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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

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| Arizona Asian American Native Hawaiian And Pacific Islander For Equity Coalition,<br><br>Plaintiff,<br><br>vs.<br><br>Katie Hobbs, in her official capacity as Arizona Secretary of State; et al.,<br><br>Defendants. | Case No.: CV-22-01381-PHX-SRB<br><br>**RESPONSE TO MOTION TO CONSOLIDATE** |

## I. INTRODUCTION

Defendant Attorney General Brnovich's ("AG") 1-page motion for consolidation is bereft of any analysis purporting to show why this case should be consolidated with the different cases currently consolidated under the *Mi Familia Vota* case, 2:22-cv-00509-PHX-SRB (the "*Mi Familia Vota* cases"). The AG does not cite to the appropriate legal standard and relevant factors, does not refer to any case setting forth how courts examine such factors/balance the various interests, and does not include a single sentence assessing the similarities and key differences in this case and the *Mi Familia Vota* cases: the parties named, the statutes challenged, the claims being brought, the allegations being made, the discovery to be pursued, the timing of discovery, the evidence already in record, issues regarding delay, the prejudice to Plaintiff, or anything else.

This failure of discussion is dispositive. It is unusual for any movant to so completely avoid engaging with the substance of their motion that the opposing party and Court must simply guess at what is actually being asked (what "consolidation" is even being requested here—for briefing, for discovery, for trial, for all purposes?), let alone why any relief is appropriate. Moreover, the AG did not even seek to meet and confer with Plaintiff on, for example, whether consolidation for a limited purpose was appropriate or if there were other ways to ensure judicial efficiency. The AG cannot exclaim that "it would be the worst of all worlds" for this Court to not consolidate without explaining *why*. Mot. at 1. This case is obviously different—as the motion for preliminary injunction and the Court's order resolving that motion in Plaintiff's favor show. Dkt. 54. And a "guessing game" motion like this means that Plaintiff cannot appropriately focus its response, the AG as moving party can sandbag in reply, and the Court does not get briefing that fully joins on the relevant issues. Plaintiff thus respectfully requests that the AG's motion be denied outright.

Should the Court nevertheless wish to engage on this issue, Plaintiff addresses the relevant consolidation factors below. Plaintiff respects that the Court has broad discretion to decide whether consolidation is desirable in any given case, and what that consolidation

looks like—and of course will proceed in whatever manner the Court finds most efficient. And there are indeed some common questions of fact or law between this case and the *Mi Familia Vota* consolidated cases related to the challenge to the H.B. 2492 statute—which is why Plaintiff moved to transfer this case to this Court. Dkt. 8. But there are also some significant differences, making consolidation *inefficient* and inappropriate at this time—because this case also challenges the H.B. 2243 statute in a way none of the other consolidated cases do. Indeed, most of those cases don't challenge H.B. 2243 at all—and of the two that (now) reference H.B. 2243, via amendments to their complaints, the claims are different.

Plaintiff's motion for preliminary injunction explained at length how H.B. 2243 has pernicious short-term voter purge effects, and the fact that Plaintiff was able to succeed in obtaining prohibitions on any enforcement of that statute until January 1, 2023 is only a short-term reprieve. Plaintiff has already reached out to Defendants to schedule the parties' 26(f) conference and intends to move forward with all haste regarding discovery as to H.B. 2243 in particular—though the AG is stonewalling and refuses to offer a date that it is available, stating that there is no urgency to get discovery started despite the County Recorder Defendants necessarily getting ready to implement these laws in just a few short months.[1] And the differences don't stop there. As compared to the *Mi Familia Vota* consolidated cases, the parties in this case are different (all County Recorders are named in this action), the allegations and claims are different (including as to the discriminatory



[1] In attempting to justify its refusal to abide by the mandates of Rule 26(f), the AG claims that Plaintiff is being manifestly unreasonable by even asking for a Rule 26(f) conference because, according to the AG, *none* of the plaintiffs in the *Mi Familia Vota* consolidated cases have yet pressed for discovery or sought a Rule 26(f) conference. Leaving aside this style of self-help, the AG's claim in fact makes clear just why consolidation is not appropriate at this time. The *Mi Familia Vota* cases are proceeding along a timeline agreed to by those parties that is *not* the timeline here. It is precisely and solely because of the filing of Plaintiff's motion for preliminary injunction that there is a Court order prohibiting the voter purge mandated by H.B. 2243 until January 1, 2023. But it is already late September, and Plaintiff cannot wait to obtain discovery in order to prosecute this case swiftly and ensure voters are not purged beginning in the new year. The parties' different approaches and timing regarding discovery is a critical reason why a blanket consolidation is inappropriate at this time.

nature of the legislatures' changes to the predecessor of the H.B. 2243 statute), the evidence is different (as per Plaintiff's declarations submitted in support of a preliminary injunction), and the timing and scope of discovery sought is different. In light of all this, the benefits to judicial efficiency is scant, and the prejudice to Plaintiff poses a significant risk. So apart from failure of process, on substance, too, the AG's motion should be denied.

