[354] And Congress itself had implicitly endorsed private litigation by reauthorizing the VRA without amending the law to eliminate private rights of action.[355]

In the 2001 case *Alexander v. Sandoval*,[356] however, the Supreme Court established a much more demanding two-prong test for determining whether a federal law may be enforced through an implied private right of action.[357] Emphasizing that only Congress has the constitutional authority to create "private rights of action to enforce federal law,"[358] *Sandoval* held that a plaintiff cannot sue for violations of a federal statute

348. *See* Morse v. Republican Party of Va., 517 U.S. 186, 231 (1996) (plurality opinion) (citing Allen v. State Bd. of Elections, 393 U.S. 544 (1969)); *see, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose [underlying a federal law]."), *abrogated by* Alexander v. Sandoval, 532 U.S. 275, 276 (2001).

349. Allen v. State Bd. of Elections, 393 U.S. 544, 555 (1969) (citing 42 U.S.C. § 1973c).

350. *Morse*, 517 U.S. at 230–31 (citing 42 U.S.C. § 1973h).

351. 393 U.S. 544 (1969).

352. *Id.* at 556 ("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.").

353. 517 U.S. 186, 231–32 (1996) (plurality opinion); *id*. at 240 (Breyer, J., concurring).

354. *Id.* at 231–32 (plurality opinion).

355. *Id.* at 232.

356. 532 U.S. 275 (2001).

357. *Id.* at 286.

358. *Id.*

unless he shows that Congress intended for that provision to create both a "private right" and a "private remedy."[359]

Regarding the first element, the Court requires the statute to contain "'rights-creating' language."[360] Generally speaking, to create private rights, a statute's language must focus on the individual or individuals to be protected.[361] In contrast, statutory provisions that center on the governmental agencies charged with preventing specified harms are unlikely to give rise to private rights.[362] Similarly, "[s]tatutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'"[363]

Even if a statute creates private rights, a plaintiff must also show that Congress intended to establish a private remedy.[364] One of the most important pieces of circumstantial evidence of Congress's intentions in this regard is whether it established other methods of enforcing the right at issue.[365] The creation of particular remedies "suggests that Congress intended to preclude others."[366]

The Court would most likely apply *Sandoval*'s new standard in determining whether a private right of action exists under the Materiality Provision, even though Congress enacted the Provision decades before *Sandoval* in 1964. *Sandoval* itself dismissed the likelihood that earlier Congresses, relying on pre-*Sandoval* precedents, assumed that the laws they passed would be privately enforceable.[367] Rather, the *Sandoval* Court held that its new two-prong test applies to almost all statutes, regardless of when they were adopted.[368]

Both *Allen* and *Morse* were decided pre-*Sandoval*, so their precedential value is unclear. And both of them involved the VRA, while *Sandoval* concerned Title VI of the Civil Rights Act.[369] Even if the Court continues to be lenient in recognizing implied rights of action under the VRA, *Sandoval* suggests that such preferential treatment does not carry over to the Civil

359. *Id.*
360. *Id.* at 288 (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 690 n.13 (1979)).
361. Cannon v. Univ. of Chi., 441 U.S. 677, 690 n.13 (1979).
362. *See Sandoval*, 532 U.S. at 289.
363. *Id.* at 289 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).
364. *Id.* at 286.
365. *Id.* at 290.
366. *Id.*
367. *Id.* at 287–88.
368. *Id.*
369. *Id.* at 278 (citing 42 U.S.C. § 2000d-1).

Rights Act. Applying the *Sandoval* standard at face value, it is unclear whether the Materiality Provision creates an implied private right of action.

