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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MI FAMILIA VOTA, et al.,

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State, et al.,

Defendants,

and

Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

Case No. 22-00509-PHX-SRB
(Lead)

DEMOCRATIC NATIONAL COMMITTEE'S AND ARIZONA DEMOCRATIC PARTY'S RESPONSE TO DEFENDANTS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

No. CV-22-00519-PHX-SRB
No. CV-22-01003-PHX-SRB
No. CV-22-01124-PHX-SRB
No. CV-22-01369-PHX-SRB
No. CV-22-01381-PHX-SRB
No. CV-22-01602-PHX-SRB
No. CV-22-01901-PHX-SRB

LIVING UNITED FOR CHANGE IN ARIZONA, et al.,

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State, et al.,

Defendant,

and

STATE OF ARIZONA, et al.,

Intervenor-Defendants,

and

Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

PODER LATINX, et al.,

Plaintiff,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State, et al.,

Defendants,

and

Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ARIZONA, et al.,

Defendants,

and

Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State, et al.,

Defendants,

and

REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendant,

and

Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN AND PACIFIC ISLANDER FOR EQUITY COALITION,

Plaintiff,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State, et al.,

Defendants,

and

Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

PROMISE ARIZONA, et al.,

Plaintiffs,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State, et al.,

Defendants,

and

Speaker of the House Ben Toma and Senate President Warren Petersen,

Intervenor-Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

LEGISLATIVE REPORTS

OTHER AUTHORITIES

INTRODUCTION

Congress enacted the National Voter Registration Act ("NVRA") to "establish procedures that will increase the number of eligible citizens who register to vote," to "enhance[] the participation of eligible citizens as voters," and to "protect the integrity of the electoral process." 52 U.S.C. §20501(b)(1)-(3). To further these goals, Congress required the creation of a federal voter-registration form for "elections for Federal Office," *id.* §20508(a)(2), and mandated that all states "accept and use" that form, which is known as the federal form, *id.* §20505(a)(1). In *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) ("*ITCA*"), the Supreme Court held that Congress intended the federal form to serve as a "backstop" protecting the right to vote, "guarantee[ing] that a simple means of registering to vote in federal elections will be available," *id.* at 13. The Court also rejected Arizona's attempts to require the submission of documentary proof of citizenship ("DPOC") to register, holding that states must treat the federal form—which does not require DPOC—as a "complete and sufficient" application. *Id.* at 9.

Brazenly flouting *ITCA*, Arizona has now re-imposed *precisely* the same barrier to registration that the Supreme Court proscribed, again requiring people who register to vote using the federal form to submit DPOC. Those who do not do so can be barred from voting by mail in any election or in presidential elections at all, and can be investigated by law enforcement. Arizona voters can now also be removed from the rolls within 90 days of federal elections. Each of these provisions conflicts with the NVRA and thus is preempted.

Indeed, the state, the attorney general, and the secretary of state agree that Arizona's re-imposition of a DPOC requirement in order to vote in federal elections is partly or wholly preempted. The secretary says that Arizona law violates the NVRA and *ITCA* "by requiring DPOC to register to vote in all federal elections using the Federal Form," ECF 121 ¶72. And the state and attorney general acknowledge that Arizona law is preempted insofar as it requires voters to submit DPOC in order to vote in presidential elections. ECF 364 at 4.

The arguments offered in defense of this clear disregard of *ITCA* fail. For example, decades of binding precedent foreclose the argument offered by the Republican National

Committee ("RNC") that the NVRA cannot apply to presidential elections. (That argument also wrongly assumes that the NVRA was enacted only under the Elections Clause, although *ITCA* shows that the Elections Clause alone suffices to preempt here.) Similarly, the text of the NVRA—which addresses registration as a means to ensure "participation" in federal elections, 52 U.S.C. §20501(b)(2)—forecloses defendants' claim that the NVRA covers *only* registration and thus cannot preempt Arizona's ban on mail voting for those who do not submit DPOC. That argument would gut the NVRA, allowing every state to *register* people but then impose any limits on *voting* that the state wanted—even a total ban. Finally, defendants say that Arizona can remove people from the rolls in the run-up to election day despite the NVRA's bar on most such removals because otherwise (they argue) non-citizens might be able to vote. But defendants assume that anyone *suspected* of not being a U.S. citizen actually isn't one. The NVRA's 90-day ban on removals shows that Congress, in enacting the law, recognized that states might make mistakes (or even deliberately remove eligible voters), and it balanced that danger against the danger of ineligible people voting, via the 90-day ban on removals. Arizona cannot flout that congressional judgment.

