IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

WASSERBERG, *et al*, *Plaintiffs*, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.* *Defendants*.	Case No. 5:24-cv-578

STATEMENT OF INTEREST OF THE UNITED STATES

INTRODUCTION

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General "to attend to the interests of the United States in a suit pending in a court of the United States." This case presents important questions relating to the enforcement of the Materiality Provision in Section 101 of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B) ("Materiality Provision" or "Section 101"). Congress has given the Attorney General authority to enforce the Civil Rights Act on behalf of the United States. *See* 52 U.S.C. § 10101(c). Accordingly, the United States has a substantial interest in ensuring the Act's proper interpretation.

The United States submits this Statement of Interest to address issues related to the scope of the Materiality Provision, which Plaintiffs raise in their response to Defendants' Motion to Dismiss. *See* Memo. in Supp. of Mot. to Dismiss, D.E. 22; Resp. to Mot. to Dismiss, D.E. 42. Contrary to Plaintiffs' assertion, the Materiality Provision applies to the entire voting process—not just the voter qualification stage. The Provision specifically applies to a voter's error or omission *on* any record or paper, which can include the failure to seal a ballot secrecy envelope. And rejecting an absentee ballot based on such errors or omissions that are not material to determining whether an individual is qualified to vote denies the right to vote for purposes of the Materiality Provision, even if the voter has an

opportunity to cure the ballot. The United States expresses no view on any issues other than those set forth below.

PROCEDURAL BACKGROUND

North Carolina law prescribes that, when the State Board of Elections transmits absentee ballots to eligible voters, the packet must also include a "container-return envelope," which is printed with spaces for information that voters must write on the outside of the container-return envelope. N.C. Gen. Stat. § 163-229(b). Voters voting with absentee ballots "shall . . . [p]lace the folded ballots in the container-return envelope and securely seal it." *Id.*, § 163-231(a)(3). When North Carolina's voter-ID law, Session Law 2018-144, went into effect in April 2023, absentee voters began to be required to include photo ID documentation with their absentee ballot. *Id.*, § 163-230.1(g). According to Defendants, this change required a shift to a two-envelope return system: the ballot inside the container-return envelope, and the container-return envelope along with photo ID documentation inside an outer envelope. *See* D.E. 22 at 3-5.

The question then arose of whether ballots returned with deficiencies related to the container-return envelope (such as arriving with the inner container-return envelope unsealed, or with the ballot inside the outer envelope rather than the container-return envelope) were to be counted, when the outer envelope was ultimately sealed. *Id.* at 6. The Board issued guidance in Numbered Memo 2021-

03 stating that under certain circumstances, ballots returned with container-return sealing or ballot placement deficiencies should not be automatically spoiled and reissued. *Id.* Instead, the Numbered Memo says, these should be evaluated to determine whether the application on the container-return envelope has been properly executed and includes the required photo ID documentation. *Id.* Plaintiffs sued the North Carolina State Board of Elections and individual defendants, alleging that the Numbered Memo's guidance conflicts with state law by allowing absentee ballots to be counted even when they are not contained in a sealed, inner container-return envelope. Compl., D.E. 1-3. Plaintiffs seek to rescind the Numbered Memo's guidance that prohibits automatically throwing out validly requested absentee ballots so long as they are contained in a sealed outer envelope. *Id.* Among other arguments, Defendants contend in response that the guidance in the Numbered Memo was required to comply with the Materiality Provision of the Civil Rights Act of 1964 because failing to seal the inner container-return envelope in an otherwise sealed outer envelope constitutes an immaterial "error or omission." D.E. 22 at 7.

STATUTORY BACKGROUND

The Materiality Provision states that "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" qualification to vote. 52 U.S.C. § 10101(a)(2)(B). The Civil Rights Act's definition of "vote" includes "all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted and included in the appropriate totals of votes cast." *Id.* § 10101(a)(3)(A), (e).

LEGAL STANDARD

In ruling on a motion to dismiss, courts must "take all well-pled facts to be true, drawing all reasonable inferences in favor of the plaintiff," but "need not accept the legal conclusions drawn from the facts," nor "accept as true unwarranted inferences, unreasonable conclusions or arguments." *Carey v. Throwe*, 957 F.3d 468, 474 (4th Cir. 2020) (internal quotation marks omitted).