The Materiality Provision's language is likely sufficiently rights-creating to satisfy *Sandaval*'s first requirement. The Provision states, "No person acting under color of law shall . . . deny the *right of any individual to vote* in any election because of an [immaterial] error or omission on any record or paper relating to any application, registration, or other act requisite to voting."[370] This sentence is aimed at potential wrongdoers and structured around the particular misconduct Congress sought to prevent. Nevertheless, the Materiality Provision expressly recognizes and seeks to protect the "right to vote" of any "individual."[371] Accordingly, the Materiality Provision likely contains sufficient rights-creating language to give rise to an implied right of action.[372]

Sandoval's second prong—whether Congress affirmatively intended to create an implied private remedy—presents a tougher question. Again, circumstantial evidence is conflicting. The overall statutory structure of § 10101, where the Materiality Provision is codified, appears to contemplate private enforcement. The Civil Rights Act of 1964 inserted the Materiality Provision into a statutory subsection of the U.S. Code which was subject to the following mandate:

> 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.[373]

The phrase "the party aggrieved" typically applies only to private parties and not the Attorney General or the United States in its capacity as a sovereign.[374] Accordingly, several

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370. 52 U.S.C. § 10101(a)(2)(B) (emphasis added).

371. *Id.*

372. *See* Schwier v. Cox, 340 F.3d 1284, 1296 (11th Cir. 2003) ("[T]he focus of the text is . . . the protection of each individual's right to vote."); Mi Familia Vota v. Fontes, 719 F. Supp. 3d 929, 990 (D. Ariz. 2024).

373. 52 U.S.C. § 10101(d) (emphasis added).

374. Vote.org v. Callanen, 89 F.4th 459, 475 (5th Cir. 2023); Tex. Democratic Party v. Hughs, 474 F. Supp. 3d 849, 859 (W.D. Tex. 2020), *rev'd in part on other grounds*, 860 F. App'x 874 (5th Cir. 2021); *see also Schwier*, 340 F.3d at 1296 (agreeing that § 1971(d)'s elimination of administrative exhaustion requirements

courts have held that this phrase reveals Congress's intent that the Materiality Provision be privately enforceable.[375]

This jurisdictional grant was enacted as 42 U.S.C. § 1971(d) in the Civil Rights Act of 1957, well before the Materiality Provision was adopted.[376] Congress therefore could not have adopted this language to empower private parties to sue under the Materiality Provision. Rather, it passed this subsection to eliminate potential roadblocks to lawsuits under the express cause of action that § 1971 had previously established for racial discrimination regarding voting rights, and perhaps also any new cause of action that the 1957 Act may have created to ban intimidation and coercion concerning federal elections.[377] Of course, several years later, Congress chose to incorporate the Materiality Provision within § 1971, making it subject to this proviso. It can reasonably be argued that Congress's choice to codify the Materiality Provision within a statutory section which waived exhaustion requirements for aggrieved parties is evidence of its intent that the Provision be privately enforceable.

Conversely, the major piece of circumstantial evidence that weighs against implying a private remedy stems from another amendment that the Civil Rights Act of 1957 made to § 1971. The 1957 Act adopted 42 U.S.C. § 1971(c), which stated:

> Whenever any person has engaged . . . 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 preventive relief . . . . In any proceeding hereunder the United States shall be liable for costs the same as a private person.[378]

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suggests that private parties may sue under § 1971's other provisions); Migliori v. Cohen, 36 F.4th 153, 160 (3d Cir. 2022) ("[T]his section specifically contemplates an aggrieved party (i.e., private plaintiff) bringing this type of claim in court."), *stay denied sub nom.*, 142 S. Ct. 1824 (2022), *judgment vacated and remanded sub nom.*, Ritter v. Migliori, 143 S. Ct. 297 (2022).

375. *See, e.g.*, *Schwier*, 340 F.3d at 1296.

376. Pub. L. No. 85-315, § 131(c), 71 Stat. 634, 637 (Sept. 9, 1957) (codified at 42 U.S.C. § 1971(d), subsequently recodified as, 52 U.S.C. § 10101(d)).

377. *See infra* notes 382–410 and accompanying text.

