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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mi Familia Vota, et al.,

Plaintiffs,

v.

Katie Hobbs, in her official capacity as Arizona Secretary of State, et al.

Defendants.

Case No. 22-00509-PHX-SRB

DEMOCRATIC NATIONAL COMMITTEE-ARIZONA DEMOCRATIC PARTY OPPOSITION TO STATE'S MOTION TO DISMISS

Living United for Change in Arizona, et al.,

Plaintiffs,

v.

Katie Hobbs

Defendant,

and

State of Arizona, et al.,

Intervenor-Defendants.

Poder Latinx,

Plaintiff,

v.

Katie Hobbs, et al.,

Defendants.

United States of America,

Plaintiff,

v.

State of Arizona, et al.,

Defendants.

Democratic National Committee, et al.,

Plaintiffs,

v.

Katie Hobbs, in her official capacity as Arizona Secretary of State, et al.,

Defendants,

and

Republican National Committee,

Intervenor-Defendant.

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GLOSSARY

DPOC: Documentary proof of citizenship

DPOR: Documentary proof of residence

H.B. 2492: House Bill 2492

NVRA: National Voter Registration Act

The National Voter Registration Act requires states to "accept and use" a prescribed form to register voters for federal elections. 52 U.S.C. §20505. That form does not require an applicant to provide documentary proof of citizenship (DPOC) or residence (DPOR), but only to aver U.S. citizenship and residence under penalty of perjury. Yet Arizona's recently enacted House Bill 2492 bars federal-form applicants who fail to provide DPOR from voting and those who fail to provide DPOC from voting in any federal election by mail and from voting in presidential elections at all unless state officials can verify an applicant's citizenship using means that are poorly designed to do so. The NVRA preempts these provisions.

The State's dismissal arguments fail. As explained herein, its standing arguments have been rejected, including in many challenges to voting restrictions brought by political parties and voting-rights organizations. And its claim that the NVRA does not apply to presidential elections—a claim that no court has accepted and that would create a tectonic shift in both voting-rights and constitutional law—gainsays the statutory text and decades of case law upholding congressional regulation of such elections. Regardless, H.B. 2492 (much of which the State scarcely defends) violates the NVRA even as to congressional elections.[1]

ARGUMENT

I. PLAINTIFFS HAVE STANDING

If one consolidated plaintiff has standing on any claim, this Court need not consider others' standing on that claim. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (op. of Stevens, J.). The State does not dispute that the United States has standing on its NVRA and Civil Rights Act claims, and it assuredly does. *See In re Debs*, 158 U.S. 564, 584 (1895). For the remaining claims, it suffices for any other plaintiff to have either representational *or* organizational standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982). Plaintiffs have both.

A. Representational Standing

An organization may sue on behalf of members who could "sue in their own right" if "the interests at stake are germane to the organization's purpose, and neither the claim

[1] The DNC and ADP adopt the other plaintiffs' pertinent arguments against dismissal.

asserted nor the relief requested requires the participation of individual members." *Friends of the Earth, Inc. v. Laidlaw Envtl. (TOC) Servs., Inc.*, 528 U.S. 167, 181 (2000). Under this test, organizations can sue on behalf of members injured by a state's voter-registration laws. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015).

The State argues (MTD 9-10) that organizational plaintiffs must identify affected members by name. The Ninth Circuit has rejected this argument, holding—after citing the Supreme Court case the State relies on—that an organization need not name injured members where the injury to members is clear and members' specific identity is not relevant to the defendant's ability to understand or respond. *Nat'l Council*, 800 F.3d at 1041. And courts routinely hold that political parties and civic-membership organizations can represent members in voting-rights cases without naming specific affected members. *Id.*; *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-574 (6th Cir. 2004) (per curiam).

The DNC and ADP have identified (Compl. ¶15) the 1.3 million registered Democrats in Arizona as members. Those include some of the roughly 35,000 voters in Arizona who registered without DPOC. Corasanitti, *Arizona Passes Proof-of-Citizenship Law for Voting in Presidential Elections*, N.Y. Times (Mar. 3, 2022), https://www.nytimes.com/2022/03/31/us/politics/arizona-voting-bill-citizenship.html. It is thus "relatively clear, rather than speculative," *Nat'l Council*, 800 F.3d at 1041, that under H.B. 2492, DNC-ADP members will be barred from voting by mail and in presidential elections, and subject to investigation and removal from the rolls. These members would have standing to sue. Democratic voters' rights are also germane to the DNC's and ADP's mission to elect Democratic candidates and to ensure all eligible voters can vote, including by mail. Compl. ¶14. Finally, the State does not argue that either the claims asserted or the relief requested requires individual members to participate here. Hence, under *National Council*, plaintiffs have representational standing.

