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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mi Familia Vota, et al.,

Plaintiffs,

v.

Adrian Fontes, et al.,

Defendants.

AND CONSOLIDATED CASES.

Case No. 2:22-cv-00509-SRB (lead)

NON-US PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR CLARIFICATION AS TO TRIAL OF CLAIMS SEEKING "ALTERNATIVE GROUNDS" FOR RELIEF

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

In its September 14 partial summary judgment order, the Court held, *inter alia*, that the NVRA preempts various parts of H.B. 2492, including the requirement that Arizonans provide documentary proof of citizenship ("DPOC") to vote in presidential elections or by mail. *See* ECF No. 534 at 9-15, 33. Consistent with the Court's direction, none of the parties moved for summary judgment on claims against H.B. 2492's DPOC requirements that could not be decided as a matter of law—*e.g.*, that they impose an undue burden on the right to vote and violate due process and equal protection, claims this Court has held are evaluated under well-established doctrines such as the *Anderson-Burdick* framework. *See* ECF No. 304 at 20-23, 27-28. The parties have conducted extensive discovery into these claims and are fully prepared to present this evidence at the November 6 trial.[1]

In the guise of seeking "clarification," Defendants now effectively move to prevent Plaintiffs from presenting these claims at trial. But holding trial on these claims now is critical. It is clear based on the parties' communications that at least some Defendants are likely to appeal the Court's order that the NVRA prohibits H.B. 2492's DPOC requirement—including based on constitutional arguments pressed by the Intervenors. *See* ECF No. 367 at 1-4; *see also* ECF Nos. 369, 443; ECF No. 535 at 10-12 (rejecting these arguments). If they are successful on appeal, it would require the parties and Court to reconvene to try those questions, potentially close to the 2024 elections, needlessly injecting uncertainty into the critical question of whether eligible Arizonans will have their voting rights severely burdened by H.B. 2492's DPOC requirements. No one, including the public, is well-served by an approach that risks the need for a second trial in 2024. The Court should therefore make clear Plaintiffs may present evidence on all claims not resolved by the September 14 partial summary-judgment order, including the constitutional and Voting Rights Act Section 2 claims regarding H.B. 2492's DPOC requirement.

[1] Plaintiffs are also proceeding to trial on claims challenging other provisions of H.B. 2492 and H.B. 2243 not ruled on by the partial summary judgment order. There is no dispute among the parties about whether Plaintiffs should be allowed to present those other claims.

I. Discussion

Plaintiffs should be permitted to present evidence supporting their claims that H.B. 2492's DPOC restrictions violate the Constitution and Section 2 of the Voting Rights Act. The presentation of this evidence will conserve judicial and party resources, ensure that a complete record and comprehensive final judgment is reviewed in one appeal, and avoid any later delays in resolving this case that could follow if the Court's ruling on partial summary judgment is disturbed on appeal. In contrast to Defendants' preference for the possibility of piecemeal trials and successive appeals—potentially prolonging this case by years—permitting Plaintiffs to present all their evidence now will ensure that any available relief to voters is not delayed and that the ground rules for the 2024 elections are settled. It will also eliminate the need for a second trial in the event of remand, as well as the potential need for any fresh discovery ahead of such a trial.

For precisely these reasons, courts routinely allow plaintiffs to present evidence on alternative bases for relief at trial, even where an earlier summary-judgment order grants relief as to the same targeted law or practice. As the RNC is aware, for example, an ongoing trial in Texas is proceeding on just such a basis. *See La Union del Pueblo Entero, et al. V. Abbott, et al.*, No. 5:21-cv-844, ECF Nos. 724, 753 (W.D. Tex.) (granting summary judgment on Materiality Provision claims but proceeding to trial on claims—including *Anderson-Burdick*, Fourteenth Amendment, and Fifteenth Amendment claims—seeking relief against same provisions). The Court's jurisdiction to hear these alternative bases for relief is indisputable. *Air Line Pilots Ass'n, Int'l v. UAL Corp.*, 897 F.2d 1394, 1397 (7th Cir. 1990); *Novella v. Westchester Cnty.*, 661 F.3d 128, 149 (2d Cir. 2011); *WorldCom, Inc. v. FCC*, 246 F.3d 690, 695 (D.C. Cir. 2001); *accord* 13A Wright, Miller & Cooper, Federal Practice and Procedure § 3533. Defendants suggest nothing to the contrary.