378. Pub. L. No. 85-315, § 131(c), 71 Stat. 634, 637 (Sept. 9, 1957) (codified at 42 U.S.C. § 1971(c), *subsequently recodified as*, 52 U.S.C. § 10101(c)).

On its face, Congress's decision to expressly authorize the Attorney General to enforce § 1971(a) and (b) could reasonably be interpreted as implicitly excluding private enforcement. Several courts, however, have held that Congress's grant of such enforcement authority was not intended to preclude private rights of action.[379]

The 1957 Act's legislative history presents a complicated picture as to whether Congress intended § 1971(c) to implicitly bar private enforcement of § 1971's other provisions, which would later include the Materiality Provision. When Congress passed the 1957 Act, § 1971 contained only a single provision, which traced back to the Enforcement Act of 1870; it largely reiterated the Fifteenth Amendment's prohibition on racial discrimination with regard to voting rights.[380] Private parties had successfully sued to enforce § 1971 on numerous occasions.[381] Part IV of the Civil Rights Act of 1957 recodified that prohibition as § 1971(a) and added a new subsection, § 1971(b), making it illegal to "intimidate, threaten, [or] coerce" any person to interfere with her right to vote for federal offices.[382] The 1957 Act also contained § 1971(c)—quoted above—authorizing the Attorney General to sue to enforce both § 1971(a) and (b).[383]

The legislative history explicitly establishes that Congress did not intend for § 1971(c)'s authorization of Attorney General enforcement to prevent private parties from continuing to sue under § 1971(a)'s existing prohibition against racial discrimination in voting.[384] Attorney General Herbert

379. *See, e.g.*, *Tex. Democratic Party*, 474 F. Supp. 3d at 859.

380. Act of May 31, 1870, ch. 114, § 1, 16 Stat. 140, 140 (subsequently codified as REV. STAT. § 2004 and 42 U.S.C. § 1971). This provision is one of the only parts of the Enforcement Act to escape repeal after Reconstruction ended. Michael T. Morley, *The Enforcement Act of 1870, Federal Jurisdiction Over Election Contests, and the Political Question Doctrine*, 72 FLA. L. REV. 1153, 1173 (2020) (citing Act of Feb. 8, 1894, ch. 25, § 1, 28 Stat. 36, 36).

381. *See* Schwier v. Cox, 340 F.3d 1284, 1295 (11th Cir. 2003) (discussing such enforcement); *Tex. Democratic Party*, 474 F. Supp. 3d at 858.

382. Civil Rights Act of 1957, Pub. L. No. 85-315, § 131(b)–(c), 71 Stat. 634, 637 (codified at 42 U.S.C. § 1971(a)–(b), *subsequently recodified as*, 52 U.S.C. § 10101(a)–(b)).

383. *Id.* § 131(c), 71 Stat. at 637 (codified at 42 U.S.C. § 1971(c), *subsequently recodified as*, 52 U.S.C. § 10101(c)).

384. *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 S. Comm. on the Judiciary*, 85th Cong. 57 (1957) [hereinafter, *Senate Subcomm. Hearing on Civil Rights Act of 1957*].

Brownell, Jr., who had sought this authority, repeatedly emphasized before the Senate Subcommittee on Constitutional Rights that private litigants currently could sue under § 1971 to challenge racial discrimination with regard to voting rights.[385] He cited several examples of "present Federal practice in . . . election cases where the plaintiff is a private individual."[386] Brownell explained that the 1957 Act would allow the Government to seek the same remedies for violations of § 1971 that were already available to private parties.[387]

It is somewhat more ambiguous, however, whether Congress intended to create an implied right of action to allow private plaintiffs to enforce § 1971(b)'s new ban on coercion, or it instead wished for lawsuits by the Attorney General under § 1971(c) to be the only enforcement mechanism for § 1971's restrictions other than § 1971(a). The following exchange suggests that the new anti-coercion provision would be enforceable through an implied right of action:

