No. 25-_____

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE,

Petitioner,

v.

MI FAMILIA VOTA, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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February 19, 2026

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-3188
D.C. No. 2:22-cv-00509-SRB

MI FAMILIA VOTA; VOTO LATINO; LIVING UNITED FOR CHANGE IN ARIZONA; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; ARIZONA STUDENTS' ASSOCIATION; ADRC ACTION; INTER TRIBAL COUNCIL OF ARIZONA, INC.; SAN CARLOS APACHE TRIBE; ARIZONA COALITION FOR CHANGE; UNITED STATES OF AMERICA; PODER LATINX; CHICANOS POR LA CAUSA; CHICANOS POR LA CAUSA ACTION FUND; DEMOCRATIC NATIONAL COMMITTEE; ARIZONA DEMOCRATIC PARTY; ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN AND PACIFIC ISLANDER FOR EQUITY COALITION; PROMISE ARIZONA; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; TOHONO O'ODHAM NATION; GILA RIVER INDIAN COMMUNITY; KEANU STEVENS; ALANNA SIQUIEROS; LADONNA JACKET,

Plaintiffs - Appellees,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State; KRIS MAYES, in her official capacity as Arizona Attorney General; STATE OF ARIZONA; LARRY NOBLE, Apache County Recorder, in his official capacity; DAVID W. STEVENS, Cochise County Recorder, in his official capacity; PATTY HANSEN, Coconino County Recorder, in her official

capacity; SADIE JO BINGHAM, Gila County Recorder, in her official capacity; SHARIE MILHEIRO, Greenlee County Recorder, in her official capacity; RICHARD GARCIA, La Paz County Recorder, in his official capacity; STEPHEN RICHER, Maricopa County Recorder, in his official capacity; KRISTI BLAIR, Mohave County Recorder, in her official capacity; MICHAEL SAMPLE, Navajo County Recorder, in his official capacity; GABRIELLA CAZARES-KELLY, Pima County Recorder, in her official capacity; RICHARD COLWELL, Yuma County Recorder, in official capacity; DANA LEWIS, Pinal County Recorder, in official capacity; POLLY MERRIMAN, Graham County Recorder, in her official capacity; JENNIFER TOTH, in her official capacity as Director of the Arizona Department of Transportation; MICHELLE BURCHILL, Yavapai County Recorder, in official capacity; ANITA MORENO, Santa Cruz County Recorder, in her official capacity,

Defendants - Appellees,

WARREN PETERSEN, President of the Arizona Senate; BEN TOMA, Speaker of the Arizona House of Representatives; REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendants - Appellants.

No. 24-3559
D.C. No. 2:22-cv-00509-SRB

MI FAMILIA VOTA; VOTO LATINO; LIVING UNITED FOR CHANGE IN ARIZONA; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; ARIZONA STUDENTS' ASSOCIATION; ADRC ACTION; INTER TRIBAL COUNCIL OF ARIZONA, INC.; SAN CARLOS APACHE TRIBE; ARIZONA COALITION FOR CHANGE; UNITED STATES OF

AMERICA; PODER LATINX; CHICANOS POR LA CAUSA; CHICANOS POR LA CAUSA ACTION FUND; DEMOCRATIC NATIONAL COMMITTEE; ARIZONA DEMOCRATIC PARTY; ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN AND PACIFIC ISLANDER FOR EQUITY COALITION; PROMISE ARIZONA; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; TOHONO O'ODHAM NATION; GILA RIVER INDIAN COMMUNITY; KEANU STEVENS; ALANNA SIQUIEROS; LADONNA JACKET,

Plaintiffs - Appellees,

v.

KRIS MAYES; STATE OF ARIZONA,

Defendants - Appellants.

No. 24-4029
D.C. No. 2:22-cv-00509-SRB

PROMISE ARIZONA; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT,

Plaintiffs - Appellants,

and

MI FAMILIA VOTA, VOTO LATINO, LIVING UNITED FOR CHANGE IN ARIZONA, LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA, ARIZONA STUDENTS' ASSOCIATION, ADRC ACTION, INTER TRIBAL COUNCIL OF ARIZONA, INC., SAN CARLOS APACHE TRIBE, ARIZONA COALITION FOR CHANGE, UNITED STATES OF AMERICA, PODER LATINX, CHICANOS POR LA CAUSA, CHICANOS POR LA CAUSA ACTION FUND, DEMOCRATIC NATIONAL COMMITTEE, ARIZONA DEMOCRATIC PARTY, ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN AND

PACIFIC ISLANDER FOR EQUITY COALITION, TOHONO O'ODHAM NATION, GILA RIVER INDIAN COMMUNITY, KEANU STEVENS, ALANNA SIQUIEROS, LADONNA JACKET,

Plaintiffs,

v.

ADRIAN FONTES, LARRY NOBLE, DAVID W. STEVENS, PATTY HANSEN, SADIE JO BINGHAM, SHARIE MILHEIRO, RICHARD GARCIA, STEPHEN RICHER, KRISTI BLAIR, MICHAEL SAMPLE, GABRIELLA CAZARES-KELLY, SUZANNE SAINZ, RICHARD COLWELL, DANA LEWIS, POLLY MERRIMAN, JENNIFER TOTH, MICHELLE BURCHILL,

Defendants,

and

KRIS MAYES; STATE OF ARIZONA,

Defendants - Appellees,

WARREN PETERSEN; BEN TOMA; REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendants -Appellees.

———

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

———

Argued and Submitted September 10, 2024
San Francisco, California

———

Filed February 25, 2025

Before: Kim McLane Wardlaw, Ronald M. Gould, and Patrick J. Bumatay, Circuit Judges.

Opinion by Judge Gould;
Dissent by Judge Bumatay

OPINION

SUMMARY*

Voting Rights

The panel affirmed in part the district court's rulings on summary judgment and following a bench trial, vacated in part a portion of its factual findings, and remanded, in an action brought by the United States, several nonprofits, the Democratic National Committee, the Arizona Democratic Party, and three federally recognized Tribes who challenged two Arizona laws regulating voter registration, H.B. 2492 and H.B. 2243 (together the "Voting Laws"), on the grounds that they were preempted or in violation of the National Voter Registration Act ("NVRA"), the consent decree in *League of United Latin Am. Citizens of Ariz. v. Reagan* (the "LULAC Consent Decree"), the Civil Rights Act, and the Equal Protection Clause of the United States Constitution.

To register to vote in Arizona, an applicant may use the federal form created by the United States Election Assistance Commission or a state form prescribed by

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Arizona law. The federal form requires applicants to check a box under penalty of perjury indicating they are United States citizens but does not require applicants to disclose their birthplace. The Voting Laws amended provisions regulating voter registration and enabled government officials to require heightened proof of citizenship from federal-form and state-form applications. Specifically, pursuant to H.B. 2492, federal-form applicants without documentary proof of citizenship ("DPOC") may be registered as federal-only voters but are not eligible to vote for president or to vote by mail. State-form applicants must check a box confirming their citizenship, disclose their birthplace and provide documentary proof of residency ("DPOR"). State-form applications without DPOC must be rejected. Pursuant to H.B. 2243, county recorders must periodically conduct citizenship checks of registered federal-only voters or registered voters who county recorders have "reason to believe" are not citizens and cancel registrations if citizenship is not confirmed.

The panel held that the Republican National Committee, the Arizona House Speaker and Senate President (Republican Appellants), and two nonprofit organizations had standing to pursue their appeals.

The panel affirmed the district court's rulings on the NVRA claims, the LULAC Consent Decree claim, the Civil Rights Act claims, and the Equal Protection claim. The panel held that although some provisions of the Voting Laws are legitimate and lawful prerequisites to voting, many of the challenged provisions are unlawful measures of voter suppression. Specifically, (1) the requirement that federal form applicants must provide DPOC to vote by mail is preempted by Section 6 of the NVRA and obstacle preemption; (2) the

requirement of DPOC to vote in presidential elections is preempted by Section 6 of the NVRA; (3) the requirement that state-form applicants registering for federal elections must provide DPOR violates Sections 6 and 7 of the NRVA; (4) the requirement that county recorders conduct citizen checks of voters that they have "reason to believe" are not citizens violates Section 8(b) of the NVRA; and (5) the periodic cancellation of registrations violates the 90-day Provision of the NVRA to the extent that H.B. 2243 authorizes systematic cancellation of registrations within 90 days before a federal election.

The panel held that the requirement that county recorders reject state-form applications without DPOC violates the LULAC Consent Decree. Alternatively, the NVRA does not let states require DPOC from state-form applicants registering for only federal elections. The citizen checkbox requirement relating to Arizona's state form violates the Civil Rights Act when enforced on a person who has provided DPOC and is otherwise eligible to vote in Arizona. The birthplace disclosure requirement and the requirement that county recorders conduct citizen checks of voters they have reason to believe are not citizens violate the Civil Rights Act. The requirements of DPOC and DPOR for state-form applicants, however, do not violate the Equal Protection Clause under the arbitrary and disparate treatment standard.

The panel held that the district court imposed a higher evidentiary standard than required in finding that Arizona enacted H.B. 2243 without intent to discriminate. The panel, therefore, vacated the district court's factual finding on this issue and remanded with instructions for the district court to apply the proper totality of the circumstances analysis.

The panel held that the Republican Appellants' appeal of the district court's holding that the Legislative Parties waived legislative privilege was moot.

Dissenting, Judge Bumatay stated that while some parts of H.B. 2492 and H.B. 2243 may violate federal law, in no way must they be completely invalidated. Most of the voter-verification laws are consistent with the Constitution and federal law, and the panel should have vacated and substantially narrowed the injunction.

Judge Bumatay would reverse the district court's preliminary injunction enjoining the Voting Law requirements for proof of citizenship to vote for president and to vote by mail and for state voter registration forms. He would also reverse the order enjoining requirements for proof of residence, for the disclosure of birthplace, and for the removal of noncitizens from the voter rolls. Neither the NVRA nor the LULAC consent decree barred enforcement of these requirements.

Judge Bumatay disagreed with the majority that the nonprofit organizations had standing to appeal the equal protection claim against H.B. 2243. He also disagreed with the majority's discriminatory purpose analysis. Given the strong presumption of good faith to legislative enactments, there was no basis to overturn the district court's factual determination.

Judge Bumatay joined the majority on three issues. First, he agreed with enjoining the "reason to believe" and the citizenship-checkbox requirements because these requirements violated the Civil Rights Act. He also agreed that the appeal of the district court's holding that the Legislative Parties waived their legislative privilege was moot.

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OPINION

GOULD, Circuit Judge:

The United States, several nonprofits, the Democratic National Committee, the Arizona Democratic Party, and three federally recognized Tribes (collectively, the "Plaintiff-Appellees") challenge two Arizona laws regulating voter registration, H.B. 2492 and H.B. 2243 (together the "Voting Laws"), contending these are preempted or in violation of the National Voter Registration Act ("NVRA"), the LULAC consent decree, the Civil Rights Act, and the Equal Protection Clause of the United States Constitution. Consolidating the eight lawsuits challenging the Voting Laws, the district court held that certain provisions of the Voting Laws are preempted by the NVRA, that certain provisions of the Voting Laws violate the NVRA, and that Sections 6 and 9 of the NVRA require county recorders to register state-form applicants without documentary proof of location of residency ("DPOR") as "federal-only" voters. The district court also held that state-form applicants without documentary proof of citizenship ("DPOC") must be processed in accordance with the consent decree in *League of United Latin Am. Citizens of Ariz. v. Reagan*, No. 2:17-cv-4102 (D. Ariz. 2018) (the "LULAC Consent Decree") or, in the alternative, that the NVRA does not let states require DPOC from state-form applicants registering for only federal elections.

Regarding the Civil Rights Act claims, the district court held that two requirements imposed by the Voting Laws violate the "Materiality Provision" of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), and that the requirement that county recorders verify the

citizenship status ("citizenship checks") of voters that they have "reason to believe" are not citizens violates the different standards, practices, or procedures provision ("DSPP Provision") of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(A). Regarding the Equal Protection claims, the district court held that the requirements of DPOC and DPOR do not violate the Equal Protection Clause of the United States Constitution and found that neither of the Voting Laws was enacted with intent to discriminate. In adjudicating these claims, the district court held that Arizona House Speaker Ben Toma and Arizona Senate President Warren Petersen (together the "Legislative Parties") waived legislative privilege.

The Republican National Committee, Toma, and Petersen (collectively, the "Republican Appellants") appeal the district court's holdings about claimed violations of the NVRA, the LULAC Consent Decree, and the Civil Rights Act. The Republican Appellants also appeal the holding that the Legislative Parties waived legislative privilege.

Two of the nonprofit Plaintiff-Appellees, Promise Arizona and Southwest Voter Registration Education Project (together the "Promise Cross-Appellants"), cross-appeal the factual finding that H.B. 2243 was not enacted with intent to discriminate. The State of Arizona and the Arizona Attorney General Kris Mayes (in her official capacity) (together "the State") appeal, contending that the state-form requirement that applicants disclose their birthplace does not violate the Materiality Provision of the Civil Rights Act and that the Promise Cross-Appellants do not have standing to pursue their cross-appeal. Another group of

nonprofit entities[1] (collectively, "LUCHA Appellees") contend that the Republican Appellants do not have standing to appeal and that the DPOC and DPOR requirements violate Equal Protection.

The challenges raised in the briefing can be grouped into six general categories: (1) whether certain parties have standing, (2) whether the NVRA preempts provisions of the Voting Laws, (3) whether the Voting Laws violate the LULAC Consent Decree, (4) whether the Voting Laws violate the Civil Rights Act, (5) whether the Voting Laws violate the Equal Protection Clause of the United States Constitution, and (6) whether there was waiver of legislative privilege.

There are fourteen specific issues raised in the briefing, namely (1) whether the Republican Appellants have standing to appeal, (2) whether the Promise-Cross Appellants have standing to cross-appeal, (3) whether the DPOC requirement to vote by mail is preempted by the NVRA, (4) whether the DPOC requirement to vote in presidential elections is preempted by the NVRA, (5) whether the DPOR requirement for state-form applicants registering for federal elections is preempted by the NVRA, (6) whether citizenship checks of voters who county recorders have "reason to believe" are not citizens violates the NVRA, (7) whether the periodic cancellation of registrations violates the NVRA, (8) whether the requirement that county recorders reject state-form applications without DPOC violates the LULAC Consent Decree, (9) whether the checkbox requirement

[1] Living United for Change in Arizona; League of United Latina American Citizens; Arizona Students' Association; ADRC Action; Inter Tribal Council of Arizona, Inc.; San Carlos Apache Tribe, a federally recognized tribe; and Arizona Coalition for Change

violates the Materiality Provision of the Civil Rights Act, (10) whether the birthplace requirement violates the Materiality Provision of the Civil Rights Act, (11) whether the "reason to believe" provision violates the DSPP Provision, (12) whether the district court erred in finding Arizona enacted H.B. 2243 without intent to discriminate, (13) whether the requirements of DPOC and DPOR cause "arbitrary and disparate treatment" violating the Equal Protection Clause, and (14) whether the Legislative Parties waived legislative privilege.

We address each issue in turn. Although some provisions of the Voting Laws are legitimate and lawful prerequisites to voting, many of the challenged provisions are unlawful measures of voter suppression.

We have jurisdiction under 28 U.S.C. § 1291. We hold that the Republican Appellants and Promise Cross-Appellants have standing to pursue their appeals. We affirm the district court's rulings on the NVRA claims, the LULAC Consent Decree claim, the Civil Rights Act claims, and the Equal Protection claim. We also vacate the district court's factual finding that H.B. 2243 was not enacted with intent to discriminate, and we remand for further proceedings consistent with this opinion. We hold that the Republican Appellants' appeal of the district court's holding that there was a waiver of legislative privilege is moot.

I. FACTS AND PROCEDURAL HISTORY

A. Voting and Voter Registration System in Arizona

Arizona has a history of discrimination against minorities and of voting discrimination. For example, the Arizona territorial government in 1909 imposed a literacy test prerequisite to voting, with the explicit

aim to limit the "ignorant Mexican vote." After obtaining statehood, Arizona renewed this literacy test in 1912. Next, in the 1970s and 1980s, Arizona conducted voter roll purges of previously-registered voters, which required all previously-registered individuals to re-register to vote and resulted in fewer minority voters re-registering compared to white voters. There is also an example of a Maricopa County election official requesting DPOC around this time, even though it was not yet required by law.

To qualify to vote in Arizona, a person must be a United States citizen, a resident of Arizona, at least eighteen years old, and not adjudicated, incapacitated, or convicted of a felony. Ariz. Const. art. VII, § 2. An eligible person can register to vote in Arizona using the "federal form" created by the United States Election Assistance Commission or can register with the state form prescribed by Arizona law. Public assistance agencies in Arizona typically use the state form to register individuals to vote.

The NVRA requires states to "accept and use" the federal form to register voters for federal elections, 52 U.S.C. § 20505(a)(1); *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9 (2013), and the federal form contains:

> only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.

52 U.S.C. § 20508(b)(1). The federal form requires applicants to check a box under penalty of perjury indicating that they are citizens of the United States. The federal form does not require applicants to disclose their birthplace. Although Arizona in previous times did not require applicants to disclose their birthplace, Arizona has long collected birthplace information from state-form applicants—including an optional field on the state form for applicants to include their "state or country of birth." *See* 1913 Ariz. Rev. Stat. § 2855.

Subject to limitations,[2] states may require additional information from applicants seeking to vote in both state and federal elections. *See Inter Tribal Council*, 570 U.S. at 12. Since 2004, Arizona has required DPOC in its state form for applicants who want to vote in state elections. "[S]atisfactory evidence of citizenship" includes an applicant's driver's license, birth certificate, U.S passport, U.S. naturalization documents, the number of the certificate of naturalization, or Bureau of Indian Affairs card number. *See* Ariz. Rev. Stat. § 16-166(F).

Before the Supreme Court decided *Inter Tribal Council*, Arizona required DPOC from all applicants regardless of the form used, but we held and the

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[2] Sections 6 and 9 read together permit states to develop "a mail voter registration form" that requires "only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. §§ 20505, 20508(b). These state forms "may not include any requirement for notarization or other formal authentication." 52 U.S.C. § 20508(b)(3).

Supreme Court affirmed that the NVRA, 52 U.S.C. § 20505, preempted Arizona's requirement of DPOC as applied to federal-form applicants. *See Gonzalez v. Arizona*, 677 F.3d 383, 398–402 (9th Cir. 2012) [hereinafter *Gonzalez II*] (*en banc*), *aff'd sub nom. Inter Tribal Council*, 570 U.S. at 15. Arizona continued to reject state-form applications without DPOC until 2018 when the then-Arizona Secretary of State entered into the LULAC Consent Decree. *League of United Latin Am. Citizens of Ariz. v. Reagan*, Doc. 37, No. 2:17-cv-4102 (D. Ariz. 2018) [hereinafter *LULAC Consent Decree*].

The LULAC Consent Decree requires county recorders to register otherwise eligible voters for federal elections regardless whether they provide DPOC. *See id*. at 8–10, 13. The LULAC Consent Decree mandates that for state-form and federal-form applicants without DPOC, county recorders must search Arizona Department of Transportation ("ADOT") records to verify citizenship. *See id.* at 8-10, 13–14. If citizenship is confirmed by the search, the applicant is registered as a full-ballot voter; but if citizenship cannot be confirmed, the applicant is registered as a federal-only voter. *See id*.

Since the LULAC Consent Decree was filed and until the Supreme Court's order in *RNC v. Mi Familia Vota*, No. 24A164, 603 U.S. ___, slip. op. (Aug. 22, 2024), Arizona registered both federal-form and state-form applicants without DPOC as federal-only voters eligible to vote in only federal races. As of July 2023, there were 19,439 active federal-only voters in Arizona who were registered without DPOC. These federal-only voters represent less than half a percent of Arizona's registered voters. About 0.76% of all minority voters in Arizona are registered as federal-only voters and 0.35% of white voters are registered as federal-only voters.

B. The Voting Laws

1. Legislative History

Arizona's November 2020 presidential election was decided in favor of President Biden by a margin of 10,457 votes. The Arizona Senate established a committee to audit the 2020 election in response to a claim that non-citizens had illegally cast more than 36,000 ballots in the election. This committee found no evidence of voter fraud.

Before passing the Voting Laws, the Arizona Legislature (the "Legislature") did not establish that any non-citizens were registered to vote in Arizona. Neither House Speaker Toma nor Senate President Petersen recalled the Legislature being presented with or considering evidence of non-citizen voter fraud in Arizona. The allegation that persons who were not citizens swayed the election results was apparently fanciful.

Nonetheless, the Voting Laws were introduced to the Arizona House of Representatives in 2022. The Arizona Free Enterprise Club (the "Free Enterprise Club") drafted the Voting Laws. In its initial advocacy for the Voting Laws, the Free Enterprise Club sent lobbying materials to Arizona legislators with the heading "how more illegals started voting in AZ."

In support of H.B. 2492, a state representative asserted during a House Government and Elections Committee meeting that after the LULAC Consent Decree, more than 11,600 individuals had registered without DPOC as federal-only voters. A majority of the House Rules Committee voted in favor of H.B. 2492 despite concerns voiced by the Committee's legal counsel that the NVRA likely preempted the bill's DPOC requirement for federal-form applicants. The

Legislature persisted in passing the bill, and it was signed into law by the then-Arizona Governor Ducey.

As originally drafted, H.B. 2243 amended Ariz. Rev. Stat. § 16-152 to only require a notice on the state form telling voters that their registrations would be cancelled if they moved permanently to a different state. Another bill, H.B. 2617, was introduced the same month and passed by the Legislature in May 2022. Former-Governor Ducey vetoed the bill, however. After this veto, House Speaker Toma decided to include an amended version of H.B. 2617 in H.B. 2243. Senate President Petersen sponsored the amendment in the Arizona Senate and proposed a floor amendment to incorporate H.B. 2617 into H.B. 2243. Senate President Petersen said that the amendments to H.B. 2243 are essentially "identical to" H.B. 2617, except for some "additional notice requirements." The explanation for these changes in the legislative record is that H.B. 2243 was amended to "address the [Governor's] veto letter." In his deposition, House Speaker Toma said that he could not recall another time when a vetoed voting bill was pushed through to passage in this manner. The Legislature passed H.B. 2243, and it was signed into law by former-Governor Ducey.

2. Changes to Arizona Voter Registration Laws

The Voting Laws amend provisions regulating voter registration and enable government officials to require heightened proof of citizenship from federal-form and state-form applicants, prescribing consequences if an applicant does not provide such proof. The Voting Laws also provide for monthly comparisons of some registered voters to several databases and cancellation of certain registrations after those database comparisons are made.

H.B. 2492 made the following specific changes. First, federal-form applicants without DPOC may still be registered as federal-only voters but are not eligible to vote for president or to vote by mail. Ariz. Rev. Stat. §§ 16- 121.01(D)–(E), 16-127(A). Second, state-form applications without DPOC must be rejected, and it is a felony for a county recorder to fail to reject a state-form application without DPOC. Ariz. Rev. Stat. § 16-121.01(C). Finally, state-form applicants must check a box confirming their citizenship ("checkbox requirement"), disclose their birthplace ("birthplace requirement"), and provide DPOR. Ariz. Rev. Stat. §§ 16-121.01(A), 16-123.

H.B. 2243 made the following changes. First, county recorders must periodically check available databases to compare the citizenship status of registered federal-only voters and, if they are not confirmed to be citizens, cancel their registrations ("periodic cancellation of registrations"). Ariz. Rev. Stat. §§ 16-165(A)(10), 16-165(G)–(K). The terms of Arizona Revised Statutes §§ 16-165(G)–(K) provide that the county recorder shall research the citizenship status of registered voters by periodically checking available databases including the ADOT, Social Security Administration, Systematic Alien Verification for Entitlements ("SAVE"), National Association for Public Health Statistics and Information Systems ("NAPHSIS"), and city, town, county, state, and federal databases and, if the registrants are not confirmed to be citizens, cancel their registrations. But there is a problem of voter suppression because these provisions may result in actual citizens having their valid voter registrations cancelled if the databases have not been kept up to date. For example, SAVE may not immediately return updated naturalization records if an individual is naturalized before a weekend or a federal holiday.

One provision of H.B. 2243 specifically directs that county recorders must each month, or to the extent practicable, conduct citizenship checks of registered federal-only voters or registered voters who county recorders have "reason to believe" are not citizens. Ariz. Rev. Stat. § 16 165(I). These citizenship checks are to be done through the SAVE program maintained by the U.S. Citizenship and Immigration Services. Ariz. Rev. Stat. § 16-165(I).

C. Procedural History

The district court consolidated eight lawsuits challenging provisions of the Voting Laws. The district court resolved some claims at summary judgment and others after a 10-day bench trial.

Regarding the NVRA claims, the district court specifically held that:

- Section 6 of the NVRA, 52 U.S.C. § 20505(a)(1), preempted H.B. 2492's provisions prohibiting federal-only voters from voting by mail and in presidential elections;
- Sections 6 and 9 of the NVRA require county recorders to register state-form applicants without DPOR as federal-only voters;
- The DPOR requirement violates Section 7 of the NVRA, 52 U.S.C. § 20506(a)(6)(A)(ii);
- Citizenship checks of voters who county recorders have "reason to believe" are not citizens violate Section 8(b) of the NVRA, 52 U.S.C. § 20507(b); and
- The periodic cancellation of registrations violates Section 8(c) of the NVRA (the "90-day Provision"), 52 U.S.C. § 20507(c)(2).

The district court also held that state-form applicants without DPOC must be processed in accordance with the LULAC Consent Decree. Alternatively, the district court held that the NVRA does not let states require DPOC from state-form applicants registering for only federal elections.

Regarding the Civil Rights Act claims, the district court held that:

- The checkbox requirement violates the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), when applicants provide DPOC;
- The birthplace requirement violates the Materiality Provision of the Civil Rights Act; and
- The "reason to believe" provision of Arizona Revised Statute § 16-165(I) violates the DSPP Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(A).

Regarding the Equal Protection claims, the district court held that the requirements of DPOC and DPOR do not violate the Equal Protection Clause of the United States Constitution and found that neither of the Voting Laws was enacted with intent to discriminate. In adjudicating these claims, the district court held that the Legislative Parties waived legislative privilege regarding their motives for the Voting Laws. The Legislative Parties complied with the discovery order that they claim violated their legislative privilege.

The district court issued its final judgment on May 2, 2024 and permanently enjoined enforcement of the provisions of the Voting Laws inconsistent with its foregoing holdings.

II. STANDARD OF REVIEW

Summary judgment is reviewed *de novo*, and we may affirm summary judgment on any ground supported by the record. *Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017). After a bench trial, the district court's legal conclusions are reviewed *de novo*, and findings of fact are reviewed for clear error. *Yu v. Idaho State Univ.*, 15 F.4th 1236, 1241–42 (9th Cir. 2021); Fed. R. Civ. P. 52(a)(6).

III. DISCUSSION

A. Standing

Because a "question of appellate jurisdiction must always be resolved before the merits of an appeal are examined or addressed," we first examine the standing issues. *In re Application for Exemption from Elec. Pub. Access Fees by Jennifer Gollan & Shane Shifflett*, 728 F.3d 1033, 1036 (9th Cir. 2013) (internal quotation marks and citation omitted).

"[S]tanding must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (internal quotation marks and citation omitted). "All that is needed to entertain an appeal" on an issue, however, "is one party with standing." *Brnovich v. DNC*, 594 U.S. 647, 665 (2021).

Under Article III of the United States Constitution, a plaintiff has standing if the plaintiff can show (1) an "injury in fact" that is concrete and particularized and actual or imminent, not hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a

favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Under this general rule, standing requires a showing of injury, causation, and redressability. *See id.*

1. The Republican Appellants

A federal court's injunction of a state statute's implementation injures the state. *See Abbott v. Perez*, 585 U.S. 579, 602 & n.17 (2018) ("[T]he inability to enforce [the State's] duly enacted plans clearly inflicts irreparable harm on the State."). "[A] State must be able to designate agents to represent it in federal court." *Hollingsworth*, 570 U.S. at 710. "Respect for state sovereignty" considers, however, "the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court." *Cameron v. EMW Women's Surgical Ctr.*, 595 U.S. 267, 277 (2022). The executive branch does not "hold[] a constitutional monopoly on representing [a State's] practical interests in court." *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 194 (2022) (recognizing the authority of the legislative branch to defend state law on behalf of the State because North Carolina has a statute authorizing the House Speaker and Senate President to do so in certain circumstances); *see* N.C. Gen. Stat. § 120-32.6(b).

No party disputes that the district court's permanent injunction of parts of the Voting Laws causes a clear and obvious injury to the State. *See Abbott*, 585 U.S. at 602 & n.17. Although Arizona has designated the Attorney General to represent it in federal court, Arizona Revised Statute § 12-1841(A) states that "[i]n any proceeding in which a state statute . . . is alleged to be unconstitutional, the attorney general and the speaker of the house of the representatives and the

president of the senate shall be served with" notice "and shall be entitled to be heard." Like the North Carolina statute in *Berger* that authorized the North Carolina House Speaker and Senate President to defend North Carolina's state laws on behalf of the State, Arizona Revised Statute § 12-1841(A) authorizes the Legislative Parties to defend Arizona's state laws on behalf of the State. *Berger*, 597 U.S. at 194. A plain reading of the statute's literal terms shows that the Legislature intended to "reserve[] to itself some authority to defend state law on behalf of the State" and "empowers" the Legislative Parties here to defend Arizona's sovereign interests in federal court. *See id*; *EMW Women's Surgical Ctr.*, 595 U.S. at 277.

We hold that the Legislative Parties have standing to bring their appeal. Given that "[a]ll that is needed to entertain" the Republican Appellants' appeal "is one party with standing," the Legislative Parties satisfy the standing requirement for Republican Appellants' appeal. *See Brnovich*, 594 U.S. at 665.

2. Promise Cross-Appellants

To invoke representational standing, an organization must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Students for Fair Admissions, Inc. v. President of Harvard Coll.*, 600 U.S. 181, 199 (2023). As a general rule of representational standing, when it is clear and not speculative that a member of a group will be adversely affected by a challenged action and a defendant does not need to know the identity of a particular member to defend against an organization's claims, the organ-

ization does not have to identify particular injured members by name. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015), *overruled on other grounds by Ariz. All. for Retired Americans v. Mayes*, 117 F.4th 1165 (9th Cir. 2024). When we analyze injury in fact, "we consider whether the [parties] face a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014).

Promise Arizona is a membership organization with 1,043 dues-paying members as of November 2023, and its members include voters who are naturalized citizens. Absent the district court's injunction, the enforcement of the Voting Laws and H.B. 2243's citizenship checks would proceed and apply to any registered voter in Arizona if any county recorder has "reason to believe" that the registered voter is not in fact a citizen; from this, Promise Arizona members face an imminent and "realistic danger of sustaining a direct injury." *Bowen*, 752 F.3d at 839. Any of Promise Arizona's members may be subject to a citizenship check if a county recorder has "reason to believe" they are not a citizen. The danger to voting rights here is that properly registered voters, who in fact are citizens, may have their voter registrations cancelled upon mere and potentially arbitrary suspicion of a county recorder, losing their constitutional right to vote.[3] Improper voter suppression here threatens the

[3] The right to vote is a precious constitutional right. As explained in *Reynolds v. Sims*, "[u]ndeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear." 377 U.S. 533, 554 (1964) (collecting Supreme Court cases restraining

public because it appears that Promise Arizona's members include naturalized citizens and "SAVE may not immediately return updated naturalization records if an individual is naturalized prior to a weekend or a federal holiday." This threat of future injury is traceable to H.B. 2243 and redressable by maintaining the district court's injunction currently preventing enforcement of H.B. 2243. *See Lujan*, 504 U.S. at 560. Because the Promise Arizona members satisfy the three prongs for standing required by *Lujan*, Promise Arizona's members have standing to sue. *See id*. at 560–61.

Because one or more members of Promise Arizona may be adversely affected by H.B. 2243 and the State does not need to know the identity of a particular member to respond to Promise Arizona's claim of injury, Promise Arizona need not identify by name its members who would be injured by H.B. 2243 absent

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acts of voter suppression). Because the right to vote is fundamental, any deprivation of that right caused by voter suppression measures is of grave concern to the public. Federal circuit judges and district judges have consistently restrained acts of voter suppression. *See, e.g.*, *Perkins v. City of West Helena*, 675 F.2d 201, 216-17 (8th Cir. 1982); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 774-75 (9th Cir. 1990); *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 110-12 (2d Cir. 2008); *Obama for Am. v. Husted*, 697 F.3d 423, 428-36 (6th Cir. 2012); *Veasey v. Abbott*, 830 F.3d 216, 235-43 (5th Cir. 2016); *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. Supp. 3d. 1017, 1029-31 (N.D. Fla. 2018); *McConchie v. Scholz*, 567 F. Supp. 3d 861, 885-89 (N.D. Ill. 2021).

Stated another way, the exercise of the fundamental right to vote is a cornerstone premise of democracy; suppression of that right to vote is not only hostile to the right to vote but should also be firmly and unequivocally rejected by the courts that guard that right.

the injunction. *See Nat'l Council of La Raza*, 800 F.3d at 1041.

Because Promise Arizona's "core activities include registering voters, educating voters, and turning out the vote," protecting the voting rights of its members is germane to Promise Arizona's purpose. *See Students for Fair Admissions*, 600 U.S. at 199. Promise Arizona's cross-appeal and requested relief do not require the participation of its members in this litigation, and the State does not contend otherwise.

We hold that Promise Arizona has representational standing, and the Promise Cross-Appellants have standing to pursue their cross-appeal. *See Brnovich*, 594 U.S. at 665 ("All that is needed to entertain an appeal" on an issue "is one party with standing.").

B. The NVRA

"Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's preemptive intent . . . . Unlike the States' historic police powers, the States' role in regulating congressional elections . . . has always existed subject to the express qualification that it terminates according to federal law." *Inter Tribal Council*, 570 U.S. at 14–15 (internal quotation marks and citations omitted); *see also Gonzalez II*, 677 F.3d at 392 ("[T]he 'presumption against preemption' and 'plain statement rule' that guide Supremacy Clause analysis are not transferable to the Elections Clause context." (citation omitted)).

State law is preempted when a federal statute expressly preempts state law. *Chamber of Com. v. Bonta*, 62 F.4th 473, 482 (9th Cir. 2023). State law is also preempted "where it is impossible for a private

party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (internal quotation marks and citations omitted).

1. Sections 6, 7, and 9 of the NVRA

Under Section 6 of the NVRA, states must "accept and use" the federal form. 52 U.S.C. § 20505(a)(1). The Supreme Court has held that this means that the federal form must "be accepted as *sufficient* for the requirement it is meant to satisfy." *Inter Tribal Council*, 570 U.S. at 10 (emphasis in original). Section 6 of the NVRA permits states to use their own state forms for federal elections. *See* 52 U.S.C. § 20505(a)(2). But those forms must comply with Section 9 and "require only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration." 52 U.S.C. § 20508(b)(1).

Section 7 of the NVRA provides that any voter registration agency that "provides service or assistance in addition to conducting voter registration shall . . . distribute with each application for such service or assistance" the federal form or an "equivalent" form. 52 U.S.C. § 20506(a)(6)(A)(ii).

a. Requirement of DPOC to Vote by Mail

The Arizona statutory requirement of DPOC to vote by mail means Arizona's statute conflicts with its need to "use" the federal form to register federal-form applicants to vote in federal elections by mail, because Arizona would not "accept" the federal form as sufficient without DPOC. Arizona's statute would

require federal-only voters seeking to cast their ballots by mail to provide more information than what the federal form requires. *See English*, 496 U.S. at 79; *Inter Tribal Council*, 570 U.S. at 10. Arizona's statute thereby conflicts with Section 6's mandate that states "accept and use" the federal form. *See Inter Tribal Council*, 570 U.S. at 15 ("[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." (citation omitted)). We conclude that the requirement of DPOC to vote by mail conflicts with Section 6 of the NVRA and so that provision of H.B. 2492 is preempted and cannot stand.

The requirement of DPOC to vote by mail is also an obstacle to the NVRA's purpose and preempted by obstacle preemption as well. The NVRA's findings state:

> the right of citizens of the United States to vote is a fundamental right; it is the duty of the Federal, State, and local governments to promote the exercise of that right; and discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

52 U.S.C. § 20501(a). The NVRA aims to "enhance[] the participation of eligible citizens as voters in elections for Federal office." 52 U.S.C. § 20501(b)(2).

"What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and

intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Id.*

Because the NVRA seeks to "enhance[] the participation of eligible citizens as voters in [federal] elections," 52 U.S.C. § 20501(b)(2), the requirement of DPOC to vote by mail is a "sufficient obstacle" to the "accomplishment and execution of the [NVRA's] full purposes" and "must yield to the regulation of Congress" within federal elections. *See Crosby*, 530 U.S. at 373; *see also English*, 496 U.S. at 79. By restricting federal-only voters without DPOC to only in-person voting, the DPOC requirement limits federal-only voters' "fundamental right" to vote, impedes the "duty of the Federal, State, and local governments to promote the exercise of that right," and frustrates the purpose of the NVRA to "enhance[] the participation of . . . voters in [federal] elections." *See* 52 U.S.C. §§ 20501(a), 20501(b)(2). Our conclusion is reinforced by the fact that about 89% of Arizona voters cast ballots by mail in 2020. Congress explicitly noted in its findings for the NVRA that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in [federal] elections." 52 U.S.C. § 20501(a)(3). That finding demonstrates beyond doubt Congress's intent to increase voter turnout through diminishing barriers to registration laws and procedures.

The Republican Appellants contend that the NVRA "governs voter registration—not rules for casting a ballot by mail." If the NVRA is read, as the Republican

Appellants contend, to regulate only "registration" in isolation from the rest of the voting process such as casting a ballot by mail, then states could "accept" the federal form solely to place individuals' names on the voting rolls but then preclude those who do not provide DPOC from casting vote-by-mail ballots in federal elections. Under such a reading, the federal form would "cease[] to perform any meaningful function, and would be a feeble means of" accomplishing the purpose of "enhanc[ing] the participation of eligible citizens as voters in [federal] elections." *See Inter Tribal Council*, 570 U.S. at 13; 52 U.S.C. § 20501(b)(2). Such a narrow view of the NVRA's purpose is contrary to the text of the NVRA which declares the right "to vote" is a fundamental right and establishes purposes beyond registration. *See* 52 U.S.C. § 20501. The Republican Appellants' view also narrows the NVRA's ability to preempt, contrary to the Supreme Court's view of Congress's power to preempt through Elections Clause litigation. *Inter Tribal Council*, 570 U.S. at 14 ("Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's preemptive intent.")

We hold that H.B. 2492's requirement of DPOC to vote by mail is preempted by Section 6 of the NVRA and by obstacle preemption.

b. Requirement of DPOC to vote in presidential elections

Requiring DPOC to vote in presidential elections is expressly preempted by the NVRA, which requires states to "accept and use" the federal form "for the registration of voters in elections for Federal office." *See Bonta*, 62 F.4th at 482; 52 U.S.C. § 20505(a)(1) (Section 6 of the NVRA); *Inter Tribal Council*, 570 U.S.

at 10. Republican Appellants contend, however, that the NVRA does not apply to presidential elections. They contend that Congress enacted the NVRA under the authority granted to it in U.S. Const. art. I, § 4 (the "Elections Clause"), empowering Congress to preempt only "Manner" regulations for congressional elections. By contrast, U.S. Const. art. II § 1 permits Congress to preempt only "the Time of chusing the Electors, and the Day on which they shall give their Votes" for presidential elections.

When analyzing express preemption, we focus on the "plain meaning" of the statute. *See Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1101 (9th Cir. 2024). Here, the plain language of the NVRA shows an intent to regulate "voter registration for elections for Federal office" defined to include the "office of President or Vice President." 52 U.S.C. §§ 20507(a), 30101(3). The NVRA provides that the scope of preemption includes all federal elections, including presidential elections. *See Inter Tribal Council*, 570 U.S. at 14; 52 U.S.C. §§ 20507(a), 30101(3).

Aside from the NVRA's plain language, our precedent also requires us to hold that Congress has the power to control registration for presidential elections. In 1934, the Supreme Court rejected a narrow framing of Congress's power over presidential elections, like the view argued here by Republican Appellants. The Supreme Court reasoned:

> The only point of the 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 section 1, art. 2, of the Constitution to the states, and that the congressional authority is thereby limited to

> determining 'the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.' So narrow a view of the powers of Congress in respect of the matter is without warrant.

Burroughs v. United States, 290 U.S. 534, 544 (1934). The Court squarely held that Congress had the power to pass legislation to protect the integrity of the federal election process in the presidential election. *Id.* at 545; *see also Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976) (citing to *Burroughs* as more generally "recogniz[ing] broad congressional power to legislate in connection with the elections of the President and Vice President").

We have also recognized Congress's power to regulate all federal elections under the NVRA. *See Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1413–14 (9th Cir. 1995) (rejecting a challenge to the constitutionality of the NVRA in part because "the Supreme Court has read the grant of power to Congress in Article I, section 4 [of the U.S. Constitution] as quite broad" and has endorsed that "[t]he broad power given to Congress over congressional elections has been extended to presidential elections" (citing *Burroughs*, 290 U.S. at 545)).

We hold that H.B. 2492's requirement of DPOC to vote in presidential elections is preempted by Section 6 of the NVRA.

c. Requirement of DPOR for state-form applicants registering for federal elections

As former Chief Justice Rehnquist persuasively explained, statutory interpretation requires courts to

"presume that the legislature says in a statute what it means . . . [t]hus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). "We give the words of a statute their 'ordinary, contemporary, common meaning,'" absent an indication to the contrary from Congress. *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (citation omitted). The NVRA allows states to seek only the information "necessary" to assess an applicant's eligibility, so whether the NVRA lets Arizona require DPOR from state-form applicants registering for only federal elections depends on whether DPOR is necessary for registration.

We hold that DPOR is not "necessary" as required by Section 9 of the NVRA. Because Arizona limits voting to residents of the State, an applicant's location of residence is "necessary to enable the appropriate State election official to assess the eligibility of the applicant" to vote in state elections. *See* 52 U.S.C. § 20508(b)(1); Ariz. Const. art. VII, § 2(A); Ariz. Rev. Stat. § 16-101(A)(3). But DPOR is not "necessary" because voters who obtain an out-of-state license or identification and receive a notice from the county recorder requesting confirmation of residency must only attest "under penalty of perjury" that the voter is still a resident of Arizona. *See* Ariz. Rev. Stat. § 16-165(F). The ordinary meaning of "necessary" is "essential." *See Williams*, 529 U.S. at 431; *Necessary*, *Black's Law Dictionary* (12th ed. 2024); *Necessary*, *Oxford English Dictionary* (2d ed. 1989). The requirement of DPOR is not "necessary" for new applicants because attestation sufficiently confirms the eligibility of registered voters. *See* 52 U.S.C. § 20508(b)(1); Ariz. Rev. Stat. § 16-165(F). Our inquiry ends here because the text of the NVRA is unambiguous. *See BedRoc*, 541

U.S. at 183. We hold that the DPOR requirement violates Section 6 of the NVRA for state-form applicants registering for federal elections.

The district court held that "if the Secretary of State supplies the State Form to public assistance agencies, the State Form must be 'equivalent' or 'virtually identical' to the Federal Form." The state form is not equivalent to the federal form because the state form has unnecessary additional requirements of DPOC, DPOR, and birthplace. *Compare* Ariz. Rev. Stat. §§ 16-121.01(A), 16-121.01(C), 16-123, 16-166(F) *with* 52 U.S.C. § 20508(b)(1). Because public assistance agencies in Arizona typically use the state form to register individuals to vote, the state form must be "equivalent" to the federal form. *See* 52 U.S.C. § 20506(a)(6)(A)(ii).

The DPOR requirement renders the state form not "equivalent" to the federal form for applicants without DPOR. Applicants who do not include DPOR on the state form will not be registered as federal-only voters, but if the same applicants use the federal form, they will be registered. That difference prevents the forms from being "virtually identical" for applicants without DPOR, and the requirement of DPOR for state-form applicants violates Section 7 of the NVRA.

Republican Appellants contend that because Section 9 of the NVRA permits state forms to differ from the federal form, compliance with Section 9 makes a state form equivalent to the federal form for the purposes of Section 7. But "[w]e give the words of a statute their 'ordinary, contemporary, common meaning,'" absent an indication to the contrary from Congress, and here the ordinary meaning of "equivalent" means "virtually identical." *See Williams*, 529 U.S. at 431 (citation omitted); *Equivalent*, *Black's Law Dictionary* (12th ed.

2024); *see also Equivalent*, *Oxford English Dictionary* (2d ed. 1989) (defining equivalent as "virtually the same thing; identical in effect").

Also, "[w]hen interpreting the language of a statute, we do not look at individual subsections in isolation" but "read the words in their context and with a view to their place in the overall statutory scheme." *Tovar v. Sessions*, 882 F.3d 895, 901 (9th Cir. 2018) (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)). While Sections 6 and 9 read together let states develop "a mail voter registration form" that meets the criteria stated in 52 U.S.C. § 20508(b) and let states include information necessary to determine voter eligibility that is not otherwise on the federal form, Section 7 does not do so. Section 7 permits use of only the federal form and "the office's own form if it is equivalent" to the federal form. *Compare* 52 U.S.C. §§ 20505(a)(2) (Section 6 of the NVRA), 20508(b) (Section 9 of the NVRA) *with* 52 U.S.C. § 20506(a)(6)(A) (Section 7 of the NVRA).

We hold that H.B. 2492's state-form requirement of DPOR to register for federal elections violates Sections 6 and 7 of the NVRA.

2. Section 8 of the NVRA

Section 8(b) of the NVRA provides that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1). In *United States v. Florida*, the district court held that the Secretary of State's list maintenance program "probably ran afoul" of Section 8(b) of the NVRA

because its "methodology made it likely that the properly registered citizens who would be required to respond and provide documentation would be primarily newly naturalized citizens." 870 F. Supp. 2d 1346, 1350 (N.D. Fla. 2012). Thus, "[t]he program was likely to have a discriminatory impact on these new citizens." *Id*.

The 90-day Provision (Section 8(c) of the NVRA) mandates that states "shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. § 20507(c)(2)(A). It also lists exceptions to the 90-day Provision. *See* 52 U.S.C. § 20507(c)(2)(B). These exceptions are removals "at the request of the registrant," or "by reason of criminal conviction or mental incapacity," "the death of the registrant," "a change in the residence of the registrant," or "correction of registration records pursuant to this chapter." 52 U.S.C. §§ 20507(a)(3)–(4), 20507(c)(2)(B)(ii).

a. Citizenship checks of voters who county recorders have "reason to believe" are not citizens

Under H.B. 2243, county recorders must conduct citizenship checks of registered federal-only voters or registered voters who county recorders have "reason to believe" are not citizens using the SAVE program maintained by the U.S. Citizenship and Immigration Services. Ariz. Rev. Stat. § 16-165(I). The citizenship checks are non-uniform and are discriminatory in effect because it is "likely that the properly registered citizens who would be required to respond and provide documentation would be" naturalized citizens. *See Florida*, 870 F. Supp. 2d at 1350. Although the Voting

Laws are written as if they confirm the citizenship status of all voters, running a citizenship check through SAVE requires an immigration number. *See* Ariz. Rev. Stat. § 16-165(I). As a result, county recorders can only conduct SAVE checks on naturalized citizens and non-citizens. Absent injunction, naturalized citizens would be at risk of county recorders' subjective decisions to investigate their citizenship status because of the "reason to believe" provision, which will not apply to U.S.-born citizens. The citizenship checks are "likely to have a discriminatory impact on [naturalized] citizens," and on its face, the "reason to believe" provision would have a non-uniform and discriminatory impact. *See id*; *Florida*, 870 F. Supp. 2d at 1350.

We hold that H.B. 2243's citizenship checks violate Section 8(b) of the NVRA.

b. Periodic cancellation of registrations

The Republican Appellants contend that because "[t]he NVRA does not discuss . . . a State's authority to remove noncitizens from the voter rolls," the NVRA does not regulate the periodic cancellation of registrations and does not forbid removal of noncitizens from voter rolls. But that contention mischaracterizes the district court's holding, which never said that the NVRA forbids removal of noncitizens from voter rolls. Rather, the district court held that the periodic cancellation of registrations violates the 90-day Provision of the NVRA to the extent it "allow[s] systematic cancellation of registrations within 90 days of a[] [federal] election."

The Republican Appellants also contend that the periodic cancellation of registrations is not subject to the 90-day Provision because the 90-day Provision

is limited to "general program[s]" to remove ineligible voters who are no longer eligible because of conviction, death, or change in residence. *See* 52 U.S.C. §§ 20507(a)(3)–(4).

"We give the words of a statute their 'ordinary, contemporary, common meaning,'" absent an indication to the contrary from Congress. *See Williams*, 529 U.S. at 431 (citation omitted). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980).

The 90-day Provision requires that states "shall complete, not later than 90 days prior to [a federal election] . . . *any* program" that "systematically remove[s] the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. § 20507(c)(2)(A) (emphasis added). Based on the ordinary meaning of "any," "program" should be construed to have an expansive meaning. *Any*, *Oxford English Dictionary* (rev. ed. 2024) (defining any "[w]ith singular noun in affirmative contexts" as being "used to refer to a member of a particular group or class without distinction or limitation"), available at https://doi.org/10.1093/OED/4481770737. The Supreme Court has commented that "the word 'any' has an expansive meaning," namely, "one or some indiscriminately of whatever kind." *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

The prior provision, 52 U.S.C. § 20507(c)(1), limits the applicable program to 52 U.S.C. § 20507(a)(4) by saying that "[a] State may meet the requirement of subsection (a)(4) by establishing a program." By contrast, the 90-day Provision does not limit the applicable

programs to a specific provision and instead enumerates exceptions. *See* 52 U.S.C. §§ 20507(c)(2)(A)–(B). That the 90-day Provision does not contain a similar limiting provision to describe the programs to which it applies suggests that Congress intended "any program" in the 90-day Provision to have an expansive meaning. Similarly, Congress's enumerated exceptions to the 90-day Provision suggest that Congress intended for "any program" to have a broad meaning absent an exception. *See* 52 U.S.C. § 20507(c)(2)(B). Holding that the 90-day Provision does not apply to the periodic cancellation of registrations would create a new exception, and "[w]here Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *See Andrus*, 446 U.S. at 616–17; *Williams*, 529 U.S. at 431. We conclude that the 90-day Provision applies to the periodic cancellation of registrations.

The plain language of the 90-day Provision lets states continue any non-systematic cancellation of registrations within the 90-day window. 52 U.S.C. § 20507(c)(2)(A). A non-systematic or "individualized" removal program relies on "individualized information or investigation" to determine removal of ineligible voters from voting rolls rather than cancelling batches of registrations based on a set procedure such as "us[ing] a mass computerized data-matching process to compare the voter rolls with other state and federal databases, followed by the mailing of notices." *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014).

The periodic cancellation of registrations is required by H.B. 2243. But that statute's language does not limit cancellation to at least 90 days before a federal

election. *See* Ariz. Rev. Stat. §§ 16-165(A)(10), 16-165(G)–(K). And here, none of the NVRA's enumerated exceptions to the 90-day Provision applies. *Compare* Ariz. Rev. Stat. §§ 16-165(A)(10), 16-165(G)–(K) *with* 52 U.S.C. §§ 20507(a)(3)– (4), 20507(c)(2)(B). Whether the periodic cancellation of registrations required by Arizona's law violates the 90-day Provision depends on whether it is a "systematic" or an "individualized" removal program.

Arizona Revised Statute § 16-165(A)(10) provides that "[t]he county recorder shall cancel a registration: . . . [w]hen the county recorder obtains information pursuant to this section and confirms that the person registered is not a United States citizen" and before cancelling the registration, the "county recorder shall send the person notice by forwardable mail that the person's registration will be cancelled in thirty-five days unless the person provides satisfactory evidence within thirty-five days." Arizona Revised Statutes §§ 16-165(G)–(K) provides that the county recorder shall obtain such information by periodically checking available databases including the ADOT, Social Security Administration, SAVE, NAPHSIS, and city, town, county, state, and federal databases to research the citizenship status of registered voters[4] and, if they are not confirmed to be citizens, cancel their registrations.

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[4] Some provisions are limited to specific types of registered voters. While most provisions apply to all registered voters, Arizona Revised Statute § 16-165(I) specifies citizenship checks against SAVE will be for persons "who the county recorder has reason to believe are not United States citizens and persons who are registered to vote without satisfactory [DPOC]." Arizona Revised Statute § 16-165(J) similarly limits checks against NAPHSIS to persons registered to vote without DPOC.

This periodic cancellation of registrations does not rely on "individualized information or investigation" but rather comparisons to databases. It is a systematic removal program and violates the 90-day Provision because it permits systematic cancellation of registrations within 90 days preceding a federal election. Like the program that violated the 90-day Provision in *Arcia*, H.B. 2243 uses "a mass computerized data-matching process to compare the voter rolls with other state and federal databases, followed by the mailing of notices." 772 F.3d at 1344. Cancellation of batches of registered voters based on a set procedure is systematic as opposed to individualized, and like the program in *Arcia*, one database that H.B. 2243 uses is SAVE: the "*Systematic* Alien Verification for Entitlements." *See id.* (emphasis in original).

The Republican Appellants contend that such periodic cancellation is individualized because Arizona Revised Statute § 16-165(A)(10) provides a person with mail notice and opportunity to respond after information is obtained "pursuant to this section . . . that the person registered is not a United States citizen." That argument does not persuade us because the statute details how such information is obtained: through the systematic comparison of all—or groups of—registered voters to various databases. *See* Ariz. Rev. Stat. §§ 16-165(G)–(K). The mailing of notices is to individuals, but this is only *after* the systematic comparison prompts the mailing, as opposed to it being prompted by an individualized investigation.

Our holding is consistent with the purposes of the 90-day Provision and of the NVRA generally. The NVRA's purposes include "protect[ing] the integrity of the electoral process," "ensur[ing] that accurate and current voter registration rolls are maintained," and

"establish[ing] procedures that will increase the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(b). As the Eleventh Circuit has recognized, the 90-day Provision is designed to balance with care the NVRA's purposes by acting "cautious[ly]" with respect to systematic cancellation programs in the lead up to an election because such programs can cause inaccurate removal and "[e]ligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote." *Arcia*, 772 F.3d at 1346. In sharp contrast, individualized removals that are not prohibited by the 90-day Provision are based on more "rigorous individualized inquir[ies], leading to a smaller chance for mistakes." *Id*.

In light of the purposes of the 90-day Provision and the NVRA, the periodic cancellation of registrations required by Arizona's law is precisely the type of systematic cancellation program that the 90-day Provision was meant to preclude. The periodic cancellation of registrations is based on the systematic comparison of registered voters to various databases, *see* Ariz. Rev. Stat. §§ 16-165(G)–(K), which will likely cause inaccurate removals. Mailing notices to individuals does not change that because if the affected voter does not respond to the notice with "satisfactory evidence within thirty-five days," their voter registration will still be cancelled. Ariz. Rev. Stat. § 16-165(A)(10). Because of that short period for response to be given, there is an unduly high risk that voter registrations will be inaccurately cancelled because of the systematic comparisons and eligible voters "will likely not be able to correct the State's errors in time to vote," depriving them of their fundamental right to vote. *See Arcia*, 772 F.3d at 1346. Such a voter suppression measure should not be tolerated by the

law, which protects the constitutional right of citizens to vote.

We hold that H.B. 2243's periodic cancellation of registrations violates the 90-day Provision of the KVRA to the extent that H.B. 2243 authorizes systematic cancellation of registrations within 90 days before a federal election.

C. The LULAC Consent Decree

A consent decree approved by a court is an enforceable, final judgment with the force of *res judicata*. *SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984); *see also Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 391 (1992) ("[A] consent decree is a final judgment that may be reopened only to the extent that equity requires."). For this reason, "the equitable decree based on the [parties'] agreement 'is subject to the rules generally applicable to other judgments and decrees.'" *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996) (quoting *Rufo*, 502 U.S. at 378). Because it is a final judgment, a consent decree "may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Taylor v. United States*, 181 F.3d 1017, 1024 (9th Cir. 1999) (*en banc*) (quoting *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)). Consent decrees are binding final judgments that remain in force permanently even if the entering court explicitly retains jurisdiction only for a limited period of time. *See id*. at 1024–26; *see, e.g.*, *Thompson v. U.S. Dep't of Hous. & Urb. Dev.*, 404 F.3d 821, 828, 833 (4th Cir. 2005) (court retained authority to enforce terms of decree beyond seven-year period during which it retained jurisdiction); *Roberts v. St. Regis Paper Co*., 653 F.2d 166, 171–72 (5th Cir. 1981) (clause retaining jurisdiction for five

years did not "refer[] to the life of the decree itself," and decree's injunction was permanent).

Although the district court entering the LULAC Consent Decree retained jurisdiction only until December 21, 2020, the consent decree has never been set aside. *See Taylor*, 181 F.3d at 1024. That the court retained jurisdiction for a limited period of time supports that the LULAC Consent Decree is a final judgment under *Taylor* and does not suggest that the preclusive effect of the final judgment expired after the docket was closed. *See id.* at 1023. The LULAC Consent Decree remains an enforceable, binding final judgment.

Contrary to the LULAC Consent Decree requirement that Arizona county recorders accept state-form applications without DPOC and register those applicants as federal-only voters, H.B. 2492 would require county recorders to do the opposite and reject state-form applications without DPOC. *Compare LULAC Consent Decree* at 8–10 *with* Ariz. Rev. Stat. § 16-121.01(C). Because H.B. 2492 requires county recorders to violate the LULAC Consent Decree's requirements, the LULAC Consent Decree bars enforcement of this provision of H.B. 2492.

Republican Appellants contend that the Secretary of State cannot "via a private contract divest the Legislature of any portion of its sovereign authority." *See State v. Prentiss*, 786 P.2d 932, 936 (Ariz. 1989) ("The legislature has the exclusive power to declare what the law shall be [in Arizona]."). But the LULAC Consent Decree does not divest the Legislature of its sovereign authority. Instead, it cabins the authority of parties to the decree, specifically the Secretary of State of Arizona and the Maricopa County Recorder, and limits the ability of executive officers in Arizona to

enforce legislation contrary to the final judgment of the federal decree. *See LULAC Consent Decree* at 1.

Sitting *en banc* in *Taylor v. United States*, we recognized that "[t]he Constitution's separation of legislative and judicial powers denies [Congress] the authority" to "enact[] retroactive legislation requiring an Article III court to set aside a final judgment." 181 F.3d at 1026; *see also id.* at 1024 ("Congress may change the law and, in light of changes in the law or facts, a *court* may decide in its discretion to reopen and set aside a consent decree . . . but *Congress* may not *direct* a court to do so with respect to a final judgment (whether or not based on consent) without running afoul of the separation of powers doctrine.") (emphasis in original). The Republican Appellants present no authority suggesting that Arizona's state legislature may permissibly nullify a final judgment entered by an Article III court. The principle stated in our *en banc* panel decision in *Taylor* applies with equal force here. As Chief Justice Marshall explained: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery." *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809); *see Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (noting that "Chief Justice Marshall spoke for a unanimous Court" in *Peters*). We decline Arizona's invitation for us to reject the law established by Chief Justice John Marshall and a unanimous court in 1809. That law has never been in doubt.

We hold that the LULAC Consent Decree bars Arizona election officials from enforcing H.B. 2492's mandate to reject state-form applications without DPOC.

1. Alternatively, the NVRA does not let Arizona require DPOC from applicants registering for only federal elections.

As discussed in Section III.B.1.c, although Section 6 of the NVRA lets states use their own state forms for federal elections, those forms must comply with Section 9, under which states may seek only information "necessary" to assess an applicant's eligibility to vote. 52 U.S.C. §§ 20505(a)(2), 20508(b)(1); *see supra* pp. 40–41. The NVRA does not let Arizona require DPOC from state-form applicants registering for only federal elections because DPOC is not legitimately necessary for registration.

To elaborate, DPOC is not "necessary" as required by Section 9 of the NVRA because, although citizenship is "necessary to enable the appropriate State election official to assess the eligibility of the applicant" to vote in federal elections, *see* 52 U.S.C. § 20508(b)(1), the state form's checkbox requirement supplies proof of citizenship by an attestation. Ariz. Rev. Stat. § 16-121.01(A). The ordinary meaning of "necessary" is "essential," and the challenged requirement of DPOC for state-form applicants registering to vote in only federal elections is not "essential" because the checkbox requirement already gives proof of citizenship. *See Williams*, 529 U.S. at 431; *Necessary*, *Black's Law Dictionary* (12th ed. 2024); *Necessary*, *Oxford English Dictionary* (2d ed. 1989); 52 U.S.C. § 20508(b)(1). Our inquiry ends here because the text of the NVRA is unambiguous. *See BedRoc*, 541 U.S. at 183.

Republican Appellants urge that we have held that Section 9 "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *See Gonzalez v. Arizona*, 485 F.3d 1041, 1050–51 (9th Cir. 2007)

[hereinafter *Gonzalez I*]). Although *Gonzalez I* holds that "[t]he language of the statute does not prohibit documentation requirements," the *Gonzalez I* case was decided at the preliminary injunction stage, addressing only whether plaintiffs showed a likelihood of succeeding on the merits of this claim. *See* 485 F.3d at 1050–51. We have not decided whether and to what extent states may "require their citizens to present evidence of citizenship when registering to vote." *See id.* at 1051. And because we on *en banc* review did not decide that question in *Gonzalez II*, the quoted language from *Gonzalez I* is not persuasive here. The issue presented in this case was not decided in our *en banc* decision in *Gonzalez II*. *See* 677 F.3d at 400 ("Even assuming, without deciding, that Arizona is correct in its interpretation of [Section 9 of the NVRA] . . .").

Similarly, Section 7 of the NVRA requires that state forms supplied to public assistance agencies be "'equivalent' or 'virtually identical'" to the federal form. 52 U.S.C. § 20506(a)(6)(A)(ii); *see supra* pp. 41–42. Because public assistance agencies in Arizona typically use the state form to register individuals to vote, the state form must be "equivalent" to the federal form. *See* 52 U.S.C. § 20506(a)(6)(A)(ii). Here, the state form is not equivalent to the federal form because the state form has unnecessary additional requirements of DPOC, DPOR, and birthplace. *Compare* Ariz. Rev. Stat. §§ 16-121.01(A), 16-121.01(C), 16-123, 16-166(F) *with* 52 U.S.C. § 20508(b)(1).

The DPOC requirement renders the state form not "equivalent" to the federal form for applicants without DPOC. If applicants who do not include DPOC use the state form, they will not be registered as federal-only voters but if they use the federal form, they will be registered. That difference prevents the forms from

being "virtually identical" for applicants without DPOC, and the requirement of DPOC for state-form applicants violates Section 7 of the NVRA.

We hold that the NVRA does not let states require DPOC from applicants registering for only federal elections.

D. The Civil Rights Act

1. The Materiality Provision

The Materiality Provision prohibits states from denying an individual the right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." 52 U.S.C. § 10101(a)(2)(B). Normal principles of statutory interpretation, as explained by the Supreme Court, require courts to "presume that the legislature says in a statute what it means . . . [t]hus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc*, 541 U.S. at 183. "We give the words of a statute their 'ordinary, contemporary, common meaning,'" absent an indication to the contrary from Congress. *See Williams*, 529 U.S. at 431 (citation omitted).

