SECTION 1983 AND VOTING RIGHTS: A CASE STUDY ON THE MATERIALITY PROVISION AND THE FUTURE OF PRIVATE ENFORCEMENT

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A recent ruling by the U.S. Court of Appeals for the Eighth Circuit stating that § 2 of the Voting Rights Act of 1965 is not enforceable by private litigants under an implied private right of action has many voting rights advocates rightfully concerned about the future of federal voting rights protections. Indeed, that ruling appears partly motivated by signals from the U.S. Supreme Court. However, not all hope is lost. In Health and Hospital Corp. of Marion County v. Talevski*, the Supreme Court recently reaffirmed its* Gonzaga University v. Doe *test for enforcing a statute under § 1983. The* Talevski *opinion provides a clear path for private litigants to enforce voting rights under § 1983 should an implied private right of action be unavailable.*

This Note considers how several circuit courts have applied the Supreme Court's § 1983 test to the materiality provision—a voting rights protection in Title I of the Civil Rights Act of 1964. Specifically, this Note argues that the U.S. Court of Appeals for the Fifth Circuit—the only court to consider whether the materiality provision is enforceable under § 1983 since Talevski*—came to the correct conclusion. That is, the materiality provision is enforceable under § 1983. This Note concludes, however, that the Fifth Circuit's reasoning was incomplete.* Talevski *provides stronger support for enforcing voting rights under § 1983 than the Fifth Circuit suggested.*

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INTRODUCTION

"The right to vote is precious, almost sacred. It is the most powerful nonviolent tool or instrument in a democratic society. We must use it."[1] Yet, as with most levers of power, those who had the right to vote sought to deny it to others. Indeed, our history is riddled with systematic disenfranchisement.[2] Although the Fifteenth Amendment[3] provided that states could not limit the right to vote on account of race,[4] discriminatory voting laws ran rampant and, in part, sparked the civil rights movement in

1. John Lewis (@repjohnlewis), X (July 26, 2016, 3:39 PM), https://twitter.com/repjohnlewis/status/758023941998776321?lang=en [https://perma.cc/6X62-YW6Z].

2. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) ("[R]acial discrimination in voting . . . has infected the electoral process in parts of our country for nearly a century.").

3. U.S. CONST. amend. XV.

4. *See id.* § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.").

the mid-twentieth century.[5] Ultimately, the civil rights movement culminated in the Voting Rights Act of 1965[6] (VRA), which aimed to end voting discrimination.[7] Yet, the legal attacks on voting rights began before the ink was even dry[8]—and they continue today.

One current battle is not about *whether* a law violates voting rights protections but rather *who* can enforce those protections in court.[9] Conservatives contend that several civil-rights-era voting protections that expressly provide for enforcement by the Attorney General of the United States are enforceable exclusively by the Attorney General—not by private citizens.[10] Without a private right of action, individual voters and civil rights groups cannot challenge state laws that may violate federal voting protections.[11] Rather, they would completely rely on the Attorney General, resulting in the underenforcement of voting rights.[12] As the U.S. Supreme Court noted, "[t]he Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government" that may infringe upon voting rights.[13] Moreover, throughout the twentieth century, private lawsuits resulted in monumental voting rights victories, including "striking down state election poll taxes, declaring unconstitutional unequal apportionment of state legislatures, and enjoining racial gerrymandering."[14] Finally, one can easily imagine that a conservative Attorney General hostile to voting protections would be less likely to challenge voting rights violations.[15]

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5. *See* R. SAM GARRETT, CONG. RSCH. SERV., R47520, THE VOTING RIGHTS ACT: HISTORICAL DEVELOPMENT AND POLICY BACKGROUND 3–10 (2023) (recounting historical voting discrimination and its impact on the civil rights movement).

6. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702).

7. Allen v. Milligan, 143 S. Ct. 1487, 1499 (2023) ("Spurred by the Civil Rights movement, Congress enacted and President Johnson signed into law the Voting Rights Act. The Act 'create[d] stringent new remedies for voting discrimination,' attempting to forever 'banish the blight of racial discrimination in voting.'" (alteration in original) (citation omitted) (quoting *Katzenbach*, 383 U.S. at 308)).

8. *See, e.g.*, *Katzenbach*, 383 U.S. at 323 (challenging the constitutionality of the VRA within the same year it was passed).

9. *See generally* Caroline Sullivan, *The Conservative Legal Movement's Latest Target*, DEMOCRACY DOCKET (Mar. 3, 2023), https://www.democracydocket.com/analysis/the-conservative-legal-movements-latest-target/ [https://perma.cc/7KW5-3G3Q].

10. *See, e.g.*, Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016) (holding that Title I of the Civil Rights Act of 1964 is enforceable exclusively by the Attorney General); Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204 (8th Cir. 2023) (holding that § 2 of the VRA is enforceable exclusively by the Attorney General).

11. A private right of action "allow[s] an aggrieved individual or entity, as opposed to the government, to bring suit." VICTORIA L. KILLION, CONG. RSCH. SERV., R46484, UNDERSTANDING FEDERAL LEGISLATION: A SECTION-BY-SECTION GUIDE TO KEY LEGAL CONSIDERATIONS 50 (2022).

12. Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969).

13. *Id.*

14. Brief for The Brennan Center for Justice in Support of Petitioners at 14, Ne. Ohio Coal. for the Homeless v. Husted, 137 S. Ct. 2265 (2017) (No. 16-1068), 2017 WL 1326548, at *16–17.

15. Katie Benner, Nick Corasaniti & Reid J. Epstein, *Garland Pledges Renewed Efforts to Protect Voting Rights*, N.Y. TIMES (June 14, 2021), https://www.nytimes.com/20

In November 2023, the U.S. Court of Appeals for the Eighth Circuit vindicated this attack.[16] In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*,[17] the court held that § 2 of the VRA[18] did not have an implied private right of action.[19] According to the Eighth Circuit, only the Attorney General can enforce § 2.[20] Moreover, those seeking to end private enforcement may have friends in high places. The Eighth Circuit's decision appears to be inspired by signals from Supreme Court Justices Gorsuch and Thomas.[21]

Yet not all hope is lost. *Arkansas NAACP* was decided under the test for *implied* private rights of action.[22] Another pathway exists, however, for

21/06/11/us/politics/garland-justice-department-voting-laws.html [https://perma.cc/R54G-9W9N] (explaining that then-President Donald J. Trump's Department of Justice did not file any new cases under the VRA until May 2020, which was "a rare period of silence for one of the most consequential arms for protecting voting rights in the country").

16. *See generally* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204 (8th Cir. 2023).

17. 86 F.4th 1204 (8th Cir. 2023).

18. 52 U.S.C. § 10301. Section 2 of the VRA, which does not include an express private right of action, prohibits states from enacting any "qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgment of the right . . . to vote on account of race or color." *Id.* § 10301(a). Section 2 governs vote dilution claims such as racial gerrymanders. *See, e.g.*, Allen v. Milligan, 143 S. Ct. 1487 (2023).

19. *Ark. NAACP*, 86 F.4th at 1206–07.

20. *Id.* at 1209. *But see, e.g.*, Robinson v. Ardoin, 86 F.4th 574, 588 (5th Cir. 2023) (holding that private litigants may enforce § 2).

21. *See* Hansi Lo Wang, *How a Supreme Court Justice's Paragraph Put the Voting Rights Act in More Danger*, NPR (Feb. 26, 2023, 5:00 AM), https://www.npr.org/2023/02/26/1157248572/supreme-court-voting-rights-act-private-right-of-action-arkansas [https://perma.cc/B3VL-ZHAL] ("Gorsuch's paragraph of a concurring opinion, which was joined by Justice Clarence Thomas, planted the seeds for an unusual argument that has emerged in an Arkansas redistricting case—that private individuals are not allowed to bring Section 2 lawsuits."); Allen v. Milligan, 143 S. Ct. 1487, 1545 n.22 (2023) (Thomas, J., dissenting) ("The Court does not address whether § 2 [of the VRA] contains a private right of action, an issue that was argued below but was not raised in this Court."); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring) ("Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2. Lower courts have treated this as an open question . . . . [T]his Court need not and does not address that issue today." (citations omitted)).

22. *See generally Ark. NAACP*, 86 F.4th 1204. Historically, an implied private right of action was a judicially created private right to sue when a statute lacked an express private right of action. *See* Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 126–27 (2010). Courts implied private rights of action when the statute's existing remedies failed to "effectuate Congress's purpose" in passing the statute. *Id.* at 127; *see, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 556–57 (1969) (implying a private right of action for § 5 of the VRA, because, if the VRA was only enforceable by the Attorney General then the VRA "might well prove an empty promise" and the legislation's "laudable goal could be severely hampered"); J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (implying a private right of action for § 14(a) of the Securities and Exchange Act of 1934 because sole enforcement by the Securities and Exchange Commission was insufficient to protect investors). The approach championed by *Allen* and *Borak*, however, is now disfavored. *See generally* Alexander v. Sandoval, 532 U.S. 275 (2001). As the Eighth Circuit explained, "private rights of action to enforce federal law must be created by Congress," not by a judge "divining 'congressional purpose.'" *Ark. NAACP*, 86 F.4th at 1209 (quoting *Sandoval*, 532 U.S. at 286–87). Now, when a statute lacks a private right of action in the statute's text, "[t]he judicial task is to interpret the statute . . . to determine

private litigants to enforce voting rights—namely, a Reconstruction Era civil rights statute known as § 1983.[23] Section 1983 is an *express* private right of action to sue state actors if they violate a federal law that does not contain a private right of action within its text.[24]

This Note will explain why recent Supreme Court precedent confirms that § 1983 can be used by private litigants to enforce voting rights. Specifically, this Note provides a case study on why the materiality provision[25]—a voting rights statute passed as part of Title I of the Civil Rights Act of 1964[26] ("CRA of 1964")—is enforceable by private litigants under § 1983.[27]

Part I begins with a history of the materiality provision and explains why it is now a critical protection against a wave of states that have sought to restrict voter registration and voting by mail.[28] Next, Part I turns to § 1983 and explains the current test that a statute must pass to be enforceable by private litigants. Part II examines how the U.S. Courts of Appeals for the Third, Fifth, Sixth, and Eleventh Circuits have applied that test to the materiality provision—and their divergent holdings.[29] Finally, Part III explains why *Health and Hospital Corp. of Marion County v. Talevski*,[30] the

whether it displays an intent to create not just a private right but also a private remedy." *Sandoval*, 532 U.S. at 286. Without statutory intent to create a private remedy a private "cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87.

23. 42 U.S.C. § 1983.

24. *Id.* Section 1983 is discussed in more detail in Part I.B.

25. 52 U.S.C. § 10101(a)(2)(B).

26. Pub. L. No. 88-352, § 101, 78 Stat. 241, 241–42 (1964) (codified as amended at 52 U.S.C. § 10101). Previously, Title I of the CRA was codified as 42 U.S.C. § 1971, and various cases discussed below analyze Title I as it was previously codified. For a comprehensive overview of the legislative history and goals of Title I, see generally CHRISTINE J. BACK, CONG. RSCH. SERV., R46534, THE CIVIL RIGHTS ACT OF 1964: AN OVERVIEW (2020).

27. *See infra* Part III.

28. For a recent survey of restrictive voting laws see *Voting Laws Roundup: June 2023*, BRENNAN CTR. FOR JUST. (June 14, 2023), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-june-2023 [https://perma.cc/3Z8U-NF3W]; *Voting Laws Roundup: December 2022*, BRENNAN CTR. FOR JUST. (Dec. 19, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022 [https://perma.cc/FSZ4-69HC]. Additionally, this Note uses terms such as "voting by mail," "mail-in ballot," "voting absentee," and "absentee voting" to describe the general process of voting through the mail rather than voting in person. Nonetheless, each term has the same meaning. The varying language reflects the different terms used in individual cases, which in turn reflects the terms that states use to describe their voting-by-mail processes.

29. The U.S. Courts of Appeals for the Third, Fifth, and Eleventh Circuits have held that the materiality provision is privately enforceable under § 1983, whereas the U.S. Court of Appeals for the Sixth Circuit held otherwise. *Compare* Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016) (holding that the materiality provision is enforceable only by the Attorney General), *with* Vote.org v. Callanen, 89 F.4th 459 (5th Cir. 2023) (holding that the materiality provision is enforceable by private litigants), Migliori v. Cohen, 36 F.4th 153 (3d Cir.) (same), *vacated as moot sub nom*. Ritter v. Migliori, 143 S. Ct. 297 (2022), and Schwier v. Cox, 340 F.3d 1284 (11th Cir. 2003) (same). Although the Third Circuit's decision in *Migliori* was vacated as moot by the Supreme Court, this Note will analyze the opinion as an active part of the circuit split. *See, e.g.*, Pa. State Conf. of NAACP Branches v. Sec'y of Pa., 97 F.4th 120, 129 n.5 (3d Cir. 2024) ("We assume private plaintiffs can sue to enforce [the materiality provision.]" (citing *Migliori*, 36 F.4th at 159–62)).