> Senator Ervin: . . . . [U]nder these amendments the Federal courts will never be given an opportunity to pass on any of these matters until after the Attorney General has exercised his discretion and decided whether or not these remedies should be invoked.
>
> Mr. Brownell: Well, of course, the private citizen can bring a suit but in the public action, a Government action, the Attorney General . . . starts the ball

385. *Id.* (statement of Herbert Brownell, Jr., Att'y Gen. of the United States) ("[A]t the present time a private individual can go into Federal court, and does every year, in this very area of civil rights, and gets injunctive relief. It is only that we are asking that the Government should have this right."); *cf.* H.R. REP. NO. 84-2187, at 13–14 (1956) (statement of Herbert Brownell, Jr., Att'y Gen. of the United States) (explaining the proposed legislation would "eliminat[e] . . . the requirement that all State administrative and judicial remedies must be exhausted before access can be had to the Federal court"); *accord* H.R. REP. NO. 85-291, at 15 (1957) (statement of Herbert Brownell, Jr., Att'y Gen. of the United States).

386. *Senate Subcomm. Hearing on Civil Rights Act of 1957*, *supra* note 384, at 66 (statement of Herbert Brownell, Jr., Att'y Gen. of the United States); *see also Hearings on Miscellaneous Bills Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 85th Cong. 591 (1957) [hereinafter, *House Subcomm. No. 5 Hearing on Civil Rights Act of 1957*] (statement of Herbert Brownell, Jr., Att'y Gen. of the United States) ("In the civil rights field itself, we have numerous statutes which authorize private persons to seek civil remedies.").

387. *Senate Subcomm. Hearing on Civil Rights Act of 1957*, *supra* note 384, at 66 ("[W]here the plaintiff is a private individual, it works very well to use this equitable injunction . . . and we are asking that Uncle Sam be given the same equitable remedies that private individuals now have.").

> rolling . . . .
>
> Senator Ervin: But until the Attorney General makes the initial decision the other 160 million people in the United States . . . . are not required to be heard.
>
> Mr. Brownell: They can start their own suits, Senator, under the existing law.[388]

Other parts of the colloquy, in contrast, appear to raise the possibility that only the Attorney General could enforce the new provisions. For example, Senator Ervin declared, "[W]hether or not the provisions of parts 3 and 4[389] will ever come into operation insofar as bringing of suits is concerned, is dependent first of all upon the decision of one man, to wit, the temporary occupant of the Office of the Attorney General of the United States."[390] Attorney General Brownell agreed, stating, "The Attorney General authorizes the suit to be brought, that is correct."[391]

Senator Ervin and Brownell then distinguished the existing § 1971, which created an implied private right of action, from the proposed amendments in the Civil Rights Act of 1957. Senator Ervin acknowledged that private enforcement was available "[u]nder existing law."[392] He emphasized, however, that he wished to "talk[] about the changes" the Attorney General was advocating through the Civil Rights Act of 1957.[393] Senator Ervin asked, "The power to put parts 3 and 4 of this bill in motion"—including § 1971(b)'s new anti-coercion amendment—"is confided by this bill to 1 man, namely, the temporary occupant of the Office of Attorney General to the exclusion of the other 160 million Americans; isn't it?"[394] Brownell agreed, stating that enforcement would be his statutory responsibility.[395]

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388. *Id.* at 69–70.

389. As noted earlier, the 1957 Act's new prohibition on coercion in federal elections, 42 U.S.C. § 1971(b), was contained in Part IV of the legislation. *See* Civil Rights Act of 1957, Pub. L. No. 85-315, § 131(c), 71 Stat. 634, 637 (codified at 42 U.S.C. § 1971(b), *subsequently recodified as*, 52 U.S.C. § 10101(b)).

390. *Senate Subcomm. Hearing on Civil Rights Act of 1957*, *supra* note 384, at 70 (statement of Sen. Samuel James Ervin, Jr.).

391. *Id.* (statement of Herbert Brownell, Jr., Att'y Gen. of the United States).