The Democratic National Committee ("DNC") and the Arizona Democratic Party ("ADP") oppose summary judgment for defendants on any claim in the DNC's and ADP's complaint, and cross-move for the following rulings on counts IV and VII of their complaint:

- The NVRA preempts Arizona's efforts to bar state residents who do not (or did not) submit DPOC when registering with the federal form from (1) voting by mail in any election and/or (2) voting in presidential elections at all.
- The NVRA preempts Arizona law to the extent that the latter allows removal of any registered voter from the rolls within 90 days before any federal election for any reason other than those expressly permitted by the NVRA.

BACKGROUND

A. H.B. 2492

Enacted in March 2022, Arizona House Bill 2492 (one of the two laws challenged in this litigation) imposes various restrictions on Arizonans' ability to register, and hence to vote. ECF 121, ¶32. For example, if a person submits a federal form without DPOC, the

law bars that person from voting in all elections unless election officials—using databases that are highly unreliable, *id.* ¶36—happen to be able to verify his or her U.S. citizenship. *See* H.B. 2492, §4. If election officials decide that a person who did not submit DPOC is not a U.S. citizen, moreover, they must refer the person to law enforcement for possible prosecution. *See id.* And if officials cannot satisfy themselves that such a person is a citizen, the person is barred, until DPOC is provided, from voting in *any* federal election by mail (a right Arizonans have had for decades) and from voting in presidential elections *at all*. *Id.*; ECF 121, ¶33. The law imposes the same limits on those who registered without providing DPOC prior to the law's passage. H.B. 2492, §5; ECF 121, ¶27. Lastly, H.B. 2492 amended Arizona law to require removal from the rolls of anyone a county recorder determines not to be a U.S. citizen, with no temporal limitation on such removals. H.B. 2492, §8.[1]

B. The NVRA And The Federal Voter-Registration Form

Congress enacted the NVRA in 1993, finding that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation." 52 U.S.C. §20501(a)(3). To prevent that, Congress "require[d] States to provide simplified systems for registering to vote in *federal* elections." *ITCA*, 570 U.S. at 5.

Two NVRA provisions are relevant to this cross-motion and opposition:

First, section 6 provides that "[e]ach State" must "accept and use" the federal form to register "voters in elections for Federal office." 52 U.S.C. §20505(a). The law also spells out certain aspects of the federal form's contents, mandating that it (1) specify each eligibility requirement (including U.S. citizenship) and (2) require an attestation under penalty of perjury from any applicant that he or she meets each requirement. *Id.* §20508(b)(2). And it prohibits requiring other information that is not necessary to assess eligibility. *Id.* §20508(b)(1). The NVRA otherwise leaves it to federal election officials to

[1] The other law challenged in this litigation, Arizona House Bill 2243, revised this last provision—including by requiring 35 days' advance notice to the voter before any such removal—but did not alter the command to remove from the rolls at any time voters a county recorder determines is not a citizen. H.B. 2243, §2 (codified at A.R.S. §16-165(A)(10)).

develop the form's contents in consultation with state officials. 52 U.S.C. §20508(a).

Second, section 8 of the NVRA provides that no state may operate a program "to systematically remove the names of ineligible voters from the official list of eligible voters" during the 90 days before any federal election. 52 U.S.C. §20507(c)(2).

C. *ITCA* And *Kobach*

In *ITCA*, the Supreme Court invalidated, under the NVRA, Arizona's prior effort to require DPOC of anyone seeking to register in the state. *See* 570 U.S. at 4-5. The Court held that "a state-imposed requirement of evidence of citizenship not required by the Federal Form is 'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form," and therefore is preempted. *Id.* at 15. The "accept and use" language, the Court explained, does not mean that "the State is merely required to receive the form willingly and use it *somehow* in its voter registration process." *Id.* at 9-10. Rather, it "mean[s] that a State must accept the Federal Form as a complete and sufficient registration application." *Id.* at 9.

