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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Mi Familia Vota, et al.,

Plaintiffs,

v.

Katie Hobbs, et al.,

Defendants.

Case No. 2:22-cv-00509-SRB

MFV PLAINTIFFS' OPPOSITION TO THE STATE'S MOTION FOR A PROCEDURAL ORDER REGARDING CONSOLIDATED BRIEFING

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.
State of Arizona, et al.,
Defendants,
and
Republican National Committee,
Intervenor-Defendant.

Plaintiffs Mi Familia Vota and Voto Latino (together, "MFV Plaintiffs"), by and through counsel, file this Opposition to Defendants Mark Brnovich and the State of Arizona's (together, the "State") Motion for a Procedural Order Regarding Consolidated Briefing (ECF No. 85, the "Motion" or "Mot."). For the reasons set forth below, MFV Plaintiffs respectfully request that the Court deny the Motion.

INTRODUCTION

The State intends to move to dismiss claims brought independently by five consolidated groups of plaintiffs (comprising 13 separate plaintiffs) in a single brief, and it asks this Court to require all plaintiffs other than the United States ("Plaintiffs") to respond to the State's challenges to their claims and standing in a single consolidated brief. Plaintiffs do not object to the State's proposal as to how to handle its *own* briefing;[1] they object to the State's attempt to mandate how *Plaintiffs* may respond.

A motion to dismiss is, of course, dispositive briefing. Plaintiffs made different choices as to which claims to assert and how to plead them, and each Plaintiff has unique features that establish its standing. Requiring Plaintiffs to consolidate their oppositions to the State's motion to dismiss would ignore the differences in Plaintiffs' complaints and deprive them of the ability to frame their own arguments. Each Plaintiff group should be permitted to respond as the rules contemplate, defending each of their claims in an opposition brief they control.

Mandatory consolidation is also unnecessary because Plaintiffs have no interest in filing repetitive briefing that would burden the Court. They are committed to working together to minimize repetition for the sake of efficiency and expediency. But because this matter involves separate cases brought by different types of entities, a single mega-brief would be difficult to navigate and muddy the waters as to each Plaintiff's unique claims and bases for standing. Given the variation of parties and claims, it will be less confusing and "chaotic" to permit each Plaintiff group to file its own opposition. This will allow each

[1] The State does not appear to plan to consolidate its briefing with Secretary Hobbs or the County Recorder Defendants, and Plaintiffs have not asked this Court to order it to do so.

Plaintiff to squarely address its specific, individualized bases for standing and defend its claims. The Court should deny the Motion.

BACKGROUND

Five suits—by four Plaintiff groups and the United States—have been consolidated in this action. *See* ECF Nos. 39, 69, 79, & 91 (consolidating cases). As a result, this case includes challenges to two recently enacted laws, H.B. 2492 and H.B. 2243 (although not all plaintiffs challenge both), by five groups of plaintiffs who brings different sets of claims against different sets of defendants concerning different statutory provisions.[2]

The parties have been in discussion since early August to try to streamline upcoming motion to dismiss briefing, which resulted in the then-existing parties filing a joint motion proposing deadlines and page limits (including for Plaintiffs if their briefs are not consolidated). ECF No. 84. During those discussions, the State repeatedly insisted that Plaintiffs prematurely consent to consolidated opposition briefing. Plaintiffs uniformly opposed the State's request. The State now asks this Court to require consolidated briefing over Plaintiffs' unified opposition.

ARGUMENT

In the American judicial system, plaintiffs are the "masters of the complaint." *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394-95 (1987). Plaintiffs choose when, where, and how to bring cases, and their success often rises and falls with these strategic decisions. The State's request would deny Plaintiffs the right to make a crucial strategic decision: how to defend against a motion to dismiss. What's more, the State asks the Court to order this *before* it even moves to dismiss, prematurely seeking to constrain Plaintiffs' ability to respond to arguments they have not yet seen—perhaps because the motion to dismiss will confirm that mandatory consolidation is inappropriate.

The State speculates that, absent consolidation, "the arguments presented to this

[2] *Arizona Asian American Native Hawaiian and Pacific Islander for Equity Coalition v. Hobbs et al.*, Case No. 2:22-cv-01381, which also challenges H.B. 2492 and H.B. 2243, has been transferred to this Court and marked as related, but has not yet been consolidated with this action. ECF No. 93.

Court *could* be needlessly scattered, redundant, and chaotic." Mot. at 2 (emphasis added). But as Plaintiffs repeatedly advised the State's attorneys—and reaffirm to this Court—they are committed to incorporating each other's arguments where appropriate to avoid the "briefing free-for-all" the State claims will result from independent briefing.[3] *See id.* at 1. Nonetheless, each Plaintiff group has a strong interest in fully defending their claims against dismissal, and the State's contentions do not outweigh Plaintiffs' right to determine how best to do that. *See Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018) (explaining that consolidation does not "completely merg[e] the constituent cases into one, but instead . . . preserv[es] the distinct identities of the cases and the rights of the separate parties in them").