392. *Id.* (statement of Sen. Samuel James Ervin, Jr.).

393. *Id.*

394. *Id.*

395. *Id.* (statement of Herbert Brownell, Jr., Att'y Gen. of the United States).

The following exchange then occurred, expressly reiterating that the Attorney General would be solely responsible for enforcing the new prohibitions:

> Senator Ervin: . . . . [U]nder the proposed amendments set forth in parts 3 and 4, the question of whether or not the powers conferred upon the Attorney General of the United States by those amendments shall be exercised are confided to the sole power of one individual . . . to the exclusion of every other human being in the United States; isn't that right?
>
> Mr. Brownell: Well, the powers that are imposed upon the Attorney General by the statute, he would exercise them; yes. . . . [T]he Attorney General's only function here is the one which is given to him by Congress to start proceedings in this area.[396]

Attorney General Brownell went on to declare yet again that the bill was not eliminating private plaintiffs' existing ability to sue to enforce § 1971, but he did not comment on whether the new § 1971(b) similarly included an implied private right of action:

> Senator Ervin: . . . . Under this bill not a single one of any of the inhabitants of the United States of America could exercise any power to put parts 2 and 3 [(this is likely a typo or misstatement and should read "parts 3 and 4"[397])] in motion according

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396. *Id.* at 71 (statements of Sen. Samuel James Ervin, Jr. & Herbert Brownell, Jr., Att'y Gen. of the United States).

397. Throughout these discussions, the parties had focused solely on Parts III and IV of the bill. *See, e.g.*, *id.* at 73 (statement of Sen. Samuel James Ervin, Jr.). Part II did not create any new prohibitions or allow the Government to sue for anything; rather, it was a brief provision establishing the position of Assistant Attorney General for Civil Rights. Civil Rights Act of 1957, S. 83, 85th Cong. § 111 (introduced in Senate Jan. 3, 1957).

At the time of the Attorney General's testimony, Part III of S. 83 would have amended 42 U.S.C. § 1985 to allow the Attorney General to sue to enforce that statute's prohibitions against certain conspiracies to impede federal officials or judicial proceedings or to deprive people of their right to equal protection of the laws. Civil Rights Act of 1957, S. 83, 85th Cong. § 121 (introduced in Senate Jan. 3, 1957). The Government sought this amendment because each of § 1985's prohibitions was enforceable only through express private rights of action created by that provision. *See* 42 U.S.C. § 1985. The Senate later amended Part III of S. 83 to remove this new grant of authority. *See* 103 CONG. REC. 12564–65 (July 24, 1957). Accordingly, the Civil Rights Act of 1957 did not authorize public enforcement of § 1985, *see* Civil

> to the amendments except the one man who occupies the Office of Attorney General.
>
> Mr. Brownell: Well, you see if this program passes[,] . . . it amends the statute and the parts of the statute that are already on the books are still a part of that statute. . . . They provide that ***some of these actions*** can be brought by private individuals. That stays in the law. This is not a substitute for that. This is an addition to that. So that it would not be accurate to say under the statute . . . proposed to be amended . . . that the Attorney General would be the only one to take the action. We are not taking away the right of the individual to start his own action. That still stays in the law.[398]

Thus, Attorney General Brownell emphasized that private parties would retain their ability to enforce existing provisions without addressing whether they could likewise sue under the new anti-coercion amendment.[399]

Senator Ervin then shifted the discussion specifically to Part III of the bill,[400] which would have empowered the Attorney General to enforce 42 U.S.C. § 1985's prohibitions against various types of conspiracies.[401] Section 1985 already established an express private right of action to allow injured parties to recover damages for such conspiracies.[402] Brownell reiterated that, even with the proposed amendment to Part III, "[p]rivate individuals" would retain their ability to sue for violations "based on the same set of facts" as the Attorney General.[403] Upon further questioning, he responded in broad

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Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, and that provision currently remains enforceable only by private parties, *see* United States v. City of Philadelphia, 644 F.2d 187, 195, 197 (3d Cir. 1980); *see also supra* note 382 and accompanying text (discussing Part IV of the Civil Rights Act of 1957).