The Court also noted that Arizona was free to request that federal officials add a state-specific DPOC requirement to the federal form. *See ITCA*, 570 U.S. at 20. Arizona did so (along with Kansas), and when officials rejected the request, the states sued. But the Tenth Circuit upheld the rejection, holding among other things that the states had not "advance[d] proof that registration fraud in the use of the Federal Form prevented Arizona and Kansas from enforcing their voter qualifications." *Kobach v. United States Election Assistance Commission*, 772 F.3d 1183, 1188 (10th Cir. 2014), *cert. denied*, 576 U.S. 1055 (2015).

PREEMPTION STANDARDS

"A fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). "'[A]ny state law, however clearly within a State's acknowledged power, which … is contrary to federal law, must yield.'" *Felder v. Casey*, 487 U.S. 131, 138 (1987).

Preemption can be express or implied. Express preemption occurs when a federal law explicitly precludes or mandates certain content for state law. With express preemption, the courts' "task is to identify the domain expressly pre-empted," to decide if a state law falls in

that domain. *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 257 (2013) (quotation marks omitted). "To do so, [courts] focus first on the statutory language, which necessarily contains the best evidence of Congress' pre-emptive intent." *Id.* (quotation marks omitted).

In addition, "state laws are preempted when they conflict with federal law," including "where the challenged state law 'stands as an obstacle to the accomplishment … of the full purposes … of Congress.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012). Whether a state law is such an obstacle is evaluated "by examining the federal statute as a whole and identifying its purpose and intended effects." *Chamber of Commerce v. Bonta*, 62 F.4th 473, 482 (9th Cir. 2023). Conflict preemption does not require that "every provision within a[n] … enactment is invalid"; rather, some parts of a law can be preempted while others are not. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1049 (9th Cir. 2007).

Finally, although courts sometimes apply a "presumption against preemption," no presumption applies here because this case involves (1) express preemption, *see Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016), and (2) Congress's constitutional authority to "make or alter" state election regulations, *see ITCA*, 570 U.S. at 14.

ARGUMENT

I. THE DNC AND ADP ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR NVRA "ACCEPT AND USE" CLAIM (COUNT IV)

H.B. 2492 imposes voting restrictions that conflict with the mandate in section 6 of the NVRA (52 U.S.C. §20505(a)(1)) that states "accept and use" the federal form to register voters for federal elections. These restrictions include that anyone who registers (or registered) via the federal form without providing DPOC cannot vote by mail in any federal election or vote in presidential elections at all. H.B. 2492, §§4, 5. Each is preempted.

A. H.B. 2492's Ban On Those Who Submit A Federal Form Without DPOC Voting In Presidential Elections Or By Mail In Any Federal Election Is Preempted By NVRA Section 6, As It Was Properly Construed In *ITCA*

H.B. 2492 does *exactly* what the Supreme Court has deemed preempted by NVRA section 6. As explained, *ITCA* held that Arizona could not require those who register using the federal form to submit DPOC; in the Court's words, "requir[ing] state officials to 'reject'

a Federal Form unaccompanied by documentary evidence of citizenship[] conflicts with the NVRA's mandate that Arizona 'accept and use' the Federal Form." 570 U.S. at 9. *ITCA* forecloses Arizona's latest effort to deny voters who do not submit DPOC with the federal form the right to vote in presidential elections, or by mail in *any* federal elections. As the Court emphasized, "accept and use" "mean[s] that a State must accept the Federal Form as a *complete and sufficient* registration application." *Id.* (emphasis added). Arizona is not treating submission of a federal form without DPOC as "complete and sufficient" if it bars the applicant from voting in certain ways or in certain federal elections. To the contrary, Arizona treats the form as *in*complete (because DPOC is absent) and as *in*sufficient to entitle the applicant to the same voting rights that those who submit DPOC have. *ITCA* forbids that.

If anything, this is an even stronger case for preemption than *ITCA*, because H.B. 2492 does more than limit the voting rights of those who submit a federal form without DPOC. It also threatens such people with investigation and even prosecution. That is directly contrary to Congress's goals in enacting the NVRA of "increas[ing] the number of eligible citizens who register to vote" and "enhanc[ing] the participation of eligible citizens as voters." 52 U.S.C. §20501(b)(1)-(2). H.B. 2492's DPOC requirement thus not only conflicts directly with the NVRA's "accept and use" mandate but also "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016). It is therefore preempted. Summary judgment should accordingly be granted for the DNC and the ADP on their claim that H.B. 2492's provision denying people who submit a properly completed federal form without also providing DPOC both the right to vote by mail in any federal election and the right to vote at all in presidential elections is invalid and cannot be enforced.[2]

[2] Because intervenors make constitutional arguments regarding Congress's authority over presidential elections, the Court may deem it appropriate—under the canon of constitutional avoidance, *see, e.g.*, *Jennings v. Rodriguez*, 138 S.Ct. 830, 844 (2018)—to defer ruling on the presidential-elections issue until after trial. Doing so would leave open the possibility that the Court would not need to rule on the issue because plaintiffs obtain relief on other claims that is as broad as or broader than the relief sought on the relevant NVRA claims.