One need only look at the complaints to see why consolidated briefing would be problematic. The State's concession that Plaintiffs' complaints are "not completely coterminous," Mot. at 3, is an understatement. Plaintiffs vary in how they plead a variety of federal constitutional claims, including arbitrary and disparate treatment in violation of the Equal Protection Clause (4 complaints); *Anderson-Burdick* undue burden claims (3 complaints); and procedural due process claims (3 complaints). And although Plaintiffs all claim that H.B 2492 and/or H.B. 2243 violate the NVRA, each Plaintiff group alleges that one or both laws violate different sections of the NVRA or violate those sections in different ways.[4] Finally, the LUCHA Plaintiffs and Poder Latinx are the only Plaintiffs challenging both H.B 2243 and H.B. 2492, and the LUCHA Plaintiffs alone claim that both challenged laws violate the Voting Rights Act.[5] Each Plaintiff group should be allowed to

[3] This commitment effectively neutralizes the State's purported concern about "excessive" attorneys' fees "padded with needlessly repetitive briefing." *Id.* at 4. The State's concern also ignores that this Court retains final authority to reduce any fees it finds excessive.

[4] As just one example, DNC Plaintiffs alone allege that H.B. 2492 violates Section 8 of the NVRA by permitting voters to be barred from voting in presidential elections within 90 days of an election.

[5] Poder Latinx will file its First Amended Complaint on September 6, 2022, pursuant to the parties' Joint Motion. ECF No. 84. It will challenge H.B. 2243 in addition to H.B. 2492; assert a claim under 52 U.S.C. § 10101(a)(2)(A), which is distinct from the materiality claims raised by other Plaintiffs under 52 U.S.C. § 10101(a)(2)(B); and uniquely claim racial and national origin discrimination.

defend their suit without bartering for space in a restrictive 45-page consolidated brief.[6]

Additionally, the State has indicated that it intends to challenge Plaintiffs' standing. Given the substantial variation not only in the four Plaintiff groups' claims, but between the 12 Plaintiffs themselves, individual briefing will ensure that each Plaintiff can clearly address its bases for standing. Conflating Plaintiffs' briefing on standing would only confuse and overcomplicate, whereas keeping these arguments separated by case will promote clarity and efficiency, ensuring that the Court has information before it to properly assess the State's standing challenges as to each Plaintiff on the specific claims they bring.

None of the cases or examples offered by the State support a different result. The State misleadingly presents two recent decisions from this District as instructive, but both involved the imposition of joint briefing on parties granted *permissive intervention* to a single action. *See Ariz. Democratic Party v. Hobbs*, No. CV-20-01143, 2020 WL 6559160 (D. Ariz. June 26, 2020); *Mi Familia Vota v. Hobbs*, No. CV-21-01423, 2021 WL 5217875, at *2 (D. Ariz. Oct. 4, 2021). Far from "a less onerous structure," Mot. at 3, the State seeks to graft limitations placed on permissive intervenors—who are only permitted to enter a case at the court's discretion—onto multiple groups of plaintiffs who bring individual cases and assert independent bases for standing.

The D.C. Circuit's "long prevailing practice" of requiring joint briefs is even further afield. *Id.* First, appellate briefing comes only after the opportunity for the development of a record below. The State asks this Court to strip Plaintiffs of sufficient autonomy to adequately develop their claims for review. Second, to the extent appellate procedure is instructive, the D.C. Circuit is an outlier from the Federal Rules of Appellate Procedure and the Ninth Circuit, neither of which mandate consolidated briefing; instead "any number of appellants or appellees *may* join in a brief." Fed. R. App. P. 28(i) (emphasis added); 9th Cir. R. 32-2(b); *see also, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 3:07–

[6] Should this Court grant the Motion, MFV Plaintiffs submit that a 45-page joint brief is unlikely to be sufficient due to the number of Plaintiffs whose standing and claims must be defended. The State has effectively conceded that 45 pages is insufficient by proposing that the United States have *thirty-five* pages to defend its *two* claims. *See* Mot. at 2.

cv–05944–JST, 2017 WL 3468376, at *1 (9th Cir. Mar. 2, 2017). These rules embrace a basic concept: how to brief and argue their case is a decision parties are entitled to make alone.

District courts in this Circuit have recognized this principle. For example, in *Audubon Society of Portland v. Zinke*, consolidated plaintiffs argued that defendants should be confined to a single summary judgment brief. No. 117-CV-69, 2017 WL 2172439 (D. Or. May 16, 2017). The district court disagreed, explaining that it is "most sensible for the parties to make their own determination on the number of summary judgment briefs . . . ." *Id.* at *2; *see also id.* ("[u]ntil a party actually receives the briefs to which it must respond, . . . it cannot be determined how to most effectively and efficiently structure their motions or responses") (quotation marks omitted). That same standard—allowing Plaintiffs to choose how best to respond to the State's motion to dismiss—should apply here.

CONCLUSION

MFV Plaintiffs respectfully request that the Court deny the State's Motion.

Dated: September 1, 2022

Respectfully Submitted,

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