398. *Senate Subcomm. Hearing on Civil Rights Act of 1957*, *supra* note 384, at 71 (emphasis added).

399. *Id.* at 70–71 (statements of Sen. Samuel James Ervin, Jr. & Herbert Brownell, Jr., Att'y Gen. of the United States).

400. *Id.* at 71–72 (statement of Sen. Samuel James Ervin, Jr.).

401. Civil Rights Act of 1957, S. 83, 85th Cong. § 111 (introduced in Senate Jan. 3, 1957) (proposed amendments to 42 U.S.C. § 1985).

402. *See* 42 U.S.C. § 1985.

403. *Senate Subcomm. Hearing on Civil Rights Act of 1957*, *supra* note 384, at 72 (statement of Sen. Samuel James Ervin, Jr.); *see also House Subcomm. No. 5 Hearing on Civil Rights Act of 1957*, *supra* note 386, at 599 (statements of Rep. Emanuel Celler, Chairman, H. Comm. on the Judiciary & Herbert Brownell, Jr., Att'y Gen. of the United States).

language that appeared to extend beyond Part III:

> Under the laws amended if this program passes, private people will ***retain the right they have now*** to sue in their own name and the Attorney General will have the additional right which he does not now have to bring on behalf of the United States for the protection of its citizens the new . . . remedial actions.[404]

He did not mention private litigants obtaining the ability to bring any new causes of action for violations of the bill's new substantive restrictions.

The committee reports accompanying the 1957 Act do not resolve this uncertainty. Two different reports from the House Judiciary Committee expressly declare that the bill's new anti-intimidation provision, § 1971(b), "does not provide for a remedy."[405] These statements appear to flatly contradict the notion that § 1971(b) established an implied private right of action. Further, the committee reports noted that the bill's next paragraph "provide[s] a remedy in the form of a civil action instituted on the part of the Attorney General."[406] This express discussion of public enforcement appears to further preclude recognition of a private right of action.

Conversely, those committee reports also observed that "the rights legislatively declared in [42 U.S.C. § 1971] have been enforced" through suits under 42 U.S.C. § 1983, and they cited some cases as examples.[407] The earlier of the two reports, from May 1956, went on to emphasize that "[t]he basic democratic

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404. *Senate Subcomm. Hearing on Civil Rights Act of 1957*, *supra* note 384, at 73 (statement of Herbert Brownell, Jr., Att'y Gen. of the United States) (emphasis added). Senator Ervin later read the relevant language from Part III to the Attorney General, commenting that it "is substantially in the same words as subsection (c) of part 4." *Id.* (statement of Sen. Samuel James Ervin, Jr.). The Attorney General again stated that "private persons retain their rights under the existing law which would be part of the amended law and the part that you have read there gives the United States Government . . . an additional right to also start actions." *Id.* at 74 (statement of Herbert Brownell, Jr., Att'y Gen. of the United States).

405. H.R. REP. NO. 85-291, at 11 (1957); *accord* H.R. REP. NO. 84-2187, at 9 (1956) ("There is no remedy provided in this subsection.").

406. H.R. REP. NO. 85-291, at 11 (1957); *accord* H.R. REP. NO. 84-2187, at 9 (1956) ("However, the succeeding subsection, designated (c), provides a civil action at the behest of the Attorney General to redress or prevent deviations from the requirements of subsections (a) and (b).").