Arizona cannot deny an individual the right to vote because of an "error or omission [that] is not material in determining" an applicant's eligibility to vote. *See* 52 U.S.C. § 10101(a)(2)(B). The Materiality Provision requires invalidation of any voting prerequisite that does not convey "material" information that has a probability of affecting an election official's eligibility determination. *See Williams*, 529 U.S. at 431; *see also Material*, *Black's Law Dictionary* (12th ed. 2024);

Material, *Oxford English Dictionary* (2d ed. 1989).[5] The erroneous or omitted information need not be absolutely essential to determine if a person is eligible to vote, but it must have probable impact on eligibility to vote.

a. The checkbox requirement

In light of our holding on the meaning of "material," the state form's checkbox requirement violates the Materiality Provision because confirming citizenship via the checkbox "is not material in determining" an applicant's eligibility to vote when they have already provided DPOC. *See* 52 U.S.C. § 10101(a)(2)(B). DPOC is sufficient to show citizenship— a requirement to vote in Arizona—so the state form's checkbox requirement has no probable impact in determining applicant's eligibility to vote when DPOC has been provided. *See* Ariz. Const. art. VII, § 2; Ariz. Rev. Stat. §§ 16-121.01(A), 16-121.01(C).

Our holding is consistent with the purpose of the Materiality Provision. The Materiality Provision was "intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). In *League of Women Voters of Arkansas v.*

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[5] Black's Law Dictionary defines material as "having some logical connection with the consequential facts" or "[o]f such a nature that knowledge of the item would affect a person's decision-making." *Material*, *Black's Law Dictionary* (12th ed. 2024). The Oxford English Dictionary defines material as "of such significance as to be likely to influence the determination of a cause." *Material*, *Oxford English Dictionary* (2d ed. 1989).

Thurston, the district court held that a voting law violated the Materiality Provision because it required absentee voters to provide information about their eligibility to vote "several times," and voters had their ballots "rejected on the basis of a mismatch or omission in one of the multiple documents they ha[d] provided" even when they "correctly provided th[e] information at least once." No. 5:20-cv05174, 2021 WL 5312640, at *4 (W.D. Ark. Nov. 15, 2021).

The checkbox requirement similarly creates the danger that Arizona may reject a state-form application based on a "mismatch" between documents, such as an incomplete checkbox on a state form, notwithstanding that a voter registration applicant had already given DPOC. *See Thurston*, 2021 WL 5312640, at *4; Ariz. Rev. Stat. §§ 16 121.01(A), 16-121.01(C). By requiring voters to provide information about their citizenship status "several times," Arizona "increase[s] the number of errors or omissions" on the application forms "and provide an excuse to disenfranchise otherwise qualified voters." *See Thurston*, 2021 WL 5312640, at *4; *Schwier*, 340 F.3d at 1294. The checkbox requirement contradicts the purpose of and violates the Materiality Provision.

We hold that H.B. 2492's checkbox requirement relating to Arizona's state form violates the Materiality Provision of the Civil Rights Act when enforced on a person who has provided DPOC and is otherwise eligible to vote in Arizona.

b. The birthplace requirement

Given our holding on the meaning of "material," the state form's birthplace requirement also violates the Materiality Provision because disclosing one's birthplace has no probable impact on and "is not material in

determining" an applicant's eligibility to vote. *See* 52 U.S.C. § 10101(a)(2)(B).

To vote in Arizona, a person must be a United States citizen, a resident of Arizona, at least eighteen years old, and not adjudicated, incapacitated, or convicted of a felony. Ariz. Const. art. VII, § 2. At no place in Arizona law is birthplace location a prerequisite to vote in Arizona. An individual's birthplace does not directly verify an individual's citizenship or place of residence. But the State nonetheless asserts without basis that the birthplace requirement can be used to verify an individual's identity. The district court found that county recorders "do not use birthplace information to determine an applicant's eligibility to vote, nor do county recorders need birthplace to verify an applicant's identity."

Although Arizona has collected birthplace information from state-form applicants and included a field in the state form for applicants to include their "state or country of birth" since 1979, Arizona did not require birthplace information for voter registration until 2022 and has determined prior voters qualified to vote despite the absence of birthplace information. That fact strongly indicates that birthplace has no probable impact in determining eligibility to vote. Indeed, an expert at trial, Dr. Eitan Hersh, testified that about one-third of currently registered voters in Arizona had not provided birthplace information when they registered to vote.

The Voting Laws do not require county recorders to verify an individual's birthplace or to reject state-form applications with an incorrect birthplace. *See* Ariz. Rev. Stat. § 121.01(A). Dr. Hersh also testified at trial that about 200,000 voter registrations in Arizona merely list "the United States" as the voter's

birthplace, and county recorders manually enter an applicant's birthplace (when provided) "exactly as it appears on the state-form," resulting in non-uniform birthplace information for existing registered voters. Moreover, some birthplace designations are unclear such as "CA," which could refer to either California or Canada. And many applicants write only their city or county (which can refer to multiple locations) despite the state form's request that applicants include "state or country of birth." "If the substance of the [birthplace field] does not matter, then it is hard to understand how . . . this requirement has any use in determining a voter's qualifications." *Migliori v. Cohen*, 36 F.4th 153, 164 (3d Cir. 2022) (holding that omitting the date on a ballot was immaterial because ballots were only to be set aside if the date was missing— not incorrect), *vacated on other grounds by Ritter v. Migliori*, 143 S. Ct. 297 (2022).

We hold that H.B. 2492's birthplace requirement violates the Materiality Provision of the Civil Rights Act.

2. Different Standards, Practices, and Procedures Provision

The DSPP Provision of the Civil Rights Act states "[n]o person acting under color of law shall in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." 52 U.S.C. § 10101(a)(2)(A).

Case authorities from extra-circuit cases decided by district courts illustrate the type of fact patterns that district courts have said violate the DSPP Provision.

For example, in the case of *U.S. Student Ass'n Foundation v. Land*, the district court held that the DSPP Provision "requires that if Michigan wishes to impose unique procedural requirements on the basis of a registrant's original voter ID being returned as undeliverable, it must impose those requirements on *everyone* whose original ID is returned as undeliverable." 585 F. Supp. 2d 925, 949–50 (E.D. Mich. 2008) (emphasis in original). As another example, in *Frazier v. Callicutt*, the district court held different standards and procedures existed where the registrar summarily denied and referred the registration of every Black student whose registration listed a previous address outside of the county, potentially indicating lack of residency, to the board of election commissioners, but the registrar approved nearly all non-students whose registrations similarly listed a previous address outside of the county. 383 F. Supp. 15, 18–19 (N.D. Miss. 1974).

Also, in *Shivelhood v. Davis*, the district court held that the Board of Civil Authority, in charge of examining voter applications, "must use its best efforts to insure that any questionnaire [concerning domicile] is equally relevant to all applicants and not designed only to apply to student applicants" to comply with the DSPP Provision. 336 F. Supp. 1111, 1115 (D. Vt. 1971).

H.B. 2243's "reason to believe" provision in effect encourages county recorders to apply different standards, practices, and procedures to naturalized citizens than those standards, practices, and procedures they apply to U.S.-born citizens. *See* Ariz. Rev. Stat. § 16-165(I); 52 U.S.C. § 10101(a)(2)(A). Although a county

recorder may in some cases have a reason to think that a person seeking to register to vote is not a citizen, county recorders can only conduct SAVE checks on naturalized citizens and non-citizens because running a citizenship check through SAVE requires an immigration number. *See* Ariz. Rev. Stat. § 16-165(I). Absent injunction, naturalized citizens would be at risk of county recorders' subjective decisions to further investigate their citizenship status because of the open-ended "reason to believe" provision, and that provision will not apply to U.S.- born citizens. *See id.*

Because the "reason to believe" provision "determine[s] whether any individual is qualified under State law . . . to vote in any election" and "appl[ies] a[] standard, practice, or procedure" for naturalized citizens "different from the standards, practices, or procedures applied under such law" to U.S.-born citizens, the "reason to believe" provision violates the DSPP Provision. *See* 52 U.S.C. § 10101(a)(2)(A); Ariz. Rev. Stat. § 16-165(I); *U.S. Student*, 585 F. Supp. 2d at 949–50; *Frazier*, 383 F. Supp. at 18–19; *Shivelhood*, 336 F. Supp. at 1115. It need hardly be added that the "reason to believe" provision invites county recorders to pose a barrier to registration for any disfavored individual.

The Republican Appellants contend that the "reason to believe" provision is not discriminatory because a county recorder must run a citizenship check through SAVE on any voter the recorder has "reason to believe" is not a citizen.

These citizenship checks will not have utility for U.S.-born citizens because the system cannot yield substantive information without an inputted alien registration number. *See* Ariz. Rev. Stat. § 16-165(I). Because SAVE contains no information on U.S.-born

citizens, however, the district court found that the "reason to believe" provision "solely" impacts naturalized citizens and cannot be used if the subject of the inquiry is a U.S.-born citizen. By requiring the use of SAVE to check citizenship status whenever the county recorder is suspicious about citizenship, rather than a method that could be applied to both naturalized and U.S.-born citizens, Arizona Revised Statute § 16-165(I) limits the "reason to believe" provision to a subset of the electorate: persons with immigration numbers. It is not merely a matter of "utility" then, as the Republican Appellants contend; a query cannot start without an immigration number so county recorders cannot run a citizenship check through SAVE for U.S.-born citizens. For this reason, we conclude that the "reason to believe" provision applies different standards, practices, or procedures to naturalized citizens compared to U.S.-born citizens.

As Republican Appellants contend, Arizona can investigate the citizenship status of registered voters to ensure that only qualified individuals are registered to vote. For example, county recorders must check the ADOT, Social Security Administration, and city, town, county, state, and federal databases for all registered voters. *See* Ariz. Rev. Stat. §§ 16-165(G)–(H), 16-165(K). That does not violate the DSPP Provision. The Supreme Court has alluded that holding otherwise "would raise serious constitutional doubts" regarding the DSPP Provision. *See Inter Tribal Council*, 570 U.S. at 17. But because the "reason to believe" provision subjects only naturalized citizens to database checks, this provision violates the DSPP Provision.

We hold that H.B. 2243's "reason to believe" provision violates the DSPP Provision of the Civil Rights Act.

E. Factual Finding Regarding Discriminatory Intent

Although the clear error standard for reviewing factual findings is deferential, "it is not a rubber stamp." *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 18 (2024). We must ensure that the applicable law or standard is properly applied. *See Masayesva v. Zah*, 65 F.3d 1445, 1453 (9th Cir. 1995*), as amended on denial of reh'g and reh'g en banc* (Dec. 5, 1995) ("[W]e review the district court's application of law to facts for clear error where it is 'strictly factual,' but *de novo* where application of law to fact requires 'consideration of legal principles.'").

The Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* set out a non-exhaustive list of factors for courts to consider in evaluating whether a law was enacted with discriminatory intent: (1) historical background, (2) the relevant legislative history, (3) the sequence of events leading up to the enactment, including departures from the normal legislative process, and (4) whether the law has a disparate impact on a specific racial group. 429 U.S. 252, 266–68 (1977). Under *Arlington Heights*, a plaintiff must "'simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated' the defendant and that the defendant's actions adversely affected the plaintiff in some way." *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013) (quoting *McGinest v. GTE Serv. Corp.,* 360 F.3d 1103, 1122 (9th Cir. 2004)). "A plaintiff does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a 'motivating factor.'" *Arce v. Douglas,* 793 F.3d

968, 977 (9th Cir. 2015) (quoting *Arlington Heights,* 429 U.S. at 266).

"Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976), in large part because "discriminatory intent is rarely susceptible to direct proof," *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 606 (2d Cir. 2016).

The Supreme Court's decision in *Desert Palace, Inc. v. Costa* supports the principle that a plaintiff may rely successfully on either circumstantial or direct evidence to demonstrate that a law was enacted with discriminatory intent. *See* 539 U.S. 90 (2003); *see also Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1029–30 (9th Cir. 2006) (recognizing because of *Costa* that plaintiffs may rely on circumstantial evidence in the Title VII context). In *Costa*, the Supreme Court explained that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" 539 U.S. at 100 (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957)).

Here, the district court applied a heightened version of the *Arlington Heights* analysis to the facts—insisting that Plaintiff-Appellees directly link the motive of the Legislature to every piece of evidence offered under each prong of the *Arlington Heights* framework. Because the district court's reasoning imposed a higher evidentiary standard than that required by the *Arlington Heights* test analyzing the "totality of circumstances," the district court clearly erred. We address each *Arlington Heights* prong:

1. Historical background

First, the district court acknowledged that "Arizona does have a long history of discriminating against people of color" and gave examples of the state's past discrimination. But the district court then failed to meaningfully address the significance of that history in its analysis of whether Arizona acted with discriminatory intent in enacting the Voting Laws. Rather, the district court dismissed Arizona's history as too old to be determinative, and insisted that Plaintiff-Appellees show "a nexus between Arizona's history of animosity toward marginalized communities and the Legislature's enactment of the voting laws."

The district court's "nexus" requirement could not be satisfied, absent an unambiguous admission from the Legislature that the purpose of the Voting Laws was to perpetuate Arizona's "well-documented history of voting discrimination." That of course was not likely ever to happen. Such evidence is rare because legislators "seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority." *Arce*, 793 F.3d at 978 (quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982)).

In *Cornwell*, we recognized in the Title VII context that "[a]lthough some plaintiffs might discover direct evidence that a defendant's nondiscriminatory justification is pretext, most will not." 439 F.3d at 1029. Consequently, plaintiffs may rely on circumstantial evidence. *Id*. While the context here is different, the reasoning in *Cornwell* applies with equal force because direct evidence of legislators' discriminatory purpose is similarly rare, and consequently most plaintiffs will not be able to show direct evidence of a discriminatory legislative purpose. *See Arce*, 793 F.3d at 978. In light

of the Supreme Court's recognition in *Costa* that circumstantial evidence may be "more certain, satisfying and persuasive than direct evidence," the district court should not have required plaintiffs to produce direct evidence of discriminatory purpose. *See* 539 U.S. at 100.

In creating its onerous "nexus" requirement, the district court misapplied the *Arlington Heights* framework by requiring Plaintiff-Appellees to provide direct evidence of racial animus for every prong of the test, rather than applying a totality of the circumstances analysis that also took into account circumstantial evidence. If the district court had viewed the evidence in its totality, a different conclusion may have been reached. A historical pattern of discriminatory behavior from a legislative body, particularly as it pertains to voting laws, gives context as to whether the same legislative body has acted with discriminatory purpose in enacting new voting laws. The district court erred in its analysis of the first prong of the *Arlington Heights* framework.

2. Legislative history

Second, the district court found that "[n]othing in the legislative hearings [on the Voting Laws] evince a motive to discriminate against voters based on race or national origin," and concluded that the legislators were instead motivated by a desire to control the increase in federal-only voters in Arizona who had not provided DPOC. The district court did not properly analyze the evidence in its totality, however, as required by the *Arlington Heights* test. *See United States v. Carrillo-Lopez*, 68 F.4th 1133, 1140 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 703 (2024) ("Courts must consider the totality of the evidence presented by the

plaintiff" when conducting an *Arlington Heights* analysis).

The political climate in Arizona leading to enactment of the Voting Laws provides circumstantial evidence of discriminatory intent. After the November 2020 presidential election, there were claims that non-citizens had illegally cast more than 36,000 votes in the election. The Arizona Senate then established a committee to audit the 2020 election results. The audit did not reveal any evidence of voter fraud, yet the Legislature proceeded to enact legislation aimed at remedying the voter fraud issue that was contradicted by its own findings.[6] When considering both the charged political climate and the events leading to the passage of the Voting Laws, *see infra*, the Legislature's insistence on pressing forward with the Voting Laws despite its own audit revealing no voter fraud is circumstantial evidence "demonstrating that a discriminatory reason more likely than not motivated" the Legislature in enacting the Voting Laws.[7] *Pac.*

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[6] A state has a legitimate interest in "preserving the integrity of its election process," regardless whether there is actual evidence of fraud. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). But the absence of evidence of voter fraud can still be considered when assessing the motivations of the Legislature as is specifically required by the holistic *Arlington Heights* standard.

[7] This conclusion is bolstered by the evidence demonstrating that the claim there was illegal voting by non-citizens was repeated on many occasions throughout the legislative process, even though the Legislature's own audit contradicted his claim. For example, Senate President Petersen repeated the illegal-voter accusation when discussing the Voting Laws in an Arizona Senate Judiciary Committee meeting on March 10, 2022. And Greg Blackie of the Free Enterprise Club also repeated the claim

Shores, 730 F.3d at 1158 (quoting *McGinest*, 360 F.3d at 1122).

Despite the Legislature's failed audit and the charged political climate leading to the passage of the Voting Laws, the district court did not infer that there was discriminatory intent, instead concluding that the Plaintiff-Appellees failed to "adduce evidence challenging the sincerity" of the Legislature's belief that non-citizens were voting in Arizona elections. But in addressing an issue of voter suppression, we are not bound by questions of sincerity of legislators, but rather must look to what was actually done, and the purported reasons for and the effects of legislative action, which cannot be determined by legislative say-so but requires a demonstration through a presentation of facts. The Legislature's failure to show evidence of voter fraud in its audit calls into question the sincerity of its belief in the existence of voter fraud. But more importantly, this "sincerity" requirement imposed by the district court exists nowhere in the *Arlington Heights* framework established by the United States Supreme Court. Rather, *Arlington Heights* asks that courts make a "sensitive inquiry into [] circumstantial and direct evidence" of discriminatory intent, because "discriminatory intent is rarely susceptible to direct proof." *Mhany Mgmt.*, 819 F.3d at 606. By requiring direct evidence that the Legislature was not acting out of sincerely held beliefs, the district court misapplied *Arlington Heights*.

Next, the Free Enterprise Club played a vital role in enacting the Voting Laws. As the district court acknowledged, the "Free Enterprise Club helped

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that there was illegal voting by non-citizens in an email to Republican members of the Arizona Senate Judiciary Committee.

author the Voting Laws." And in his deposition, Senate President Petersen said that the Free Enterprise Club drafted "*most* of [the Voting Laws.]"[8] But in its findings, the district court excluded evidence demonstrating how deep the Free Enterprise Club's involvement ran. For example, House Speaker Toma, referring to the Free Enterprise Club, called H.B. 2243 "their" bill. And Greg Blackie of the Free Enterprise Club testified to the details of the bill as the Senate Government Committee's expert witness on March 14, 2022. Also, the bill's sponsor, state Representative Jacob Hoffman, deferred to Blackie when asked questions about the bill in a committee hearing. Representative Hoffman emphasized the role of the Free Enterprise Club, telling the same committee that he had been "working with the Free Enterprise Club on this bill, and they've spent hundreds of hours digging into this."

The Free Enterprise Club, in its advocacy for the Voting Laws, sent lobbying materials to Arizona legislators with the heading "how more illegals started voting in AZ." "[T]he use of 'code words' may demonstrate discriminatory intent," *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 505 (9th Cir. 2016) (citation omitted), and the term "illegals" can evidence racial animus for members of the Latino community in Arizona. This suggests that the Free Enterprise Club—an architect and advocate of the Voting Laws—was motivated by a discriminatory purpose in drafting and advocating for the Voting Laws, which, in turn, supports a conclusion that the Voting Laws were the product of intentional discrimination. *See Ave. 6E Ins.*, 818 F.3d at 504 ("The presence of community animus

[8] In its amicus brief in this case, the Free Enterprise Club also claims that it was "instrumental in the drafting and adoption of the statutes at issue in this case."

can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views.").

The Free Enterprise Club's involvement sets this case apart from *Brnovich v. DNC*. In *Brnovich*, the Supreme Court reversed our decision and held that the district court did not clearly err in finding that a different Arizona voting law was not enacted with discriminatory intent. *See* 594 U.S. at 687–88. There, the main evidence of discriminatory animus in the legislative process was a former senator's "unfounded and far-fetched allegations of ballot collection fraud" and a "'racially-tinged' video created by a private party," both of which led to what the district court concluded was "a serious legislative debate on the wisdom of early mail-in voting." *Id.* at 688. Here, in sharp contrast, discriminatory animus permeated each and every step of the legislative process because the Free Enterprise Club was involved with the Voting Laws' enactment from start to finish, from conception to passage. Although we may accept the district court's conclusion that some members of the Legislature may have been sincerely motivated by a desire to control the increase in federal-only voters for a non-discriminatory purpose, the sincerity of some legislators' actions does not change the totality of the circumstances—starting with assertions that non-citizens had voted in the 2020 election and continuing with discriminatory animus of the Free Enterprise Club in drafting and lobbying for the Voting Laws. We conclude that the totality of the circumstances suggests the Voting Laws were the product of intentional discrimination.

The district court did not view the evidence in its totality, instead concluding that "Plaintiff[-Appellees]

presented no persuasive evidence that the Legislature relied on the Free Enterprise Club's coded appeals, nor that the Legislature enacted the Voting Laws to prevent anyone other than non-citizens from voting," and that "[t]he legislative record lacks any indicia of a nefarious motive." We conclude that these conclusions are not supported by the record, as we view it. And the district court imposed a higher evidentiary burden than is mandated by the Supreme Court's precedent in *Arlington Heights,* which expressly permits "circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the defendant." *Pac. Shores*, 730 F.3d at 1158 (internal quotation marks and citation omitted).

Plaintiff-Appellees did not need to provide direct evidence showing that every member of the Legislature relied upon the Free Enterprise Club's coded discriminatory appeal. But the district court should have done what *Arlington Heights* requires and should have evaluated the political climate leading to the Voting Laws and the Free Enterprise Club's involvement within their context—a context that in the totality of the circumstances supports an inference of discriminatory intent. *See Davis*, 426 U.S. at 242.

3. Departures from the normal legislative process

Third, there were departures from ordinary procedure throughout the legislative process. Such departures "might afford evidence that improper purposes are playing a role." *Arlington Heights*, 429 U.S. at 267. Consider H.B. 2243's frenzied passage on the final day of the 2022 legislative session. After the initial version of H.B. 2243 was vetoed by former-Governor Ducey, an amended version of the bill was distributed to the legislators only minutes before it

was to be debated and brought to a final vote, giving the legislators little time to review the substantial amendment. In his deposition, House Speaker Toma admitted that he could not recall another time when a vetoed voting bill was pushed through to passage this way. And testimony revealed that amendments that "change everything that was in a prior version of a bill" in the final stages of the legislative process, as the amendment did here, are not a common occurrence.

Despite these departures from the usual legislative procedure, the district court found that "[t]he speed with which the Legislature passed H.B. 2243 as amended was not so abrupt as to infer an improper motive, considering the Legislature had previously passed H.B. 2617 through the ordinary legislative process." But this is not probative because the amended bill contained many substantive changes from its previous version that even supportive legislators had not previously considered.[9] The abrupt passage of this bill occurred in the final moments of the legislative session.

The district court should have viewed those departures from typical legislative procedure in the context of the totality of the circumstances when determining whether an improper motive should be inferred. If it had done so, the district court may have drawn a different conclusion. These departures from ordinary legislative procedure, considered with the

[9] For example, House Speaker Toma himself was not aware of many changes made by the bill. He was not aware that the notice period to cure for those suspected to be not citizens had been reduced from 90 days to 35 days. He learned about this change for the first time when he was deposed on November 28, 2023.

evidence supporting the other *Arlington Heights* factors, could indicate discriminatory intent.

4. Impact on a minority group

Finally, we focus on one troubling aspect of the district court's decision: its finding that "Plaintiff[-Appellees] did not show the Arizona Legislature enacted the Voting Laws *because of* any impact on minority voters or naturalized citizens." In so finding, the district court said that "[e]vidence of a law's disparate impact is generally insufficient alone to evidence a legislature's discriminatory motive."

But Plaintiff-Appellees did not ask the district court to view evidence of the Voting Laws' disparate impact alone, nor contend that disparate impact should be dispositive. The district court's narrow view of the evidence was clear error. The district court, by requiring direct evidence of legislators' motive on this prong, imposed a stricter test than held by *Arlington Heights*, which required district courts to consider evidence of disproportionate impact along with other direct and circumstantial evidence offered for each of the *Arlington Heights* prongs.

The district court clearly erred by viewing each piece of evidence in isolation and expecting Plaintiff-Appellees to proffer direct evidence of animus for each prong of the *Arlington Heights* framework, rather than examining the circumstantial evidence as part of a larger totality of the circumstances analysis. *See Carrillo-Lopez*, 68 F.4th at 1140. The contentious political climate arising from claims of illegal voting may seem innocuous standing alone. So might the Free Enterprise Club's use of the term "illegals" in lobbying materials, if standing alone. So might H.B. 2243's hasty passage departing from legislative norms, if

standing alone. But viewed in context these discrete pieces of evidence take on a different meaning and support an inference of discriminatory intent. Factfinders considering whether a law was passed with discriminatory intent must analyze the totality of the circumstances. *See Davis*, 426 U.S. at 242.

Because the district court erred by misapplying *Arlington Heights* and did not show that it was viewing the evidence in context, we vacate and remand the issue of whether H.B. 2243 was enacted with discriminatory intent, with instructions for the district court to apply the proper totality of the circumstances analysis that is required by the Supreme Court's precedent of *Arlington Heights*.

F. Equal Protection Clause

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

Bush v. Gore relied on the principle that in the voting context, "arbitrary and disparate treatment" that does not meet "the rudimentary requirements of equal treatment and fundamental fairness" will not survive constitutional scrutiny under the Equal Protection Clause. 531 U.S. 98, 104–05, 109 (2000) (*per curiam*). *Bush v. Gore* held that the Equal Protection Clause has a "minimum requirement for nonarbitrary treatment of voters." *Id*. at 105; *see also Election*

Integrity Project Cal., Inc. v. Weber, 113 F.4th 1072, 1089 (9th Cir. 2024).

Bush v. Gore famously stated that its "consideration [wa]s limited to the present circumstances." 531 U.S. at 109. That statement was not believed by many commentators.[10] What the Supreme Court says in its decisions normally affects future cases raising the same issues.[11] And in most cases in which we have applied the "arbitrary and disparate treatment" standard, we have like *Bush v. Gore* focused on the one-person, one-vote principle that was first laid down in *Reynolds v. Sims*. 377 U.S. 533 (1964); *see, e.g.*, *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1076–77, 1077 n.7 (9th Cir. 2003); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894–95 (9th Cir. 2003), *rev'd on other grounds en banc*, 344 F.3d 914 (9th Cir. 2003). "The general principle that *Bush* applied—that 'the rudimentary requirements of equal treatment and

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[10] *See*, *e.g.*, Laurence H. Tribe, Bush v. Gore *and Its Disguises: Freeing* Bush v. Gore *from its Hall of Mirrors*, 115 HARV. L. REV. 170, 271 (November 2001) ("Many see the Court's attempt to limit the case to whatever 'the present circumstances' might be as profoundly illegitimate. These critics argue that the Court was in essence trying to free itself from the discipline of stare decisis, which forces a court either to eat its own words in future cases or else give good reasons for spitting them out.").

[11] *See id.* ("Indeed, whenever an Article III court renders a decision, these commentators argue, that decision must have precedential effect."); *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992) ("[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 589 (1987) ("[T]he conscientious decisionmaker must recognize that future conscientious decisionmakers will treat her decision as precedent, a realization that will constrain the range of possible decisions about the case at hand.").

fundamental fairness' prohibits states from engaging in wholly 'arbitrary and disparate treatment' of members of the public—is not unique to that case," and we should not hesitate to apply it when relevant. *See Election Integrity*, 113 F.4th at 1090 n.15 (citing 531 U.S. at 107, 109).

We apply *Bush v. Gore*, because despite its disclaimer, it is relevant precedent. Here, the requirements of DPOC and DPOR do not match the "varying" and complete lack of specific standards which violate Equal Protection under the "arbitrary and disparate treatment" standard. *See Bush v. Gore*, 531 U.S. at 106–07. In *Bush v. Gore*, the Florida Supreme Court had directed election officials to discern the intent of voters whose "punchcard" ballots were not registering perforation, but the attempted recount resulted in disparate treatment among similarly situated voters because there were no standards by which to determine voter "intent." *Id*. at 105–06. Each of the counties involved had used "varying standards" to determine what was a legal vote, and the Supreme Court held that "[t]he problem inheres in the absence of specific standards to ensure its equal application." *Id.* at 106–07.

In contrast, we held in *Election Integrity* that California's vote counting rules satisfied the minimum requirement for nonarbitrary treatment of voters because California's voting rules were "more than sufficiently detailed and uniform" than "the standardless vote counting order considered in *Bush*" and California's "vote counting standard applies uniformly to the counting of all ballots and votes regardless of the vote tabulation method used." 113 F.4th at 1095 (internal quotation marks and citation omitted).

Here, the requirements of DPOC and DPOR apply uniformly, and consequently do not violate Equal Protection under the "arbitrary and disparate treatment" standard. Unlike *Bush v. Gore*, in which each of the Florida counties involved in the votes to be tabulated had used "varying standards" to determine what was a legal vote, here the requirements of DPOC and DPOR are "more than sufficiently detailed and uniform." *See* 531 U.S. at 107; *Election Integrity*, 113 F.4th at 1095. Arizona Revised Statute § 16-121.01(C) requires county recorders to reject state-form applications without DPOC and Arizona Revised Statute § 16-123 requires state-form applicants to provide DPOR. A failure to provide either will result in rejection of the state-form application to vote, and this standard applies to all applicants using the state-form application. The district court also found that there was no evidence that county recorders will act arbitrarily when confirming an individual's citizenship status. That county recorders will not act arbitrarily is reinforced by the permanent injunction prohibiting enforcement of Arizona Revised Statute § 16- 165(I)'s "reason to believe" provision.

The periodic cancellation of registrations, relevant here because Arizona Revised Statutes §§ 16-165(I)–(J) specify citizenship checks against SAVE and NAPHSIS for "persons who are registered to vote without satisfactory [DPOC]," is a systematic removal program with cancellation of batches of registered voters based on the set procedure of routine comparison to certain databases. *See supra* pp. 47– 50. Unlike the "absence of specific standards to ensure its equal application" in *Bush v. Gore*, here the standards are specific, clearly defined, and based on an established procedure. *See* 531 U.S. at 106. Because the DPOC and DPOR requirements and the procedures implement-

ing these requirements are uniform, they are consistent with the minimum requirement for nonarbitrary treatment of voters set forth in *Bush v. Gore* and they do not violate the Equal Protection Clause. We conclude that there have been statutory violations under the NVRA and the Civil Rights Act, but no constitutional violations under the Equal Protection Clause.

We hold that H.B. 2492's requirements of DPOC and DPOR for state-form applicants do not violate the Equal Protection Clause.

G. Legislative Privilege

The district court held that the Legislative Parties had waived legislative privilege. We need not decide that issue for the reasons that follow.

The doctrine of legislative immunity protects state legislators "from criminal, civil, or evidentiary process that interferes with their 'legitimate legislative activity.'" *Puente Ariz. v. Arpaio*, 314 F.R.D. 664, 669 (D. Ariz. 2016) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). Legislative privilege is a corollary to legislative immunity and is a qualified privilege that generally shields legislators from compulsory evidentiary process. *Lee v. City of Los Angeles*, 908 F.3d 1175, 1187–88 (9th Cir. 2018).

The Legislative Parties here complied with the discovery order that they contend violated their legislative privilege. Because "[c]ompliance with a discovery order renders moot an appeal of that order," this issue of whether legislative privilege was waived

is moot. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1479 (9th Cir. 1992).[12]

IV. CONCLUSION

We hold that Republican Appellants and Promise Cross-Appellants have standing to pursue their appeals. We AFFIRM the district court's rulings regarding the NVRA claims, the LULAC Consent Decree, the Civil Rights Act claims, and the Equal Protection claim. We VACATE the district court's factual finding that H.B. 2243 was not enacted with intent to discriminate, and we REMAND for further proceedings consistent with this opinion based on the record that the district court previously developed in its bench trial. We hold that the Republican Appellant's appeal regarding the district court's holding that there was a waiver of legislative privilege is moot.

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[12] Although the Supreme Court has held that compliance with administrative summons and subpoenas does not moot challenges to those requests, that holding is inapposite here. *See Church of Scientology v. United States*, 506 U.S. 9, 12–13 (1992). In *Church of Scientology*, the issue was not moot because the "[t]axpayers have an obvious possessory interest in their records . . . and a court can effectuate relief by ordering the Government to return the records." *Id.* at 13. Here, the district court's discovery order is not an administrative summons or subpoena, and the court cannot order for the Legislative Parties' depositions to be undone, let alone returned.

BUMATAY, Circuit Judge, dissenting:

In the wake of the 2020 election, Arizona enacted two sets of voter-verification laws: House Bill ("H.B.") 2492 and H.B. 2243. Arizona sought to amend its voting laws to improve verification of those registered to vote in the State. These voter-verification amendments made several changes:

- H.B. 2492 prohibits applicants who have not provided "satisfactory evidence of citizenship" from voting in presidential elections. Ariz. Rev. Stat. § 16-127(A)(1).
- H.B. 2492 prohibits applicants who have not provided "satisfactory evidence of citizenship" from voting by mail. *Id.* § 16-127(A)(2).
- H.B. 2492 requires voter-registration applicants using the state-created voter-registration form to provide "satisfactory evidence of citizenship." *Id.* § 16-121.01(C).
- H.B. 2492 requires voter-registration applicants using the state-created form to provide satisfactory proof of residence. *Id.* §§ 16-121.01(A), 16-123.
- H.B. 2243 requires county recorders to periodically check available databases to verify the citizenship of registered voters and cancel registrations of foreign citizens. *Id.* § 16-165(A)(10), (G), (H), (J), (K).
- H.B. 2492 requires applicants using the state voter-registration form to provide their birthplace and check a "box" confirming U.S. citizenship. *Id.* § 16 121.01(A).
- H.B. 2243 requires county recorders to verify citizenship in the Systematic Alien Verification

> for Entitlements ("SAVE") database maintained by the U.S. Citizenship and Immigration Services ("USCIS") if the county recorder has "reason to believe" a registered voter is not a citizen. *Id.* § 16-165(I).

Before these voter-verification amendments went into effect, the Democratic National Committee ("DNC"), the Arizona Democratic Party, the Biden Administration's Department of Justice Civil Rights Division, and various aligned groups (collectively, "Voting Law Opponents") sought to stop the voter-verification laws in their tracks. They sued alleging violations of the National Voting Rights Act ("NVRA"), the Civil Rights Act of 1964, a consent decree, and the Constitution.

In an unprecedented ruling, the district court granted the Voting Law Opponents virtually everything they wanted, except for finding that H.B. 2243 was enacted with discriminatory intent. The district court enjoined enforcement of most of H.B. 2492 and H.B. 2243—just months before the 2024 election.

In an emergency appeal, the Republican National Committee ("RNC") and two Arizona legislators (collectively, "Voting Law Proponents") sought to lift the injunction on the three proof-of-citizenship requirements.[1] A motions panel of our court granted a partial stay of the injunction—allowing the proof-of-citizenship requirement for the state-voter registration forms—but otherwise declined to upset the injunction. In an extraordinary move, a divided merits panel reconsidered the motions panel order and

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[1] At least the Arizona legislators have standing to bring this appeal. *See Mi Familia Vota v. Fontes* ("*Mi Familia Vota III*"), 111 F.4th 976, 994 (9th Cir. 2024) (Bumatay, J., dissenting).

vacated the partial stay a mere *two weeks later*. The Supreme Court quickly reversed the merits-panel majority and allowed the proof-of-citizenship requirement to be enforced.

Now, the majority tries again. This time, ignoring the Supreme Court's direction on at least the state voter-form issue, it again affirms the injunction wholesale. But even more, the majority thinks that the district court *didn't go far enough* in overturning Arizona's voter-verification laws. While following the district court's legal rulings on the NVRA, Civil Rights Act, and the consent decree, the majority reverses the district court's factual findings and all but declares H.B. 2243 the product of discrimination. Unprecedented yet again.

When courts are forced to enter the political realm—as challenges to voting laws require—we must be our most deliberate, careful, and thoughtful. Our robes are not blue or red but *black*. Sweeping rulings setting aside a State's laws don't help. While some parts of H.B. 2492 and H.B. 2243 may violate federal law, in no way must they be completely invalidated. Most of the voter-verification laws are consistent with the Constitution and federal law, and we should have vacated and substantially narrowed the injunction.

I respectfully dissent.

I.

Proof of Citizenship to Vote in Presidential Elections

H.B. 2492 prohibits registered voters who do not provide "satisfactory evidence of citizenship" from voting in presidential elections. Ariz. Rev. Stat. § 16-127(A)(1). The district court ruled that Section 6 of the NVRA preempts this provision. Under that section of

the NVRA, States "shall accept and use" federally created voter-registration forms "for the registration of voters in elections for Federal office." 52 U.S.C. § 20505(a)(1). The district court interpreted this NVRA provision to require States to allow any individual who submits the federal form to vote in presidential elections—regardless of proof of citizenship—and enjoined the Arizona law. But because the Constitution doesn't grant Congress the power to regulate who may vote in presidential elections, we should have reversed this ruling.

A.

The NVRA gives citizens who want to vote in federal elections two options for registration. First, citizens may register to vote through a federal voter-registration form issued by the Election Assistance Commission. 52 U.S.C. § 20505(a). Second, citizens may also register through state voter-registration forms—forms designed by each State for that State's elections. *Id.* The NVRA mandates that "[e]ach State . . . accept and use" the federal voter-registration form "for the registration of voters in elections for Federal office." *Id.* § 20505(a)(1). The NVRA defines "Federal office" to include the "office of President or Vice President." *Id.* §§ 20502(2), 30101(3). Congress derived its authority to enact the NVRA from the Elections Clause of the Constitution. *See Arizona v. Inter Tribal Council of Arizona, Inc.* ("*ITCA*"), 570 U.S. 1, 8–9 (2013): *see also id*. at 40 (Alito, J., dissenting) ("[T]he NVRA was the first significant federal regulation of voter registration enacted under the Elections Clause since Reconstruction[.]").

But, as a matter of constitutional text, the Elections Clause doesn't govern presidential elections. The Elections Clause of Article I provides that "[t]he Times,

Places and Manner of holding *Elections for Senators and Representatives*, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1 (emphasis added). Under that Clause, States have the "duty" to set the time, place, and manner of holding congressional elections, but Congress has the power to "alter" those regulations or "supplant them altogether." *See ITCA*, 570 U.S. at 8. The Court has held that the "Times, Places, and Manner" of holding elections "embrace authority to provide a complete code for congressional elections," including regulation of voter registration. *Id.* at 8–9.[2] But the Clause is *expressly* limited to "Elections for Senators and Representatives." Thus, while the Elections Clause may give Congress power over registration in congressional elections, it doesn't extend that authority over presidential elections.

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[2] As a matter of original understanding, this conclusion may not provide the full picture. Both the Voter Qualifications Clause and the Seventeenth Amendment direct that States set the "qualifications" for electors for the House of Representatives and Senate. U.S. Const. art. I, § 2, cl. 1 ("the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"); *id.* amend. XVII ("The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures"). "Taken together, these provisions suggest that the United States Constitution commits wholly to the states decisions about who may vote in federal elections[.]" James A. Gardner, Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote, 145 U. Pa. L. Rev. 893, 964 (1997); *see also ITCA*, 570 U.S. at 26 (Thomas, J., dissenting) ("Congress has no role in setting voter qualifications, or determining whether they are satisfied[.]"). Even so, as an inferior court, we are bound by *ITCA*'s holding.

Other Clauses of Article II cover presidential elections. First, the Electors Clause lays out much of the groundwork—granting nearly all authority to the States. It provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors[.]" U.S. Const. art. II, § 1, cl. 2. Unlike the grant of a revisory power to Congress in the Elections Clause, the Electors Clause gives the States *sole* power over the "Manner" of appointing electors to the electoral college. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) (describing the Electors Clause as the sort of "express delegation[] of power to the States" by the Constitution necessary for them "to act with respect to federal elections").

Second, the Time of Chusing Clause provides a narrow role for Congress in presidential elections. The Time of Chusing Clause says that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." U.S. Const. art. II, § 1, cl. 4. So rather than having any power over the "Manner" of holding congressional elections, Congress merely has authority to choose the date of the presidential election and date of the electoral college vote. "Any shadow of a justification for congressional power with respect to congressional elections therefore disappears utterly in presidential elections." *Oregon v. Mitchell*, 400 U.S. 112, 212 (1970) (Harlan, J., concurring in part); *see also* Nicholas O. Stephanopoulos, *The Sweep of the Electoral Power*, 36 Const. Comment. 1, 54 (2021) ("As a textual matter, the [Time of Chusing] Clause is plainly narrower than the Elections Clause. It only authorizes Congress to set the time of presidential elections.").

Together, these Clauses form a cohesive structure governing federal elections—States and Congress share authority over congressional elections, but States retain near-exclusive power over presidential elections. Thus, the Constitution forecloses congressional authority to control voter-registration requirements for presidential elections. Under the Electors Clause, that power falls within the province of the States alone. And congressional authority under the Elections Clause can't be twisted to encompass presidential elections. *See ITCA*, 570 U.S. at 16 ("[O]ne cannot read the Elections Clause as treating implicitly what . . . other constitutional provisions regulate explicitly.").

Giving Congress a narrow role over presidential elections makes sense for the separation of powers. As Hamilton explained, a central concern at the Founding was that "the Executive should be independent for his continuance in office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to the duration of his official consequence." The Federalist No. 68 (Alexander Hamilton). Imagine then a Congress with power to regulate presidential elections—the Executive may fear retaliation from Congress in the form of unfavorable election laws. State ratification debates echoed this concern. As James Wilson put it in Pennsylvania's debates: "Was the President to be appointed by the legislature? . . . To have the executive officers dependent upon the legislative, would certainly be a violation of that principle, so necessary to preserve the freedom of republics, that the legislative and executive powers should be separate and independent." *See Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General*

Convention at Philadelphia in 1787 511–12 (J. Elliot 2d ed. 1836).

In its briefing, the Civil Rights Division waves this all away—claiming that the Necessary and Proper Clause, along with Congress's more limited electoral duties, instead supports Congress's broad authority over presidential elections. The Civil Rights Division vaguely lists three clauses as support for this authority. *See, e.g.*, U.S. Const. amend. XII (vesting in Congress powers and duties in connection with the election of the President and Vice President); *id.* amend. XIV, § 2 (setting forth a process for penalizing States for denial of "the right to vote at any election for the choice of electors for President and Vice-President of the United States" and other federal offices); *id.* amend. XXIV, § 1 (prohibiting denial or abridgment of the right to vote in any "election for President or Vice President" and other federal offices based on failure to pay a poll tax). The Civil Rights Division cites no authority for its broad view of federal power. And the Necessary and Proper Clause may not serve as a workaround to the Constitution's express provisions. Regardless of that Clause's scope, a "federal statute . . . must . . . not be prohibited by the Constitution." *United States v. Comstock*, 560 U.S. 126, 135 (2010) (simplified). And the Constitution "could [not] be clearer in stating what Congress can control and what it cannot control" when it comes to presidential elections. *ITCA*, 570 U.S. at 16 (simplified).

Thus, the NVRA can't preempt state laws governing presidential elections. *See id.* at 35 n.2 (Thomas, J., dissenting) (While "the NVRA purports to regulate presidential elections," that is "an area over which the Constitution gives Congress no authority whatsoever.").

B.

The opponents of the proof-of-citizenship requirement seemingly acknowledge the States' role over the "Manner" of appointing electors under the Electors Clause. But, citing *McPherson v. Blacker*, 146 U.S. 1 (1892), they argue that "Manner" refers only to a narrow right to select the mode of choosing electors—either by popular election, appointment, or some other mechanism. But once a State chooses a mode, they contend that Congress has a free hand to regulate presidential elections as it pleases. Four reasons prove this argument unconvincing.

First, their argument would contradict *ITCA*. If "Manner" in the Electors Clause only means the *mode* of an election, then Congress too would not have authority to enact voter-registration regulations under the Elections Clause, which also refers to the "Manner of holding elections." U.S. Const. art. I, § 4, cl. 1. But *ITCA* directly held that Congress has such power. 570 U.S. at 8–9. Indeed, the phrasing of the Elections Clause is narrower than the Electors Clause. The Elections Clause refers only to the "Manner of *holding* elections," compared to the broadly worded Electors Clause allowing States to decide the "Manner" of appointing electors "as the Legislature thereof may direct." *Compare* U.S. Const., art. I, § 4, cl.1 (emphasis added) *with id.*, art. II, § 1, cl. 2. It would be inconsistent to read the Electors Clause more narrowly than the Elections Clause.

Second, as a matter of common sense, if States may let *no one* vote for presidential electors (by letting legislatures pick them), then they may decide to let only *some* vote for electors. In other words, subject to other constitutional constraints like the Fourteenth and Fifteenth Amendments, the power to disenfranchise

all its citizens suggests the power to franchise only some of its citizens—those meeting certain registration requirements. Indeed, at the Founding, the States had different requirements for voting—for example, some had race, property, religious, or literacy tests. Akhil Reed Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840* 226 (2021). So it's wrong to think of choosing "popular election" as an all-ornothing option. States could choose a "popular election" with varying levels of enfranchisement.

Third, *McPherson* doesn't support this overly narrow role for States. *McPherson* determined that Michigan could establish district-level elections for the selection of presidential electors under the Electors Clause. 146 U.S. at 24. The Court remarked that, historically, the Electors Clause meant that States may "appoint [electors] in any mode its legislature saw fit to adopt"—meaning through legislative vote, general popular vote, district-level vote, or other "mode." *Id.* at 29. In that case, the Court reasoned that "Manner" of appointment *included* "mode" of appointment. But *McPherson* didn't establish the definitive scope of "Manner" in the Electors Clause or determine that "Manner" *only* meant the "mode" of choosing. Rather, *McPherson* reinforced the narrow role the federal government plays in presidential elections compared to the "*plenary* power" state legislatures enjoy "in the matter of the appointment of electors." *Id.* at 35 (emphasis added). While "Congress is empowered to determine the time of choosing the electors and the day," "otherwise the power and jurisdiction of the state is *exclusive*." *Id.* (emphasis added). Indeed, *McPherson* confirmed that "[t]he right to vote in the states comes from the states." *Id.* at 38. So *McPherson* teaches us that States have plenary and exclusive power to plan the administration of

presidential elections and Congress can't encroach on that power.

Fourth and most importantly, this narrow view of the scope of "Manner" contravenes the original understanding of the Electors Clause. At the Founding, the "Manner" of appointing electors was broad enough to encompass regulating voter-registration requirements. At the time, "Manner" meant "Way; mode"; "Custom; habit; fashion"; or "Form; method." Samuel Johnson, A Dictionary of the English Language (1773); *see also* Noah Webster, An American Dictionary of the English Language (1828) (defining "Manner" as "Form; method; way of performing or executing"; "Custom; habitual practice"; and "Way; mode."). These definitions establish that "Manner" included a broad range of election regulations—not just a choice between popular vote and legislative appointment. *See* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 20 (2010) (The word "Manner" in the Electors Clause "was an acknowledgment of state power to fix the qualifications (or identity) of the person or persons appointing the presidential electors[.]").

Before the Founding, sources from England and elsewhere used the phrase "manner of election," and its synonyms, in various ways: "the times, places, and mechanics of voting; legislative districting; provisions for registration lists; the qualifications of electors and elected; . . . and the rules of decisions." *Id.* at 20. For instance, rules setting out the "manner of election" in London dealt with the election of candidates from districts, the qualifications of the electorate, the choice of candidate, and methods of certification. *Id.* at 10 (citing 1 Philip Morant, The History and Antiquities of the County of Essex 98 (London, 1768)). Parliamentary

legislation governing the "manner of election" to the House of Commons prescribed the creation and maintenance of a list of qualified and disqualified voters, public notice and proclamations, times and places of voting, the duties of supervising officers, *viva voce* voting, adjudication of disputed elections, and punishment for vote-selling. *Id.* at 11 (citing, *e.g.*, *Determinations of the Honourable House of Commons, Concerning Elections, and All Their Incidents* 42–79 (London 1774); 4 John Comyns, *A Digest of the Laws of England* 330–32, 557 (1780)). The main limit on the use of "manner of election" in these sources was that it did not include the governance of campaigns. *Id.* at 12.

And "Americans ascribed the same general content to the phrase 'manner of election' as the English . . . did." *Id.* at 12–13. Take a 1721 South Carolina election code that referred to oaths and enrollment of electors, the choice of election managers, and the conduct of voter assemblies, as part of "the Manner and Form of electing Members" to the colonial assembly. *Id.* at 13 (citing S.C. Stat. 113–15 (1721) ("An Act to ascertain the Manner and Form of electing members . . . in the Commons House of Assembly."). Likewise, a 1787 New York statute treated inspection of the poll lists, voters' receipt of their ballots in the presence of inspectors, the administration of oaths to voters of questionable loyalty, and the qualifications of voters as part of the "Mode" of conducting an election. *Id.* at 16 (citing An Act for Regulating Elections (Feb. 13, 1787), § VI, *reprinted in* 2 *Laws of the State of New York* 27, 29–30 (1789)). And a 1781 Maryland law included the administration of oaths to voters in the "manner" in which special elections were conducted. *Id.* (citing An Act for Holding Special Elections in Caecil County, 1781 Md. Laws, ch. IX). Similar examples abound. *See id.* at 12–16 (collecting sources). Thus, without more,

the historical understanding of "Manner" in the context of elections included within its meaning voter-registration regulations.[3]

Compare too the ratification-era debates over congressional and presidential elections. First, how congressional elections would work under the Elections Clause generated heated debate. Across the country, Federalists had to refute predictions that the federal government would entrench itself by exploiting power over voting qualifications in congressional elections. *See ITCA*, 27, 31–34 (Thomas, J., dissenting) (collecting sources). "Madison explained that 'reduc[ing] the different qualifications in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention.'" *Id.* (quoting The Federalist No. 52). Put another way, "setting voter qualifications in the constitution could have jeopardized ratification, because it would have been difficult to convince States to give up their right to set voting qualifications." *Id.* (citing Joseph Story, *Commentaries on the Constitution of the United States* 216, 218–19 (abridged ed. 1833)). Thus, federal government power over who may vote in congressional elections was a point of serious contention.

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[3] While "manner of elections" is broad enough to encompass voter-registration regulations, the Constitution may have carved away congressional regulation of voter qualifications in congressional elections through Article I, § 2, cl. 1 and the Seventeenth Amendment. *See* note 2 above. What's more, congressional authority under the Elections Clause is narrower than "manner of elections"—it only applies to the "Manner of *holding* elections." U.S. Const. art. I, § 4, cl. 1 (emphasis added). This textual difference may further limit congressional power over voter qualifications and registrations. But, once again, *ITCA* governs this question. *See* 570 U.S. at 8–9, 17–18.

In contrast, the Electors Clause sparked little concern over federal government interference with presidential elections. Hamilton observed that "[t]he mode of appointment of the Chief Magistrate of the United States is almost the only part of the [Constitution], of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents." The Federalist No. 68 (Alexander Hamilton); *see also* The Federalist No. 45 (James Madison) ("Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it."). Thus, the ratification debates suggest that the Founders left regulation of presidential elections (apart from the narrow "Time of chusing") wholly to the States—otherwise, we would expect the same tension as raised over congressional elections.

In sum, "Manner" in the Electors Clause is broad. It sweeps in modern voter-registration requirements. And it leaves States with the exclusive right to regulate voter registration for presidential elections.

C.

And no controlling precedent alters the States' exclusive power over presidential elections. Citing *Ex parte Yarbrough*, 110 U.S. 651 (1884), and *Burroughs v. United States*, 290 U.S. 534 (1934), the district court claimed that the Court has recognized Congress's power to regulate presidential elections. But that's wrong. If anything, these precedents reaffirm the principle that Congress's role in presidential elections is limited, and that the manner of appointing presidential electors is within the "exclusive" "power and jurisdiction of the state[s]." *See McPherson*, 146

U.S. at 35. Even in the modern era, the Court has continued to express that "the state legislature's power to select the manner for appointing [presidential] electors is plenary[.]" *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

In *Ex parte Yarbrough,* several men severely beat a Black citizen to prevent him from voting in a congressional election and were convicted under two federal statutes criminalizing the violent intimidation of citizens attempting to vote in a federal election. 110 U.S. at 657. They sought the writ of habeas corpus on the ground that those statutes exceeded Congress's constitutional authority. *Id.* In denying the petition, the Court affirmed the power of Congress to protect all voters in federal elections—it is "the duty of that government to see that [a voter] may exercise this right freely, and to protect him from violence while so doing, or on account of so doing." *Id.* at 662. According to the Court, this duty comes "from the necessity of the government itself." *Id.* Thus, "its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its members of congress and its president are elected shall be the free votes of the electors." *Id.*

Rather than broadly proclaiming an atextual and expansive role for Congress in presidential elections, *Yarbrough* simply recognized the federal government's power to enact laws to secure "election[s] from the influence of violence, of corruption, and of fraud." *Id.* at 657. This authority to guard against violence is distinct from the authority to establish voter qualifications or organize voter registration. Indeed, *Yarbrough* itself separated the protection of voters to vote "free from force and fraud" from the power to establish the "qualification of the voter[, which is]

determined by the law of the state where he votes." *Id.* at 663. In other words, there is a difference between a federal law that operates *on third parties* involved in presidential elections and a federal law that operates directly *on the States* to mandate certain rules and requirements for presidential elections. While the Court understood the necessity of federal power over the former, *Yarbrough* had nothing to say about federal power over the latter. So *Yarbrough* doesn't support congressional power to override the States' exclusive power to establish the "Manner" of presidential elections, including over voter-registration requirements.

Nor did *Burroughs* confer broad power over presidential elections on Congress. That case involved the indictment of a political committee treasurer and chairman for failing to disclose contributions and expenditures in a presidential election. 290 U.S. at 543. The defendants challenged the indictment claiming that Congress lacked authority to enact a campaign finance law for presidential elections under the Electors Clause. *Id.* at 544. Once again, the Court recognized the difference between regulating third parties involved in presidential elections and regulating the States' administration of presidential elections. Because the campaign finance law did not cross into the States' exclusive authority to decide the procedures and requirements for a presidential election, it was constitutional. As the Court said,

> Neither in purpose nor in effect does [the law] interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the purpose of influencing elections in two or more states, and with branches or subsidiaries of national

> committees, and excludes from its operation state or local committees. Its operation, therefore, is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. *It in no sense invades any exclusive state power.*

Id. at 544–45 (emphasis added). The Court thus contrasted authority over the rules and requirements for presidential elections with the power to protect the federal government from "impairment or destruction, whether . . . by force or by corruption." *Id.* at 545. While the federal government could legislate against the actions of third parties seeking to impair elections, the Court has never recognized the power to directly legislate the States' choices in appointing electors. *See also Mitchell*, 400 U.S. at 291 (Stewart, J., concurring in part) (observing that "the qualifications that voters must have when . . . selecti[ng] electors" is "left to the States" and that *Burroughs* only acknowledges "Federal Government . . . power to assure that such elections are orderly and free from corruption"). Indeed, the Court never suggested that voter registration is "beyond [a State's] power to deal with adequately." *Burroughs*, 290 U.S. at 544–45. This distinction also flows from the original public meaning of "Manner," which appears not to extend to the governance of campaigns. *See* Natelson, *Original Scope*, at 12.

So, much like *Yarbrough*, *Burroughs* recognized the federal government's power to regulate third parties who seek to corrupt a federal election—whether by dollars or by fists. While Congress can bar third parties from disrupting federal elections, it cannot establish or regulate the registration process for a presidential

election. Thus, the Court's later characterization of *Burroughs* in another campaign finance case as recognizing "broad congressional power to legislate in connection with the election[] of the President" is also beside the point. *See Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976) (per curiam).

And the Ninth Circuit hasn't recognized broad federal power over voter registration either. In *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413 (9th Cir. 1995), California challenged the "motor voter" provisions of the NVRA. While acknowledging Congress's role over congressional elections under the Elections Clause, California argued that the NVRA provisions interfered with its sovereign authority because they "will have a significant impact on its registration procedures applicable to elections of state and local officials." *Id.* at 1415–16. We respected California's concern for its sovereignty. *Id.* But, as a facial challenge, we observed that "at this point we cannot determine the extent to which, if at all, these [NVRA] changes impinge on the legitimate retained sovereignty of the states." *Id.* at 1416. We directed California to comply with the NVRA but "[w]e fores[aw] the possibility in which the district court will be asked to determine whether a certain implementation of the statute sought by the United States . . . is properly resisted by the state on substantial grounds related to its sovereignty." *Id.* We also admonished that "our opinion is not intended to foreclose future judicial review of any [constitutional] issues" and that our opinion spoke "only with respect to an as yet unapplied statute." *Id.* at 1413. Thus, *Wilson* was a limited ruling that had nothing to do with the Electors Clause or presidential elections, and we cautioned against overreading its precedential value.

Yet the opponents of the proof-of-citizenship requirement rely on *Wilson* for a single, throwaway line from the opinion. That line says that "[t]he broad power given to Congress over congressional elections has been extended to presidential elections." *Id.* at 1414 (citing *Burroughs*, 290 U.S. at 545). This single statement, which misreads *Burroughs*, doesn't alter the constitutional design. First, as *Wilson* itself warned, the opinion was not meant to answer complex constitutional questions for the circuit and didn't "foreclose future judicial review" of these issues. *Id*. at 1413. Second, while the Ninth Circuit adheres to the "binding dicta" rule, even this odd rule has its limits. "Where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *United States v. McAdory*, 935 F.3d 838, 843 (9th Cir. 2019) (simplified). But "we are not bound by a prior panel's comments made casually and without analysis, . . . uttered in passing without due consideration of the alternatives, or . . . done as a prelude to another legal issue that commands the panel's full attention." *Id.* (simplified). Thus, *Wilson*'s unreasoned musing on *Burroughs* is not binding on our court. Rather than invent a surprising new balance of power between the States and the federal government divorced from constitutional text out of a single line of dicta, we should look to the historical understanding of the Constitution's meaning.

Thus, no precedent alters the original public meaning of the Electors Clause and the plenary authority of the States to decide the requirements for voting in presidential elections.

D.

Finally, the opponents of the proof-of-citizenship requirement also argue that the NVRA is a proper exercise of Congress's powers under the Fourteenth and Fifteenth Amendments. The district court did not reach this question. *See Mi Familia Vota v. Fontes* ("*Mi Familia Vota I*"), 691 F. Supp. 3d 1077, 1090 n.7 (D. Ariz. 2023). Because we are a court of "review, not first view," I would remand to the district court to consider this question in the first instance. *See Roth v. Foris Ventures, LLC*, 86 F.4th 832, 838 (9th Cir. 2023).

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Given all this, we should have reversed the district court's injunction of § 16-127(A)(1).

II.

Proof of Citizenship to Vote by Mail in Federal Elections

H.B. 2492 prohibits voters registered to vote in only federal elections from voting by mail if they do not provide "satisfactory evidence of citizenship." Ariz. Rev. Stat. § 16-127(A)(2) ("A person who has not provided satisfactory evidence of citizenship . . . and who is eligible to vote only for federal offices is not eligible to receive an early ballot by mail."). The district court likewise ruled that Section 6 of the NVRA preempts this provision. Recall that section of the NVRA commands States to "accept and use" federally created voter registration forms "for the registration of voters in elections for Federal office." 52 U.S.C. § 20505(a)(1). While the NVRA's text refers only to "registration" and not to "voting," the district court read this provision to prevent States from imposing any other requirement on mail-in voting, like proof of

citizenship. It interpreted the NVRA's provision permitting States to "require" first-time voters "to vote in person" to mean that States may not add any other mail-in voting requirements. *Mi Familia Vota I*, 691 F. Supp. 3d at 1090–91 (citing 52 U.S.C. § 20505(c)(1)). The district court also ruled that NVRA's "purpose" to "enhance[] participation of eligible citizens as voters" preempted Arizona's mail-in provision. *Id.* at 1091–92 (citing 52 U.S.C. § 20501(b)(2)). But because the text of the NVRA doesn't preempt States' mail-voting rules, we should have reversed this ruling.

As background, the "default" rule is that States hold "responsibility for the mechanics of congressional elections." *Foster v. Love*, 522 U.S. 67, 69 (1997). Of course, under the Elections Clause, Congress may override State regulations for congressional elections. *Id.* Because Congress's regulations are "paramount" to those of the States, if state and federal law "conflict," then state law "so far as the conflict extends, ceases to be operative." *Ex parte Siebold*, 100 U.S. 371, 384 (1879).

To show preemption, a party must point to "a constitutional text or a federal statute t[hat] assert[s]" preemptive force. *See P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). "Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead opinion of Gorsuch, J.). Thus, we must look to the NVRA's text to see if a conflict exists.

A.

First, the NVRA's text does not support preempting Arizona's mail-voting requirements. The NVRA only

mandates that States "accept and use" federal voter-registration forms "for the *registration of voters* in elections for Federal office[.]" 52 U.S.C. § 20505(a)(1) (emphasis added). As a matter of plain text, this provision about voter *registration* doesn't conflict with state-specific rules for *voting* by mail in federal elections. Here, it's not impossible for Arizona to both "accept and use" the federal form for *registering* voters and require proof of citizenship for *mail voting*. *See Whistler Investments, Inc. v. Depository Tr. and Clearing Corp.*, 539 F.3d 1159, 1164 (9th Cir. 2008) (Preemption occurs only when "a party's compliance with both federal and state requirements is impossible[.]").

At most, the NVRA may require States to allow eligible federal-form applicants to vote in congressional elections. *See ITCA*, 570 U.S. at 12 ("[T]he Federal Form guarantees that a simple means of *registering to vote* in federal elections will be available.") (emphasis added). But the NVRA doesn't prescribe the way in which those voters must cast their vote—either in person, by mail, or other method. Once a State has complied with its obligation to register the federal-form applicants to vote, nothing prevents the State from prohibiting registered voters from voting *by mail* unless they meet certain conditions. In other words, while the NVRA may require that the federal form be "accepted as *sufficient*" to be eligible to vote in congressional elections, it doesn't require the federal form to be *sufficient* for *all* purposes—like satisfying heightened mail-voting requirements. *Id.* at 10. Thus, the NVRA doesn't bar States from imposing added safeguards before allowing voters to cast a ballot outside of traditional in-person voting.

Indeed, aside from military or overseas voters, no federal law requires States to allow *all* its citizens to

vote by mail. After all, when it comes to state mail-in voting rules, "[i]t is . . . not the right to vote that is at stake . . . but a claimed right to receive absentee ballots." *McDonald v. Bd. of Election Com'rs of Chicago*, 394 U.S. 802, 807 (1969). And States may have different approaches to mail balloting. *Cf. id.* at 809 ("[A] legislature traditionally has been allowed to take reform one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.") (simplified). Some States offer broader access to mail ballots than others. *See* Nat'l Conf. of State Legislatures, Table 2: Excuses to Vote Absentee (Jan. 3, 2024).[4] Some States let all voters vote by mail. Others demand voters clear certain hurdles to vote by mail. Those States demand an excuse, such as absence from the locality, illness, or disability. *Id.* So many States have required more than what's required to vote in person.

None of the opponents of the proof-of-citizenship requirement argue that the NVRA displaces all these requirements. Instead, the Civil Rights Division conceded at oral argument that the NVRA did no such thing. But how can they draw such an arbitrary distinction? Imagine a State with one of these mandates. The hypothetical law provides that "a person who has not provided satisfactory evidence of a disability is not eligible to receive an early ballot by mail." But what's the functional difference between this hypothetical law and Arizona's statute? Arizona's statute establishes that "[a] person who has not provided satisfactory evidence of citizenship . . . is not eligible to receive an early ballot by mail." Ariz. Rev. Stat. § 16-127(A)(2). Thus, nothing in the text of the

[4] Available at: perma.cc/B4ML-L6KJ.

NVRA reflects Congress's intent to require all federal-form applicants to be allowed to vote by mail—regardless of these individual state mandates.

B.