B. Defendants' Contrary Arguments Fail

The intervenors (joined by the state and attorney general as to mail voting) assert that the NVRA does not preempt H.B. 2492's DPOC requirement, such that summary judgment should be granted for *them* on plaintiffs' relevant claims. Defendants' arguments lack merit.

1. Voting By Mail

The RNC argues (ECF 367 at 8-9) that the NVRA does not preempt H.B. 2492's ban on people who register using the federal form without providing DPOC from voting by mail in *any* federal election. That is so, the RNC says, because the NVRA sets only "registration rules," saying "nothing about the *mechanisms* for … voting." *Id.* at 8. This argument (which the state and attorney general barely endorse, *see* ECF 364 at 3-4) is meritless.

To start, the argument ignores the NVRA's text, which is not limited to registration. Congress found that the right "to *vote*" is "fundamental," that states must "promote the exercise of *that right*," and that "discriminatory … registration laws … can have a damaging effect on *vot[ing]*." 52 U.S.C. §20501(a) (emphases added). And the NVRA's purposes include "increas[ing] the number of eligible citizens who register to vote" and "enhanc[ing]" people's participation "as voters in federal elections." *Id.* §20501(b). The NVRA thus reflects a "a conviction that Americans … eligible … to vote have every right to exercise their franchise," and that this right "must not be sacrificed to … chicanery, oversights, or inefficiencies." *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012). Put simply, "[r]egistration is indivisible from election," so a "state could not, by separating registration from voting, … undermine the power that Article I section 4 grants to Congress." *ACORN v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995). That is precisely what the RNC's proposed distinction would do, allowing states to engage in the bait-and-switch of formally *registering* people in compliance with the NVRA, but then imposing barriers to prevent them from actually voting. In this way too, then, H.B. 2492 would "stand[] as an obstacle to the accomplishment … of the full purposes … of Congress,'" *Puente Arizona*, 821 F.3d at 1103.

In fact, if the RNC's registration/voting dichotomy were valid, the NVRA (and *ITCA*) would be gutted. States could *register* those who submitted the federal form without DPOC,

but then sharply limit how those people actually *voted*, such as by letting them vote only in person at midnight, or only hundreds of miles from their homes. Or a state could say that those who did not provide DPOC could not vote, period (or perhaps, as the state and attorney general suggest, could vote in one election so that a state could say those people can "cast a ballot," ECF 364 at 4). In all these circumstances, people would be registered, so under the RNC's theory the NVRA would be satisfied, but in effect they could not vote at all. The idea that Congress's intent in enacting the NVRA—"enhanc[ing] the participation of eligible citizens *as voters in [federal] elections*," 52 U.S.C. §20501(b)(2) (emphasis added)—can be so easily evaded is absurd. Those who register via NVRA-protected means must have the same ability to vote in federal elections as those who register in other ways a state allows.[3]

Relying on two non-NVRA cases that involved none of the issues addressed by the relevant claims, the RNC argues that mail voting is a mere "privilege." ECF 367 at 9. That is irrelevant because Congress's preemption power is not more limited with "privileges." The argument is also just wrong, because Arizona *guarantees* that "[a]ny qualified elector may vote by early ballot." Ariz. Rev. Stat. §16-541. Indeed, most Arizonans (roughly 89%) voted by early mail ballot in the 2020 election. ECF 388, ¶60. That underscores the extent to which the RNC's registration/voting distinction would eviscerate the NVRA's protections.

Next, the RNC—citing nothing that plaintiffs have said or filed—says that plaintiffs' position would require "uniformity among mail-in ballot applications" *nationwide*. ECF 367 at 8. In reality, the DNC's and ADP's position is simply that, as *ITCA* held, states cannot treat voters who register using the federal form but without providing DPOC any differently in terms of voting in any federal election than those who did provide DPOC.