ARGUMENT

A. The Materiality Provision applies outside the context of voter-qualification determinations.

The Materiality Provision contains two clauses. The first clause defines the Provision's scope as "error[s] or omission[s] on *any* record or paper relating to *any* application, registration, *or other act requisite to voting*." 52 U.S.C. 10101(a)(2)(B) (emphases added). And the second clause, which is phrased conditionally, specifies under what circumstances an "error or omission" that falls within the statute's scope can be the basis for "deny[ing] the right . . . to vote." *Id.*

The statute's scope is plain from its text. "[O]ther act requisite to voting," as used in the first clause, means that the Materiality Provision covers actions besides "application" and "registration" that are required to vote. Congress's repetition of the word "any" also makes clear that the statute applies beyond processes like registration that determine voters' qualifications. The first use requires a "broad" reading that reaches documents "of whatever kind." *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 218-219 (2008) (citation omitted). And the second use requires a similarly "broad" reading of the occasions when an immaterial error might occur, *id.*: during the processes of applying, registering, or undertaking whatever act is "requisite to voting." The statutory definition of "vote" confirms this. That definition "includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 52 U.S.C.10101(e). On its face, that language applies the Provision not just to determinations of voter qualifications, but to the entire voting process.

1. The Materiality Provision applies to requirements on mail ballot applications and envelopes.

Courts regularly apply Section 101 to requirements on mail ballot applications and envelopes. *See*, *e.g.*, *La Unión del Pueblo Entero*, 604 F. Supp. 3d 512, 540-41 (W.D. Tex. 2022) (requirements for mail ballot carrier envelope); *League of Women Voters of Ark. v. Thurston*, No. 5:20-cv-5174, 2021 WL

5312640, at *4 (W.D. Ark. Nov. 15, 2021) (requirement to provide citizenship, residency, age, registration status, and photo identification multiple times); *Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 803 (W.D. Mo. 2020) (differential requirements for absentee and mail-in ballots); *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-1309 (N.D. Ga. 2018) (requirement to include voter's place and date of birth on absentee ballot). To exclude mail voting materials from Section 101 would flout the statute's plain text. Congress repeatedly used the word "any" to describe the statute's inclusive coverage: Section 101 applies to "any individual" participating in "any election" and to "any record or paper" relating to "any application, registration, or act requisite to voting." 52 U.S.C. § 10101(a)(2)(B). In each application—the individuals protected, the elections administered, the records and papers governed, and the application, registration, or other acts requisite to voting at issue—Congress deployed the words "all" and "any" to give the statute "an expansive meaning" that encompasses "one or some indiscriminately of whatever kind." *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *see also Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008); *United States v. Serafini*, 826 F.3d 146, 150 (4th Cir. 2016) (Congress's "use of the word 'all' [as a modifier] suggests an expansive meaning because 'all' is a term of great

breadth.").[1]

Plaintiffs incorrectly contend that the failure to seal the container-return envelope does not constitute an error or omission "on" any record or paper because sealing a ballot secrecy envelope is akin to conduct such as casting a ballot from the wrong polling place, failing to present photo identification during in-person voting, or submitting an absentee ballot late. D.E. 42 at 16-17. While the Materiality Provision would not prevent States from disqualifying ballots in these three circumstances, *see infra* at 11-12, the seal of a ballot secrecy envelope is "on" a record or paper. *See* Merriam Webster, "On," (definitions of "on" include: "used as a function word to indicate position in contact with and supported by the top surface of"; "used as a function word to indicate position in or in contact with an outer surface"; "used as a function word to indicate the location of something"), https://perma.cc/WB85-BN4R. Failing to moisten the adhesive or remove the plastic film on the ballot secrecy envelope and adhere it to

[1] In *Ali*, the Supreme Court rejected the argument that including the specific examples "officer of customs or excise" before the general phrase "or any other law enforcement officer" limited that general phrase to "officers acting in a customs or excise capacity." 552 U.S. at 218 (citation omitted). The Court determined that "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind." *Id.* at 220. Likewise, Congress's use of "any" in Section 101 to modify "other act requisite to voting" is most naturally read to mean acts of *whatever* kind that are necessary to cast a ballot and have it counted. 52 U.S.C. § 10101(a)(2)(B).

seal the envelope is, therefore, an error "on" a record or paper relating to an act requisite to voting. And Plaintiffs' suggestion that the Materiality Provision is limited to circumstances in which a voter is "providing some information," D.E. 42 at 16, is entirely divorced from case law and the text of the statute. *See* 52 U.S.C. § 10101(a)(2)(B).