30. 143 S. Ct. 1444 (2023).

most recent Supreme Court decision to discuss § 1983, confirms that the materiality provision is privately enforceable. *Talevski*, however, was decided after the Third, Sixth, and Eleventh Circuits' opinions.[31] As such, those courts did not have the benefit of *Talevski*'s reasoning. The Fifth Circuit approach, on the other hand, was decided after *Talevski*.[32] Part III argues that the Fifth Circuit correctly concluded that the materiality provision is enforceable under § 1983 but that the court fell short in applying *Talevski*'s full promise. In other words, the Fifth Circuit came to the right conclusion with incomplete reasoning. Thus, private litigants who seek to enforce voting rights under § 1983 have an even stronger leg to stand on than the Fifth Circuit suggests.

In sum, this Note shows that although the Eighth Circuit gave conservative activists a win in the battle over private enforcement, the war is not lost. Rather, § 1983 provides a path forward to ensure the "almost sacred" right to vote endures.[33]

I. TITLE I, THE MATERIALITY PROVISION, AND PRIVATE RIGHTS OF ACTION UNDER § 1983

Part I discusses the materiality provision's history, purpose, and enforcement mechanisms. Then this part explains the test that courts use to determine whether an express private right of action is available through § 1983.

A. Title I and the Materiality Provision

After only sixteen years, "many considered the VRA 'the most successful civil rights statute in the history of the Nation.'"[34] Yet, the VRA was not Congress's first attempt to curb discriminatory voting practices. One attempt was Title I of the CRA of 1964,[35] which amended the Civil Rights Acts of 1957[36] ("CRA of 1957") and 1960[37] ("CRA of 1960").[38] Building on its previous efforts "to guarantee to all citizens the right to vote without discrimination,"[39] Congress passed Title I to remedy "problems encountered in the operation and enforcement of the Civil Rights Acts of 1957 and 1960."[40] Two problems that Congress addressed include (1) the practice of "rejecting voter registration applications because of minor, technical

31. *See infra* Parts II.A–C.
32. *See infra* Part II.D.
33. Lewis, *supra* note 1.
34. Allen v. Milligan, 143 S. Ct. 1487, 1499 (2023) (quoting S. REP. NO. 97-417, at 111 (1982)).
35. *See generally* BACK, *supra* note 26.
36. Pub. L. No. 85-315, § 131, 71 Stat. 637, 637 (codified as amended at 52 U.S.C. § 10101).
37. Pub. L. No. 86-449, 74 Stat. 90 (codified as amended at 52 U.S.C. § 10101).
38. BACK, *supra* note 26, at 2–3. The 1957 Act amended earlier voting protections first passed in 1870. Vote.org v. Callanen, 89 F.4th 459, 474 (5th Cir. 2023).
39. H.R. REP. NO. 88-914, at 5 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2394.
40. *Id.*

errors"[41] and (2) the slow pace at which voting discrimination cases were heard in federal district courts.[42]

To address the first problem, Congress prohibited states from denying someone the right to vote because of an immaterial "error or omission" on their voting or registration forms.[43] This protection is known as the materiality provision.[44] Through this provision, Congress mandated 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 whether such individual is qualified under State law to vote in such election.[45]

One specific practice that Congress sought to prohibit involved disqualifying potential Black voters due to minor errors on their registration forms, such as age miscalculations or spelling mistakes.[46] Those same registrars would approve a White voter's application if they made a similar error.[47] One example cited in Title I's legislative history noted that a registrar rejected a Black applicant because the potential voter miscalculated their age by a single day.[48] That is, "when asked to provide their age in years, months, and days [the applicant] wrote '5 months and 30 days instead of 6 months and 0 days.'"[49]

Moreover, the materiality provision was Congress's response to registrars who treated "different voters in disparate and discriminatory ways during the voting process."[50] Registrars held Black applicants to "impossibly high technical standards," while simultaneously assisting White voters to fill out their forms—a service not provided to Black applicants.[51]

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41. Helen L. Brewer, *Title I of the Civil Rights Act in Contemporary Voting Rights Litigation*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 277, 278 (2023).

42. *See* BACK, *supra* note 26, at 6 ("The legislative history of Title I also reflects concern that federal courts delayed the adjudication of cases brought under the 1957 and 1960 Civil Rights Acts' voting provisions."); South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966) ("Title I of the Civil Rights Act of 1964 expedited the hearing of voting cases." (citation omitted)). Ultimately the CRA fell short as the VRA was passed in part because the enforcement mechanisms provided for in the CRAs of 1957, 1960, and 1964 were seen as "having been ineffective in protecting voting rights because they depended mainly on litigation for enforcement." Tokaji, *supra* note 22, at 139.

43. 52 U.S.C. § 10101(a)(2)(B). Title I also prohibits states from applying different voter registration prerequisites to different groups and bans the use of literacy tests to determine voter qualifications unless the tests were given to all prospective registrants. 52 U.S.C. § 10101(a)(2)(A), (C).

44. *See* BACK, *supra* note 26, at 7 (noting 52 U.S.C. § 10101(a)(2)(B) is "sometimes referred to as the 'materiality' provision" (quoting Schwier v. Cox, 340 F.3d 1284, 1297 (11th Cir. 2003))).

45. 52 U.S.C. § 10101(a)(2)(B).

46. Brewer, *supra* note 41, at 278.

47. *Id.*

48. *Id.*

49. *Id.* (quoting 110 CONG. REC. 6715 (1964) (statement of Sen. Kenneth B. Keating)).

50. *Id.*

51. *Id.*

Additionally, Title I continued Congress's effort to "facilit[ate] case-by-case litigation" that challenged discriminatory voting practices.[52] First, in the CRA of 1957, Congress authorized the "Attorney General to seek injunctions" against public interference with a person's right to vote.[53] When Congress added the materiality provision in 1964, it extended the Attorney General's right of action to the materiality provision.[54]

Then, in 1960, Congress "permitted the joinder of States as [a] defendant, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination."[55] Finally, the CRA of 1964 addressed "lengthy and often unwarranted delays" in cases filed under the CRAs of 1957 and 1960.[56] To address the slow pace at which voting rights cases moved through the courts, Title I "require[d] the courts to give priority to voting cases brought by the United States or the Attorney General."[57] Moreover, Congress authorized the Attorney General to request the appointment of a three-judge panel to oversee cases that challenged violations of Title I.[58] Congress commanded the panels "to cause the case to be in every way expedited."[59]

The CRA of 1957—which gave the Attorney General a civil right of action—is the source of the circuit split at issue in this Note.[60] Importantly, Congress did not include a private right of action in any of the three Civil Rights Acts.[61] As such, courts are divided on whether the Attorney General's express authorization to sue forecloses a private litigant's right to sue.[62] This issue was also at the heart of the Eighth Circuit's holding in *Arkansas NAACP*.[63]

Finally, despite the historical significance of Title I, the materiality provision faded into relative obscurity—partly because the VRA passed the following year.[64] However, a wave of new laws that increase barriers to

52. South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966).

53. *Id.* The 1957 Act updated a voting rights provision from 1870. *See supra* note 38. "Until 1957, the United States could enforce this law only via criminal prosecutions." Brief for the United States as Amicus Curiae in Support of Plaintiff-Appellee on the Issues Addressed Herein at 3, Vote.org v. Callanen, 89 F.4th 459 (5th Cir. 2023) (No. 22-50536), 2022 WL 16862793, at *3.

54. 52 U.S.C. § 10101(c). As discussed in Part II, this provision is the source of the circuit split at issue in this Note.

55. *Katzenbach*, 383 U.S. at 313; *see also* 52 U.S.C. § 10101(c), (e).

56. H.R. REP. NO. 88-914, at 5 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2394.

57. *Id.*

58. *Id.*; *see* 52 U.S.C. § 10101(g).

59. 52 U.S.C. § 10101(g).

60. *See supra* note 29; *infra* Part II.

61. *See generally* 52 U.S.C § 10101.

62. *See infra* Part II.

63. Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1208 (8th Cir. 2023) ("The who-gets-to-sue question is the centerpiece of today's case. The Voting Rights Act lists only one plaintiff who can enforce § 2: the Attorney General.").

64. *See*, Tokaji, *supra* note 22, at 138–40 (characterizing the materiality provision as "relative[ly] obscur[e]" and suggesting that the materiality provision "might well have assumed greater importance . . . had Congress not enacted the VRA the next year" because "[t]he VRA effectively overwhelmed the system of disenfranchisement that had kept Southern

registration and restrict voting by mail have triggered challenges to state laws under the materiality provision.[65] For instance, the case discussed in Part II.D considers whether a Texas law that requires voters to physically, as opposed to digitally, sign a voter registration form violates the materiality provision.[66] As Judge Stephen A. Higginson noted in oral arguments, "[Y]oung people sign almost everything on the internet. They don't have printers. Especially in big states like . . . Texas, where people just can't drive to Kinkos easily . . . this is a very big impediment for a lot of people that might want to sign up and be a voter."[67] Thus, although it was passed to combat outright, intentional discrimination,[68] the materiality provision remains an important protection for voting rights.

This Note next turns to the test for whether the Attorney General's express right to sue forecloses a private right of action under § 1983. Then, Part II discusses the application of the test to the materiality provision.

B. Private Rights of Action Under § 1983

Federal laws do not always specify who can enforce a statutory right.[69] In some instances, statutes provide an express private right of action.[70] Other times—like in Title I—a statute grants a right of action to the Attorney General but is silent on a private right of action.[71] What, then, is a private plaintiff to do when they want to enforce a statute that is silent as to their right of action? One option is an implied private right of action.[72] A second is an express private right of action under § 1983. Given the uncertainty the Eighth Circuit unleashed in *Arkansas NAACP*, this Note discusses the latter.[73]

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blacks from voting"); Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 146 (2012) ("It is somewhat surprising how little attention this provision . . . has received. I am aware of no sustained scholarly examinations of the provision, and it is seldom addressed in published judicial decisions.").

65. For an overview of recent litigation over the materiality provision see Brewer, *supra* note 41.

66. *See infra* Part II.D; Vote.org v. Callanen, 89 F.4th 459 (5th Cir. 2023).

67. Oral Argument at 16:25, *Vote.org*, 89 F.4th 459, https://www.ca5.uscourts.gov/OralArgRecordings/22/22-50536_03-06-2023.MP3 [https://perma.cc/55T5-9MNC].

68. *See supra* notes 46–51 and accompanying text.

69. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 723 (7th ed. 2015).

70. *Id.* ("For example, the patent laws expressly authorize patentholders to sue infringers for damages and injunctive relief.").

71. 52 U.S.C. § 10101.

72. *See supra* note 22.

73. *See supra* notes 16–21 and accompanying text. Although implied private rights of action are disfavored, they remain an important tool for private litigants generally. *See supra* note 22. Section 1983 provides a cause of action against state actors, and voting rights cases are challenges to state actions. *See* 42 U.S.C. § 1983; *infra* Part II (discussing voting rights challenges against state actors). Implied private rights of action, however, can provide a cause of action against a private actor. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (implying private right of action against private company). Nonetheless, the doctrines are intertwined. The Supreme Court "reject[ed] the notion that [its] implied right of action cases are separate and distinct from [its] § 1983 cases." Gonzaga Univ. v. Doe, 536 U.S. 273, 283

Passed as a provision of the Civil Rights Act of 1871,[74] § 1983 allows private litigants to sue for damages or injunctive relief when, "under color of any statute," a state "depriv[es]" someone of their rights "guaranteed by the Constitution and laws" of the United States.[75] In other words, a private person can sue, via § 1983, if they believe their state passed a law that violates a Constitutional right or infringes on a right protected by a federal statute.[76] Section 1983 "provides a mechanism for enforcing individual rights 'secured' elsewhere, *i.e.*, rights independently 'secured by the Constitution and laws' of the United States."[77] Section 1983 "by itself does not protect anyone against anything."[78]

Although often used to recover from state and local government actors for constitutional equal protection violations,[79] the Supreme Court has held that § 1983 could provide a private cause of action for the violation of *any* federal statute.[80] So, the word "laws" in § 1983 "means what it says."[81] Thus, under this reading, the materiality provision should be enforceable by private litigants.