That the NVRA expressly permits States to require first-time voters to vote in person doesn't foreclose States from imposing other qualifications on mail voting. *See* 52 U.S.C. § 20505(c)(1). The NVRA provides that "a State may by law require a person to vote in person if—(A) the person was registered to vote in a jurisdiction by mail; and (B) the person has not previously voted in that jurisdiction." *Id*. The district court took the negative implication of this anti-fraud provision to affirmatively bar States from imposing any other requirements for mail-in voting. The district court surmised, "[h]ad Congress intended to permit states . . . to require in-person voting under additional circumstances[,] . . . it could have said so in the NVRA." *Mi Familia Vota I*, 691 F. Supp. 3d at 1091.

But this logic makes little sense.

First, as discussed above, the "default" position is that States decide the mechanism of elections. *See Foster*, 522 U.S. at 69. States create election law and state law governs unless it conflicts with federal law. It would be odd for Congress to displace the whole field of mail-in voting rules through such an opaque provision. Reading this narrow provision to establish a new status quo and to preempt a broad swath of state mail-in voting laws would violate the principle that Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). After all, negative inferences from statutory text only work if it is "fair to suppose that Congress considered the unnamed possibility and meant to say

no to it." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (simplified).

Second, Congress enacted this provision as an anti-fraud provision—not a broad preemption clause. As we have held, this provision is one of "numerous fraud protections" in the NVRA. *See Gonzalez v. Arizona*, 677 F.3d 383, 403 (9th Cir. 2012) (en banc). The "NVRA allows states to require first-time voters who register by mail to vote in person at the polling place, where the voter's identity can be confirmed." *Id.* at 403 n.28. Thus, Congress didn't work to create a major upheaval in mail-in voting laws and preclude States from adopting *other* anti-fraud measures through a provision to empower States to weed out voter fraud.

And third, this argument proves too much. The district court's logic would mean that *all* state limitations on absentee and mail voting would be preempted. But no one argues that the NVRA goes this far. Indeed, this would be too thin a reed to support implied preemption of a field historically and constitutionally left to the States.

C.

Lastly, the NVRA's purpose doesn't get us to preemption. The district court relied on one of the NVRA's statutory purposes to read a broad preemptive intent to occupy the field of mail voting. Looking to the NVRA's purpose to "enhance[] participation of eligible citizens as voters," *see* 52 U.S.C. § 20501(b)(2), the district court saw the law as preempting States' mail-voting requirements. But there are dangers in using supposed purpose rather than statutory text to interpret the law. *See generally Rojas v. FAA*, 989 F.3d 666, 693 (9th Cir. 2021) (Bumatay, J., dissenting in

part). And reading a broad preemption regime from the NVRA's purpose falls into these traps.

First, this reading ignores that "[l]egislation . . . is often about the art of compromise." *Id.* at 695. Legislation encompasses "the clash of purposes, interests, and ideas," and its text "may reflect hard-fought compromises." *Id.* (simplified). And "no legislation pursues its purposes at all costs, so it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Id.* (simplified). This case is a perfect example of this principle. The NVRA had multiple statutory purposes—which the district court ignored. Besides broadening the franchise, the NVRA's purpose was also "to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(3)–(4). Thus, both expanding voting and preventing voter fraud were at the heart of the NVRA.

If we are to govern by purpose rather than by text, which purpose must prevail here? While some legislators may have felt that letting as many people as possible vote by mail was paramount, others may have believed that combatting voter fraud was more critical. Permitting States to require proof of citizenship to ensure the integrity of the mail-voting system furthers that latter purpose. As judges, we are not well situated to step into the shoes of our elected representatives and select which purpose should guide our interpretation. So it was a mistake to let one singular purpose guide the preemption analysis here without any express textual command.

* * *

Thus, nothing in the text of the NVRA precludes Arizona from requesting proof of citizenship before allowing voters to vote by mail. We should have reversed the district court order enjoining enforcement of § 16-127(A)(2).

III.

Proof of Citizenship to Register to Vote Using State Forms

H.B. 2492 requires voters who register to vote through Arizona's state voter-registration form to provide "satisfactory evidence of citizenship" and requires state election officials to "reject any application for registration that is not accompanied by satisfactory evidence of citizenship." Ariz. Rev. Stat. § 16-121.01(C). The district court held that this provision was barred by the terms of a consent decree signed by Arizona's Secretary of State and that the NVRA preempts it. The Supreme Court stayed the district court's injunction on this matter and allowed the law to take effect. We should have taken the hint and ruled that neither the consent decree nor the NVRA bars enforcement of this provision.

A.

The LULAC Consent Decree Doesn't Bar Proof of Citizenship

In 2018, the former Arizona Secretary of State and former Maricopa County Recorder entered a consent decree with the League of United Latin American Citizens of Arizona ("LULAC"). *See LULAC v. Reagan*, Doc. 37, No. 2:17-cv-4102 (D. Ariz. 2018). The LULAC Consent Decree bars Arizona county recorders from categorically rejecting the registration of applicants who use the state voter-registration form but provide

no proof of citizenship. Under this regime, applicants who did not provide proof of citizenship and whose citizenship could not be verified in state databases would be registered to vote only in federal elections. The district court held that the LULAC Consent Decree precludes Arizona from rejecting state-form registrations lacking proof of citizenship. Because this holding raises alarming separation-of-powers concerns, I would reverse.

Even if § 16-121.01(C) conflicts with the LULAC Consent Decree, Arizona's law must prevail. The view that a settlement by a single state executive-branch official may forever curtail the state legislature's lawmaking power presents disturbing separation-of-powers concerns. Under that view, state executive-branch officials can permanently circumvent legislative authority by entering whatever arrangements they want with private parties. The opportunity for abuse is clear. A state official could collude with like-minded parties to "sue and settle" to prevent a legislature from enacting contrary policies. As the Supreme Court has recognized, consent decrees have the potential to "improperly deprive future officials of their designated legislative and executive powers." *Horne v. Flores*, 557 U.S. 433, 449–50 (2009) (simplified).

While these separation-of-powers concerns would apply to any restriction of a state legislature's lawmaking power, they're particularly acute in the election-law context, where state legislatures enjoy express constitutional authority to act. As discussed above, the Constitution leaves it to state legislatures to set the mechanisms for elections. *See Moore v. Harper*, 600 U.S. 1, 10 (2023) (observing that the "state legislatures" have the "duty to prescribe rules governing federal elections") (simplified); *see also*

Carson v. Simon, 978 F.3d 1051, 1060 (8th Cir. 2020) ("[T]he Secretary [of State] has no power to override the Minnesota Legislature" by stipulating to the tabulation of absentee ballots received after Election Day.).

These separation-of-powers concerns animate the many cases signifying that legislative acts must trump consent decrees, not the other way around. After all, consent decrees cannot be used to handcuff governments in perpetuity. Thus, consent decrees may need to give way to intervening changes in law, including legislative enactments. *See, e.g.*, *Horne*, 557 U.S. at 450 ("[C]ourts must . . . ensure that [the] responsibility for discharging the State's obligations is returned promptly to the State and its officials when the circumstances warrant.") (simplified); *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 388 (1992) ("[A] consent decree must of course be modified if . . . one or more of the obligations placed upon the parties has become impermissible under federal law," and that modification may also be warranted "when the statutory or decisional law has changed to make legal what the decree was designed to prevent."); *Agostini v. Felton*, 521 U.S. 203, 215 (1997) ("[T]he court cannot be required to disregard significant changes in law . . . if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong[.]") (simplified); *Miller v. French,* 530 U.S. 327, 347 (2000) ("[W]hen Congress changes the law underlying a judgment awarding prospective relief, that relief is no longer enforceable to the extent it is inconsistent with the new law."); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (Parties to a consent decree "c[annot] agree to terms which would exceed their authority and supplant state law."); *League of Residential Neighborhood Advocates v. City*

of Los Angeles, 498 F.3d 1052, 1055 (9th Cir. 2007) (A consent decree "cannot be a means for state officials to evade state law."); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 189 (3d Cir. 1999) (opinion of Alito, J.) (When a consent decree conflicts with later legislative action, absent a finding of a "current and ongoing violation of federal law, the law demands nothing less than the immediate termination of the consent decree."); *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1169–70 (10th Cir. 2004) (A consent decree "does not freeze the provisions of the statute into place. If the statute changes, the parties' rights change, and enforcement of their agreement must also change. Any other conclusion would allow the parties, by exchange of consideration, to bind not only themselves but Congress and the courts as well."). So when a change in statutory law conflicts with a consent decree, it's the statute that governs.

Of course, state laws must yield to federal constitutional rights. So a consent decree guarding a federal right is a different matter. But "[w]ithout . . . finding[]" that a "remedy is *necessary* to rectify a *violation of federal law*," federal courts have no authority to "override[] state law provisions" and "parties can only agree to that which they have the power to do outside of litigation." *League of Residential Neighborhood Advocates*, 498 F.3d at 1058 (simplified). At no point did the district court that entered the LULAC Consent Decree hold that the requirement of proof-of-citizenship violates federal law. In fact, the LULAC Consent Decree notes the Secretary of State's continued assertion of the law's constitutionality, despite the compromise. So the LULAC Consent Decree is *not* a judicial remedy necessary to enforce federal law. Rather, the basis for the decree hides in plain sight—consent alone. And the consent of a single

state executive-branch official is no basis to upset the balance of power among the branches of state government or the balance of power between the state and federal governments.

Opponents of the proof-of-citizenship requirement frame this issue as one of federal supremacy and judicial finality—that a state legislature cannot reverse the binding effect of a federal court's final judgment. True, consent decrees "are essentially contractual agreements that are given the status of a judicial decree." *Hook v. State of Ariz., Dep't of Corr.*, 972 F.2d 1012, 1014 (9th Cir. 1992). But "finality" isn't the end all and be all in the law. No doubt, "[h]aving achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995). But that principle does not "call[] into question" a legislature's ability to pass legislation that "alter[s] the prospective effect of injunctions entered by Article III courts." *Id.* at 232. Regardless of whether a prospective remedy is an injunction or a consent decree, "a court does not abdicate its power to revoke or modify its mandate, if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *Sys. Fed. No. 91 v. Wright*, 364 U.S. 642, 650–51 (1961) (simplified). And so a consent decree—though blessed by a federal court—doesn't forever foreclose legislative change.

Indeed, it would detract—rather than augment—respect for federal law to claim that federal courts are powerless to stop a state executive official from

teaming up with like-minded private litigants to tie the hands of future state legislatures. It's *this* picture that turns federal supremacy on its head at the expense of the separation of powers in the States. In no way are federal courts forced to "bind state and local officials to the policy preferences of their predecessors" and erode state legislative powers. *See Horne*, 557 U.S. at 449 (simplified). After all, "[a] State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions" to its government. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 442 (2004).

Curiously, the majority argues that enjoining § 16-121.01(C) poses no threat to the Arizona "Legislature['s] sovereign authority" because it does not bar the legislature from *enacting* the law—it only bars executive officials from *enforcing* the law. *See* Maj. Op. at 52. That is no solace for the Arizona Legislature. Instead, "the inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 585 U.S. 579, 602 n.17 (2018). Of course, "completely nullif[ying] any vote by the Legislature" flouts the separation of powers. *Ariz. State Legislature v. Ariz. Indep. Redistricting Com'n*, 576 U.S. 787, 804 (2015). After all, the heart of the legislative power is to transform the words of proposed legislation into enforceable statutes. We can't turn a blind eye to neutering the Arizona Legislature by sophistry.

Finally, it is claimed § 16-121.01(C) can't be enforced because no party has moved to modify the consent decree under Federal Rule of Civil Procedure 60(b). But "the general rule" is that "only a party to the action" can move under Rule 60. Wright & Miller 21A Fed. Proc., L. Ed. § 51:170 (2024). And no one here was a party to the LULAC Consent Decree. Courts have

"emphasize[d] the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party." *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008). Simply, the LULAC Consent Decree "does not conclude the rights of strangers" and "collateral attack" is proper when, as here, the decree "affects [a stranger's] legal rights." *Martin v. Wilks*, 490 U.S. 755, 762–63 (1989) (simplified); *see also Sys. Fed. No. 91*, 364 U.S. at 650–51. After all, "[a] court that invokes equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution has *the continuing duty and responsibility* to assess the efficacy and consequences of its order." *Brown v. Plata*, 563 U.S. 493, 542 (2011) (emphasis added). Given the profound effect of the LULAC Consent Decree on the structure of Arizona's government, the fundamental instruction to federal courts to continually reassess prospective relief applies here too. So no procedural obstacle prevents enforcement of § 16-121.01(C).

B.

The NVRA Doesn't Preempt the Proof-of-Citizenship Requirement

Nor does the NVRA preempt Arizona's requirement for proof of citizenship. Opponents of the requirement make two arguments under the NVRA. First, they assert that the Requirement violates § 20508(b)(1)'s "necessary" information rule. Second, they contend that § 20506(a)(6)(A)'s "public assistance agencies" provision bars enforcement of § 16-121.01(C). Both arguments are wrong.

1.

NVRA's Necessary Information Provision

Because the district court ruled based on the LULAC Consent Decree, it relegated its NVRA analysis to a mere footnote. *See Mi Familia Vota I*, 691 F. Supp. 3d at 1096 n.13. The district court tersely reasoned that the NVRA preempts § 16-121.01(C) because the statute "precludes states from requiring [documentary proof of citizenship] to register applicants for federal elections." *Id.* As the following shows, that's wrong.

Once again, the NVRA creates two paths for citizens to register to vote. They may register using a federally created voter-registration form or they may register with a state-created voter-registration form. *See* 52 U.S.C. § 20505(a)(1)–(2). The NVRA places different constraints on the design and use of both forms, though States have leeway to design their state form. The NVRA directs that a State may "develop and use" a state form so long as it "meets all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office." *Id.* § 20505(a)(2).

The NVRA then establishes the substantive rules that the state form must follow. *Id.* § 20508(b). It provides that the state form "may require only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 20508(b)(1). It also mandates that the state form "include a statement that": (A) "specifies each eligibility requirement (including citizenship);" (B) "contains an attestation that the

applicant meets each such requirement; and" (C) "requires the signature of the applicant, under penalty of perjury." *Id.* § 20508(b)(2)(A)–(C).

Despite these set requirements, § 20508(b) is no straitjacket on the States. In the end, "state-developed forms may require information the Federal Form does not." *ITCA*, 570 U.S. at 12. At all times, "States retain the flexibility to design and use their own registration forms[.]" *Id.* The key word here is "flexibility." After all, why would Congress want to micromanage what information can be included on a state form when they already obligated States to "accept and use" the federal form? The NVRA thus confirms the States' plenary authority to design state election forms— subject to a few mandatory requirements. So we should largely defer to the States to develop their own forms with the sole constraint that the State must only request information it finds "necessary." *Id.* § 20508(b)(1).

And there's no reason to read "necessary" information as meaning only the bare minimum amount of information. While § 20508(b)(1) permits the States to ask for "necessary" information, elsewhere the NVRA limits States to asking for "only the minimum amount of information necessary to . . . enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 20504(c)(2)(B) (providing the standard for "motor voter" forms). So Congress distinguished between "information" that was "necessary" in the eyes of state officials and "information" that was the "minimum amount . . . necessary" for state officials. *See Fish v. Kobach*, 840 F.3d 710, 734 (10th Cir. 2016) (holding that § 20504(c)(2)(B) imposes a "stricter principle" than § 20508(b)(1)). And "when the legislature uses certain language in one part of the statute

and different language in another, the court assumes different meanings were intended." *Cheneau v. Garland*, 997 F.3d 916, 920 (9th Cir. 2021) (en banc) (simplified). While it would be fair to strictly enforce necessity in § 20504(c)(2)(B), § 20508(b)(1) still gives States flexibility. So "necessary" in § 20508(b)(1) doesn't impose a least-restrictive-means test on state forms.

Here, we have no basis to overrule Arizona's determination that documentary proof of citizenship is "necessary to enable [its] election official[s] to assess the eligibility of the applicant." 52 U.S.C. § 20508(b)(1). Such a requirement obviously would ensure the citizenship of the voter—a necessary qualification. And precedent already supports States' authority to request proof of citizenship. As the Court said, "[s]ince the power to establish voting requirements is of little value without the power to enforce those requirements, . . . it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *ITCA*, 570 U.S. at 17. The Court even used Arizona's proof-of-citizenship requirement as the *example* of the type of information that "state-developed forms may require" that "the Federal Form does not." *Id.* at 12. And our own court has remarked that the NVRA "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *Gonzalez v. Arizona*, 485 F.3d 1041, 1050–51 (9th Cir. 2007) (observing that "[t]he language of the [NVRA] does not prohibit documentation requirements" and refusing to enjoin Arizona's documentary proof-of-citizenship requirement).

Given this overwhelming support for Arizona's law, opponents of the law must climb a steep hill to support the injunction—a burden they do not meet. First, they primarily rely on an out-of-circuit interpretation of a *different* provision of the NVRA. Citing *Fish*, they argue that mere attestation of citizenship is all that States may request and documentary proof is too far. True, *Fish* held that attestation "is the *presumptive* minimum amount of information necessary for state election officials to carry out their [duties]." 840 F.3d at 717. But *Fish* was applying § 20504(c)(2)(B)'s "motor voter" *stricter* standard, which only permits the "minimum amount of information necessary." *Id.* It had nothing to do with § 20508(b)(1)— the issue here. Given their different standards, it's more appropriate to use *Fish* to show why Arizona's law *meets* § 20508(b)(1)'s more permissive standard.

Their next out-of-circuit authority fares no better. *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014), is an Administrative Procedure Act case deferentially reviewing the EAC's determination of "necessity" for the federal voter-registration form. *Kobach* applied "very deferential" review to that question. *Id.* at 1187–88, 1197. There's no similar agency action here. More to the point, EAC's determinations about what's necessary for the *federal form* don't govern what's necessary for the *state form*. *See ITCA*, 570 U.S. at 12.

Finally, they point to the district court's factual finding that "non-citizens voting in Arizona is quite rare" and so they argue Arizona's law is unnecessary. *See Mi Familia Vota v. Fontes* ("*Mi Familia Vota II*"), 719 F. Supp. 3d 929, 967 (D. Ariz. 2024). But this ignores that the district court found that non-citizen voting *does* occur—even if it isn't widespread. *Id.* And

Arizona's elected officials—not federal judges— get to determine what level of voter fraud the State may tolerate. Indeed, even if no voter fraud were proven, state officials may still decide that the concern for voter fraud warrants legislative action. *Cf. Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 686 (2021) (noting a State "may take action to prevent election fraud without waiting for it to occur and be detected within its own borders").

2.

NVRA's Public Assistance Agencies Provision

Opponents of Arizona's proof-of-citizenship requirement make a final argument under the NVRA. Relying on the district court's holding that the NVRA preempts the state form because of its proof-of-residency requirement under the "public assistance agencies" provision, they contend that the proof-of-citizenship requirement is also preempted. *See Mi Familia Vota II*, 719 F. Supp. 3d at 997. This provision establishes that States must designate "public assistance agencies" that will provide to all applicants for services either the federal voter-registration form or "the office's own form if it is equivalent to the [federal] form." 52 U.S. § 20506(a)(6)(A)(i)–(ii). In the district court's view, because the proof-of-residency (and proof-of-citizenship) requirements make Arizona's state form not "equivalent" to the federal form, those requirements must give way. Instead, the district court ruled that any state form provided by a public assistance agency must be "virtually identical to the Federal Form." *Mi Familia Vota II*, 719 F. Supp. 3d at 997 (simplified).

First, "equivalent" doesn't always mean "identical." Common definitions show that "equivalent" can fall short of meaning the "exact same"—especially when

two different things have the same function or cause similar effects. *See Equivalent*, American Heritage Dictionary 291 (4th ed. 2000) ("Similar or identical in function or effect"); *Equivalent,* Oxford English Dictionary 358 (2d ed. 1989) (Equal in value, power, efficacy, or import"; "That is virtually the same thing; identical in effect; tantamount"; "Having the same relative position or function; corresponding."); Equivalent, Webster's Third New Int'l Dictionary 769 (1981) ("like in signification or import"; "corresponding or virtually identical esp. in effect or function"). So this provision doesn't demand that state public assistance agencies use a form that is *identical* to the federal form. Rather, like the state form, an "equivalent" form need only have the same "effect" for purposes of registration. And demanding that the federal form and the state form be identical would render § 20505(a) void and contravene *ITCA*.

Allowing some variation between the federal form and the public assistance agencies' "own form" best accounts for the NVRA's "context" and "overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 486 (2015) (simplified). As discussed above, the NVRA creates a two-track approach for voter registration: applicants may use either the federally created voter-registration form or a state-created form. *See* 52 U.S.C. § 20505(a). States have some freedom in designing the state form if they follow the permissive requirements of § 20505(a)(2). The upshot of this statutory framework is that voters can pick a "simple means of registering to vote in federal elections" through the federal form or they can choose the state form, which can "require information the Federal Form does not." *ITCA*, 570 U.S. at 12. It is an elegant scheme that respects the balance of power between the federal government and the States. It would thus be odd if

Congress gave States the flexibility to create their own form in § 20505(a) but then took away all that freedom through the "public assistance agencies" provision of § 20506(a)(6)(A). It's doubtful that Congress expected a third form—a public agency's "own form" that must be identical to the federal form. Thus, the best way to harmonize all these provisions is to consider a compliant state form—one "that meets all of the criteria stated in section 20508(b)"—as "equivalent" to the federal form. *See* 52 U.S.C. §§ 20505(a)(2), 20506(a)(6)(A).

At the very least, even if the district court were right that the state form is not "equivalent" to the federal form, the remedy isn't to redesign Arizona's chosen form. The proper remedy would have been to have Arizona's "public assistance agencies" distribute the federal form. Such a narrowly tailored remedy would respect the State's sovereignty and fulfill the commands of the NVRA.

C.

Finally, opponents of the proof-of-citizenship requirement assert an equal protection challenge to the law. Even the majority agrees this argument was a stretch. *See* Maj. Op. at 74–78.

* * *

For all these reasons, we should have reversed the district court order enjoining enforcement of § 16-121.01(C).

IV.

Requiring Proof of Residence to Register to Vote

H.B. 2492 requires a person who registers to vote to provide "an identifying document that establishes proof of location of residence." Ariz. Rev. Stat. § 16-123;

see also id. § 16-121.01(A). A "valid and unexpired Arizona driver license" constitutes "satisfactory proof of location of residence." *Id.* § 16-123. If a person fails to provide proof of residence, then the person will be registered to vote in only federal elections. The district court held that the NVRA's "public assistance agencies" provision barred enforcement of this provision, *see* 52 U.S.C. § 20506(a)(6)(A)(i)–(ii), for the same reasons as the proof-of-citizenship requirement. For the reasons discussed above, the district court's analysis was wrong, and we should have reversed it. Opponents of the proof-of-residence requirement also make an equal protection argument against it. The majority properly dismisses that contention. *See* Maj. Op. at 74–78.

The district court also ruled that the proof-of-residency requirement violated the necessity provision of § 20508(b)(1). Recall that § 20508(b)(1) requires that state-created voter registration forms "may require only such identifying information . . . and other information . . ., as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1). Once again, we have no basis to overrule what Arizona thought was "necessary" for state voter-registration forms. *See id.*

The district court's ruling that proof-of-residence isn't "necessary" hinged on what it perceived to be an inconsistency in Arizona's registration requirements. Under the law, new voter-registration applicants must provide proof-of-residence, Ariz. Rev. Stat. §§ 16-121.01(A), 16 123, but existing registered voters who obtain an out-of-state license or identification must only provide a signed statement under the penalty of

perjury that they are still a resident of Arizona, *id.* § 16-165(F). "The Court cannot reconcile why [documentary proof of residence] would be *necessary* for new applicants when an attestation is *sufficient* to determine the eligibility of registered voters who subsequently obtain an out-of-state identification." *Mi Familia Vota II*, 719 F. Supp. 3d at 996. Respectfully, the district court could have tried harder to reconcile the two provisions. There is a clear difference between an *existing* registered voter who has previously been verified as a legitimate voter and a new applicant who has not yet gone through the State's vetting process. It makes sense to require heightened proof for the unverified applicant. That Arizona permits existing voters with a known track record to provide less proof of residence than unknown, new applicants doesn't make proof of residence unnecessary. In other words, what may be "necessary" in some cases may not be "necessary" in all cases.

Further, § 20508(b)(1) doesn't impose a least-restrictive-means test on what sort of documentation a state form can require. The State has no duty to do just the bare minimum of vetting. If the State finds it "necessary," it may request more thorough proof of eligibility. Otherwise, we impose a non-existent narrow-tailoring test onto § 20508(b)(1). And no one disputes that residency is a valid eligibility requirement to vote in Arizona. *See* Ariz. Const. art. VII, § 2(A); Ariz. Rev. Stat. § 16-101(A)(3). Without convincing proof that information serves no function, we have no basis to second-guess Arizona's determination of necessity.

For these reasons, we should have reversed the district court order enjoining enforcement of §§ 16-121.01(A) and 16-123.

V.

Removal of Noncitizens Within 90 Days of an Election

H.B. 2243 directs state officials to conduct periodic, often monthly, inspections of Arizona's voter roll to determine whether any person is ineligible to vote or not a U.S. citizen. *See* Ariz. Rev. Stat. § 16-165(G)–(K). If election officials "obtain[] information" from these inspections and "confirm" that a "person registered is not a United States citizen," they "shall cancel the registration." *Id.* § 16-165(A)(10). The district court held that the cancellation of an improperly registered *foreign citizen's* registration violates the NVRA's "90-Day Provision." *See* 52 U.S.C. § 20507(c)(2)(A). Under that provision, with some exceptions, "[a] State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." *Id.* § 20507(c)(2)(A). So the district court ruled that Arizona cannot execute H.B. 2243's provisions requiring the "systematic investigation and removal of registered voters" within 90 days of a federal election. But because the phrase "ineligible voters" in the 90-Day Provision doesn't include foreign citizens, the provision doesn't apply to Arizona's cancellation program. I would thus reverse the district court on this issue.

To be sure, the 90-Day Provision uses broad language—applying to "any" program to remove undefined "ineligible voters." Given these seemingly capacious terms, it's easy—as the majority does—to just throw up our hands and give the provision its widest implications. *See* Maj. Op. at 45– 46. But that's not how we interpret statutes. We don't read a term "in

isolation" or give the statute "the broadest imaginable definitions of its component words." *See Sackett v. EPA*, 598 U.S. 651, 674 (2023); *Dubin v. United States*, 599 U.S. 110, 120 (2023). Instead, our job is to conduct "a careful examination of the ordinary meaning and structure of the law" and keep the "overall statutory scheme" in mind. *Food Mktg. Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (simplified). Once we do that, the best reading of the statute is that the NVRA's 90-Day Provision doesn't apply to the removal of aliens from state voter rolls.

Start with the 90-Day Provision's place within the NVRA's statutory scheme. It is part of § 20507, also known as Section 8, which addresses "the administration of voter registration." 52 U.S.C. § 20507. Section 20507 introduces a systematic series of regulations regarding voter rolls. In other words, think of § 20507 as walking the States through each step of the voter-registration process—a process that both enhances participation in elections and ensures the integrity of the vote. It starts with the pre-registration process, then goes to the post-registration process, and ends with voter-removal programs. As in any conversation, what Congress said *earlier* shapes how we understand what Congress says *next*. And consistent with the protection of voters' rights, the NVRA becomes more stringent as we get closer to Election Day.

First, the pre-registration process. The first subsection of § 20507 begins with discussion of the "valid voter registration form of the *applicant*." *Id.* § 20507(a)(1)(A)-(D) (emphasis added). Among their responsibilities, States must accept valid voter registration forms from an "applicant" within certain timeframes and provide "notice to *each applicant* of the

disposition of the application." *Id.* § 20507(a)(1)–(2) (emphasis added). States must also "inform applicants" of "voter eligibility requirements" and the penalties for providing false voter information. *Id.* § 20507(a)(5).

At this stage, "applicant" must refer to any person who submits a voter registration application, which may include both U.S. citizens and foreign citizens. But before proceeding, this subsection provides an important limitation. Congress instructs the States that they must "ensure that any *eligible applicant* is registered to vote in an election." *Id.* § 20507(a)(1) (emphasis added). In this context, an "eligible applicant" is an "applicant" who is qualified to be registered to vote. *See Eligible*, Webster's Third New Int'l Dictionary 736 (1981) ("fitted or qualified to be chosen or used: entitled to something"); *Eligible*, Oxford English Dictionary 140 (2d ed. 1989) ("Fit or proper to be chosen (for an office or position)."); *Eligible*, American Heritage Dictionary 280 (4th ed. 2000) ("Qualified to be chosen"). So Congress distinguishes between an "applicant" and an "eligible applicant," which is a smaller subset of "applicant[s]." States must "ensure" that only "eligible applicant[s]" are "registered to vote." *Id.* § 20507(a)(1). Thus, foreign citizens—as *ineligible* applicants—are weeded out of the statutory process at this stage and may never go further down the regulatory scheme.

Second, the post-registration process. After successful "disposition of the application" and an "eligible applicant" is registered to vote, the next subsection calls the person a "registrant." *Id.* § 20507(a)(3). As a "registrant," the person may vote unless the person becomes ineligible because of a criminal conviction, disability, or move. *Id.* Respecting this, this subsection "provide[s] that . . . a *registrant* may not be removed

from the official list of eligible voters except" by request of the registrant or for a criminal conviction, mental incapacity, death, or change of address. *Id.* § 20507(a)(3)-(4) (emphasis added). This protection applies only to a "registrant"—again meaning *only* an "eligible applicant" who was registered to vote. *See id.* § 20507(a)(3). This definition necessarily excludes foreign citizens, who are never "eligible applicant[s]" having the right to be registered to vote. Thus, § 20507(a)(3) in no way protects foreign citizens improperly registered from removal from the voter rolls. *See Bell v. Marinko*, 367 F.3d 588, 591–92 (6th Cir. 2004) ("In creating a list of justifications for removal, Congress did not intend to bar the removal of names from the official list of persons who were ineligible and improperly registered to vote in the first place.").

Third, removal programs. This phase directs States to conduct programs to purge "ineligible voters" from voter rolls. To begin, States must "conduct a general program that makes a reasonable effort to remove the names of *ineligible voters* from the official lists of *eligible voters* by reason of . . . death of the *registrant* . . . or change in the residence of the *registrant*." *Id.* § 20507(a)(4) (emphasis added). For the first time in § 20507, Congress distinguishes between "eligible voters" and "ineligible voters." *Id.*

Based on the structure of the preceding subsections and placing the terms within the statutory scheme, these terms must refer to two subcategories of "registrant[s]." The subcategory of "eligible voters" are those "registrants"— "eligible applicants" registered to vote—who remain eligible to vote. The subcategory of "ineligible voters" are those "registrant[s]" who have lost eligibility to vote because of the "death of the

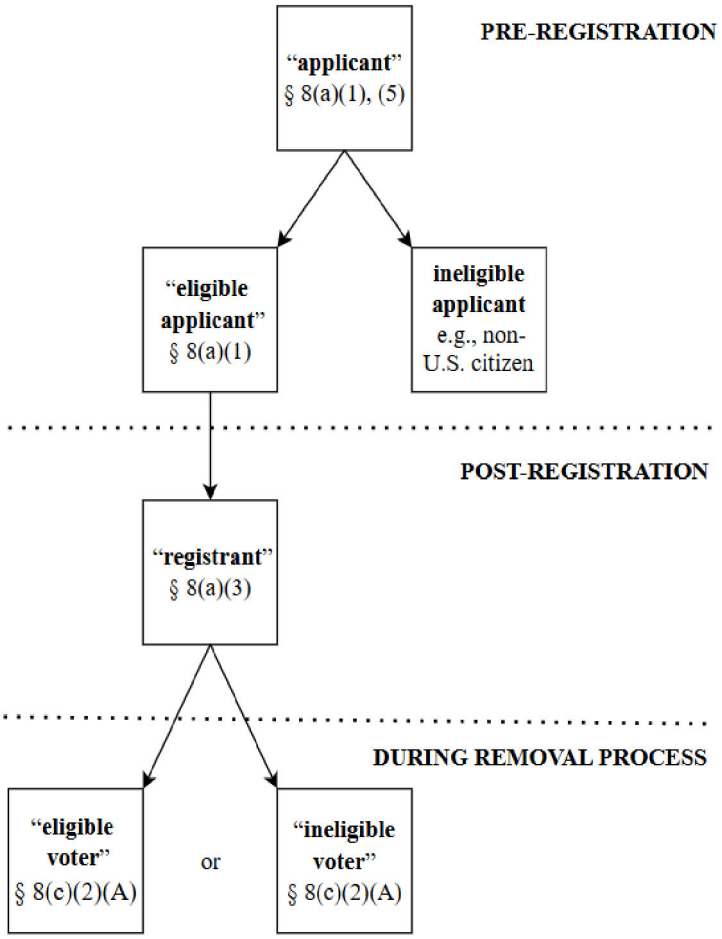
registrant," "change in the residence of the registrant," or some other intervening event. *Id.* § 20507(a)(4); *see Ineligible*, Webster's New Third Int'l Dictionary 1156 (1981) ("not eligible: not qualified to be chosen for an office : not worthy to be chosen or preferred"); *Ineligible*, Oxford English Dictionary 904 (2d ed. 1989) ("[i]ncapable of being elected; legally or officially disqualified for election to an office or position"); *Ineligible*, American Heritage Dictionary 436 (4 ed. 2000) ("[d]isqualified by law or rule"). Thus, Congress itself uses "registrants" to define "ineligible voters."

In other words, Congress uses these two new terms to subdivide the old group of "registrants" for a new stage of the registration process: post-registration removal programs. But one thing is clear. In all cases, foreign citizens can never be "ineligible voters" or "eligible voters" because they could never have been "registrant[s]"—that is, "eligible applicant[s]" registered to vote. Thus, any limitation Congress places on removal programs doesn't apply to the removal of non-U.S. citizens.

That leads us to the 90-Day Provision—the provision that the district court used to enjoin enforcement of § 16-165 within 90-days of an election. Under that provision, "[a] State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of *ineligible voters* from the official lists of eligible voters." *Id.* § 20507(c)(2)(A) (emphasis added). The subsection then clarifies that the 90-day quiet period "shall not be construed to preclude . . . the removal of names from official lists of voters on a basis" of (1) a "request of the registrant," (2) "criminal conviction or mental capacity," or (3) "the death of the

registrant." *Id.* § 20507(c)(2)(B). Taken as a whole, this subsection protects only "ineligible voters" from removal within 90 days of election, and "ineligible voters" are simply a subcategory of "registrants." The 90-Day Provision then doesn't protect those who were *never* "registrants"—meaning those who were never "eligible applicants" registered to vote, such as non-U.S. citizens.

In other words, § 20507 progresses from (1) "applicant[s]" to (2) "eligible applicant[s]" to (3) "registrant[s]" to (4) "eligible voters" and "ineligible voters." Each term or set of terms is a subset of its preceding term. As explained above, a foreign citizen may be an "applicant" but may not be in the subset of "eligible applicant[s]." Because of this, foreign citizens are excluded from the terms "registrant[s]," "eligible voters" and "ineligible voters." The following graphic explains this progression of terms:



Once placed within the overall statutory scheme, foreign citizens aren't included in the protection of "ineligible voters" in the 90-Day Provision. Simply, foreign citizens are excluded from the NVRA's statutory protections during the removal process, and nothing in the NVRA prevents their removal at *any point whatsoever*.

In contrast, reading the 90-Day Provision in a literalist way would lead to absurd results and raise

serious constitutional concerns. If foreign citizens are included in the protection of "ineligible voters," that would mean that States can continue to "systemically remove" those voters convicted of a crime, found mentally incapacitated, or who died—*all voters susceptible of being incorrectly removed*—within 90 days of the election, but they can't stop foreign citizens from voting in our elections—a category easier to verify. 52 U.S.C. § 20507(c)(2)(B). And a congressional ban on removing foreign citizens for voting in American elections is absurd. It's one thing to allow an American citizen who has moved to a new precinct to vote in the wrong district; it's entirely different to force a State to allow a foreign citizen to vote in its elections. While used only "sparingly," the absurdity canon means we should "not myopically focus[] on a single" term or phrase and instead we should "evaluate the statute in context." *United States v. Lucero*, 989 F.3d 1088, 1098 (9th Cir. 2021). The majority's acontextual interpretation of § 20507 creates an absurdity that Congress never established in the statutory text. And forcing States to accept foreign citizens in their voting booths would infringe on States' rights to set voter qualifications and administer elections. Rather than breaking the 90-Day Provision into component parts and reading words in isolation, we should have read the law as a whole and understood that it offers no protection for foreign citizens.

Lastly, the majority relies on the Eleventh Circuit's purpose-based analysis in *Arcia v. Florida Secretary of State*, 772 F.3d 1335 (11th Cir. 2014). According to the Eleventh Circuit, the 90-Day Provision "strikes a careful balance" of the NVRA's purposes—"[i]t permits systematic removal programs at any time except for the 90 days before an election because that is when the risk of disfranchising eligible voters is the greatest."

Id. at 1346. As explained above, it's a mistake to overly rely on *purpose* in interpreting statutes. Even so, this supposed "balanc[ing]" test fails to explain why voters who are convicted of a crime, have a disability, or have died receive no protections at all but foreign citizens are immune from removal. As the Sixth Circuit considered, by finding foreign citizens protected by the NVRA's removal program regulations, we "effectively grant, and then protect, the franchise of persons not eligible to vote." *Bell*, 367 F.3d at 592. It's hard to see how that's consistent with the NVRA's purposes.

Because the 90-Day Provision doesn't apply to foreign citizens, we should have reversed the district court's injunction of § 16-165(A)(10).

VI.

Birthplace and Citizen Checkbox Requirements

H.B. 2492 requires a state-form voter-registration applicant to provide a "place of birth," along with the applicant's name, address, birthdate, and signature "to be properly registered to vote." Ariz. Rev. Stat. § 16-121.01(A). It also requires the applicant to place a "checkmark" in a box indicating that the applicant is a U.S. citizen. *Id.* If any of this information is "incomplete or illegible," "the registration cannot be completed" and the county recorder must give the applicant notice and opportunity to supply the information. *Id.* § 16-134(B). The district court held that the birthplace and citizen-checkbox requirements violate the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B). It permanently enjoined Arizona election officials from enforcing these requirements and from rejecting applicants for the lack of birthplace or citizen-checkbox information if

the applicant is otherwise eligible. I would reverse in part and affirm in part.

When the Civil Rights Act was enacted, local election officials exploited "hypertechnical[] or entirely invented" errors to reject Black applicants. Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 Wm. & Mary L. Rev. 83, 148 (2012). For example, one applicant was rejected because, when required to provide her age in years, months, and days, she "missed the mark by one day because the day had not yet ended." *Id.* Similarly, "[a]nother application was rejected because the applicant's state was misspelled as 'Louiseana.'" *Id.* In another anecdote, a Black schoolteacher in Alabama had her voter-registration form "rejected because she omitted a date in one question—even though she gave the same information elsewhere on the form." Hearings on S. 1731 and S. 1750 Before the S. Comm. on the Judiciary, 88th Cong. 101–02 (1963) (Statement of Att'y Gen. Robert F. Kennedy). The list goes on. *See* Levitt, *Materiality*, at 148 (collecting examples). Congress thus sought to deny the use of irrelevant errors as pretext to hide election officials' discriminatory intent to deny voters their right to vote.

The Materiality Provision provides that—

> No person acting under color of law shall deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(B).

First, the term "material" is used often in the law. We've recently reiterated that something "is material if it could have affected or influenced the government's decision." *United States v. Patnaik*, 125 F.4th 1223, 2025 WL 85836, at *3 (9th Cir. 2025) (simplified); *see also Material*, Oxford English Dictionary Online (defining "material" in legal sense as "significant or influential, esp[ecially] in having affected a person's decision-making" or "having a logical connection with the facts at issue"). Something need not be *essential* to be "material" in this context. *Vote.Org v. Callanen*, 89 F.4th 459, 478 (5th Cir. 2023) ("We reject 'essential' as a reasonable meaning" of "material.") So an "error or omission" is "material" if it could have affected or influenced the decision "whether an individual is qualified under State law to vote." 52 U.S.C. § 10101(a)(2)(B). The "error or omission" need not be "essential" to the decision to register the person.

Second, the Materiality Provision only bars the improper use of an immaterial "error or omission" on voting forms. *Id.* It doesn't prevent government officials from *requesting* the underlying information. States may thus ask for any information they deem necessary in voter-registration forms. The law only applies once an applicant makes an error or omits some information. In other words, whatever preemptive force the Materiality Provision has, it applies only from the *use* of an "error or omission"—not from the request for the underlying information.

Finally, the Materiality Provision is violated only if a voter registration is "reject[ed]" "because of" the immaterial error or omission. 52 U.S.C. § 10101(a)(2)(B). In this context, "because of" means the "'but-for' cause." *Univ. of Texas Southwestern Medical Center v.*

Nassar, 570 U.S. 338, 350 (2013) (simplified). So the law prohibits an immaterial "error or omission" from being the "but-for" cause of rejecting a voter-registration application. The law thus doesn't prevent government officials from using an immaterial "error or omission" to investigate or further probe the application. Nor does it prevent election officials from requesting corrections. And if investigation uncovers other information revealing that the applicant is ineligible to register to vote under state law, then the "error or omission" certainly becomes material.

Given these considerations, I would reverse the district court's injunction as to the birthplace requirement but affirm the injunction of the citizenship-checkbox requirement.

A.

Birthplace Requirement

After a bench trial, the district court concluded that the birthplace requirement violates the Materiality Provision because it can't be used to verify citizenship, residence, or identity—all state-law requisites for voting. *Mi Familia Vota II*, 719 F. Supp. 3d at 995. But because some circumstances exist in which an omitted birthplace may affect or influence verification of a person's registration application, I would reverse the district court's injunction.

As this is a pre-enforcement challenge, opponents of the birthplace requirement bring a facial challenge to the law—a claim that is "hard to win." *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024). "Claims of facial invalidity often rest on speculation about the law's coverage and its future enforcement." *Id.* (simplified). And "facial challenges threaten to short circuit the democratic process by preventing duly

enacted laws from being implemented[.]" *Id.* (simplified). Thus, a facial challenge is "the most difficult challenge to mount successfully." *Anderson v. Edwards*, 514 U.S. 143, 155 (1995) (simplified). Plaintiffs must "establish[] that no set of circumstances exists under which the Act would be valid, i.e., that the law is [invalid] in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (simplified). Indeed, so onerous is the task, a defendant can "defeat [a] facial challenge by conjuring up *a single valid application of the law*." *City of Chicago v. Morales*, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting).

To be qualified to vote, an applicant in Arizona must be a U.S. citizen, over 18 years old, and (in most cases) a resident of the State for 29 days before the election. Ariz. Const. art. VII, § 2; Ariz. Rev. Stat. § 16-101(A). And implicitly underlying these qualifications is identity—that the applicant is who he says he is. *See Vote.Org*, 89 F.4th at 489 (noting that identity is "the most basic qualification to vote"). An omitted birthplace could be material in determining an applicant's identity in at least two situations.

First, an omitted birthplace could be significant when a county recorder comes across what's called a "soft match." Once a voter-registration form is received, county recorders must search existing voter records to try to determine if the applicant matches someone already registered to vote. If there's a match, the new form is treated as a request to update voter information. If there's no match, the county recorder registers the applicant as a new voter. A "soft match" occurs when an old voting record does not provide enough information to conclusively match a new registration form. One county recorder stated that this situation "happens a lot."

The "birthplace" requirement helps resolve "soft matches." Before H.B. 2492, applicants only needed to provide their name, address, date of birth, signature, and an affirmation of citizenship. If applicants had a social security or driver's license number, they were asked to include it too. A "soft match" occurs, for example, when a recorder finds matches between the applications' listed first name, last name, and birth date or listed first name, birth date, and the last four digits of a social security number. Adding a datapoint—like matching birthplaces—would eliminate some soft matches. Imagine a county recorder receives a voter registration application from "John Doe" born on "April 1, 2000." There's a match with an existing voter record—a "John Doe" also born on "April 1, 2000." This presents a "soft match"—he might or might not be the same person. Now say that the new registration form indicates that "John Doe" was born in "Peoria." But the registered John Doe was born in "Phoenix." Now we know they are not the same person. This difference means that county recorders could eliminate the record as a "soft match." On the other hand, a match between first name, last name, birthdate, and birthplace would give further evidence of a "match" and might prompt the county recorder to follow up with the applicant—as one county recorder testified.

Opponents of the requirement claim that a birthplace resolving a "soft match" would be rare—as the Civil Rights Division's expert witness testified. The expert identified only 12 pairs of voter records where incompatible birthplaces would eliminate the "soft match"—out of 4.7 million voter records. Opponents also point out that the databases used by Arizona county recorders do not *currently* use birthdate to find matches.

This is not enough to succeed on a facial challenge. To begin, even a *single valid circumstance* showing the omission of a birthplace is enough to defeat a facial challenge. *See Morales*, 527 U.S. at 81 (Scalia, J., dissenting). Further, Arizona hasn't been allowed to implement H.B. 2492. If birthplace information became mandatory, Arizona could alter how it collects and analyzes that information—advancing its use in the verification process. Instead, the district court relied on the state of affairs in Arizona as it existed before the law changed. On a facial challenge, we are not so backwards looking. *Cf. Wash. State Grange*, 552 U.S. at 450 ("The State has had no opportunity to implement [the challenged law], and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions."). We thus resist facial challenges relying on "premature interpretations of statutes." *Id.* (simplified).

Second, an omitted birthplace could be material when an applicant submits a birth certificate as proof of citizenship that includes a last name different from the applicant's current last name. In that case, Arizona's 2023 Election Procedures Manual instructs county recorders to accept the birth certificate if the applicant's first and middle names, birthplace, date of birth, and parents' names match. Once again, omission of birthplace could be dispositive.

In conclusion, an omitted birthplace can sometimes pose an obstacle to verifying an applicant's identity. Opponents of the requirement thus fail to show that "no set of circumstances exists under which the [law] would be valid." *Moody*, 603 U.S. at 723 (simplified). We

should have lifted the injunction on this part of § 16-121.01(A).

B.

Citizenship-Checkbox Requirement

The district court's injunction of the citizenship-checkbox requirement is a different matter.

First, all parties agree that the citizenship checkbox can help determine an applicant's citizenship in some cases. The district court acknowledged that the checkbox could be material when an applicant submits no documentary proof of citizenship. It thus permitted Arizona to reject voter-registration applications for failure to check the citizenship box when no documentary proof of citizenship exists.

Second, the district court only enjoined the checkbox requirement when two conditions are met: (1) the applicant has provided satisfactory proof of citizenship and (2) county recorders have *otherwise* established eligibility, including citizenship. Thus, the injunction applies only when there is *no doubt* about the applicant's citizenship or eligibility.

Third, nothing prevents Arizona from still using the checkbox and investigating applicants who skip it. The injunction doesn't prevent Arizona election officials from contacting applicants who neglected to check the box or asking them to correct the omission. And if investigation leads to other information indicating that the applicant is not the rightful bearer of the citizenship documents or that the person is otherwise ineligible, Arizona may still reject that applicant on those grounds. Once there's a determination of ineligibility then the injunction simply doesn't apply by its own terms. So in all cases, election officials may

reject ineligible applicants. The injunction would, however, prevent officials from rejecting applicants for failing to check the citizenship box when those officials have already verified the applicant's citizenship.

Proponents of the requirement argue that enjoining the checkbox amounts to an anti-repetition rule—that States can't enforce requests for duplicative information. They are correct that a sweeping rule against seeking duplicative information would be troubling. Sometimes a belt-andsuspenders approach is appropriate. But focus on this case— it's hard to see how the failure to check the citizenship box could affect or influence the determination of the applicant's citizenship when the applicant's citizenship has already been verified. Rejecting a voter application for omitting a citizenship checkbox at the same time the applicant provides hard proof of citizenship seems more like dinging a voter for misspelling "Louisiana," which falls into the heart of the Civil Rights Act.

We thus properly affirm the injunction of this provision.

VII

"Reason To Believe" Provision

H.B. 2243 requires Arizona county recorders to periodically search a registrant's citizenship within the USCIS SAVE database if the county recorder has "reason to believe" the registrant is not a U.S. citizen. Ariz. Rev. Stat. § 16-165(I). The district court enjoined this provision under the "Different Standards, Practices, and Procedures" Provision of the Civil Rights Act. I agree with affirming the injunction.

Under that provision,

> No person acting under color of law shall[,] in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.

52 U.S.C. § 10101(a)(2)(A). The provision has a relatively straightforward command—election officials can't use a "different . . . practice[] or procedure" for determining voter eligibility for different groups of "individuals" within the same political unit. *Id.*

While the duty to verify citizenship through the SAVE database is reasonable enough, there's a problem with it in practice—the SAVE database is only searchable for individuals with an immigration or A-File number. *See Mi Familia Vota II*, 719 F. Supp. 3d at 995. That means that it *only* contains information about naturalized citizens. Thus, county recorders can only use the SAVE database for naturalized citizens—and never for natural-born citizens. So while the state law may be facially neutral, in "practice" or "procedure" it can be applied only in unequal ways.

Say the county recorder has "reason to believe" two registrants are not U.S. citizens. One is a native-born registrant, who the recorder thinks is no longer a U.S. citizen (maybe, the registrant renounced his citizenship). The other is a naturalized citizen born out of the country. Under § 16-165(I), only the latter can be subject to a SAVE check, meaning the naturalized citizen is subject to a "different . . . practice[] or procedure" than the natural-born citizen. Thus, I

would affirm this portion of the district court's injunction.

VIII.

Discriminatory-Purpose Challenge to Voter-Verification Laws

Opponents of the Voting Laws also challenge the voter-verification laws under the Equal Protection Clause of the Fourteenth Amendment. They claim that the laws were enacted with discriminatory intent. The district court ruled against this challenge. Reviewing what's known as the *Arlington Heights* factors, the district court found that these opponents hadn't overcome the "strong presumption of good faith" we must afford to state legislatures. *See United States v. Carrillo-Lopez*, 68 F.4th 1133, 1140 (9th Cir. 2023) (simplified). It determined that the laws' legislative history shows no "motive to discriminate against voters based on race or national origin" and that the laws have no discriminatory impact based on "naturalization status, race, or ethnicity." *See Mi Familia Vota II*, 719 F. Supp. 3d at 1016.

Not enough—the majority reverses the district court and all but finds that Arizona legislators enacted H.R. 2243 for a discriminatory purpose. In reversing the district court's finding, the majority commits two errors. First, it neglects

Article III standing doctrine. Only two non-profit organizations, Promise Arizona and Southwest Voter Registration Education Project, appeal the district court's ruling. But neither organization has standing to bring this challenge. Second, the majority substitutes the district court's factfinding for its own and lowers the evidentiary burden to the floor—flipping the strong presumption of good faith we give

to legislative action and essentially requiring the State to disprove any discriminatory motive.

A.

Article III Standing

Before reaching the merits, we must first decide whether the non-profits have Article III standing. *See Mendoza v. Strickler*, 51 F.4th 346, 354 n.5 (9th Cir. 2022).

Organizations, like Promise Arizona and Southwest Voter Registration Education Project, can claim two paths to standing. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* ("*SFFA*"), 600 U.S. 181, 199 (2023) (simplified). The first path—known as "organizational standing"—is for the organization to show that it directly satisfies the Article III standing requirements. *Id.* The second path—known as "associational" or "representational standing"—is for it to assert "standing solely as the representative of its members." *Id.* (simplified). Promise Arizona and Southwest Voter Registration Education Project claim both paths. Neither leads them to standing.

1.

Organizational Standing

The Ninth Circuit long viewed organizational standing as "an ever-expanding universe." *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 693 (9th Cir. 2021) (Bumatay, J., dissenting for the denial of rehearing en banc). Ignoring the traditional need for an injury in fact, we have continuously "loosen[ed] organizational standing requirements" to "increase our own authority to adjudicate policy disputes." *Id.*

Under our precedent, all an organization had to do was declare some voluntary "diversion of its resources" in response to a policy objection and it got a ticket into federal court. *See, e.g.*, *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012); *id.* at 1224 (Ikuta, J., dissenting in part). But a self-inflicted injury cannot establish standing. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves[.]"); *Nat'l Fam. Plan. and Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing."); *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam) ("The injuries to the plaintiffs' fiscs were self-inflicted . . . . No state can be heard to complain about damage inflicted by its own hand.").

The Supreme Court has finally declared enough is enough. In *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024), the Court reined in this expansive view of organizational standing. No longer will an organization's "sincere legal, moral, ideological, and policy objections" to a law be sufficient to grant it Article III standing. *See id.* at 386. Now, an organization "cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *Id.* at 394. Nor can it "manufacture its own standing in that way." *Id.* Instead, an organization may only assert standing when a challenged policy "directly affect[s] and interfere[s] with [its existing] core business activities." *Id.* at 395; *see also Ariz. All. for Retired Americans v. Mayes*, 117 F.4th 1165, 1177 (9th Cir. 2024) (To confer organizational standing, "the organization must show

that the new policy directly harms its *already-existing* core activities.").

Promise Arizona and Southwest Voter Registration Education Project assert that they are non-profit organizations seeking to empower Latino communities through their vote and increase their participation in the electoral process. To do this, they assist with voter registration, voter education, and turn-out-the-vote operations. In other words, their mission is to help Latinos navigate voting laws.

To establish organizational standing, the organizations claim H.B. 2243 may cause them to reallocate resources to train staff and voters on the new voting laws, will require them to assist voters whose registration is erroneously cancelled, and might deter Latinos from registering to vote. In particular, they worry that H.B. 2243's requirement for periodic verification of citizens *might* lead to inaccurate removal of eligible voters too close to an election to be corrected. They believe they *may* need to spend money to remedy this and to educate voters.

This is hardly an injury in fact to the organizations. It is nothing more than the diversion-of-resources theory of standing rejected in *Alliance for Hippocratic Medicine*. Simply, organizations can't assert standing "based on their incurring costs to oppose" the voter-verifications laws. *See All. for Hippocratic Med.*, 602 U.S. at 394 (holding that no organizational standing exists when organizations engage in "public advocacy" and "public education" on the effects of governmental action). At most, the new voter-verification laws may mean that the organizations will need to update their voter-registration operations—a completely voluntary move consistent with their mission. Such voluntary actions in no way interfere with their "core business

activit[y]" of registering new voters. *Id.* at 395. Unlike "a retailer who sues a manufacturer for selling defective goods to the retailer," these organizations are merely diverting resources to oppose a law they dislike. *Id*. "With or without" H.R. 2243, the non-profits "can still register and educate voters— in other words, continue their core activities that they have always engaged in." *Ariz. All. for Retired Americans*, 117 F.4th at 1178. They can't "attempt to spend their way into Article III standing by taking new actions in response to what they view as a disfavored policy." *Id.*

And they can't manufacture standing based on their speculation that county recorders may erroneously reject voter applications. Standing isn't based on a "highly attenuated chain of possibilities" premised on the presumption of erroneous actions by government officials. *See Clapper*, 568 U.S. at 410. Granting the organizations standing to challenge H.B. 2243 just because county recorders *might* make mistakes "would be an unprecedented and limitless approach and would allow [non-profits] to sue in federal court to challenge almost any policy affecting" voter registration. *See All. for Hippocratic Med.*, 602 U.S. at 391–92. After all, "that is not what the law requires or what any county recorder would reasonably be expected to do." *Ariz. All. for Retired Americans*, 117 F.4th at 1179. And it is even *more* speculative to claim that H.B. 2243 might injure the organizations' "abstract social interest[]" in encouraging Latino-voter registration. *See id.* at 1177 (simplified). Thus, all these arguments amount to "a diversion-of-resources theory by another name." *Id.* at 1180.

2.

Associational Standing

Associational standing doesn't help the non-profit organizations either. To pursue associational standing, an organization must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *All. for Hippocratic Medicine*, 602 U.S. at 398 (Thomas, J., concurring) (simplified).

We must be just as careful in granting organizations associational standing as well. Justice Thomas raises some valid concerns. First, "associational standing conflicts with Article III by permitting an association to assert its members' injuries instead of its own." *Id.* at 399. It does seem odd that we allow an association to "seek relief for its entire membership" when a single member suffers an injury—"even if the association has tens of millions of other, non-injured members." *Id.* Likewise, "associationalstanding doctrine does not appear to comport with the requirement that the plaintiff present an injury that the court can redress." *Id.* at 400. If a single member has suffered an injury, why then do we provide redress to the organization, which hasn't sustained an injury itself? Anomalously, the actual injured party may not receive any relief himself. Thus, we mustn't relax any standing requirements just because an organization presses a claim on behalf of an injured member.

Here, Promise Arizona and Southwest Voter Registration Education Project fail to show that their "members would otherwise have standing to sue in

their own right." *See SFFA*, 600 U.S. at 199 (simplified). Promise Arizona claims 1,043 members, including an *unspecified* number of voters who are naturalized citizens. Promise Arizona hooks onto the H.B. 2243 provision that requires county recorders to conduct monthly SAVE checks on registered voters whom the county recorder has "reason to believe" are not U.S. citizens. Promise Arizona argues that its naturalized members will suffer an injury in fact *if* a SAVE check is run against them and *if* they are improperly removed from the voter rolls. The majority buys this argument—claiming that Promise Arizona's members are in danger of losing the right to vote. This isn't sufficient for associational standing.

Promise Arizona has not plausibly alleged a "real and immediate threat of" future injury to its members. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). Rather, it only posits conjectural allegations of potential injuries that require a "long chain of hypothetical contingencies." *Lake v. Fontes*, 83 F.4th 1199, 1204 (9th Cir. 2023) (per curiam) (simplified).

First, Promise Arizona doesn't specify how many naturalized members it has. All we know is that the number is between 2 and 1,043. So we are left to wonder what the chances are that one of its members will be subject to a SAVE check.

Second, we must guess the possibility that a county recorder will somehow have "reason to believe" one of Promise Arizona's naturalized members is not a U.S. citizen.

Third, we must calculate the unlikely probability that the SAVE database will *erroneously* show that the naturalized member is not a U.S. citizen. Keep in mind that the district court found that the SAVE database

is not "unreliable" and it doesn't "contain[] severely inaccurate or outdated citizenship information." *Mi Familia Vota II*, 719 F. Supp. 3d at 955. While the SAVE database can take one or two days to update, the district court found that Arizona has procedures to ensure that county recorders seek the latest information on citizenship. *Id.*[5]

Fourth, we must predict the chances that the county recorder will not catch the error in citizenship for that naturalized member.

Fifth, because Arizona law lets registrants correct any error, we must then presume that the naturalized member will not persuade the county recorder to fix the problem.

And finally, we must then assess the likelihood that the naturalized member will be denied the vote because of all these hypothetical screw-ups.

This is the kind of speculation that stretches the concept of imminence of harm beyond recognition. We can't manufacture injury based on "conjecture about the behavior of other parties"—here, county recorders.

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[5] Promise Arizona doesn't seem to assert an injury from the simple fact of a member's name being run through the SAVE database. In any case, it's hard to imagine what the injury would be if the SAVE database then confirms the member's U.S. citizenship and nothing happens to the member's voting status. Further, Promise Arizona doesn't say how its member would find out about any database check and so its implausible that the check itself would lead to injury. To the extent that the member could assert some sort of "stigmatic injury" based on the database check, Promise Arizona will have to show much more. *See, e.g.*, *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984) (A "stigmatic injury" demands "identification of some concrete interest with respect to which respondents are personally subject to discriminatory treatment.").

Ecological Rts. Found. v. Pac. Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000). Simply, Promise Arizona's "conjectural allegations of potential injuries . . . are insufficient to plead a plausible real and immediate threat of" voter suppression. *Lake*, 83 F.4th at 1204 (simplified). As we recently said, Promise Arizona fails to "support[] a plausible inference that [its members'] individual votes in future elections will be adversely affected by" H.B. 2243, "particularly given the robust safeguards in Arizona law." *Id.* Thus, Promise Arizona and Southwest Voter Registration Education Project can't establish standing to appeal the equal protection claim against H.B. 2243. We should have ended the appeal here.

B.

Discriminatory Purpose Analysis

While Promise Arizona and Southwest Voter Registration Education Project lack standing to raise this appeal, the majority disagrees and reaches the merits of the equal protection challenge. Unfortunately, they all but find discriminatory intent based on the weakest of evidence. Simply, the majority views any voter-verification requirements as discriminatory voter suppression. Because the majority decides the merits, I am compelled to address the serious flaws in its analysis.

In seeking to overturn a duly enacted law based on a legislature's discriminatory purpose, the plaintiff bears the burden to prove that purpose "by an evidentiary preponderance." *Carrillo-Lopez*, 68 F.4that 1139 (simplified). In line with our respect for the separation of powers and federalism, we must accord a "strong presumption of good faith" to state legislative

enactments. *Id.* at 1140 (simplified). Several non-exhaustive factors guide the inquiry:

> (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged action; (4) the defendant's departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history.

Arce v. Douglas, 793 F.3d 968, 977 (9th Cir. 2015) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977)). The discriminatory-purpose analysis demands a "sensitive inquiry into . . . circumstantial and direct evidence" of intent. *Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 488 (1997) (quoting *Arlington Heights*, 429 U.S. at 266).

We review the district court's discriminatory-purpose finding for clear error. *Brnovich*, 594 U.S. at 687. If the district court's finding was "plausible," we "may not reverse even if . . . [we] would have weighed the evidence differently in the first instance." *Id.* "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* (simplified).

The district court's finding on discriminatory intent had ample support in the record. In the district court's view, opponents of the law didn't prove Arizona had a discriminatory purpose in enacting the voter-verification laws and H.B. 2243 based on several factual findings:

- While Arizona has a long-ago history of discriminating against people of color, opponents

identified no "persuasive nexus between Arizona's history of animosity toward marginalized communities and the Legislature's enactment of the Voting Laws."

- Analysis of the legislative hearings "evince[s] [no] motive to discriminate against voters based on race or national origin."
- Any concern for non-citizens voting in elections doesn't amount to "community animus" to "impute a discriminatory motive" to the Legislature.
- Although the Free Enterprise Club, a major supporter of the voter-verification laws, used the term "illegals" in lobbying materials, no evidence showed that the Legislature relied on "coded appeals" or sought to "prevent anyone other than non-citizens from voting."
- One legislator's allegedly discriminatory comments are not enough to impute intent to the "Arizona Legislature as a whole."
- Opponents "have not shown that the Voting Laws will have any significant discriminatory impact based on naturalization status, race, or ethnicity."
- At most, database checks will require only 0.001% of voters to produce documentary proof of citizenship.
- Although H.B. 2243 was passed "abrupt[ly]" after the Arizona governor's veto, it wasn't "so abrupt" to show improper motive because related legislation was passed "through the ordinary legislative process."

- Arizona has had proof-of-citizenship requirements since 2005 and the provisions of H.R. 2243 "supplement" and "expand[]" on Arizona's "existing practice[s]."

Mi Familia Vota II, 719 F. Supp. 3d at 1014–18 (simplified). Under the totality of the circumstances, the record is more than enough to support the district court's finding of a lack of discriminatory purpose. Given our strong presumption of good faith, we have no basis to overturn the district court's factual determination.

Despite this thorough analysis, the majority grasps at straws to find some error. It settles on some odd notion that the district court tried to "directly link" the evidence presented by the opponents of the law to "the motive of the Legislature." Maj. Op. at 64. Although unclear, it seems the majority believes that the district court should have been more pliable to "circumstantial" evidence. *See id.* But the district court examined circumstantial evidence—it just found it *unconvincing*. While circumstantial evidence "*may* . . . be more certain, satisfying and persuasive than direct evidence" of discriminatory intent, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (emphasis added) (simplified), circumstantial evidence must still convince us of animus—and it can fall short. *See, e.g.*, *Abbott*, 585 U.S. at 610–11 (finding circumstantial evidence of quick passage of redistricting legislation unconvincing). And to be clear: at no point did the district court conclude that *only* direct evidence could suffice. It even stated explicitly that community animus, a form of circumstantial evidence, "*can* support a finding of discriminatory motives by government officials . . . ." *Mi Familia Vota II*, 719 F. Supp. 3d at 1016 (emphasis added) (quoting *Ave. 6E*

Invs., LLC v. City of Yuma, Ariz., 818 F.3d 493, 504 (9th Cir. 2016)). So the majority's differences with the district court, in the end, are factual. While the majority clearly would have found discriminatory intent here, our job is not to substitute our will for the factfinder's.