## II. BACKGROUND

Plaintiff Arizona Asian American Native Hawaiian and Pacific Islander for Equity Coalition ("Plaintiff") filed this case on August 16, 2022, challenging two recently-enacted Arizona laws, H.B. 2492 and H.B. 2243 as violating the U.S. Constitution, the Civil Rights Act of 1964, and/or the National Voter Registration Act of 1993 ("NVRA"). *See generally* Dkt. 1. By that time, the parties from *Mi Familia Vota v. Hobbs*, No. 2:22-cv-509, *Living United for Change in Arizona v. Hobbs*, No. 2:22-cv-519, *Poder Latinx v. Hobbs*, No. 2:22-cv-1003, and *United States of America v. Arizona*, No. 2:22-cv-1124, had already agreed to have their cases consolidated. *See Mi Familia Vota*, No. 2:22-cv-509, Dkts. 68, 69, 78, 79. However, neither the parties' filings, nor the Court's orders, describe the extent of the consolidation. *See Mi Familia Vota*, No. 2:22-cv-509, Dkts. 19, 39, 68, 69, 78, 79. It is unclear to Plaintiff whether the cases are consolidated for all purposes, including a consolidated trial.



What is clear is that all the parties in the five now-consolidated cases were in agreement that the core (or sole) issue, in all of the cases, was H.B. 2492—and various statutory and constitutional challenges to that statute. On August 18, 2022, the parties in the *Mi Familia Vota* cases filed a Joint Motion for a Procedural Order setting a briefing schedule extending past the November election. *See Mi Familia Vota*, No. 2:22-cv-509, Dkt. 84. The plaintiffs in *Democratic National Committee v. Hobbs*, No. 2:22-cv-1369,

who filed their complaint challenging only H.B. 2492 a day before Plaintiff here, likewise agreed with the *Mi Familia Vota* parties' joint filing. *See id.*[2]

The lack of emphasis on H.B. 2243 in the *Mi Familia Vota* cases was apparent from the parties' joint filing. The parties referred to "the same statute at issue"—singular—clearly referring only to H.B. 2492. *Mi Familia Vota*, No. 2:22-cv-509, Dkt. 84 at 1-2. Likewise, in the AG's subsequent related filing, only H.B. 2492 (defined as "the 'Act'" in the motion) is mentioned. *Mi Familia Vota*, No. 2:22-cv-509, Dkt. 85 at 1. In other words, the AG told this Court that every case to that point was only and all about H.B. 2492—full stop.[3] Further demonstrating the fundamental misunderstanding in the differences between cases, in that filing the AG referred to Plaintiff's case as "an equivalent challenge as the [*Mi Familia Vota*] suit." *Id.* at 2.

That was not true then and is not true now. Indeed, in seeking transfer to the Honorable Judge Bolton, Plaintiff expressly noted the difference in its treatment of H.B. 2243 versus the *Mi Familia Vota* cases, and the potential need for "significantly greater urgency" in its case. 2:22-cv-1381, Dkt. 8 at 3 n.8. Plaintiff then filed a preliminary injunction motion to enjoin implementation H.B. 2243, which the Court essentially granted by way of Plaintiff's stipulated order with the Defendants in this case. 2:22-cv-1381, Dkt. 54. While that order resolved Plaintiff's then-pending preliminary injunction motion, ending the threat of H.B. 2243 to the upcoming November election, that order also makes clear that Plaintiff may "bring a subsequent motion for injunctive relief regarding H.B. 2243 or to modify this order in any respect, including as to the overall length of any injunction prohibiting implementation or enforcement of H.B. 2243." *Id.* Plaintiff, in fact,



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[2] The parties subsequently agreed to consolidate the *Democratic National Committee* case with the others. *See Mi Familia Vota*, No. 2:22-cv-509, Dkts. 90, 91.

[3] This is telling for another reason. At that time, the *Living United for Change in Arizona* plaintiffs (the "*LUCHA* plaintiffs") had included H.B. 2243 allegations in their amended complaint. But the *LUCHA* plaintiffs, nor any other party—plaintiffs or defendants—referenced H.B. 2243 at all in the *Mi Familia Vota* parties' joint filing on scheduling.

is moving forward expeditiously—and has already asked Defendants to schedule the parties' Rule 26(f) conference, so that discovery may commence forthwith.