Yet, the standard is not so simple. Indeed, the "bar is high."[82] In *Gonzaga University v. Doe*,[83] the Supreme Court established the current test for whether a private litigant can file suit under § 1983. The Supreme Court reaffirmed the test in 2023 in *Health and Hospital Corp. of Marion County v. Talevski*.[84] The inquiry is two-fold. First, the plaintiff must demonstrate that the federal statute "confers an individual right."[85] If the plaintiff meets

(2002). "To the contrary, . . . implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983." *Id.* A key distinction, however, is that an implied private right of action requires a plaintiff "show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* at 284 (quoting Alexander v. Sandoval, 532 U.S. 275, 286 (2001)). On the other hand, § 1983 provides a remedy itself. *Id.*; *see infra* note 75 and accompanying text.

74. WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10852, *HEALTH & HOSPITAL CORPORATION OF MARION COUNTY V. TALEVSKI*: DETERMINING WHEN A STATUTE CREATES A FEDERAL RIGHT ACTIONABLE UNDER 42 U.S.C. § 1983 1 (2022).

75. *See* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .").

76. *Id.*

77. *Gonzaga*, 536 U.S. at 285 (quoting 42 U.S.C. § 1983).

78. *Id.*

79. NOVAK, *supra* note 74, at 2.

80. *See* Maine v. Thiboutot, 448 U.S. 1, 4–8 (1980) (holding that § 1983 could provide a private cause of action for violations of any federal statute, not only violations of civil rights laws).

81. Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1450 (2023) (quoting *Thiboutot*, 448 U.S. at 4).

82. *Id.* at 1463 (Barrett, J., concurring).

83. 536 U.S. 273 (2002).

84. *Talevski*, 143 S. Ct. at 1452–62 (majority opinion).

85. *Gonzaga*, 536 U.S. at 284.

their burden, the statute is "presumptively enforceable" via § 1983.[86] The burden then shifts to the defendant to "rebut this presumption by showing that Congress 'specifically foreclosed a remedy under § 1983.'"[87] Parts I.B.1 and I.B.2 discuss the burdens each party must meet under the *Gonzaga* test.

1. Plaintiff's Burden to Enforce an Individual Right Under § 1983

To privately enforce a statute under § 1983, the plaintiff must first show that the statute "unambiguously . . . confers an individual right."[88] First, "[c]ourts must employ traditional tools of statutory construction to assess whether Congress has 'unambiguously conferred' [an] 'individual right[]'" upon the plaintiff.[89] Moreover, it must be determined that Congress intended to create an individual right for the specific plaintiff, not that the plaintiff merely falls "within the general zone of interest that the statute is intended to protect."[90]

The Court has laid down markers to look for within a statute's text. Namely, a statute unambiguously confers an individual right when the "provision in question is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'"[91] Conversely, if the statute in question uses "no rights-creating language" and has an "aggregate, not individual, focus," then it does not unambiguously confer an individual right and is thus unenforceable via § 1983.[92]

The examples discussed below of a plaintiff who satisfied—and one who failed to meet—their burden under *Gonzaga* help to clarify the high bar[93] that plaintiffs must clear. In *Talevski*, the plaintiff met their initial burden because they showed that the statute at issue, which did not include an express private right of action, unambiguously conferred an individual right.[94] There, Talevski, a resident of a state-run nursing home, was subjected to chemical restraints that the resident and his family thought were unnecessary.[95] Furthermore, the nursing home attempted to transfer the resident to another facility without notifying him or his family.[96] The resident's family sued under § 1983 and alleged that the facility violated the Federal Nursing Home

86. *Id.*
87. *Id.* at 284 n.4 (quoting Smith v. Robinson, 468 U.S. 992, 1004–05 (1984)).
88. *Id.* at 283–84; *see also* Tokaji, *supra* note 22, at 135 ("This requirement is drawn from the language of § 1983 itself, which states that plaintiffs deprived of 'rights, privileges, or immunities' secured by federal law may obtain redress [under § 1983]." (quoting 42 U.S.C. § 1983)).
89. *Talevski*, 143 S. Ct. at 1457 (quoting *Gonzaga*, 536 U.S. at 280).
90. *Id.* (quoting *Gonzaga*, 536 U.S. at 283).
91. *Id.* (quoting *Gonzaga*, 536 U.S. at 284, 287).
92. *Id.* (quoting *Gonzaga*, 536 U.S. at 290).
93. *See id.* at 1463 (Barrett, J., concurring).
94. *Id.* at 1457 (majority opinion).
95. *Id.* at 1451.
96. *Id.*

Reform Act[97] (FNHRA)[98]—a bill intended to improve the quality of state-run nursing homes that receive federal funding.[99] The FNHRA mandates that nursing homes (1) "'protect and promote' residents' 'right to be free from . . . any [unnecessary] physical or chemical restraints,'"[100] and (2) bars nursing facilities from transferring residents unless, among other preconditions, the facility provides advance notice.[101] The Court concluded that the FNHRA unambiguously conferred an individual right upon Talevski.[102]

The Court first noted that the provisions at issue were found in a section of the U.S. Code "which expressly concerns '[r]equirements *relating to residents' rights*.'"[103] Given that statutes "must be read in their context and with a view to their place in the overall statutory scheme,"[104] the FNHRA had the rights-creating language that *Gonzaga* demands.[105] The Court then emphasized that the FNHRA required that facilities protect "*[t]he right* to be free from . . . any physical or chemical restraints . . . not required to treat *the resident's* medical symptoms."[106] This, too, is the type of rights-creating and individual-centric language required to presumptively enforce a statute under § 1983.[107] Moreover, the Court explained that the provision that required nursing facilities to provide notice prior to transferring a resident is "focused on individual residents."[108] In sum, the provisions at issue in *Talevski* "use[d] clear 'rights-creating language,' sp[oke] 'in terms of the persons benefited,' and [had] an 'unmistakable focus on the benefited class.'"[109] As such, the FNHRA was presumptively enforceable under § 1983.[110]

Conversely, *Gonzaga* itself was a case in which a statute was not enforceable under § 1983 because it did not use rights-creating language.[111] There, a former graduate student at Gonzaga University filed an action under § 1983 and alleged that the university violated a provision of the Family Educational Rights and Privacy Act of 1974[112] (FERPA).[113] Specifically, the student claimed that the university improperly released personal information to an unauthorized person.[114] FERPA maintained that no federal

97. 42 U.S.C. § 1396r.
98. *Talevski*, 143 S. Ct. at 1450.
99. *Id.* at 1455–56.
100. *Id.* at 1456 (quoting 42 U.S.C. § 1396r(c)(1)(A)(ii)).
101. *Id.* (citing 42 U.S.C. § 1396r(c)(2)(A)–(B)).
102. *Id.* at 1457–59.
103. *Id.* at 1457 (alteration in original) (quoting 42 U.S.C. § 1396r(c)).
104. *Id.* (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2607 (2022)).
105. *Id.* at 1458.
106. *Id.* (first and second alterations in original) (quoting 42 U.S.C. § 1396r(c)(1)(A)(ii)).
107. *Id.*
108. *Id.* ("A nursing home may transfer or discharge [a resident] if, among other things, the transfer is 'necessary to meet *the resident's* welfare.'" (quoting 42 U.S.C. § 1396r(c)(2)(A))).
109. *Id.* (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 284, 287, 290 (2002)).
110. *Id.*
111. *Gonzaga*, 536 U.S. at 276.
112. 20 U.S.C. § 1232g.
113. *Gonzaga*, 536 U.S. at 276–77.
114. *Id.* at 277.

funds could be "made available" to educational institutions that had a policy or practice of releasing educational records or "personally identifiable information" without the written consent of the student's parents.[115] Moreover, FERPA charged the Secretary of Education with enforcing this precondition on federal funds.[116] Unlike in *Talevski*, the Court held that FERPA did not unambiguously confer an individual right.[117]

The Court noted that the provision "lacked the sort of 'rights creating' language critical to showing" that Congress intended to permit enforcement under § 1983.[118] That is, FERPA's provisions spoke only to the Secretary of Education and instructed the Secretary to withhold funds from educational institutions that violated the law.[119] Furthermore, FERPA focused on the institutions regulated—such as universities—rather than the individuals protected.[120] Moreover, FERPA "sp[oke] only in terms of institutional policy and practice."[121] Thus, the statute had an "aggregate" rather than individual focus.[122] Therefore, the plaintiff in *Gonzaga* failed to meet their burden, and the statute was not enforceable through § 1983.[123]

If, as in *Talevski*, a plaintiff shows that the statute in question unambiguously confers an individual right, then the statute is presumptively enforceable under § 1983.[124] The defendant can "rebut this presumption by showing that Congress 'specifically foreclosed a remedy under § 1983.'"[125]

2. Defendant's Burden to Foreclose Enforcement Under § 1983

Even if a plaintiff shows that a statute unambiguously confers an individual right, those rights are not necessarily enforceable under § 1983.[126] Rather, a defendant "'may defeat t[his] presumption by demonstrating that Congress did not intend' that § 1983 be available to enforce those rights."[127]

Congressional intent to foreclose a private right of action through § 1983 can be implicit rather than explicit.[128] Implicit intent to foreclose

115. *Id.* at 278–79 (quoting 20 U.S.C. § 1232g(b)(1)).
116. *See id.* at 279 (citing 20 U.S.C. § 1232g(f)).
117. *Id.* at 287.
118. *Id.* (quoting Alexander v. Sandoval, 532 U.S. 275, 288–89 (2001)).
119. *Id.* (citing 20 U.S.C. § 1232g(b)(1)).
120. *Id.* (citing *Sandoval*, 532 U.S. at 289).
121. *Id.* (citing 20 U.S.C. § 1232g(b)(1)–(2)).
122. *Id.* at 288 (quoting Blessing v. Freestone, 520 U.S. 329, 343 (1997)).
123. *Id.* at 290.
124. *Id.* at 284.
125. *Id.* at 284 n.4 (quoting Smith v. Robinson, 468 U.S. 992, 1004–05 (1984)).
126. Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1459 (2023); *see supra* Part I.B.1 (discussing how courts determine if a statute unambiguously confers an individual right).
127. *Talevski*, 143 S. Ct. at 1459 (quoting City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 120 (2005)).
128. *Id.* Congress explicitly forecloses enforcement of a right through § 1983 when a statute contains an "express, private means of redress in the statute itself." *Rancho Palos Verdes*, 544 U.S. at 121. In other words, if a statute provides private litigants with an express cause of action, enforcement through § 1983 is unavailable. *Id.* Explicit foreclosure is not at

enforcement through § 1983 is "divined from [the] text and context" of the statute.[129] Courts must determine whether "Congress intended a statute's remedial scheme to 'be *the exclusive avenue* through which a plaintiff may assert [their] claims.'"[130] In other words, courts apply "the traditional tools of statutory construction to a statute's remedial scheme" to determine if the scheme is "sufficiently comprehensive" and therefore "incompatible" with enforcement under § 1983.[131] Yet, courts do not easily conclude that Congress meant to bar private enforcement.[132] Indeed, the presence of a "detailed enforcement mechanism" in a statute does not automatically indicate congressional intent to foreclose a § 1983 cause of action.[133]

To determine whether Congress implicitly foreclosed enforcement under § 1983, courts consider the specificity of the statutory remedies.[134] That is, a statute that contains "detailed procedures for administrative and judicial review" indicates congressional intent to foreclose § 1983 enforcement.[135] Indeed, in every case in which the Supreme Court held that Congress implicitly foreclosed enforcement under § 1983, the remedial scheme at issue "required plaintiffs to 'comply with particular procedures and/or to exhaust particular administrative remedies'" before filing suit.[136]

Furthermore, courts may discern congressional intent by looking for inconsistencies between remedies available under a statute and remedies available under § 1983.[137] In other words, if a statute itself provides plaintiffs with a cause of action for "fewer benefits"[138] than those available under § 1983—which provides for damages or injunctive relief[139]—then courts discern that Congress intended to foreclose enforcement under § 1983. Finally, courts may consider legislative history.[140] If the statute's text does not fully indicate intent, legislative history might suggest that Congress intended to permit enforcement under § 1983.[141]

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issue here because the materiality provision does not include an express private right of action. *See supra* Part I.A.

129. *Talevski*, 143 S. Ct. at 1459.

130. *Id.* (quoting Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 252 (2009)).

131. *Id.* at 1459–60.

132. 1 CIVIL ACTIONS AGAINST STATE & LOCAL GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS § 7:5 (2d ed. 2023); *see also Fitzgerald*, 555 U.S. at 252 ("In three cases, this Court has found that statutory enactments precluded claims under [§ 1983].").