B. Organizational Standing

Organizations have standing in their own right if a challenged law will require them to divert resources from other efforts, *Nat'l Council*, 800 F.3d at 1040-1041, or harm their electoral prospects, *Mecinas v. Hobbs*, 30 F.4th 890, 897-898 & n.3 (9th Cir. 2022). A

diversion-of-resources injury occurs if an organization must spend additional resources to achieve its mission. *See Nat'l Council*, 800 F.3d at 1040-1041. And such an injury suffices "to establish organizational standing at the pleading stage, even when it is 'broadly alleged.'" *Id.* at 1040. Separately, the Ninth Circuit has recognized political parties' "competitive standing … to sue 'to prevent their opponent from gaining an unfair advantage in the election process.'" *Mecinas*, 30 F.4th at 897-898 & n.3.

The DNC and ADP have standing under either approach. They allege (Compl. ¶16) that H.B. 2492 will require them to divert resources from "voter-outreach and mobilization efforts" toward education, to ensure "voters are not erroneously removed from the voter rolls." They also allege (*id.*) that H.B. 2492 "undermin[es their] ability to succeed in having Democrats elected," especially given that many federal-only voters are registered Democrats. *See* Duda, *Few voters use federal-only ballots*, AZMirror (Jan. 9, 2019), https://www.azmirror.com/blog/few-voters-use-federal-only-ballots. That is sufficient.

C. Traceability And Redressability

Traceability requires "a causal connection between the injury and the … challenged action." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). And "[r]edressability is satisfied so long as the requested remedy would … significant[ly] increase … the likelihood that the plaintiff would obtain relief that directly redresses the injury." *Mecinas*, 30 F.4th at 900. These requirements are met here by virtue of the secretary's authority, including over county officials. The Ninth Circuit has twice "held that a challenged Arizona election law was traceable to" and redressable by an order against the secretary, "relying on [her] role in promulgating rules … for … statewide elections." *Id.*; *see Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1281 (9th Cir. 2003) (per curiam). The same is true here because the secretary is "responsible for coordination of State responsibilities" related to registration under the NVRA, 52 U.S.C. §20509; *see* A.R.S. §16-142. And in fact, she has issued comprehensive guidance to county officials on voter registration as part of the Election Procedures Manual. *See* Election Procedures Manual, Arizona Secretary of State (2021). An order that she conform that guidance to federal law would remedy plaintiffs' injuries.

The State's response—that voter registration is not a proper subject for the secretary's Election Procedure Manual (MTD 11)—does not defeat traceability or redressability. The secretary "prescribe[s] rules … on the procedures for early voting and voting, … producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. §16-452. This Court could thus redress the H.B. 2492 injuries by directing her to issue rules under this authority permitting federal-only voters to vote by mail and in presidential elections even if they do not provide DPOC, and requiring that those votes be counted. Such rules would redress the injuries because "the counties would have no choice but to follow a mandate from" the secretary, *Mecinas*, 30 F.4th at 900. In addition, H.B. 2492 directs the secretary to take specific actions plaintiffs challenge (*see* DNC Compl. ¶2), including referring individuals and providing information to the attorney general for investigation, H.B. 2492 §7(A), and providing database access to the attorney general, *id.* §7(C). An order preventing those actions would redress injuries arising from them. Similarly, certain H.B. 2492 injuries are traceable to the attorney general, specifically investigations and prosecutions he conducts under the law. An order enjoining those actions would redress those injuries.

Finally, the county officials that the State says (MTD 11-12) must be joined to establish redressability *are* parties in the consolidated action. They will thus be named in any injunction, ensuring redress. By contrast, in the State's cited authority, *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236 (11th Cir. 2020), county officials had *not* been joined and hence would not have been named in an injunction.[2]

II. H.B. 2492 VIOLATES THE NVRA

A. The NVRA Constitutionally Applies To Presidential Elections

The State argues (MTD 22-23) that the NVRA cannot constitutionally apply to

[2] Citing nothing, the State makes a one-sentence argument (MTD 12) that county recorders are required parties here. But even putting aside that they all *are* parties to the consolidated action, Federal Rule of Civil Procedure 19 requires joining an entity only if (1) complete relief is otherwise not possible or (2) the absent party claims a legally protected interest in the action. *Yellowstone Cnty. v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996). Neither is true here of county recorders: This Court can declare H.B. 2492 unlawful, affording complete relief to plaintiffs, without joining the recorders in each consolidated case. *See supra* pp.3-4. And the recorders have not asserted any protected interest.