407. H.R. REP. NO. 84-2187, at 9 (1956) (citing Chapman v. King, 154 F.2d 460 (5th Cir. 1946); and then citing Brown v. Baskin, 80 F. Supp. 1017 (D.S.C. 1948), *aff'd*, 174 F.2d 391 (4th Cir. 1949)); *accord* H.R. REP. NO. 85-291, at 12 (1957).

right to vote can never be too securely protected. ***Every possible shield*** should be employed to guarantee its inviolability."[408] It also observed, "The addition of this civil remedy . . . will add greater flexibility to present Federal protections of the right to vote."[409]

The later committee report, issued April 1957, was framed differently. After recognizing the centrality of voting rights, it declared that "[t]he right of the franchise must be protected by the sovereign if representative government is to be maintained. Therefore, the sovereign . . . must preserve this fundamental and basic right against any and all unlawful interference."[410] This focus on "the sovereign" protecting voting rights is in some tension with the notion that the underlying bill created an implied right of action empowering private plaintiffs to do so.

Thus, the legislative history is ambiguous regarding whether Congress intended § 1971(b) to create an implied private right of action or instead wished for public enforcement under § 1971(c) to be the exclusive remedy for § 1971(b) violations. Such uncertainty makes it that much harder to ascertain Congress's intentions regarding its decision to codify the Materiality Provision as § 1971(a)(2)(B) in the Civil Rights Act of 1964. That is, while Congress clearly intended to allow continued private enforcement of § 1971's original prohibition on racial discrimination in voting—which traced back to Reconstruction—it is unclear whether Congress also wished to implicitly authorize private enforcement of subsequent additions to that section of the U.S. Code.

One other part of § 1971(c) yields similarly conflicting inferences. That provision states, "In any proceeding hereunder the United States shall be liable for costs the same as a private person."[411] Some courts have concluded that this language implicitly presumes that a private party may sue to enforce any provision of § 1971 to the same extent as the Attorney General.[412] It is also reasonably possible, however, to construe this provision to mean that the Government is liable for costs to the same extent that a private person would be in a lawsuit of that type, without necessarily presuming that private plaintiffs are authorized to bring such a suit.

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408. H.R. REP. NO. 84-2187, at 11 (1956) (emphasis added).

409. *Id.*

410. H.R. REP. NO. 85-291, at 12–13 (1957).

411. 52 U.S.C. § 10101(c).

412. Tex. Democratic Party v. Hughs, 474 F. Supp. 3d 849, 859 (D. Tex. 2020), *rev'd in part on other grounds*, 860 F. App'x 874 (5th Cir. 2021).

Thus, while the Materiality Provision likely establishes a private right, it is highly debatable whether the totality of the circumstances demonstrates congressional intent to create a private remedy. Accordingly, it is uncertain whether the Provision gives rise to an implied private right of action.

B. *Section 1983 Suits*

Rather than suing directly under the Materiality Provision itself, a private plaintiff would be much more likely to succeed by suing for alleged violations of the Provision through 42 U.S.C. § 1983.[413] Section 1983 creates a cause of action allowing private plaintiffs to sue anyone acting under color of state law (including local officials) for violating their "rights, privileges, or immunities secured by the [U.S.] Constitution and [federal] laws."[414] This provision "provides a mechanism for enforcing individual rights 'secured'" by certain federal statutes.[415]

In *Gonzaga University v. Doe*,[416] the Court established a two-prong test for determining whether a person may sue under § 1983 for violations of some other federal statute such as the Materiality Provision.[417] First, the plaintiff must show, based on a statute's "text and structure," that it "unambiguously confer[s] [a] right"[418]—the same standard that *Sandoval* established for implied private rights of action.[419] As discussed in the previous Section, the Materiality Provision likely creates a sufficiently clear right to satisfy this requirement.[420]

Second, a § 1983 claim may proceed unless the defendant demonstrates that Congress intended to bar plaintiffs from enforcing the statute at issue under § 1983.[421] Courts will generally find that a statute's creation of a "comprehensive

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413. 42 U.S.C. § 1983. "[W]hether a statutory violation may be enforced through § 1983 'is a different inquiry than that involved in determining whether a private right of action can be implied from a particular statute.'" Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (quoting Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990)).