133. *Talevski*, 143 S. Ct. at 1460 ("[Section] 1983 can play its textually prescribed role . . . even alongside a detailed enforcement regime . . . so long as § 1983 enforcement is not incompatible with Congress's handiwork.").

134. 1 CIVIL ACTIONS AGAINST STATE & LOCAL GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS, *supra* note 132, § 7:6.

135. *Id.*

136. *Talevski*, 143 S. Ct. at 1461 (quoting *Fitzgerald*, 555 U.S. at 254).

137. 1 CIVIL ACTIONS AGAINST STATE & LOCAL GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS, *supra* note 132, § 7:6.

138. *Talevski*, 143 S. Ct. at 1461.

139. *See* 42 U.S.C. § 1983.

140. CIVIL ACTIONS AGAINST STATE & LOCAL GOVERNMENT: ITS DIVISIONS, AGENCIES AND OFFICERS, *supra* note 132, § 7:6.

141. *Id.*

With the *Gonzaga* test—and the burdens that each party bears—in mind, this Note now turns to how several circuits have applied the test to the materiality provision. Part II discusses the current circuit split and some of the arguments that parties presented in those cases.

II. SECTION 1983 APPLIED TO THE MATERIALITY PROVISION: DIVERGENCE AMONG THE CIRCUIT COURTS

As discussed above, the materiality provision expressly authorizes the Attorney General to bring suits but is silent on whether there is a private right of action.[142] Over the last twenty years, however, circuit courts have split on whether private litigants can enforce the materiality provision under § 1983. The Third, Fifth, and Eleventh Circuits have held that the materiality provision is enforceable by private litigants,[143] whereas the Sixth Circuit has held otherwise.[144] This part discusses those cases, each court's application of the *Gonzaga* test, and the parties' arguments.

A. Eleventh Circuit: Schwier v. Cox *(2003)*

In *Schwier v. Cox*,[145] the Eleventh Circuit held that private litigants could enforce the materiality provision under § 1983.[146] There, the plaintiffs challenged a state voter registration law that required applicants to include their Social Security number (SSN) on their application.[147] Before the November 2000 elections, the plaintiffs attempted to register to vote.[148] Yet their applications were rejected because they did not supply their SSNs.[149] Consequently, they sued under § 1983, alleging that Georgia violated the materiality provision.[150]

The plaintiffs argued that the SSN requirement was immaterial to determining their voting qualifications.[151] Indeed, under Georgia law, "an individual is qualified to vote . . . if [they are] a United States citizen, a Georgia resident, at least 18 years of age, not incompetent, and not a felon."[152] The district court granted summary judgment to the defense[153] and held that the materiality provision was not enforceable by private litigants.[154] The district court reasoned that when Congress authorized the Attorney General to sue under the materiality provision, it "foreclose[d] the possibility

142. *See supra* Part I.A.
143. *See infra* Parts II.A, C–D.
144. *See infra* Part II.B.
145. 340 F.3d 1284 (11th Cir. 2003).
146. *Id.* at 1297.
147. *Id.* at 1286.
148. *Id.*
149. *Id.*
150. *Id.* at 1286–87. The plaintiffs also alleged that the SSN requirement violated The Privacy Act. *Id.* at 1286.
151. Schwier v. Cox, 412 F. Supp. 2d 1266, 1276 (N.D. Ga. 2005), *aff'd*, 340 F.3d 1284 (11th Cir. 2003).
152. *Id.*
153. *Schwier*, 340 F.3d at 1286.
154. *Id.* at 1296.

of a private right of action under § 1983."[155] That is—in *Gonzaga* terms—enforcement by the Attorney General is a sufficiently comprehensive remedial scheme that is incompatible with private enforcement under § 1983.[156] The Eleventh Circuit disagreed.[157]

On appeal, the court applied the *Gonzaga* test to the materiality provision.[158] It addressed the plaintiff's burden and explained that it "must first ask whether the statute contains 'explicit right—or duty—creating language.'"[159] The court concluded that the materiality provision did.[160] The Eleventh Circuit explained that although the "subject of the [materiality provision] is the person acting under color of state law,"[161] the "focus" of the provision is "the protection of each individual's right to vote."[162] Moreover, the court concluded that the materiality provision "clearly provides rights which are specific and not amorphous."[163] That is, "[t]he statute protects an individual's right to vote" by forbidding states from disqualifying voters for immaterial errors.[164] Finally, the court noted that the materiality provision is phrased in "mandatory rather than precatory" terms.[165] That is, "*[n]o person* acting under color of law *shall . . . deny* the right of any individual to vote . . . ."[166] Thus, the Eleventh Circuit concluded that the materiality provision unambiguously conferred an individual right and was therefore presumptively enforceable under § 1983.[167]

Next, the court addressed the defendant's burden—whether Congress intended to foreclose enforcement under § 1983.[168] First, the court examined the history of Title I.[169] It noted that "the provision authorizing the Attorney General to sue . . . was added to the statute by the [CRA] of 1957."[170] This was significant because, prior to the CRA of 1957, private litigants challenged state voting laws under § 1983.[171] Indeed, the CRA of 1957's

155. *Id.* at 1294; *see also supra* Part I.A. (discussing enforcement of the materiality provision).
156. *See supra* Part I.B.2.
157. *Schwier*, 340 F.3d at 1296 ("[W]e hold that the district court erred.").
158. *Id.*
159. *Id.* (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 284 n.3 (2002)).
160. *Id.*
161. *Id.*; *see also* 52 U.S.C. § 10101(a)(2)(B) ("*No person acting under color of law shall* . . . deny the right of any individual to vote . . . ." (emphasis added)).
162. *Schwier*, 340 F.3d at 1296.
163. *Id.*
164. *Id.* at 1296–97.
165. *Id.* at 1297.
166. *Id.* (second and third alterations in original).
167. *Id.*; *see also supra* Part I.B.1.
168. *Schwier*, 340 F.3d at 1294–96; *see also supra* Part I.B.2.
169. *Schwier*, 340 F.3d at 1294.
170. *Id.*
171. *Id.* (collecting cases). The cases the Eleventh Circuit cited were challenges under earlier civil rights protections that predate the materiality provision, which was added in 1964. *See supra* Part I.A.

legislative history shows that the "bill's purpose was 'to provide means of *further* securing and protecting . . . civil rights.'"[172]

Moreover, the court explained that nothing in the legislative history suggested that Congress intended to foreclose enforcement under § 1983 when it authorized the Attorney General to bring suits.[173] In fact, the committee report noted that the "deprivation of the right to vote is the first step on the road to tyranny and dictatorship" and that "the [state] must preserve this fundamental and basic right against any and all unlawful interference."[174] Under the Eleventh Circuit's reading, this language "demonstrat[ed] an intense focus on protecting the right to vote."[175] As such, Congress could not have intended to "substitute" existing private enforcement under § 1983 with exclusive enforcement by the Attorney General.[176] Therefore, the legislative history suggested that Congress did not intend to foreclose private enforcement under § 1983.[177]

Next, the court analogized to *Allen v. State Board of Elections*[178] and *Morse v. Republican Party of Virginia*.[179] In those cases, the Supreme Court held that sections of the VRA contained an implied private right of action even though the VRA provided for enforcement by the Attorney General.[180] In other words, because the Supreme Court had permitted private enforcement in a similar dilemma, the Eleventh Circuit could do so for the materiality provision.

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172. *Schwier*, 340 F.3d at 1294 (quoting H.R. REP. NO. 85-291, at 1 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 1966, 1966).

173. *Id.* at 1295.

174. *Id.* (quoting H.R. REP. NO. 85-291, at 12–13 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 1966, 1977).

175. *Id.*

176. *Id.*

177. *Id.* The Supreme Court has critiqued the use of legislative history in statutory interpretation because judges can selectively incorporate favorable statements and reports. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) ("Judicial investigation of legislative history has a tendency to become . . . an exercise in 'looking over a crowd and picking out your friends.'" (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983))). Indeed, one court's analysis of the legislative history suggests that Congress *did* intend to foreclose private enforcement of Title I. *See* Migliori v. Lehigh Cnty. Bd. of Elections, No. 22-cv-00397, 2022 WL 802159, at *11 (E.D. Pa. Mar. 16, 2022) (noting that representatives in the minority, considered the bill a "plenary grant of authority to the Attorney General." Moreover, the Attorney General at the time stated that "[t]he only method of enforcing existing laws [that protect voting rights] is through criminal proceedings." This "suggest[s] that the alternative to the newly devised Attorney General enforcement mechanism was not one of private civil suits, but rather a criminal action"), *remanded sub nom*. Migliori v. Cohen, 36 F.4th 153 (3d Cir.), *vacated as moot sub nom*. Ritter v. Migliori, 143 S. Ct. 297 (2022).

178. 393 U.S. 544 (1969).

179. 517 U.S. 186 (1996) (plurality opinion).

180. *Schwier*, 340 F.3d at 1294. *But see supra* note 22; Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017) (citing *Allen* as an example of "a different approach to recognizing implied causes of action than [the Court] follows now").

Finally, the Eleventh Circuit criticized the district court for relying on *McKay v. Thompson*.[181] *McKay* was a Sixth Circuit decision which held that Congress intended to foreclose enforcement under § 1983 when it authorized the Attorney General to seek relief.[182] The court argued that the Sixth Circuit's analysis was flawed because it "relied entirely" on a single district court case that also relied on a single case.[183] As such, the Eleventh Circuit concluded that the district court in *Schwier* incorrectly relied on *McKay*.[184]

Thus—because of Title I's legislative history, Supreme Court precedent that found implied private rights of action in the VRA, and the district court's reliance on weak precedent—the Eleventh Circuit held that Congress did not foreclose private enforcement of the materiality provision under § 1983.[185] Therefore, the court held that the state failed to meet their burden under *Gonzaga* and the materiality provision was enforceable under § 1983.

This Note now turns to the Sixth Circuit's analysis which held that the materiality provision was not enforceable under § 1983.

B. Sixth Circuit: Northeast Ohio Coalition for the Homeless v. Husted *(2016)*

In *Northeast Ohio Coalition for the Homeless v. Husted*,[186] the Sixth Circuit held that the materiality provision was not enforceable under § 1983.[187] There, the plaintiffs challenged Ohio Senate Bills 205 (SB 205) and 216 (SB 216)—two 2014 bills that amended the state's absentee and provisional voting rules.[188] First, SB 205 required that a voter must include their name, proper signature, address, and birthdate on the envelope containing their executed absentee ballot.[189] That information had to "perfectly match" the voter's records.[190] Previously, however, a voter needed to provide only their address and signature.[191] Additionally, if the envelope contained an error, the local election official gave "the voter notice of the additional information required for the ballot to be counted."[192] SB 205 reduced the time that voters could remedy errors from ten days after the election to seven.[193] SB 216 made similar changes to the rules for provisional ballots.[194]

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181. 226 F.3d 752 (6th Cir. 2000); *see Schwier*, 340 F.3d at 1294.
182. *Schwier*, 340 F.3d at 1294 (discussing *McKay*). *McKay* is discussed in Part II.B.1 as that case was the basis for the Sixth Circuit's holding at issue in this Note.
183. *Id.*
184. *Id.*
185. *Id.* at 1296.
186. 837 F.3d 612 (6th Cir. 2016).
187. *Id.* at 630.
188. *Id.* at 619. A provisional vote is cast by someone who "declares that [they are] registered but whose name does not appear on a precinct's list of eligible voters." *Id.* at 618.
189. *Id.*
190. *Id.*
191. *Id.* at 619.
192. *Id.*
193. *Id.*
194. *Id.* at 620.

The plaintiffs challenged SB 205 and SB 216 under the materiality provision and claimed that the new laws denied people their right to vote due to immaterial errors.[195] The record at the trial included:

> declarations of absentee and provisional voters whose ballots were rejected for birthdate and address errors. Several, for example, wrote the current date instead of their birthdates. One transposed the location of the digits indicating the month and day of his birth despite specific language on the form to the contrary because he grew up in a country that follows the date sequence used elsewhere in the world.[196]

Yet, the trial court held that the plaintiffs could not challenge SB 205 and SB 216 under the materiality provision because they were private litigants.[197] The Sixth Circuit's reasoning is discussed in Part II.B.1. Then, in Part II.B.2, this Note discusses some of the arguments that the parties made in the petition for certiorari process.