Finally, section 6 of the NVRA also provides that (with specified exceptions) voters

[3] Indeed, as the Ninth Circuit has observed, the conference report accompanying the NVRA makes clear that Congress viewed a DPOC requirement as inconsistent with the act's purposes, explaining that a proposed amendment that would have *allowed* states to require DPOC was rejected precisely because it "'could effectively eliminate, or seriously interfere'" with those purposes. *Gonzalez v. Arizona*, 677 F.3d 383, 403 n.29 (9th Cir. 2012) (quoting H.Rep. No. 103-66, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148).

can be required by state law to vote in person *if* they registered to vote by mail *and* have not previously voted in person in the relevant jurisdiction. 52 U.S.C. §20505(c)(1). If the RNC were correct that the NVRA imposes no restrictions on states' ability to limit *how* people vote, this provision would be unnecessary—and in fact meaningless. But "one of the most basic interpretive canons" is that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009). The provision thus shows that the RNC is wrong. Moreover, under another fundamental interpretive canon—that "[t]he expression of one thing implies the exclusion of others," *Jennings*, 138 S.Ct. at 844—the provision makes clear that voters who submit a federal form can be required to vote in person (i.e., can be denied a state-law right to vote by mail) *only* in the circumstance that section 6 describes. H.B. 2492's limit on voting by mail goes beyond that circumstance. It is thus preempted.

2. Voting In Presidential Elections

The RNC argues (ECF 367 at 3-8) that the NVRA cannot apply to presidential elections because (1) Congress enacted the law only under the Elections Clause, and (2) that clause gives Congress no authority over presidential elections. Hence, the RNC says, the NVRA cannot stop states from *registering* people to vote but then denying them the ability to *actually* vote in presidential elections if they do not provide DPOC. Neither part of the argument is correct: The NVRA was not enacted solely under the Elections Clause, and—as decisions of the Supreme Court, the Ninth Circuit, and other courts recognize—multiple provisions of the Constitution give Congress the authority to regulate presidential elections.[4]

a. Binding precedent recognizes Congress's power to regulate presidential elections

Supreme Court cases affirming congressional authority to regulate presidential

[4] The RNC does not reprise (and hence has waived) other arguments that the state and attorney general made in moving to dismiss, including that the NVRA should be read "to apply only to Congressional elections," ECF 127 at 23, and that H.B. 2492 does not regulate congressional elections, *id.* at 22, 24. Those arguments failed in any event for the reasons the DNC and ADP gave in opposing dismissal, *see* ECF 151 at 5.

elections date back many decades. For example, in *Burroughs v. United States*, 290 U.S. 534 (1934), the Court held that "Congress, undoubtedly, possesses" the "power to pass … legislation to safeguard [a presidential] election … from impairment," rejecting an argument (much like the RNC's) that Congress cannot regulate presidential elections, *id.* at 545. In fact, the Court observed that it had rejected the same argument—which it labeled "'a proposition so startling as to arrest attention'"—50 years earlier. *Id.* at 546 (quoting *Ex parte Yarbrough*, 110 U.S. 651, 657 (1884)). More recently, the Court cited *Burroughs* in noting that it had "recognized broad congressional power to legislate in connection with the elections of the President and Vice President." *Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976) (per curiam). Finally, 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.).

Relying on many of these decisions, the Ninth Circuit long ago rejected a facial 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). Other circuits agree. *See ACORN v. Miller*, 129 F.3d 833, 836 n.1 (6th Cir. 1997); *ACORN v. Edgar*, 56 F.3d at 793. Indeed, the RNC cites no case holding that Congress *cannot* regulate presidential elections.

Nor do any of the RNC's attempts to deal with the wall of (largely binding) adverse precedent have merit. For example, the RNC asserts (ECF 367 at 6) that *Burroughs* "had nothing to do with the appointment of presidential electors." To the contrary, *Burroughs* (as noted) expressly rejected an argument nearly *identical* to the RNC's claim here, stating:

> The only … constitutional objection necessary to be considered is that the power of *appointment of presidential electors* and the manner of their appointment are expressly committed by § 1, Art. II … to the states, and … the congressional authority is thereby limited to determining "the Time of chusing the Electors, and the Day on which they … Vote[]…." So narrow a view of the powers of Congress in … the matter is without warrant.