presidential elections, and that this Court therefore should read the law to apply only to congressional elections. Even if that argument had merit, H.B. 2492 would still be preempted as to congressional elections. The State claims (MTD 22, 24) that H.B. 2492 does not apply to those elections, but that is plainly wrong. The law excludes federal-form voters who do not provide DPOC from voting "by mail … in *any* election," §4(E) (emphasis added). Permitting voters who provide DPOC to vote by mail in congressional elections while requiring others to vote in person violates NVRA section 6's requirement that states "accept" the federal form, 52 U.S.C. §20505(a)(1), and section 8's requirement that the state's registration regime "be uniform [and] non-discriminatory," *id.* §20507(b)(1). So does treating federal-form applications not accompanied by DPOR as entirely invalid, H.B. 2492 §4(A), §5, and subjecting only federal-form voters to investigation, H.B. 2492 §7.

That aside, the State is wrong about both the NVRA's reach and its constitutionality. The law reaches both congressional and presidential elections, 52 U.S.C. §20502(2); *id.* §30101(3). And that is constitutional: As explained in the paragraphs that follow, courts—including the Supreme Court and the Ninth Circuit—have upheld Congress's authority to enact legislation related to the administration of federal elections (both congressional and presidential). Those decisions reflect that the Elections Clause, the Electors Clauses, the Necessary and Proper Clause, and the Fourteenth and Fifteenth Amendments collectively give Congress expansive authority to ensure that elections for federal office (including the presidency) are conducted smoothly and fairly, and that all qualified Americans can register and vote for the highest official in the land. The Fourteenth and Fifteenth Amendments also give Congress authority to prevent discrimination, including in voting for president.

In *Burroughs v. United States*, 290 U.S. 534 (1934), the Supreme Court held that "Congress, undoubtedly, possesses" the "power to pass … legislation to safeguard [a presidential] election … from impairment," rejecting an argument (much like the State's) that Congress cannot regulate presidential elections, *id.* at 545. And in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court upheld a law lowering the voting age for *all* federal elections and limiting registration and absentee-voting deadlines for presidential elections, *see id.* at

124 (Black, J. op.); *id.* at 141-144 (Douglas, J. op.); *id.* at 238 (Brennan, J. op.). Justice Black explained that "it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices" and therefore "[i]t cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." *Id.* at 124.

Relying on these decisions, the Ninth Circuit rejected a challenge to the NVRA's constitutionality, explaining that "[t]he broad power given to Congress over congressional elections has been extended to presidential elections." *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995); *accord ACORN v. Miller*, 129 F.3d 833, 836 n.1 (6th Cir. 1997); *ACORN v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995). Indeed, the Elections Clause itself gives Congress vast authority to regulate federal elections. "[T]he history of the Clause … tells a clear story" that "[i]t was understood from the start to give Congress extraordinary power over federal elections." Sweren-Becker & Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 1001-1002 (2021). This history supports courts' longstanding view that the Clause is "comprehensive," and "embrace[s] authority to … to enact the numerous requirements … necessary in order to enforce the fundamental rights involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). And because presidential and congressional elections are held simultaneously, 2 U.S.C. §7; 3 U.S.C. §1, applying the NVRA to presidential elections is a necessary and proper way to regulate the "manner" of congressional elections, U.S. Const., art. I, §4, to avoid chaos from the proliferation of conflicting regimes for voting in such elections—not just within any one state, but nationwide. *See generally* Stephanopoulos, *The Sweep of the Electoral Power*, 36 Const. Comment. 1, 53-55 & nn.308, 310 (2021). The Elections Clause, in fact, "has long been interpreted to give Congress power over so-called 'mixed elections'—that is, to permit Congress to regulate all aspects of an election … used even in part to select members of Congress." Karlan, *Section 5 Squared*, 44 Hous. L. Rev. 1, 17 (2007); *see, e.g.*, *In re Coy*, 127 U.S. 731, 751-752 (1888). Congress thus has the authority to ensure that states do not concoct cumbersome or error-prone systems that could interfere with elections for federal

office, including the presidency. *See* Sweren-Becker & Waldman, *supra*, at 1029-1033.[3]