2. The Materiality Provision applies to the entire process of registering and voting.

Plaintiffs are incorrect that the Materiality Provision ceases to apply once a voter is registered. *See* D.E. 42 at 19-23. Neither the Supreme Court nor the Court of Appeals for the Fourth Circuit have considered whether the Materiality Provision applies to every step in the voting process. The Third Circuit's divided decision holding that the Provision applies only to the "process" of "determining whether an individual is qualified to vote" was incorrect and should not be expanded to this circuit. *Pa. State Conf. of NAACP Branches v. Secretary Commonwealth of Pa.*, 97 F.4th 120, 131-133 (3d Cir. 2024) (*Pennsylvania NAACP*). The majority reached that conclusion by reading the words "in determining" in the statute's second clause to mean that the Provision applies only to "voter qualification determinations." *Pennsylvania NAACP*, 97 F.4th at 131. Given that context, the majority then concluded, based on an apparent application

of the *ejusdem generis* canon,[2] that—contrary to its plain meaning—the phrase "act requisite to voting" must be limited to records or papers used in the voter-qualification determination process. *Id.* at 132. The majority also pointed to the legislative history's many references to "registration" to confirm its reading, *id.* at 132-133, and warned that a broader construction of the statute would "tie state legislatures' hands in setting voting rules unrelated to voter eligibility," *id.* at 134.

Pennsylvania NAACP's reasoning disregards the statutory language and Congress's intent. First, the majority's narrow construction of the Materiality Provision depends on reading the words "in determining" in the statute's *conditional* clause to mean that the Provision's *scope* is limited to "voter qualification determinations." *Pennsylvania NAACP*, 97 F.4th at 131. Not only does that reading conflate the distinct functions of the statute's first and second clauses, but it renders superfluous the words "other acts requisite to voting" in the statute's scope clause. *Id.* at 138 (acknowledging this problem but excusing it because "no matter how we read a statute there will be redundancies" (citation and internal quotation marks omitted)). In the majority's view, reading the Provision to extend beyond the voter registration context would render superfluous the statute's "deliberate references to 'registration' and 'application.'" *Id.* But recent Supreme Court

[2] The *ejusdem generis* canon concerns "the idea that a general phrase following an enumeration of things should be read to encompass only things of the same basic kind." *Muldrow v. City of St. Louis*, 601 U.S. 346, 356 (2024).

decisions demonstrate that this was a misapplication of the *ejusdem generis* canon.

In *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024), for example, the Supreme Court considered Title VII of the Civil Rights Act of 1964, which makes it unlawful to "fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1) (emphasis added). The City of St. Louis argued that the "otherwise discriminate" residual clause should be read in light of the statute's specific hiring and discharge terms to include a "significant-harm requirement." *Muldrow*, 601 U.S. at 357. But the Court rejected that argument, holding that "discrimination [that] occurs by way of an employment action" is "a more than sufficient basis to unite the provision's several parts and avoid *ejusdem generis* problems." *Id.*; *see also Fischer v. United States*, 144 S. Ct. 2176, 2183 (2024) (stating that a residual clause must "cover some set of matters not specifically contemplated by" the statute's narrower terms (citation and internal quotation marks omitted)); *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 255 (2024) (refusing to read a statute's residual clause as "swallow[ing] up" a statute's "narrower terms"). Similarly, construing "other act requisite to voting" to reach all "prerequisite[s] to voting, casting a ballot, and having such balloted counted," 52 U.S.C. 10101(e), unites the Materiality Provision's various components, consistent with the statutory definition of "vote."

By including the specific terms "registration" and "application" in the Provision's scope clause, Congress made clear that the statute applies to steps in the voting process other than actually casting a ballot. At the same time, "other act requisite to voting" makes clear that the statute is not limited to those earlier steps. A proper reading of the Provision's scope clause thus leaves "work to do" for each of its constituent parts. *Fischer*, 144 S. Ct. at 2185.

Congress enacted the Provision to "prohibit[] the disqualification of an individual because of immaterial errors or omissions in papers or acts relating to . . . voting." H.R. Rep. No. 88-914, at 2394 (1963). Although the legislative history is primarily focused on voter registration (because that is the stage in the voting process where most of the disenfranchisement was occurring in the 1960s), it is consistent with the view—supported by the statute's text—that Congress intended the Provision to cover the entire voting process. Indeed, summaries entered into the *Congressional Record* described the Provision as proscribing denials of the right to vote "because of immaterial errors or omissions *in any step of the voting process*." 110 Cong. Rec. 6970 (1964) (statement of Sen. Scott) (emphasis added); *accord* 110 Cong. Rec. at 6998 (statement of Sen. E. Long); 110 Cong. Rec. at 8915 (statement of Sen. H. Williams).