Start with the majority's critique of the district court's treatment of the "historical background" prong. The district court acknowledged that "Arizona does have a long history of discriminating against people of color," but decided that this history was of "little probative value" because it was long ago—mostly up to the 1970s. *Id.* at 1014 (simplified). The district court thus found no "persuasive nexus" between this history and the enactment of H.B. 2243. *Id.* The majority attacks the district court for not considering how this history may be "circumstantial evidence" of discriminatory intent and calls the district court's attempt to find any "nexus" an overly "onerous" inquiry. Maj. Op. 66. But the majority misunderstands the historical inquiry. By its nature, distant "history" is circumstantial evidence. After all, looking to past events—when current legislators weren't alive, were infants, or not in office—must be circumstantial. Thus, distant incidents, dissimilar to current circumstances, offer only weak circumstantial evidence. As the Court has said, "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987). We can't simply "accept official actions taken long ago as evidence of current intent." *Id.* And so the district court's weighing of the weak historical evidence was no clear error.

The majority opinion gets even more baffling when it comes to legislative history. Again, the majority

faults the district court for not analyzing the totality of the evidence. Maj. Op. at 66. But it's the majority that cherry-picks events. The majority focuses on the fact that the Legislature conducted an audit that found no voter fraud as evidence that the voter-verification laws must have been a product of discriminatory intent. *Id.* It also relies on the Free Enterprise Club's use of the word "illegals" to conclude the passage of the laws was racially motived. *Id.* at 69. The district court fully accounted for both facts. But reviewing the totality of the evidence, including the legislative hearings, public comments made about non-citizen voting, the Free Enterprise Club lobbying materials, and statements made by legislators, the district court found insufficient evidence to attribute animus to the Arizona Legislature as a whole. *Mi Familia Vota II*, 719 F. Supp. 3d at 1014–16. Rather than conclude that the Arizona Legislature attempted to suppress voters after the 2020 election (as the majority does), the district court considered how legislators have long required proof of citizenship and how legislators wanted to revive the requirement after the Supreme Court seemed to open the door to it in *ITCA*. *Id.* at 1015 (citing *ITCA*, 570 U.S. at 12, 16). The district court also concluded that the other circumstantial evidence here—public concern over "illegals" voting, potentially "offensive" language in Free Enterprise Fund materials, and allegedly derogatory comments by a single state senator—failed to support an inference of discriminatory intent for the dozens of legislators in Arizona's Legislature. *Id.* at 1015–16. Thus, the majority failed to look at the totality of the evidence when seeking to reverse the district court's factual findings.

Next, the majority relies on the accelerated passage of H.B. 2243 after the Governor's veto to suggest

improper motive. Maj. Op. at 71–72. But the majority discounted the fact that a related bill, H.B. 2617, had gone through the normal legislative process, because, in the majority's view, the "amended bill contained many substantive changes." Maj. Op. at 72. The district court explicitly considered the substance of H.B. 2243 and found it to be more of a "supplement" to valid existing laws than a stark departure indicative of discriminatory purpose. *Mi Familia Vota II*, 719 F. Supp. 3d at 1018. And the majority ignores that speed alone is poor evidence of animus. *See Abbott*, 585 U.S. at 610–11 ("[W]e do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith[.]").

Finally, the majority's criticism of the district court's "impact on a minority group" analysis is even more off base. The majority attacks the district court's analysis as "troubling" for suggesting that "[e]vidence of a law's disparate impact is generally insufficient alone to evidence a legislature's discriminatory motive." Maj. Op. 73 (quoting *Mi Familia Vota II*, 719 F. Supp. 3d at 1016). But there's a problem with that. The district court was essentially paraphrasing our precedent. "[W]hile [d]isproportionate impact is not irrelevant," we have said that "it is generally *not dispositive*, and there must be other evidence of a discriminatory purpose." *Carrillo-Lopez*, 68 F.4th at 1141 (emphasis added) (simplified). And the majority ignores that the district court did consider impact of the laws on minorities. Perhaps because it doesn't fit its narrative, the majority ignores that the district court found that "Plaintiffs have not shown that the Voting Laws will have *any* significant discriminatory impact." *Mi Familia Vota II*, 719 F. Supp. 3d at 1016 (emphasis

added). The district court continued on to find the other evidence of intent similarly unconvincing. *See id.* at 1016–17. So although the majority claims the district court wrongly "view[ed] evidence of the Voting Laws' disparate impact alone" or "dispositve[ly]," it's not clear what more the district court could have done. Maj. Op. at 72.

In sum, the district court properly considered all relevant evidence, piece by piece, but ultimately concluded that the record only presented a weak array of circumstantial evidence. Because these findings are plausible, the majority is left to accuse the district court of "viewing each piece of evidence in isolation" and failing to consider the "totality of the circumstances." *Id.* at 73. But this criticism is just sleight of hand. The district court *did* view the evidence in context—and concluded that it was unpersuasive. Simply, the majority wants to equate any legislative action to prevent foreign citizens from voting in Arizona's elections with evidence of discriminatory intent. In doing so, the majority essentially flips the strong presumption of good faith we grant to legislative action and requires the State to *disprove* any discriminatory motive. This is inconsistent with the law and the facts.

IX.

Waiver of Legislative Privilege

The district court ordered Warren Petersen, President of the Arizona Senate, and Ben Toma, Speaker of the Arizona House of Representatives, to sit for depositions and produce privileged documents. On appeal, the Arizona legislators challenge these orders as violations of legislative privilege. *See Lee v. City of Los Angeles*, 908 F.3d 1175, 1187–88 (9th Cir. 2018)

(explaining that "plaintiffs are generally barred from deposing local legislators, even in extraordinary circumstances") (simplified). But their challenge is moot.

Why? Because they have already complied with the discovery orders. So even if the district court were wrong to compel the legislators to provide evidence for trial, that trial already happened and a favorable ruling wouldn't help the legislators. I understand that we denied the legislators the opportunity to appeal the order immediately and they faced sanctions if they didn't comply with the district court's order. But in law as in life, sometimes there are no "take backs." It's straightforward that "[c]ompliance with a discovery order renders moot an appeal of that order." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1479 (9th Cir. 1992); *see also Fraunhofer-Gesellschaft zur Förderung der angewandten Forschung E.V. v. Sirius XM Radio Inc*., 59 F.4th 1319, 1322 (D.C. Cir. 2023) (noting this rule is the consensus rule of the circuits). Because we cannot redress the legislators' injury, Article III bars us from hearing their claim. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000).

X.

Conclusion

I join the judgment on three issues. First, I agree with enjoining the "reason to believe" provision of Arizona Revised Statute § 16-165(I) under the Different Standards, Practices, and Procedures Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(A). Second, I agree that the citizenship-checkbox requirement under Arizona Revised Statute § 16-121.01(A) violates the Materiality Provision of the Civil Rights Act, 52

U.S.C. § 10101(a)(2)(B), when accompanied by satisfactory proof of citizenship. And third, I agree that the appeal of the district court's discovery order on Arizona's legislative leaders is moot.

I strongly disagree with the judgment on all other issues. Except as noted above, we should have vacated this sweeping injunction.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-3188

D.C. No. 2:22-cv-00509-SRB
District of Arizona, Phoenix

MI FAMILIA VOTA; et al.,

Plaintiffs - Appellees,

v.

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

Defendants - Appellees,

WARREN PETERSEN, President of the Arizona Senate; et al.,

Intervenor-Defendants - Appellants.

ORDER

No. 24-3559
D.C. No. 2:22-cv-00509-SRB
District of Arizona, Phoenix

MI FAMILIA VOTA; et al.,

Plaintiffs - Appellees,

v.

KRIS MAYES and STATE OF ARIZONA,

Defendants - Appellants.

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No. 24-4029
D.C. No. 2:22-cv-00509-SRB
District of Arizona, Phoenix

———

PROMISE ARIZONA and SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT,

Plaintiffs - Appellants,

and

MI FAMILIA VOTA; et al.,

Plaintiffs,

v.

ADRIAN FONTES; et al.,

Defendants,

and

KRIS MAYES and STATE OF ARIZONA,

Defendants - Appellees,

WARREN PETERSEN and REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendants - Appellees,

and

STEVE MONTENEGRO, Speaker of the Arizona House of Representatives,

Intervenor-Defendant - Appellant.

Filed September 22, 2025

Before: Kim M. Wardlaw, Ronald M. Gould, and Patrick J. Bumatay, Circuit Judges.

Order;

Dissent by Ryan D. Nelson, joined by Consuelo M. Callahan, Mark J. Bennett, | Kenneth K. Lee, Patrick J. Bumatay, and Lawrence VanDyke, Circuit Judges, and with whom Sandra S. Ikuta, Circuit Judge, concurs as to Part II;

Dissent by Daniel P. Collins, Circuit Judge;

Dissent by Daniel A. Bress, Circuit Judge, joined by Bridget S. Bade, Danielle J. Forrest, Circuit Judges

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SUMMARY*

Voting Rights

The panel denied petitions for panel rehearing and for rehearing en banc in a case in which the panel affirmed in part and vacated in part the district court's rulings pertaining to two Arizona laws regulating voter registration that require, among other things, heightened proof of citizenship.

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Dissenting from the denial of rehearing en banc, Judge R. Nelson, joined by Judges Callahan, Bennett, Lee, Bumatay, and VanDyke, and with whom Judge Ikuta concurs as to Part II, wrote that the panel majority opinion will prevent states from deterring voter fraud. In Part II, Judge R. Nelson stated that the panel ignored both Supreme Court and Ninth Circuit precedent when it upheld the district court's injunction enjoining Arizona's documentary proof of citizenship (DPOC) requirement for voters registering using Arizona's state form, despite the Supreme Court's indication that Arizona's requirement was lawful in this case. In Part III of his dissent, Judge R. Nelson wrote that the panel majority erred by holding that the National Voter Registration Act preempted Arizona's DPOC requirement to vote by mail and to vote for presidential elections. In Part IV of his dissent, Judge R. Nelson stated that the panel majority created a circuit split with the Sixth Circuit.

Dissenting from the denial of rehearing en banc, Judge Collins stated that, as to the issues on which rehearing en banc had been sought in the petitions, his views are in general accord with those expressed in Judge Bumatay's panel dissent.

Dissenting from the denial of rehearing en banc, Judge Bress, joined by Judges Bade and Forrest, wrote that, at a minimum, the court should have re-evaluated the panel majority's incorrect and consequential decision upholding the injunction of Arizona's documentary proof of citizenship requirement for state-form applicants, the portion of the injunction that the Supreme Court already stayed.

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ORDER

Judge Wardlaw and Judge Gould voted to deny both the petitions for rehearing *en banc*. Judge Bumatay voted to grant both the petitions for rehearing *en banc.* A judge of the court requested a vote on whether to rehear the matter *en banc*. The matter failed to receive a majority of the votes of the active judges in favor of *en banc* consideration. Fed. R. App. P. 35. Judge Desai did not participate in the deliberations or vote in this case. The petitions for rehearing *en banc*, Dkt. Nos. 261 and 262, are **DENIED**.

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R. NELSON, Circuit Judge, with whom CALLAHAN, BENNETT, LEE, BUMATAY, VANDYKE, Circuit Judges, join, and with whom IKUTA, Circuit Judge, concurs as to Part II, dissenting from the denial of rehearing en banc

Republican government serves as the keystone of the Constitution. *See* U.S. Const. art. IV, § 4. In such a government a majority of citizens who lawfully vote determines who represents us in the White House, Congress, and state legislatures. Courts must therefore defend the franchise—both by protecting the right of all citizens to vote, and by ensuring non-citizens do not vote. Arizona passed laws to protect the franchise. The panel majority upheld an injunction on those laws. Sadly, the panel majority opinion undermines republican government, shreds federal-

ism and the separation of powers, and imperils free and fair elections. We should have reheard this case en banc to correct these errors.

Most egregiously, the panel majority ignored both Supreme Court and Ninth Circuit precedent when it upheld the district court's injunction enjoining Arizona's documentary proof of citizenship (DPOC) requirement for voters registering through Arizona's state form. It reversed a motions panel before it even heard the merits of the case. And it upheld the district court's injunction despite the Supreme Court's indication that Arizona's requirement was lawful in this very case. *See Republican Nat'l Comm. v. Mi Familia Vota*, 145 S. Ct. 108 (2024) ("*RNC*"). And the Supreme Court has cited Arizona's prior citizenship documentation requirement in dicta as the example of a permissible state form requirement. *See Arizona v. Inter Tribal Council of Az., Inc.*, 570 U.S. 1, 12 (2013) ("*ITCA*"). These are bold judicial moves by the majority and warrant a high burden to justify such departures. The majority failed this test and got fundamental legal principles wrong.

The majority opinion mangles our circuit's analysis of National Voter Registration Act (NVRA) pre-emption issues. In enacting the NVRA, "Congress only sought to regulate the times, places, and manner of electing Representatives and Senators" in a limited capacity. *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995). Congress could not completely abrogate the "considerable freedom" states have "to design their own election laws." *Bennett v. Yoshina*, 140 F.3d 1218, 1225 (9th Cir. 1998) (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)). The majority misinterprets the NVRA to preempt state law when it either could not do so (i.e., in Presidential elect-

ions), *see* U.S. Const. art. II, § 1, cl. 2, 4, or does not do so (i.e., in Congressional elections), *see* U.S. Const. art. I, § 4, cl. 1.

Finally, the majority opinion creates a circuit split with the Sixth Circuit, which correctly held that the NVRA does not "bar the removal of names from the official [state voter rolls] of persons who were ineligible and improperly registered to vote in the first place." *Bell v. Marinko*, 367 F.3d 588, 591–92 (6th Cir. 2004). The majority interprets 52 U.S.C. § 20507 to protect such individuals, placing us on the wrong side of a circuit split. *See Mi Familia Vota v. Fontes*, 129 F.4th 691, 714–17 (9th Cir. 2025).

The majority opinion will prevent states from deterring voter fraud. In doing so, it undermines the fundamental right of citizen voters to cast our ballots to elect a "government of the people, by the people, for the people." President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863). I dissent.

I

A

This case arises from pre-enforcement challenges to two Arizona laws enacted in 2022—House Bills 2492 and 2243 (Voting Laws). The Arizona legislature implemented modest changes to Arizona's voting rules. H.B. 2492 made these changes: (1) if an Arizonan registering using the federal registration form1 did so without DPOC (such as a passport), that voter could still be registered but could not vote in

[1] Arizona uses a dual-track voter registration system. A voter can register either through the federal form created by the Election Assistance Commission, 52 U.S.C. § 20508(a)(2), or the state form prescribed by Arizona law.

the Presidential election, or vote by mail; (2) state form applications without DPOC were to be rejected; and (3) state form applicants were to disclose their birthplace and provide documentary proof of residence in Arizona. *See* Ariz. Rev. Stat. Ann. §§ 16-121.01(D)–(E), 16-127(A), 16-121.01(C), 16-121.01(A), 16-123.

H.B. 2243 made these changes: (1) Arizona county recorders, each month, would conduct routine checks to ensure registered voters were in fact citizens; (2) those recorders would provide notice to flagged individuals by mail asking them to confirm their eligibility to vote in the county, and (3) those recorders would only cancel registrations for persons who do not respond after thirty-five days. *See id.* § 16-165(A)(10), (G)–(K).

The district court consolidated eight pre-enforcement challenges against the Voting Laws and held a bench trial. *See Mi Familia Vota v. Fontes*, 719 F. Supp. 3d 929, 947 (D. Ariz. 2024) ("*Fontes*"). The district court enjoined several elements of H.B. 2492, holding that the NVRA preempted restrictions on registration in presidential elections. *See id.* at 951 n. 12; 52 U.S.C. § 20505. It enjoined H.B. 2492's mandate to reject state forms without accompanying DPOC, citing a preexisting consent decree in *League of United Latin Am. Citizens of Ariz. v. Reagan*, No. 2:17-cv-4102 (D. Ariz. 2018), Dkt. No. 37 (the LULAC consent decree). *See Fontes*, 719 F. Supp. 3d at 1015. It held that H.B. 2492's checkbox provision, and its requirement that individuals who register to vote using the Arizona state form disclose their birthplace violated the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B). *See id.* at 1018. The district court also enjoined H.B. 2492's proof-of-

location-of-residence requirement as violating the NVRA. *See id.* at 996–97.

The district court also enjoined one element of H.B. 2243. It held that providing for the investigation and removal of noncitizen voters from Arizona's registration system violated the NVRA, 52 U.S.C. § 20507(b). *See id.* at 999.

A motions panel partially stayed the district court's injunction. *Mi Familia Vota v. Fontes*, No. 24-3188, 2024 WL 3629418, at *1 (9th Cir. July 18, 2024) (Motions Panel Order). The Motions Panel Order stayed the district court's injunction barring enforcement of Arizona Revised Statues § 16-121.01(C), which required voters using the Arizona state form to provide DPOC. *Id.* Two weeks later, a merits panel reversed the motions panel over a dissent by Judge Bumatay. *Mi Familia Vota v. Fontes*, 111 F.4th 976, 980 (9th Cir. 2024).

The Supreme Court reversed the merits panel and stayed the district court's injunction barring enforcement of § 16-121.01(C). *RNC*, 145 S. Ct. at 108–09. Three Justices—Thomas, Alito, and Gorsuch—would have stayed the district court's injunction in full. *Id.*

B

On the merits, the majority affirmed vast swaths of the district court's injunction. First, the majority upheld the district court's ruling on the LULAC consent decree— despite the Supreme Court staying that portion of the district court's injunction. *Mi Familia Vota*, 129 F.4th at 717–20.

Second, the majority upheld the district court's analysis of the NVRA claims. The majority focused on Sections 6, 7, 8, and 9 of the NVRA. *See Mi Familia*

Vota, 129 F.4th at 710–17. Section 6 states that each "State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission." 52 U.S.C. § 20505(a)(1). Section 9 permits states to also use their own state forms to register voters for federal elections, but such forms "may require only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 20508(b)(1). Section 7 explains that any voter registration agency "that provides service or assistance" in "conducting voter registration" shall distribute the federal voter registration form or its "equivalent" state form. *Id.* § 20506(a)(6)(A)(i)–(ii).

The majority held that Arizona's requirement to provide DPOC to vote by mail conflicted with Section 6 because doing so meant Arizona was not "accept[ing] and us[ing]" the federal form as sufficient. *Mi Familia Vota*, 129 F.4th at 710; *see* 52 U.S.C. § 20508(a)(1). The majority also held that Section 6 preempted Arizona's requirement for DPOC in presidential elections. *Mi Familia Vota*, 129 F.4th at 711–12.

Finally, the majority held Arizona's periodic removals of ineligible individuals from the voter rolls unlawful. It construed 52 U.S.C. § 20507(c)(2)(A) to protect applicants who were never eligible to register in the first place. *Mi Familia Vota*, 129 F.4th at 714–17; *see* Ariz. Rev. Stat. Ann. § 16–165(A)(10), (G)–(K).2

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[2] Several other holdings by the panel majority are troubling, including its conclusions on the Materiality Provisions of the

Judge Bumatay dissented. He noted that the majority erred because: (1) Arizona's state form requirement could not be limited by the LULAC consent decree; (2) the DPOC requirement to vote by mail was a restriction on voting rather than on registering to vote; (3) the NVRA does not cover Presidential elections; and (4) the periodic removal provisions were lawful as 52 U.S.C. § 20507(c)(2)(A) only protects applicants who were initially eligible to vote. *See Mi Familia Vota*, 129 F.4th at 745–50, 741–45, 733–41, 752–57 (Bumatay, J., dissenting).

II

Despite the Supreme Court's stay, the majority upheld the injunction on Arizona's requirement for DPOC with its state form. The majority erred by holding: (1) the LULAC consent decree independently invalidated the requirement; and (2) the requirement was preempted by the NVRA.

A

Our government is "strictly republican," for it "is evident that no other form would be reconcilable with the genius of the people of America." The Federalist No. 39 (James Madison). Consent decrees subvert republican government.

The majority wrongly held that Arizona could not enact Arizona Revised Statutes § 16-121.01(C) be-

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Civil Rights Act, its holding on the proof of residency requirement under H.B. 2492, its analysis of the Voting Laws' list maintenance provisions, its analysis of organizational and associational standing for certain non-profit Appellees, and its decision to vacate the district court's factual finding that the Voting Laws were not motivated by discriminatory intent. *See Mi Familia Vota*, 129 F.4th at 732–770 (Bumatay, J., dissenting).

cause it violated the LULAC consent decree. *Mi Familia Vota*, 129 F.4th at 717–20. Section 16-121.01(C) mandates that individuals registering with the state form provide DPOC. The majority invalidated that requirement because the LULAC consent decree was a "binding final judgment[] that remain[s] in force permanently." *Mi Familia Vota*, 129 F.4th at 718.

The majority opinion misses the point. True, the LULAC consent decree remains in force as resolving that specific litigation. But the decree cannot bind future legislative action that contradicts the decree. And a consent decree cannot forcefully prevent Arizona's executive branch officials from executing duly passed laws subsequently enacted by the Arizona legislature.

While many consent decrees pose no problems under Ninth Circuit caselaw, "a narrow but important class of consent decrees, if judicially enforced, would violate the structural provisions of the Constitution by denying future executive [and legislative] officials the policymaking authority vested in them by the Constitution and laws." Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 298. Consent decrees that "bind state and local officials to the policy preferences of their predecessors" may "'improperly deprive future officials of their designated legislative and executive powers.'" *Horne v. Flores*, 557 U.S. 433, 449 (2009) (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)).

Applying consent decrees to future legislative action poses serious constitutional concerns. Consent decrees draw their force from "the agreement of the

parties, rather than the force of the law upon which [a] complaint was originally based." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 522 (1986). Courts do not determine whether "the plaintiff established his factual claims and legal theories in litigation." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). "Thus, a court may enter a consent decree against a government defendant without finding that a statutory or constitutional violation has occurred, inquiring into the precise legal rights of the parties, or reaching and resolving the merits of the claims or controversy." Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. Pa. J. Const. L. 637, 647–48 (2014) (quotation omitted) (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992); *Armour & Co.*, 402 U.S. at 682–83) (cleaned up).

Given these concerns, we have created a common-sense rule to determine when consent decrees that limit government defendants can bind subsequent state legislatures and executives. Neither the district court nor the panel majority can "supersede [Arizona's] law," by citing a consent decree "unless [Arizona's law] conflicts with any federal law." *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997). The majority erred in concluding that the consent decree alone could nullify any portion of the subsequently enacted Voting Laws. That holding conflicts with *Volpe*, which correctly holds that a violation of a consent decree is not an independent basis to bar subsequent state law.

Volpe's holding is based on fundamental principles. Applying government defendant consent decrees

beyond the case in which they are entered violates the strictures of Article III and raises grave separation of powers concerns. The judicial power only extends to "Cases" and "Controversies." U.S. Const. art III, § 2, cl. 1. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," we do so only "to particular cases." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Without a case or controversy, we are powerless to decide questions of law under the Constitution. *Id.*

This principle has stood firm since the inception of our Republic. In 1793, in the wake of hostilities between England and France, President Washington issued a Proclamation of Neutrality between the warring powers. *See* President George Washington, *Neutrality Proclamation* (Apr. 22, 1793), *in* Founders Online, https://founders.archives.gov/documents/Washington/05-12-02-0371. Months later, Secretary of State Jefferson sent a letter to the Supreme Court, requesting the Justices to provide legal advice on twenty-nine questions relating to the United States' legal obligations about the ongoing conflict. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 50–52 (7th Ed. 2015) (reproducing the letter).

Breaking from pre-constitutional practice, the Supreme Court declined to entertain Secretary Jefferson's questions. *Id.* Chief Justice John Jay wrote to President Washington:

> The lines of separation drawn by the Constitution between the three departments of the government—their being in certain respects checks upon each other—and our being judges of a court in the last resort—are

> considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to; especially as the power given by the Constitution to the President of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly limited to the *executive* departments.

Id. (reproducing the letter). So when federal courts declare law outside a particular case, they act "extrajudicially" (i.e., outside the judicial power) and erode "[t]he lines of separation drawn by the Constitution between the three departments of the government." *Id.*

The Supreme Court has thus constructed modern justiciability doctrines to ensure the judiciary acts within its constitutional authority. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–61 (1992). In applying those doctrines, judges must also consider whether they are properly exercising the judicial power as originally understood, expounding on the law only through defined cases or controversies. *Marbury*, 5 U.S. (1 Cranch) at 177.

Applying consent decrees to future cases falls outside the judicial power. When entering consent decrees, federal courts do "not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy." *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (citation omitted). When a government defendant and a litigant form a consent decree, they are not adverse. And the "judicial power, as we have seen, is the right to determine actual controversies arising *between adverse litigants*." *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (emphasis added).

When "both litigants desire precisely the same result," as with consent decrees, there is "no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971). Such decrees encourage the government to collude with friendly actors and achieve legal results they would be unable to reach normally. *See, e.g.*, *Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1189–91 (10th Cir. 2008).

And unlike settlement agreements which are private contracts courts can lawfully enforce, *see, e.g., U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 21–22, 28–29 (1994), the enforcement mechanism of consent decrees demonstrates their constitutional limits. While violation of a settlement agreement is remedied through a separate breach-of-contract suit, "noncompliance with a consent decree is enforceable by citation for contempt of court." *Local No. 93*, 478 U.S. at 518. We treat the violation of a consent decree as if the violator has broken the law, even though that "law" was not decided in the context of a case or controversy as the judicial power requires. *See id.*; *Marbury*, 5 U.S. (1 Cranch) at 177.

By giving consent decrees the force of law, we act extrajudicially, doing greater damage to the separation of powers than by rendering advisory opinions. At least when Secretary Jefferson requested an advisory opinion, he expected the Supreme Court to say "what the law is." *Compare* Fallon, Jr. et al., *supra*, at 50–52 *with Marbury*, 5 U.S. (1 Cranch) at 177. When entering consent decrees, the parties tell a court what they want the law to be, and the court rubber stamps their fancies with the imprimatur of law. *Armour & Co.*, 402 U.S. at 682.

By independently relying on the LULAC Consent Decree, the majority exceeds the judicial power assigned to it by the Constitution, defacing the carefully constructed separation of powers designed by our eminent forebears.

B

The majority separately held that the NVRA preempts Arizona's DPOC requirement for state form applicants in federal elections. *Mi Familia Vota*, 129 F.4th at 719. But the NVRA does not conflict with Arizona's requirement. And by extension, no federal law nor the LULAC consent decree prevents Arizona from enforcing the requirement.

Under the NVRA each "State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 20508(a)(2) of this title for the registration of voters in elections for Federal office." 52 U.S.C. § 20505(a)(1). The Act also states, however, that "[i]n addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office." *Id.* § 20505(a)(2).

Under § 20508(b) a registration form "may require only such identifying information . . . and other information . . . as is *necessary* to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 20508(b)(1) (emphasis added). Further, such forms "shall include a statement that—(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and (C) requires the signature of the applicant, under penalty of perjury." *Id.* § 20508(b)(2).

The key question then is whether Arizona's DPOC requirement is "necessary" to allow state officials to assess the eligibility of applicants and administer voter registration. The majority concluded that the requirement was not "necessary" because "necessary" in § 20508(b)(1) means "essential." *Mi Familia Vota*, 129 F.4th at 719. And any DPOC requirement cannot be essential because the state form's checkbox requirement supplies proof of citizenship by attestation. *Id.* The majority gets it wrong.

While "necessary" can mean "essential," the majority ignores that "necessary" also has another more common meaning. In many statutory and constitutional contexts, "necessary" means "needful." *See Necessary*, Merriam-Webster Unabridged Dictionary, https://unabridged.merriam-webster.com/unabridged/necessary; *Needful*, Merriam-Webster Unabridged Dictionary, https://unabridged.merria m-webster.com/unabridged/needful; *see also* Merriam-Webster's Collegiate Dictionary, 829 (11th ed. 2005) (defining "needful" as "necessary"). In interpreting the Necessary and Proper Clause, for example, the Supreme Court has rejected reading "necessary" to mean essential. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414–20 (1819).

And between these two meanings, the NVRA is better read as authorizing states to create state forms that collect information needful "to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C.

§ 20508(b)(1). In "ordinary speech, the term [necessary] is often used more loosely to refer to something that is merely important or strongly desired" rather than "[i]n the strictest sense of the term" where "something is 'necessary' only if it is essential." *Ayestas v. Davis*, 584 U.S. 28, 44 (2018). Between the two readings, courts are better off leaning towards "necessary" meaning "needful" rather than "essential," especially when analyzing statutes granting powers to the states or the federal government (unless the statutory text demands the stricter meaning).

The NVRA's statutory scheme strongly suggests that "necessary" in § 20508(b)(1) carries the more lenient meaning. The relevant text allows states to require identifying information "*necessary to enable*" a state election official to assess the eligibility of an application. 52 U.S.C. § 20508(b)(1) (emphasis added). Under the principle of *noscitur a sociis*, "a word is known by the company it keeps." *Yates v. United States*, 574 U.S. 528, 543 (2015). And "necessary" appears just before "to enable" in the text.

This provision of the NVRA actively empowers states to create forms that enable state election officials to determine voter registration eligibility by giving them information necessary to that endeavor. Under the majority's reading of "necessary" (i.e., "essential"), the statute would not "enable" state election officials. Rather than read the provision as a statutory grant, the majority's reading of "necessary" actively *disables* states and state election officials. If states must keep second guessing if any information they collect is truly essential, then the statute turns from a provision enabling them to collect useful information, into a manacle that subjects state forms

to onerous litigation second guessing information unequivocally useful in determining voter registration eligibility.

Taken to its logical extreme, states could never collect *any* information under (b)(1) because (b)(2) mandates that state forms include provisions in which applicants attest that they are eligible. An attestation under (b)(2) theoretically covers all eligibility information, rendering any information collected under (b)(1) inessential.

By giving "necessary" in the NVRA this meaning, the majority reads out § 20508(b)(1). But "[t]hese words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936). The only reading of "necessary" in § 20508(b)(1) that does not mangle § 20508 is to conclude that "necessary" means "needful." And no one can dispute that DPOC is needful "to enable" a "State election official to assess the eligibility of [an] applicant" to register to vote. 52 U.S.C. § 20508(b)(1).

The majority then posits that Section 7 of the NVRA also prevents a state from requiring DPOC with its state form. *Mi Familia Vota*, 129 F.4th at 720. But this argument also lacks merit.

The majority points to § 20506(a)(6)(A)(ii), providing that a state form can register voters only "if it is equivalent to the form described in section 20508(a)(2) of this title." That provision states that the "Election Assistance Commission—in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office." 52 U.S.C. § 20508(a)(2).

The majority misconstrued these two provisions. Under § 20506(a)(6)(A)(ii), the state form had to be "equivalent" to the federal form. *Mi Familia Vota*, 129 F.4th at 720. The majority concluded that "the state form is not equivalent to the federal form because the state form has unnecessary additional requirements of DPOC, [documentary proof of residence], and birthplace." *Id.* But "equivalent" in § 20506(a)(6)(A)(ii) is better read to mean similar in function or effect rather than identical. *Mi Familia Vota*, 129 F.4th at 750–51 (Bumatay, J., dissenting). Under that reading, Arizona's state form passes muster.

The majority's reading, which implies that state forms need to match federal forms or be rendered not "equivalent" under § 20506(a)(6)(A)(ii), does not track Supreme Court precedent. In *ITCA*, the Supreme Court explained what the NVRA permits and proscribes. 570 U.S. at 12, 20. The Supreme Court explained that states could not mandate DPOC above what the federal form required to register federal form applicants. *Id.* at 20. But "state–developed forms may require information the Federal Form does not." *Id.* at 12. And the example the Court gave of such additional information was that "Arizona's registration form includes . . . proof-of-citizenship" documentation as information it collects. *Id.*

ITCA thus shows that states can require DPOC with state registration forms without breaching the NVRA. *Id.* Such a requirement does not render a state form nonequivalent to the federal form. *Id.* Although *ITCA* dealt with whether DPOC was allowed with federal form registration, the colloquy about the state form issue was "considered dicta of the Supreme Court," entitled to "greater weight and

deference" than the majority gave it. *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1131 (9th Cir. 2010).

Our caselaw also confirms that states may require DPOC with state forms. The NVRA does not have "a proscription against states requiring documentary proof of citizenship." *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007). But the majority shrugged off *Gonzalez*. *Mi Familia Vota*, 129 F.4th at 719. Because *Gonzalez* was decided at the preliminary injunction stage, the majority felt it was not bound by the case. *Id.*

But this conclusion misstates the law. A published opinion, even at the preliminary injunction stage, *does* bind future panels if its conclusions are on pure issues of law. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 682–83 (9th Cir. 2021) (Fernandez, J., concurring); *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007). So the majority not only ignored Supreme Court precedent, but binding circuit precedent as well. *See RNC*, 145 S. Ct. 108.

III

The majority held that the NVRA preempted the Voting Laws in two critical ways. It held that Arizona's DPOC requirement to vote by mail was preempted. *Mi Familia Vota*, 129 F.4th at 710–11. It also held that Arizona's DPOC requirement for presidential elections was preempted. *Id.* at 711–12. Both holdings are wrong.

A

The majority upheld the district court's injunction on the portion of H.B. 2492 that required citizenship documentation to vote by mail. Citing conflict preemption, it concluded that the requirement flouted 52 U.S.C. § 20505(a)(1)'s requirement that states "accept and use" the federal form. *Mi Familia Vota*, 129 F.4th at 710. But this conclusion runs headlong into Supreme Court precedent.

In *ITCA* the Supreme Court held that the requirement that states "accept and use" the federal form meant that requiring DPOC to *register* a federal form voter was impermissible. 570 U.S. at 19–20; *see* 52 U.S.C. § 20508(b)(1). But registering to vote and casting a vote by mail differ. Once Arizona *registers* people to vote, it can require them to present identification before they *do vote*.

For example, the Supreme Court has upheld a state law that requires a citizen voting on election day to present photo identification before casting a ballot. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 185–86, 203–04 (2008). In *Crawford*, the Court recognized that states had to "reexamine their election procedures" to comport with the

NVRA and still upheld a state law requiring photo identification to vote. *Id.* at 192, 203–04. Instead, the Supreme Court explained that such regulations must simply withstand scrutiny under the *Anderson-Burdick* balancing test. *See id.* at 190; *see also Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick*, 504 U.S. 428. Under that test, the same state interest in "deterring and detecting voter fraud," that led the Supreme Court to uphold DPOC requirements for in-person voting, also counsels upholding Arizona's

DPOC requirement for mail-in voters using the federal form. *Crawford*, 553 U.S. at 191, 203–04. Since determining voter eligibility aims to deter voter fraud, Arizona can lawfully require DPOC for mail-in ballots as with voting in person. *Id.* at 185–86, 191, 203–04.[3]

B

Next, the majority held that requiring DPOC in presidential elections is preempted by the NVRA. *Mi Familia Vota*, 129 F.4th at 711. According to the majority, 52 U.S.C. § 20505(a)(1)'s "accept and use" language preempts Arizona Revised Statutes § 16-127(A)(1)'s proof of citizenship requirement. But regulating who may vote in presidential elections falls solely to the states.

The Elections Clause of Article I empowers Congress to legislate on federal elections by regulating the "Times, Places, and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. The Clause applies only to the election of Senators and Representatives. For presidential elections, the Electors Clause explains that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." U.S. Const. art. II, § 1, cl. 2. Congress's only role in the process comes from the Chusing Clause which does not govern voter eligibility requirements. *See* U.S. Const. art. II, § 1, cl. 4.

The majority concludes that the Supreme Court has given Congress broad authority to regulate

[3] The logic underlying *Crawford* also demonstrates why the majority's analysis of obstacle preemption fails since Voter ID laws deterring voter fraud do not impede the NVRA's underlying purposes. *See Mi Familia Vota*, 129 F.4th at 711.

presidential elections. *Mi Familia Vota*, 129 F.4th at 712. But the majority overreads *Burroughs v. United States*, 290 U.S. 534, 544 (1934). *Burroughs* involved an indictment where the petitioners argued that the Federal Corrupt Practices Act (FCPA) contravened "section 1, art. 2, of the Federal Constitution, providing for the appointment by each state of electors." 290 U.S. at 541–42. The Court upheld the FCPA, but did so narrowly since it "in no sense invades any exclusive state power." *Id.* at 545. The Court explained that "[w]hile presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." *Id.* (cleaned up). Thus, Congress had the "power to pass appropriate legislation to safeguard [a presidential election] from the improper use of money to influence the result." *Id.*

Burroughs can be read to mean that Congress can legislate in some cases to ensure presidential elections aren't improperly corrupted through bribes or violence. *Id.* at 544– 48. It does not suggest, as the majority concludes, that Congress, rather than the states, can regulate who gets to vote to choose electors. *Mi Familia Vota*, 129 F.4th at 712. Under both the text of the Electors Clause and *Burrough*s, it is the "power of a state to appoint electors [and to determine] the manner in which their appointment shall be made." 290 U.S. at 544. Requiring proof of citizenship to vote falls squarely within that power. Unlike in *Burroughs*, the majority's application of the NVRA to invalidate H.B. 2492's requirement of DPOC "invades" Arizona's "exclusive state power" to regulate the manner of choosing electors. *Id.* at 545.

Supreme Court precedent confirms this conclusion. "[I]n choosing Presidential electors, the Clause leaves it to the legislature exclusively to define the method of effecting the object." *Moore v. Harper*, 600 U.S. 1, 27 (2023) (cleaned up). Both "the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892). Arizona can both choose to select its electors through popular elections and determine who is eligible to vote in them. *Id.*

IV

Finally, the majority created a circuit split with the Sixth Circuit in *Bell*, 367 F.3d at 591–92 by upholding the district court's injunction on Arizona Revised Statutes § 16–165(A)(10), (G)–(K), the provisions of H.B. 2243 that task county recorders with periodically conducting citizenship checks and removing ineligible applicants from the rolls.

The majority found that the periodic removal provisions conflicted with 52 U.S.C. § 20507(c)(2)(A). *Mi Familia Vota*, 129 F.4th at 714–17. That portion of the NVRA states that a "State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C § 20507(c)(2)(A). And since, in the majority's view, Arizona's periodic cancellation does not rely on "individualized information or investigation, but rather comparisons to databases," "[i]t is a systematic removal program [that] violates the 90-day Provision because it permits systematic cancellation of registrations within 90 days preceding

a federal election." *Mi Familia Vota*, 129 F.4th at 716 (cleaned up).

But § 20507(c)(2)(A) covers "ineligible voters," not ineligible applicants. *See Mi Familia Vota*, 129 F.4th at 752–57 (Bumatay, J., dissenting). Section 20507(c)(2)(A) refers to three sets of people. In the pre-registration process it refers to applicants, then once eligible applicants are registered, they are known as registrants, and finally the statute calls on states to remove ineligible voters (i.e., a subset of registrants) from the rolls. *See* 52 U.S.C. §§ 20507(a)(1)(A)–(D), 20507(a)(3), 20507(a)(4). "Ineligible voters" in § 20507(c)(2)(A) comprise individuals eligible to vote at the time of their registration who become ineligible to vote subsequently. *Id.* They are not individuals who were never eligible at all, the target of H.B. 2243.

And the majority opinion conflicts with the Sixth Circuit's holding in *Bell*, 367 F.3d at 591–92. When analyzing the voter removal provisions of the NVRA, the Sixth Circuit held that "[i]n creating a list of justifications for removal, Congress did not intend to bar the removal of names" for "persons who were ineligible and improperly registered to vote in the first place." *Id*. If the NVRA were read that way then "we would effectively grant, and then protect, the franchise of persons not eligible to vote." *Id.* at 592. The NVRA, enacted to help states "protect the integrity of the electoral process," does not mandate such a result. 52 U.S.C. § 20507(b). The Sixth Circuit got it right, and the panel majority did not.

Moreover, given that Appellees brought a facial pre-enforcement challenge (and no as applied challenge), they needed to show "no set of circumstances exists under which the Act would be valid." *United*

States v. Salerno, 481 U.S. 739, 745 (1987). The removals are valid against anyone who was ineligible at registration. And they are valid for removals done prior to 90 days before an election. *See* 52 U.S.C. § 20507(c)(2)(A) (applying only to removals within the 90-day window). Those applications alone undermine the facial pre-enforcement challenge.

V

The majority opinion is profoundly wrong; it ignores Supreme Court precedent and our own. Much worse, it skirted Supreme Court direction in this case and again in a case with nearly identical issues. And the opinion makes our elections less safe—our country less free.

The rule of law is vital to the American experiment. It requires us as inferior courts to respect the Court that the Constitution hails as Supreme. U.S. Const. art. III § 1, cl. 1. Each time this court shirks the Supreme Court with wrong legal analysis we erode the rule of law, inviting "anarchy" into our jurisprudence. *Nat'l Inst. of Health v. Am. Pub. Health Ass'n*, No. 25A103, 2025 WL 2415669, at *3 (U.S. Aug. 21, 2025) (Gorsuch, J., concurring in part). And if it continues, "law in time will sign its epitaph." *Abrego Garcia v. Noem*, No. 25-1404, 2025 WL 1135112, at *3 (4th Cir. Apr. 17, 2025). Today our court does a grave injustice to republican government. And so, I must dissent.

COLLINS, Circuit Judge, dissenting from the denial of rehearing en banc:

As to the issues on which rehearing en banc has been sought in the pending petitions, my views are in general accord with those expressed in Judge Bumatay's panel dissent, which details the panel majority's many errors. *See Mi Familia Vota v. Fontes*, 129 F.4th 691, 732 (9th Cir. 2025) (Bumatay, J. dissenting). We should have reconsidered en banc the panel majority's egregiously flawed decision in this important case, and I dissent from our failure to do so.

BRESS, Circuit Judge, with whom BADE and FORREST, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I respectfully dissent from the denial of rehearing en banc. At a minimum, we should have reevaluated the panel majority's incorrect and consequential decision upholding the injunction of Arizona's documentary proof of citizenship requirement for state-form applicants, Ariz. Rev. Stat. Ann. § 16-121.01(C)—the portion of the injunction that the Supreme Court already stayed. *Republican Nat'l Comm. v. Mi Familia Vota*, 145 S. Ct. 108 (2024).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-22-00509-PHX-SRB

MI FAMILIA VOTA, *et al.*,

Plaintiffs,

v.

ADRIAN FONTES, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, *et al.*,

Defendants.

AND CONSOLIDATED CASES

AMENDED ORDER[*]

This case arises out of Plaintiffs' challenge to the Arizona Legislature's passage of H.B. 2492 and H.B. 2243 (collectively, the "Voting Laws"). The Court conducted a 10-day bench trial, which concluded on December 19, 2023. Having considered the evidence and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

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[*] The Court's Amended Order amends the Court's conclusion at page 108, lines 27 to 28 that "Arizona may conduct SAVE checks on registered voters who have provided DPOC" to instead read that "Arizona may conduct SAVE checks on registered voters who have not provided DPOC."

I. FINDINGS OF FACT[1]

A. Arizona Election Law Background

To be qualified to vote in Arizona, a person must be a United States citizen, a resident of Arizona, and at least eighteen years of age. Ariz. Const. art. VII, § 2.

1. Voter Demographics

As of the 2020 Census, Arizona had a total population of 7,151,502. (Doc. 672, Plaintiffs' Revised Request for Judicial Notice ("Pls.' Judicial Notice") ¶ 1.)[2] The Census Bureau estimates that as of 2022, Arizona's population was 52.9% non-Hispanic White, 32.5% Hispanic or Latino, 5.5% Black or African American, 5.2% American Indian and Alaska Native, 3.9% Asian, and 0.3% Native Hawaiian and Other Pacific Islander. (*Id.* ¶ 20; Doc. 672-2, Ex. 20, at ECF-218.) The Census Bureau's 2017 to 2021 American Community Survey estimates that Arizona's U.S. citizen voting-age population is 5,000,102. (Pls.'

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[1] All docket citations refer to *Mi Familia Vota*, 2:22-cv-00509-SRB, unless otherwise noted. Portions of the Court's findings of fact have been adopted from Plaintiffs' and Defendants' respective Proposed Findings of Fact and Conclusions of Law, without separate citation. (*See* Doc. 673, Pls.' Proposed Findings of Fact; Doc. 674, Pls.' Proposed Conclusions of Law; Doc. 676, Defs.' Proposed Findings of Fact and Conclusions of Law.) Citations to exhibits or documents refer to each exhibit's numbering system unless otherwise indicated. Citations to the trial transcript are denoted by "Tr."

[2] The Court takes notice of those facts cited from Plaintiffs' Request for Judicial Notice, as the Court finds that these facts are "not subject to reasonable dispute." Fed. R. Evid. 201(b). This includes data from the U.S. Census and the Census Bureau's American Community Survey ("ACS"). *See Evenwell v. Abbott*, 578 U.S. 54, 63–64 (2016) (referring to ACS data to determine compliance with one-person, one-vote rule).

Judicial Notice ¶ 3.) Approximately 436,816 of these individuals are naturalized U.S. citizens. (*Id.* ¶ 5.) There are approximately 1.2 million voting-age Latino (Hispanic) citizens, 17.5% of whom are naturalized citizens. (*Id.* ¶ 31; *see* Doc. 672-4, Ex. 31, at ECF-9, -19.) There are approximately 136,607 voting-age Asian-American, Native Hawaiian, and Pacific Islander ("AANHPI") citizens, 61.5% of whom are naturalized citizens. (*See* Doc. 672-1, Ex. 6, at ECF-37; Doc. 672-1, Ex. 7, at ECF-42.)

As of July 2023, there were 4,198,726 registered voters in Arizona. (Doc. 571-1, Pls.' Stipulated Facts ("Pls.' Stip.") No. 26.) This includes 19,439 active voters who have not provided documentary proof of citizenship ("DPOC") and are registered only for federal elections ("Federal-Only Voters"). (Ex. 336.) The remaining are "Full-Ballot Voters" who may vote in Arizona's State and federal elections. Non-Hispanic White citizens are more likely to be registered to vote than Hispanic citizens or citizens of color.[3] (*See* Doc. 672-1, Ex. 8, at ECF-44.) Arizona's 19,439 Federal-Only Voters represent less than half a percent of all the State's registered voters. Dr. Michael McDonald[4] estimated that the racial composition of the Federal-Only Voters is 53.3% non-Hispanic White and 46.7% minority individuals. (Ex. 338; *see* McDonald Tr.

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[3] Specifically, the ACS estimates that 80.1% of non-Hispanic White citizens are registered to vote, as compared to 79.2% of Black citizens, 70.2% of Asian citizens, and 66.8% of Hispanic citizens. (*See* Doc. 672-1, Ex. 8, at ECF-44.)

[4] Plaintiffs offered Dr. McDonald "as an [expert] on political science, voter registration, election registration and quantitative methodologies." (McDonald Tr. 1067:9–12.) The Court found Dr. McDonald credible and affords his analysis considerable weight unless otherwise noted.

1125:20–1129:22.) According to Dr. McDonald's estimates, approximately one-third of a of non-Hispanic White voters are Federal-Only Voters, while a little more than two-thirds of a percent of minority voters are Federal-Only Voters.[5]

2. Proposition 200 and the LULAC Consent Decree

Arizona residents qualified to vote may register for elections using Arizona's state-created registration form ("State Form") or the form created by the United States Election Assistance Commission ("Federal Form"). *See Gonzales v. Arizona*, 677 F.3d 383, 395 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.* ("*ITCA*"), 570 U.S. 1 (2013); (*see generally* Ex. 27, ("State Form"); Ex. 28, ("Federal Form").) Public assistance agencies in Arizona typically use the State Form to register individuals to vote. (Petty Tr. 89:9–15.)

In 2004, Arizona voters approved Proposition 200, which required individuals registering to vote to provide one of the following forms of "satisfactory evidence of citizenship," also known as documentary proof of citizenship or "DPOC" ("DPOC Requirement"):

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[5] Dr. McDonald applied geocoding and surname matching to estimate the percent of voters by ballot-type, race, and ethnicity. (McDonald Tr. 1125:20–1129:22.) Using these estimates, minority voters comprise 28.8% of Arizona's active registered voters, or 1,199,610 voters. (*See* Ex. 338 (minority active registered voter population (0.231 + 0.017 + 0.018 + 0.022) multiplied by 4,165,313 voters).) Minority voters comprise 46.7% of Federal-Only Voters, or 9,078 voters. (*Id.* (minority Federal-Only Voter population (0.378 + 0.052 + 0.012 + 0.025) multiplied by 19,439 voters).) Only 0.76% of all minority voters in Arizona are registered as federal-only (9,078/1,199,610). And 0.35% of White voters are registered as federal-only. (*Id.* ((19,439 x 0.533) / (4,165,313 x 0.712)).)

1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.

2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

Ariz. Rev. Stat. § 16-166(F). County recorders must document that a voter has submitted DPOC in the voter's "permanent voter file" and store the voter's DPOC for at least two years. § 16-166(J). In 2013, the United States Supreme Court held that the National Voter Registration Act ("NVRA") preempted the DPOC Requirement as applied to persons registering to vote with the Federal Form, requiring Arizona to register Federal Form users without DPOC as Federal-Only Voters. *ITCA*, 570 U.S. at 20. The Supreme Court confirmed, however, that Arizona's State Form "may require information the Federal Form does not" and may "be used to register voters in both state and federal elections." *Id.* at 12.

Following *ITCA*, Arizona continued to reject State Forms that were not accompanied by DPOC. In 2018, the Arizona Secretary of State entered into a consent decree that requires Arizona to treat Federal Form and State Form users the same when registering applicants[6] for federal elections ("LULAC Consent Decree"). (Ex. 24, ("LULAC Consent Decree").)[7] Specifically, the LULAC Consent Decree mandates that for *any* applicant who does not provide DPOC, Arizona must review the motor vehicle division ("MVD") database to check for citizenship documentation. (*Id.* at PX 024-8 to -10, -13 to -14.) Arizona must then register an applicant as a Full-Ballot Voter if

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[6] The Voting Laws at issue in this case refer to individuals registering to vote as "applicants," but the Court will use the term "applicant" and "registrant" interchangeably.

[7] The LULAC Consent Decree was the result of a lawsuit initiated by the League of United Latin American Citizens of Arizona ("LULAC"), alleging that county recorders were not registering State Form applicants who omitted DPOC for any elections. (*See* LULAC Consent Decree at 1–2.)

MVD records show the applicant has provided DPOC, or as a Federal-Only Voter if MVD records show no DPOC or "foreign-type" Arizona credential on file, regardless of whether the applicant used the State Form or Federal Form. (*Id.*)

3. H.B. 2492

Under House Bill 2492 § 4 and § 5, "[a] person is presumed to be properly registered to vote" only if she, among other things, provides documentary "proof of location of residence" ("DPOR Requirement"), lists her "place of birth" ("Birthplace Requirement"), and marks "yes" in the checkbox confirming United States citizenship ("Checkbox Requirement").[8] H.B. 2492 §§ 4–5, 55th Leg., 2d Reg. Sess. (Ariz. 2022); A.R.S. § 16-121.01(A); *see* A.R.S. § 16-123; (*see generally* Ex. 1, ("H.B. 2492 Text").) If an applicant fails to include all the information necessary to be presumed properly registered to vote, "the county recorder shall notify the applicant within ten business days of receipt of the registration form" and inform the applicant that her registration cannot be completed until the applicant supplies the missing information.[9] A.R.S. § 16-134(B), *see* § 16-121.01(A).

A person seeking to register as a Full-Ballot Voter must also satisfy the DPOC Requirement by providing

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[8] The Federal Form does not include a space for applicants to provide birthplace information. (*See generally* Federal Form.)

[9] The Court previously ruled that section 6 of the NVRA pre-empted H.B. 2492's requirement that Federal Form users provide DPOR to be registered for federal elections. (Doc. 534, 09/14/2023 Order at 9; *see* H.B. 2492 Text.) The Court did not decide Plaintiffs' claims regarding whether Arizona may reject State Forms that lack DPOR.

one of the forms of DPOC enumerated in § 16-166(F).[10] § 16-121.01(C); (LULAC Consent Decree at PX 024-8 to -9, -13.) For applicants who use the Federal Form and do not provide DPOC, H.B. 2492 § 4 requires that county recorders "use all available resources to verify the citizenship status of the applicant" before that applicant may be registered to vote ("Citizenship Verification Procedures"). § 16-121.01(D), (E).

Specifically:

> [A]t a minimum [the county recorder] shall compare the information available on the application for registration with the following, *provided the county has access*:
>
> 1. The department of transportation databases of Arizona driver licenses or nonoperating identification licenses [("MVD database")].
>
> 2. The social security administration [("SSA")] databases.
>
> 3. The United States citizenship and immigration services systematic alien verification for entitlements [("SAVE")] program, if practicable.
>
> 4. A national association for public health statistics and information systems electronic

[10] The Court previously ruled that Arizona must register any qualified voter who does not complete the Checkbox Requirement but instead satisfies the DPOC Requirement. (09/14/2023 Order at 34.) The Court also found that Arizona must abide by the LULAC Consent Decree and may not reject State Forms not accompanied by DPOC if the registrant is otherwise found qualified to vote. (*Id.*; *see* H.B. 2492 Text at PX 001-4 to -5 (requiring county recorder to reject any State Form not accompanied by DPOC).)

> verification of vital events system [("NAPHSIS")].
>
> 5. Any other state, city, town, county or federal database and any other database relating to voter registration to which the county recorder . . . has access, including an electronic registration information center database.

§ 16-121.01(D) (emphasis added).[11]

H.B. 2492 § 4 mandates different outcomes from these database searches. A county recorder "shall" register as Full-Ballot Voters those registrants who the county recorder verifies are United States citizens and qualified to vote. § 16-121.01(E). But if the county recorder "matches the applicant with information that the applicant is not a United States citizen, the county recorder . . . shall reject the application, notify the applicant that the application was rejected because the applicant is not a United States citizen and forward the application to the county attorney and attorney general for investigation."[12] *Id.* H.B. 2492

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[11] As further discussed *infra* Section I(B)(1), the MVD database contains information on all Arizonans who possess an Arizona driver's license or identification. The SSA database contains individuals' social security numbers. The SAVE program is a federal system used to retrieve immigration-related information to determine an immigrant's eligibility for state and federal benefits. NAPHSIS is a nonprofit organization that collects vital records, including birth certificates.

[12] H.B. 2492 also requires Federal Form applicants to provide DPOC to vote in presidential elections or by mail if the county recorder was unable to verify the registrant's citizenship status. § 16-121.01(E). The Court ruled that section 6 of the NVRA preempts H.B. 2492's DPOC Requirement for voting in

does not require county recorders to provide an applicant with an opportunity to submit DPOC before rejecting the applicant's registration and forwarding the registration for investigation. *See id.*

H.B. 2492 § 7 directs county recorders to "make available to the attorney general a list of all individuals who are registered to vote and who have not provided [DPOC],"[13] as well as the registrations forms of these voters by October 31, 2022. A.R.S. § 16-143(A). The Attorney General must then use "all available resources to verify the citizenship" of these individuals and "at a minimum" consult the same databases listed in § 16-121.01(D) (collectively, "Attorney General Referral Provision"). § 16-143(B). As of trial, neither the Secretary of State nor any county recorders had furnished these lists or registration forms to the Attorney General. (*See* Petty Tr. 113:20–114:1; Knuth Tr. 2122:7–8.) And without these lists or forms, the Attorney General has not investigated the citizenship status of any registered voters pursuant to the Voting Laws. (*See* Knuth Tr. 2124:4–6; Ex. 285.) H.B. 2492 § 7 also directs the Attorney General to "prosecute individuals who are found to not be United States citizens pursuant to § 16-182." § 16-143(D); *see also* A.R.S. § 16-182(A) (stating that a person who "knowingly" registers himself or another person "knowing" that the registrant is not eligible to vote is guilty of a class 6 felony).

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presidential elections or by mail. (09/14/2023 Order at 33; *see also* H.B. 2492 Text at PX 001-6 to -7.)

[13] Voters who registered before the effective date of Proposition 200 are "deemed to have provided" DPOC. *See* § 16-166(G).

4. H.B. 2243

House Bill 2243 expanded upon or superseded H.B. 2492 in certain respects. H.B. 2243, 55th Leg., 2d Reg. Sess. (Ariz. 2022); (*see generally* Ex. 2, ("H.B. 2243 Text").) Specifically, election officials must regularly consult state and federal databases to identify potential non-citizens (collectively, "List Maintenance Procedures"). For example, the Secretary of State must compare the Arizona Voter Registration Database to the MVD database each month and notify county recorders of voters who have moved residences or are not citizens. § 16-165(G). County recorders must also, "[t]o the extent practicable," conduct monthly SAVE checks on registered voters "who the county recorder has reason to believe are not United States citizens" ("Reason to Believe Provision") and on voters "who are registered to vote without [DPOC]." § 16-165(I). County recorders must conduct similar checks with the SSA database and NAPHSIS database. § 16-165(H), (J). Under H.B. 2243 § 2's "Cancellation Provision," a county recorder must then cancel a voter registration:

> When the county recorder obtains information pursuant to this section and confirms that the person registered is not a United States citizen, including when the county recorder receives a summary report from the jury commissioner or jury manager pursuant to § 21-314 indicating that a person who is registered to vote has stated that the person is not a United States citizen. Before the county recorder cancels a registration pursuant to this paragraph, the county recorder shall send the person notice by forwardable mail that the person's registration will be

> canceled in thirty-five days unless the person provides satisfactory evidence of United States citizenship pursuant to §p16-166. The notice shall include a list of documents the person may provide and a postage prepaid preaddressed return envelope. If the person registered does not provide satisfactory evidence within thirty-five days, the county recorder shall cancel the registration and notify the county attorney and attorney general for possible investigation.

A.R.S. § 16-165(A)(10). H.B. 2243 § 2 directs county recorders to consult "relevant city, town, county, state and federal databases to which the county recorder has access to confirm information obtained that requires cancellation of registrations pursuant to this section." § 16-165(K).

5. Sources of Arizona Election Law Guidance

The Elections Procedures Manual ("EPM") is a set of election rules prescribed by the Arizona Secretary of State and approved by the Governor and Attorney General every two years. *See* A.R.S. § 16-452. The EPM is binding on county recorders and "ensure[s] election practices are consistent and efficient throughout Arizona." *McKenna v. Soto*, 481 P.3d 695, 699–700 ¶¶ 20–21 (Ariz. 2021). The EPM serves a "gap-filling function" to address election matters not specifically addressed by statute. (Petty Tr. 25:3–5.) The current operative EPM was approved by the Arizona Secretary of State, Governor, and Attorney General on December 30, 2023 ("2023 EPM"). (Doc. 699, ("2023 EPM").) Colleen Connor is Arizona's Elections Director and oversees the elections division of the Secretary of State's office. (Connor Tr. 305:15–19, 307:9–13.) Ms.

Connor guides the development of the EPM. (*Id.* 307:14–25.)

The Voter Registration Advisory Committee ("VRAC") consists of Arizona's 15 county recorders and the Secretary of State's office. (Petty Tr. 26:8–12.) The VRAC addresses voter registration matters not addressed by statute or the EPM. (*Id.* 26:13–18.) Specifically, the VRAC may unanimously approve "VRAC papers," which act as non-binding guidance to maintain uniform election administration practices. (*Id.* 27:11–28:2.) The VRAC has not yet approved any VRAC papers to guide county recorders on the implementation of the Voting Laws.

The Court will consider the Voting Laws in the context of the 2023 EPM. Though the parties' arguments at trial relied on the 2019 version of the EPM, the Court finds it appropriate to consider the Voting Laws based on the current and binding 2023 EPM. (*Compare* 2023 EPM, *with* Ex. 6, ("2019 EPM").)

B. Voter Registration and List Maintenance Procedures

The Arizona Voter Registration Database ("AVID") is Arizona's state-wide voter registration and election management database. (Connor Tr. 333:5–9.) Thirteen counties use AVID directly for voter registration, while Maricopa County and Pima County each operate their own voter registration databases that sync with AVID. (*Id.* 333:15–25.) Maricopa County's system is referred to as "VRAS" and Pima County's system is "Voter." (Petty Tr. 28:7–13; Hiser Tr. 2021:8–14.) The following describes the Voting Laws' impact on Arizona's existing voter registration and list maintenance procedures.

1. Databases Referenced in the Voting Laws

Before the Voting Laws, Arizona retrieved information from MVD and SAVE to verify the citizenship status of voters, in addition to receiving reports of non-citizenship from juror questionnaires. (*See* 2019 EPM at PX 006-20 to -25, -50 to -51; LULAC Consent Decree at PX 024-8 to -10, -13.) H.B. 2492 and H.B. 2243 supplement these databases with SSA and NAPHSIS checks. §§ 16-121.01(D), 16-165(G)–(J). According to Ms. Petty, county recorders currently do not have access to NAPHSIS or the SSA database. (Petty Tr. 38:16–39:1, 68:19–69:16.) Ms. Petty also testified that the Secretary of State has not offered county recorders any guidance on what criteria to use to match voters to the databases required by the Voting Laws, nor how to address situations where multiple databases return conflicting citizenship information. (*Id.* 79:18–80:10.) The Court addresses the utility and reliability of each database in turn.

i. MVD Database

MVD issues two types of "credentials": Arizona driver licenses and Arizona identification cards. United States citizens and non-citizens may obtain an MVD credential, so long as an individual can show proof of "authorized presence" in the United States. (Doc. 679-1, Ex. 2, 30(b)(6) Dep. of ADOT ("ADOT Dep.") 27:21–25, 30:18–31:8.) MVD categorizes credentials as either non-foreign or foreign based on an individual's authorized presence status, as stated in the authorized presence documentation. (Pls.' Stip. No. 88; Ex. 231, ("MVD Credential Documents List") at PX 231-4 (listing forms of documentation).) MVD issues non-foreign credentials to U.S. citizens, including naturalized citizens, and foreign-type credentials to non-citizens. A naturalized citizen seeking to obtain

a non-foreign credential must show an official copy of their naturalization certificate. (MVD Credential Documents List at PX 231-3; ADOT Dep. 72:25–73:10.)

An "original credential" is the first issuance of a specific MVD credential, while a "duplicate credential" is a new version of an existing credential. (Pls.' Stip. No. 84; Jorgensen Tr. 555:22–556:4.) Credentials may be REAL ID-compliant or non-REAL ID. (Jorgensen Tr. 543:1–21 (explaining REAL ID), 553:17–22, 554:16–20 (explaining a non-travel ID or "non-TID" is a non-REAL ID); MVD Credential Documents List at PX 231-2 (listing requirements to obtain a travel ID or non-travel ID).) REAL IDs expire after eight years, whereas non-REAL IDs may not expire for more than ten years. (ADOT Dep. 60:21–61:6.) In addition, a foreign-type credential expires based on the individual's provided foreign authorized presence documentation. (*Id.* 62:24–63:3; Ex. 233 at PX 233-1; Ex. 434, at PX 434-3.) For example, if a non-citizen submits a permanent resident card that is valid for five more years to show authorized presence, that individual will receive a foreign-type credential that expires when the permanent resident card expires. (*See, e.g.*, ADOT Dep. 63:4–14.)