414. 42 U.S.C. § 1983.

415. *Gonzaga Univ.*, 536 U.S. at 285.

416. 536 U.S. 273 (2002).

417. *Id.* at 283.

418. *Id.* at 283, 286.

419. *Id.* at 287 ("[O]ur implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."); *see supra* notes 356–63 and accompanying text (discussing the first prong of the *Sandoval* test).

420. *See supra* notes 370–72 and accompanying text.

421. *Gonzaga Univ.*, 536 U.S. at 284 n.4 (holding that a plaintiff may not bring a § 1983 claim for violation of a federal statute if Congress "specifically foreclosed a remedy under § 1983" (quoting Smith v. Robinson, 468 U.S. 992, 1004–05 (1984))).

enforcement scheme"[422] or alternate "judicial remedy"[423] implicitly precludes enforcement through § 1983. This standard presents a lower potential barrier for plaintiffs than the second prong of *Sandoval*'s test for implied private rights of action:

> Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by § 1983.[424]

Merely authorizing the Attorney General to sue does not constitute the type of alternate enforcement mechanism that implicitly precludes § 1983 suits.[425] Because the Civil Rights Act of 1964 does not create any other alternate remedial scheme for the Materiality Provision, private plaintiffs may enforce it through § 1983 litigation.[426]

CONCLUSION

The Materiality Provision plays an important role in protecting voting rights. It prevents states from manufacturing hyper-technical, irrelevant requirements as pretexts for refusing to recognize citizens as qualified voters. The Provision does not suggest, however, that the only reason a state may ask people for information or documentation in connection with an election is to establish their eligibility to vote. Nor does the

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422. *Id.* at 284 n.4 (quoting Blessing v. Freestone, 520 U.S. 329, 341 (1997)).

423. City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 127 (2003).

424. *Gonzaga Univ.*, 536 U.S. at 284 (citation omitted).

425. *See* Vote.org v. Callanen, 89 F.4th 459, 476 (5th Cir. 2023); Schwier v. Cox, 340 F.3d 1284, 1294–95 (11th Cir. 2003).

426. *See, e.g.*, *Vote.org*, 89 F.4th at 476; *Schwier*, 340 F.3d at 1294–95 ("[T]he provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under § 1983."); Tex. Democratic Party v. Hughs, 474 F. Supp. 3d 849, 859–60 (D. Tex. 2020), *rev'd in part on other grounds*, 860 F. App'x 874 (5th Cir. 2021); Taylor v. Howe, No. 3:96-cv-00458, 1999 WL. 35793770, at *8 (E.D. Ark. Mar. 31, 1999) (holding that the Materiality Provision is "enforceable in private litigation by linkage to 42 U.S.C. § 1983"), *aff'd in part and rev'd in part on other grounds*, 225 F.3d 993 (8th Cir. 2000); Migliori v. Cohen, 36 F.4th 153, 162 (3d Cir. 2022), *stay denied sub nom.*, 142 S. Ct. 1824 (2022), *judgment vacated and remanded sub nom.*, Ritter v. Migliori, 143 S. Ct. 297 (2022); *see also* League of Women Voters of Ark. v. Thurston, No. 5:20-cv-05174, 2021 WL 5312640, at *4 (D. Ark. 2021) ("A private right of action exists to enforce the materiality provision . . . , if not implied in the statute then brought pursuant to 42 U.S.C. § 1983."), *complaint dismissed*, 2023 WL 6446015 (W.D. Ark. Sept. 29, 2023).

Provision bar states from attempting to promote other important interests in connection with their elections beyond determining a putative voter's qualifications. In particular, it does not preclude states from confirming a person's identity or the accuracy of information she provides to election officials. In any event, confirming that a person's identifying information is accurate, and that she is the eligible voter she claims to be when she requests or returns an absentee ballot or seeks to vote in person, are important aspects of determining that person's eligibility to vote. Accordingly, the Materiality Provision generally allows such measures.