Despite the Provision's broad scope, it does contain important limiting principles. The Materiality Provision applies only to "record[s] and paper[s]"

related to voting. *See id*. at 136 (acknowledging that the Provision's scope is limited in this respect). The statute therefore does not limit States' ability to designate voting deadlines, polling locations, or other voting regulations effectuated by means other than requiring voters to provide written or documentary information. *Id.* Moreover, the Materiality Provision expressly permits vote denials when the paperwork errors or omissions upon which they are based are material to determining a voter's substantive qualifications under state law. 52 U.S.C. 10101(a)(2)(B).

B. Rejecting an absentee ballot denies the right to vote.

Plaintiffs also argue that the rejection of an absentee ballot for noncompliance with the sealed container-return envelope requirement does not "deny the right . . . to vote," 52 U.S.C. 10101(a)(2)(B), based on a semantic distinction that ignores the statutory definition of "vote." *See* Resp. to Mot. to Dismiss at 27-30.

The definition of "vote" that applies is the one in the statute being interpreted, and that definition "includes all action necessary to make a vote effective including, but not limited to, registration or other action required by State law prerequisite to voting, casting a ballot, and having such ballot counted." 52 U.S.C. § 10101(e). Because North Carolina has elected to provide for absentee voting, the Provision's broad definition of "vote" means that its safeguards apply to

its container-return envelope, completion of which is a "prerequisite" to having an absentee ballot "counted."[3]

That North Carolina has established procedures to "cure" absentee ballots with errors or omissions makes no difference. The Materiality Provision does not "say that state actors may initially deny the right to vote based on errors or omissions that are not material as long as they institute cure processes." *La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 541 (W.D. Tex. 2022). And voters—particularly servicemembers or other citizens residing overseas—oftentimes will not have sufficient time to cure any defects on their absentee ballots, particularly if they submit them close to the voting deadline.

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[3] Plaintiffs are misguided when they claim that the Materiality Provision does not apply to records or papers related to a person's "vote," only to those related to "voting." Resp. to Mot. to Dismiss at 27 (citing *Liebert v. Mills*, No. 23-cv-672, 2024 WL 2078216, at *11 (W.D. Wis. May 9, 2024). The Materiality Provision protects—and specifically invokes—the "right of any individual to vote," 52 U.S.C. § 10101(a)(2)(B), which includes the right to cast a ballot and have it counted, *id.*, § 10101(e). Moreover, there is no basis to conclude that Congress silently intended the term "vote" in § 10101(e) to have a different and narrower meaning than the gerund version of that term, "voting." Plaintiffs also err when they rely on *Liebert* to argue that "[t]he same act cannot be both 'voting' and 'something necessary for voting' at the same time." Resp. to Mot. to Dismiss at 27 (quoting *Liebert*, 2024 WL 2078216, at *11). "When a statute includes an explicit definition," courts "*must* follow that definition, even if it varies from a term's ordinary meaning." *Tanzin v. Tanvir*, 592 U.S. 43, 47 (2020) (quotation marks omitted and emphasis added). In this case, the statute's definition of "vote" *includes* "other action required by state law prerequisite to voting." 52 U.S.C. § 10101(e). Thus, under the statute's definition, which this Court must follow, the same act can in fact simultaneously be both "voting" and "something necessary for voting."

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court reject Plaintiffs' arguments regarding the scope of the Materiality Provision.

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KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division

/s/ Holly F.B. Berlin
R. TAMAR HAGLER
JASMYN G. RICHARDSON
HOLLY F.B. BERLIN
Attorneys, Voting Section
Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(800) 253-3931
holly.berlin@usdoj.gov
IL Bar No. 6329447

MICHAEL F. EASLEY, JR.
United States Attorney

/s/ Andrew Kasper
KATHERINE ASARO
ANDREW KASPER
Assistant United States Attorneys
United States Attorney's Office
Eastern District of North Carolina
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601
(919) 856-4829
katherine.asaro@usdoj.gov
NC Bar No. 44185
andrew.kasper@usdoj.gov
NC Bar No. 44515

CERTIFICATE OF SERVICE

I certify that on November 27, 2024, I filed the foregoing via the CM/ECF system, which sends notice to counsel of record.

/s/ Holly F.B. Berlin
Holly F.B. Berlin
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with Local Rule 7.2(f)(3). The brief, including headings, footnotes, citations, and quotations, contains no more than 8,400 words, indicated by Microsoft Word, the program used to prepare the brief.

November 27, 2024

/s/ Holly F.B. Berlin
Holly F.B. Berlin
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530