Naturalized citizens are not required to update authorized presence status with MVD when they become a citizen, meaning some citizens may still possess an unexpired foreign-type credential. (Pls.' Stip. No. 93; Jorgensen Tr. 560:2–14.) An individual with a non-REAL ID, foreign-type credential is also not required to provide proof of authorized presence when they renew that credential or obtain a duplicate credential after a change to the individual's address, name change after marriage, or losing the credential. (Jorgensen Tr. 544:2–18, 545:17–546:1, 556:5–24,

558:1–12, 559:17–560:1.) In these circumstances, MVD may possess outdated authorized presence information for naturalized citizens with a foreign-type credential. Dr. McDonald determined that 6,048 Full-Ballot Voters who provided DPOC have a foreign-type credential and would be identified as non-citizens in the MVD database. (McDonald Tr. 1088:16–1089:5.) In addition, Dr. Jesse Richman[14] found that MVD records indicate that 65 Federal-Only Voters possess a foreign-type credential, with 31 of these voters receiving the credential at the same time or after registering to vote. (Richman Tr. 1927:11–15; Ex. 930, ("MVD Non-Citizen Records").) There are also 112 Federal-Only Voters that MVD records indicate are citizens. (Richman Tr. 1915:24–1916:5.)

ADOT reports an overall internal record error rate of approximately 10 to 15%. (Jorgensen Tr. 548:12–21; Pls.' Stip. No. 115.) But an MVD representative "would have to make multiple errors" to mistakenly enter a credential applicant's incorrect citizenship status into the MVD database. (Jorgensen Tr. 584:14–585:1.) While AVID has on at least one occasion experienced system error when retrieving citizenship information from MVD, the parties' experts nevertheless agree that Arizona's MVD data is generally reliable. (McDonald Tr. 1189:24–1190:1; Richman Tr. 1907:2–16; *see* Hiser Tr. 2025:3– 2027:13; Exs. 207, 220, 226 (explaining AVID mistakenly identified hundreds of voters as lacking DPOC).) The Court finds that while MVD may possess outdated citizenship information on

[14] Dr. Richman is a professor of political science and international studies with a focus on American politics and elections in addition to research methodology, modeling, and simulation. (Richman Tr. 1903:1–8.) The Court found Dr. Richman's testimony credible and affords his opinions considerable weight.

some Arizonans, MVD typically obtains and maintains accurate information on each Arizona credential-holder.

ii. SAVE

The U.S. Citizenship and Immigration Services ("USCIS") administers the SAVE system, which is used to retrieve immigration and citizenship data from different Department of Homeland Security agencies. (Pls.' Stip. Nos. 116–17; Doc. 679-3, Ex. 19, 30(b)(6) Dep. of USCIS ("USCIS Dep.") 25:1–16, 38:12–13.) Arizona's county recorders and the Secretary of State access SAVE pursuant to a memorandum of agreement between the Secretary of State and USCIS ("SAVE MOA"). (Ex. 266, ("SAVE MOA") at PX 266-2.) The SAVE MOA permits county recorders to verify citizenship information of naturalized and derived U.S. citizens[15] only "when they register to vote." (*Id.*) Arizona currently may not use SAVE for any other purpose. (*Id.* at PX 266-4.) At least one state uses SAVE for "voter list maintenance." (USCIS Dep. 170:15–171:20.) The SAVE system can only verify the citizenship status of naturalized or derived U.S. citizens by searching the individual's immigration number[16] and contains no information on native-born citizens. (*Id.* 27:22, 28:8–11; Pls.' Stip. Nos. 121–122, 131.) Naturalized citizens rarely include their immigration numbers on the State Form, and the Federal Form does not include a space for registrants

[15] A derived citizen is an individual born abroad who derives U.S. citizenship at birth from a U.S. parent or automatically acquires U.S. citizenship as a minor under specific provisions of U.S. naturalization law. (Ex. 274, at PX 274-1 n.1.)

[16] An immigration number is a numeric identifier from a government-issued immigration document and includes an Alien Number, Certificate of Naturalization Number, or Certificate of Citizenship Number. (Ex. 271, ("SAVE Guide") at PX 271-13.)

to provide this information. (Petty Tr. 57:15–58:1; *see generally* Federal Form.)

USCIS considers SAVE to be generally reliable, but recognizes that data integrity issues can arise, including data entry errors. (USCIS Dep. 37:19–25, 112:5–12, 114:5–16, 209:12–23.) While one or two-day delays are possible, SAVE can typically return updated naturalization records within 24 hours of an individual's naturalization. (*Id.* at 37:19–25, 39:20–41:4; *see* 2023 EPM at ECF-25 (cautioning county recorders to be aware of possible delays in SAVE when registering voters close to an election).) USCIS also explained that SAVE may not immediately return updated naturalization records if an individual is naturalized prior to a weekend or a federal holiday. (USCIS Dep. 41:1–19.) Unlike with MVD, which could possess outdated information about naturalized citizens years after naturalization, the Court finds that Plaintiffs have failed to adduce evidence that SAVE is unreliable or contains severely inaccurate or outdated citizenship information. And to the extent that SAVE does occasionally contain temporarily outdated citizenship information following an individual's naturalization, the 2023 EPM adequately informs county recorders of how to address these circumstances.

iii. SSA

Arizona's county recorders check SSA records to "confirm[] the registrant's identity and help[] ensure integrity of registration rolls." (2023 EPM at ECF-40; Petty Tr. 37:22– 38:15.) County recorders may access the SSA database by conducting a "HAVA Check"[17]

[17] The Help America Vote Act ("HAVA") requires first-time voters to prove identity before voting in federal elections if the

through MVD but lack direct access to SSA records. (Petty Tr. 38:16–39:1.) According to reports in the 2000s, the error rate for data in the SSA database is approximately six percent. (McDonald Tr. 1093:6–8.) The SSA database returns "soft" record matches based on the last four digits of a social security number, meaning a SSA check could return multiple matches. (*Id.* 1092:16–1093:5.)

Approximately one quarter of SSA records lack citizenship information. (McDonald Tr. 1091:10–13.) An individual who was issued a social security number before obtaining U.S. citizenship has no duty to update her citizenship information with the Social Security Administration. (Pls.' Stip. No. 150.) Setting aside these data issues, the Court finds that it is impracticable for county recorders to obtain citizenship information from the SSA database pursuant to the Voting Laws' Citizenship Verification or List Maintenance Procedures, as the federal government does not allow access to this information. (Petty Tr. 66:19–67:5; McDonald Tr. 1090:13–1091:6.) And Plaintiffs offered no evidence suggesting that Arizona could eventually access additional SSA information for these purposes.

iv. NAPHSIS

NAPHSIS is a national nonprofit organization that compiles vital records, including birth certificates, for individuals born in the United States. (McDonald Tr. 1099:16–25, 1100:21–1101:4.) NAPHSIS does not provide information about individuals born outside of the United States. (Richman Tr. 1941:11–21 (explaining this is a "key limitation[]" to NAPHSIS).) Arizona's county recorders currently do not have

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voter registered by mail or through a third-party registration drive. *See* 52 U.S.C. § 21083(b)(1)–(3).

access to NAPHSIS, nor are county recorders familiar with the database. (*See, e.g.*, Petty Tr. 68:19–70:16.) But the evidence indicates Arizona could request access to the NAPHSIS database with relative ease. (McDonald Tr. 1101:2–4; Richman Tr. 1934:1–14.) And according to Dr. Richman, the U.S. Election Systems Commission recommends that states use NAPHSIS for election administration. (Richman Tr. 1914:15–1915:2.) Plaintiffs did not adduce evidence establishing that NAPHSIS is unreliable for the purpose of determining the citizenship status of native-born citizens.

v. Jury Summary Reports

H.B. 2243 requires Arizona's jury administrators to provide county recorders and the Secretary of State with jury summary reports that contain the prospective jurors who stated that they were not a U.S. citizen or resident of that county. *See* A.R.S. § 16-314(F). Matthew Martin, the Jury Administrator for the Maricopa County Judicial Branch, described Maricopa County's juror selection procedures. (Ex. 970, ("Martin Decl.") ¶ 2.) Specifically, the jury office maintains a master list of potential jurors that includes names from VRAS and MVD records. (*Id.* ¶¶ 6–9.) The jury office receives the full name, address, and birthdate of the individuals on each list but does not obtain citizenship information. (*Id.* ¶¶ 7–8.) Because non-citizens may obtain a foreign-type credential, the master list includes non-citizens from the MVD database. The jury office randomly selects individuals from the master list to issue summonses for jury duty. (*Id.* ¶ 9.) After receiving a jury summons, a prospective juror can inform the jury office that she is a non-citizen by submitting an online pre-screen

questionnaire, or by submitting a written statement directly to the jury office. (*Id.* ¶¶ 12–16.)

The jury summary reports may contain only as much information as is necessary for county recorders to identify the prospective juror in the voter registration database. A.R.S. § 21-314(F); (*see* 2023 EPM at ECF-57 (requiring county recorders to match the individual to a registered voter to "confirm" non-citizenship).) Plaintiffs presented no evidence indicating that the jury summary reports would erroneously report jurors' self-attestation of non-citizenship. (*See* Connor Tr. 393:7–394:16.) Moreover, county recorders have historically received reports of non-citizenship from juror questionnaires without issue. (Petty Tr. 104:17–105:11; *see* 2019 EPM at PX 006-50 to -51 (describing past use of jury questionnaires).)

H.B. 2243 also mandates the Secretary of State to inform the Legislature each quarter of the number of individuals who stated on a juror questionnaire that the individual is not a United States citizen. § 16-165(M)(3). In the first half of 2023, 1,324 individuals reported that they were not U.S. citizens. (Ex. 805, at AZSOS-563798; Ex. 806, at AZSOS563800.) The State does not know how many of these individuals are registered to vote, nor how many misrepresented their citizenship status to avoid jury duty. (*See* Connor Tr. 393:7–22 (recalling 11 prosecutions where persons falsely stated they were non-citizens on a juror questionnaire); Hiser Tr. 2004:4–2005:1 (recalling instances where registered voters declared themselves as non-citizens on juror questionnaires to avoid jury duty).) And in counties like Maricopa that collect prospective juror information from MVD to include lawfully present non-citizens, these quarterly reports

do not correlate to the incidence of non-citizens registered to vote.

2. HAVA Checks

Election officials conduct a HAVA Check each time an individual submits a new voter registration or updates an existing voter registration. (*See* Morales Tr. 611:16–19, 614:17–615:14; *see* 2023 EPM at ECF-42.) A HAVA Check compares the applicant's voter registration in AVID to the information available in the MVD database to validate the applicant's identity and check for DPOC. (Morales Tr. 614:17–615:6, 615:11–14; Petty Tr. 33:15–34:4.) When a voter registration is entered into AVID, the database will first compare the registration to existing records to identify duplicate registrations.[18] (2023 EPM at ECF-40.) Then, to conduct the HAVA Check, AVID submits a request to ADOT to return any MVD records that match the information provided on the voter registration. (Pls.' Stip. Nos. 100, 102–104.) AVID uses matching criteria to return either a "hard" match, "soft" match, or no match with MVD records. These matching criteria include an applicant's last name, first three characters of first name, last four digits of a social security number ("SSN4"), date of birth, and MVD credential number. (Ex. 935, ("MVD Verification Criteria").)

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[18] When the Maricopa County Recorder's office receives a physical voter registration form, the county recorder manually enters the registrant's information into VRAS, which first checks for existing records in VRAS before automatically comparing the registrant's information to AVID. (Petty Tr. 30:8–15, 31:11–32:9; *see also* Pima Dep. 21:11–17, 63:12–64:14, 66:16–67:6 (describing some of the process of using Voter).)

A HAVA Check returns a "soft" match in four scenarios: when AVID and MVD records match the registrant's (1) last name, first three characters of first name, and SSN4; (2) last name, first three characters of first name, and date of birth; (3) first name, date of birth, and SSN4; or (4) MVD credential number. (*Id.* at AZSOS-564548; *see* McDonald Tr. 1082:9–1083:1.) A soft match may return up to 50 MVD records, after which county recorders exercise "some level of discretion" to determine which MVD record matches the voter registration. (Petty Tr. 36:5–37:11; Morales Tr. 611:1–4, 611:20–612:10; Jorgensen Tr. 563:5–7.) The HAVA Check returns a "hard" match when a combination of at least four of these datapoints return an exact match between AVID and the MVD database. (MVD Verification Criteria at AZSOS-564548.) AVID will "acquire" a missing MVD credential number upon a match with MVD records. (2023 EPM at ECF-40.) The HAVA Check will return no match if the applicant does not possess an unexpired Arizona credential. (Petty Tr. 34:11–35:12.) In that case, the HAVA Check will compare the registrant's information with the SSA database to verify the individual's identity. (*Id.* 37:22–38:5; Ex. 594; 2023 EPM at ECF-40, -42.)

3. Verifying a Voter Registrant's Citizenship Status

County recorders use MVD and SAVE to verify the citizenship of Arizonans who provide an Arizona credential number or immigration number when registering to vote. Applicants who do not provide an Arizona credential number, immigration number, or tribal identification number must provide a physical copy of another form of DPOC to register as a Full-Ballot Voter. *See generally* § 16-166(F). County

recorders must retain copies of a voter's DPOC for two years. (2023 EPM at ECF-26; *see* Petty Tr. 56:4–8.)

i. MVD Records

County recorders also use the HAVA Check to verify the citizenship of applicants who provide an Arizona MVD credential number as DPOC. (2023 EPM at ECF-40; Morales Tr. 611:16–19.) AVID contains a "citizenship verified" field, which identifies whether a voter is a U.S. citizen. (*See* Morales Tr. 613:15–24.) If a HAVA Check returns a match from MVD, the county recorder will obtain a voter's citizenship status as it exists in the MVD records at the time of the check. (*Id.* 612:23–613:3; Petty Tr. 36:15–22; Doc. 622-1, Ex. A, ("County Recorder Testimony Stip.") No. 5.) An individual's citizenship status is automatically transmitted from MVD and into AVID's "citizenship verified" field. (Morales Tr. 613:15–19; Petty Tr. 39:7–14.) If AVID returns a match with MVD records that indicate U.S. citizenship, AVID will code that voter's citizenship as verified and the county recorder will register the individual as a Full-Ballot Voter. (Morales Tr. 613:20–24, 617:2–7; Petty Tr. 41:7–11.)

If the HAVA Check matches the applicant with MVD records indicating that the applicant has a foreign-type credential, AVID will automatically mark the "no" box under the "citizenship verified" field. (Morales Tr. 613:25–614:3.) County recorders must then manually override the citizenship field for voters who provide a different form of DPOC. (*Id.* 613:25–614:3, 616:2–14; *see* Hiser Tr. 2019:24–2020:25 (explaining that separate DPOC "is the controlling factor" to determine citizenship when a citizen has a foreign-type credential).) The parties adduced no evidence of the rate at which county recorders erroneously override or fail to override the citizenship field for registrants with a

foreign-type credential. For registrants with a foreign-type credential who *do not* provide a different form of DPOC, the 2023 EPM directs county recorders to indicate in the applicant's registration file that the registrant is "not eligible" due to "invalid citizenship proof," and notify the registrant that she must provide DPOC in order to be eligible to vote. (2023 EPM at ECF-22; *see* Petty Tr. 41:16–42:19 (explaining that a registration may be put in "suspense" status for lack of DPOC).)[19] Arizona's State Form requests individuals who become a citizen after receiving a foreign-type credential to provide a different form of DPOC, such as the individual's immigration number. (State Form at PX 027-3.) If the HAVA Check returns no match with MVD records and the applicant provides no other DPOC, the county recorder must register the individual as a Federal-Only Voter. (2023 EPM at ECF-21; Morales 617:8–13.) County recorders send these voters notice of their federal-only status and explain that the voters must provide DPOC to register for a full ballot. (2023 EPM at ECF-22.)

ii. SAVE Verification

The 2023 EPM directs county recorders to use SAVE to verify citizenship information when an applicant provides an immigration number as DPOC, including a citizenship certificate number, naturalization certificate number, or alien registration number. (*Id.* at ECF-23 to -24; *see also* Morales Tr. 616:15–24.) When a county recorder searches the SAVE system, SAVE can return a match with citizenship verified, a match

[19] A registration is in "suspense" when a county recorder determines that additional information is necessary to confirm that the applicant is qualified to vote in Arizona, such as by verifying citizenship or residency. (*See, e.g.*, Petty Tr. 42:9–15; McDonald Tr. 1110:11–19.)

with citizenship not verified, or no match. (Petty Tr. 58:2–8.) SAVE cannot conclusively "confirm" non-citizenship. (USCIS Dep. 152:19–153:6.) A SAVE match with citizenship verified establishes that the applicant is a naturalized or derived U.S. citizen, after which a county recorder will register the applicant as a Full-Ballot Voter. (2023 EPM at ECF-24; Petty Tr. 58:17–59:13.) If SAVE returns a match with citizenship not verified, the applicant must provide DPOC to be registered to vote. (2023 EPM at ECF-24.) If SAVE returns no match, the applicant will be registered as a Federal-Only Voter. (*Id.* at ECF-24 to -25.) In a case of citizenship not verified or no match, the SAVE MOA obligates county recorders to initiate additional verification procedures with SAVE for these individuals unless Arizona "has alternative processes upon which to base its decision." (SAVE MOA at PX 266-4; SAVE Guide at PX 271-10.) Arizona's county recorders do not typically initiate the additional verification procedures, but Plaintiffs adduced no evidence that county recorders do not use "alternative processes" to confirm the eligibility of these registrants. (*See* Ex. 268 (county recorders initiating 154 additional verifications of the 2502 SAVE searches requiring additional verification from 2020 to 2022).)

iii. Verifying Citizenship without DPOC

For applicants who do not provide any form of DPOC, county recorders must apply H.B. 2492's Citizenship Verification Procedures by consulting the MVD, SAVE, SSA, and NAPHSIS databases to retrieve citizenship information. § 16-121.01(D). However, because SAVE requires an immigration number, county recorders will be unable to search SAVE to verify the citizenship of registrants who do not have or provide an immigration number as DPOC in the first

place. (*See* Petty Tr. 57:15–58:1 (testifying few naturalized citizens provide an immigration number).) Nor can county recorders retrieve citizenship information from the SSA database. In cases where county recorders are unable to conduct the relevant database searches or if a county recorder's investigation does not match an applicant to information establishing citizenship or non-citizenship, the county recorder must register that applicant as a Federal-Only Voter. § 16-121.01(E).

The Voting Laws require county recorders to forward registrations of applicants matched to information of non-citizenship to the Attorney General, but the 2023 EPM has interpreted this provision to first require county recorders to provide applicants with an opportunity to provide DPOC. *See id.*; (2023 EPM at ECF-17.) Specifically, for applicants who do not provide DPOC, "[i]f the database checks affirmatively show the applicant is a non-citizen, the County Recorder must (1) not register the applicant, (2) notify the applicant, and (3) *if the applicant does not timely provide DPOC in response*, forward the application to the County Attorney and Attorney General." (2023 EPM at ECF-27 (emphasis added); *see id.* at ECF-22 (describing similar process when a HAVA Check indicates the applicant possesses a foreign-type credential).) Regardless of whether the county recorder matches the applicant to evidence of non-citizenship in the MVD database or SAVE, an applicant has until "the Thursday before the next regular election" to submit DPOC and be registered to vote in that election. (*Id.* at ECF-22, -24.)

Taken together, Arizona's voter registration procedures utilize reliable methods to verify the citizenship status of registrants. For registrants who provide an

Arizona credential number or an immigration number, the MVD and SAVE checks will generally return accurate citizenship information. The 2023 EPM also provides registrants who county recorders match to affirmative information indicating non-citizenship with sufficient time to provide DPOC to register to vote and avoid potential investigation by the Attorney General. And registrants will be appropriately registered as Federal-Only Voters when county recorders do not identify affirmative information establishing citizenship or non-citizenship.

4. Birthplace Information

Arizona has long collected birthplace information from individuals registering to vote. *See* 1913 A.R.S. § 2885. Since 1979, Arizona has required the State Form to include a field for a registrant to include her "state or country of birth." (*See* State Form at PX 027-1); 1979 Ariz. Laws ch. 209, § 3 (adopting A.R.S. § 16-152 to mandate the inclusion of the birthplace field on the State Form). But prior to the Voting Laws, an individual's birthplace was not *mandatory* for an individual to register to vote. *See, e.g.*, 1993 Ariz. Laws ch. 98, § 10 (adopting § 16-121.01, which specifies the minimum information required to be presumed properly registered to vote).

An individual's place of birth is not dispositive of citizenship status, as individuals born outside the U.S. may be derived or naturalized citizens. County recorders do not use birthplace information to determine an applicant's eligibility to vote, nor do county recorders need birthplace to verify an applicant's identity. (Connor Tr. 311:22–312:17; Petty Tr. 100:21–101:9, 102:10–103:1 (explaining use in Maricopa County); Hiser Tr. 2055:18–2056:8 (Pima County).) Instead, the HAVA Check matches AVID and MVD

records to confirm a person's identity for purposes of voter eligibility. (Petty Tr. 32:19– 33:14, 103:2–7; *see* MVD Verification Criteria at AZSOS-564548 (listing first and last name, date of birth, Arizona credential number, and SSN4 as matching criteria for duplicate records).) AVID also does not use birthplace as matching criteria to match duplicate registrations in the MVD database. (*See* MVD Verification Criteria at AZSOS-564547.) However, Ms. Petty and Ms. Hiser testified that a county recorder could use birthplace to identify duplicate registrations in VRAS or Voter if an applicant has the same name and other identifying information as an existing registered voter. (Petty Tr. 132:2–8; Hiser Tr. 2000:19–2002:23.)

County recorders may collect birthplace in some circumstances related to voter registration.[20] Specifically, if a registrant submits a birth certificate as DPOC that lists a different name than the registrant's current legal name but cannot provide supporting documentation verifying the different last name, the 2023 EPM instructs county recorders to accept the birth

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[20] Voters can submit a photocopy of the "pertinent pages" of a U.S. passport as DPOC, which the 2023 EPM states includes "the photo, passport number, name, nationality, date of birth, gender, place of birth, and signature" of the applicant. § 16-166(F)(3); (2023 EPM at ECF-19.) The United States requires birthplace on passport applications because it "is an integral part of establishing an individual's identity. It distinguishes that individual from other persons with similar names and/or dates of birth, and helps identify claimants attempting to use another person's identity." (Ex. 941, at 6.) Defendants ask the Court to take judicial notice of this provision of the U.S. Department of State's Foreign Affairs Manual. But the fact that the United States requires birthplace information for an international travel document is irrelevant to whether birthplace is useful to county recorders when verifying the identity of prospective voters.

certificate as DPOC if the registrant's first and middle names, birthplace, date of birth, and parents' names match that on the voter registration. (2023 EPM at ECF-19.) Maricopa County may also send notices requesting additional information to process applicants' registration forms. These notices request personal identifying information that the county recorder can use to "uniquely identify" the applicant's registration, including the applicant's birthplace, occupation, phone number, and father's name or mother's maiden name, though the county recorder will accept notices returned with incomplete information. (Ex. 85, at PX 85-1; Ex. 773, at MC 002990; Petty Tr. 168:1–12.)

County recorders may also use birthplace alongside additional personal identifying information that could be used as a security question to verify a voter's identity over the phone.[21] (Petty Tr. 101:10–14, 102:1–5; Connor Tr. 390:20–391:21; Hiser Tr. 2002:21–2004:3; 2023 EPM at ECF-229 (verifying birthplace when a voter calls to confirm provisional ballot status).) But birthplace alone is generally not sufficient to distinguish between voters for identity verification. (*See* Hiser Tr. 2056:18–2057:10, 2058:17–21.) In addition, ballot-by-mail request forms must contain a field for the voter's "State or country of birth, *or another piece of information* that, if compared to the voter's record, would confirm the voter's identity (such as the AZDL/ID# or SSN4, father's name, or mother's maiden name)." (2023 EPM at ECF-70 to -71 (emphasis added)); *see* A.R.S. § 16-542(A) (requiring a voter to provide her birthplace "or other information" that can be used to confirm her identity). And county

[21] Other personal identifying information could include a voter's date of birth or SSN4. (Petty Tr. 102:1–20, 166:10–167:3; Hiser 2003:20–2004:3.)

recorders may use birthplace when available to match deceased voters with the correct voter record and cancel registrations. (2023 EPM at ECF52 ("A County Recorder should match as much information as possible (including first name, last name, maiden name (if applicable), year of birth, place of birth, and city or town of residence) . . . .").)

Dr. Eitan Hersh[22] analyzed the efficacy of birthplace information to uniquely identify voters. (Hersh Tr. 647:2–12, 649:23–650:14.) Dr. Hersh noted several data issues with the birthplace information Arizona possesses for currently registered voters. Specifically, approximately one-third of existing voter registrations in Arizona lack birthplace information. (*Id.* 659:13–21.) Another 200,000 registrations list the United States as the voter's country of birth. (*Id.* 677:23–25.) Moreover, county recorders manually enter an applicant's birthplace (when provided) exactly as it appears on the State Form, resulting in non-uniform birthplace information for existing registered voters. (*Id.* 651:25–652:19, 677:20–22, 678:24–679:2; Petty Tr. 99:4–25; Connor Tr. 313:21–314:15.) Some birthplace designations are unclear, such as "CA," which could refer to either California or Canada. (Hersh Tr. 651:25–652:19.) And despite the State Form's request that applicants include "state or country of birth," applicants occasionally write their city or county

[22] Dr. Hersh is a Professor Political Science at Tufts University with a background in U.S. elections and election administration. (Hersh Tr. 642:24–643:18.) The Court credits Dr. Hersh's testimony and affords his opinions significant weight.

instead, which in some cases can refer to multiple locations.[223] (*Id.* 652:20–653:4; Petty Tr. 100:2–15.)

To Ms. Connor's knowledge, county recorders are unable to confirm the accuracy of an applicant's birthplace. (Connor Tr. 316:3–6; *see* Petty Tr. 103:21–104:5 (explaining Maricopa County is unable to confirm birthplace).) There is no evidence that Arizona plans to establish parameters to standardize the collection of birthplace information for new voters or to collect missing birthplace information from currently registered voters. (*See generally* 2023 EPM (lacking any guidance about how to collect birthplace information on a voter registration).) And despite county recorders' *potential* uses of birthplace, defendants adduced no evidence that county recorders have ever encountered challenges determining the identity or eligibility of the one-third of voters for whom Arizona lacks this information. Dr. Hersh also opined that standardized birthplace information would still not meaningfully help to identify voters. (Hersh Tr. 677:20–679:7.) Specifically, he determined that of the nearly 4.7 million active and inactive voter records in Arizona, only 2,734 records cannot be uniquely identified based on the voter's name and date of birth.[24] (*Id.* 658:20–659:11.) Most of these remaining

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[23] For example, Dr. Hersh testified that "San Luis" is a city in Arizona and twelve other countries. (Hersh Tr. 652:20–653:1.)

[24] Dr. Hersh did not use the matching criteria from the HAVA Check to conduct his analysis, but instead treated registration records as identical only if the names matched exactly. (Hersh Tr. 684:12–687:14.) By contrast, Dr. McDonald calculated 12,051 "instances" of indeterminate record matches from the HAVA Check's soft matching criteria, which Plaintiffs offered as evidence of the unreliability of the MVD database for determining citizenship. (McDonald Tr. 1071:14–23, 1084:12–1085:8, 1102:23–1103:1.) The Court finds it unnecessary to ascertain the most

records can be uniquely identified with the individual's SSN4 or Arizona credential number. (*Id.* 659:13–665:12 (explaining that an ID number can confirm whether two records are for the same or two separate individuals in nearly all ambiguous cases); *see* Ex. 972 (illustrating possible identification scenarios).) And for those records that lack an ID number, Dr. Hersh found that birthplace alone would not sufficiently resolve the identity of two voter records. (Hersh Tr. 665:17–668:1.)

The Court finds that while county recorders can sometimes use birthplace in Arizona's voter registration process, birthplace is of little utility in nearly all cases.

5. Registration List Maintenance

H.B. 2243 § 2's List Maintenance Procedures require county recorders to conduct recurring database checks to verify voters' citizenship status. § 16-165(G)–(J). And pursuant to the Cancellation Provision, county recorder must cancel a voter registration after the county recorder "obtains" and "confirms" information that the voter is a non-citizen, notifies the voter, and that voter fails to provide DPOC within 35 days. § 16 165(A)(10), (K). Except for listing various databases, the Voting Laws do not specifically describe how county recorders are to "obtain" or "confirm" information that a voter is a non-citizen, but the 2023 EPM provides some additional guidance.

i. Obtaining Information of Non-Citizenship

Prior to the Voting Laws, county recorders were required to cancel a voter's registration if that voter

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likely correct figure, as these analyses both indicate that county recorders would seldom have a reason to consult birthplace to verify a soft match and identify a voter.

had indicated on a juror questionnaire that they were not a U.S. citizen, the county recorder did not find the voter's DPOC on file, and the voter failed to provide DPOC within 35 days. (2019 EPM at PX 006-50 to -51.) The Voting Laws expand on this system by mandating the use of jury summary reports to cancel the registrations of all voters who attest to non-citizenship on a jury questionnaire. §§ 16-165(A)(10), 21 314(F). This is one method for county recorders to "obtain" information of non-citizenship of registered voters. (2023 EPM at ECF-57.)

Since December 2022, ADOT has furnished the Secretary of State a monthly "customer extract" file containing the authorized presence status of all individuals with an MVD credential to comply with H.B. 2243 § 2. (Pls.' Stip. Nos. 101, 105, 107, 108, 112; Ex. 234 at PX 234-1 to -2.) H.B. 2243 § 2 directs the Secretary of State to compare the customer extract file to AVID, identify voters who MVD indicates are not U.S. citizens, and notify county recorders of these individuals.[25] § 16-165(G); (*see also* 2023 EPM at ECF-54 (interpreting § 16-165(G) as requiring the Secretary of State to notify county recorders of individuals who are "not a United States citizen according to the [MVD] database").) The customer extract marks a "non-citizen" field with "Y" when an individual's MVD records indicate that the individual possesses a foreign-type credential and leaves the field blank for individuals with a non-foreign-type credential. (Pls.' Stip. No. 106; Ex. 234 at PX 234-1.) Because MVD

[25] Though the Secretary of State has not yet used the customer extract file for any purpose, the court finds it reasonable that the Secretary of State will do so to comply with the Voting Laws. (Jorgensen Tr. 566:24–573:19; Connor Tr. 376:6–15; Morales Tr. 622:5–623:6.)

records reflect only that information provided to MVD when an individual receives a new or duplicate credential, the customer extract file may contain outdated citizenship information for naturalized citizens who still possess an unexpired foreign-type credential or are awaiting SAVE verification to obtain a new credential. (Jorgensen Tr. 571:21–572:15; ADOT Dep. 137:20–138:15.) And because native-born citizens cannot be issued a foreign-type credential, the Secretary of State's use of the customer extract file to conduct monthly MVD checks will only ever misidentify naturalized citizens as non-citizens.

The 2023 EPM states that it is not currently "practicable" for county recorders to obtain information of non-citizenship from SAVE because county recorders lack access to SAVE for list maintenance purposes. (2023 EPM at ECF-24, -57); § 16-165(I). But the evidence suggests that USCIS would consider expanding Arizona's use of SAVE under an amended or new MOA. (USCIS Dep. 59:14–23, 62:20–63:7, 70:8–23, 170:15–171:20 (explaining at least one state is authorized to use SAVE for list maintenance).) Moreover, because the Voting Laws direct county recorders to use SAVE for list maintenance, it is reasonable that Arizona would seek authorization for this purpose.[26] H.B. 2243 § 2 instructs county recorders to consult SAVE each month for voters lacking DPOC

[26] The Voting Laws also require the Secretary of State to provide the Attorney General access to SAVE to investigate voters lacking DPOC, but the SAVE MOA does not authorize this sort of use. A.R.S. § 16-143(C); (USCIS Dep. 58:13–25 (explaining that the Attorney General's office would need its own MOA to use SAVE); *see generally* SAVE MOA.) The Court finds it similarly probable that Arizona would seek authorization from USCIS to use SAVE for investigative purposes.

and voters who the county recorder has "reason to believe" are non-citizens. § 16-165(I). The Voting Laws do not specify what constitutes a "reason to believe" and Ms. Connor testified that county recorders will likely exercise discretion to make this determination. (Connor Tr. 372:11–23.) Regardless of any county recorder discretion, only naturalized citizens will ever be subject H.B. 2243's SAVE checks under the Reason to Believe Provision because SAVE contains no information on native-born citizens.

The Voting Laws and 2023 EPM provide county recorders with well-defined procedures by which county recorders could "obtain" information that a voter is a non-citizen. However, given the limitations of the data accessible from MVD and SAVE, the Court finds that the Voting Laws' List Maintenance Procedures' MVD checks and the Reason to Believe Provision's SAVE checks will cause county recorders to "obtain" information of non-citizenship predominately for naturalized citizens.

ii. Confirming Information of Non-Citizenship

If a county recorder obtains information that a voter is a non-citizen, the county recorder must "confirm" this information. § 16-165(A)(10). The county recorder "shall first verify that the person at issue is a true match to a person listed on [AVID]." (2023 EPM at ECF-57.) When there is a "true match" and AVID records indicate that the voter has previously provided DPOC, the county recorder "shall not cancel" the voter's registration. (*Id.*) If AVID indicates that the voter has not provided DPOC (i.e., Federal-Only Voters), county recorders must, when practicable, review databases to which the county recorder has access, and may communicate directly with the voter.

(*Id.* (citing § 16 165(K).) If a county recorder "confirms" that a voter not a U.S. citizen, the county recorder must notify the individual by forwardable mail that the individual must provide DPOC within 35 days to avoid having her registration canceled.[27] (*Id.*) "The notice shall include a list of documents the person may provide as DPOC and a postage prepaid pre-addressed return envelope." (*Id.* at ECF-58.) County recorders must complete any systematic cancellation of voter registrations based upon the receipt of a jury summary report or MVD records at least 90 days before an election. *(Id.* at ECF-62; *see* 09/14/2023 Order at 34.)

Dr. McDonald opined that the 6,084 naturalized voters whose MVD records reflect outdated citizenship information could become stuck in a "loop" where MVD will flag the voter as a non-citizen after each monthly check. (McDonald Tr. 1071:24–1072:5, 1089:23–1090:8.) According to Dr. McDonald, these voters must then repeatedly provide DPOC to county recorders to avoid cancellation and referral to the Attorney General. (*Id.* 1075:3– 1077:9.) Dr. McDonald's theory is unpersuasive considering the 2023 EPM's directive that county recorders must first check whether the voter has previously submitted DPOC. (2023 EPM at ECF-57.) Dr. McDonald also opined that the "anomalies" in the distribution of Federal-Only Voters and voter registration cancellations and suspensions among counties "suggest" that county recorders do not uniformly implement DPOC procedures.

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[27] Plaintiffs offered evidence that Arizona counties provide notice letters only in English, Spanish, Native languages, and Braille, and that no county issues notice letters in AANHPI languages. (Petty Tr. 162:2–16.) But Plaintiffs do not claim that Arizona is failing to satisfy the Voting Rights Act's voting materials language requirements. *See* 52 U.S.C. § 10503.

(McDonald Tr. 1107:12–22, 1113:17–25.) For example, Pima County reported zero canceled or suspended registrations for invalid DPOC despite being the second-largest county. (*See* Ex. 334 ("Registration Cancellation Rates"); Ex. 335 ("Registration Suspension Rates").) But Dr. McDonald adduced no explanation of the cause of this discrepancy except that the Pima County Recorder registers applicants without DPOC as Federal-Only Voters, just as the LULAC Consent Decree requires. (McDonald Tr. 1108:23–1109:6; *see also id.* 1111:19–1112:20 (describing Maricopa County's small number of suspended registrations); Doc. 679-1, Ex. 4, 30(b)(6) Dep. of Pima County Recorder ("Pima Dep.") 143:5–12.) These county registration cancellation, suspension, and Federal-Only Voter rates hold little persuasive value.

6. Investigation by the Attorney General

As outlined above, the Voting Laws require county recorders to refer for investigation the voter registrations of all (1) Federal-Only Voters as part of the Attorney General Referral Provision; (2) applicants who a county recorder "matches" with information indicating non-citizenship and do not submit DPOC; and (3) registered voters who a county recorder "confirms" are non-citizens and do not submit DPOC (collectively, the "Criminal Investigation Procedures"). *See* §§ 16-121.01(E), 16-143(A), 165(A)(10); (2023 EPM at ECF-17, -22.) County recorders refer these registrations to their respective county attorneys in addition to the Arizona Attorney General.

Bill Knuth, a lead special agent with the Attorney General's office, investigates election integrity matters. (Knuth Tr. 2107:25–2108:11.) Mr. Knuth explained that the Attorney General's office currently handles election-related referrals from county

recorders for further investigation on a case-by-case basis. (*Id.* 2124:4–16, 2130:23– 2131:4.) Specifically, the Election Integrity Unit assesses referrals and determines whether allegations of non-citizenship warrant a more thorough investigation. (*Id.* 2134:18–2135:5.) H.B. 2492 § 7 mandates that the Attorney General's office "use all available resources to verify the citizenship status" of Federal-Only Voters. § 16-143(B). At minimum, this includes consulting SAVE, the MVD and SSA databases, and any other databases to which the county recorders have access. *Id.*

Mr. Knuth primarily consults the MVD database and various law enforcement databases for his own investigations and testified that he can retrieve limited information from the SSA database. (Knuth Tr. 2114:4–2117:1, 2117:18–2118:10.) He was unfamiliar with SAVE. (*Id.* 2111:6–12.) An MVD search will yield the subject's credential type, but neither the MVD nor SSA database provide the Attorney General's office with direct citizenship information. (*Id.* 2115:12–21.) The Attorney General's office may also speak directly to the subject of an investigation of illegal voting, but Mr. Knuth has never contacted an alleged non-citizen during an investigation. (*Id.* 2131:5–17, 2138:19–2139:14.) Mr. Knuth testified that he would forward a case to prosecutors upon finding probable cause that a non-citizen had registered to vote or voted but he could not recall ever referring such a case for prosecution. (*Id.* 2132:13–2133:2, 2133:17–2134:3.)

C. State Interests in Enacting the Voting Laws

The State offers two purported interests in the Voting Laws: (1) preventing voter fraud and limiting voting to individuals eligible to vote, and (2) improving public confidence in Arizona's elections.

1. Preventing Ineligible Individuals from Registering to Vote or Voting in Arizona

It is a felony to knowingly register oneself or another person to vote, "knowing" that the registrant is not eligible to vote. § 16-182. Dr. Lorraine Minnite[28] opined that voter fraud is exceedingly rare nationally and in Arizona. (Minnite Tr. 1578:13–1582:7.) Dr. Minnite and Dr. Mark Hoekstra[29] agreed, however, that voter fraud can be difficult to detect. (Minnite Tr. 1565:23–1566:8, 1567:14–22; Hoekstra Tr. 1747:3–1748:2.) As part of her "mixed methods"[30] approach, Dr. Minnite analyzed prosecution data from the U.S. Attorney General's office. Between 2002 and 2005, 200 million votes were cast in federal elections. (Minnite Tr. 1579:4–13.) During this time, the U.S. Attorney General began its "Ballot Access and Voting Integrity Initiative" to identify voter intimidation and voter

[28] Dr. Minnite is an associate professor at Rutgers University and has studied the incidence of voter fraud in U.S. elections for 20 years. (Minnite Tr. 1555:19–1556:9.) Dr. Minnite is the author of a leading book regarding the incidence of voter fraud, which the United States Government Accountability Office has recognized as scientifically reliable. (*Id.* 1557:13–1559:13.) The Court found Dr. Minnite credible and affords substantial weight to her opinions.

[29] Dr. Hoekstra is a professor of economics at Baylor University. (Hoekstra Tr. 1640:20–21.) Dr. Hoekstra has published one paper on the impact of photo identification laws. (*Id.* 1642:20–24.) Defendants offered Dr. Hoekstra's testimony to rebut Dr. Burch's, Dr. McDonald's, and Dr. Minnite's opinions regarding issues of the Voting Laws' correlation to, among other things, disparate registration and voting outcomes. (*Id.* 1654:7–9.) The Court found Dr. Hoekstra credible and affords his opinions only some weight.

[30] The mixed methods approach combines quantitative data and qualitative sources to identify patterns in the research and infer a conclusion from this information. (Minnite Tr. 1564:6–1565:22, 1570:12–1571:4.)

fraud. (*Id.* 1578:13–25.) The U.S. Attorney General's office indicted 40 individual voters for voter fraud from 2002 to 2005 through the initiative, with only 15 indictments for non-citizen voting. (Minnite Tr. 1578:13–1580:1.) In addition, nearly one billion votes were cast from 2000 to 2017, but U.S. Attorney offices initiated less than 200 election-related cases. (*Id.* 1580:19–1581:21.)

The Arizona Attorney General's office maintains a list of all election-related prosecutions. According to this list, there have been 38 total prosecutions related to illegal voting by the Attorney General since 2008, none of which involved a charge of non-citizen voting. (Ex. 292 at PX 292-1 to -6; Lawson Tr. 1688:3–1690:7.) The Attorney General's office is aware of two current indictments against alleged non-citizen voters, both which involve individuals who engaged in systematic identity theft. (Lawson Tr. 1691:11–15, 1707:8–1708:4.) These cases are sealed and were not known to the Arizona Legislature at the time it enacted the Voting Laws. (Lawson Tr. 1708:14–23.) The Attorney General's office also receives complaints from the public that non-citizens are voting in Arizona, including allegations regarding specific voters, though these allegations have never led to any prosecutions. (Knuth Tr. 2109:6–2110:2, 2120:11–2121:9; Ex. 286, Ex. 287.) Dr. Minnite identified 13 prosecutions for non-citizen voting in Maricopa County between 2007 and 2008. (Minnite Tr. 1588:3–23.)

Aside from prosecutions, Ms. Petty could recall "one or two instances" in which the Maricopa County Recorder's office confirmed that a registered voter was a non-citizen after receiving notice from the jury office that a potential juror self-reported non-citizenship. (Petty Tr. 105:24–107:24.) Other county recorders

reported being unaware of the prevalence of non-citizens registering to vote or voting. (*See* Pima Dep. 241:14–242:11; Doc. 679-3, Ex. 17, 30(b)(6) Dep. of Pinal County Recorder ("Pinal Dep.") 114:19–115:1.) In addition, county recorders often receive faulty voter registration forms from third-party registration drives. For example, both Maricopa County and Pima County reported a marked increase in these forms during the 2022 election cycle. (Petty Tr. 137:21–24; Hiser Tr. 1995:7–1996:19.) But Defendants adduced no evidence indicating that these forms were submitted in an attempt to register non-citizens. (*See, e.g.*, Hiser Tr. 1995:21–1998:15 (Pima County receiving registration forms purported to be for deceased voters); Johnston Tr. 2083:6–2085:5 (Yuma County receiving registration forms containing falsified or incorrect birth date, SSN4, or residence information).) Nor is there evidence that any of Arizona's Federal-Only Voters are non-citizens.

The Court finds that though it may occur, non-citizens voting in Arizona is quite rare, and non-citizen voter fraud in Arizona is rarer still. But while the Voting Laws are not likely to meaningfully reduce possible non-citizen voting in Arizona, they could help to *prevent* non-citizens from registering or voting. (*See* Minnite Tr. 1563:3–14 (opining the Voting Laws will not "reduce" voting fraud "further").)

2. Voter Confidence

Evidence at trial indicates that members of the public have expressed concerns about election integrity in Arizona, specifically as it relates to non-citizens voting in federal elections. (Knuth Tr. 2121:12–23; Lawson Tr. 1696:18–25; Quezada Tr. 877:8–878:17.) For example, when drafting the 2023 EPM, the Secretary of State received public comments

for two weeks, approximately one-quarter of which were "form" letters commenting that "voters should be citizens" or should prove their citizenship. (Connor Tr. 382:12–383:25.)

According to Dr. Hoekstra, the Voting Laws could reduce perceptions of voter fraud by persuading voters that Arizona is taking precautions to make it more difficult for noncitizens to vote. (Hoekstra Tr. 1751:18–1752:9, 1870:2–16; *see also* Richman Tr. 1933:10–18, 1934:16–23, 1935:14–17 (opining that the Voting Laws "should" improve voter confidence).) Dr. Hoekstra cited a study that found "a couple percentage points" increase in voter confidence among individuals who were notified before an election that their state had a voter identification law. (*Id.* 1752:15–1753:16.) However, measuring improved voter confidence typically requires voters to be well-informed about the election law, and Defendants adduced no evidence quantifying the likelihood that Arizonans will become aware of the Voting Laws and their purported impacts on preventing voter fraud in Arizona. (*See id.* 1797:18–1800:16, 1866:4–1867:25.)

No party offered direct evidence predicting the expected effects of the Voting Laws on Arizonans' confidence in the State's elections.

D. Intent and Effects of the Voting Laws

1. Evidence of Discrimination

i. History of Discrimination in Arizona

Plaintiffs offered the expert testimony of Dr. Orville Burton and Dr. Derek Chang to illustrate the Voting Laws in the context of Arizona's history of discrimination. Plaintiffs offered Dr. Burton as "an expert in American history, voting behavior,

discrimination, socioeconomic status and equality and historical intent."[31] (Burton Tr. 1403:20–22.) Plaintiffs offered Dr. Chang as an expert on historical patterns between the Voting Laws and other discriminatory laws.[32] (Chang Tr. 1335:17–24.)

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[31] Overall, the Court affords Dr. Burton's opinions some weight but questions the reliability of some of his testimony regarding Arizona history. For example, Dr. Burton testified that Arizona had been deemed the "twelfth star of the Confederacy," but it was unclear whether he understood this to refer to the former territory that encompassed both Arizona and New Mexico at the time, or what would become Arizona following statehood. (Burton Tr. 1491:16–1493:23, *see also id.* 1496:14–24 (failing to consider Arizona's history of supporting the Union), 1498:17–1500:23 (Arizona's prohibition of slavery).) Dr. Burton also lacked a strong understanding of existing Arizona election law. (*See, e.g.*, *id.* 1528:8– 1529:20 (incorrectly believing voters removed for non-citizenship were not notified under previous Arizona law), 1536:4–16 (unaware if polling locations are open past 5:00 PM).) And Dr. Burton did not consider it necessary to consult the legislative history of the Voting Laws in forming his opinions. (*Id.* 1542:12–24.)

[32] The Court affords Dr. Chang's opinions little weight. Dr. Chang did not review the legislative history of the Voting Laws because he did not believe it would have been particularly useful when comparing the Voting Laws to broader historical patterns of discrimination. (Chang Tr. 1342:8–12, 1382:8–19.) Dr. Chang informed most of his opinion by considering the history of the Asian American and Pacific Islander ("AAPI") community from a national perspective. (*See id.* 1345:20–1346:3 (discussing the federal Page Act), 1348:1–23 (discussing the Federal Chinese Exclusion Act of 1882).) As for some of the history of discrimination against the AAPI community in Arizona, Dr. Chang's opinions were incomplete or misleading. For example, he opined that a recent House Bill was like Arizona's 1921 "alien land law," but he had not read the bill in its entirety, which prohibits land sales and leases to specific foreign governments or companies. (*Id.* 1375:14 1377:14); H.B. 2376, 56th Leg., 1st Sess. (Ariz. 2023). Dr. Chang also asserted that Phoenix experienced a

Before statehood, Arizona banned intermarriage between Asians and White people. (Chang Tr. 1346:19–1347:15, *see id.* 1337:24–1338:19 (describing the "Period of Immigration").) Though Arizona historically banned interracial marriage, an Arizona state court ruled this to be unconstitutional before *Loving v. Virginia*, 388 U.S. 1 (1967); (Burton Tr. 1415:1–21, 1504:6–24.) Arizona also passed an "alien land law" in 1921 that barred immigrants who were ineligible to become U.S. citizens—specifically, people of Asian descent—from owning land. (Chang Tr. 1349:16–1350:5.) In 1953, Arizona courts ordered the full desegregation of schools. (Burton Tr. 1421:19–1422:2, 1507:25–1508:17.) Following desegregation, however, Arizona continued to require English-only classroom instruction, thereby producing disparate educational outcomes particularly for Native Americans and Spanish speakers. (*Id.* 1422:3–7, 1423:5–23.) Arizonans also amended the Arizona Constitution in 1988 to mandate that all political subdivisions of Arizona act only in English, but the Arizona Supreme Court ruled this unconstitutional. *See Ruiz v. Hull*, 957 P.2d 984, 998, 1000 (Ariz. 1998).

Arizona also has a well-documented history of voting discrimination. For example, the territorial government imposed a literacy test as a prerequisite to voting to limit the "ignorant Mexican vote," which Arizona renewed in 1912 after statehood. (Burton Tr. 1429:1–1431:22.) And while Native Americans were granted citizenship in 1924, Arizona courts only recognized their right to vote in 1948. (*Id.* 1432:16–1434:1, 1513:2–8); *see* Indian Citizenship Act of 1924,

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50% increase in anti-Asian violence from 2019 to 2020, which while correct, was an increase from just two reports of violence in 2019 to three in 2020. (Chang Tr. 1383:2–1384:24, 1385:3–9.)

Pub. L. No. 68-175, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)). However, Arizona's literacy requirement stood until 1972, meaning many Native Americans were, for all intents and purposes, still unable to vote. (Burton Tr. 1432:16–1434:1); *see Oregon v. Mitchell*, 400 U.S. 112 (1970) (finding amendment to the Voting Rights Act banning literacy tests constitutional). In the 1970s and 1980s, Arizona conducted "total" voter roll purges that required individuals to re-register to vote, but fewer minority voters would re-register compared to White voters. (Burton Tr. 1435:3–10, 1436:3–11.) Dr. Burton also cited at least one example of a Maricopa County election official requesting DPOC around this time even though DPOC was not required by law. (*Id.* 1435:10–20.) And for forty years, Arizona was subject to section 5 of the Voting Rights Act, which required Arizona to seek "preclearance of changes affecting voting."[33] 28 C.F.R. pt. 51, App. (2012).

Plaintiffs offered evidence that disparate socioeconomic outcomes remain pervasive for communities of color. The median household income for Black, Native Indian and Alaska Native, and Latino individuals is approximately $9,000 to $21,000 less than the household average. (Doc. 672-3, Ex. 28, ("ACS Household Income") at ECF-59.) Non-White Arizonans are also more likely than White Arizonans to live in a household with an income falling below the poverty line. (Pls.' Judicial Notice ¶ 27.) For example, 19.2% of Latino Arizonans live in a household below the poverty line, compared to 9.6% of White Arizonans, although naturalized citizens are less likely than native-born

[33] In *Shelby County, Alabama v. Holder*, the Supreme Court held that the formula for determining "covered jurisdictions" that were required to seek preclearance was unconstitutional. 570 U.S. 529, 556–57 (2013).

citizens to live in poverty. (Doc. 672-3, Ex. 27, ("ACS Poverty Rates") at ECF-51, -53.) Moreover, approximately 72% of voting-age Latino and 78% of American Indian or Alaska Native Arizonans have earned a high school diploma or equivalent, compared to 95% of White Arizonans. (Doc. 672-3, Ex. 29, ("ACS Educational Attainment") at ECF-71, -74.)

ii. The Voting Laws' Legislative History

Arizona's November 2020 presidential election was decided in favor of President Biden by a margin of 10,457 votes. (Pls.' Stip. No. 154.) Former President Trump falsely claimed that non-citizens had illegally cast more than 36,000 ballots in the election. (Minnite Tr. 1597:5–11.) President Trump's attorney Rudolph Giuliani also stated that tens of thousands of "illegal aliens" voted in Arizona, which a New York state appellate court found "false and misleading." *In the Matter of Rudolph W. Guiliani*, 146 N.Y.S. 3d 266, 268, 279–80 (N.Y. App. Div. 2021). Against this backdrop, the Arizona Senate established a committee to audit the 2020 election, which revealed no evidence of voter fraud. (Quezada Tr. 824:15–825:9.)

Prior to passing the Voting Laws, the Arizona Legislature did not establish that any non-citizens were registered to vote in Arizona. (Doc. 679-1, Ex. 6, ("Toma Dep.") 99:20–22, 100:1–5, 102:7–21; Doc. 679-2, Ex. 7, ("Petersen Dep.") 84:15–85:5.) Neither Speaker Toma nor President Petersen could recall the Legislature being presented with or considering evidence of non-citizen voter fraud in Arizona. (Toma Dep. 99:12–18; Petersen Dep. 95:6–8, 95:11–96:10, 184:18–185:4.)

H.B. 2492 was introduced to the Arizona House of Representatives on January 24, 2022. (Pls.' Stip. No.

42.) Representative Jake Hoffman was the prime sponsor of H.B. 2492 and the Arizona Free Enterprise Club[34] helped draft the substance of the bill. (Toma Dep. 139:19–20; Peterson Dep. 158:7–13, 159:19–160:7; *see* Ex. 54, ("H.B. 2492 House Gov. Comm. Tr.") at PX 054-5 to -7.) In support of H.B. 2492's DPOC Requirement, Representative Hoffman explained during a House Government and Elections Committee meeting that following the LULAC Consent Decree, more than 11,600 individuals had registered to vote in federal elections without DPOC. (H.B. 2492 House Gov. Comm. Tr. at PX 054-3 to -4.) On February 22, 2022, a majority of the House Rules Committee voted in favor of H.B. 2492 over the concerns of the Committee's counsel that the NVRA likely pre-empted the bill's DPOC Requirement for Federal Form applicants. (*See generally* Ex. 57.) The Arizona House of Representatives passed the bill. (*See generally* Exs. 58, 59.)

The Arizona Senate Judiciary Committee met on March 10, 2022 to discuss the bill. (*See generally* Ex. 61.) In explaining his vote against H.B. 2492 during the committee meeting, then-Senator Martin Quezada indicated that the bill would disproportionately "target[]" people of color, leading Senator Petersen to call a recess after the audience began to audibly react. (*Id.* at PX 061-34 to -36.) The Senate passed H.B. 2492 on March 23, 2022, which then-Governor Doug Ducey signed into law. (Ex. 62, at PX 062-22; Pls.' Stip. No. 43.) H.B. 2492 took effect January 1, 2023. (Pls.' Stip. Nos. 44–45.) The legislative history indicates that the legislators in favor of the bill were concerned

[34] The Free Enterprise Club is a conservative lobbying group that advocated for the Voting Laws to address "how more illegals started voting in AZ." (Ex. 602 (email from Arizona Free Enterprise Club to Senator Petersen).)

specifically with the increase of Federal-Only Voters in Arizona who had not provided DPOC. (*See, e.g.*, H.B. 2492 House Gov. Comm. Tr. at PX 054-3.)

H.B. 2243 was first introduced in the Arizona Legislature in January 2022. (*See generally* Ex. 68.) As originally drafted, H.B. 2243 amended only § 16-152 to require a notice on the State Form informing the voter that her registration would be cancelled if the voter moved permanently to a different state. (*See generally* Exs. 705, 707.) On January 31, 2022, H.B. 2617 was introduced, which would have required county recorders to cancel a voter's registration if the county recorder "confirms" either that the voter is a non-citizen or was issued an out-of-state identification, and the voter failed to furnish "satisfactory evidence that the person is qualified" within 90 days of receiving notice of cancellation.[35] (Ex. 4, ("H.B. 2617 Text") at PX 004-2 to -3; *see generally* Ex. 67, ("H.B. 2617 Bill History").) House Representative Joseph Chaplik was the Primary Sponsor of H.B. 2617, and the Arizona Free Enterprise Club helped draft the bill. (H.B. 2617 Bill History at PX 067-1; Petersen Tr. 238:4–8.) On May 25, 2022, the Arizona Legislature passed H.B. 2617. (*See* H.B. 2617 Bill History at PX 067-3; *see also*

[35] As discussed *supra* Section I(B)(5)(i), county recorders previously provided a voter with 35 days to submit DPOC if that voter had indicated on a juror questionnaire that they were not a U.S. citizen, and voter's registration file lacked DPOC. Also, before the introduction of H.B. 2617, voters were also entitled to a 35-day final notice to update the voter's address and avoid being placed into inactive status if official election mail was returned to county recorders as undeliverable. (2019 EPM at PX 006-52 (describing the process to satisfy the NVRA); *see also id.* at PX 006-52 to -53 (describing similar process when a county recorder receives information from USPS's National Change of Address Service).)

Exs. 490, 491, 494, 495, 497, 498.) Governor Ducey vetoed the bill, noting that H.B. 2617 was "vague and lack[ed] any guidance for how a county recorder would" determine whether a person was a "qualified elector." (Ex. 53, ("H.B. 2617 Veto Letter") at PX 053-1; *see* H.B. 2617 Text at PX 004-2 to -3 (requiring county recorder to cancel voter registration when the county recorder confirms that a voter is "not a qualified elector").)

Following Governor Ducey's veto of H.B. 2617, Representative Toma and Representative Chaplik decided to include an amended version of H.B. 2617 into H.B. 2243. (*See* Toma Dep. 235:7–23, 240:2–3, 246:23–247:6, 257:13–17.) Senator Petersen sponsored the amendment in the Senate, and on the last day of the legislative session, proposed a floor amendment[36] in the Committee of the Whole to incorporate H.B. 2617 into H.B. 2243. (Ex. 708; Petersen Dep. 247:10–20, 268:6–22, 269:2–10.) Senators Quezada and Petersen, and Representative Toma all agreed that last-minute amendments commonly occur at the end of the legislative session, though Senator Quezada testified that it was abnormal for "significant" amendments to be introduced so late in the legislative session. (*See* Quezada Tr. 860:9–861:16; Toma Dep. at 237:8–239:3; Petersen Dep. at 319:3–24.)

Senator Petersen characterized the amendments to H.B. 2243 as essentially "identical to" H.B. 2617, except for some "additional notice requirements." (Ex. 499 at PX 499-3.) But H.B. 2243 provides voters with

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[36] A floor amendment allows a legislator to include the substance of a bill that has changed after leaving its assigned committees into a separate "germane" bill within the same section or title of the Arizona Revised Statutes. (Petersen Dep. 270:3–10.)

35 days to furnish DPOC instead of the 90 originally in H.B. 2617. (*Compare* H.B. 2243 Text at PX 002-5 to -6, *with* H.B. 2617 Text at PX 004-3.) H.B. 2243 also differs from H.B. 2617 by requiring county recorders to place a voter's registration into inactive status instead of cancelling the registration if the voter fails to attest (instead of providing "satisfactory evidence") that she is an Arizona resident within 90 days. (*Compare* H.B. 2243 Text at PX 002-6, *with* H.B. 2617 Text at PX 004-3.) There is no explanation for these changes in the legislative record except that H.B. 2243 as amended "addresses the [Governor's] veto letter." (Ex. 499 at PX 499-3.) The Committee of the Whole adopted Senator Petersen's floor amendment. (*Id.* at PX 499-6.) The Arizona Legislature then passed H.B. 2243, which Governor Ducey signed into law.[37] (*See* Exs. 68, 500.)

Nothing in the legislative history of H.B. 2492 or H.B. 2243 reflects an intent to suppress voter registrations of members of minority groups or naturalized citizens.[38] (*See generally* H.B. 2492 House Gov. Comm. Tr.; Exs. 57, 58, 61, 490, 491, 494, 495, 497– 500.) The evidence indicates that concerns of reinforcing election integrity in response to the increase in Federal-Only Voters drove the Legislature's enactment of the Voting

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[37] H.B. 2243 supersedes H.B. 2492 § 8, which would have directed county recorders to cancel the registrations of voters who county recorders "confirm[]" are not U.S. citizens, without first providing notice or an opportunity for voters to furnish DPOC. (*See* H.B. 2492 § 8.)

[38] Plaintiffs make much of ongoing discriminatory comments Senator Borelli purportedly made to Senator Quezada during Senator Quezada's time in the Senate, but regardless of what Senator Borelli may have expressed, Plaintiffs cannot impute his beliefs or motives to the entire Arizona Legislature.

Laws. (*See, e.g.*, H.B. 2492 House Gov. Comm. Tr. at PX 054-3.) Plaintiffs did not adduce evidence challenging the sincerity of some Arizonans' beliefs that non-citizens had voted in the 2020 election. And while there is no evidence that Federal-Only Voters may be non-citizens, the Legislature's decision to scrutinize these voters does not ring of discrimination. In addition, the justification for the Birthplace Requirement came from a representative for the Arizona Free Enterprise Club, who explained that birthplace could help identify voters in the databases enumerated in the Voting Laws, such as NAPHSIS. (Ex. 61 at PX 061-24 to -26.) The legislative record lacks any indicia of a nefarious motive. And despite Dr. Chang and Dr. Burton's account of Arizona's history of discrimination, neither expert articulated a persuasive factual nexus between this history and the Fifty-Fifth Legislature's enactment of the Voting Laws.

2. Effect of the Voting Laws on Voters

Most of H.B. 2243 requires no action on the part of voters. Its List Maintenance Procedures impose obligations on county recorders and the Secretary of State to ensure that all registered voters are U.S. citizens. *See* § 16-165(G)–(J). Only if a county recorder "confirms" a voter is a non-citizen must that voter produce DPOC within 35 days to avoid having her registration cancelled and referred to the attorney general for investigation. *Id.* § 16-165(A)(10). H.B. 2492's Citizenship Verification Procedures and Attorney General Referral Provision similarly require county recorders and the attorney general to investigate the citizenship status of registrants and voters without DPOC. §§ 16-121.01(D), 16-143(B).

Dr. Traci Burch[39] applied the "rational choice" framework to analyze the burdens the Voting Laws would impose on Arizona voters. The rational-choice framework weighs the perceived probable rewards of an action against the probable corresponding costs to predict the likelihood that an individual will perform the action. (Burch Tr. 931:20–932:11.) The three primary costs are: (1) learning costs, such as learning how to register to vote; (2) compliance costs, such as the cost to obtain the information necessary to register to vote; and (3) psychological costs, or the emotional burdens associated with performing the action and the resulting effects of that action. (*Id.* 933:13–17, 934:10–25, 935:15– 936:7.) Individuals of higher socioeconomic status are typically better positioned to bear these costs as compared to individuals of lower socio-economic status. (*Id.* 940:23–941:24, 942:19–944:12.)

Dr. Burch opined that requiring DPOC to register to vote and avoid removal from the voter rolls will increase compliance costs for Arizona voters, particularly those who lack ready access to DPOC. (*Id.* 969:5–9.) Plaintiff representatives testified that some citizens residing in Arizona may lack ready access to the information that constitutes DPOC in Arizona. (*See, e.g.*, Nitschke Tr. 469:8–470:3 (explaining out-of-state students may keep records with parents); Tiwamangkala Tr. 1273:22–1274:3 (explaining that Equity Coalition's partner organization helps AANHPI

[39] Dr. Burch is an associate professor of political science at Northwestern University and a research professor at the American Bar Foundation. (Burch Tr. 923:23–25.) Dr. Burch testified to the burdens the Voting Laws may impose on individuals in attempting to vote. (*Id.* 927:16–18, 928:16–929:3.) The Court found Dr. Burch credible and affords her opinions considerable weight.

individuals obtain citizenship documentation to apply for government benefits).) Estimates suggest that around seven percent of all U.S. citizens lack ready access to proof of citizenship. (Hoekstra Tr. 1838:24–1839:10.) But Plaintiffs adduced no evidence estimating the number of Federal-Only Voters who lack all acceptable forms of DPOC. Nor did Plaintiffs show that naturalized citizens or people of color are more likely than their White counterparts to lack DPOC. And assuming *all* of Arizona's Federal-Only Voters did not possess DPOC at the time of registration, this would account for less than half a percent of the State's registered voters. (*See* Ex. 336; Pls.' Stip. No. 26 (19,439/4,198,726=0.4%).)