1. The Sixth Circuit's Materiality Provision Analysis

The Sixth Circuit affirmed the district court's holding that the materiality provision was not enforceable by private litigants.[198] The court explained that "[w]e have held [in the past] that the negative implication of Congress's provision for enforcement by the Attorney General is that the [materiality provision] does not permit private rights of action."[199] The Sixth Circuit cited its *McKay*[200] precedent and reasoned that "[a] panel of this court may not overturn binding precedent because a published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.'"[201] In other words, the Sixth Circuit was bound by stare decisis.[202] Because the Sixth Circuit addressed the issue by citing *McKay* rather than a *Gonzaga* analysis, a discussion of *McKay* and the cases it relied on is instructive.

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195. *Id.* at 629–30.

196. *Id.* at 621.

197. Ne. Ohio Coal. for the Homeless v. Husted, No. 06-CV-896, 2016 WL 3166251, at *53 (S.D. Ohio June 7), *aff'd in part, rev'd in part*, 837 F.3d 612 (6th Cir. 2016). The plaintiffs also challenged SB 205 and SB 216 as violations of the federal constitution's equal protection clause. *Id.* at *35. Ultimately, the Sixth Circuit upheld the district court's finding that SB 205 imposed an undue burden on the plaintiffs. *Ne. Ohio*, 837 F.3d at 618, 631–32 (The required "fields directly and measurably disenfranchise[d] some voters . . . . [I]n the 2014 and 2015 general elections, 620 provisional ballots were rejected as failing to meet SB 216's address and birthdate perfection requirements, out of a total of 16,942 rejections. Among over 860,000 domestic civilian absentee ballots cast in 2014 and 430,000 in 2015, 1378 ballots were rejected in 2014, and 334 in 2015, for failure to comply with the similar provision in SB 205." (citation omitted)).

198. *Ne. Ohio*, 837 F.3d at 630.

199. *Id.* (citing McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000)).

200. This is the decision that the district court in *Schwier* relied on and the Eleventh Circuit criticized. *See supra* notes 181–84 and accompanying text.

201. *Ne. Ohio*, 837 F.3d at 630 (quoting United States v. Elbe, 774 F.3d 885, 891 (6th Cir. 2014)).

202. *Id.* ("*McKay v. Thompson* therefore binds this panel.").

In *McKay*, the plaintiff challenged a Tennessee law that required prospective voters to provide their SSNs to register.[203] McKay had his voter registration application denied because he omitted his SSN.[204] He argued the Tennessee law violated the materiality provision because "his [SSN] was not 'material' to determining his qualification for voting," and therefore his failure to provide his SSN could not be grounds to refuse his application.[205] The Sixth Circuit held that the materiality provision "is enforceable by the Attorney General, not by private citizens."[206] The court cited a single district court decision[207]—*Willing v. Lake Orion Community School Board of Trustees*.[208]

In *Willing*, the plaintiff sued local officials and claimed that they "interfered with . . . elections and recounts by intimidating, harassing and humiliating" voters.[209] The lawsuit was filed under a different section of Title I and did not invoke the materiality provision.[210] The court dismissed the complaint, noting that "[u]pon review of the language of [Title I] and the case law interpreting it" the plaintiff had no private right of action.[211] It also cited a single case—*Good v. Roy*.[212] The *Willing* court explained that Title I "is intended to prevent racial discrimination at the polls and is enforceable by the Attorney General, not by private citizens."[213]

In *Good*, the plaintiff sought to enjoin a candidate from making misleading campaign statements.[214] In dismissing the complaint, the district court first noted that Title I did not protect against misleading statements.[215] Moreover, the court explained that, even if the statute did prohibit misleading statements, the statute "provides for enforcement . . . by the Attorney General with no mention of enforcement by private persons."[216] As such, the court declined to recognize a private right of action.[217]

In sum, the Sixth Circuit did not conduct a *Gonzaga* analysis of the materiality provision in *Northeast Ohio*.[218] In the language of *Gonzaga*, however, *Northeast Ohio* and *McKay* can be read as decisions that held that

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203. *McKay*, 226 F.3d at 754.
204. *Id.*
205. *Id.* at 756.
206. *Id.*
207. *Id.*
208. 924 F. Supp. 815 (E.D. Mich. 1996).
209. *Id.* at 820.
210. Specifically, the claim invoked a provision that mandated that "[n]o person shall intimidate, threaten, coerce . . . any other person for the purpose of interfering with the right of such other person to vote." *Id.* (citing 52 U.S.C. § 10101(b)).
211. *Id.*
212. 459 F. Supp. 403 (D. Kan. 1978).
213. *Willing*, 924 F. Supp. at 820 (citing 52 U.S.C. § 10101(c)).
214. *Good*, 459 F. Supp. at 404–05.
215. *Id.* at 405 ("Plaintiffs somehow read into this subsection the protection sought in this lawsuit; namely, protection against misleading statements by candidates for public office. Such an interpretation is unjustified.").
216. *Id.*
217. *Id.*
218. *See* Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 629–30 (6th Cir. 2016).

enforcement by the Attorney General is a sufficiently comprehensive remedial scheme that is incompatible with private enforcement under § 1983.[219] The Sixth Circuit's holding aligns with the conclusion of most courts.[220]

Some commentators, however, have criticized the Sixth Circuit's decision. For example, the Sixth Circuit reasoned that it could not overturn its holding in *McKay* "unless an inconsistent decision of the United States Supreme Court requires modification of the decision."[221] One scholar has noted that *Gonzaga* was decided two years after *McKay*, "making *Gonzaga* an intervening Supreme Court precedent within the meaning of the law."[222] As such, the Sixth Circuit failed to apply appropriate Supreme Court precedent.[223]

Another commentator has argued that the Sixth Circuit's reasoning stands "in stark contrast" to the Eleventh Circuit's thorough reasoning.[224] That is, "[t]he Sixth Circuit's analysis of the issue is so cursory that it is easier to quote than to summarize."[225] Moreover, they argue that the cases *Northeast Ohio* relied on lacked "strong analysis."[226] That is, *McKay* included an "even shorter . . . analysis" than the Sixth Circuit provided in *Northeast Ohio*.[227] *McKay* relied on the district court's ruling in *Willing*, which, other than citing *Good*, "did not offer any analysis to support" its holding.[228] Finally, the court in *Good* "reasoned that the statutory language was unambiguous but provided no further reasoning or legal support."[229] In sum, the commentator concludes that "the Eleventh Circuit['s] analysis is . . . much more thorough, and more convincing" than the Sixth Circuit's.[230] Although these critiques are informative, a deeper examination of the parties' arguments for and against private enforcement is warranted. As such, Part II.B.2 addresses the briefs

219. *See supra* Part I.B.2.

220. *See* Tokaji, *supra* note 22, at 138, 141 ("[M]ost courts to have addressed the issue have concluded that [the] statute is not privately enforceable" and have disagreed with the Eleventh Circuit's analysis in *Schwier*.); Charquia Wright, *Circuit Circus: Defying SCOTUS and Disenfranchising Black Voters*, 83 OHIO ST. L.J. 601, 617 (2022) ("[M]ost courts have refused to allow private plaintiffs to sue under the [Civil Rights Act], holding that no private right of action exists."); Democratic Cong. Campaign Comm. v. Kosinski, 614 F. Supp. 3d 20, 48 (S.D.N.Y. 2022) (collecting cases in the Second Circuit that found no private right of action).

221. *Ne. Ohio*, 837 F.3d at 630.

222. Wright, *supra* note 220, at 625.

223. *Id.*

224. *See* Megan Hurd, Comment, *Promoting Private Enforcement of the Voting Rights Act and the Materiality Provision: Contrasting* Northeast Ohio Coalition for the Homeless v. Husted *and* Schwier v. Cox, 86 U. CIN. L. REV. 1379, 1394 (2018).

225. *Id.* (alteration in original) (quoting Petition for Writ of Certiorari at 33, *Ne. Ohio*, 137 S. Ct. 2265 (No. 16-1068), 2017 WL 876221, at *19).

226. *Id.*

227. *Id.*

228. *Id.* at 1395.

229. *Id.*

230. *Id.* at 1396.

submitted to the Supreme Court during the petition for certiorari process—which the Court denied.[231]

2. Appealing to the Supreme Court

Although the court in *Northeast Ohio* enjoined SB 205 on constitutional grounds,[232] the plaintiffs appealed the Sixth Circuit's ruling on the materiality provision.[233] This Note addresses both the petitioner's and respondent's arguments below.

a. Northeast Ohio Coalition for the Homeless's Arguments for Certiorari

The petitioners presented their argument using the *Gonzaga* framework.[234] First, they argued that the language of the materiality provision unambiguously confers an individual right.[235] Relying on *Schwier*, they argued that Title I speaks "in language that 'focus[es]' on the 'individual's right to vote.'"[236]

Then the petitioners contended that Title I did not include a comprehensive remedial scheme that foreclosed enforcement under § 1983. They first argued that "the language of [Title I] presupposes that there will be lawsuits brought by parties other than the Attorney General."[237] The petitioners pointed to Title I subsection (d), which gives federal district courts jurisdiction over materiality provision cases.[238] Subsection (d) "directs that the district courts shall exercise [their] jurisdiction 'without regard to whether *the party aggrieved* shall have exhausted any administrative or other remedies that may be provided by law.'"[239] The Northeast Ohio Coalition for the Homeless (the "Coalition") explained that the Attorney General "would never be required to exhaust administrative remedies."[240] Thus, Congress clearly contemplated that there would be lawsuits in which someone *other* than the Attorney General was the plaintiff.[241]

The petitioners also pointed to Title I subsection (e).[242] Subsection (e) "begins with the phrase '[i]n any proceeding instituted pursuant to subsection

231. *See Ne. Ohio*, 137 S. Ct. 2265.
232. *See supra* note 197.
233. *See generally* Petition for Writ of Certiorari, *Ne. Ohio*, 137 S. Ct. 2265 (No. 16-1068), 2017 WL 876221.
234. *Id.* at 27–30.
235. *Id.*; *see supra* Part I.B.1.
236. Petition for Writ of Certiorari, *supra* note 233, at 30 (alteration in original) (quoting Schwier v. Cox, 340 F.3d 1284, 1296 (11th Cir. 2003)).
237. *Id.* at 29.
238. *Id.* at 30 (citing 52 U.S.C. § 10101(d)).
239. *Id.* (quoting 52 U.S.C. § 10101(d)).
240. *Id.*
241. *Id.*
242. *Id.* at 31–32.

(c).'"[243] Subsection (c) is the provision that authorizes the Attorney General to bring suits.[244] The petitioners contended that this language "presupposes that there will be proceedings under [Title I] not 'instituted pursuant to subsection (c)'—that is, lawsuits brought by parties other than the Attorney General."[245] As such, lawsuits brought by the Attorney General "are only a subset of the entire universe of potential actions to enforce [Title I]."[246]

The Coalition, like the Eleventh Circuit in *Schwier*, next argued that Title I's legislative history "confirms the availability of a private right" of action.[247] That is, nothing in the 1957 amendments—which authorized the Attorney General to file suits—provides support for the Sixth Circuit's analysis that Congress intended to foreclose private enforcement. The Attorney General testified that if the amendment passed, "private people will retain the right they have now to sue in their own name."[248] As the Eleventh Circuit noted, private plaintiffs brought § 1983 suits to enforce earlier versions of Title I between 1870 and 1957.[249] Finally, the petitioners argued that it was unlikely Congress intended to repeal a preexisting private right of action at the same time it "was passing legislation to strengthen [voting rights]."[250]

Naturally, the respondents brought their own methods of statutory interpretation to bear and argued that Congress intended to foreclose private enforcement.[251] Those arguments are discussed in the next section.

b. Ohio's Arguments Against Certiorari

Like the petitioners, Ohio focused its arguments on *Gonzaga*'s second prong—whether Congress intended to foreclose private enforcement when it authorized the Attorney General to bring suits.[252] First, Ohio noted that Titles II[253] and VII[254] of the CRA of 1964 included private rights of action.[255] Congress, however, did not include a private right of action in Title I.[256] In other words, although Congress authorized the Attorney General to bring suits in the 1957 amendments, it chose not to add a private right of action in

243. *Id.* at 31 (quoting 52 U.S.C. § 10101(e)). Subsection (e) provides procedures and remedies if a court finds that a state violated Title I "pursuant to a pattern or practice" of discrimination. *See* 52 U.S.C. § 10101(e)).

244. *See* 52 U.S.C. § 10101(c).

245. Petition for Writ of Certiorari, *supra* note 233, at 31 (quoting 52 U.S.C. § 10101(e)).

246. *Id.*

247. *Id.* at 37. *But see supra* note 177.