Regulating registration for presidential elections is also a "necessary and proper" exercise, U.S. Const. art. I, §8, cl. 18, of Congress' authority to "determine the Time of ch[oo]sing" the presidential electors, *id.* art. II, §1, cl. 4, and to "count" those electors' votes, *id.* cl. 3. As noted, Congress has exercised this authority to mandate simultaneous presidential and congressional elections. But that authority goes beyond timing, to encompass steps necessary and proper to ensure that the selection process is "beneficial[ly]" carried out, *M'Culloch v. State*, 17 U.S. 316, 409 (1819). Congress' determination that one voter-registration process should apply to all federal elections is plainly a "means that is rationally related to the implementation of" Congress' power under the Electors Clause, *United States v. Comstock*, 560 U.S. 126, 134 (2010). The State offers no argument why setting minimum registration requirements across all federal elections would not be "convenient," "useful" or "conducive" to the exercise of Congress's authority to set the time for choosing electors—which is all that is required under Supreme Court precedent to bring it within the scope of the Necessary and Proper Clause, *id.* at 133-134.

Moreover, Congress' power over presidential elections is properly exercised to "preserve the departments and institutions of the general government," including the presidency, "from impairment." *Burroughs*, 290 U.S. at 545. The Founders recognized that "every government ought to contain in itself the means of its own preservation." *The Federalist* No. 59, p.362 (C. Rossiter ed. 1961). Ensuring that voters can easily register and vote, and preventing states from using voter-registration requirements to disenfranchise people, are appropriate means of preserving the democratic process and ensuring that the presidential-selection process is not impaired. Recognizing this, "courts have construed the Electors Clause coextensively with the Elections Clause, holding that the former endows Congress with the same authority over presidential elections that the latter grants it over congressional races." Stephanopoulos, *supra*, pp.54-55; *see also supra* pp.5-6.

[3] The State's argument also conflicts with decades of the NVRA applying to presidential elections, and of Congress regulating such elections, *see* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§301-305, 84 Stat. 314, 318-319 (1970).

Finally, the Fourteenth and Fifteenth Amendments further expand Congress's power over presidential elections, and the NVRA (including as applied to presidential elections) is a valid exercise of that power because "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting," *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). Contrary to the State's claim (MTD 23 n.7), "the legislative history and the text … are clear" that Congress relied on that power to enact the NVRA. *Condon v. Reno*, 913 F.Supp. 946, 962 (D.S.C. 1995). Indeed, the law explicitly states that "discriminatory and unfair registration laws and procedures … disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. §20501(a)(3); *see also* H.Rep. No. 103-9, at 3 (1993) (NVRA was necessary to complete the work of the Voting Rights Act); S.Rep. No. 103-6, at 3 (1993) (same). The NVRA was a "rational means," *Katzenbach*, 383 U.S. at 324, of preventing such harm, which can obviously occur with presidential elections as well as other federal elections.

B. The State Offers No Specific Argument On Several NVRA Claims

The State boldly proclaims (MTD 24) that "All Plaintiffs' NVRA Claims Fail as a Matter of Law." But it then makes no specific argument for dismissal as to several of plaintiffs' core claims about how H.B. 2492 violates, and thus is preempted by, the NVRA. Arguments for dismissal of those claims cannot be first made in reply; they are waived.

For example, the State makes no specific argument on plaintiffs' claim (e.g., DNC Compl. ¶¶69-72) that sections 4 and 5 of H.B. 2492 violate NVRA section 6, which requires Arizona to register for *all* federal elections any qualified elector who timely submits the federal form. 52 U.S.C. §20505(a)(1). Nor does the State specifically address plaintiffs' claim (e.g., DNC Compl. ¶¶79-83) that H.B. 2492's DPOC requirement violates NVRA section 5, which provides that voter-registration applications included with driver's license applications "may require only the minimum amount of information necessary to … enable State … officials to assess … eligibility … and to administer voter registration," 52 U.S.C. §20504(c)(2)(B)(i)-(ii). Requiring DPOC violates this provision because the NVRA makes clear that all that is "necessary" to assess citizenship is "an attestation" signed under penalty

of perjury. *Id.* §20508(b)(1); *see also id.* §20504(c)(2)(C)(i)-(iii) (requiring voter-registration applications accompanying state driver's license applications to include that same information). Because these provisions violate the NVRA, they are preempted. *See Arizona v. Inter Tribal Council of Arizona*, 570 U.S. 1, 20 (2013). And again, as to these claims, the State relies entirely on the argument that the NVRA does not and cannot reach presidential elections. For purposes of the motion to dismiss, any other argument is waived.