Aside from Federal-Only Voters, Dr. McDonald testified that county recorders cancelled 1,290 Arizona voter registrations for "Invalid Citizenship Proof," and suspended 5,555 additional voter registrations for this same reason. (McDonald Tr. 1106:25–11, 1111:13–21; *see* Registration Cancellation Rates; Registration Suspension Rates.) Dr. McDonald did not, however, opine on whether these were citizens who did not possess or could not provide DPOC, but instead offered these figures as evidence that county recorders historically have not uniformly implemented Arizona's election laws. (McDonald Tr. 1107:12–22, 1232:2–1234:13.) For example, Cochise County appears to have placed voter registrations in suspense status for lacking DPOC, rather than registering these registrants as Federal-Only Voters. (*See, e.g.*, Ex. 510.) Dr. Richman noted that most of these voters did not match with any MVD file containing citizenship information, in which case county recorders could not have relied on stale MVD data to cancel or suspend these registrations. (Richman Tr. 1954:12–1956:3; MVD Non-Citizen Records (indicating lack of MVD matches

for 858 of 1,290 cancelled registrations and 5,010 of 5,555 suspended registrations but listing 77 cancelled registrations for lack of DPOC and 253 suspended registrations for "Invalid Citizenship Proof" in MVD).) Dr. Richman also explained that AVID's coding system to suspend and cancel voter registrations for "Invalid Citizenship Proof" contained "overlapping codes." (*See, e.g.*, Richman Tr. 1917:11–1919:11 (explaining citizenship cancellation codes include voluntary and involuntary cancellation); *see also* Ex. 796, (listing an "Invalid Citizenship Proof" code for registrants who are "Not Eligible," but lacking any similar code for cancelled or suspended registrants).) The Court finds that Arizona's cancellation and suspension of approximately 7,000 voter registrations for "Invalid Citizenship Proof" is not probative of the number of qualified Arizonans unable to provide DPOC when registering to vote.

Plaintiffs did offer evidence that obtaining DPOC could impose a financial burden on low-income voters. For example, the cost of obtaining a copy of an Arizona birth certificate is 35 dollars.[40] (Doc. 672-7, Ex. 50.) The fee to replace a naturalization certificate is significantly greater, costing $555.[41] (Doc. 672-7, Ex. 53.) However, naturalized citizens are less likely than native-born

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[40] Plaintiffs ask the Court to take judicial notice of the cost of obtaining a passport. But a U.S. citizen must provide proof of U.S. citizenship to obtain a passport or pay an additional 150-dollar fee for the United States to conduct a search for a previously issued passport. The Court gives little weight to the burden of obtaining a passport because an individual may obtain a new birth certificate for substantially less and in less time. (*Compare* Doc. 672-7, Ex. 50, *with* Doc. 672-7, Ex. 51, at ECF-13, 16.)

[41] It can take up to eight months to receive a replacement certificate. (Doc. 672-7, Ex. 54.)

citizens to live in a household with income below the poverty line, and furthermore, naturalized citizens need only provide an immigration number as DPOC if they do not possess a naturalization certificate. § 16-166(F)(4). Furthermore, while approximately 19% of Latino individuals live in a household below the poverty line, 82% of Arizona's Latino citizens are native-born, meaning most Latinos will not be burdened by the considerably higher costs associated with obtaining new naturalization documents.

Dr. Burch opined that requiring voters to provide DPOC and subjecting voters who cannot provide DPOC to potential investigation could also impose psychological costs. (Burch Tr. 946:12–947:9, 969:5–9, 972:14–23, 993:6–17.) Specifically, Latino and AANHPI voters may fear drawing attention to their families, particularly voters who live with non-citizens in mixed-status households. (*Id.* 993:18–994:7; *see also* Tiwamangkala Tr. 1274:19–1275:3 (chilling effect among AANHPI community); Guzman Tr. 480:9–481:18 (chilling effect among Latino community).) For instance, pursuant to H.B. 2243's mandate that the Secretary of State compare AVID to the MVD database each month, the MVD customer extract will flag all individuals with a foreign-type credential as non-citizens, despite that this information will be outdated for the 6,084 naturalized Full-Ballot Voters who still possess an unexpired foreign-type credential. And because MVD does not issue foreign-type credentials to native-born citizens, only naturalized citizens will ever be misidentified as non-citizens. H.B. 2243's Reason to Believe Provision will similarly affect only naturalized citizens because SAVE cannot search for native-born citizens. The Latino and AANHPI communities may associate these procedures with

Arizona's history of discriminatory treatment against people of color. (*See supra* Section I(D)(1)(i).)

The Court finds that the compliance and psychological costs associated with the Voting Laws' DPOC Requirements[42] and investigative procedures would predominately impact voters of lower socioeconomic status and naturalized citizens. Plaintiffs did not, however, quantify the scope of this impact, given the lack of evidence regarding the distribution of voters who do not possess or would be unable to obtain DPOC. As for the Voting Laws' Birthplace Requirement, Plaintiffs did not adduce any evidence that voters would be unable to include birthplace information. However, the evidence shows that Latino and AANHPI voters could be deterred from registering to vote due to fears of investigation.

E. Plaintiffs Sue for Relief

Following the passage of the Voting Laws, the United States and a collection of nonpublic entities (collectively, "Plaintiffs") filed several lawsuits seeking injunctive relief. (*See, e.g.*, Doc. 1, 2:22-cv-00519-SRB; Doc. 1, 2:22-cv-01124-SRB.) The Court consolidated the Plaintiffs' eight lawsuits into the instant case. (*See* Docs. 39, 48, 69, 79, 91, 164, 193.) Together, Plaintiffs claim the Voting Laws, among other things, (1) violate the Civil Rights Act of 1964, the NVRA, and the Voting Rights Act; (2) place an undue burden on the right to vote; and (3) violate the due process and equal

[42] The Court uses "DPOC Requirements" to refer to H.B. 2492 § 4's mandate that all voter registrations include DPOC to be registered as a Full-Ballot Voter, as well as H.B. 2492 § 4 and H.B. 2243 § 2's requirement that a registrant or voter provide DPOC if a county recorder matches that individual to information of non-citizenship.

protection guarantees of the U.S. Constitution. (*See* Doc. 304.) The Republican National Committee ("RNC"), Arizona Senate President Warren Petersen, and Arizona House of Representatives Speaker Ben Toma, intervened as defendants. (Doc. 18, 2:22-cv-01369-SRB; Doc. 363.)

The Voting Laws have not yet been enforced, but many non-US Plaintiffs have already shifted their operations to mitigate the anticipated impacts of the laws, while other non-US Plaintiffs anticipate doing so if the Voting Laws take effect. All non-US Plaintiffs assert an interest in maximizing voter turnout among certain communities, including Latinos, Native Americans, AANHPI individuals, Black Americans, students, young people, the elderly, and Democratic voters generally.

1. Mi Familia Vota

Mi Familia Vota is a national, nonprofit civic engagement organization that seeks to increase civic participation in the Latino community and "ensure that as many people as possible can participate in the democratic process, including members of the Latino community." (Rodriguez-Greer Tr. 780:20–25, 781:22–782:2). At trial, Carolina Rodriguez-Greer, Mi Familia Vota's State Director for Arizona, testified that Mi Familia Vota engages in "year-round" voter engagement efforts and has a reputation as a "trusted community resource" on voting and civic participation. (*Id.* 780:14–17, 782:14–18). Mi Familia Vota's voting-related activities include providing election resources in Spanish, hosting voter education workshops, assisting permanent legal residents with the citizenship application process, and registering voters by tabling at events and with paid canvassers. (*Id.* 781:22–782:24, 785:4–17.) Mi Familia Vota provides in-depth

training to its canvassers on the voter registration forms and on how to engage with potential voters in the communities that the organization serves. (*Id.* 783:25–784:7.) Mi Familia Vota has registered over 30,000 voters in Arizona since 2021. (*Id.* 780:18–19, 784:12–14.)

Mi Familia Vota claims that the Birthplace Requirement will impact its voter registration efforts because the community members it serves are often hesitant to share personal information with the government, including their place of birth. (*Id.* 786:12–787:3, 787:15–788:8.) Rodriguez-Greer testified that she observed this fear among naturalized citizens growing up in Tucson, Arizona, which is less than 100 miles from the U.S.-Mexico border. (*Id.* 786:12–787:3.) Mi Familia Vota does not have additional resources to devote to mitigate the anticipated effects of the Voting Laws, so it expects that it will need to "go into crisis mode" and redirect existing funds toward new voter education initiatives. (*Id.* 791:16–792:4, 809:24–810:1.) For example, Mi Familia Vota anticipates redirecting staff members from its ambassadors program, which is designed educate voters about basic election issues, to a new effort that addresses community members' confusion about the Voting Laws and educates them about the changes to the registration and voting process. (*Id.* 791:16–792:23.) Mi Familia Vota also expects to adjust its voter registration program and reallocate its staff's efforts to developing a new training program for canvassers. (*Id.* 792:24–793:12.) Mi Familia Vota spent approximately $1.5 million on its voter engagement efforts in 2023, and it expects that its budget for voter engagement will be "significantly higher" in 2024. (Rodriguez-Greer Tr. 781:13–15, 784:19–22.)

2. Voto Latino

Voto Latino is a 501(c)(4) nonpartisan, nonprofit social welfare organization that aims to "educate and empower a new generation of Latino voters in Arizona." (Patel Tr. 217:4–11.) Voto Latino's voting-related work includes voter registration, increasing voter turnout among low-propensity voters, and advocacy. (*Id.* 216:16–17, 217:12–218:5.) Voto Latino's voter registration efforts include "chase programming," by which Voto Latino follows up with individual voters who did not complete their voter registration or may not have successfully submitted their registration to be placed onto the voter rolls. (*Id.* 221:20– 223:14.) Since 2012, Voto Latino has registered over 60,000 voters in Arizona. (*Id.* 220:25–221:6.)

Voto Latino claims that the Birthplace Requirement will disproportionately impact the Latino community, which is more likely to be born outside of the United States. (*Id.* 227:10–25.) Voto Latino's Managing Director Ameer Patel testified that Voto Latino expects to expend additional resources on its chase programming to successfully register the same number of voters as it did in the 2020 election cycle as a result of the Voting Laws. (*Id.* 229:17–231:8.) Voto Latino claims that this will "take away" resources from the organization's advocacy and turnout efforts. (*Id.* 238:17–23.) Voto Latino also claims that H.B. 2492's Citizenship Verification Procedures and Attorney General Referral Provision will have a chilling effect on prospective Latino voters, which will hinder Voto Latino's voter registration and voter turnout efforts and require the organization to reallocate resources to educate voters about the investigation provisions. (*Id.* 236:9–237:8.) After H.B. 2492 was passed, Voto Latino spent resources and devoted staff time to create new

content, including videos, infographics, one-pagers, and a press release to educate voters about the impact of the bill. (*Id.* 237:9–19, 253:22–254:22.)

3. Southwest Voter Registration Education Project

Southwest Voter Registration Education Project ("SVREP") is a 501(c)(3) nonpartisan, nonprofit organization committed to empowering Latino communities through their vote. (Camarillo Tr. 729:10–14, 730:4–13, 732:17–21.) SVREP's voting activities include educating and registering voters, "turning out the vote," and training candidates who run for nonpartisan offices. (*Id.* 727:14–16, 730:7–11.) SVREP has registered 15,000 Latino voters in Arizona since 2022. (*Id.* 736:9–17.) In 2024, SVERP plans to register voters by engaging high schools and community colleges, meeting individuals door-to-door, and conducting voter registration sites. (*Id.* 735:24–736:4.) SVREP is also planning to turn out the vote in 2024 by contacting voters through door-to-door visits, phone banking, and digital messaging, along with continuing its voter education efforts. (*Id.* 737:4–15, 738:5–11.) At trial, SVREP President Lydia Camarillo testified that SVREP anticipates reallocating funding and staff time from its voter registration, voter education, and voter turnout efforts to help voters who receive the 35-day notice letter obtain DPOC and assist voters who are removed from the voter rolls pursuant to H.B. 2243. (*Id.* 740:9–19, 741:6–742:6, 742:21–743:12, 743:21–745:4.)

4. Promise Arizona

Promise Arizona is a community nonprofit organization that seeks to increase the participation of Latino communities from Maricopa County and throughout Arizona in the electoral process. (Falcon Tr. 1307:3–7,

1307:24–1308:14.) Promise Arizona is a membership organization with 1,043 dues-paying members as of November 2023. (*Id.* 1306:22–23, 1308:15–23.) Promise Arizona's members include voters who are naturalized citizens. (*Id.* 1321:23–1322:3.) The primary services that Promise Arizona's members receive are adult education and assistance with the naturalization application process. (*Id.* 1306:20–23, 1308:24–1309:4.) Promise Arizona's core activities include registering voters, educating voters, and turning out the vote, all of which are carried out by paid staff members and volunteers. (*Id.* 1308:7–14; 1309:5–23, 1313:15–17, 1314:11–1315:1.) Over the past ten years, Promise Arizona has registered around 63,000 voters in Arizona. (*Id.* 1314:7–10.) In 2024, Promise Arizona expects to continue its voter turnout efforts for the primary and general elections. (*Id.* 1316:18–1317:1.)

At trial, Petra Falcon, Promise Arizona's Founding Executive Director, testified that H.B. 2243 will "undo a lot of the work" the organization has done over the past decade. (*Id.* 1321:8–20.) For example, Promise Arizona claims that H.B. 2243's List Maintenance Procedures will cause some of its members to "feel penalized." (*Id.* 1321:8–1322:14) And if one of its members is removed from the voter rolls pursuant to H.B. 2243, Promise Arizona claims that members "would not have trust in the system." (*Id.* 1322:21–1323:10.) Promise Arizona expects to prepare its field organizers and volunteers for the implementation of H.B. 2243, which it anticipates will require new training on the effects of the law. (*Id.* 1320:21–1321:20, 1328:8–1329:20) Promise Arizona also anticipates redirecting the use of its staff members and volunteers to assist registrants who receive a notice to provide DPOC under H.B. 2243. (*Id.* 1318:24–1319:20, 1320:3–1321:20, 1322:20–1323:3.) In addition, Promise

Arizona plans to update its literature and its website to reflect the changes to Arizona's voting laws. (*Id.* 1329:8–20.)

5. Arizona Asian American Native Hawaiian Pacific Islander for Equity Coalition

Arizona Asian American Native Hawaiian Pacific Islander for Equity Coalition ("Equity Coalition") is a statewide, nonprofit, nonpartisan organization that strives for equity and justice on behalf of its AANHPI constituents. (Tiwamangkala Tr. 1265:11–23.) Equity Coalition pursues its mission by increasing civic engagement, organizing communities, and developing young leaders. (*Id.* 1265:18–23.) Equity Coalition conducts its voting-related activities—which include voter education, registration, and mobilization—through its Civic Engagement Program. (*Id.* 1265:1–2, 1267:21–1268:1.) Equity Coalition registers voters using digital and print advertisements, phone and text banking, and in person at Asian cultural festivals, Asian businesses, and religious organizations. (*Id.* 1269:10–1270:3.) Equity Coalition also provides voter registration instructions in six AANHPI languages on its website. (*Id.* 1270:4–14.)

At trial, Equity Coalition's Advocacy Director Matine Tiwamangkala testified that after the Voting Laws were passed, Equity Coalition "had to take a pause" on its voter registration efforts to discern how the laws would impact the registration process. (*Id.* 1274:12–18.) Equity Coalition hired a new employee to allow its "Democracy Defender Director" to focus on voting rights. (*Id.* 1281:2–17.) Equity Coalition claims the AANHPI community is fearful of H.B. 2243's List Maintenance Procedures and Cancellation Provision because some may be escaping government persecution. (*Id.* 1274:19–1275:3, 1275:15–21.) Equity Coalition

expects to retrain its canvassers, volunteers, subgrantees, and fellows on how to register voters and address these fears of the AANHPI community. (*Id.* 1275:15–1276:1) Equity Coalition also plans to expand the services of one of its subgrantees to assist voters who receive the 35-day notice and need to obtain DPOC. (*Id.* 1275:16–23.) In addition, the organization expects to update the voter registration instructions on its website and translate each set of instructions, which costs 25 cents per word. (*Id.* 1270:18–21, 1275:16–1276:1.) Because Equity Coalition does not currently have the resources to complete these tasks, Equity Coalition plans to "shift [its] priorities" toward assisting the AANHPI community to obtain DPOC and educating its community members and volunteers about the effects of the Voting Laws. (*Id.* 1275:16–1276:19.) Equity Coalition claims that this shift in priorities will impact its other initiatives including the organization's actual collection of voter registration forms—and will harm its mission. (*Id.* 1276:4–18.) Equity Coalition decided to reduce its voter registration goals in response to the Voting Laws, which it claims led to a decrease in the organization's funding since its funding is "tied" to its registration goals. (*Id.* 1274:12–18, 1275:4–8, 1278:20–1279:7.)

6. Poder Latinx

Poder Latinx is an organization that aims to "engage the Latinx community to be civil participants through their vote." (Herrera Tr. 1285:5–10.) Poder Latinx serves marginalized communities, primarily "Black, Indigenous, people of color," with a focus on the environment, economic justice, and immigration justice. (*Id.* 1285:11–16, 1285:24–1286:5.) The organization's elections-related work promotes voter engagement, voter participation, and voter protection. (*Id.* 1284:11–

13, 1285:5–10.) For example, Poder Latinx engages voters by canvassing in communities, translating election information, and conducting campaigns across multiple content mediums. (*Id.* 1286:6–14, 1286:6–1287:4.) Poder Latinx set a goal of registering 4,600 new voters in 2023 and seeks to register 9,000 new voters in 2024. (*Id.* 1286:19–23.) Poder Latinx plans to meet its registration goals by conducting outreach with on-the-ground canvassers and through social media, television, and radio. (*Id.* 1286:24–1287:4.) Poder Latinx calculates that it costs around $50 to register each individual voter. (*Id.* 1288:6–8.)

Poder Latinx claims that the Citizenship Verification Procedures and List Maintenance Procedures in H.B. 2492 and H.B. 2243 will remove qualified registered voters from the voter rolls and will unlawfully deny new voter applicants. (*Id.* 1290:4–15.) Poder Latinx also claims that naturalized citizens will be fearful of the database checks, which will make them less likely to participate in elections. (*Id.* 1290:16–1291:7.) Nancy Herrera, Poder Latinx's Arizona State Program Director, testified that the Voting Laws' database checks will harm the organization's reputation, as community members who receive support from Poder Latinx and who are later removed from the voting rolls or denied registration will lose trust in the organization. (*Id.* 1300:23–1302:4.) To mitigate these anticipated effects, Poder Latinx claims it will need to "restructure" its "entire program" and allocate additional time and funding to its voter engagement efforts. (*Id.* 1290:16–1291:12.) The organization plans to add additional canvassers, translate new voting materials, and contact community members who are removed from the voter rolls or those whose applications are denied. (*Id.* 1291:8–25, 1299:10–1300:20.) Poder Latinx also plans to conduct new

campaigns utilizing social, digital, television, and print media, accounting for an anticipated increase in spending. (*Id.* 1300:6–22.) Poder Latinx estimates that these strategies will cost an additional $10 to $20 for each voter it registers or reregisters and expects to reallocate funding from its issue-based campaigns. (*Id.* 1299:10– 1300:5, 1302:15–23.) It also anticipates that these additional costs will detract from the organization's ability to register new voters. (*Id.* 1291:20–25.)

7. Chicanos Por La Causa

Chicanos Por La Causa, Inc. is a 501(c)(3) community development nonprofit organization with a mission to "empower[] lives" by engaging Latino communities in the political process. (Garcia Tr. 176:16–20, 178:24–179:5; Guzman Tr. 478:2–6, 16–21.) Chicanos Por La Causa Action Fund is a 501(c)(4) nonprofit advocacy organization that aims to support the mission of Chicanos Por La Causa, Inc. (Garcia Tr. 175:19–20, 177:18– 22.) The core activities of Chicanos Por La Causa, Inc. and Chicanos Por La Causa Action Fund (collectively, "CPLC") include helping eligible people to register to vote and follow up to make sure they actively vote, in part by targeting "low propensity voters" through its "Latino Loud" initiative. (*Id.* 179:6–22, 180:10–18; Guzman Tr. 478:22–479:17.) Joseph Garcia, vice president of public policy at Chicanos Por La Causa and executive director of Chicanos Por La Causa Action Fund, testified that CPLC has a reputation as "a trusted name within the Latino community." (Garcia Tr. 186:8–19; *see also* Guzman Tr. 485:20– 486:3.)

CPLC claims that the Voting Laws' Citizenship Verification Procedures and List Maintenance Procedures regarding voters lacking DPOC will have a chilling

effect on voters in the Latino community. (Garcia Tr. 190:19–25, 199:14–200:16; Guzman Tr. 480:9–481:18.) These new procedures would harm CPLC's reputation if members of the Latino community attribute the effects of the Voting Laws to CPLC's inability to effectively register individuals to vote. (Garcia Tr. 191:1–7, 194:7–195:4, 206:24–207:15; Guzman Tr. 486:4–487:2.) During the 2022 midterm election cycle, CPLC registered 37,000 new voters and spent $5.7 million on canvassing and registering people to vote. (Garcia Tr. 180:10–18, 203:4–8.) CPLC anticipates reallocating approximately 20 to 30% of its election budget specifically to address the effects of the Voting Laws on its voter programming by increasing its staffing to educate voters about the Voting Laws and assisting those who are removed from the voting rolls. (Garcia Tr. 191:8–194:6, 203:4–23, 204:3–22.)

8. Arizona Coalition for Change

Arizona Coalition for Change is a 501(c)(3) nonprofit organization based in Arizona, and its mission is to empower individuals in underserved communities to impact their community through civic engagement and collaboration. (Bolding Tr. 258:3–25.) Arizona Coalition for Change operates in Maricopa, Pima, and Pinal Counties and primarily serves Black, Brown, and Indigenous communities, women, and young people. (*Id.* 258:16–25.) Arizona Coalition for Change hosts leadership development programs for youth and college students, leads community organizing efforts, and conducts voter registration and voter education programs as part of its civic engagement activities. (*Id.* 259:9–17, 265:8–11.) Arizona Coalition for Change registers voters by tabling at events and at "hot spots," which are high-traffic locations such as grocery stores, libraries, and small businesses. (*Id.* 267:7–268:1,

268:15–25.) The organization staffs its registration drives with paid staff members and volunteers. (*Id.* 261:9–12, 268:2–14.) Arizona Coalition for Change also hosts voter education events to inform individuals about voting, changes to Arizona election law, and the various offices that are up for election. (*Id.* 260:3–261:8, 262:25–263:9.) Organizing, marketing, and hosting each voter education event requires, at a minimum, ten hours of labor. (*Id.* 261:13–25.) Arizona Coalition for Change also pays to advertise its voter education events through social media, digital, and print communications. (*Id.* 262:1–24.)

Arizona Coalition for Change claims that the Voting Laws will pose a "significant challenge" for individuals registering to vote. (*Id.* 265:4–17, 279:11–19.) For example, many individuals will incorrectly believe they are registered to vote when they are not. (*Id.* 272:22–273:3.) Arizona Coalition for Change's President Reginald Bolding testified that Arizona Coalition for Change plans to host new voter education events and create new, paid advertisements about the Voting Laws. (*Id.* 265:4–266:16.) Arizona Coalition for Change also expects to change its voter registration program by hiring additional community organizers, implementing new training for its staff members and volunteers, and hosting "office hours" to assist community members with the registration process. (*Id.* 270:20–273:17, 274:20–275:23.) Arizona Coalition for Change anticipates reallocating time and resources from its civil leadership development program to implement these new voter registration efforts. (*Id.* 273:25–274:18.)

9. Arizona Students' Association

Arizona Students' Association ("ASA") is a nonprofit, nonpartisan organization based in Arizona that

advocates for affordable and accessible higher education for Arizona university and college students. (Nitschke Tr. 447:18–449:2.) ASA advances its mission by advocating at the state and local level, developing student leaders, and registering students to vote. (*Id.* 445:23–25, 447:18–449:2.) According to ASA, its members include all students at Arizona's public universities, community colleges, and Grand Canyon University, totaling approximately 500,000 students. (*Id.* 446:17–21.) This student population includes Latinos and naturalized citizens. (*Id.* 446:17–447:1.) ASA's primary beneficiaries are its members, and ASA receives input from its members through polling and various on-campus events. (*Id.* 473:15–25.)

ASA conducts its voter registration efforts through online platforms year-round and by tabling at various campus locations during the beginning of every fall semester. (*Id.* 448:14–449:13.) Since the passage of the Voting Laws, ASA has spent time updating its training materials, conducting additional training for its volunteers and paid staff members, and following up with the organization's Federal-Only Voters to ensure they become Full-Ballot Voters. (*Id.* 452:4–23, 453:12–17.) ASA estimates that its regional organizers and executive staff have spent roughly 100 hours conducting the new trainings. (*Id.* 452:14–23, 453:12–17.) ASA also estimates that it has spent between $150 and $210 to provide updated training materials to its staff members and volunteers. (458:17–25, 467:20–467:6.)

At trial, Kyle Nitschke, co-Executive Director for ASA, testified that the DPOR Requirement would impact ASA's ability to help Federal-Only Voters on college campuses become Full-Ballot Voters, since many Federal-Only Voters do not have an in-state ID, a utility bill, or another form of DPOR. (*Id.* 453:18–

454:8, 462:8–463:2.) ASA further claims that the DPOR requirement would require ASA to spend additional time checking each student's application documents, which would "really slow down the registration process" and may lead to ASA turning away students who do not have readily accessible DPOR. (*Id.* 454:9–24.) ASA expects that it will continue to reallocate resources from its other initiatives, including its youth empowerment summit, to train its staff, pay for upgraded document scanning software to help students upload DPOR and DPOC, and check the voter database to determine the effect the Voting Laws are having on students. (*Id.* 456:8–457:7, 458:9–16, 459:1–16., 460:20–461:5.) ASA also claims that students will choose not to register to vote for fear of H.B. 2492's investigation procedures. (*Id.* 461:21–462:7.)

10. Democratic National Committee and Arizona Democratic Party

The Democratic National Committee ("DNC") is the national arm of the Democratic Party. (Reid Tr. 422:10–12.) The DNC coordinates the Democratic Party's operations across all fifty states with the goal of electing Democrats "up and down the ballot," including federal, state, and local offices in Arizona. (*Id.* 422:13–19, 24–25.) The DNC is comprised of formal voting members along with grassroots Democratic supporters. (*Id.* 434:10–435:5.) The Arizona Democratic Party ("ADP") is the operating arm of the Democratic Party in Arizona. (Dick Tr. 508:1–3.) The ADP also works to elect Democrats in federal, state, and local elections in Arizona. (*Id.*) The ADP's membership is comprised of Democratic voters and supporters. (*Id.* 519:12–520:5.) In Arizona, there are approximately 1.26 million registered Democrats.

(*Id.* 508:9–10.) The DNC and the ADP both work to persuade citizens to vote for Democratic candidates and help Democratic supporters register to vote and cast a ballot. (*Id.* 509:13–24; Reid Tr. 423:21–424:10.)

At trial, Ramsey Reid, DNC's Director of States, and Morgan Dick, ADP's Executive Director, both testified that H.B. 2492's Criminal Investigation Procedures would deter Democratic supporters from registering to vote for fear of potentially subjecting themselves or a family member to scrutiny by law enforcement or prosecution. (Reid Tr. 421:8–13, 430:1–23; Dick Tr. 506:25–507:4, 516:22–517:11.) As a result, Reid and Dick testified that these provisions would impact the ability of Democratic candidates to successfully compete in Arizona elections. (Reid Tr. 433:9–23, Dick Tr. 518:18–21.) To address the anticipated impact of H.B. 2492, the DNC is planning to reallocate resources from its work in other states to find new potential registrants and further train its staff and volunteers on how to communicate with potential voters about the Voting Laws. (Reid Tr. 430:24–432:25.) The ADP is also planning reallocating resources from other endeavors to make up the "lost ground" of voters that the ADP could have registered and mobilized to vote. (Dick Tr. 517:12–518:8.)

11. Tribal Plaintiffs

San Carlos Apache Tribe ("Tribe") is a federally recognized Indian Tribe. (Pls.' Stip. No. 1.) The San Carlos Apache Reservation ("Reservation") spans across Gila, Graham, and Pinal Counties in south-eastern Arizona and is the tenth largest reservation in the United States. (*Id.* Nos. 2, 4; Rambler Tr. 996:10–17.) Approximately 13,000 to 14,000 of the Tribe's 17,300 members live on the Reservation. (Rambler Tr. 996:18–21.) Roughly half of the Tribe members that

live on the Reservation are over sixty years old, and many of them speak Apache and are not fluent in English. (*Id.* 1005:16–23.)

At trial, Tribe Chairman Terry Rambler testified that voting in federal, state, and local elections is very important to the Tribe and its members. (*Id.* 995:14–18, 1003:22–1004:19.) The Tribe claims that the DPOR Requirement would make it more difficult for Tribe members—especially those who are elderly and not fluent in English—to register to vote because the Reservation does not have a uniform mapping system. (*Id.* 999:24–1000:5, 1005:12–23, 1008:11–21.) For example, residences on the Reservation typically do not have street names or building numbers, and Tribe members receive mail at post office boxes on the Reservation. (*Id.* 996:22–997:4, 997:7–11.) Tribe identification cards list post office box numbers instead of residential addresses. (*Id.* 998:11–16.) In addition, not all Tribe members have an Arizona credential, and those Tribal members with Arizona credentials may list the nearest highway mile marker on their credential, as opposed to a residential address. (*Id.* 997:12–998:1, 999:10–12.) Some Tribe members, including those who are temporarily living with a family member or those who are experiencing homelessness, do not have a permanent residence.[43] (*Id.* 998:17–22.)

Tohono O'odham Nation is a federally recognized Tribe. (Pls.' Stip. No. 5.) According to the 2020 Census, approximately 6,713 voting-age individuals live on

[43] The remaining "LUCHA Plaintiffs"—namely, Living United for Change in Arizona, League of United Latin American Citizens, Arizona Democracy Resource Center Action, and Inter Tribal Council of Arizona, Inc.—did not present any evidence at trial regarding their standing to bring this action.

Tohono O'odham lands. (*Id.* No. 6.) Gila River Indian Community is a federally recognized Tribe. (*Id.* No. 7.) According to the 2020 Census, approximately 9,628 voting-age individuals live on the Gila River Reservation.[44] (*Id.* No. 8.)

II. CONCLUSIONS OF LAW

The Court previously ruled on several of Plaintiffs' claims in its Order addressing the parties' motions for summary judgment. (*See generally* 09/14/2023 Order.) The parties presented evidence on the following remaining issues at trial:

- Whether the non-US Plaintiffs have standing to bring each of their claims.
- Whether H.B. 2492 § 4's Birthplace Requirement for State Form users violates the Civil Rights Act ("CRA"), 52 U.S.C. § 10101, section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301 et seq., or the Equal Protection Clause, or imposes an undue burden on the right to vote. *See* A.R.S. § 16-121.01(A).
- Whether H.B. 2492 § 4's citizenship verification and criminal investigation referral procedures for registrations lacking DPOC violates section 2 of the VRA, procedural due process, or the Equal Protection Clause, or imposes an undue burden on the right to vote. *See* § 16-121.01(D), (E).
- Whether H.B. 2492 § 5's DPOR requirement for State Form users violates the NVRA or the Equal Protection Clause or imposes an undue

[44] The remaining Tohono O'odham Plaintiffs—namely, Alanna Siquieros, Keanu Stevens, and LaDonna Jacket—did not provide any evidence at trial regarding their standing to bring this action.

burden on the right to vote. *See* § 16-123; *see also* § 16-121.01(A).

- Whether H.B. 2492 § 7's referral, citizenship verification, and prosecution procedures for registered voters without DPOC violate the NVRA, section 2 of the VRA, or the Equal Protection Clause, or imposes an undue burden on the right to vote. *See* § 16-143.
- Whether H.B. 2492 § 8's cancellation of a voter registration upon "confirm[ing]" a person's non-citizenship violates the NVRA, section 2 of the VRA, procedural due process, or the Equal Protection Clause, or imposes an undue burden on the right to vote. *See* § 16-165(A)(10), *amended by* H.B. 2243 § 2.
- Whether H.B. 2243 § 2's citizenship verification, registration cancellation, and criminal investigation referral procedures violate the NVRA, section 2 of the VRA, procedural due process, the Equal Protection Clause, or imposes an undue burden on the right to vote. *See* § 16-165(A)(10), (G)–(K).
- Whether H.B. 2243 § 2's Reason to Believe Provision violates the CRA, the NVRA, section 2 of the VRA, or the Equal Protection Clause *See* § 16-165(I).
- Whether the Voting Laws were enacted with a discriminatory intent.

Under the principles of preemption, "when federal and state law conflict, federal law prevails and state law is preempted." *Knox v. Brnovich*, 907 F.3d 1167, 1173 (9th Cir. 2018) (quoting *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 471 (2018)).

Because the Voting Laws have not yet been implemented, Plaintiffs are bringing a facial challenge to the Voting Laws' legality. To succeed on a facial challenge, Plaintiffs must establish "that 'no set of circumstances exists under which the Act would be valid.'" *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1104 (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). The Court "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008).

A. Subject Matter Jurisdiction

1. Standing

Defendants argue that all non-U.S. Plaintiffs lack standing because non-U.S. Plaintiffs have not demonstrated that their organizations, or a specific member of their organizations, will suffer an actual or imminent, concrete, and particularized injury due to any challenged provision of the Voting Laws.

Under Article III of the United States Constitution, a plaintiff has standing if it can show (1) an "injury in fact" that is concrete and particularized and actual or imminent, not hypothetical; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). In cases for prospective injunctive relief, "past wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983). Rather, a plaintiff's "standing to seek the injunction requested depend[s] on whether he [is] likely to suffer future

injury." *Id.* at 105. When addressing behavior that is alleged to increase the risk of future injury, the future injury must be "certainly impending." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013); *see also Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014) ("Whether we view injury in fact as a question of standing or ripeness, 'we consider whether the plaintiff[] face[s] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement'" (alterations in original) (citation omitted)); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019) ("[O]rganizations may rely on not only actual, but imminent harm for standing, including by challenging laws pre-enforcement if the organization can show a substantial threat of injury.").

"Only one plaintiff needs to have standing when only injunctive relief is sought." *DNC v. Reagan*, 329 F. Supp. 3d 824, 841 (D. Ariz. 2018) (citing *Crawford v. Marion Cnty. Election Bd.* ("*Crawford I*"), 472 F.3d 949, 951 (7th Cir. 2007)) (finding standing where Arizona Democratic Party and additional private plaintiffs requested injunctive and declaratory relief against Arizona election law), *aff'd sub nom. DNC v. Hobbs*, 9 F.4th 1218, 1219 (9th Cir. 2021) (Mem.); *Mecinas v. Hobbs*, 30 F.4th 890, 897 (9th Cir. 2022) ("In a suit with multiple plaintiffs, generally only one plaintiff need have standing for the suit to proceed."). However, at least one plaintiff must establish standing "for each claim for relief." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020).

An organization can have direct standing by "claim[ing] that it suffered an injury in its own right" or representational standing by asserting "standing

solely as the representative of its members." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023) (citation omitted). "[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021) (citing *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)). Organizations cannot "manufacture the injury by incurring litigation costs," but they can show standing when they "would have suffered some other injury had they not diverted resources to counteracting the problem." *Id.* (internal quotations omitted). "The fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a *minimal showing of injury*." *Crawford I*, 472 F.3d at 951 (emphasis added), *aff'd*, 553 U.S. 181 (2008); *see also See E. Bay Sanctuary Covenant*, 993 F.3d at 664 ("Organizations are not required to demonstrate some threshold magnitude of their injuries . . . .").

To invoke representational standing, an organization must show that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Students for Fair Admissions*, 600 U.S. at 199 (citation omitted). "Implicit in the first prong of this test is the requirement that an organization must generally have 'members' to bring suit on their behalf." *Or. Moms Union v. Brown*, 540 F. Supp. 3d 1008, 1013 (D. Or. May 20, 2021). However, a non-membership organization may also have representational standing if it possesses

"indicia of membership" such that it is "sufficiently identified with and subject to the influence of those it seeks to represent as to have a 'personal stake in the outcome of the controversy.'" *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096 (9th Cir. 2021) (quoting *Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003)). For example, in *Oregon Advocacy Center v. Mink*, the Ninth Circuit held that a nonmembership organization had associational standing because it served a "specialized segment" of a community, who were the "primary beneficiaries" of the organization's activities. 322 F.3d at 1111.

i. Challenges to the Birthplace Requirement

Mi Familia Vota's testimony demonstrates that the Birthplace Requirement poses a "substantial threat of injury," which frustrates Mi Familia Vota's mission and will require it to divert resources to counteract its effects, constituting an injury-in-fact. *Common Cause*, 937 F.3d at 950; s*ee, e.g.*, *Crawford I*, 472 F.3d at 951 ("[T]he new law injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote."); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014) ("[O]rganizations can establish standing to challenge election laws by showing that they will have to divert personnel and time to educating potential voters on compliance with the laws and assisting voters who might be left off the registration rolls on Election Day."); *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 909–10 (W.D. Wis. 2016) (finding that nonprofit plaintiffs had suffered an injury-in-fact where plaintiffs presented evidence that they "devoted money, staff time, and other resources

away from their other priorities to educate voters about the new laws"), *rev'd in part on other grounds sub nom. Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020). This injury is traceable to the Birthplace Requirement and redressable by the injunction sought by Mi Familia Vota. *See Common Cause*, 937 F.3d at 950.

Defendants argue that Mi Familia Vota has not identified any individual who is likely to be injured by the Birthplace Requirement. But to have standing based on a future injury, a plaintiff need not identify specific individuals who are likely to be harmed by the challenged conduct, so long as the future injury alleged is "certainly impending." *Clapper*, 568 U.S. at 409. Defendants further argue that Mi Familia Vota "cannot predict the financial impact" of the Birthplace Requirement and that its anticipated expenses to counteract the provision are speculative. However, a plaintiff need not estimate the cost of their injury to demonstrate standing. *See Crawford I*, 472 F.3d at 951. The Court concludes that Mi Familia Vota has direct standing.

ii. Challenges to H.B. 2492's Citizenship Verification Procedures and Criminal Investigation Procedures

The Court concludes that the Democratic National Committee and the Arizona Democratic Party have direct standing. The organizations' testimony demonstrates that H.B. 2492's Criminal Investigation Procedures pose a substantial threat of injury, which frustrates the DNC's and the ADP's missions and will require them to divert resources to respond to its effects. *See Common Cause*, 937 F.3d at 950; *Arcia*, 772 F.3d at 1341. The diversion-of-resources constitutes injuries-in-fact, which is traceable to the H.B. 2492's

Criminal Investigation Procedures and redressable by the injunctive relief sought by the DNC and the ADP.

The Court also concludes that the Democratic National Committee and the Arizona Democratic Party have representational standing. First, the DNC's and the ADP's members would have standing to sue in their own right. Given the impending enforcement of the Voting Laws, both organizations' members face a "realistic danger of sustaining a direct injury" due to H.B. 2492's Criminal Investigation Procedures. *Bowen*, 752 F.3d at 839. This constitutes an injury-in-fact, which is traceable to H.B. 2492 and redressable by an injunction preventing their enforcement. Second, the DNC and the ADP seek to protect voting rights of its members, which is germane to the purposes of both organizations. And third, the organizations' claims and requested relief do not require the participation of its members in this litigation. In addition, because it is "relatively clear" that at least one of each organization's members will be impacted by H.B. 2492's Criminal Investigation Procedures, and because defendants need not know the identity of any particular DNC or ADP member to respond to their claims, it is not necessary for the DNC or the ADP to identify any specific member who will be injured by the challenged provisions. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015).

In addition, Poder Latinx's testimony demonstrates that H.B. 2492's Citizenship Verification Procedures pose a substantial threat of injury, which frustrates Poder Latinx's mission and will require it to divert resources to counteract its effects. *See Common Cause*, 937 F.3d at 950; *Arcia*, 772 F.3d at 1341. This constitutes an injury-in-fact, which is traceable to H.B.

2492's and H.B. 2243's database checks and redressable by the injunctive relief sought by Poder Latinx. Defendants assert that the costs of increasing its community outreach efforts does not amount to injury-in-fact because informing voters about the electoral process is part of the organization's "regular mission." This argument is also misplaced, as an organization can have standing where it "diverts its resources to achieve its typical goal in a different or *amplified manner*." *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1178 (N.D. Ga. 2022) (emphasis added). The Court concludes that Poder Latinx has direct standing.

Lastly, Voto Latino's testimony demonstrates that H.B. 2492's Citizenship Verification Procedures and Criminal Investigation Procedures frustrate Voto Latino's mission. As a result, Voto Latino has diverted and anticipates further diversion of resources to counteract its effects, which constitutes an injury-in-fact. *See Crawford I*, 472 F.3d at 951. This injury is traceable to H.B. 2492's criminal prosecution procedures and redressable by the injunctive relief sought by Voto Latino. Though Defendants argue that Voto Latino did not adduce evidence that the educational content it has created specifically addresses the bill's prosecution procedures, the standing inquiry does not require such minute specificity. Rather, it is sufficient that Voto Latino presented evidence that it "devoted money, staff time, and other resources away from their other priorities to educate voters about the new laws." *One Wis. Inst., Inc.*, 198 F. Supp. 3d at 909–10. The Court concludes that Voto Latino has direct standing.

iii. Challenges to the List Maintenance Procedures and Cancellation Provision

The Court concludes that Promise Arizona has direct standing to challenge H.B. 2243's List Maintenance Procedures and Cancellation Provision. H.B. 2243's database checks and notice and investigation procedures pose a substantial threat of injury, which frustrates Promise Arizona's mission and will require it to divert resources to counteract its effects. *See Common Cause*, 937 F.3d at 950; *Arcia*, 772 F.3d at 1341. This constitutes an injury-in-fact, which is traceable to H.B. 2243's database checks and notice and investigation procedures and redressable by the injunctive relief sought by Promise Arizona.

Promise Arizona also has representational standing. First, Promise Arizona's members would have standing to sue in their own right. Given the impending enforcement of the Voting Laws, and because H.B. 2243's database checks would apply to all registered voters in Arizona, Promise Arizona's members face a "realistic danger of sustaining a direct injury" due to H.B. 2243. *Bowen*, 752 F.3d at 839 (*see* Connor Tr. 371:15–372:2 (testifying the Secretary of State will implement the Voting Laws); Petty Tr. 160:3–15 (testifying Maricopa County Recorder's office will implement the Voting Laws).) This threat of future injury constitutes an injury-in-fact that is traceable to H.B. 2243 and redressable by an injunction preventing its enforcement. Second, Promise Arizona seeks to protect voting rights of its members, which is germane to the organization's purpose. And lastly, Promise Arizona's claim and requested relief do not require the participation of its members in this litigation.

Defendants argue that Promise Arizona has not identified any specific member who has been or is

likely to be injured by H.B. 2243's database checks and notice and investigation procedures. However, to demonstrate representational standing, an organization is not required to identify of any member who is or will be injured "[w]here it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action," and where the defendant does not need to know "the identity of a particular member to understand and respond to an organization's claim of injury." *Nat'l Council of La Raza*, 800 F.3d at 1041; *see also Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008) ("When the alleged harm is prospective, we have not required that the organizational plaintiffs name names because every member faces a probability of harm in the near and definite future.").

The Court also concludes that Equity Coalition, CPLC, and SVREP, and Poder Latinx have direct standing. Tiwamangkala's, Garcia's, Camarillo's, and Herrera's testimony demonstrates that H.B. 2243's List Maintenance Procedures and Cancellation Provision pose a substantial threat of injury, which frustrates the organizations' missions and will require the diversion of resources to respond to its effects. *See Common Cause*, 937 F.3d at 950; *Arcia*, 772 F.3d at 1341. This constitutes an injury-in-fact, which is traceable to H.B. 2243 and is redressable by the injunctive relief.

iv. Challenges to the DPOR Requirement

The Court concludes that the San Carlos Apache Tribe has representational standing to challenge the DPOR Requirement. First, the Tribe's members would have standing to sue in their own right. Given the impending enforcement of the Voting Laws, the Tribe's

members face a "realistic danger of sustaining a direct injury" due to the DPOR Requirement. *Bowen*, 752 F.3d at 839. This constitutes an injury-in-fact, which is traceable to H.B. 2492 and redressable by an injunction preventing their enforcement. Second, the Tribe seeks to protect voting rights of its members, which is germane to the Tribe's purpose. And third, the Tribe's claim and requested relief do not require the participation of its members in this litigation. In addition, because it is "relatively clear" that at least one of the Tribe's members will be impacted by the DPOR requirement, and because defendants need not know the identity of any particular Tribe member to respond to the Tribe's claims, it is not necessary for the Tribe to identify any specific member who will be injured by the challenged provisions.[45] *Nat'l Council of La Raza*, 800 F.3d at 1041.

2. Ripeness

Defendants argue that Plaintiffs' claims regarding the Voting Laws are constitutionally and prudentially unripe because Plaintiffs have not shown whether or how these provisions will be implemented, or how they will be affected by their implementation.

"[T]he ripeness inquiry contains both a constitutional and a prudential component." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (citation omitted). Like the standing analysis, a claim is constitutionally ripe when "plaintiffs face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.'" *Id.* at 1139 (quoting *Babbitt v. United*

[45] Because the Court finds that a Plaintiff has standing for each claim for relief, the Court need not determine whether remaining Plaintiffs have standing.

Farm Workers Nat. Union, 442 U.S. 289, 298 (1979)); *see Coons v. Lew*, 762 F.3d 891, 897 (9th Cir. 2014) ("When addressing the sufficiency of a showing of injury-in-fact grounded in potential future harms, ... the analysis for both standing and ripeness is essentially the same." (citations omitted)), *as amended* (Sept. 2, 2014). Generally, Courts apply three factors to evaluate whether a pre-enforcement challenge is constitutionally ripe: (1) whether "plaintiffs have articulated a concrete plan to violate the law in question," (2) "whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings," and (3) "the history of past prosecution or enforcement under the challenged statute." *Thomas*, 220 F.3d at 1138 (internal quotations and citation omitted). However, where the plaintiffs "are not the target of enforcement," the Ninth Circuit has determined that "the familiar pre-enforcement analysis articulated in *Thomas* does not apply," and has limited its ripeness analysis to the prudential component.[46] *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1173 (9th Cir. 2011). In addition, the Ninth Circuit "appl[ies] the requirements of ripeness and standing less stringently in the context of First Amendment claims." *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1174 (9th Cir. 2022).

The Court concludes that Plaintiffs' claims are constitutionally ripe. The Voting Laws target individual voters, rendering the *Thomas* pre-enforcement factors inapplicable to nearly all Plaintiffs. *See Salazar*, 638 F.3d at 1173. Regardless,

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[46] The third pre-enforcement factor in *Thomas*—the history of past enforcement—is also inapplicable where, as here, the statutes at issue are new. *See Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010).

the organizational Plaintiffs have shown that Arizona's enforcement of the Voting Laws will imminently harm their missions and/or their members. (*See supra* Section II(A)(1)); *Bowen*, 752 F.3d at 839 (pre-enforcement action is ripe "if the alleged injury is 'reasonable' and 'imminent,' and not merely 'theoretically possible'" (citation omitted)). Defendants emphasize that the Voting Laws are not currently being enforced, it is unclear how the Voting Laws will be enforced, and that Plaintiffs have not proven that any person will be injured by the Voting Laws. But Ms. Connor testified that the Secretary of State will implement the Voting Laws once the Court determines their legality. (Connor Tr. 371:15–372:2.) And the county recorders have indicated their intent to implement the Voting Laws after receiving guidance from the Secretary of State or the Court.[47] (*See, e.g.*, Petty Tr. 160:3–15; Ex. 111, at PX 111-3 to -5; Ex. 118, at PX 118-4 to -5; Ex. 121, at PX 121-2 to -3; *see also* Exs. 123, 127, 136, 146, 151, 156, 174, 175.) Plaintiffs' injuries are not just "theoretically possible," but "imminent." *See Bowen*, 752 F.3d at 839.

The Court also finds that Plaintiffs' claims are prudentially ripe. A claim is prudentially ripe when "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration" both weigh toward hearing the case. *See Ass'n of Irritated Residents v. EPA*, 10 F.4th 937, 944 (9th Cir. 2021) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). First, the issues are fit for review "because further factual development would not 'significantly

[47] At least one county has already begun implementing certain provisions of the Voting Laws. (Doc. 679-2, Ex. 8, 30(b)(6) Dep. of Cochise County Recorder ("Cochise Dep.") at 26:16–27:10, 28:12–19, 30:8–18, 80:5–81:24; *see also* Exs. 507–510.)

advance [the Court's] ability to deal with the legal issues presented.'" *Salazar*, 638 F.3d at 1173 (quoting *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 804 (2003)). Second, as the Court previously ruled, "delaying review until after certain Plaintiffs have already been unlawfully removed from Arizona's voting rolls and prevented from voting would make any review 'too late to redress the injuries suffered by [Plaintiffs'] members.'" (Doc. 304, 02/16/2023 Order at 19 (quoting *Ass'n of Irritated Residents*, 10 F.4th at 944).)

B. Civil Rights Act

Plaintiffs claim that the Birthplace Requirement and the Reason to Believe Provision violate the Civil Rights Act.

1. Private Right Under the CRA

Defendants argue that § 10101 does not confer a private right, and alternatively, that non-U.S. Plaintiffs may not enforce § 10101 under § 1983. Section 10101 provides:

> (2) No person acting under color of law shall—
>
> (A) in determining whether an individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;
>
> (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any

> application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(A)–(B). The statute does not expressly create a private right of action but empowers the U.S. Attorney General to bring "a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order." § 10101(c). The Ninth Circuit has not decided whether private citizens may enforce § 10101, though the Fifth and Eleventh Circuits have found in the affirmative. *Vote.Org v. Callanen*, 89 F.4th 459, 473–76 (5th Cir. 2023) (finding federal right under § 10101(a)(1) and (a)(2)(B)); *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003) (finding federal right under § 10101(a)(2)(B)); *see also Davis v. Commonwealth Election Comm'n*, No.: 1-14-CV-00002, 2014 WL 2111065, at *9–10 (D. N. Mar. I. May 20, 2014); *but see McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (finding no private right of action).

To enforce § 10101 under § 1983, non-U.S. Plaintiffs must show that Congress intended to "'unambiguously confer[]' 'individual rights upon a class of beneficiaries' to which [Plaintiffs] belong[]." *Health and Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285–86 (2002)); *see also Gonzaga Univ.*, 536 U.S. at 283–84 (applying implied right of action caselaw to analyze whether a statute confers a private federal right enforceable under § 1983). "'[F]all[ing] within the general zone of interest that the statute is intended to protect' is not enough." *All. of Nonprofits for Ins., Risk*

Retention Grp. v. Kipper, 712 F.3d 1316, 1326 (9th Cir. 2013) (second alteration in original) (quoting *Gonzaga Univ.*, 536 U.S. at 283). If a statute confers a federal right, that right is "presumptively enforceable" under § 1983 because "§ 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Gonzaga Univ.*, 536 U.S. at 284; *see* 42 U.S.C. § 1983 (providing remedy for the deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States).

i. Section 10101 Confers a Federal Private Right

When determining whether a statute creates an enforceable federal right, the Court "considers whether the statute: (1) is intended to benefit a class of individuals of which the Plaintiff is a member; (2) sets forth a standard, clarifying the nature of the right, that makes the right capable of enforcement by the judiciary; and (3) is mandatory, rather than precatory in nature." *Crowley v. Nevada ex rel. Nev. Sec'y of State*, 678 F.3d 730, 735 (9th Cir. 2012) (citing *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997)).

The Court agrees with the courts that have found a federal right under the "Materiality Provision," under which "[n]o person acting under color of law shall . . . deny *the right of any individual* to vote in any election." § 10101(a)(2)(B) (emphasis added); *see, e.g.*, *Schwier*, 340 F.3d at 1296; *Davis*, 2014 WL 2111065, at *10. First, "[t]he subject of the sentence is the person acting under color of state law, but the focus of the text is nonetheless the protection of each individual's right to vote." *Schwier*, 340 F.3d at 1296; *see also Talevski*, 599 U.S. at 185 ("[I]t would be strange to hold that a statutory provision fails to secure rights simply because it considers, alongside the rights bearers, the

actors that might threaten those rights (and we have never so held)."); *Gonzaga Univ.*, 536 U.S. at 284 (explaining statutes "phrased 'with an unmistakable focus on the benefited class'" have been found to create private rights (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 691 (1979)) (emphasis omitted)). For example, *Gonzaga University* cited Title VI of the Civil Rights Act and Title IX of the Education Amendments as examples of clear rights-creating language, which provide that "[n]o person in the United States shall . . . be subjected to discrimination." 536 U.S. at 284 n.3 (quoting 42 U.S.C. § 2000d and 20 U.S.C. § 1681(a)). The Materiality Provision is similar. Second, the Materiality Provision specifically and unambiguously protects an individual's right to vote notwithstanding an immaterial error or omission on her voter registration, which courts are readily capable of enforcing. *See Schwier*, 340 F.3d at 12696–97. And lastly, the Materiality Provision is mandatory, rather than precatory: "[n]o person acting under color of law *shall* . . . *deny* the right of any individual to vote." § 10101(a)(2)(B) (emphasis added).

The Court is unaware of any case analyzing whether § 10101(a)(2)(A) also creates a federal right, under which "[n]o person acting under color of law shall . . . in determining whether any individual is qualified under State law or laws to vote" apply any standard or procedure different than those standards or procedures applied to individuals found qualified to vote ("Different Practices Provision"). Like the Materiality Provision, "[t]he subject of the sentence is the person acting under color of state law," but the Different Practices Provision does not contain similarly clear and "paradigmatic rights-creating language." *Schwier*, 340 F.3d at 1296; *Sanchez v. Johnson*, 416 F.3d 1051, 1058 (9th Cir. 2005) (citing *Gonzaga Univ.*, 536 U.S. at 287).

However, the Ninth Circuit has instructed that a court "should not be limited to looking for those precise phrases" and may consider "other indicia so unambiguous that [it is] left without any doubt that Congress intended to create an individual, enforceable right." *Ball v. Rodgers*, 492 F.3d 1094, 1106 (9th Cir. 2007) (quoting *Sanchez*, 416 F.3d at 1058).

Here, by use of the term "shall," the Different Practices Provision mandates that Arizona officials refrain from applying differential standards or procedures to "any individual." Section 10101(a)(2)(A) does not have an "'aggregate' focus" or "speak only in terms of institutional policy and practice," but unambiguously benefits a specific class of individuals. *See Gonzaga Univ.*, 536 U.S. at 288 (first quoting *Blessing*, 520 U.S. at 343). And "no gap exists" between the provision's proscribed conduct "and the persons whose interests are at stake": any individual seeking to vote. *Colon-Marrero v. Valez*, 813 F.3d 1, 19 (1st Cir. 2016); *compare id.* (finding enforceable right under HAVA § 303(a)(4)(A), because its "proscription—'no registrant may be removed' [from the voter rolls]—directly and explicitly protects individual voters" (quoting 52 U.S.C. § 21083(a)(4)(A))), *with Gonzaga Univ.*, 536 U.S. at 287–91 (finding no private right in the Family Educations Rights and Privacy Act, because the provision's prohibition on providing funds to any educational institution with a policy of releasing education records without parental consent "is two steps removed from the interests of individual students and parents"). Finally, forbidding state actors from applying any different "standard, practice, or procedure" to determine if an individual is qualified to vote is "not so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520

U.S. at 340–41) (citation omitted). The Court finds that § 10101(a)(2)(A) creates a private right.

Defendants contend that non-U.S. Plaintiffs may not enforce § 10101 because the statute is not intended to benefit organizations, which are unable to vote. A party generally may assert only "his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). But so long as the Court has subject matter jurisdiction, there may be circumstances in which a plaintiff may rest its claim on the legal rights of another. *Id.* at 500–01. The Fifth Circuit recently concluded that an organization with organizational standing could assert individual voters' rights under the Materiality Provision. *Vote.Org*, 89 F.4th at 471–73.

Specifically, the organization Vote.org could assert § 10101 claims of voters because "Vote.org's position as a vendor and voting rights organization is sufficient to confer third-party standing." *Id.* at 472; *see also La Union del Pueblo Entero v. Abbott*, 618 F. Supp. 3d 388, 431–32 (W.D. Tex. 2022) ("*LUPE I*") (finding organizational plaintiffs could enforce § 10101); *Tex. Democratic Party v. Hughs*, 474 F. Supp. 3d 849, 858 (W.D. Tex. 2020) (holding that organizational plaintiffs could sue under § 1983 for violations of § 10101 because "[t]he same facts that establish organizational and associational standing . . . also demonstrate standing to sue for voting rights violations under [§ 10101]"), *rev'd and remanded on other grounds*, 860 F. App'x 874 (5th Cir. 2021). The Court concludes that non-U.S. Plaintiffs may similarly assert the rights of Arizona voters under the CRA.

ii. Plaintiffs May Enforce § 10101 Under § 1983

Because § 10101 creates a federal right, Plaintiffs may presumably enforce the provisions of § 10101 under § 1983. *Gonzaga Univ.*, 536 U.S. at 283–84. Defendants may rebut this presumption by showing that "Congress shut the door to private enforcement either expressly, through specific evidence from the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Id.* at 284 n.4 (citations and internal quotations omitted); *see Talevski*, 599 U.S. at 187. The text of § 10101 does not explicitly preclude a § 1983 remedy, so the question is whether Congress created a comprehensive enforcement mechanism incompatible with enforcement under § 1983. *Migliori v. Cohen*, 36 F.4th 153, 160–61 (3d Cir. 2022), *cert. granted, judgment vacated sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022).[48] A remedy under § 1983 is foreclosed "when Congress creates a right by enacting a statute but at the same time limits enforcement of that right through a specific remedial scheme that is narrower than § 1983." *Stilwell v. City of Williams*, 831 F.3d 1234, 1244 (9th Cir. 2016).

Section 10101 does not include a comprehensive enforcement scheme incompatible with enforcement

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[48] A vacated decision may still be considered for its persuasive effect. *See Orhorhaghe v. I.N.S.*, 38 F.3d 488, 493 n.4 (9th Cir. 1994) (citing as persuasive authority a decision vacated by the Supreme Court as moot); *In re Taffi*, 68 F.3d 306, 310 (9th Cir. 1995) (citing as persuasive authority a decision vacated by the Supreme Court on other grounds). Though the Supreme Court vacated *Milgori* as moot, this did not disrupt the Third Circuit's underlying analysis of § 10101.

under § 1983. First, district courts have jurisdiction over "proceedings instituted pursuant to [§ 10101] and shall exercise the same without regard to whether the *party aggrieved* shall have exhausted any administrative or other remedies that may be provided by law." 52 U.S.C. § 10101(d) (emphasis added). *Schwier* explained that because private citizens sued to enforce § 10101 before Congress granted the Attorney General authority to initiate an action in 1957, "this language could not have applied to the Attorney General and thus was meant to remove roadblocks for the previously authorized private rights of action."[49] 340 F.3d at 1295–96 (cleaned up); *see also Migliori*, 36 F.4th at 160 (explaining that § 10101(d) "specifically contemplates an aggrieved party (i.e., private plaintiff) bringing this type of claim in court"); H.R. Rep. No. 85-291 (1957). And when Congress amended § 10101 authorizing the Attorney General to enforce the statute, it did so as a "means of *further securing* and protecting the civil rights of persons within the

[49] Though several district courts and the Sixth Circuit have found no federal right under § 10101, the *Schwier* Court noted that these decisions rely almost exclusively on *Good v. Roy*, which concluded, without elaboration, that the "unambiguous language" of § 10101 precluded the court from implying a private right of action because "subsection (c) provides for enforcement of the statute by the Attorney General with no mention of enforcement by private persons." *Schwier*, 340 F.3d at 1294 (quoting *Good*, 459 F. Supp. 403, 405–06 (D. Kan. 1978)); *see McKay*, 226 F.3d at 756 (citing *Willing v. Lake Orion Cmty. Schs. Bd. of Trs.*, 924 F. Supp. 815, 820 (E.D. Mich. 1996)); *Willing*, 924 F. Supp at 820 (citing *Good*, 459 F. Supp. at 405). Defendants cite to *Northeast Ohio Coalition for the Homeless v. Husted*, for further support, but there a panel of the Sixth Circuit only noted that *McKay* remained binding in the absence of any Sixth Circuit en banc or Supreme Court decision holding to the contrary. 837 F.3d 612, 630 (6th Cir. 2016).

jurisdiction of the United States." H.R. Rep. No. 85-291, at 1966 (1957) (emphasis added). This "demonstrates an intense focus on protecting the right to vote and does not support the conclusion that Congress meant merely to substitute one form of protection for another."[50] *Schwier*, 340 F.3d at 1295 (citing H.R. Rep. No. 85-291).

In addition, § 10101 lacks the "panoply of enforcement options, including noncompliance orders, civil suits, . . . criminal penalties," and "several" private enforcement options that are characteristic of statutory remedies found incompatible with § 1983. *Migliori*, 36 F.4th at 161 (quoting *Blessing*, 520 U.S. at 347). And though "any person of such race or color" may apply for "an order declaring him qualified to vote" if the court finds a "pattern or practice" of § 10101 violations, this entitlement to a judicial determination merely "complement[s], rather than supplant[s], § 1983." § 10101(e); *Isabel v. Reagan*, 394 F. Supp. 3d 966, 977 (D. Ariz. 2019) (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122 (2005)) (finding plaintiff must sue directly under the NVRA instead of § 1983 because, among other things, the NVRA creates an express private right of action that requires a plaintiff to first give notice of a violation and explicitly allows only declaratory and injunctive relief, while

[50] The Attorney General's potential enforcement of § 10101 in and of itself does not foreclose a private remedy. *See Schwier*, 340 F.3d at 1294–95 (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 556–57 (1969) (holding enforcement by the Attorney General did not preclude private citizens from enforcing section 12(f) of the VRA and noting that the goals of the VRA "could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General")); *Migliori*, 36 F.4th at 162 (noting that § 10101(d) does not *mandate* enforcement by the Attorney General).

§ 1983 lacks any notice requirement and allows suits for damages). The Court finds that Defendants have failed to rebut the presumption of an enforceable right under § 1983. Non-US Plaintiffs may enforce the rights conferred by § 10101 pursuant to § 1983.

2. H.B. 2492 § 4's Birthplace Requirement

Plaintiffs claim that the Birthplace Requirement violates the Materiality Provision of the Civil Rights Act. *See* § 10101(a)(2)(B). The Materiality Provision prohibits the State from denying an individual her right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." *Id.* The Materiality Provision was "intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Schwier*, 340 F.3d at 1294.

Defendants do not dispute that an applicant's failure to include her birthplace is an "error or omission on any record or paper relating to" a requisite to voting. *See* § 10101(a)(2)(B). And Arizona's refusal to register an individual who omits birthplace is a denial of that individual's right to vote. The question is whether an individual's failure to provide birthplace is material to determining that individual's eligibility to vote. To vote in Arizona, a person must be a United States citizen, a resident of Arizona, and at least eighteen years of age, who has not been adjudicated incapacitated or convicted of a felony. Ariz. Const. art. VII, § 2; *see also* A.R.S. § 16-121. An individual's

birthplace cannot be used to directly verify that individual's citizenship or place of residence. (*See, e.g.*, Connor Tr. 311:22–312:17; County Recorder Testimony Stip. No. 1.) Instead, Defendants claim that the Birthplace Requirement can be used to verify an individual's identity, which is an integral component of determining eligibility.

Materiality "signifies different degrees of importance in different legal contexts." *Fla. State Conf. of N.A.A.C.P.*, 522 F.3d at 1173. The Court previously determined that Congress intended materiality to require "some probability of actually impacting an election official's" determination of a person's eligibility to vote. (09/14/2023 Order at 26.) The erroneous or omitted information need not be essential to determining a person's eligibility to vote, but it must be more than useful or minimally relevant. (*See id.* at 25–26).