248. Petition for Writ of Certiorari, *supra* note 233, at 37.

249. *Id.* at 38 (collecting cases); *see also supra* notes 169–72 and accompanying text.

250. Petition for Writ of Certiorari, *supra* note 233, at 41.

251. *See infra* Part II.B.2.b.

252. *See generally* Brief in Opposition to Certiorari, Ne. Ohio Coal. for the Homeless v. Husted, 137 S. Ct. 2265 (2017) (mem.) (No. 16-1068), 2017 WL 1907753.

253. 42 U.S.C § 2000a. Title II governs claims of discrimination in places of public accommodation. *Id.*

254. 42 U.S.C § 2000e. Title VII governs claims of employment discrimination. *Id.*

255. Brief in Opposition to Certiorari, *supra* note 252, at 31–32.

256. *Id.*; *see also supra* Part I.A.

1964 despite granting that right in different civil rights contexts.[257] A "general principle of statutory construction [is] that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely."[258] Therefore, Ohio argued that Congress intended to foreclose private enforcement of the materiality provision because it simultaneously granted that right for other civil rights.[259]

Next, Ohio noted that "the 'express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'"[260] This is the same reasoning deployed in *McKay* and reaffirmed in *Northeast Ohio*.[261] Finally, the respondents argued that even if prior iterations of Title I were privately enforceable before 1957,[262] that "says nothing about whether subsections added much later are."[263] Indeed, the Supreme Court has rejected the "one-size-fits-all test."[264]

Ultimately, the Supreme Court denied the appeal and cemented a circuit split between the Sixth and Eleventh Circuits.[265] In 2022, the Third Circuit entered the fray and largely adopted the petitioner's arguments—holding that the materiality provision is enforceable under § 1983. That opinion is discussed below in Part II.C.

C. Third Circuit: Migliori v. Cohen *(2022)*

In *Migliori v. Cohen*,[266] the Third Circuit held that the materiality provision was enforceable by private litigants under § 1983. There, five plaintiffs challenged a Pennsylvania law that required voters to complete, date, and sign a voter declaration statement on their vote-by-mail ballot

257. Brief in Opposition to Certiorari, *supra* note 252, at 32.

258. *Id.* (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002)); *see also supra* note 104 and accompanying text (Statutes "must be read in their context and with a view to their place in the overall statutory scheme.").

259. Brief in Opposition to Certiorari, *supra* note 252, at 32. *But see* BACK, *supra* note 26, at Summary ("Though [the CRA of 1964's] titles share a thematic focus on discrimination, the 1964 Act—from a legal perspective—is perhaps best understood as a series of unique and *distinct* statutes. The titles vary in terms of the actions and practices they prohibit, whether and how an individual may seek relief for the violation of a title's requirements, and available remedies for particular violations. Relatedly, where provisions of a title are enforced in federal courts, they have given rise to distinct lines of case law, questions of interpretation, and application.").

260. Brief in Opposition to Certiorari, *supra* note 252, at 33 (quoting Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 328 (2015)).

261. *See supra* notes 199–201 and accompanying text.

262. *See supra* notes 171, 247–49 and accompanying text.

263. Brief in Opposition to Certiorari, *supra* note 252, at 34. The materiality provision was added in 1964. *See supra* Part I.A.

264. Brief in Opposition to Certiorari, *supra* note 252, at 34 (citing Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 42 (1977) ("[N]o private right of action under one subsection despite earlier holding that other subsection implied private right of action.")).

265. *See* Ne. Ohio Coal. for the Homeless v. Husted, 137 S. Ct. 2265 (2017) (mem.).

266. 36 F.4th 153 (3d Cir.), *vacated as moot sub nom*. Ritter v. Migliori, 143 S. Ct. 297 (2022).

return envelopes.[267] The plaintiffs' votes, along with the votes of 252 others, were not counted in the 2021 election because they failed to date the envelope.[268] Their ballots were otherwise received on time.[269] In fact, "the only thing that prevent[ed] their vote[s] from being counted [was] the fact that they did not enter a date on the outside envelope."[270] Although the district court concluded that "the Materiality Provision unambiguously confers a personal right," the court nonetheless held there was no private right of action.[271] On appeal, the Third Circuit engaged in a *Gonzaga* analysis and held otherwise.[272]

Because the district court concluded that the materiality provision unambiguously conferred an individual right, the Third Circuit only engaged with *Gonzaga*'s second prong.[273] The court explained that "[t]o rebut the presumption, a defendant must point to either 'specific evidence from the statute itself' or 'a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.'"[274] The court addressed each approach in turn.

First, the court explained that the statute explicitly contemplates enforcement by parties other than the Attorney General.[275] Like the petitioners in *Northeast Ohio*, the Third Circuit pointed to the language in Title I subsection (d).[276] That is, Title I gave the federal courts jurisdiction over Title I claims, "whether the party aggrieved shall have exhausted any administrative or other remedies."[277] Thus, the court concluded that Title I "specifically contemplates an aggrieved party (i.e., private plaintiff) bringing this type of claim in court."[278]

Next, the court concluded that Title I did not have "a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983."[279] The court noted that this has occurred "in very few instances."[280] The judges then summarized some cases in which the Supreme Court held that a comprehensive enforcement scheme precluded enforcement under § 1983.[281] In one case, the Supreme Court explained that Congress precluded a private right of action because "the relevant statute both provided 'a panoply of enforcement options, including non-compliance orders, civil suits, and criminal penalties' . . . and authorized 'private persons to initiate

267. *Id.* at 157 (citing 25 PA. CONS. STAT. §§ 3146.6(a), 3150.16 (2020)).
268. *Id.* at 158.
269. *Id.*
270. *Id.*
271. *Id.* at 158–59.
272. *Id.* at 159–62.
273. *Id.* at 159.
274. *Id.* at 160 (quoting Gonzaga Univ. v. Doe, 536 U.S. 273, 284 n.4 (2002)).
275. *Id.*
276. *Id.*; *see also supra* notes 237–41 and accompanying text.
277. *Migliori*, 36 F.4th at 160 (quoting 52 U.S.C. § 10101(d)).
278. *Id.*
279. *Id.* (quoting *Gonzaga*, 536 U.S. at 284 n.4).
280. *Id.*; *see also supra* note 132 and accompanying text.
281. *See generally Migliori*, 36 F.4th at 160–62.

enforcement actions' in several provisions."[282] Thus, the Court "concluded it was 'hard to believe that Congress intended to preserve the § 1983 right of action when it created so many specific statutory remedies.'"[283] In another case, the Supreme Court explained that the statute at issue first instructed plaintiffs to "invoke carefully tailored local administrative procedures" before seeking federal judicial review.[284] As such, Congress could not have intended for plaintiffs to skip that statute's procedures and go straight to enforcement under § 1983.[285] The Third Circuit explained that Title I lacked similar schemes.[286] Thus, "the presumption of a private right of action under § 1983 [was] not rebutted."[287]

Finally, like the Eleventh Circuit in *Schwier*, the Third Circuit pointed to the legislative history of Title I.[288] That is, "[w]hen Congress added a provision for civil enforcement by the Attorney General, it acknowledged that private individuals had enforced the substantive rights in [previous iterations of Title I] via § 1983 for nearly a century."[289] Additionally, Congress "did not make the Attorney General's enforcement mandatory."[290] Thus, the Third Circuit held that the materiality provision was enforceable by private litigants under § 1983.[291] This Note now turns to the Fifth Circuit's analysis of § 1983 and the materiality provision.

D. Fifth Circuit: Vote.org v. Callanen *(2023)*

In *Vote.org v. Callanen*[292]—where a nonprofit organization challenged a Texas voter registration law—the Fifth Circuit held that the materiality provision was enforceable under § 1983.[293] However, unlike the cases discussed above, the Fifth Circuit relied on the Supreme Court's reasoning in *Talevski*.[294]

In 2018, the plaintiff, Vote.org, began registering low-propensity voters, including those from underrepresented groups and young people, through its mobile application.[295] The app first asked prospective voters to input required information by following a series of prompts.[296] Once completed,

282. *Id.* at 160 (quoting Blessing v. Freestone, 520 U.S. 329, 347 (1997)).
283. *Id.* (quoting *Blessing*, 520 U.S. at 347).
284. *Id.* (quoting *Blessing*, 520 U.S. at 347).
285. *Id.*
286. *Id.* at 160–61.
287. *Id.* at 161.
288. *Id.* at 162; *see also supra* notes 169–76 and accompanying text.
289. *Migliori*, 36 F.4th at 162 (citing H.R. REP. NO. 85-291, 12–13 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 1966, 1977).
290. *Id.* (citing 52 U.S.C. § 10101(c) ("[T]he Attorney General *may* institute for the United States . . . a civil action . . . ." (alterations and omissions in original))).
291. *Id.*
292. 89 F.4th 459 (5th Cir. 2023).
293. *Id.* at 478.
294. *See generally id.* at 473–78 (citing *Talevski* throughout); *see also supra* notes 94–110 and accompanying text.
295. *Vote.org*, 89 F.4th at 468.
296. *Id.*

the app "auto-fill[ed the information] onto the voter registration form."[297] Texas (as all states) requires applicants to sign their application.[298] To sign the form generated by Vote.org's app, the registrant signed a blank piece of paper, took a photo of their signature, and uploaded it to the app.[299] The app then added the signature to the appropriate field in the registration form.[300] The digitally signed application was then faxed and mailed to the requisite county registrar.[301]

Later that year, the Texas Secretary of State issued a statement that "[a]ny web site that misleadingly claims to assist voters in registering to vote online by simply submitting a digital signature is not authorized to do so."[302] Vote.org subsequently shut down its app.[303] Then, in 2021, the Texas Governor signed a bill that codified the Secretary of State's statement.[304] The law, known as the wet signature rule, required that registrants who fax their registration form also mail a paper version that "contain[ed] the voter's original signature."[305] Indeed, the bill was a specific response to Vote.org's app.[306] Vote.org then sued several Texas county registrars under § 1983 and argued that Texas's voter registration law violated the materiality provision[307] because requiring a wet signature is not material to determining someone's eligibility to vote.[308]

Before reaching the claim's merits, the Fifth Circuit first concluded that the materiality provision was enforceable under § 1983.[309] The court applied the *Gonzaga* and *Talevski* framework and first asked whether the materiality provision contained the requisite rights-creating language.[310] The *Vote.org* court agreed with the Eleventh Circuit's reasoning "that, although '[t]he subject of the [materiality provision] is the person acting under color of state law, . . . the focus of the text is nonetheless the protection of each individual's right to vote.'"[311] Indeed, Texas argued in its brief that the materiality provision did not confer an individual right because it was framed in terms

297. *Id.*
298. *Id.* at 467–68 (citing TEX. ELEC. CODE ANN. § 13.002(b) (West 2021)).
299. *Id.* at 468.
300. *Id.*
301. *Id.*
302. *Id.* (alterations in original).
303. *Id.*
304. *Id.*
305. *Id.* (quoting TEX. ELEC. CODE ANN. § 13.143(d-2) (West 2021)).
306. *Id.* at 471 ("[T]he 'particular genesis' of the Wet Signature Rule was Vote.org's app.").
307. *Id.* at 468. Vote.org also challenged the signature requirement as an undue burden on the right to vote in violation of the First and Fourteenth Amendments. *Id.* at 468–69.
308. *Id.* at 468. Ultimately the court concluded that the wet signature rule did not violate the materiality provision. *Id.* at 489 ("[U]nder the totality of the circumstances, . . . [the] signature [is] a material requirement.").
309. *Id.* at 473–78.
310. *Id.* at 473.
311. *Id.* at 475 (quoting Schwier v. Cox, 340 F.3d 1284, 1296 (11th Cir. 2003) (first alteration and omission in original)).

of the "regulated party" *not* the "person benefitted."[312] The Fifth Circuit responded with *Talevski*.[313] There, the Supreme Court stated "that 'it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights (and we have never so held).'"[314] The Fifth Circuit also analogized the materiality provision to the FNHRA—the statute at issue in *Talevski*—and distinguished the materiality provision from FERPA—the statute at issue in *Gonzaga*.[315] Thus, the court concluded that the materiality provision unambiguously conferred an individual right.[316]

The Fifth Circuit then turned to whether Congress implicitly intended to foreclose enforcement of Title I under § 1983.[317] First, the court explained that when Congress granted the Attorney General authority to sue, it passed subsection (d) at the same time.[318] Subsection (d) "provides that all actions brought 'pursuant to [Title I]' can be exercised 'without regard to whether the *party aggrieved* shall have exhausted administrative or other remedies that may be provided by law.'"[319] This is noteworthy because, under Supreme Court precedent, past statutes that foreclosed private enforcement required plaintiffs to exhaust administrative remedies prior to filing suit.[320] Moreover, the court explained that it was unlikely that subsection (d)'s "party aggrieved" language referred to the Attorney General.[321] Indeed, the House Report on the CRA of 1957 explained that the exhaustion waiver was a response to "court opinions in which exhaustion of remedies had been required for *private* plaintiffs."[322] Thus, subsection (d), passed at the same time as the grant of authority to the Attorney General, contemplated suits by private plaintiffs.[323] The court explained that this reading, coupled with the fact that private plaintiffs brought suits prior to the CRA of 1957,[324] meant that the CRA of 1957 augmented the "established private right to sue with an explicit right in the Attorney General."[325]

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312. *See* Reply Brief for Appellants at 10, Vote.org v. Callanen, 89 F.4th 459 (5th Cir. 2023) (No. 22-50536), 2022 WL 17222581, at *10.