Any claim that the constitutional avoidance doctrine counsels against hearing these remaining claims is a red herring. Defendants have made clear *they* intend to raise constitutional arguments in their appeal of this Court's holding that Section 6 of the NVRA

preempts H.B. 2492's restrictions on voting in presidential elections and by mail—the very holding that grants overlapping relief for some of the claims Defendants now say should not be allowed at trial. The RNC's argument on the point implicates a host of constitutional provisions, including the Elections Clause, the Electors Clause, the Necessary & Proper Clause, and the Fourteenth and Fifteenth Amendments. *See* ECF No. 442 at 2-6. It strains credulity to believe that no Defendant will raise these same constitutional arguments on appeal. Simply put, Defendants are not in fact offering this Court, or any appellate court, "an alternative basis for disposing of the case" that "avoid[s] constitutional questions." *United States v. Sandoval–Lopez*, 122 F.3d 797, 802 n.9 (9th Cir. 1997).

Plaintiffs' remaining claims directed to H.B. 2492's DPOC requirements, on the other hand, require only that the Court apply the facts of this case to well-articulated doctrines like the *Anderson-Burdick* framework. This task requires breaking no new constitutional ground—only the routine judicial task of applying facts to the "well-established *Anderson-Burdick* framework." *Libertarian Party of Ky. v. Grimes*, 835 F.3d 570, 574 (6th Cir. 2016). It is *Defendants*, and not Plaintiffs, who have injected novel constitutional theories about Congress's power to regulate presidential elections into this case. Their strategic interest in limiting the factual record while pursuing their novel theories on appeal—and excluding other grounds for relief against H.B. 2492's DPOC requirement—does not outweigh the interest the parties, the Court, and the public have in resolving these issues well in advance of the November 2024 general election. Rather than permitting Defendants to test their constitutional theories and potentially return to Plaintiffs' outstanding claims months or years down the line, the Court should permit Plaintiffs to make a full record now for a single appeal that resolves this case entirely.[2]

[2] That the Court did not reach Plaintiffs' NVRA Section 8(a) challenge to H.B. 2492's DPOC requirements is irrelevant. *See* ECF 555 at 2. That claim, in effect, rose or fell alongside Plaintiffs' Section 6 claim based on how the Court interpreted the NVRA. And Plaintiffs *themselves* proposed that the Court need not reach their Federal-Form DPOC claim under the Materiality Provision if it granted such relief under the NVRA. ECF No.

Finally, there is no efficiency to be gained by granting Defendants' proposed modification of trial. For one, Plaintiffs' ten-day estimate assumed their fact-based claims would be heard at trial, consistent with the Court's plan to hold "a trial on the merits of whatever's left after fact discovery." 03/23/2023 Tr. at 46:17-18. The current trial schedule therefore contemplates hearing evidence on these claims. Just as importantly, the evidence on the disputed claims for trial substantially overlaps with the evidence the Court will hear anyways on claims that all parties agree are ripe for trial. This includes, for example, evidence detailing Arizona's voter registration and list maintenance practices. Similarly, LUCHA's Section 2 and intentional discrimination claims challenge most of the challenged provisions in this lawsuit, including some not resolved by the Court's summary judgment order. *See* ECF No. 67 ¶¶ 329-341, 363-371. Under Section 2's "totality of the circumstances" test, the Court must consider the whole of H.B. 2492 and H.B. 2243 as enacted by the Legislature—meaning it will hear evidence at trial about H.B. 2492's DPOC requirements in any event as part of LUCHA's outstanding claims. Defendants' request yields no added efficiency for the November trial, while at the same time creating a substantial risk of piecemeal resolution of this case over an elongated timeframe that frustrates full resolution of this matter ahead of the 2024 elections. Their effort to restrict the Plaintiffs' case through a thinly-supported "clarification" motion should be denied.[3]

399 at 9 n.9. In contrast, Plaintiffs *wish* to pursue their remaining claims at trial—all of which present distinct theories of relief from those resolved at summary judgment.

[3] Although not framed as such, Defendants' motion is in effect a request for separate trials under Rule 42(b). As the "part[ies] seeking bifurcation," Defendants have "the burden of demonstrating that judicial economy would be served and that no party would be prejudiced by separate trials." *Parish v. Lansdale*, No. CV-17-00186-TUC-JGZ, 2021 WL 1827233, at *1 (D. Ariz. May 7, 2021) (citation omitted); *accord* 9A Fed. Prac. & Proc. Civ. § 2388 (3d ed.) (explaining that the "piecemeal trial of separate issues . . . is not to be the usual course"). For the reasons herein, Defendants fall well short of carrying that burden—concerns of efficiency, as well as the public interest, uniformly weigh in favor of promptly resolving Plaintiffs' outstanding claims in a single trial. And Plaintiffs, as well as Arizona voters, will be severely prejudiced if Plaintiffs are required to try their

II. Requested Order on Defendants' Motion

The Court should reject Defendants' proposed clarification and instead confirm that trial will encompass any claims left unresolved at summary judgment.

Dated: October 9, 2023

Respectfully submitted,

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remaining claims directed to H.B. 2492's DPOC requirement close in time to the 2024 elections. As Plaintiffs suggested to Defendants, these issues, including the instant motion, will be further elaborated and explained in the parties' Joint Pretrial Order.

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