Despite this case not being consolidated with the *Mi Familia Vota* cases, the AG has proceeded essentially as though it is. The AG filed a consolidated motion to dismiss, addressing Plaintiff's Complaint and those of the plaintiffs in the *Mi Familia Vota* cases, and filed a motion for leave to have its consolidated motion to dismiss accepted in response to Plaintiff's Complaint in this unconsolidated action. Dkts. 64, 65. While Plaintiff has no issue responding to the AG's consolidated motion to dismiss, Plaintiff was not a party to the joint motion that the parties in the *Mi Familia Vota* cases coordinated on and filed regarding consolidated briefing, and Plaintiff is not subject to the Court's subsequent order in those cases. *Mi Familia Vota*, No. 2:22-cv-509, Dkts. 84, 100. Indeed, Plaintiff certainly has not been—nor would it be proper for it to be given it is not a consolidated plaintiff—involved in any decision as to whether there would be a consolidated response to the consolidated motion to dismiss, as contemplated by the Court's order. *Id.*, Dkt. 100. The AG made no attempt to reach an agreement with Plaintiff regarding how to approach the motion to dismiss briefing. Instead, the AG only asked Plaintiff to agree to an undefined consolidation with the other cases. Plaintiff intends to respond to the AG's motion to dismiss consistent with the Local Rules. *See* LRCiv 12.1(b) (stating that schedule for motions to dismiss for lack of jurisdiction, like the AG's motion to dismiss, follow those in Rule 56.1); LRCiv 56.1(d); LRCiv 7.2 (e) (setting forth page limits).



## III. LEGAL STANDARD

"Rule 42 permits consolidation of separate actions presenting a common issue of law or fact as a matter of convenience in judicial administration." *Sapiro v. Sunstone Hotel Investors, L.L.C.*, No. CV 03 1555 PHX SRB, 2006 WL 898155, at *1 (D. Ariz. Apr. 4, 2006). "However, the fact that a common question is present does not guarantee consolidation." *Id.*; *see also, e.g.*, *Dodaro v. Standard Pacific Corp.*, No. EDCV 09-1666-VAP (OPx), 2009 WL 10673229, at *3 (C.D. Cal. Nov. 16, 2009) ("The existence of common issues, while a prerequisite to consolidation, does not compel consolidation.").

"The district court has broad discretion to decide whether consolidation is desirable" and should take into account a number of considerations, such as the balance between judicial convenience versus the potential for delay, confusion, and prejudice that may result from consolidation, differing stages of the cases, prejudice to the rights of the parties under the facts and circumstances of the particular case, inconsistent adjudications of common factual and legal issues, and the "paramount concern for a fair and impartial trial." *Sapiro*, 2006 WL 898155, at *1 (quotation and citations omitted).

The AG bears the burden of proof on its motion. *Id.* at *2.

## IV. DISCUSSION

The AG has failed to carry its burden. The AG's motion boils down to: (1) a conclusory and generic statement espousing the benefits of consolidation; and (2) that everyone else has agreed to consolidation. Neither point is sufficient to warrant consolidating Plaintiff's case with the *Mi Familia Vota* cases.

*First*, the AG makes the conclusory statement that "[c]onsolidation will promote efficiency and conserve the resources of this Court and the parties, as well as protecting the parties from the potential prejudice that could result from separate resolutions." Mot. at 1. This statement is entirely unsupported. There is no explanation how any efficiency will be promoted, how party resources would be conserved, or why there would be potential prejudice from separate resolutions.

Plaintiff's case is different from the others, and has proceeded differently from the others. When Plaintiff was actively learning that at least some County Recorder Defendants believed they would implement H.B. 2243 ahead of the November election, *see* 2:22-cv-1381, Dkt. 32 at 9, and that the AG too believed the effective date of H.B. 2243 was in September, only the *LUCHA* plaintiffs had even mentioned H.B. 2243 in their complaint at that time, and were not seeking preliminary relief as far as Plaintiff is aware. Indeed, at this same time, the parties in the *Mi Familia Vota* cases were still discussing only H.B. 2492 in their coordinated filings. *See Mi Familia Vota*, No. 2:22-cv-509, Dkt. 84 at 1-2; *Mi Familia Vota*, No. 2:22-cv-509, Dkt. 85 at 1. While both laws are invidious

and onerous in erecting schemes to disenfranchise naturalized voters and other voters of color, they are different laws attacking the right to vote from different angles.

Thus, while the other parties were preparing for the start of the motion to dismiss briefing, Plaintiff swiftly obtained an order on its preliminary injunction motion, prohibiting implementation of H.B. 2243 until January 2023. 2:22-cv-1381, Dkt. 54. Only after Plaintiff filed that motion and it became fairly clear that a stipulated resolution of it was near, *see* 2:22-cv-1381, Dkt. 47 (filed Sept. 2, 2022, indicating that there was "an agreement in principle"), did the plaintiffs in *Poder Latinx*, 2:22-cv-1003, amend their complaint to add H.B. 2243.