313. *Vote.org*, 89 F.4th at 474–75.

314. *Id.* (quoting Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1458 (2023)).

315. *Id.* at 474–75 nn.3–4; *see supra* Part I.B.1.

316. *Vote.org*, 89 F.4th at 475 ("We conclude that [Title I] confer[s] an individual right.").

317. *Id.* at 475–78.

318. *Id.* at 475.

319. *Id.* (emphasis added) (quoting 52 U.S.C. § 10101(d)).

320. Brief of Plaintiff-Appellee Vote.org at 27, *Vote.org*, 89 F.4th 459 (No. 22-50536), 2022 WL 16716018, at *27 (quoting Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 253, 255 (2009)).

321. *Vote.org*, 89 F.4th at 475.

322. *Id.* (citing H.R. REP. NO. 85-291, at 10–11 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 1966, 1975).

323. *Id.* at 475.

324. *Id.* at 474 ("[P]laintiffs could and did enforce [Title I] under § 1983" between 1871 and 1957 (quoting Schwier v. Cox, 340 F.3d 1284, 1296 (11th Cir. 2003)).

325. *Id.* at 476.

The court then addressed whether, even if Title I contemplated suits by private plaintiffs, there was nonetheless a comprehensive enforcement scheme that precluded enforcement under § 1983.[326] The judges noted that subsections (c)–(e) "seem[ed] . . . to qualify as a 'comprehensive scheme.'"[327] Those provisions provide details of the Attorney General's authority.[328] Relying on *Talevski*, the court explained that "[r]egardless of how comprehensive" the scheme, § 1983 "is foreclosed only when the scheme is 'incompatible' or 'inconsistent' with § 1983 enforcement."[329] Yet, private plaintiffs enforced earlier versions of Title I under § 1983 prior to 1957.[330] Therefore, "there [was] a long history of *compatibility*" between Title I and § 1983.[331] Thus, because subsections (c)–(e) pertained to the *Attorney General's* enforcement scheme and private plaintiffs had "a long history" of bringing suits, the CRA of 1957 "create[ed] no conflicts with private suits."[332]

The Fifth Circuit next addressed the Eleventh Circuit's *Schwier* opinion and endorsed the court's "sound" reasoning.[333] However, the Fifth Circuit noted that *Schwier*'s reliance on *Allen*—in which the Supreme Court implied a private right of action into § 5 of the VRA—was "undermined by later caselaw."[334] Section 5 of the VRA, like the materiality provision, contains an express cause of action for the Attorney General but is silent on a private cause of action.[335] In implying a private right of action, the Supreme Court "reasoned that the goals of the [VRA] were much more likely to be reached if private citizens were not 'required to depend solely on litigation instituted at the discretion of the Attorney General.'"[336] The Fifth Circuit explained

326. *Id.*

327. *Id.* Subsection (c) grants the Attorney General authority to sue, subsection (d) grants federal courts jurisdiction regardless of whether the plaintiff has exhausted administrative remedies, and subsection (e) allows the Attorney General to request the appointment of independent referees to review voter registration forms if a court determines that a person has been deprived of a right under Title I on account of race. *See* 52 U.S.C. § 10101(c)–(e). Although not discussed in the opinion, subsection (g) allows the Attorney General to request that a three-judge panel hear a case under subsection (e). *Id.* § 10101(g).

328. *Vote.org*, 89 F.4th at 476.

329. *Id.* (quoting Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1459 (2023)).

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 476–77. The Fifth Circuit also discussed the Third Circuit's reasoning in *Migliori* and the Sixth Circuit's *McKay* opinion. *Id.* at 477–78. The *Vote.org* court agreed entirely with the Third Circuit. *Id.* at 477 ("We agree with [the *Migliori* court's] conclusions."); *see also supra* notes 279–87 and accompanying text. On the other hand, the Fifth Circuit critiqued the *McKay* opinion, highlighting its brevity and that it did not "wrestle with the [*Gonzaga*] considerations." *Vote.org*, 89 F.4th at 478; *see also supra* notes 221–30 and accompanying text.

334. *Vote.org*, 89 F.4th at 477 (citing Allen v. State Bd. of Elections, 393 U.S. 544 (1969)); *see also supra* notes 22, 178–80 and accompanying text.

335. *See* 52 U.S.C. § 10304.

336. *Vote.org*, 89 F.4th at 477 (quoting Schwier v. Cox, 340 F.3d 1284, 1294–95 (11th Cir. 2003)).

that *Allen*'s approach "had largely lost [its] force."[337] Indeed, "the [Supreme] Court [has] adopted a far more cautious course."[338] The key consideration is not whether a private right of action would effectuate a statute's purpose but "whether there was congressional intent to create a private right."[339] Despite critiquing the Eleventh Circuit, the Fifth Circuit ultimately noted that "regardless of the reliance on *Allen*, the *Schwier* court properly applied . . . *Gonzaga*."[340] As discussed in Part III, however, this is one way the Fifth Circuit's analysis falls short.[341] In sum, the Fifth Circuit applied *Gonzaga* and *Talevski* and concluded that the materiality provision is enforceable under § 1983.

Having explored the circuit split over whether the materiality provision is enforceable by private litigants, this Note now seeks to settle the split. As discussed in Part III, this Note argues that under *Talevski*, the most recent Supreme Court case to address § 1983, the Third, Fifth, and Eleventh Circuits' interpretations are correct. This Note, however, goes one step further and shows why the Fifth Circuit—the most recent court to weigh in—did not go far enough.

III. RECENT SUPREME COURT PRECEDENT CONFIRMS THE THIRD, FIFTH, AND ELEVENTH CIRCUITS' CONCLUSIONS, BUT THE FIFTH CIRCUIT'S REASONING WAS INCOMPLETE

Part III argues that *Gonzaga* and *Talevski* confirm that the materiality provision is enforceable by private litigants under § 1983. In other words, the Third, Fifth, and Eleventh Circuits got it right. Yet, the Fifth Circuit, the only court that had the benefit of the recent *Talevski* decision,[342] fell short in its reasoning. A more complete application of *Talevski* to the materiality provision shows that § 1983 is a stronger tool for privately enforcing voting rights than the Fifth Circuit's opinion suggests.

Before acknowledging the shortcomings of the Fifth Circuit's reasoning, however, a response to the Sixth Circuit is warranted. Had the Sixth Circuit thoroughly engaged with *Gonzaga*, it likely would have held that the materiality provision is enforceable under § 1983.[343] Indeed, the three other circuit courts to address the question have held that the materiality provision is enforceable under § 1983.[344] Instead, the Sixth Circuit missed an opportunity to close the circuit split in *Northeast Ohio* because it relied on *McKay*, its own precedent, rather than the Supreme Court's intervening *Gonzaga* decision.[345] Although the weight of authority aligns with the Sixth

337. *Id.*
338. *Id.* (quoting Ziglar v. Abbasi, 582 U.S. 120, 132 (2017)).
339. *Id.* (quoting *Ziglar*, 582 U.S. at 132).
340. *Id.*
341. *See infra* notes 396–410 and accompanying text.
342. *Schwier* was decided in 2003, *Ne. Ohio* was decided in 2016, and *Miglori* was decided in 2022. *Talevski* was decided in June 2023 and *Vote.org* was decided in December 2023.
343. Wright, *supra* note 220, at 621.
344. *See supra* Parts II.A, C–D.
345. Wright, *supra* note 220, at 625.

Circuit's holding,[346] the precedent is built on a house of cards. Indeed, the line of cases stems from a single, poorly-reasoned district court decision from 1978 which was cited by another district court in 1996.[347] In 2000, the Sixth Circuit cited the 1996 case, and a circuit split was born.[348] As the Third, Fifth, and Eleventh Circuits opinions show, a faithful study of the text and history of Title I leads to only one conclusion—the materiality provision is privately enforceable.

Turning to the Fifth Circuit's *Vote.org* opinion, Part III.A discusses why *Talevski* confirms that the materiality provision unambiguously confers an individual right.[349] The discussion, however, highlights a key tool of statutory interpretation that the Supreme Court applied in *Talevski* that the Fifth Circuit did not apply in *Vote.org*.[350] Part III.A also highlights why the Supreme Court's broad understanding of § 1983 is key for future voting rights litigants.[351] This, too, was absent from the Fifth Circuit's discussion. Finally, Part III.B discusses why the materiality provision does not foreclose enforcement under § 1983.[352] First, the section explains why *Talevski* confirms the Third, Fifth, and Eleventh Circuits' conclusions. Then, the section argues that the Fifth Circuit's criticism of the Eleventh Circuit's reliance on *Allen* was misplaced.[353] Additionally, the section responds to criticism of the Third, Fifth, and Eleventh Circuits' reliance on legislative history.[354]

A. The Materiality Provision Unambiguously Confers an Individual Right

To enforce a statute through § 1983 the statute must unambiguously confer an individual right.[355] The Third, Fifth, and Eleventh Circuits concluded that the materiality provision met this high burden.[356] As the Third Circuit correctly explained, "the Materiality Provision unambiguously confers a personal right because it 'places "[a]ll citizens" qualified to vote at the center of its import and provides that they "shall be entitled and allowed" to vote.'"[357] Indeed, Ohio did not even challenge the issue in its brief to the Supreme Court.[358]

346. *See supra* note 220.
347. *See supra* notes 181–84, 196–217, 224–30 and accompanying text.
348. *See supra* notes 208–11 and accompanying text.
349. *See infra* Part III.A.
350. *See infra* notes 370–73 and accompanying text.
351. *See infra* notes 374–84 and accompanying text.
352. *See infra* Part III.B.
353. *See infra* notes 396–410 and accompanying text.
354. *See infra* notes 411–18 and accompanying text.
355. *See supra* Part I.B.1.
356. *See supra* Parts II.A, C–D.
357. Migliori v. Cohen, 36 F.4th 153, 159 (3d Cir.) (quoting Migliori v. Lehigh Cnty. Bd. of Elections, No. 22-cv-00397, 2022 WL 802159, at *10 (E.D. Pa. Mar. 16, 2022)), *vacated as moot sub nom.* Ritter v. Migliori 143 S. Ct. 297 (2022).
358. *See generally* Brief in Opposition to Certiorari, *supra* note 252.

In *Vote.org*, however, Texas argued that the materiality provision does not unambiguously confer an individual right.[359] Specifically, Texas contended that the subject of the materiality provision is the party regulated, not the individual.[360] To some extent, Texas was correct. The materiality provision instructs that "*[n]o person acting under color of law shall* . . . deny the right of any individual to vote" because of an immaterial omission.[361] The court in *Schwier* addressed this argument.[362] It noted that although the "subject of the [materiality provision] is the person acting under color of state law" the "focus" of the provision is "the protection of each individual's right to vote."[363]

The Fifth Circuit properly applied *Talevski*, rebutted Texas's argument, and validated the Eleventh Circuit's reasoning.[364] In *Talevski*, the Supreme Court had rejected a similar argument.[365] The nursing home defendant contended that the FNHRA could not confer an individual right because the subject of the statute was "the Medicaid-participant nursing homes" and not the individual resident.[366] The Court explained that the subject of the statutory sentence was "not a material diversion" from the statute's "necessary focus on the nursing home residents."[367] Moreover, the Court noted, and the Fifth Circuit cited, that "it would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the actors that might threaten those rights."[368] Indeed, the Court has never held that out as a possibility.[369]

Yet, *Talevski* supports the Fifth Circuit's holding more than its opinion lets on. The *Talevski* opinion noted that statutes must be read with a view to the overall statutory scheme.[370] In *Talevski*, the Court explained that both provisions at issue resided in the section of the statute which "expressly concerns '[r]equirements *relating to residents' rights*.'"[371] The materiality provision is similarly situated. Indeed, the title of Part IV of the CRA of 1957, as enacted, read: "To Provide Means of Further Securing and Protecting the *Right to Vote*."[372] Moreover, the materiality provision resides in 52 U.S.C. § 10101, aptly titled "Voting Rights."[373] Thus, although the Fifth Circuit came to the right conclusion, it did not fully rely on what

359. *See* Reply Brief for Appellants, *supra* note 312, at 10.
360. *See id.*; *supra* notes 310–16 and accompanying text.
361. 52 U.S.C. § 10101(a)(2)(B) (emphasis added).
362. *See supra* notes 161–61 and accompanying text.
363. *See supra* notes 161–61 and accompanying text.
364. *See supra* notes 310–16 and accompanying text.
365. *See* Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1458 (2023).
366. *Id.*
367. *Id.*
368. *Id.*; *see supra* notes 313–14 and accompanying text.
369. *Talevski*, 143 S. Ct. at 1458.
370. *See supra* notes 103–04 and accompanying text.
371. *Talevski*, 143 S. Ct. at 1457 (alteration in original) (quoting 42 U.S.C. § 1396r(c)); *see supra* notes 103–05 and accompanying text.
372. Pub. L. No. 85-315, Part IV, 71 Stat. 634, 637 (1957) (emphasis added).
373. *See generally* 52 U.S.C. § 10101.