The Court concludes that an individual's birthplace is not material to determining her eligibility to vote. First, H.B. 2492 § 4 is not retroactive, meaning approximately one-third of current voter registrations will lack the voter's birthplace until that voter submits a new registration while an additional 200,000 registrations will continue to identify birthplace generally as the United States. That Arizona has determined these voters are qualified to vote notwithstanding the lack of any meaningful birthplace information strongly indicates birthplace is immaterial. Moreover, the Voting Laws do not mandate county recorders to verify an individual's birthplace or reject State Forms with an incorrect birthplace. *See* § 16-121.01(A); (Petty Tr. 103:21–104:5; Connor Tr. 316:3–6, 326:13–16.) "If the substance of the [birthplace field] does not matter, then it is hard to understand how one could claim that this requirement has any use in determining a voter's

qualifications." *Migliori*, 36 F.4th at 164 (finding omitting the date on a ballot immaterial in part because "ballots were only to be set aside if the date was *missing*—not incorrect" (emphasis in original)). And HAVA Checks do not use birthplace as matching criteria for AVID and MVD records to verify an applicant's identity for voter eligibility. (Petty Tr. 32:19–33:14, 103:2–7; *see generally* MVD Verification Criteria.)

Nor does the fact that Arizona can use birthplace for other administrative purposes render birthplace material in determining a voter's eligibility. Specifically, county recorders' use of birthplace as one of several security questions to verify the identity of a *registered voter* does not make birthplace material because that voter has already been identified and found eligible to vote. (*See, e.g.*, 2023 EPM at ECF-70 (including field for birthplace on ballot-by-mail request form,), ECF-229 (using birthplace to verify caller inquiring about status of provisional ballot).) "Once election officials have determined an applicant or voter's identity, additional requirements that confirm identity are not material to determining whether the applicant or voter is qualified to vote or vote by mail and compounds the chance for error and disenfranchisement." *La Union del Pueblo Entero v. Abbott*, 5:21-CV-0844-XR, 2023 WL 8263348, at *18 (W.D. Tex. Nov. 29, 2023) ("*LUPE II*"); *see Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1309 (N.D. Ga. 2018) ("[W]ith respect to the absentee ballots rejected solely on a year of birth error or omission . . . the qualifications of the absentee voters are not at issue because . . . election officials have already confirmed such voters' eligibility through the absentee ballot application process."). And the evidence indicates that county recorders can nevertheless reliably verify the identity of registered voters without

birthplace when necessary, especially considering the one-third of all voters who have never provided birthplace information when registering to vote. (*See, e.g.*, Petty Tr. 168:1–12 (explaining Maricopa County accepts registration deficiency notices without birthplace information); Hiser Tr. 2056:18– 2057:10 (explaining birthplace alone is insufficient to verify a voter's identity via phone).)

The Court concludes that the Birthplace Requirement violates the Materiality Provision of the Civil Rights Act.

3. H.B. 2243 § 2's Reason to Believe Provision

Plaintiffs claim that H.B. 2243's Reason to Believe Provision will cause county recorders to apply different standards, practices, and procedures to voters who county recorders suspect lack U.S. citizenship than those standards, practices, and procedures applied to voters not suspected of lacking citizenship. *See* § 10101(a)(2)(A). Specifically, H.B. 2243 requires county recorders to search SAVE only for naturalized voters who county recorders suspect are not U.S. citizens. *See* § 16-165(I).

While the Voting Laws purport to confirm the citizenship status of all voters, because SAVE requires an immigration number, county recorders can only ever conduct SAVE checks on naturalized citizens who county recorders have "reason to believe" are non-citizens. Naturalized citizens will always be at risk of county recorders' subjective decision to further investigate these voters' citizenship status, whereas the Reason to Believe Provision will never apply to native-born citizens. This violates the Different Practices Provision. *C.f. U.S. Student Ass'n Found. v.*

Land, 585 F. Supp. 2d 925, 949–50 (E.D. Mich. 2008) ("[The Different Practices Provision] simply requires that if Michigan wishes to impose unique procedural requirements on the basis of a registrant's original voter ID being returned as undeliverable, it must impose those requirements on *everyone* whose original ID is returned as undeliverable." (emphasis in original)); *Frazier v. Callicutt*, 383 F. Supp. 15, 18–19 (N.D. Miss. 1974) (finding violation of § 10101 where registrar summarily referred the registration of every Black student whose registration may have indicated lack of residency to the board of election commissioners for appeal but approved nearly all non-student registrations that similarly indicated lack of residency); *Shivelhood v. Davis*, 336 F. Supp. 1111, 1115 (D. Vmt. 1971) (explaining that "the Board of Civil Authority must use its best efforts to insure that any questionnaire [concerning domicile] is equally relevant to all applicants and not designed only to apply to student applicants" in order to comply with § 10101(a)(2)(A)); *see also Whatley v. Clark*, 482 F.2d 1230, 1232–33 (5th Cir. 1973) (finding equal protection violation where Texas law requiring residency was substantively the same for all voters but applied differently to students by creating a presumption of non-residency for students).

Arizona is entitled to investigate the citizenship status of registered voters to ensure that only qualified individuals are registered to vote. Holding otherwise "would raise serious constitutional doubts if [the Different Practices Provision] precluded a State from obtaining the information necessary to enforce its voter qualifications." *ITCA*, 570 U.S. at 17. For example, County recorders must check SAVE and/or NAPHSIS for all voters without DPOC, *i.e.*, Federal-Only Voters. § 16-165(I), (J). But because the

application of H.B. 2243's Reason to Believe Provision subjects *only* naturalized citizens to database checks, this provision violates § 10101.

C. National Voter Registration Act

1. Sections 6 and 7 of the NVRA

i. H.B. 2492 § 5's DPOR Requirement

The Court previously ruled that section 6 of the NVRA preempts H.B. 2492 § 5's requirement that Federal Form users submit DPOR to register for federal elections. (*See* 09/14/2023 Order at 9.) Plaintiffs claim that the DPOR Requirement violates section 6 of the NVRA to the extent that Arizona must accept Federal Forms lacking DPOR under the Court's summary judgment ruling but will continue to reject State Forms lacking DPOR and refuse to register otherwise eligible voters for federal elections.

Section 6 of the NVRA permits Arizona to register eligible voters for federal elections with a State Form that "meets all of the criteria stated in" section 9 of the NVRA. 52 U.S.C. 20505(a)(2). Specifically, as stated in section 9 of the NVRA, the State Form "may require only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 20508(b)(1). Though the State Form "may require information the Federal Form does not," Arizona must abide by section 6 and section 9 and show that the information required on the State Form is "necessary"

to determine the eligibility of the applicant.[51] *ITCA*, 570 U.S. at 12, 18; §§ 20505(a)(2), 20508(b).

Defendants failed to do so. In fact, the Voting Laws indicate otherwise, as voters who obtain an out-of-state license or identification and receive a notice from the county recorder requesting confirmation of residency must only attest under penalty of perjury that the voter is still a resident of Arizona. § 16-165(E). The Court cannot reconcile why DPOR would be *necessary* for new applicants when an attestation is *sufficient* to determine the eligibility of registered voters who subsequently obtain an out-of-state identification. Section 6 of the NVRA preempts the DPOR Requirement as to State Form users for federal elections.

Plaintiffs also claim that Arizona's differential treatment of State Form and Federal Form applications lacking DPOR violates section 7 of the NVRA, which requires public assistance agencies to distribute the Federal Form or an "equivalent" form. 52 U.S.C. § 20506(a)(6) (citing § 20508(a)(2)); *Id.* § 20506(a)(2).

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[51] In *Fish v. Kobach* ("*Fish I*"), the Tenth Circuit analyzed the necessity of information under section 5 of the NVRA, which requires states to include a voter registration as part of the application process for state driver's licenses and identifications. 840 F.3d 710, 733– 39 (10th Cir. 2016). This registration "may require only the *minimum amount* of information necessary" to determine the applicant's eligibility. 52 U.S.C. § 20504(c) (emphasis added). The *Fish I* Court held "that section 5's 'only the minimum amount of information necessary' is a stricter principle than section 9's 'such identifying information . . . as is necessary'" and that the information enumerated in section 5 is the "presumptive minimum" a state may require. 840 F.3d at 734. Assuming section 9 is an easier standard than section 5, the Court concludes that Defendants must still show the information on the State Form is necessary.

The Secretary of State supplies public assistance agencies with the State Form to register individuals. The "plain meaning of a statute controls where that meaning is unambiguous." *Khatib v. County of Orange*, 639 F.3d 898, 902 (9th Cir. 2011) (en banc). Section 7 is clear: if the Secretary of State supplies the State Form to public assistance agencies, the State Form must be "equivalent," or "virtually identical" to the Federal Form. Black's Law Dictionary (11th ed. 2019) (defining equivalent as "equal in value, force, amount, effect, or significance," or "virtually identical").

Moreover, the Court does "not look at individual subsections in isolation" but reads "words in their context and with a view to their place in the overall statutory scheme." *Tovar v. Sessions*, 882 F.3d 895, 901 (9th Cir. 2018); *id.* (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)). As discussed above, states may develop "a *mail voter registration form* that meets all of the criteria stated in section [9]" which allows states to include information necessary to determining voter eligibility that may not otherwise be on the Federal Form. §§ 20505(a)(2) (emphasis added), 20508(b)(1). By its terms, section 7 does not afford states this same discretion regarding forms made available at public assistance agencies. § 20506(a)(6). This is buttressed by the fact that Congress required public assistance agencies to provide voter registration services specifically in an effort to target the registration of persons with disabilities and low-income individuals who are more likely to receive public assistance. H.R. Rep. No. 103-66, 19 (1993) (Conf. Rep.). Requiring public assistance agencies to use an "equivalent" to the Federal Form "guarantees that a simple means of registering to vote in federal elections will be available" for these individuals. *ITCA*, 570 U.S. at 12. Because the Voting Laws require a State Form to

include DPOR, the State Form is not "equivalent" to the Federal Form. Arizona may not reject State Forms lacking DPOR and must register these applicants as Federal-Only Voters.

ii. H.B. 2243 § 2's List Maintenance Procedures and Cancellation Provision

Section 6 of the NVRA also mandates that states "accept and use" the Federal Form "for the registration of voters" for federal elections. § 20505(a). The Federal Form requires that applicants attest under penalty of perjury that they are eligible to vote, which includes being a U.S. citizen. (*See* Federal Form.) The Court previously ruled that section 6 preempts H.B. 2492 § 5, which requires Federal Form users to provide DPOC to vote in presidential elections and vote by mail. (09/14/2023 Order at 9–14.) Plaintiffs claim that section 6's "accept and use" mandate also preempts H.B. 2243 § 2. Specifically, the Secretary of State and county recorders must conduct monthly database checks to verify the citizenship of voters who do not provide DPOC, namely, Federal-Only Voters. *See* § 16-165(I), (J). If the country recorder "confirms" that the voter is a non-citizen, the voter must then provide DPOC to avoid having her voter registration cancelled. § 16-165(A)(10). Plaintiffs claim that Arizona is not "using" the Federal Form because this regime requires county recorders to investigate and confirm a Federal-Only Voter's citizenship status with information not contained on the Federal Form.

H.B. 2243 § 2 does not violate section 6 of the NVRA. *ITCA* held that section 6's "accept and use" mandate preempted Arizona's DPOC requirement for Federal Form users. 570 U.S. at 4, 15. The Supreme Court rejected Arizona's argument that section 6 only required Arizona to "receive the [Federal Form]

willingly and use it *somehow* in its voter registration process." *Id.* at 9–10 (emphasis in original). "[T]he Federal Form provides a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." *Id.* at 12. But the Supreme Court noted that "while the NVRA forbids States to demand that *an applicant submit additional information* beyond that required by the Federal Form, it does not preclude States from 'deny[ing] registration based on information in their possession establishing the applicant's ineligibility.'" *Id.* at 15 (emphasis added) (quoting § 20508(b)(1), which allows the Federal Form to include only that information "necessary to . . . assess the eligibility of the applicant").

Arizona must accept the Federal Form as prima facie proof of an applicant's eligibility to vote but the NVRA does not preclude Arizona from independently determining that an applicant or voter is ineligible. The monthly database checks require county recorders to consult information available to Arizona; applicants do not submit any "additional information." *Id.*; *see* § 16-165(I), (J). And a county recorder may cancel a registration only if the county recorder "confirms" from that information that the voter is not a citizen. § 16-165(A)(10). This is not "'inconsistent with' the NVRA's mandate that States 'accept and use' the Federal Form." *ITCA*, 570 U.S. at 15 (citation omitted); *see id.* ("The NVRA clearly contemplates that not every submitted Federal Form will result in registration.").

Nor do the investigation and additional DPOC requirements "create[] an unacceptable obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Chamber of Com. v. Bonta*, 62

F.4th 473, 482 (9th Cir. 2023) (citation and internal quotations omitted) (describing conflict preemption). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. . . ." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). One of the NVRA's purposes is to "enhance[] the participation of *eligible citizens* as voters in elections for Federal office." 52 U.S.C. § 20501(b)(2) (emphasis added); *see id.* § 20507(a)(1) (states must "ensure that any *eligible* applicant is registered to vote" (emphasis added)). Arizona is entitled to cancel the registrations of ineligible voters "based on information in [its] possession establishing the applicant's ineligibility"; it need not take a voter at her word. *ITCA*, 570 U.S. at 15.

Were the Court to embrace Plaintiffs' theory that section 6 prohibited a county recorder from requesting information not contained on the Federal Form after confirming non-citizenship, Arizona seems left with no apparent means to request proof of eligibility before cancelling a registration. The Court is unaware of any caselaw interpreting the NVRA in this manner and, considering *ITCA*, declines to do so here. Section 6 does not preempt H.B. 2243's mandate that a voter submit DPOC to avoid cancellation after the county recorder confirms the voter's non-citizenship.

2. Section 8 of the NVRA

Plaintiffs claim that the Voting Laws' post-registration citizenship investigation provisions violate section 8(b) of the NVRA. Specifically, under H.B. 2492 § 7's Attorney General Referral Provision, the Secretary of State and county recorders "shall" provide the Attorney General with the names of registered voters who have not provided DPOC, who must then

investigate these registered voters by, "at a minimum," consulting the MVD, SSA, SAVE, and NAPHSIS databases. § 16-143. Similarly, H.B. 2243's List Maintenance Procedures direct county recorders to investigate the citizenship status of registered voters with a foreign-type license, voters lacking DPOC, and voters who county recorders have "reason to believe" are non-citizens. § 16-165(G)–(J). County recorders must then cancel the registrations of confirmed non-citizens. § 16-165(A)(10), (K). Section 8(b) of the NVRA, in relevant part, provides that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965" ("Uniformity Provision"). 52 U.S.C. § 20507(b)(1). Plaintiffs claim that the Voting Laws are nonuniform and discriminatory specifically as applied to naturalized citizens and voters who do not provide DPOC.

i. H.B. 2243 § 2's Reason to Believe Provision

For the same reasons that H.B. 2243's Reason to Believe Provision violates the Civil Rights Act, discussed above, the Court concludes that this provision violates section 8(b) of the NVRA. Only naturalized citizens would be subject to scrutiny under the Reason to Believe Provision, who if "confirmed" as non-citizens, would be required to provide DPOC. This would have a non-uniform and discriminatory impact on naturalized citizens. *See United States v. Florida*, 870 F. Supp. 2d 1346, 1350–51 (N.D. Fla. 2012) (finding secretary of state's list maintenance program "probably ran afoul" of section 8 because its "methodology made it likely that the properly registered citizens who

would be required to respond and provide documentation would be primarily newly naturalized citizens. The program was likely to have a discriminatory impact on these new citizens.").

ii. H.B. 2243 § 2's List Maintenance Procedures and H.B. 2492 § 7's Attorney General Referral Provision

Plaintiffs claim that H.B. 2492 § 7 and H.B. 2243 § 2 violate section 8(b) of the NVRA by requiring county recorders to investigate the citizenship status of select groups of voters, specifically, registered voters without DPOC and naturalized citizens. In *Husted v. A. Philip Randolph Institute*, the Supreme Court reviewed a challenge to Ohio's list maintenance procedures to remove voters who became ineligible due to a change in residence. 584 U.S. 756, 764–66 (2018). Specifically, Ohio would send voters who had not voted for two years a notice requesting verification of the voter's address and remove voters who failed to respond to the notice. *Id.* at 765–66. The plaintiffs claimed that this procedure was unlawful under the NVRA in part because Ohio sent notices "without having any 'reliable indicator' that the addressee ha[d] moved." *Id.* at 776. In rejecting this argument, the Supreme Court explained in part that "[s]o long as the trigger for sending such notices is 'uniform, nondiscriminatory, and in compliance with the Voting Rights Act,' § 20507(b)(1), States can use whatever plan they think best." *Id.* at 776–77.

Like in *Randolph Institute*,[52] H.B. 2243 § 2 does not violate section 8 of the NVRA because the "trigger" for

[52] While Plaintiffs in *Randolph Institute* did not assert a claim under § 20507(b)(1), the majority noted that the dissent had not

county recorders to investigate the citizenship status of applicants is uniform and nondiscriminatory: the voter has not submitted DPOC proving her citizenship. The same is true for H.B. 2492 § 7's mandate that county recorders provide the Attorney General with the names of registered voters lacking DPOC. These provisions necessarily require that county recorders first review the registration files of *all* registered voters before further investigating those individuals who have not submitted DPOC.[53] *C.f. Florida*, 870 F. Supp. 2d at 1350–51. Regardless of whether Arizona "overestimated the correlation between" not submitting DPOC and non-citizenship, the NVRA does not prohibit the State from using this methodology to ensure that only eligible individuals are registered to vote. *Randolph Institute*, 584 U.S. at 776; 52 U.S.C. § 20507(a)(1). In addition, no party presented evidence of a comprehensive database of all

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identified any evidence that Ohio's program was tarnished by discriminatory intent. 584 U.S. at 779.

[53] Plaintiffs claim that H.B. 2492 § 7 and H.B. 2243 § 2 confer county recorders with discretion to arbitrarily implement these provisions. But the Voting Laws unequivocally *mandate* that county recorders investigate or refer to the Attorney General for investigation all voters lacking DPOC. Additionally, the Voting Laws prescribe the frequency with which county recorders and the Secretary of State must conduct citizenship checks. A.R.S. 16-165(G) (requiring Secretary of State to conduct monthly MVD database comparisons), (I)–(J) (requiring county recorders to conduct monthly checks); *c .f. Common Cause Ind. v.* L*awson*, 327 F. Supp. 3d 1139, 1153 (S.D. Indiana 2018) (concluding that the implementation of a voting law was likely to be non-uniform based on evidence that co-directors of the secretary of state's election division "provid[ed] *differing guidance* to county officials on how to determine whether a particular registered voter is a duplicate registered voter in a different state" (emphasis added)), *aff'd on other grounds*, 937 F.3d 944.

U.S. citizens, and it is not unreasonable for the Voting Laws to mandate consulting multiple sources that may contain citizenship information. Specifically, voters who have not submitted DPOC will be subject to MVD, NAPHSIS, *and* SAVE checks, if practicable.[54] A.R.S. §§ 16-143, 165(I), (J); *c.f. Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 703 (N.D. Ohio 2006) (concluding Ohio's law that required only compensated voter registration workers to pre-register with the Secretary of State and undergo "online-only" training applied to only "a selected class of persons" because, among other things, "they [did] not apply to everyone involved in the process").

Plaintiffs further claim that H.B. 2492 § 7 and H.B. 2243 § 2 violate section 8 because the additional List Maintenance Procedures and Cancellation Provision will discriminatorily impact naturalized voters due to stale citizenship information in SAVE and the MVD database. *See* A.R.S. §§ 16-143(B)(3), 16-165(I). Assuming it were somehow practicable for county recorders or the Attorney General to conduct SAVE checks on Federal-Only Voters (notwithstanding the current limitations of the SAVE MOA and the lack of immigration numbers for these voters), plaintiffs adduced no evidence that SAVE is so unreliable as to erroneously flag naturalized citizens as non-citizens each month. SAVE typically returns an individual's

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[54] SAVE checks are *not* practicable because SAVE requires an immigration number, meaning neither the Attorney General nor county recorders can conduct these checks on any Federal-Only Voters who have not provided any form of DPOC. A.R.S. § 16-143(A) (citing § 16-166); (*see* 2023 EPM at 26–27; Petty Tr. 57:15–58:1 (explaining most voters do not provide an immigration number).) For this reason, there will be no non-uniform use of SAVE on naturalized, Federal-Only Voters.

naturalization status within 24 hours of naturalization, except for the occasional one or two-day delay. (*See* USCIS Dep. 39:20–41:19.) Even if SAVE may periodically return stale citizenship information, Plaintiffs have not shown that naturalized citizens will be disproportionality required to submit additional DPOC compared to other voters. Section 8 of the NVRA does not preempt the Voting Laws' SAVE checks.

Nor does the NVRA preempt the Voting Laws' MVD checks. The Attorney General must review the citizenship information of Federal-Only Voters in the MVD database. § 16-143(B)(1). In addition, the Secretary of State must notify county recorders of all registered voters who are "not a United States citizen according to the [MVD] database." (2023 EPM at ECF-54); § 16-165(G). Under the Voting Laws, the only voters who may be flagged as non-citizens in the MVD database are naturalized citizens who still possess a foreign-type credential after naturalization. (2023 EPM at ECF-54; Jorgensen Tr. 560:2–14; *see* Pls.' Stip. No. 93.)

In *United States v. Florida*, the secretary of state compiled a list of voters that included any person who obtained a state license as a non-citizen, became a naturalized citizen, and registered to vote, but had not renewed their driver's license and had not updated motor vehicle records to reflect their new citizenship status. 870 F. Supp. 2d at 1347–48. The district court found that this methodology "probably" violated section 8 because "the Secretary's program identified many properly registered citizens as potential non-citizens" and discriminatorily burdened naturalized citizens with proving citizenship. *Id.* at 1350. Citing *Florida*, the court in *Texas League of United Latin American Citizens v. Whitley* ("*Texas LULAC*"), came to

a similar conclusion regarding the Texas Secretary of State's "proactive process using tens of thousands of Department of Public Safety driver license records matched with voter registration records." No. SA-19-CA-074-FB, 2019 WL 7938511, at *1 (W.D. Tex. Feb. 27, 2019). There, the court found that the Secretary's program imposed a burden on "perfectly legal naturalized Americans" while "[n]o native born Americans were subjected to such treatment." *Id.* Unlike in *Florida* and *Texas LULAC*, however, Arizona requires that *all voters* submit DPOC or be subject to additional citizenship investigation procedures. §§ 16-121.01(D)–(E), 16-165(G).

Moreover, for naturalized citizens that provide DPOC when registering to vote (Full-Ballot Voters), MVD's records of non-citizenship will not materially affect these voters' registration status. The 2023 EPM explicitly directs county recorders to "confirm" reports of non-citizenship from the Secretary of State, which includes "deterimin[ing] whether the voter has previously provided DPOC." (2023 EPM at ECF-57; *see id.* at ECF-27 n.10 (warning county recorders that MVD records may return outdated citizenship information for naturalized citizens registering to vote); Morales Tr. 613:25–614:3 (explaining the process of overriding a voter's non-citizenship status in AVID when the voter has provided proof of naturalization as DPOC but MVD indicates non-citizenship).) Aside from Dr. McDonald's "loop" theory, which the Court found unpersuasive, Plaintiffs have not adduced evidence that county recorders would ignore a voter's DPOC on file and burden naturalized citizens with requiring new proof of citizenship. (*See* McDonald Tr. 1071:24–1072:5.) And for those who have not provided DPOC (the 65 Federal-Only Voters with a foreign-type credential), the Court concluded *supra* Section II(C)(2)

that Arizona may lawfully request proof of citizenship when it obtains and confirms information in its possession that a Federal-Only Voter is a non-citizen. (*See* 2023 EPM at ECF-57 ("If a person has not previously provided DPOC, confirmation also includes reviewing relevant government databases . . . to the extent practicable" and may include "direct communication with the registrant.")); *ITCA*, 570 U.S. at 17 ("[I]t would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.").

Except for the Reason to Believe Provision, section 8 of the NVRA does not preempt H.B. 2492 § 7 nor H.B. 2243 § 2.

D. Section 2 of the Voting Rights Act

Under section 2 of the VRA, States are prohibited from imposing any law, practice, or procedure "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or language-minority status. 52 U.S.C. §§ 10301(a), 10303(f)(2). A law violates section 2 if:

> [B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members [protected by section 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 10301(b). "The essence of a § 2 claim . . . is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an

inequality in the opportunities of minority and non-minority voters to elect their preferred representatives." *Brnovich v. Democratic Nat'l Comm.* ("*DNC*"), 141 S. Ct. 2321, 2333 (2021) (cleaned up); *see also Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 594 (9th Cir. 1997) ("Section 2 requires proof only of a discriminatory result, not of discriminatory intent.").

The Supreme Court has enumerated a non-exhaustive set of "guideposts" for courts to consider: (1) "the size of the burden imposed by the challenged voting rule"; (2) "the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982"; (3) "[t]he size of any disparities in a rule's impact on members of different racial or ethnic groups"; (4) "the opportunities provided by a State's entire system of voting"; and (5) "the strength of the state interests served by [the] challenged voting rule." *DNC*, 141 S. Ct. at 2338–39. Courts may also consult the "Senate" factors identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), though "their relevance is much less direct" when applied outside the vote-dilution context. *DNC*, 141 S. Ct. at 2340.

Plaintiffs claim that H.B. 2492 §§ 4 and 7, and H.B. 2243 § 2 violate section 2 of the VRA.

1. Size of the Burden

Most of the Voting Laws' challenged provisions impose a de minimis burden on voters. The Citizenship Verification Procedures, Attorney General Referral Provision, and List Maintenance Procedures' database checks impose obligations related to election administration on county recorders and the Attorney General to confirm the eligibility of applicants and registered voters. *See DNC*, 141 S. Ct. at 2338 (focusing

on the "effort and compliance" required by voters to determine whether a burden exists); § 16-121.01(D) (verifying citizenship of applicants without DPOC); § 16-143 (investigating citizenship of Federal-Only Voters); § 16-165(G)–(K) (investigating citizenship of registered voters). But assuming that the psychological impacts of being referred to the Attorney General for investigation is a burden on voting, Plaintiffs did introduce evidence that Latino and AANHPI voters, particularly those from mixed-status households, may fear exposing their families to increased government oversight.

Only if a county recorder establishes that an applicant or registered voter is a non-citizen must that voter then provide DPOC. §§ 16-121.01(E), 16-165(A)(10); (2023 EPM at ECF-27.) For these voters, the Voting Laws' DPOC Requirements may impose a modest burden on a subset of socioeconomically disadvantaged voters because of the potential monetary and temporal costs associated with obtaining DPOC. Moreover, the money and time necessary to obtain a birth certificate for native-born citizens pales in comparison to the cost of obtaining a naturalization certificate. *C.f. Crawford v. Marion Cnty. Election Bd.* ("*Crawford II*"), 553 U.S. 181, 198–99 (2008) (plurality opinion) (finding that the evidence "indicate[d] that a somewhat heavier burden may be placed on a limited number of persons . . . who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification"); § 16-165(A)(10) (affording 35 days to provide DPOC before registration is cancelled); (*but see* 2023 EPM at ECF-22, -24 (allowing new registrants until the Thursday before election day to supply DPOC to be registered to vote).)

Arizona's election laws mitigate this burden by allowing voters to provide numerous forms of DPOC, ranging from physical documents to writing an identification number on the registration form, which has worked for 99.5% of Arizona's registered voters. *See* § 16 166. And Plaintiffs were unable to provide evidence quantifying the number of Arizonans qualified to vote that may be unable to provide *any* form of DPOC or that have been or will be deterred from registering to vote because of Arizona's DPOC Requirements. Considering the discrete burden on particularly disadvantaged voters who do not possess DPOC however, the Court finds that this guidepost weighs slightly in favor of finding a section 2 violation.

2. Alternative Means of Registering

"[W]here a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means." *DNC*, 141 S. Ct. at 2339. Practically speaking, the Voting Laws do not afford Arizonans "multiple ways" to register to vote. Individuals must provide DPOC when registering to vote or subject themselves to citizenship verification procedures that may later necessitate proof of citizenship. Specifically, while an applicants can register as Federal-Only Voters without DPOC, the Voting Laws' Citizenship Verification and List Maintenance Procedures may eventually require these voters to submit DPOC to remain registered. This guidepost weighs in favor of finding a section 2 violation. *C.f. DNC*, 141 S. Ct. at 2344 (citing the various methods Arizona allows voters to vote as mitigating evidence regarding the State's mandate that voters vote in their assigned precinct on election day).

3. Disparate Impact

As discussed *supra* Section I(A)(1), Arizona currently lacks DPOC for less than half a percent of its voters. Approximately one-third of a percent of Arizona's White voters are Federal-Only Voters, and a little more than two-thirds of a percent of minority voters are Federal-Only Voters. (*See* Ex. 338.) In *DNC*, the district court had found that approximately one percent of minority voters had cast ballots in the wrong precinct, while a half a percent of White voters did so. *DNC*, 141 S. Ct. at 2345. The Supreme Court rejected the Ninth Circuit's interpretation of these statistics that "minority voters in Arizona cast [out-of-precinct] ballots at twice the rate of White voters," and instead concluded that "[p]roperly understood, the statistics show only a small disparity that provides little support for" finding a disparate impact. *Id.* (first alteration in original). "A policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open." *Id.* at 2344–45 (concluding the policy's racial disparity was "small in absolute terms"); *see also Fair Fight Action*, 634 F. Supp. 3d at 1244 (finding no disparate impact where citizenship checks affected "less than one percent of any minority group"). As in *DNC*, any disparate impact regarding the Voting Laws' Citizenship Verification Procedures and List Maintenance Procedures is markedly small.[55]

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[55] Relatedly, for voters who are called upon to furnish DPOC pursuant to the Voting Laws, economically disadvantaged voters might encounter more financial challenges when obtaining DPOC. But the cost of obtaining DPOC alone is insufficient for the Court to measure how the Voting Laws' DPOC Requirements will disproportionately impact minority groups without first assuming that these voters in fact lack all forms of DPOC.

More precisely for naturalized citizens,[56] 65 Federal-Only Voters, or *one-third of a percent* of the 19,439 Federal-Only Voters, possess a foreign-type credential. (MVD Non-Citizen Records.) The Voting Laws' MVD checks will flag these voters as non-citizens, thereby triggering additional investigation by county recorders or the Attorney General and possibly requiring DPOC, while all other Federal-Only Voters will not be subject to these procedures.[57] §§ 16-143(B)(1), 16-165(A)(10), (G). But given the very few circumstances that a voter will be called upon to provide DPOC, the Voting Laws' impact on naturalized citizens who may not possess DPOC is negligible and weighs against finding a section 2 violation.

3. Laws and Practices in 1982

United States citizenship has always been a qualification to vote in Arizona. *See* Ariz. Const. art. VII, § 2. While the State Form has included "[a] statement that the registrant is a citizen of the United States" since 1980, no laws analogous to the Voting Laws' DPOC Requirements existed in Arizona in 1982. *See* 1979 Ariz. Sess. Laws ch. 209, § 3 (adopting A.R.S. § 16-152 to require contents of the State Form). Nevertheless, Arizona has already required DPOC for two decades, and the Voting Laws' additional citizenship verification procedures reinforce the State's

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[56] As discussed above, these voters will not be subject to recurring SAVE checks and risk being erroneously flagged as a non-citizen unless they have previously provided county recorders with an immigration number.

[57] On the opposite end of the scale, Dr. Richman identified 112 Federal-Only Voters for whom MVD has DPOC on record and would be eligible to vote as a Full-Ballot Voter. It is unclear, however, whether these voters are naturalized or native-born citizens.

longstanding limitation of the right to vote to citizens. *See Fair Fight Action*, 634 F. Supp. 3d at 1243 ("The use of a birth certificate as a means of establishing identification—and citizenship—speaks to the State's policy of trying to enforce the citizenship requirement prior to 1982."). This weighs against finding a section 2 violation.

4. State Interests

Arizona has a legitimate interest in preventing voter fraud and ensuring that only eligible Arizonans are registered to vote. *See DNC*, 141 S. Ct. at 2340 ("One strong and entirely legitimate state interest is the prevention of fraud."); *Crawford II*, 553 U.S. at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."). "Section 2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives." *DNC*, 141 S. Ct. at 2345–46. Consulting government databases that may contain information about a voter's citizenship status, and subsequently requiring DPOC when a voter's citizenship is seriously in question, serves this interest. *Fair Fight Action*, 634 F. Supp. 3d at 1245 (finding state's interest in preventing voter fraud served by the state's "citizenship flag" that is triggered "when there is affirmative evidence that someone who registered has a noncitizen driver's license"). And while voter fraud in Arizona is incredibly rare, the State "may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *DNC*, 141 S. Ct. at 2348 (finding Arizona's justification for third-party ballot-collection restrictions legitimate despite "no evidence that fraud in connection with early ballots had occurred in

Arizona"). This weighs against finding a section 2 violation.

5. Senate Factors

The Supreme Court in *DNC* noted that beyond the Senate factors' original purpose in vote-dilution cases, their "only relevance . . . is to show that minority group members suffered discrimination in the past (factor one) and that effects of that discrimination persist (factor five)." 141 S. Ct. at 2340 (citing *Gingles*, 478 U.S. at 36–37).

Plaintiffs' experts established that Arizona has a long history of race-based discrimination against Latino, AANHPI, and Native American individuals. Animus permeated Arizona's legal system, from banning interracial marriage and precluding immigrants from owning land, to mandating that classrooms and political subdivisions act only in English. Specific to voting, Arizona imposed literacy tests for 60 years and conducted regular voter purging practices. And Arizona was subject to the VRA's preclearance requirement until the Supreme Court's ruling in *Shelby County*. The effects of these discriminatory practices continue to linger, particularly as it relates to educational and economic outcomes for people of color. (*See generally* ACS Household Income; ACS Poverty Rates; ACS Educational Attainment.) However, considering the Voting Laws' limited to modest burdens, the small disparate impact on Federal-Only, minority and naturalized voters, and the state's interests, the Court concludes that the Voting Laws' citizenship investigation and additional DPOC Requirements do not "result[] in a denial or abridgment" of citizens' right to vote in Arizona. § 10301(a).

E. *Anderson/Burdick* Claims

Plaintiffs claim that the Voting Laws impose an undue burden on the right to vote in violation of the First and Fourteenth Amendments.[58] Plaintiffs also claim that the Voting Laws burden voters' equal protection and procedural due process rights. The *Anderson/Burdick* framework applies to these claims. *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1194–95 (9th Cir. 2021) ("*ADP III*") (holding that due process challenges to election laws should be evaluated under the *Anderson/Burdick* framework); *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 1011) (explaining that the Supreme Court has analyzed due process and equal protection claims under the same framework). Courts evaluate the validity of an election law by balancing the burden the law places on the fundamental right to vote against the state interests served by the law. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). The Court must "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate"; "identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule"; "determine the legitimacy and strength of each of those interests"; and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*; *see ADP III*, 18 F.4th at 1187.

"[T]he severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." *Nader v. Brewer*, 531 F.3d 1028, 1034 (9th Cir. 2008) (citing *Burdick v.*

[58] The Court declines to decide Plaintiffs' constitutional claims for those sections of the Voting Laws that the Court has already ruled unlawful under the CRA, NVRA, or VRA.

Takushi, 504 U.S. 428, 434 (1992)). "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Pierce v. Jacobsen*, 44 F.4th 853, 859–60 (9th Cir. 2022) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)); *see Dudum*, 640 F.3d at 1114 ("[W]hen a challenged rule imposes only limited burdens on the right to vote, there is no requirement that the rule is the only or the best way to further the proffered interests."). "This is a sliding scale test, where the more severe the burden, the more compelling the state's interest must be." *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018).

1. Burden on the Right to Vote

A restriction is "not severe" when it is "generally applicable, even-handed, politically neutral, and . . . protect[s] the reliability and integrity of the election process." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002). This balance means that voting regulations are rarely subjected to strict scrutiny. *See Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008). But in the equal protection context, laws that impose "'a particular burden on an identifiable segment' of voters are more likely to raise constitutional concerns" and demand more exacting review. *ADP III*, 18 F.4th at 1190; *Public Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 n.2 (9th Cir. 2016) (en banc) ("[C]ourts may consider not only a given law's impact on the electorate in general, but also its impact on subgroups, for whom the burden, when considered in context, may be more severe." (citing *Crawford II*, 553 U.S. at 199–203)). Plaintiffs

must present sufficient evidence for the Court to quantify the burden imposed on a specific subgroup of voters. *See Crawford II*, 553 U.S. at 199–203 (weighing the evidence plaintiffs presented to the district court to determine burdens imposed by Indiana's photo ID law).

As discussed regarding Plaintiffs' VRA claim, the Voting Laws' Citizenship Verification Procedures, Attorney General Referral Provision, and List Maintenance Procedures primarily impose burdens on county recorders and the Attorney General, not voters. *See* §§ 16-121.01(D), 16-143, 16-165(G)–(K). The "burden" of an election law is measured by the cost of compliance, not the "consequence of noncompliance." *ADP III*, 18 F.4th at 1188–89 (quoting *Ariz. Democratic Party v. Hobbs* ("*ADP I*"), 485 F. Supp. 3d 1073, 1087 (D. Ariz. 2020), *vacated on other grounds*, *ADP III*, 18 F.4th 1179). In *ADP III*, the plaintiffs argued that an election-day deadline to correct a ballot with a missing signature imposed a severe burden on voters who submitted a ballot at the last minute and election officials did not discover the missing signature until after the deadline. *Id.* at 1187–88. In rejecting this argument, the Ninth Circuit explained:

> The relevant burden for constitutional purposes is the small burden of signing the affidavit or, if the voter fails to sign, of correcting the missing signature by election day. To the extent that the election-day deadline results in voters' not casting a vote in an election, that result "was not caused by the election-day deadline, but by their own failure to take timely steps to effect their vote."

Id. at 1189 (quoting *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973)) (cleaned up).

ADP III's reasoning applies to this case. The relevant burden is the cost of timely complying with the Voting Laws' DPOC Requirements when registering to vote or after receiving a notice of non-citizenship from the county recorder. §§ 16-121.01(C), (E), 16-165(A)(10); (2023 EPM at ECF-17, -22, -24, -27.) The Voting Laws' ongoing database checks, investigations by the Attorney General, and potential rejection or cancellation of a voter's registration are not burdens, but merely the consequences of not providing DPOC. *ADP III* 18 F.4th at 1188; *see also ADP I*, 485 F. Supp. 3d at 1087–88 (explaining that if burdens were measured by the "consequence of noncompliance" and that consequence is disenfranchisement, that all voting pre-requisites would be subject to strict scrutiny). These provisions remain relevant however, as the frequency at which county recorders might reject or cancel registrations under the Citizenship Verification Procedures and List Maintenance Procedures can serve as an indicator of the severity of the burden DPOC imposes. *See, e.g.*, *Crawford II*, 553 U.S. at 202 (reviewing the frequency of individuals unable to obtain a photo ID in part to identify "how common the problem is"); *Obama for America v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (affirming district court's ruling that Ohio's changes to early voting imposed a "particularly high" burden because "[p]laintiffs introduced extensive evidence that a significant number of Ohio voters will in fact be precluded from voting" as a result of the changes).

The Voting Laws DPOC Requirements place a particular burden on individuals for whom, due to socioeconomic factors, the effort required to obtain and

provide county recorders with the appropriate documentation is cost or time prohibitive. The Court concluded this was limited to modest in analyzing Plaintiffs' VRA claim, but *Anderson/Burdick* demands closer scrutiny of the evidence for the Court to determine a more precise magnitude of this burden.[59] Plaintiffs offered no witness testimony or other "concrete evidence" to corroborate that the Voting Laws' DPOC Requirements will in fact impede any qualified voter from registering to vote or staying on the voter rolls. *Crawford II*, 553 U.S. at 201 (reviewing the "limited evidence" presented to the district court and unable to determine "the magnitude of the impact [a voter ID law] will have on indigent voters").

First, while there are more than 19,000 Federal-Only Voters who have not supplied proof of citizenship, Plaintiffs have not estimated the number of these voters that wholly *lack* DPOC, nor quantified whether naturalized voters or voters of color are more likely to lack DPOC. *Id.* at 202 n.20 (noting that "nothing in the record establishe[d] the distribution of voters who lack photo identification" or "even a rough estimate of how many indigent voters lack copies of their birth certificates [in order to obtain an ID]");[60] *c.f. Ariz.*

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[59] The Supreme Court's "size of the burden" guidepost in *DNC* blurs the distinction between the burden on voting rights central to an *Anderson/Burdick* claim and the disparate impact of voting laws central to a section 2 VRA claim. Despite the analyses' apparent overlap, the foundation of a section 2 claim remains clear: a plaintiff may demonstrate that elections are not "equally open," *due in part* to the burdens imposed on voters. 52 U.S.C. § 10301(b). By contrast, the crux of an *Anderson/Burdick* claim is the "character and agnitude" of the burden itself. *Burdick*, 504 U.S. at 434.

[60] In *Harper v. Virginia Board of Elections*, the Supreme Court held that Virginia violated the Equal Protection Clause by

Libertarian Party v. Reagan, 798 F.3d 723, 731 (9th Cir. 2015) ("Without some assessment of how many voters actually use the Registration Form [as opposed to registering under one of three alternative means], we cannot even begin to gauge the impact it may have had on party registration rolls."). For those voters who possess DPOC but want to avoid the "inconvenience" of providing it to county recorders, this "does not qualify as a substantial burden on the right to vote." *Crawford II*, 553 U.S. at 198. Second, even assuming some Federal-Only Voters do not possess DPOC, the evidence does not reliably illustrate the likelihood that voters will encounter obstacles to obtaining this information. The monetary and temporal costs of obtaining DPOC, particularly naturalization documents, can be significant for low-income individuals. But naturalized citizens experience lower levels of poverty than other Arizonans, including native-born citizens, and it bears reiterating that naturalized citizens need only provide an immigration number. And 82% of Arizona's Latino citizens are native-born, meaning most Latino voters may need to only obtain a new birth certificate. Though the costs of obtaining DPOC may have a greater impact on low-income Arizonans, this

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imposing a poll tax on individuals seeking to vote because the ability to pay the tax was not related to voter qualifications. 383 U.S. 663, 668 (1966). The plurality in *Crawford II* noted that even if "most voters already possess a . . . form of acceptable identification" to satisfy Indiana's photo identification law, this "would not save the statute under *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification." 553 U.S. at 198. *Crawford* nevertheless concluded that there was insufficient evidence to quantify the magnitude of the burden on individuals who could not afford a birth certificate, which was required to obtain a photo identification. *Id.* at 200–02. *Crawford's* reasoning applies here.

burden is nevertheless slight in the context of all Arizonan's overall ability to register to vote.

Turning to Plaintiffs' related due process claims, the Court's ruling that the Reason to Believe Provision is unlawful under the CRA and the NVRA dispels Plaintiffs' speculation that county recorders will rely on unfounded suspicions of non-citizenship to cancel voter registrations. Pursuant to H.B. 2243's remaining provisions, county recorders may still "obtain" information of non-citizenship from SAVE and NAPHSIS for Federal-Only voters and from the MVD database. A.R.S. § 16-165(G), (I), (J). Regarding the Voting Laws' temporal limitations on the opportunity to cure a voter registration, county recorders must, within ten days of matching an applicant with evidence of non-citizenship, notify the applicant that she has until the Thursday before election day to provide DPOC and be registered to vote.[61] (2023 EPM at ECF-17, -22, -24, -27.) Finding the burden of correcting a missing ballot signature by an election-day deadline to be "limited" in *ADP III*, the Ninth Circuit explained that "[t]he deadline does not prohibit voters from voting in any election; they must either sign the affidavit at the outset or correct a missing signature by the deadline of election day." 18 F.4th at 1189. The Court finds the case instructive here, as the 2023 EPM's Thursday deadline may result in some qualified Arizonans not becoming registered to vote. While *ADP III* implicated only a missing signature, the burden of timely obtaining DPOC similarly increases the closer to an

[61] For this reason alone, Plaintiffs' argument that H.B. 2492 § 4's Citizenship Verification Procedures violate voter registrants' procedural due process rights because registrants are not allowed *any opportunity* to contest a county recorder's finding of non-citizenship fails.

election an individual decides to register to vote without proactively proving citizenship. *See Rosario*, 410 U.S. at 758 (concluding New York's election law "merely imposed a time deadline on [voters'] enrollment" and voters who attained voting age before the deadline "clearly could have registered" in time for the election). And based on the evidence at trial, the Court is left to speculate as to whether the occurrence of Arizonans who may lack DPOC and be meaningfully impacted by processing delays when obtaining new citizenship documentation is sufficiently "frequent as to raise [a] question about the constitutionality" of the Voting Laws. *Crawford II*, 553 U.S. at 197.

Finally, county recorders will in fact "obtain" information of non-citizenship from MVD's monthly customer extracts for at least 65 naturalized citizens registered as Federal-Only Voters who possess a foreign-type license.[62] But the Court will not assume without any persuasive evidence that these 65 of Arizona's 19,439 Federal-Only Voters wholly lack DPOC such that they would be burdened by the List Maintenance Procedures' 35-day deadline.[63] Moreover,

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[62] While the Voting Laws' monthly MVD checks may misidentify naturalized citizens as non-citizens, the evidence indicates that all but 65 naturalized active voters with a foreign-type license have already provided county recorders with DPOC. Because county recorders must confirm evidence of non-citizenship by reviewing an individual's voter file, the Court concludes that naturalized citizens who possess a foreign-type license but have already provided DPOC will not be unduly burdened by the Voting Laws.

[63] Plaintiffs argue that Governor Ducey vetoed H.B. 2617 for lacking "sufficient due process" protections. Plaintiffs point specifically to H.B. 2617's cancellation provision, which would have afforded voters 90 days to provide DPOC and avoid cancellation, instead of the 35 days in H.B. 2243. (*Compare* H.B.

voters receive notice by forwardable mail that their registration has been cancelled and instructions regarding how to re-register if the voter is qualified. (2023 EPM at ECF-58.)

Plaintiffs cite *Fish v. Schwab* ("*Fish II*"), which held that Kansas' proof of citizenship requirement imposed an undue burden on the right to vote. 957 F.3d 1105, 1127–32 (10th Cir. 2020). The Tenth Circuit found the proof of citizenship requirement imposed a "significant" burden "primarily" because the Kansas Secretary of State had suspended or cancelled 31,000 registrations for the voters' failure to provide proof of citizenship. *Id.* at 1127–28. Here however, Arizona *may not* deny, suspend, or cancel voter registrations when a voter fails to provide DPOC. These individuals will instead be registered as Federal-Only Voters unless county recorders match the registration to information of non-citizenship. A.R.S. § 16-121.01(E). And county recorders may only cancel a registered voter's registration if the voter is confirmed a non-citizen. § 16-165(A)(10). Without any similar quantifiable evidence regarding how many qualified Arizonans' registrations without DPOC might be rejected or cancelled under the Voting Laws' new DPOC Requirements, it would be mere conjecture to conclude that the DPOC Requirements would impose a burden as significant as that in *Fish II*.

2617 Text, *with* H.B. 2243 Text.) But Governor Ducey found that H.B. 2617's requirement that county recorders cancel registrations after "receiv[ing] information that provides the basis for determining that the person is not a qualified elector" was "vague and lack[ed] any guidance for how a county recorder would confirm such a determination." (H.B. 2617 Veto Letter at PX 053-1.) Governor Ducey did not mention the 90-day cancellation provision.

The Voting Laws do not impose an excessive burden on any specific subgroup of voters raising equal protection concerns. Instead, based on the evidence presented, the Court concludes that the Voting Laws impose only a limited burden on all individuals qualified to vote in Arizona.

2. The State's Interests

Because the Voting Laws' DPOC Requirement imposes a limited burden on the right to vote, the Court conducts a "less exacting review" of Arizona's interests. *Pierce*, 44 F.4th at 859–60. The State offers two justifications for the Voting Laws: preventing non-citizens from voting and promoting voter confidence in Arizona's elections.

Arizona has an indisputably legitimate interest "in counting only the votes of eligible voters," and the State is entitled to enact prophylactic legislation to prevent the occurrence of non-citizen voting. *Crawford II*, 553 U.S. at 196; *DNC*, 141 S. Ct. at 2348; *see also League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 925 (11th Cir. 2023) (rejecting plaintiffs' argument that a voting law designed to prevent voter fraud was a "proverbial solution in search of a problem" and a pretext for discrimination because "[t]he Supreme Court has already held that deterring voter fraud is a legitimate policy on which to enact an election law, even in the absence of any record evidence of voter fraud." (quoting *Greater Birmingham Ministries v. Sec'y of State for State of Ala.*, 992 F.3d 1299, 1334 (11th Cir. 2021))). The State "need not offer 'elaborate, empirical verification'" of non-citizen voting, but it also may not rely on mere "speculative concern[s]" "to justify *any* non-severe voting regulation." *Soltysik*, 910 F.3d at 448–49 (emphasis in original) (quoting *Timmons*, 520 U.S. at 364).

While rare, voter fraud in Arizona does exist. The Arizona Attorney General's Office initiated 38 prosecutions for illegal voting between 2010 and 2023, albeit with most of these cases concerning voting in more than one jurisdiction, or "double voting." (Ex. 292 at PX 292-1 to -6; Lawson Tr. 1688:3–19, 1689:7–24.) In addition, there are currently two sealed indictments related to non-citizen voting. (Lawson Tr. 1691:11–13, 1692:5– 1694:15.) At the local level, Maricopa County initiated 13 prosecutions specifically for non-citizen voting between 2007 and 2008. (Minnite Tr. 1588:3–23.) And to be sure, while deliberate non-citizen voting is but one form of voter fraud, the legislative history indicates that the Legislature was concerned with non-citizen voting more generally. (*See, e.g.*, H.B. 2492 House Gov. Comm. Tr. at PX 054-3 to -4; Ex. 61 at PX 061-28 to -30, -39 to -40; Minnite Tr. 1630:13–1632:7.) The State's interests in preventing voter fraud and unintentional non-citizen voting are both legitimate, as both forms of non-citizen voting can undermine the integrity of Arizona's elections.

The State has a related justification for the Voting Laws: "safeguarding public confidence by eliminating [fraud and] even appearances of fraud." *Ohio Democratic Party v. Husted*, 834 F.3d 620, 633 (6th Cir. 2016) (internal quotations omitted). "[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Crawford II*, 553 U.S. at 197. Setting aside the absence of evidence that Arizona's 19,439 Federal-Only Voters are non-citizens, the Court is mindful that the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters." *Id.* Arizona is "permitted to respond to potential deficiencies in the electoral process with foresight

rather than reactively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986); *DNC*, 141 S. Ct. at 2348. While Plaintiffs may disagree with the efficacy of this method, "the propriety of doing so is perfectly clear": it helps ensure that any non-citizens that register to vote, intentionally or mistakenly, do not make it onto or remain on the voter rolls. *Crawford II*, 553 U.S. at 196; *see also Dudum*, 640 F.3d at 1114 ("[W]hen a challenged rule imposes only limited burdens on the right to vote, there is no requirement that the rule is the only or the best way to further the proffered interests.").

Considering the evidence as a whole, the Court concludes that Arizona's interests in preventing non-citizens from voting and promoting public confidence in Arizona's elections outweighs the limited burden voters might encounter when required to provide DPOC.

F. Remaining Fourteenth and Fifteenth Amendment Claims

The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. There are two aspects to the equal protection doctrine: suspect classifications and fundamental rights. "The first strand bars a state from codifying a preference for one class over another," such as based on race or national origin, while "[t]he second strand bars a state from burdening a fundamental right for some citizens but not for others. Absent some such

burden, however, legislative distinctions merit no special scrutiny." *Short v. Brown*, 893 F.3d 671, 678–79 (9th Cir. 2018) (internal citations omitted).

1. *Bush v. Gore* Arbitrary and Disparate Treatment

Non-US Plaintiffs claim that the Voting Laws subject registrants to "arbitrary and disparate treatment," under the equal protection standard articulated in *Bush v. Gore*, 531 U.S. 98, 104–09 (2000) (per curiam). The parties disagree whether *Bush* provides an equal protection analysis independent of the *Anderson/Burdick* framework.

Bush concerned the application of the one-person, one-vote principle in the context of a court-ordered "statewide recount with minimal procedural safeguards." 531 U.S. at 109. Specifically, the Florida Supreme Court directed election officials to discern the intent of voters for whom their "punchcard" ballots were not "perforated with sufficient precision for a machine to register the perforation." *Id.* at 105. But the court did not provide election officials with any standards by which to determine voter "intent," resulting in disparate treatment among similarly situated voters. *Id.* at 105–06. The Supreme Court explained that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* 104– 05 (citation omitted).

The Ninth Circuit has cast doubt on whether *Bush* is "applicable to more than the one election to which the [Supreme] Court appears to have limited it." *Lemons*, 538 F.3d at 1106; *see Paher v. Cegavske*, 457 F. Supp. 3d 919, 927–28 (D. Nev. 2020) (analyzing claim under *Anderson-Burdick* and rejecting plaintiffs' claim

that Nevada's all-mail primary would result in "voter disenfranchisement in the form of vote dilution" such that *Bush* should apply). And those cases where the Ninth Circuit has applied *Bush* have similarly focused on the one-person, one-vote principle. *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1077–78, 1077 n.7 (9th Cir. 2003) (finding that Idaho's ballot-initiative process violated the one-person, one-vote principle, and citing *Bush*); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894–95 (9th Cir. 2003) (finding that plaintiffs' claim "mirror[ed]" that in *Bush*, "that is, whether unequal methods of counting votes among counties constitutes a violation of the Equal Protection Clause"), *rev'd on other grounds en banc*, 344 F.3d 914 (9th Cir.) (describing *Bush* as "the leading case on *disputed elections*" (emphasis added)). *Bush* itself emphasized that its "consideration [was] limited to the present circumstances." 531 U.S. at 109 (noting "the special instance of a statewide recount under the authority of a single state judicial officer").

Assuming *Bush* applied, "[c]ourts have generally found equal protection violations where a lack of uniform standards and procedures results in arbitrary and disparate treatment of [similarly situated] voters." *Lecky v. Va. State Bd. of Elections*, 285 F. Supp. 3d 908, 920 (E.D. Va. 2018). The Voting Laws are not tainted by "varying" or complete "absence of specific standards" that the Supreme Court found problematic with Florida's recount. *Bush*, 531 U.S. at 106–07. County recorders may reject a voter registration only after matching that registrant to evidence of non-citizenship from the Voting Laws' list of databases. § 16-121.01(D), (E); (2023 EPM at ECF-56.) Whether an applicant's registration information "matches" to information of non-citizenship leaves no guesswork to county recorders. The List Maintenance Procedures

and Cancellation Provision likewise mandate county recorders to "obtain" and "confirm" information from these same databases before requesting DPOC from the voter. § 16-165(A)(10). Setting aside the occasional match to outdated MVD citizenship information for naturalized citizens, these databases contain objective and readily verifiable information that in nearly all cases will not require county recorders to request DPOC from a registrant or voter. (*See, e.g.*, 2023 EPM at ECF-57 (requiring county recorders to match a suspected non-citizen to a voter registration, determine whether that voter has already provided DPOC, and review available government databases before requesting DPOC).) Furthermore, Plaintiffs adduced no evidence that county recorders will act arbitrarily when confirming an individual's non-citizenship. This is buttressed by the fact that the Court's ruling prohibits county recorders from investigating the citizenship status of registered voters based on a mere "reason to believe" that a voter is a non-citizen. (*See supra* Sections II(B)(3), (C)(3)(i) (concluding the Reason to Believe Provision is unlawful).)

2. Race & National Origin or Alienage Discrimination

Lastly, Plaintiffs claim that the Voting Laws are facially discriminatory, and in the alternative, were motivated by a discriminatory purpose. Facial unconstitutionality does not require a finding of discriminatory intent. *Mitchell v. Washington*, 818 F.3d 436, 445– 46 (9th Cir. 2016) ("When the government expressly classifies persons on the bases of race or national origin . . . its action is 'immediately suspect'. . . . A plaintiff in such a lawsuit need not make an extrinsic showing of discriminatory animus or a discriminatory effect to trigger strict scrutiny."

(citation omitted)). But a plaintiff must prove discriminatory intent if the challenged law does not expressly classify persons on the bases of race or national origin. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

The Voting Laws require all voters to provide DPOC or be subject to recurring database checks to validate citizenship. *E.g.*, §§ 16-121.01(D), (E), 16-165(G)–(K). Plaintiffs cite a string of cases to argue that the Voting Laws facially discriminate based on national origin because the databases county recorders must use to verify citizenship can contain outdated citizenship information only for naturalized citizens. But Plaintiffs conflate facial discrimination with discriminatory effects. *Compare Florida*, 870 F. Supp. 2d at 1350 (finding law's use of MVD data "likely" had a "discriminatory impact" on naturalized citizens), *and Texas LULAC*, 2019 WL 7938511, at *1 (citing *Florida* for similar proposition), *with Boustani v. Blackwell*, 460 F. Supp. 2d 822, 824–25 (N.D. Ohio 2006) (concluding election law that allowed election workers to challenge the citizenship status of any voter, question whether the voter was "a native or naturalized citizen," and require naturalized citizens to produce a naturalization certificate, was facially discriminatory). The Voting Laws are facially neutral as to race, ethnicity, and national origin.

Because the Voting Laws are facially neutral, Plaintiffs must show that the Voting Laws were "motivated by" a discriminatory purpose. *Vill. of Arlington Heights* 429 U.S. at 265–66; *see Abbott v. Perez*, 585 U.S. 579, 603 (2018) (explaining burden of proof is on the plaintiff). "The central inquiry in any disparate treatment claim under the Equal Protection Clause is whether 'an invidious discriminatory

purpose was a motivating factor' in some government action." *Ballou v. McElvain*, 29 F.4th 413, 424 (9th Cir. 2022) (quoting *Ave. 6E Invs., LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9th Cir. 2016)); *see Arce*, 793 F.3d at 977 ("A plaintiff does not have to prove that the discriminatory purpose was the sole purpose of the challenged action, but only that it was a 'motivating factor.'" (quoting *Arlington Heights*, 429 U.S. at 265–66)). The Court considers the following, "non-exhaustive factors" to determine whether the Voting Laws were motivated by a discriminatory purpose:

> (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged action; (4) the defendant's departures from normal procedures or substantive conclusions; and (5) the relevant legislative or administrative history.

Arce, 793 F.3d at 977 (citing *Arlington Heights*, 429 U.S. at 266–68). Plaintiffs must overcome the "strong 'presumption of good faith'" the Court affords to the Arizona Legislature. *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1139 (9th Cir. 2023) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)); *see Abbott*, 585 U.S. at 603.

i. Historical Background

Beginning with the second *Arlington Heights* factor, Arizona does have a long history of discriminating against people of color. This includes the State's literacy tests that effectively precluded Native American and Latino voters from voting, in addition to voter roll purges that created barriers for people of

color to re-register to vote. But "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value." *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987). Arizona has not employed literacy tests since the 1970s, and Arizona's preclearance requirements under section 5 of the VRA is the most recent evidence of voter discrimination that Plaintiffs' experts cite. Despite these examples of past discrimination, the Court continues to presume good faith on behalf of the 55th Legislature because "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 585 U.S. at 603 (citation omitted). More precisely, "[t]he 'historical background' of a *legislative enactment* is 'one evidentiary source' relevant to the question of intent." *Id.* at 603–04 (quoting *Arlington Heights*, 429 U.S. at 267) (emphasis added). And neither Dr. Chang nor Dr. Burton identified a persuasive nexus between Arizona's history of animosity toward marginalized communities and the Legislature's enactment of the Voting Laws. *C.f. League of Women Voters of Fla.*, 66 F.4th at 923 (disapproving of district court's overt reliance on the state's discriminatory history that was not sufficiently contemporaneous with the legislation at issue).

ii. Events Preceding the Voting Laws and Legislative History

Regarding precipitating events, the Legislature enacted the Voting Laws on the heels of unsubstantiated voter fraud claims following a victory for President Biden in Arizona by a margin of 10,457 votes during the 2020 presidential election. (*See, e.g.*, Pls.' Stip. No. 154; Minnite Tr. 1597:5–11.) The Arizona Senate's subsequent audit of the election failed to

reveal any voter fraud in Arizona, as did the Attorney General's investigation into allegations of voter fraud. (*See, e.g.*, Minnite Tr. 1589:17–1592:14 (recounting the Elections Integrity Unit's efforts to uncover instances of non-citizen voting in the 2020 election); *see* Ex. 401 (letter explaining Elections Integrity Unit's inability to find evidence to substantiate allegations of fraudulent ballots in Pima County).)

Turning to the Voting Laws' legislative history, because legislators rarely publicize their discriminatory motives on the record, the Court considers whether legislators have "'camouflaged' their intent." *Arce*, 793 F.3d at 978 (citation omitted). Nothing in the legislative hearings evince a motive to discriminate against voters based on race or national origin. *See Carrillo-Lopez*, 68 F.4th at 1148 (finding no "racist or derogatory language regarding Mexicans or other Central and South Americans" evincing discriminatory intent in a 925-page Senate Report). Instead, the hearings and the substance of the Voting Laws indicate that the Voting Laws are in many ways the progeny of Arizona's prior effort to require DPOC for all Arizona voters through Proposition 200. The Supreme Court's decision in *ITCA* and the LULAC Consent Decree curtailed the State's power to require DPOC for Federal-Only Voters, regardless of whether voters registered with the State Form or Federal Form. *See ITCA*, 570 U.S. at 12; (LULAC Consent Decree at PX 024-8 to -10, -13 to -14.) During the hearings regarding H.B. 2492, legislators supporting the bills vocalized concerns with the marked increase in Federal-Only Voters following the LULAC Consent Decree. (H.B. 2492 House Gov. Comm. Tr. at PX 054-3 to -4.) The Legislature's passage of the bill attempted to revive the DPOC Requirement for State Form users in light of *ITCA*'s pronouncement that "States retain

the flexibility to design and use their own registration forms" and for Federal Form users by first "establishing the applicant's ineligibility" to side-step the NVRA's "accept and use" requirement. *ITCA*, 570 U.S. at 12, 16; (*see* H.B. 2492 House Gov. Comm. Tr. at PX 054-9 to -10, -17 to -19.)

The Legislature's concern with Federal-Only Voters paralleled some public sentiment that non-citizens were able to vote by falsely attesting to U.S. citizenship. (Connor Tr. 382:12–383:25 (describing public comments regarding 2023 EPM that "voters should be citizens"); Quezada Tr. 877:14–878:17 (explaining the general public's "commentary" was that non-citizens were voting).) The public's concerns regarding non-citizen voting, even if unsubstantiated, does not exhibit "[t]he presence of community animus" for the Court to impute a discriminatory motive to the Legislature. *Ave. 6E Invs.*, 818 F.3d at 504; *c.f. SoCal Recovery, LLC v. City of Costa Mesa*, No. SACV 18-1304-JVS(JDEx), 2023 WL 8263377, at *8 (C.D. Cal. Aug. 17, 2023) (noting evidence of community animus where residents cited "mayhem and violence" and "crime and homelessness" to oppose sober living homes, which the city referenced in permit denials).