290 U.S. at 544 (emphasis added). The RNC cannot avoid this flat rejection of its argument

by closing its eyes to the language and baldly asserting that *Burroughs* "had nothing to do with the appointment of presidential electors." Nor can it prevail by wrongly claiming, in direct contradiction to the language just quoted, that "the Supreme Court has never held that Congress possesses power to regulate the 'Places and Manner' of presidential elections." ECF 367 at 5. And it certainly cannot prevail by making the misleading claim that *Burroughs* recognized an "'exclusive state power' over presidential elections." *Id.* at 6 (quoting *Burroughs*, 290 U.S. at 545). What *Burroughs* said was not that states have any "'exclusive … power' over presidential elections," *id.*, but rather that the law challenged there "in no sense invades any exclusive state power." 290 U.S. at 545. That does nothing to support the RNC's argument—which, again, *Burroughs* explicitly rejected.

The RNC fares no better in discussing the other cases cited above. For instance, the RNC resorts to yet another bald (and false) claim in stating that "[n]o binding authority" holds that the Elections Clause gives Congress power to regulate presidential elections. ECF 367 at 6. That is not only what *Burroughs* held, but also what the Ninth Circuit held in *Wilson*. The RNC buries *Wilson* in a "*cf.*" clause, describing the case as "citing *Burroughs* in passing for the proposition that the Constitution gives 'broad congressional power' over presidential elections." *Id.* This ploy to dismiss binding precedent via (mis)characterization is baseless. In support of its holding that the NVRA is facially constitutional, *Wilson* stated that "[t]he broad power given to Congress over congressional elections has been extended to presidential elections." 60 F.3d 1414 (citing *Burroughs*). That statement was "necessary to th[e] result" in *Wilson*—rejection of a challenge to the constitutionality of a law regulating presidential elections—and hence constitutes binding precedent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). That precedent requires rejection of the RNC's challenge.

b. Multiple provisions of the Constitution give Congress the power to regulate presidential elections

The binding cases just discussed dispose of the RNC's claim regarding Congress's power to regulate presidential elections. But the argument also fails on first principles.

Congress's constitutional power to regulate presidential elections has several sources.

First, the Elections Clause 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 is consistent with the Supreme Court's longstanding view that the clause is "comprehensive," "embrac[ing] 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 Congress has chosen to have presidential and congressional elections held simultaneously, 2 U.S.C. §7; 3 U.S.C. §1, applying the NVRA to presidential elections is a "Necessary and Proper" way, U.S. Const., art. I, §8, cl. 18, to regulate the "manner" of congressional elections, *id.* art. I, §4. In particular, it is necessary 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). In fact, the Elections Clause "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 also In re Coy*, 127 U.S. 731, 751-752 (1888). Congress thus has authority to ensure 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.

Second, regulating registration for presidential elections is a necessary and proper exercise of Congress's authority under the Electors Clause both to "determine the Time of ch[oo]sing" the presidential electors, U.S. Const. art. II, §1, cl. 4, and to "count" those electors' votes, *id.* cl. 3. While Congress has, as noted, exercised this authority to mandate simultaneous presidential and congressional elections, the 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's determination that one voter-registration process should apply to all federal elections is certainly a "means …

rationally related to the implementation of" Congress's power under the Electors Clause, *United States v. Comstock*, 560 U.S. 126, 134 (2010). Indeed, although the DNC and ADP made these same arguments at the motion-to-dismiss stage, ECF 151 at 6-7, the RNC does not even attempt to explain 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 to bring it within the scope of the Necessary and Proper Clause, *Comstock*, 560 U.S. at 133-134.

Third (and more generally), Congress's power over presidential elections is essential to "preserve the departments and institutions of the general government"—including the presidency—"from impairment." *Burroughs*, 290 U.S. at 545. The Founders understood 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 effectively 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.9-11.

Finally, the Fourteenth and Fifteenth Amendments further expand Congress's power over presidential elections, and the NVRA (including as applied to those 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). Although Congress need not invoke its power under the amendments when legislating—there need only be "some legislative purpose or factual predicate" to support the exercise of that power, *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983)—Congress *did* invoke that power here. In fact, both "the legislative history and the text … are clear" that Congress relied on that power under to enact the NVRA. *Condon v. Reno*, 913 F.Supp. 946, 962 (D.S.C. 1995). Congress's express findings include 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). And the Senate report accompanying the law stated that the law sought "to remove the barriers to voter registration and participation under Congress' power to enforce the equal protection guarantees of the 14th Amendment." S.Rep. No. 103-6, at 3 (1993); *see also* H.Rep. No. 103-9, at 3 (1993) (deeming the NVRA necessary to complete the work of the Voting Rights Act ("VRA")).