Talevski had to offer. Applying this mode of statutory interpretation to future voting rights cases under § 1983 could prove beneficial.

Finally, *Talevski* also supports a private right of action because it reaffirmed the Supreme Court's broad understanding of "laws" in § 1983's text.[374] This, too, was not discussed in the *Vote.org* decision.[375] In *Talevski*, the defendants dusted off an argument from *Maine v. Thiboutot*,[376] the case in which the Supreme Court first adopted the broad interpretation.[377] There, like in *Talevski*, the petitioners argued that § 1983 "should be read as limited to civil rights or equal protection laws."[378] The *Thiboutot* and *Talevski* courts rejected this construction.[379] They noted that "Congress attached no modifiers to the phrase ['and laws']."[380] In other words, § 1983's language is clear.[381] Justice Thomas, dissenting in *Talevski*, however, disagreed.[382] He noted, "[T]here is substantial reason to doubt that Congress [intended § 1983 to be] a freestanding right of action to remediate the violation of *any* federal statute."[383] Nonetheless, even if Justice Thomas's opinion eventually carries the day, the materiality provision *is* a civil rights statute.[384] Thus, § 1983 would remain a viable express private right of action.

In sum, the materiality provision satisfies *Gonzaga*'s demanding test. The Third, Fifth, and Eleventh Circuits correctly concluded that the provision unambiguously confers an individual right, and *Talevski* confirms their holdings.[385] *Talevski*, however, has even more to support private litigants than the Fifth Circuit suggests. This Note next argues that the Fifth Circuit also fell short in its application of *Gonzaga*'s second inquiry.

B. Congress Did Not Implicitly Foreclose Private Enforcement of the Materiality Provision Under § 1983

The Third, Fifth, and Eleventh Circuits correctly concluded that Congress did not foreclose private enforcement under § 1983. Opponents argue that "the 'express provision of one method of enforcing a substantive rule

374. *See* Health & Human Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1450 (2023); *supra* notes 79–81 and accompanying text; 42 U.S.C. § 1983 ("Every person who, under color of [law, deprives a citizen] of any rights, privileges, or immunities secured by the Constitution *and laws*, shall be liable to the party injured." (emphasis added)).

375. *See generally* Vote.org v. Callanen, 89 F.4th 459 (5th Cir. 2023).

376. 448 U.S. 1 (1980).

377. Tokaji, *supra* note 22, at 133 n.156.

378. *Thiboutot*, 448 U.S. at 6; *Talevski*, 143 S. Ct. at 1450.

379. *Thiboutot*, 448 U.S. at 6; *Talevski*, 143 S. Ct. at 1450.

380. *Talevski*, 143 S. Ct. at 1452 (alteration in original) (quoting *Thiboutot*, 448 U.S. at 4).

381. *Id.* at 1453.

382. *Id.* at 1481 n.12 (Thomas, J., dissenting).

383. *Id.* (emphasis added).

384. *See supra* Part I.A.

385. Even Justice Alito, who dissented in *Talevski*, agreed with this part of its holding. *Talevski*, 143 S. Ct. at 1484 (Alito, J., dissenting) ("In my view, while [Talevski] has established that the Federal Nursing Home Reform Act (FNHRA) creates individual rights, [the nursing home has] established that relief for the violation of those rights under § 1983 is foreclosed by the remedial scheme in the Act.").

suggests that Congress intended to preclude others.'"[386] Beyond citing this canon of statutory interpretation, however, opponents fail to explain how private enforcement is incompatible with enforcement by the Attorney General. And, as the Fifth Circuit explained, that is what *Talevski* demands.[387] In *Talevski*, the court reiterated that the "crucial consideration" of whether Congress intended to foreclose § 1983 is whether Congress intended that the statute's remedial scheme be the exclusive avenue for enforcement.[388] In other words, private suits under § 1983 must be incompatible with the statute's enforcement scheme.[389]

In *Talevski*, the defendants argued that the FNHRA had a sufficiently comprehensive remedial scheme that was incompatible with § 1983.[390] Under the FNHRA, a "nursing home is required to adopt a grievance process for its residents, states must make an administrative procedure available to challenge transfer and discharge decisions, and the federal government is authorized to take a range of enforcement actions against noncompliant nursing homes."[391] The Court explained that "[i]n focusing on what the FNHRA contains, [the defendants] ignore what it lacks."[392] That is, a requirement that private plaintiffs "comply with particular procedures and/or to exhaust particular administrative remedies" before filing suit.[393] As the Third and Fifth Circuits explained, those same exhaustion requirements are absent in the materiality provision.[394] Moreover, the Fifth Circuit correctly noted that although Title I *seems* to have a comprehensive scheme, those provisions pertain only to the Attorney General's authority, not to private plaintiffs.[395]

Nonetheless, the Fifth Circuit's opinion is flawed in one way. That is, it criticized the Eleventh Circuit for relying on *Allen*, the case in which the Supreme Court *implied* a private right of action into § 5 of the VRA.[396] The Fifth Circuit noted that *Allen* was "undermined by later caselaw."[397] Indeed, the Supreme Court expressly abrogated that approach—explaining that *Allen* was decided under the "ancient regime" when courts routinely implied rights of action to effectuate a statute's purpose.[398] Yet, although that approach may be generally disfavored, it is still an acceptable approach for civil rights era statutes, like Title I and the VRA.[399]

386. Brief in Opposition to Certiorari, *supra* note 252, at 33 (quoting Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 328 (2015)).
387. *See supra* note 329 and accompanying text.
388. *See supra* note 130 and accompanying text.
389. *See supra* note 131 and accompanying text.
390. *Talevski*, 143 S. Ct. at 1460–62 (majority opinion).
391. NOVAK, *supra* note 74, at 3.
392. *Talevski*, 143 S. Ct. at 1461.
393. *Id.* (quoting Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 254 (2009)).
394. *See supra* notes 279–86 and accompanying text; Vote.org v. Callanen, 89 F.4th 459, 477 (5th Cir. 2023) ("We agree with [the Third Circuit's] conclusions.").
395. *See supra* notes 326–32 and accompanying text.
396. *See supra* notes 333–39 and accompanying text.
397. *See supra* note 334 and accompanying text.
398. Ziglar v. Abbasi, 582 U.S. 120, 131–32 (2017).
399. *See infra* notes 400–10 and accompanying text.

The current approach to implied rights of action traces its lineage to *Cannon v. University of Chicago*,[400] in which the Court implied a private right of action for Title IX.[401] There, Justice Lewis F. Powell, Jr. argued in dissent that rather than judicially imply a right of action to effectuate a statute's purpose, "[t]he only factor that should matter . . . was congressional intent to create a right of action."[402] "Justice Powell insisted that '[a]bsent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.'"[403] Eventually, in *Alexander v. Sandoval*,[404] the Supreme Court adopted Justice Powell's approach.[405] Thus, the question was no longer about Congress's purpose in passing the statute but whether Congress intended to confer a private right of action in the statute's text.[406]

However, Justice William H. Rehnquist, concurring in *Cannon*, suggested that there should be a carveout for statutes passed in the civil rights era.[407] During the civil rights era, Congress "tended to rely a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself."[408] In other words, although Justice Powell's approach eventually carried the day, Justice Rehnquist suggested that the contemporary legal context in which the statute was passed is relevant to whether a court can imply a private right of action.[409] The VRA and Title I fit this description.[410] Moreover, it may be inappropriate to apply a modern approach to statutory interpretation to a statute passed in a different era. As such, analogizing the materiality provision to a VRA implied private right of action case is not improper.

Finally, although the Fifth Circuit relied on legislative history,[411] the opinion did not directly respond to opponents of private enforcement that misinterpreted Title I's legislative history.[412] Generally, opponents argue that using legislative history in statutory interpretation is akin to "looking over a crowd and picking out your friends."[413] Yet, it is those who oppose private enforcement that have engaged in selective crowdsourcing. For

400. 441 U.S. 677 (1979).

401. 20 U.S.C. § 1681; *Cannon*, 441 U.S. at 717. Title IX mandates that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681.

402. Tokaji, *supra* note 22, at 131; *see also Cannon*, 441 U.S. at 731 (Powell, J., dissenting).

403. *Id.* (quoting *Cannon*, 441 U.S. at 731 (Powell, J., dissenting) (alteration in original)).

404. 532 U.S. 275 (2001).

405. Tokaji, *supra* note 22, at 132; *see also supra* notes 22, 73.

406. Tokaji, *supra* note 22, at 132.

407. *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring).

408. *Id.*

409. *Id.*

410. *See supra* Part I.A.

411. Vote.org v. Callanen, 89 F.4th 459, 475 (5th Cir. 2023) ("In looking for rebuttal evidence, we explore a little *more statutory history*." (emphasis added)).

412. *See generally id.*

413. *See supra* note 177.

instance, the district court in *Migliori* noted that prior to the Attorney General's authority to bring civil suits, the Department of Justice could only bring criminal prosecutions against those who disenfranchised voters.[414] The court cited the then-Attorney General's testimony when he said, "Civil remedies have not been available to the Attorney General in this field. We think that they should be."[415] The court further noted that the Representatives at the hearing "did not remark on the topic of private citizen suits."[416] According to the district court, this "suggest[ed] that the alternative to the newly devised Attorney General enforcement mechanism was not one of private civil suits, but rather a criminal action."[417] Yet, the Attorney General was *not* silent on the issue of private enforcement when he testified in the Senate. Indeed, the *Northeast Ohio* plaintiffs explained that the Attorney General testified that "private people will retain the right they have now to sue in their own name."[418] Thus, the district judge in *Migliori* picked their friends. An honest review of the legislative history suggests that the materiality provision is enforceable under § 1983. The Third, Fifth, and Eleventh Circuits got it right here too.

In sum, the three circuit courts that thoroughly applied *Gonzaga* to the materiality provision came to the right conclusion. The *Talevski* opinion confirms this. Yet, the Fifth Circuit could have been more thorough in its reasoning. Although it came to the correct conclusion, *Gonzaga* and *Talevski*'s full application is critical in the face of conservative attacks on voting rights.

CONCLUSION

The Supreme Court's recent *Talevski* opinion on private enforcement under § 1983 confirmed that the Eleventh and Third Circuits correctly applied *Gonzaga* to the materiality provision. The Fifth Circuit's application of *Talevski* further supports that conclusion. The *Vote.org* opinion, however, fell short in several respects. Indeed, *Talevski* provides an even stronger basis for private enforcement than the Fifth Circuit suggested. That, coupled with other shortcomings in the opinion, shows that not all hope is lost in the wake of the recently successful conservative attack on private rights of action. Indeed, § 1983 provides a viable option to enforce voting rights privately. Moreover, given the signals from the Supreme Court about implied private rights of action, future private litigants would be well advised to bring their voting rights claims under § 1983.

414. *See supra* note 177.

415. Migliori v. Lehigh Cnty. Bd. of Elections, No. 22-cv-00397, 2022 WL 802159, at *11 (E.D. Pa. Mar. 16, 2022) (alteration in original) (quoting H.R. REP. NO. 85-291, at 15 (1957), *as reprinted in* 1957 U.S.C.C.A.N. 1966, 1979).

416. *Id.*

417. *Id.*

418. Petition for Writ of Certiorari, *supra* note 233, at 37.