The State tries to obscure its failure to address these claims by rebutting straw men, pointing to various complaints' *recitations* of certain NVRA mandates and pretending those are plaintiffs' *claims*. For example, the State says (MTD 24) that "Plaintiffs argue the NVRA requires registration at motor vehicle … and other … agencies." The NVRA does require that, and the State does not say otherwise. But none of the complaints here claims that H.B. 2492 violates the NVRA because it prohibits all registrations at these agencies, as the State suggests. The State cannot obtain dismissal of the NVRA claims plaintiffs *have* made by ignoring them and instead attacking claims plaintiffs have *not* made.

C. The State's Arguments As To Plaintiffs' NVRA Section 8 Claims Fail

The State briefly addresses plaintiffs' two claims that H.B. 2492 is inconsistent with (and thus preempted by) section 8 of the NVRA. Its arguments fail as to each claim.

1. Plaintiffs' first section 8 claim (e.g., DNC Compl. ¶¶73-78) is that H.B. 2492 violates section 8's uniformity provision, 52 U.S.C. §20507(b)(1), by treating federal-form voters who do not provide DPOC and/or DPOR differently than other voters—excluding only the former from voting by mail or in presidential elections (or in the context of DPOR, from all elections) and (in the context of DPOC) subjecting only them to investigation and possible prosecution and removal from the rolls. The State argues (MTD 25) that this claim fails as a matter of law because "requiring proof of citizenship as a condition for registration or voting by mail is not discriminatory." That is another straw man. The discrimination is not "requiring proof of citizenship." It is treating those who adequately proved their citizenship via the attestation under penalty of perjury that federal law says is sufficient differently than those who did so via DPOC. The State says not one word in defense of *that*

discrimination and non-uniformity. It likewise does not respond to other plaintiffs' claims (LUCHA FAC ¶361; Poder Latinx Compl. ¶¶148-150) that the DPOC requirement discriminates against naturalized citizens, who are more likely to be removed from voter rolls based on the Act's problematic citizenship investigations, *see United States v. Florida*, 870 F.Supp.2d 1346, 1350 (N.D. Fla. 2012). A law violates the uniformity requirement "by erecting barriers—only for a selected class of persons—that previously did not exist." *Project Vote v. Blackwell*, 455 F.Supp.2d 694, 703 (N.D. Ohio 2006). Laws are "neither uniform nor non-discriminatory" when, as is true of the bar on presidential and mail voting and the investigations, "they do not apply to everyone involved in the process." *Id.*[4]

2. Plaintiffs' second section 8 claim (e.g., DNC Compl. ¶¶84-86) is that because H.B. 2492 imposes no timing limit on its directive to de-register voters whose citizenship is not verified, it violates section 8's bar on "any program … to systematically remove … ineligible voters from the" rolls within "90 days" of a federal election. 52 U.S.C. §20507(c)(2)(A). Citing no authority, the State responds (MTD 24) that "nothing in the Act provides for removal of voters from the rolls immediately before an election." In fact, H.B. 2492 section 8 does *exactly* that, providing that any voter "shall" be removed from the rolls if officials confirm that the voter is not a U.S. citizen. Nothing in the statute limits that mandate temporally (nor does the State suggest otherwise). H.B. 2492 thus establishes a "program … to systematically remove … ineligible voters from the" rolls within "90 days" of a federal election, 52 U.S.C. §20507(c)(2)(A), which the NVRA prohibits. To the extent the State is asking the Court to read an implicit 90-day time limit into H.B. 2492, the Court cannot do so. *See Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018).

CONCLUSION

The State's motion to dismiss should be denied.

[4] Yet another straw man is the State's argument (MTD 24) that "removal from the rolls of voters determined not [to] be citizens" is not discriminatory or non-uniform. Removal from the rolls of non-U.S. citizens is not what plaintiffs allege to be non-uniform or discriminatory. It is instead that H.B. 2492 subjects only *some* voters who proved their citizenship (i.e., those who did so via attestation, as federal law says suffices) to investigation and the possibility of erroneous removal from the rolls. On that, the State is (again) silent.

Respectfully submitted this 17th day of October, 2022.

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CERTIFICATE OF SERVICE

On the 17th day of October, 2022, I caused the foregoing to be filed and served electronically via the Court's CM/ECF system upon counsel of record.

/s/ Bruce Samuels
Bruce Samuels

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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ORDER

Katie Hobbs, et al.,

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Intervenor-Defendant.

Upon consideration of the state's motion to dismiss, the oppositions thereto, the amicus briefs, and the reply, it is hereby **ORDERED** that the motion is **DENIED**.