The RNC answers all this by asserting (1) that Congress enacted the NVRA *only* under the Elections Clause, i.e., did not purport to invoke its authority under any of the other provisions just discussed, and (2) that the NVRA is not valid remedial legislation under the Fourteenth and Fifteenth Amendments. ECF 367 at 3, 6-8. Both arguments fail.

As to the former, there is no basis to conclude that Congress enacted the NVRA only under the Elections Clause. That clause surely was *one* source of authority Congress relied on, and hence *ITCA* and some other cases have discussed the Elections Clause in deciding NVRA cases. But the RNC cites no case holding that Congress relied *only* on the Elections Clause in enacting the NVRA, nor does it provide any basis for so holding. In fact, the cases the RNC cites on this point—principally *ITCA*—had no need to consider other sources of power, because they each held that the Elections Clause alone sufficed to sustain the NVRA against the challenge before it. Other cases, meanwhile, have rejected the RNC's argument, citing additional powers Congress drew on to enact the NVRA. *See ACORN v. Miller*, 912 F.Supp.976, 984 (W.D. Mich. 1995); *ACORN v. Edgar*, 880 F.Supp. 1215, 1221 (N.D. Ill. 1995). These cases reflect the established principle that "Congress's power to legislate may … stem from more than one enumerated power." *United States v. Park*, 938 F.3d 354, 363 (D.C. Cir. 2019) (citing four Supreme Court cases); *accord Armstrong v. Wilson*, 942 F.Supp. 1252, 1263 (N.D. Cal. 1996), *aff'd*, 124 F.2d 1019 (9th Cir. 1997). That principle further forecloses the RNC's novel "Elections-Clause-only" argument.

Equally flawed is the RNC's claim (ECF 367 at 7) that the NVRA is not reasonably tailored to preventing race discrimination. Mandating a simplified system for registering to vote in federal elections and restricting states' ability to purge voters from the voting rolls

are assuredly "rational means," *Katzenbach*, 383 U.S. at 324, of preventing "discriminatory and unfair registration laws and procedures," 52 U.S.C. §20501(a)(3). The RNC asserts (ECF 367 at 7) that the proper standard is *not* rational means but rather "congruence and proportionality," *City of Boerne v. Flores*, 521 U.S. 507 (1997). That is wrong; even after *City of Boerne*, the Supreme Court has applied *Katzenbach* when Congress sought to remedy racial discrimination or protect voting rights. *See Lopez v. Monterey Cnty.*, 525 U.S. 266, 283 (1999). Courts have thus recognized that "*Katzenbach* has yet … to be overruled or otherwise … modified by the Supreme Court," and hence that its "rational means" standard governs in cases involving the Fifteenth Amendment. *Janis v. Nelson*, 2009 WL 5216902, at *8 (D.S.D. Dec. 30, 2009). Regardless, the NVRA *is* congruent and proportional. Disputing this, the RNC claims (ECF 367 at 7) that the NVRA is under-inclusive because it did not address state elections. But Congress need not address every aspect of a problem at once. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955). Moreover, at the same time that it faults Congress for *failing* to include state elections, the RNC argues that Congress *cannot* constitutionally regulate state elections. ECF 367 at 4. That is wrong (as the Voting Rights Act's and Civil Rights Act's coverage of all elections makes plain), but the point for the moment is that it obviously cannot be that a law lacks congruence and proportionality because Congress did not try to apply the law to matters beyond its constitutional purview.

Lastly, the RNC says that "the NVRA's 'legislative record lacks examples of modern instances' of discrimination on account of proof of citizenship required for registration." ECF 367 at 7. But the case it quotes in making this argument contrasted the record underlying the statute in that case with "the record which confronted Congress … in the voting rights cases." *City of Boerne*, 521 U.S. at 530. And in enacting the NVRA, Congress relied on an extensive record of discrimination in voting registration, similar to that underlying the VRA. *See* S.Rep. No. 103-6, at 3; H.Rep. No. 103-9, at 3-4. The Ninth Circuit has held that the record supporting the VRA confirms that that law's prophylactic elements are a congruent and proportional means of addressing discrimination in voting. *See United States v. Blaine Cnty.*, 363 F.3d 897, 904-909 (9th Cir. 2004). The same is thus true of the NVRA.