These events demonstrate that no other party has pursued challenges against H.B. 2243 with the expediency that Plaintiff has—and that this case is therefore distinct in ways making consolidation inappropriate at this time. While Plaintiff agreed to resolve its preliminary injunction motion to avoid a voter purge for the upcoming November election, Plaintiff does not intend to sit idly by while Defendants prepare to implement an unlawful voter purge under H.B. 2243 come January 2023. And the unspecified "consolidation" that the AG hopes to achieve risks prejudicing Plaintiff from pursuing its claims in an expedient manner. As the Court's order resolving Plaintiff's preliminary injunction motion makes clear, Plaintiff may "bring a subsequent motion for injunctive relief regarding H.B. 2243 or to modify this order in any respect, including as to the overall length of any injunction prohibiting implementation or enforcement of H.B. 2243." 2:22-cv-1381, Dkt. 54. While the scope of consolidation asked for by the AG remains a mystery, Plaintiff should not be prevented from pursuing a course of action expressly allowed for by order of this Court and agreed to by the AG.

Furthermore, that the cases involve different plaintiffs and constituencies, different defendants, and different legal challenges to the new Arizona laws (in some cases, to only one of the laws), indicates that there will be different scopes of discovery as well. To the extent there may be overlapping discovery between the cases, coordination—not consolidation—is all that is required to stem any concerns of inefficient or duplicative

discovery. *See, e.g.*, *Oester v. Wright Med. Tech., Inc.*, No. CV-19-04763-PHX-SPL, 2021 WL 614881, at *3 (D. Ariz. Feb. 17, 2021) (denying motion to consolidate and noting that "[t]he Court is also confident that counsel will be able to work together to avoid duplicitous discovery"); *CWT Canada II, LP v. Danzik*, No. CV16-0607 PHX DGC, 2016 WL 6963180, at *2 (D. Ariz. Nov. 29, 2016) (denying motion to consolidate despite "the same" "background transactions," and noting that "Plaintiffs can and should coordinate [discovery of Danzik's alleged wrongdoing] between this action and the Bridges Action").

Nor does the AG explain how there may be any potential prejudice from separate resolutions absent consolidation. To the extent that is a valid concern, it was largely addressed by the transfer of this case to this Court, the Honorable Judge Bolton. That there is some overlap between this case and the others was acknowledged by the transfer. But some overlap does not compel consolidation. *Sapiro*, 2006 WL 898155, at *1. Moreover, the cases involve different plaintiffs and constituencies, and different legal challenges to the new Arizona laws. Entirely uniform resolutions across all cases is not a pre-ordained result, especially here where there is not complete overlap between the cases. Indeed, most of the *Mi Familia Vota* cases do not even challenge H.B. 2243. And Plaintiff's case is the only one that challenges H.B. 2243 *and* names all of the County Recorders as Defendants. Thus, Plaintiff's case is the only one that can obtain relief against all parties that may act under color of both H.B. 2243 and H.B. 2492.[4]

*Second*, the AG asserts consolidation is proper because all the other parties agreed to consolidation. Mot. at 1-2. There are any number of reasons why those plaintiffs may have wanted their cases consolidated, such as none having any plan for immediate action or relief, a need or desire to pool or conserve litigation resources, etc. That the parties have not specified the scope of consolidation in any public filings, nor the reasons for it, leaves only speculation. Regardless, the AG cites no authority for the proposition that Plaintiff's

[4] The AG knows this, *see* Dkt. 65 at 2 ("In addition, several Private Plaintiffs here have failed to name all (or any) County Recorders, which prevents them from establishing Article III traceability and redressability."), but simply ignores it in its motion.

case must be consolidated simply because the parties in the *Mi Familia Vota* cases agreed to consolidate their cases for reasons unknown to Plaintiff. Instead, "'[t]he systematic urge to aggregate litigation must not be allowed to trump our dedication to individual justice'" and Plaintiff's cause should not be lost "'in the shadow of a towering mass litigation.'" *Dodaro*, 2009 WL 10673229, at *5 (quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)). Absent a persuasive showing of why consolidation is appropriate here, lumping Plaintiff in with the others who chose to be consolidated should not be done as a matter of course.

## V. CONCLUSION

It is within the Court's sound discretion to determine if consolidation is appropriate, and as noted, Plaintiff would of course be happy to proceed however the Court finds most expeditious and efficient. But the AG has not met its burden to show that consolidation is appropriate, and has not even tried—and there are compelling differences between this case and the *Mi Familia Vota* cases that counsel against consolidation at this time.

Dated: September 26, 2022

Respectfully submitted,

By */s/ Amit Makker*

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## CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2022, I caused the foregoing to be filed and served electronically via the Court's CM/ECF system upon counsel of record. For parties whose counsel have not yet entered an appearance, copies of this motion have bene served via electronic mail and/or mail.

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