* * *

The RNC's attempt to cabin congressional authority over presidential elections is foreclosed by binding precedent and baseless as a matter of constitutional first principles. If the Court reaches the RNC's argument, *see supra* n.2, the argument should be rejected.

II. THE DNC AND ADP ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR NVRA "90-DAY" CLAIM (COUNT VII)

As discussed, *see supra* p.3, the NVRA provides that states cannot "systematically remove the names of ineligible voters from the official lists of eligible voters" less than "90 days prior to" any federal election, save on the grounds specified. 52 U.S.C. §20507(c)(2). H.B. 2492 violates this bar because—as the secretary has conceded, ECF 121, ¶39—it places no time limit on the direction to county recorders to cancel registrations when they "receive[] and confirm[] information that [a] person registered is not" a U.S. citizen, H.B. 2492, §8.[5]

The state and attorney general argue (ECF 364 at 9), that "the NVRA does not prohibit states from cancelling registrations of voters who do not meet such requirements." That is *exactly* what the 90-day provision prohibits: systematically canceling registrations during the 90-day period for any reason other than those enumerated (e.g., because a voter died). The same point answers the state's and attorney general's concomitant claim (*id.*) that "if the limit on grounds for cancellation does not prohibit states from cancelling registrations for noncitizens, neither should the 90-day quiet period." But the state and attorney general are again just closing their eyes to the plain text, which is crystal clear in barring the removal of voters from the rolls during the 90-day period, save for the reasons specifically allowed.

The state and attorney general also cite *United States v. Florida*, 870 F.Supp.2d 1346 (N.D. Fla. 2012), which concluded that the 90-day period does not apply *at all* to voters "who were not properly registered in the first place," *id.* at 1350. That, again, cannot be

[5] As noted, *see supra* n.1, H.B. 2243 revised the language that H.B. 2492 added to Arizona Revised Statutes §16-165 requiring removal from the rolls of a voter whom a county recorder finds not to be a U.S. citizen. But H.B. 2243 left in place the relevant command, providing that a county recorder "shall cancel [a voter's] registration" anytime the recorder "confirms" that the voter "is not a United States citizen." A.R.S. §16-165(A)(10). H.B. 2243 thus does not change the preemption analysis provided in the balance of this Part II.

squared with the statutory text, which has no such limit. The *Florida* court, moreover (like the state and attorney general), simply assume that anyone *suspected* of being a non-U.S. citizen is in fact not a citizen. But the court provided no basis for that assumption (nor have defendants here), because there is none. The 90-day provision shows that Congress understood that states may well err in deeming people ineligible—and that any such error, if made within 90 days of an election, might not be corrected quickly enough to avoid improperly (and irreversibly) denying a qualified voter her fundamental right to vote in a federal election. Hence, Congress enacted the 90-day provision to "strike[] a balance" between preventing ineligible people from voting "while ensuring that legitimate voters are able to vote." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388 (6th Cir. 2008). The *Florida* district court simply ignored all this—perhaps explaining the abrogation of that case by the Eleventh Circuit in *Arcia v. Florida Secretary of State*, 772 F.3d 1335 (11th Cir. 2014). There the court of appeals held that systematically removing people from the rolls based on citizenship within the 90-day period is prohibited by the NVRA, *id.* at 1345-1346.

Contrary to defendants' suggestion (ECF 364 at 9 n.15), the mandate in Arizona Revised Statutes §16-165(A)(10) that county recorders notify a voter that their registration will be canceled 35 days before the cancellation does nothing to avoid NVRA preemption. That provision (which was added to the statute by H.B. 2243) only provides *notice* to voters; the removal from the voter rolls that the NVRA bars is still allowed—and in fact required.

Lastly, the state and attorney general say (ECF 364 at 10) that this Court could simply *construe* H.B. 2492 as not permitting removals within the 90-day period. But that is not what H.B. 2492 says, and the federal courts cannot "rewrite a state law to conform it to constitutional requirements." *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988). The proper course is thus to hold that, because of the NVRA's 90-day provision, removal under H.B. 2492 cannot be conducted during the 90-day period before any federal election.

CONCLUSION

The DNC's and ADP's motion for partial summary judgment should be granted and defendants' requests for summary judgment in their favor should all be denied.

Dated this 5th day of June, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 5th day of June, 2023, 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