Furthermore, the Free Enterprise Club disseminated lobbying materials by email to Arizona legislators that described how the Voting Laws would prevent "illegals" from voting in Arizona elections. (Ex. 602.) "[T]he use of 'code words' may demonstrate discriminatory intent," and the term "illegals" can evince racial animus for members of the Latino community in Arizona. *Ave. 6E Invs.*, 818 F.3d at 505; (*see* Quezada Tr. 867:18– 868:9 (explaining the term "illegals" in the voting context is typically used to refer to noncitizens from Latin descent and that the term

"undocumented" is less offensive for individuals who are not lawfully present in the United States); Burton Tr. 1453:17–1454:25 (explaining that the term "illegals" in the voting context can refer to non-citizens, or minorities perceived as untrustworthy).) Because Free Enterprise Club helped author the Voting Laws, the Court weighs the organization's coded appeals as some evidence of community animus. *Ave. 6E Invs.*, 818 F.3d at 505. But while community animus "*can* support a finding of discriminatory motives by government officials," Plaintiffs presented no persuasive evidence that the Legislature relied on the Free Enterprise Club's coded appeals, nor that the Legislature enacted the Voting Laws to prevent anyone other than non-citizens from voting. *Id.* at 504; *c.f. Gonzalez v. Douglas*, 269 F. Supp. 3d 948, 967 (D. Ariz. 2017) (citing officials' use of the terms "'Raza,' 'un-American,' 'radical,' 'communist,' 'Aztlan,' and 'M.E.Ch.a,'" as code words for Mexican Americans and "concepts of foreignness and political radicalism" during public debates of a House bill).

Plaintiffs contend that Senator Borrelli would frequently make derogatory comments about Latino voters to Senator Quezada during Senate Judiciary Committee meetings. Even assuming Senator Borrelli expressed discriminatory remarks, Plaintiffs may not impute his motives to the other individual legislators or the Arizona Legislature as a whole. As the Supreme Court has cautioned:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to

> sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

United States v. O'Brien, 391 U.S. 367, 383–84 (1968); *see also DNC*, 141 S. Ct. at 2349– 50 (agreeing with district court's findings that "no evidence [indicated] the legislature as a whole was imbued with racial motives"). And while Senator Quezada testified as to his reasons for voting against the Voting Laws, "the concerns expressed by political opponents during the legislative process are not reliable evidence of legislative intent." *League of Women Voters of Fla.*, 66 F.4th at 940.

iv. Impact on Minority and Naturalized Voters

Evidence of a law's disparate impact is generally insufficient alone to evidence a legislature's discriminatory motive. *Carrillo-Lopez*, 68 F.4th at 1141 (explaining that a court may infer a discriminatory motive from disproportionate impacts in the "rare cases" where the effects of the challenged action are unequivocally related to race). As discussed in the Court's section 2 analysis, Plaintiffs have not shown that the Voting Laws will have any significant discriminatory impact based on naturalization status, race, or ethnicity. First, the difference in registration

rates by race and ethnicity, with one-third of a percent of White voters and two-thirds of a percent of minority voters registered as Federal-Only Voters, is "small in absolute terms." *DNC*, 141 S. Ct. at 2345. Second, while it is possible that SAVE and MVD could return outdated citizenship information for a small number of naturalized citizens, these database checks without more do not materially affect Full-Ballot Voters who have already provided DPOC. Of course, 65 naturalized Federal-Only voters will likely be flagged as non-citizens and may be required to produce DPOC, but considering this accounts for just 0.001% of all voters, the impact of these checks is markedly small. (*See* MVD Non-Citizen Records.) Setting aside the racial, ethnic and nationality composition of Federal-Only Voters, Plaintiffs offered testimony to show that minority voters are more likely to lack, and encounter more barriers to furnishing, DPOC than White voters. (*See, e.g.*, Tiwamangkala Tr. 1273:22–1274:4 (AANHPI community); Nitschke Tr. 469:8–470:3 (out-of-state college students).) But there is no quantifiable evidence regarding the rate at which minority voters both lack *and* are unable to afford DPOC. The same is true for the number of naturalized citizens who lack both their naturalization certificate *and* their immigration number.

In addition, Plaintiffs did not show that the Arizona Legislature enacted the Voting Laws *because of* any impact on minority voters or naturalized citizens. For example, it is common sense that the Voting Laws' MVD checks would be substantially more likely to return information of non-citizenship for naturalized citizens who possess a foreign-type license, as compared to native-born citizens who are ineligible to receive a foreign-type license at all. This result "does not prove that penalizing such individuals was a

purpose of this legislation." *Carrillo-Lopez*, 68 F.4th at 1153 (concluding district court erred in relying on evidence of 8 U.S.C. § 1326's disparate impact on Mexicans, which criminalizes the reentry of a removed alien, without more evidence of animus because "the clear geographic reason for disproportionate impact on Mexicans and other Central and South Americans undermines any inference of discriminatory motive").

Plaintiffs make much of what the Arizona Legislature did not evaluate when passing the Voting Laws, specifically the impact on voters based on national origin, race, ethnicity, age, or socioeconomic status. Community stakeholders had an opportunity to oppose the Voting Laws on the record, most of whom emphasized the DPOC Requirement's disparate impacts on Federal-Only Voters and the DPOR Requirement's impacts on Native American voters. (*See, e.g.*, Ex. 61 at PX 061-8 to -20.) When explaining his vote against H.B. 2492 during the same hearing, Senator Quezada warned the Senators that the bill would have a discriminatory impact on people of color. (*Id.* at PX 061-33 to -35.) But Plaintiffs must show that the Arizona Legislature enacted the Voting Laws "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Carrillo-Lopez*, 68 F.4th at 1139 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). The Legislature's failure to adequately consider the Voting Laws' impact on people of color or naturalized citizens or decision to pass the Voting Laws *notwithstanding* the potential impact on these voters is insufficient to show a discriminatory motive. *Id.*

v. Procedural and Substantive Departures

Finally, Plaintiffs adduced no persuasive evidence of procedural departures during the Arizona Legislature's enactment of H.B. 2492. Plaintiffs contend that the House Rules Committee knowingly passed the bill after the Committee's attorney opined that the bill was likely unconstitutional and preempted by the NVRA. But the Rules Committee was not bound by this opinion, nor did the Rules Committee attorney indicate that H.B. 2492 was unconstitutionally discriminatory as relevant to Plaintiffs' Fourteenth and Fifteenth Amendment claims. (*See, e.g.*, Toma Dep. 174:3–174:10 (explaining the Rules Committee ultimately decides whether a bill "moves forward")); *c.f. Ave. 6E Invs.*, 818 F.3d at 507 (finding city's plausible departure from normal procedures by ignoring "the unanimous recommendation" of the city's Planning and Zoning Commission could evince discriminatory intent "particularly when, as here, that recommendation is consonant with the municipality's general zoning requirements and plaintiffs proffer additional evidence of animus" (emphasis added)).

Regarding H.B. 2243, Governor Ducey vetoed the bill for lacking "sufficient due process" protections. Legislators collaborated with the Governor's office specifically to address the Governor's due process concerns. (Toma Dep. 232:19–233:18, 234:14–21, 235:7–20.) Senator Petersen then introduced the language of H.B. 2617 into H.B. 2243, albeit with several substantive changes, such as reducing the opportunity to provide DPOC from 90 to 35 days. And while the legislators could not name a separate *voting* bill during their depositions that was successfully amended in a similar manner to HB. 2243,

amendments to existing bills are common at the close of a legislative session. (Toma Dep. 237:8–239:3 (explaining unsuccessful attempt to pass a different vetoed voting bill through a separate germane bill on the last day of the legislative session); Petersen Dep. 319:3–24, 333:17–334:2.) The speed with which the Legislature passed H.B. 2243 as amended was not so abrupt as to infer an improper motive, considering the Legislature had previously passed H.B. 2617 through the ordinary legislative process. *Abbott*, 585 U.S. at 610 & n.23 ("[W]e do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith.").

Substantively, Arizona has required DPOC since 2005, and the Voting Laws supplement this requirement to ensure that non-citizens do not register to vote or remain on the voter rolls. This includes expanding county recorders' existing use of SAVE and the MVD database to also identify existing registered non-citizens. Similarly, H.B. 2243's 35-day notice procedure is not a departure from prior Arizona law, as it adopts the 2019 EPM's 35-day period for a voter to prove citizenship after attesting to non-citizenship on a juror questionnaire. (2019 EPM at PX 006-50 to -51.) And while the Court concluded above that the Birthplace Requirement violates the Materiality Provision, the Legislature's decision to mandate birthplace on the State Form is consistent with Arizona's existing practice of collecting this information from voters, even if providing birthplace was historically optional.

Having considered the totality of these factors, the Court concludes that Plaintiffs failed to show that the

Voting Laws were enacted with a discriminatory purpose.

III. CONCLUSION

Non-US Plaintiffs may enforce § 10101 of the Civil Rights Act. Requiring individuals who register to vote using the State Form to include the individual's state or country of birth violates the Materiality Provision of the Civil Rights Act. H.B. 2243's Reason to Believe Provision also violates the Civil Rights Act, as well as section 8(b) of the NVRA because the provision will result in the investigation of only naturalized citizens based on county recorders' subjective beliefs that a naturalized individual is a non-citizen. In addition, requiring individuals registering to vote with the State Form to include documentary proof of residence to register for federal elections violates sections 6 and 7 of the NVRA. However, Plaintiffs have not carried their burden to show that the Voting Laws' remaining citizenship investigation procedures, DPOC requirements, and registration cancellation procedures violate the NVRA or the VRA. Nor do these provisions impose an undue burden on the right to vote or violate the equal protection and due process guarantees of the U.S. constitution. Finally, the Court concludes that Plaintiffs failed to show that the Voting Laws were enacted with any discriminatory purpose.

IT IS ORDERED declaring that A.R.S. § 16-121.01(A) violates § 10101(a)(2)(B) of the Civil Rights Act by denying Arizonans the right to vote based on errors or omissions that are not material to determining Arizonan's eligibility to vote. Arizona may not reject State Form registrations that lack an individual's state or country of birth and must register an individual if that individual is found eligible to vote.

IT IS FURTHER ORDERED declaring that A.R.S. § 16-165(I) violates § 10101(a)(2)(A) of the Civil Rights Act and section 8(b) of the NVRA by subjecting naturalized citizens whom county recorders have reason to believe are non-citizens to SAVE checks, which is a different standard, practice, or procedure than that applied to native-born citizens. Arizona may not conduct SAVE checks on any registered voter whom county recorders have reason to believe are a non-citizen. But Arizona may conduct SAVE checks on registered voters who have not provided DPOC. *See* A.R.S. § 16-165(I).

IT IS FURTHER ORDERED declaring that A.R.S. § 16-121.01(A) violates sections 6 and 7 of the NVRA by requiring Arizonans who register with the State Form to provide documentary proof of residence. Arizona may not reject State Form registrations that are not accompanied by documentary proof of residence but must register an individual without proof of residence as a Federal-Only Voter if that individual is otherwise eligible to vote.

Dated this 29th day of February, 2024.

/s/ Susan R. Bolton
Susan R. Bolton
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-22-00509-PHX-SRB

MI FAMILIA VOTA, et al.,

Plaintiffs,

v.

ADRIAN FONTES, et al.,

Defendants.

ORDER

The Court now considers the Motions for Partial Summary Judgment of Defendants State of Arizona (the "State") (Doc. 364, State Mot.), Defendant Republican National Committee ("RNC") (Doc. 367, RNC Mot.), and Plaintiff United States of America ("United States") (Doc. 391, USA Mot.), in addition to Motions and Cross-Motions for Partial Summary Judgment by several non-profit organizations ("Private Plaintiffs").

I. BACKGROUND

The facts of this case were summarized in the Court's prior Order regarding the State's Motion to Dismiss. (*See generally* Doc. 304, 02/16/2023 Order.) This case addresses the legality of two Arizona laws, H.B. 2243 and H.B. 2492 ("the Voting Laws"), which amended provisions regulating voter registration under Title 16 of the Arizona Revised Statutes.

(Doc. 388, Non-US SOF ¶¶ 4–5.) The Voting Laws, effective January 1, 2023, enable State officials to require heightened proof of citizenship and residency from Arizona applicants and registrants and mandate certain consequences if a registrant does not provide such proof. (*Id.* ¶¶ 2–5, 31, 35–50.) The Voting Laws also provide for monthly comparisons of certain registered voters to several databases and cancellation of registrations after those database comparisons. (*Id.* ¶¶ 3–4, 48–50.)

A. Substance of the Voting Laws

An individual seeking to register to vote in Arizona state elections must provide one of the following forms of "satisfactory evidence of citizenship," also known as documentary proof of citizenship or "DPOC":

> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
>
> 2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.
>
> 3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the

> county recorder of the applicant's United States passport.
>
> 4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.
>
> 5. Other documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986.
>
> 6. The applicant's Bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

Ariz. Rev. Stat. § 16-166(F).

In addition to providing applicants a State Form to register for state and federal elections, Arizona also provides a form created by the United States Election Assistance Commission, known as the Federal Form, to register for federal elections. *See Gonzales v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012); (*see generally* Doc. 365-1, Ex. C, Federal Form at 26; *see* Doc. 365-1, Ex. D, State Form.) Subject to certain limitations, states may require additional information from applicants seeking to vote in both state and federal elections. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 12–13 (2013).

In 2018, the Arizona Secretary of State entered into a Consent Decree with Plaintiff League of United Latin American Citizens ("LULAC") after the nonprofit sued Arizona for allegedly discriminating against individuals who submitted the State Form without providing DPOC. (Non-US SOF ¶¶ 24–25.) The LULAC Consent Decree mandates that Arizona may not entirely reject an otherwise valid State Form submitted without DPOC, but rather must register that State Form applicant for federal elections. (*Id.*; Doc. 388-4, Ex. 12, LULAC Consent Decree at 8–9.) In short, the LULAC Consent Decree requires Arizona to treat Federal and State Form users the same when registering applicants for federal elections. The Federal Form and State Form both include a checkbox for applicants to indicate under penalty of perjury that they are citizens of the United States. (*See* Federal Form; State Form.)

1. H.B. 2492

H.B. 2492 created additional requirements for individuals using either the Federal or State Form to show citizenship and Arizona residence. Specifically, "[a] person is presumed to be properly registered to vote," only if she, *inter alia*, provides documentary "proof of location of residence" ("DPOR"), lists her place of birth[1] ("Birthplace Requirement"), and marks "yes" in the checkbox confirming United States citizenship ("Checkbox Requirement"). A.R.S. § 16-121.01(A); *see id.* § 16-123. Unlike preexisting Arizona law, H.B. 2492 contains no exceptions to the DPOR requirement for applicants who do not have numbered street addresses, but the Secretary of State has since provided a chart recognizing that

[1] The Federal Form does not include a space to collect an applicant's birthplace information. (*See* Federal Form at 26.)

certain voters may provide DPOR without a traditional street address or any address at all. (*See* Non-US SOF ¶¶ 27–34.)

H.B. 2492 also provides different DPOC requirements for applicants using the Federal or State Form:

> Except for a form produced by the United States Election Assistance Commission, any application for registration shall be accompanied by satisfactory evidence of citizenship as prescribed in Section 16-166, Subsection F, and the county recorder . . . shall reject any application for registration that is not accompanied by satisfactory evidence of citizenship.

A.R.S. § 16-121.01(C)

Federal only voters; early ballot; eligibility

Notwithstanding any other law:

1. A person who has registered to vote and who has not provided satisfactory evidence of citizenship as prescribed by Section 16-166, Subsection F is not eligible to vote in presidential elections.
2. A person who has not provided satisfactory evidence of citizenship pursuant to Section 16-166, Subsection F and who is eligible to vote only for federal offices is not eligible to receive an early ballot by mail.

Id. § 16-127(A).

The statute places the burden on county recorders to enforce the standards of H.B. 2492. "Within ten days after receiving an application for registration

[through the Federal Form] that is not accompanied by [DPOC], the county recorder or other officer in charge of elections shall use all available resources to verify the citizenship status of the applicant." *Id.* § 16-121.01(D). The statute prescribes a specific verification process:

> [A]t a minimum, [the election official] shall compare the information available on the application for registration with the following, provided the county has access:
>
> 1. The Department of Transportation databases of Arizona driver licenses or nonoperating identification licenses.
> 2. The Social Security Administration databases.
> 3. The United States Citizenship and Immigration Services Systematic Alien Verification for Entitlements program, if practicable.
> 4. A National Association for Public Health statistics and information systems electronic verification of vital events system.
> 5. Any other state, city, town, county or federal database and any other database relating to voter registration to which the County Recorder . . . has access, including an electronic registration information center database.

Id.

The statute provides for three different outcomes from this verification. First, if the election official "matches the applicant with information that verifies

the applicant is a United States citizen . . . the applicant shall be properly registered." *Id.* § 16-121.01(E). Second, if the election official "matches the applicant with information that the applicant is not a United States citizen, the county recorder . . . shall reject the application, notify the applicant that the applicant was rejected because the applicant is not a United States citizen and forward the application to the county attorney and attorney general for investigation." *Id.* Third, if the election official "is unable to match the applicant with appropriate citizenship information, the [official] shall notify the applicant that [her citizenship could not be verified] and that the applicant will not be qualified to vote in a presidential election or by mail with an early ballot in any election until [DPOC] is provided." *Id.*

Lastly, the statute mandates prosecution of certain registrants referred for investigation. Election officials must "make available to the attorney general a list of all individuals who are registered to vote and who have not provided satisfactory evidence of citizenship pursuant to Section 16-166." *Id.* § 16-143(A). The attorney general must then use "all available resources to verify the citizenship" of the referred applicants and "at a minimum shall compare the information available on the application for registration" with the same databases listed in § 16-121.01(D) of the statute. *Id.* § 16-143(B). "The attorney general shall prosecute individuals who are found to not be United States citizens pursuant to § 16-182." *Id.* § 16-143(D).

2. H.B. 2243

H.B. 2243 expands the requirements imposed by H.B. 2492 for the cancellation of registrations for

persons suspected of being non-citizens. Specifically, a county recorder must cancel a voter registration:

> When the county recorder obtains information pursuant to this section and confirms that the person registered is not a United States citizen . . . . Before the county recorder cancels a registration pursuant to this paragraph, the county recorder shall send the person notice by forwardable mail that the person's registration will be canceled in thirty-five days unless the person provides satisfactory evidence of United States citizenship pursuant to § 16-166. The notice shall include a list of documents that person may provide and a postage prepaid preaddressed returned envelope. If the person registered does not provide satisfactory evidence within thirty-five days, the county recorder shall cancel the registration and notify the county attorney and attorney general for possible investigation.

Id. § 16-165(A)(10). H.B. 2243 also mandates monthly review of voter rolls:

> To the extent practicable, each month the county recorder shall compare persons who are registered to vote in that county and who the county recorder has reason to believe are not United States citizens and persons who are registered to vote without satisfactory evidence of citizenship as prescribed by § 16-166 with the systematic alien verification for entitlements program maintained by the United States citizenship and immigration

> services to verify the citizenship status of the persons registered.

Id. § 16-165(I). County recorders must conduct similar checks with the Social Security Administration Database, Verification of Vital Events System, and "relevant city, town, county, state and federal databases to which the county recorder has access to confirm information obtained that requires cancellation of registrations pursuant to this section." *See id.* § 16-165(G)–(K).

B. Procedural History

On March 31, 2022, Mi Familia Vota Plaintiffs[2] filed their Complaint in this Court. (Doc. 1, 03/31/2022 Mi Familia Vota Compl.) The United States and additional Private Plaintiffs subsequently filed lawsuits attacking the legality of the Voting Laws and these lawsuits were consolidated into the instant case. (*E.g.*, Doc. 164, 11/10/2022 Order re: Consolidation.) On March 23, 2023, the parties agreed to brief motions for summary judgment only regarding issues that could be adjudicated without discovery. (*See* Doc. 337, Sched. Min. Entry; Doc. 338, Sched. Order.) On May 8, 2023, the State filed its Motion, moving for partial summary judgment on several of Plaintiffs' claims that the Voting Laws are unlawful under the National Voter Registration Act ("NVRA") and the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2) (the "Materiality Provision"). (*See generally* State Mot.)

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[2] The Court references organizational Plaintiffs that have filed collectively under the name of one organization. "LUCHA Plaintiffs," for example, includes all additional Plaintiffs that are named on the briefing with LUCHA.

Specifically, the State asserts that Section 6 of the NVRA, 52 U.S.C. § 20505 ("Section 6"), preempts H.B. 2492's requirement that voters provide DPOC to vote in presidential elections. (*Id.* at 2–3.) The State also concedes that Section 6 precludes Arizona from requiring DPOR to register for federal elections. (*Id.* at 4, 16–17.) But the State argues that the Voting Laws' restriction on mail-in voting is "likely" lawful under Section 6. (*Id.* at 3–4.) The State further argues that it is entitled to summary judgment on Plaintiffs' claims that the Voting Laws violate Section 8 of the NVRA, 52 U.S.C. § 20507 ("Section 8") by unlawfully cancelling voter registrations and unlawfully purging voter rolls. (*Id.* at 5–10.) Regarding Plaintiffs' claims under the Materiality Provision, the State contends that the Voting Laws do not run afoul of its prohibition of denying the right to vote based on immaterial errors or omissions in a person's registration. (*Id.* at 10–14.) The State additionally moves for summary judgment on Plaintiff Promise Arizona's claim that the Voting Laws are unconstitutionally vague. (*Id.* at 15–16.)

The RNC then filed its Motion on May 15, 2023, cross-moving for summary judgment regarding Arizona's power to regulate voting in presidential elections and arguing additional issues unaddressed by the State. (*See generally* RNC Mot.) Asserting that the NVRA cannot lawfully regulate presidential elections, the RNC argues that H.B. 2492's DPOC requirement for presidential elections does not run afoul of Section 6. (*Id.* at 2–8.) The RNC also underscores that Arizona may require DPOC from mail-in voters. (*Id.* at 8–9.) Additionally, the RNC moves for summary judgment on Plaintiffs' claims that, *inter alia*, Section 8 requires Arizona to register

State Form users who register without DPOC for federal elections.

On June 5, 2023, the United States and Private Plaintiffs either cross-moved for summary judgment or opposed summary judgment on all issues addressed by the State and the RNC, except that Plaintiffs agreed with the State's conclusion regarding the Voting Laws' DPOR requirement. (*E.g.*, Doc. 391, USA Mot.) Specifically, Plaintiffs cross-move for summary judgment on all Section 6 claims, arguing that the NVRA preempts H.B. 2492's limitations on presidential and mail-in voting, as well as H.B. 2492's DPOR requirement. (*E.g.*, Doc. 393, DNC Mot. at 5–15; Doc. 390, Tohono O'odham Mot. at 4–10.) Plaintiffs also argue that the Court should grant summary judgment to Plaintiffs on their claim that the Voting Laws contravene Section 8 by enabling cancellation of registrations within 90 days of an election.[3] (Doc. 396, AAANHPI Mot. at 3–7; DNC Mot. at 16.) Mi Familia Vota cross-moves for summary judgment on its Materiality Provision claims, while the United States and LUCHA argue that issues of fact preclude summary judgment. (USA Mot. at 16–25; Doc. 394, LUCHA Mot. at 5–7; Doc. 399, Mi Familia Vota Mot. at 1–9.) Poder Latinx also moves for summary judgment on its § 10101 claim. (Doc. 397, Poder Latinx Mot. at 1–8.) But Plaintiffs contend that fact issues preclude summary judgment on their claims that the Voting Laws violate Section 8 by mandating cancellation for reasons not permitted by the NVRA; subjecting registrants to nonuniform

[3] Plaintiffs also move for summary judgment on their claim that Section 8(a) of the NVRA prevents Arizona for requiring DPOC to vote in presidential elections, but the Court will not reach this claim.

and discriminatory voter roll maintenance programs; and failing to ensure all eligible applicants to vote are registered to vote within 30 days of an election. (LUCHA Mot. at 13–15; AAANHPI Mot. at 8–13; Poder Latinx Mot. at 8–16.) Promise Arizona also opposes summary judgment on its void-for-vagueness claim. (*See generally* Doc. 395, Promise Arizona Resp.)

The State and the RNC responded and replied to Plaintiffs' filings on July 5, 2023, to which Plaintiffs replied on July 19, 2023. (Doc. 436, State Reply; Doc. 442, RNC Reply; Doc. 473, Tohono O'odham Reply; Doc. 474, Poder Latinx Reply; Doc. 475, DNC Reply; Doc. 476, USA Reply; Doc. 477, AAANHPI Reply; Doc. 478, Mi Familia Vota Reply.) The Court heard oral argument on all Motions and Cross-Motions on July 25, 2023. (Doc. 479, Min. Entry.)

II. LEGAL STANDARDS & ANALYSIS

Under Federal Rule of Civil Procedure 56, summary judgment is properly granted when: (1) there is no genuine dispute as to any material fact; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288–89 (9th Cir. 1987). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

A. NVRA

For the following reasons, the Court concludes that Section 6 preempts H.B. 2492's (1) DPOR requirement; (2) restriction on voting in presential elections;

and (3) restriction on mail-in voting. The Court also concludes that Section 8(c) of the NVRA forecloses enforcement of the Voting Laws' systematic purge provisions within 90 days of any federal elections. However, with the exception of Plaintiffs' argument that Section 8(b) applies to pre-registration oversight and the parties' arguments regarding registering State Form users for federal elections, the Court finds that there are genuine issues of material fact precluding summary judgment regarding whether certain provisions of the Voting Laws contravene Sections 8(a) and (b) of the NVRA.

1. Section 6

Section 6 of the NVRA requires that states "accept and use" the Federal Form to register voters in federal elections. 52 U.S.C. § 20505(a)(1); *Inter Tribal*, 570 U.S. at 9. Certain Plaintiffs and the State contend that H.B. 2492 violates Section 6 by requiring Federal Form users to submit DPOR. (*See* Doc. 390, Tohono O'odham Mot. at 3–5.) All parties who briefed this issue agree that Section 6 preempts H.B. 2492's DPOR requirement. The Court will grant summary judgment on this issue.[4] (*Id.*; State Reply at 14; *see* Doc. 502, Hr'g Tr. at 40:18–41:18.) The parties dispute whether H.B. 2492's requirements that registrants provide DPOC to vote (1) in presidential elections and (2) by mail are legal under the NVRA. (*E.g.*, DNC Mot. at 5; RNC Mot. at 2–9.)

A state law may be preempted if, *inter alia*, Congress makes an express statement to displace state law, "it is impossible for a private party to

[4] The State also agrees with Tohono O'odham Plaintiffs' requested clarifications about the DPOR requirement. (State Reply at 46–50.)

comply with both state and federal requirements," or a state law "creates an unacceptable obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chamber of Commerce v. Bonta*, 62 F.4th 473, 482 (9th Cir. 2023) (internal citation and quotation marks omitted). The Court finds that Section 6 preempts both H.B. 2492's requirement that registrants provide DPOC to vote in presidential elections and its restriction on mail-in voting.[5]

a. Presidential Elections

All Plaintiffs and the State contend that Section 6 preempts H.B. 2492's requirement that Federal Form users provide DPOC in order to vote in presidential elections. (State Mot. at 2; *e.g.*, USA Mot. at 7–10; DNC Mot. at 5–6.) The RNC counters that such preemption arguments "ignore[] the constitutional constraints on Congress's power to regulate presidential elections," and "applying the NVRA only to congressional elections gives proper effect to Elections Clause, the Electors Clause, the NVRA, and H.B. 2492." (RNC Mot. at 2–6); *see also* U.S. Const. art. II, § 1, cl. 2 ("Electors Clause") ("Each State shall appoint, in such Manner as the Legislature thereof may direct," presidential electors). The Court agrees with Plaintiffs and the State that Section 6 preempts H.B. 2492's limitation on voting in presidential elections.

The plain language of the NVRA reflects an intent to regulate all elections for "[f]ederal office," including for "President or Vice President." 52 U.S.C.

[5] The Court will not reach Mi Familia Vota Plaintiffs' related Section 8(a) claim as it applies to Federal Form users. (*See* Mi Familia Vota Mot. at 15 n.12.)

§§ 20507(a), 30101(3); *California Restaurant Ass'n v. City of Berkeley*, 65 F.4th 1045, 1050 (9th Cir. 2023) ("As with any express preemption case, our focus is on the plain meaning of [the statute]."). And binding precedent indicates that Congress has the power to control registration for presidential elections. *See* 52 U.S.C. §§ 20502(a), 30101(3) (NVRA sets criteria for registering for "[f]ederal office"; defining "[f]ederal office" to include office of the president). In 1934, the United States Supreme Court rejected a narrow framing of Congress's power over presidential elections, writing:

> The only point of the 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 section 1, art. 2, of the Constitution to the states, and that the congressional authority is thereby limited to determining 'the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.' So narrow a view of the powers of Congress in respect of the matter is without warrant.

Burroughs v. United States, 290 U.S. 534, 544 (1934). While *Burroughs* specifically addressed the constitutionality of a federal statute regulating campaign contributions in presidential elections, the Supreme Court later wrote that the decision more generally "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).

Drawing on this authority, the Ninth Circuit has recognized Congress's power to regulate all federal elections under the NVRA. In *Voting Rights Coalition v. Wilson*, the Ninth Circuit rejected a challenge to the constitutionality of the NVRA, holding that because Congress has power under the Elections Clause to "alter state laws pertaining to the 'Times, Places and Manner' of electing Representatives and Senators," the NVRA may constitutionally "conscript state agencies to carry out voter registration for the election of Representatives and Senators. The exercise of that power by Congress is by its terms intended to be borne by the states without compensation." 60 F.3d 1411, 1413–15 (9th Cir. 1995) (citing U.S. Const. art. I, § 4, cl. 1 ("Elections Clause")). And acknowledging that "the Supreme Court has read the grant of power to Congress in Article I, section 4 as quite broad," the Ninth Circuit added that "the broad power given to Congress over congressional elections has been extended to presidential elections." *Id.* at 1414 (citing *Burroughs*, 290 U.S. at 545). The DNC and RNC dispute whether the latter rationale is dicta. (RNC Reply at 5; DNC Reply at 7–8.) But the DNC persuasively raises that this "broad" reading of the Elections Clause must have been essential to the Ninth Circuit's decision to deem the NVRA constitutional, as the NVRA plainly regulates congressional and presidential elections. (*See* DNC Reply at 8.)

The parties also dispute the impact of *Inter Tribal Council* on whether the NVRA constitutionally regulates presidential elections. (DNC Mot. at 5–7; RNC Mot. at 2–7; RNC Reply at 3–4.) Contrary to the RNC's arguments, *Inter Tribal Council* underscores that the Elections Clause gives Congress the power to regulate all federal elections, and that Congress

intended to exercise this power through the NVRA to preempt conflicting state laws. The *Inter Tribal* Court affirmed the states' power to "establish qualifications (such as citizenship) for voting" on the basis that "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." 570 U.S. at 16 (emphasis original).[6] And the Court described the full preemptive impact of the NVRA:

> The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to "make or alter" state election regulations. Art. I, § 4, cl. 1. When Congress legislates with respect to the "Times, Places and Manner" of holding congressional elections, it necessarily displaces some element of a pre-existing legal regime erected by the States. Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the [NVRA's] text accurately communicates the scope of Congress's preemptive intent.

Id. at 14. The Supreme Court also foreclosed the Tenth Amendment argument offered by the RNC, reasoning that "[u]nlike the States' historic police powers, States' role in regulating congressional

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[6] The RNC argues that in *Oregon v. Mitchell*, 400 U.S. 112 (1970), "[f]ive Justices took the position that the Elections Clause did not confer upon Congress the power to regulate voter qualifications in federal elections." (RNC Mot. at 5 (quoting *Inter Tribal Council*, 570 U.S. at 16 n.8).) But this assertion has no impact on any Motion, as Section 6 does not regulate voter qualifications.

elections—while weighty and worthy of respect—has always existed subject to the express qualification that it terminates according to federal law." *Id.* at 15 (internal quotation marks and citations omitted); *see also* 1 Story § 627 ("It is no original prerogative of state power to appoint a representative, a senator, or president for the union"); (USA Mot. at 14 (citing *Cook v. Gralike*, 531 U.S. 510, 522 (2001)); RNC Mot. at 4.) *Inter Tribal Council* and additional controlling authority indicate that H.B. 2492's restriction on Federal Form users voting in presidential elections is expressly preempted by Section 6.[7]

b. Voting by Mail

Plaintiffs also contend that Section 6 preempts H.B. 2492's requirement that Federal Form users provide DPOC in order to vote by mail. (*E.g.*, DNC Mot. at 7.) The RNC counters that the NVRA does not apply to *voting* by mail or the "mechanisms for . . . voting," but only to registering to vote. (RNC Mot. at 4, 4 n.2, 8.) The State similarly asserts that H.B. 2492's mail-in voting restriction is "likely not" preempted, as Section 6 pertains to "what states must do 'for the *registration*' of voters." (State Mot. at 3–4 (quoting § 20505(a)(1)) (emphasis in original).) But both the text and purpose of the NVRA contradict Defendants' narrow framing of the statute.

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[7] Contending that the Elections Clause was not the only source of congressional power behind the NVRA, the DNC argues that the Fourteenth and Fifteenth Amendments also legitimize the statute's regulation of presidential elections. (DNC Mot. at 2.) Because the Court concludes that the Elections Clause gives Congress power to regulate presidential elections under the NVRA, it need not reach any argument regarding the Fourteenth and Fifteenth Amendments.

The text of the NVRA provides for circumstances where a state may limit voting by mail, implying that a state may not limit absentee voting outside of these prescribed circumstances. 52 U.S.C. § 20505(c)(1) (permitting states to require first-time voters to vote in person if those voters registered to vote by mail), (c)(2) (clarifying that paragraph (c)(1) does not apply to individuals who are otherwise entitled to an absentee ballot under federal law); (*see also* DNC Mot. at 9.) Had Congress intended to permit states that allow absentee voting to require in-person voting under additional circumstances—including when an registrant fails to provide DPOC—it could have said so in the NVRA. *See N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 940 (2017) (explaining that the interpretive canon *expressio unius est exclusio alterius* applies when "circumstances support a sensible inference that the term left out must have been meant to be excluded") (internal citation and quotation marks omitted). Not only does the statute exclude failure to provide DPOC among the reasons a state may require an individual to vote in person, but as explained below, the purpose of the NVRA supports an inference that Congress meant to limit the number of circumstances in which a state could prevent an individual from voting by mail.

Regarding the purpose of the NVRA, Congress recorded that it enacted the NVRA not just to "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," but also to "to make it possible for Federal, State, and local governments to implement this chapter in a manner that *enhances the participation of eligible citizens as voters* in elections for Federal office." 52 U.S.C. § 20501(b)(1)–(2) (emphasis added). Further, Congress found that

"discriminatory and unfair registration laws and procedures can have a direct and damaging effect on *voter participation in elections* for Federal office and disproportionately harm voter participation by various groups, including racial minorities" and it is the duty of "Federal, *State, and local governments* to promote the exercise of the [fundamental] right" to vote. *Id.* § 20501(a) (emphasis added).

Given Congress's purpose behind the NVRA, the DNC correctly raises not only that the statute's DPOC requirement to vote by mail is directly preempted by Section 6, but also that obstacle preemption bars the statute's enforcement. (DNC Reply at 2.) "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). "If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power." *Id.* (citation omitted). No party contests that Congress at least has the power to regulate congressional elections, and the findings and purposes included in the NVRA reflect an intent to increase voter turnout, largely but not exclusively through diminishing barriers to registration. Roughly 89 percent of Arizona voters cast ballots by mail in the 2020 election, indicating that most eligible Arizonans choose to vote by mail. (Non-US SOF ¶ 60.) By offering mail-in voting to registrants who provided DPOC but not to Federal Form registrants who omitted such documentation, H.B. 2492's mail-in voting restriction disadvantages Federal Form users

by placing an additional burden—which is not required by the Federal Form—on federal-only voters to exercise Arizona's preferred method of casting a ballot. *See Inter Tribal*, 570 U.S. at 15 ("[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.") H.B. 2492's limitation on voting by mail frustrates the purpose of the NVRA, as it impedes Arizona's "promot[ion] of the right" to vote. 52 U.S.C. § 20501(a). This limitation presents an "obstacle to the accomplishment of Congress's full objectives under the" NVRA, and the Court "find[s] that the state law undermines the intended purpose and 'natural effect'" of the NVRA. *Crosby*, 530 U.S. at 373 (citation omitted).

2. Section 8

Section 8 of the NVRA mandates that states respect additional requirements when administering registration and roll maintenance programs. *See generally* 52 U.S.C. § 20507. The State and the RNC move for summary judgment on Plaintiffs' claims that (1) H.B. 2243 unlawfully allows for cancellation of registration within 90 days of an election; (2) H.B. 2243 allows cancellation for reasons unsanctioned by the NVRA; (3) the Voting Laws enable nonuniform and discriminatory maintenance procedures; and (4) H.B. 2492 fails to ensure that all eligible State Form users are registered to vote in federal elections. (State Mot. at 5–10; RNC Reply at 9–12.) Plaintiffs also move for summary judgment on H.B. 2243's cancellation of registration within 90 days of an election, but oppose summary judgment on all other issues.

a. Cancellation Within 90 Days of Election

Section 8(c)(2) mandates that States "shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters" ("90-day Provision"). 52 U.S.C. § 20507(c)(2)(A). While states must pause any such systematic purge within 90 days of a federal election, States may continue to implement individualized[8] removal programs within this 90-day window. *See Arcia*, 772 F.3d at 1344–45 (discussing whether a program to remove noncitizens from the voter rolls within 90 days of an election by, *inter alia*, running registrants through the Systematic Alien Verification for Entitlements system is a systematic program contravening Section 8). The NVRA enumerates certain exceptions to the prohibition on removals before an election, which are "criminal conviction or mental incapacity," "the death of a registrant," "a change in the residence of the registrant," or "correction of registration records pursuant to this chapter." 52 U.S.C. § 20507(a)(3)–(4), (c)(2)(B).

Plaintiffs assert that the Voting Laws violate Section 8(c) because they allow systematic cancellation of registrations within 90 days of federal elections. (*E.g.*, AAANHPI Mot. at 8–10.) The Court agrees. The Voting Laws contain no provision limiting systematic roll review and registration cancellation to at least 90 days prior to a federal

[8] An "individualized" removal program means one in which a state determines eligibility to vote with "individualized information or investigation" rather than cancelling batches of registrations based on a set procedure. *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014).

election.[9] (*See id.*); A.R.S. § 16-165(G)–(K). The State acknowledges that the Voting Laws fail to limit systematic purges within 90 days of an election, but claims that Section 8 does not prevent states from cancelling registrations of voters found to be non-citizens within this 90-day window. (State Mot. at 9.) Though all parties agree that citizenship is a requirement for voting, the State ignores the text and purpose of the 90 day provision.

The 90-day Provision prohibits systematic cancellation of registrations within 90 days of an election. First, Section 8 plainly forbids "any program" to routinely remove registrants, subject to enumerated exceptions, and "the phrase 'any program' suggests that the 90 Day Provision has a broad meaning. . . . [R]ead naturally, the word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" *Arcia*, 772 F.3d at 1344 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). And "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Id.* at 1345 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)). Second, the Court agrees with the Eleventh Circuit that the 90-day provision "is designed to carefully balance [the] . . . purposes in the NVRA," which include protecting the integrity of the electoral

[9] The DNC seeks summary judgment on its claim that H.B. 2492 violates Section 8 because "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." (DNC Mot. at 16 (quoting H.B. 2492) (alterations in original).) This provision of H.B. 2492 was superseded by H.B. 2243. *Compare* H.B. 2492, § 8, *with* H.B. 2243, § 2.

process and ensuring that accurate rolls are maintained, yet also fostering procedures that will "enhance[] the participation of eligible citizens as voters in elections for Federal office." *Id.* at 1346. It makes sense that Congress "decided to be more cautious" leading up to an election cycle, as systematic cancellation programs can cause inaccurate removal and "[e]ligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote." *Id.*; (*see* Non-US SOF ¶¶ 48–49.) But individualized removals, not expressly forbidden within the 90-day window, are based on more "rigorous" registrant-specific inquiries "leading to a smaller chance for mistakes." *Arcia*, 772 F.3d at 1346.

The State's arguments to the contrary do not persuade the Court. Relying heavily on *United States v. Florida*, 870 F. Supp. 2d 1346, 1350 (D. Fla. 2012), the State argues that the 90-day Provision does not "apply to removing noncitizens who were not properly registered in the first place." (State Mot. at 9 (quoting *Florida*, 870 F. Supp. 2d at 1350).) Yet the State ignores that the Eleventh Circuit rejected *Florida*'s reasoning in *Arcia*. *See Arcia v. Detzner*, NO. 12–22282–CIV–ZLOCH, 2015 WL 11198230, at *1 n.1 (S.D. Fla. Feb. 12, 2015) (describing conclusion reversed in *Arcia* as the same one reached in *United States v. Florida*). The State also relies on *Bell v. Marinko*, 367 F.3d 588 (6th Cir. 2004), in which the Sixth Circuit upheld a state statute enabling purges of precinct nonresidents within the 90-day window. But the *Bell* Court did not expressly consider the effect of individualized purges, the dual purposes of Section 8, or the plain meaning of "any" in Section 8(c)(2)(A). *Bell*, 367 F.3d at 591–92. Further, the facts of *Bell* are distinguishable from the Voting Laws. The

statute at issue in *Bell* provided for individual "challenge hearings," which were "devoted to investigating each [registrant's] residence," before an alleged nonresident was purged from the voter roll. *Id.* at 590.

The State alternatively asks the Court to read the 90-day Provision into the Voting Laws, "harmoniz[ing]" the statutes with another Arizona law that mandates compliance with the NVRA, while Equity Coalition requests a declaration that Section 2 of H.B. 2243 violates the 90-day Provision. (State Mot. at 10; AAANHPI Mot. at 7–8, 10.) While the Court agrees with Plaintiffs that the State may still conduct individualized voter removals within the 90-day window, the systematic removal program mandated by H.B. 2243 violates Section 8(c)(2) of the NVRA.

b. Grounds for Cancellation

As described above, Section 8(a) lists the grounds upon which a State can cancel registrations for federal elections. 52 U.S.C. § 20507(a)(3)–(4). According to Defendant Fontes, "H.B. 2243 do[es] not specify what type, set, or combination of 'information' establishes that a registered voter 'is not a United States citizen' or what information is sufficient to match an individual in a database with the registered voter or applicant, and . . . some United States citizens may be erroneously flagged as non-citizens based on potentially outdated and inaccurate data." (Non-US SOF ¶ 49 (quoting Doc. 189, Sec'y of State Ans. ¶ 44).) Additionally, "if a county recorder obtains information and confirms that a registered voter is not a United States citizen, which may be based on potentially unreliable and outdated sources, and if, after receiving a notice, the voter does not provide proof of citizenship within 35 days, the recorder must cancel the registration and notify the county attorney

and Attorney General for possible investigation." (*Id.* ¶ 50 (quoting Ex. 21, Doc. 63, 22-cv-1381, Sec'y of State Ans. ¶ 12).) The State argues that because "citizenship is a basic requirement for voting," the Voting Laws' cancellation provision cannot violate Section 8 as a matter of law, otherwise the NVRA "would effectively grant, and then protect, the franchise of persons not eligible to vote." (State Mot. at 8.)

Plaintiffs correctly counter that "[t]he very real fact questions about voters' citizenship status and how successful the removal scheme will be in identifying truly ineligible voters make summary judgment inappropriate here." (AAANHPI Mot. at 12.) The State admits that only registrants suspected of being noncitizens are subjected to arguably unreliable database checks, which Plaintiffs may be able to prove result in inaccurate identification of non-citizens, cancellation of registration for reasons not permitted by the NVRA, and wrongful referral for prosecution. (Non-US SOF ¶¶ 45–50.) And again, the Court is not persuaded by the State's sparsely substantiated argument that Arizona may freely cancel voter registrations of those individuals suspected of being noncitizens merely because some such individuals might actually be noncitizens, nor does this outcome raise constitutional concerns. *Supra* Section II(A)(2)(a); *Arcia*, 772 F.3d at 1347–48 (Section 8 would raise constitutional concerns if it entirely prohibited states from removing noncitizens from voter rolls, but case did not present that question). The Court concludes that there remains an issue of fact as to whether the purge procedures mandated by H.B. 2243 will likely result in unlawful cancellation of legitimate voter registrations.

c. Discriminatory Maintenance Procedures

The State seeks summary judgment on Plaintiffs' claim that the Voting Laws violate Section 8(b) of the NVRA, titled "Confirmation of voter registration," which mandates that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b). Plaintiffs claim that the Voting Laws violate Section 8(b) by treating federal-only and full-ballot voters differently and imposing "disparate treatment as between naturalized citizens and U.S. born citizens, as well as within and between Arizona counties." (*E.g.*, Poder Latinx Mot. at 8–9.) Specifically, Plaintiffs oppose summary judgment on the grounds that there remain factual issues regarding the effects of the allegedly discriminatory verification procedures mandated by the Voting Laws. (*Id.* at 9.)

As a threshold issue, the State argues that Section 8(b) only applies to post-registration voter roll maintenance, namely purges, and the State is entitled to judgment as a matter of law on any claim that the State treats *applicants* to vote in a non-uniform or discriminatory way. (State Mot. at 5–6.) Based on the plain language of the NVRA, the Court agrees with the State only to the extent the State argues that Section 8(b) does not apply to state programs regarding individuals not yet registered to vote. Section 8(b), which expressly addresses confirming rather than soliciting voter registration, speaks to ensuring the *maintenance*, not the enlargement, of current voter registration rolls. *See* 52 U.S.C. § 20507(b); (*see also* State Mot. at 5–6

(discussing legislative history indicating that Section 8(b) was intended "to prohibit selective or discriminatory purge programs").) Binding authority supports this interpretation, and Plaintiffs cite no case or make no argument to otherwise persuade the Court. *See, e.g.*, *Husted v. A. Philip Randolph Inst.*, 138 S.Ct. 1833, 1840 (2018) (referencing § 20507(b)(1) as a "limitation applicable to state removal programs").

The Court will deny summary judgment on Plaintiffs' remaining claims that Section 8(b) forbids the State from (1) cancelling existing voter registrations of individuals identified as noncitizens after running certain individuals through (an) unreliable database(s) and (2) referring certain individuals for investigation based on such unreliable data. The Secretary of State admitted that H.B. 2243 "requires a different 'standard, practice, or procedure' for determining a voter's qualifications for voters who a county recorder 'has reason to believe are not United States citizens' than for voters who a county recorder does not have reason to believe are not United States citizens." [10] (Non-US SOF ¶ 44 (citing Sec'y of State Ans. ¶ 102)); A.R.S. § 16-165(I). And the Secretary

[10] Poder Latinx seeks summary judgment on its claim that the verification procedures' "reason to believe" standard violates 52 U.S.C. § 10101(a)(2)(A), which prohibits the State from "apply[ing] any standard, practice, or procedure" to determine an individual's qualification to vote that is "different from the standards, practices, or procedures applied" to other individuals "found by State officials to be qualified to vote." Because there remain issues of fact of when and how a county recorder will have "reason to believe" that a registered voter is a non-citizen and use the Systematic Alien Verification for Entitlements program to verify citizenship, the Court denies as moot Poder Latinx Plaintiffs' Motion on its 52 U.S.C. § 10101(a)(2)(A) claim. (*See* Poder Latinx Mot. at 1– 5.)

specifically admitted that H.B. 2243 mandates that county recorders distinguish between those registrants who will be subjected to the additional Systematic Alien Verification Entitlements program screens and those who "are not suspected of lacking U.S. citizenship [and] will not be subjected to the investigation and potential cancellations [sic] provisions set forth in H.B. 2243." (*Id.* ¶ 45 (citing Sec'y of State Ans. ¶¶ 102–03).); § 16-165(I). As the Court concludes that there are outstanding issues of fact as to how this purging will be executed and whether it causes nonuniform and discriminatory registration investigation and cancellation, the Court denies summary judgment on these Section 8(b) claims.[11]

d. State Form Users Registering for Federal Elections

Section 8(a) of the NVRA mandates that States "ensure that any eligible applicant is registered to vote in an election" when an applicant submits registration materials at least 30 days before an

[11] The State "takes no position" on whether the Voting Laws "*as applied*, result in a nonuniform or discriminatory program for maintaining accurate registration lists." (State Mot. at 6 n.12 (emphasis in original).) Offering an expansive definition of the term "nonuniform" as "apply[ing] to less than an entire jurisdiction," the State argues that the Voting Laws still facially pass muster under Section 8(b). (*Id.* at 6.) But the State does not address that even the text of the Voting Laws mandates purges that apply to "less than an entire jurisdiction," as only those registrants whom recorders have "reason to believe" are noncitizens will be subject to heightened scrutiny through, *inter alia*, the Systematic Alien Verification for Entitlements program. The Court need not endorse a specific definition of uniformity or parse Plaintiffs' facial and as-applied arguments to deny summary judgment on the Section 8(b) claim.

election. 52 U.S.C. § 20507(a)(1); *see also* A.R.S. § 16-120(A) (a registrant "shall not vote in an election called pursuant to the laws of this state unless the . . . [individual's] registration has been received by the county recorder . . . before midnight of the twenty-ninth day preceding the date of the election"). Plaintiffs argue, *inter alia*, that the Voting Laws contravene Section 8(a) by mandating that applicants who submit a State Form by mail or at public assistance agencies must provide DPOC in order to be registered for any election.[12] (LUCHA Mot. at 14.) Countering that the NVRA does not require states to register applicants not actually eligible to vote under state criteria, namely "known noncitizens," the RNC seeks summary judgment on Plaintiffs' claim that H.B. 2492 contravenes Section 8(a)'s requirement that states ensure all eligible applicants to vote are actually registered to vote. (RNC Mot. at 2, 9–11; LUCHA Mot. at 13–14.)

This claim is resolved by the existing LULAC Consent Decree, which requires Arizona "County Recorders to accept State Form applications submitted without DPOC . . . [and] to immediately register the applicants for federal elections, provided the applicant is otherwise qualified and the voter registration form is sufficiently complete." (LULAC Consent Decree at 8.) The LULAC Consent Decree, which Judge Campbell has never set aside, makes no carve-out for mail-in registrations or individuals who

[12] The Court has already explained that Section 6 precludes Arizona from requiring DPOC from Federal Form users and will grant summary judgment regarding the Voting Laws' DPOR requirement, so the Court need not address the parties' arguments regarding the effect of Section 8(a) in these respects. (*See* RNC Mot. at 9–11, RNC Reply at 7–8.)

register at public assistance agencies. (*See* Doc. 388-4, Ex. 15, Sec'y of State Voting Laws Implementation Email ("[Q]uestions remained as to whether we could implement [the Voting Laws'] requirements that would conflict with . . . federal settlements and court cases. Having thoroughly analyzed the changes that both bills require, the Secretary of State's Office believes that there is no way to implement certain requirements without conflicting with federal law . . . including *Documentary Proof of Citizenship for federal elections*." (emphasis added)).) Rather, it reflects that Arizona agreed to refrain from precisely the conduct that the RNC would have Arizona participate in. *C.f. Taylor v. United States*, 181 F.3d 1017, 1024 (9th Cir. 1999) ("Congress may change the law and, in light of changes in the law or facts, a *court* may decide in its discretion to reopen and set aside a consent decree under [Rule] 60(b) . . . but Congress may not direct a court to do so with respect to a final judgment (whether or not based on consent) without running afoul of the separation of powers doctrine." (internal citations omitted) (emphasis added)).[13]

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[13] Even if the Court were to accept the parties' position that the Voting Laws "roll[ed] back" the LULAC Consent Decree, the RNC's arguments are unpersuasive in light of the Court's Section 6 analysis. (Doc. 196, MTD Hr'g Tr. at 62:3–4; *see also* Doc. 67, LUCHA Compl. ¶ 90 (requiring DPOC for State Form user to register for federal elections "requires the Secretary to violate a federal consent decree"); *but see* Doc. 388-4, Ex. 19, Veto Letter from Recorder Cazares-Kelly at 1 (automatic State form rejection "had been eliminated by the consent decree in the LULAC case so that currently all voters are treated the same"). The State Form elicits the same information for federal-only voters as the Federal Form. (*Compare* State Form (federal-only information shaded red) *with* Federal Form at 26.) The State Form informs applicants that they will only be

B. Section 10101 of the Civil Rights Act

Plaintiffs argue that the Checkbox Requirement and the Birthplace Requirement violate the Materiality Provision, which prohibits the State from denying an individual her right to vote "because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election."[14] 52 U.S.C. § 10101(a)(2)(B). The Materiality Provision was "intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the

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registered for "full ballot" elections if they provide proof of citizenship, but absent DPOC and the Birthplace Requirement discussed below, the State Form's requirements are substantively indistinguishable from the Federal Form. As long as Arizona has chosen to produce a State Form that offers registration for federal elections, it must abide by the requirements outlined in Section 6, cross-referenced to Section 8. *See* § 20505(a)(2) ("In addition to accepting and using the [Federal Form], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office."). And as above explained, the NVRA precludes states from requiring DPOC to register applicants for federal elections.

[14] Plaintiffs do not dispute that the State can require DPOC to vote in state elections, but Plaintiffs do claim that requiring federal-only voters to provide DPOC to vote in presidential elections and by mail violates the Materiality Provision. (*E.g.*, Doc. 1, 22-cv-1124, USA Compl. ¶¶ 69–70; *see generally* USA Mot.; Mi Familia Vota Mot.; LUCHA Mot.) Because requiring DPOC for federal-only voters to vote in presidential elections and by mail violates Section 6, the Court need not address the parties' arguments as they relate to the Materiality Provision. (*See* State Mot. at 13.)

number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters." *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003). To be qualified to vote in Arizona, a person must be at least eighteen years old, a current United States citizen, and a current resident of Arizona. Ariz. Const. art. VII § 2.

The State asserts that the Checkbox Requirement and Birthplace Requirement do not violate the Materiality Provision because citizenship is material in determining a person's eligibility to vote and birthplace is material in determining a person's identity. (State Mot. at 10–14.) The Court concludes that the Checkbox Requirement violates the Materiality Provision when a person provides Arizona with DPOC. But the Court finds that there are genuine issues of fact precluding summary judgment on whether the Birthplace Requirement contravenes the Materiality Provision.

1. The Checkbox Requirement

The State contends that the Checkbox Requirement does not violate the Materiality Provision because "citizenship is a requirement for voting in Arizona." (*Id.* at 11–13.) The United States counters that whether the Checkbox Requirement violates the Materiality Provision is question of fact inappropriate for summary judgment. (USA Mot. at 17–20.) Specifically, the United States contends that further discovery is necessary because the State posits without any "record evidence supporting its assertions," that the Checkbox Requirement is "useful." (*Id.* at 19.)

No party disputes that citizenship itself is material to a voter's eligibility to vote. (*E.g.*, *id.*at 18.) And the

Court finds persuasive those circumstances under which the materiality of omitted information is an issue of law. *See Chism v. Washington State*, 661 F.3d 380, 389 (9th Cir. 2011) (noting the "inquiry into whether the false statements and omissions [in an affidavit for a search warrant application] were material is a purely legal question . . . . [and] were material if 'the affidavit, once corrected and supplemented,' would not have provided a magistrate judge with a substantial basis for finding probable cause" (citation omitted)); *S.E.C. v. Reys*, 712 F. Supp. 2d 1170, 1177 (W.D. Wash. 2010) (noting that, in the shareholder context, the materiality of an omission is an issue of law "[o]nly when the disclosures or omissions are so clearly unimportant that reasonable minds could not differ" (quoting *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 641 (3d Cir. 1989))). The materiality of an applicant's failure to complete the checkbox on the State Form or Federal Form is a question of law.

a. The Checkbox Requirement With DPOC

The United States contends that an incomplete checkbox on a voter registration form is immaterial when an applicant provides the State with DPOC. (USA Mot. at 21.) The State cites *Diaz v. Cobb*, 435 F. Supp. 2d 1206 (S.D. Fla. 2006), as "the most analogous case" to the Checkbox Requirement in asserting that it does not violate the Materiality Provision. (State Reply at 31; *see* State Mot. at 11–13.) The plaintiffs in *Diaz* argued that a voting law violated the Materiality Provision by requiring applicants to (1) check boxes affirming that they are citizens, have not been convicted of a felony, and have not been adjudicated mentally incompetent, and (2) sign an oath affirming, *inter alia*, that they are

"qualified to register as an elector under the Constitution and laws of the State of Florida." 435 F. Supp. 2d at 1212–13. The *Diaz* court held that checking the boxes was not "duplicative" of signing the oath because the oath did not require an applicant to specifically affirm her citizenship, and even if it were duplicative, material information does not "become[] immaterial due solely to its repetition." *Id.* at 1212–13.

Though an applicant registering for Arizona elections must similarly affirm her citizenship both by specifically marking "yes" in the checkbox and signing an oath, *Diaz* is inapposite, as an applicant must also provide DPOC. A.R.S. § 16-121.01(A), (C). Instead, the Court finds the reasoning in *League of Women Voters of Arkansas v. Thurston*, No. 5:20-cv-05174, 2021 WL 5312640 (W.D. Ark., Nov. 15, 2021), more persuasive. There, the court found that plaintiffs stated a claim that a voting law violated the Materiality Provision because it required absentee voters to provide information about their eligibility to vote "several times," and voters "correctly provided that information at least once," but had their ballots "rejected on the basis of a mismatch or omission in one of the multiple documents they ha[d] provided." 2021 WL 5312640, at *4. The Voting Laws similarly permit Arizona to reject an applicant's registration based on a "mismatch" between documents, specifically an incomplete checkbox on a registration form notwithstanding the applicant's accompanying documentary proof of citizenship. *See* § 16-121.01(A), (C).

The State contends that the checkbox is still "useful" in determining an applicant's citizenship.[15] Materiality "signifies different degrees of importance in different legal contexts." *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1173 (11th Cir. 2008). The Eleventh Circuit observed in *Browning* that if "material" under the Materiality Provision "means minimal relevance," then an error is material if it "tends to make it more likely that the applicant is not a qualified voter than" in the absence of the error. *Id.* at 1174. The *Browning* court cited to the "criminal mail and wire fraud context," where "a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.* at 1173 (quoting *United States v. Gray*, 367 F.3d 1263, 1272 n.19 (11th Cir. 2004)). However, "'capable of influencing' is an objective test, which looks at 'the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end.'" *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008). The Court does not accept that information must only meet such a low bar to be material. Because Arizona may not deny an individual the right to vote due to an error or omission that "is not material *in determining*" her eligibility to vote, the Court infers

[15] The State also argues more generally that "[t]he [checkbox] is 'material in determining' the voter's eligibility because U.S. citizenship is a requirement for voting in Arizona." (State Mot. at 12 (internal citations omitted).) But this conclusory argument conflates materiality of an applicant's citizenship with the materiality of an incomplete checkbox in *determining* an applicant's citizenship. (*See* USA Mot. at 18.)

that Congress intended[16] materiality to require some probability of actually impacting an election official's eligibility determination.[17] § 10101(a)(2)(B) (emphasis added); *c.f. TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (explaining that under the Securities Exchange Act, an omission is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"); *United States v. Bagley*, 473 U.S. 667, 682 (1985) (in criminal procedure, exculpatory "evidence is material only if there is a reasonable probability that, had the

[16] "Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Kungys v. United States*, 485 U.S. 759, 770 (1988) (citation omitted) (applying meaning of materiality of false statements to public officials to the denaturalization context).

[17] At least one court has interpreted "material" to mean something akin to necessary. *See La Unión del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 542 (W.D. Tex. 2022) (plaintiffs plausibly alleged that a voting law "may require information that is *unnecessary and therefore not material* to determining an individual's qualifications to vote under Texas law" (internal citations omitted) (emphasis added)). Whatever the appropriate definition of "material" in this context, it means something more than "useful" or "minimal[ly] relevan[t]." (*See* USA Mot. at 18); *compare Material*, Black's Law Dictionary (11th ed. 2019) ("Having some logical connection with the consequential facts" or being "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential"), *with Relevant*, Black's Law Dictionary ("Logically connected and tending to prove or disprove a matter in issue; having appreciable probative value—that is, rationally tending to persuade people of the probability or possibility of some alleged fact").

evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine the confidence in the outcome"); *Bruton v. Massanari*, 268 F.3d 824, 827 (9th Cir. 2001) (in social security benefits cases, "new evidence is material . . . if there is a reasonable possibility that the new evidence would have changed the outcome of the determination" (citation and internal quotation marks omitted) (cleaned up))).

The State asserts that "if a prospective voter is presented with a clear yes-or-no question about whether the voter is a citizen and does not mark 'Yes,' that information is material." (State Reply at 30.) The State cites *Browning*, which interpreted the Materiality Provision as "ask[ing] whether, accepting the error *as true and correct*, the information contained in the error is material to determining the eligibility of the applicant." 522 F.3d at 1175 (emphasis in original). The *Browning* court explained that with additional and accurate information:

> [an] election official will *always* be able to verify identity of the applicant. It is this additional information exclusively—and not the degree to which that new information deviates from the information on the registration application form, or the "nature of the error"—that enables the election official to ascertain the identity of the voter.

Id. at 1175 n.23 (emphasis in original). This suggests that no error could be material unless the erroneous information were considered in isolation from other additional information probative of an applicant's eligibility to vote. But the materiality of an error or omission is determined by the other information

available to the State. So when an applicant includes DPOC, it makes little sense to accept an incomplete citizenship checkbox on her registration form as "true and correct" when it is clearly not, and that incomplete checkbox should not alter any determination of her eligibility to vote. *C.f. TSC Indus.*, 426 U.S. at 449 (focusing on "the 'total mix' of information made available"). Applying *Browning*'s interpretation of materiality would allow Arizona to disregard documentation that, under Arizona law, constitutes "*satisfactory evidence* of citizenship" and disenfranchise eligible voters. A.R.S. § 16-166(F) (emphasis added). The Checkbox Requirement violates the Materiality Provision when an applicant provides satisfactory evidence of citizenship.

b. The Checkbox Requirement Without DPOC

As discussed above, the State must register both State Form and Federal Form users for federal elections without requiring DPOC. (*Supra* Part II.A.) The Checkbox Requirement as applied to these voters does not violate the Materiality Provision. Specifically, the Federal Form "may require only such [information] as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1); *see id.* § 20505(a)(1). Congress further specified that the Federal Form "shall include," *inter alia*, a checkbox for the applicant to indicate whether she is a citizen and requires that an applicant who fails to check the box be given "an opportunity to complete the form" before the next federal election. *Id.* § 21083(b)(4)(A)(i), (B); (*see* State Mot. at 12; State Reply at 29.) This statutory scheme indicates that the

checkbox is "necessary" to determine an applicant's eligibility, and it is doubtful "that Congress would mandate the gathering of information . . . that it also deems immaterial." *Browning*, 522 F.3d at 1174.

The Court also agrees with the State that even assuming the checkbox on the Federal Form is duplicative of the oath, an applicant's failure to complete the checkbox is not an immaterial omission. (State Reply at 29 (citing *Diaz*, 435 F. Supp. 2d at 1213); *see* Federal Form at 26 (requiring applicant to affirm "under penalty of perjury and threat of deportation" that she is a United States citizen).) Though an applicant must affirm her citizenship twice, it is effectively an applicant's only opportunity to provide this information when registering for federal elections. *See League of Women Voters of Ark.*, 2021 WL 5312640, at *4 (indicating that it would not violate the Materiality Provision to reject a ballot due to an error or omission "[w]here absentee voters have only one opportunity to provide information" about their qualifications to vote). As for State Form users, they must specifically affirm their citizenship only once, and the United States concedes that the Checkbox Requirement on the State Form is permissible in the absence of DPOC.[18] (USA Mot. at 21; State Form.) The Checkbox Requirement does not

[18] Unlike the checkbox and the signature box on the Federal Form, which both inquire specifically into whether an applicant is a citizen, the oath on the State Form requires an applicant to affirm that the information in the registration is true, that she is a resident of Arizona, and has not been convicted of a felony or adjudged incapacitated. (*See* Federal Form at 26; State Form at 51.) The checkbox on the State Form is not duplicative of this "general" oath. *See Diaz*, 435 F. Supp. 2d at 1213.

violate the Materiality Provision as applied to individuals who do not provide DPOC.[19]

2. The Birthplace Requirement

The State argues that the Birthplace Requirement does not violate the Materiality Provision because an applicant's place of birth "can help confirm [a] voter's identity." (State Mot. at 14 (noting that "verifying an individual's identity is a material requirement of voting" (quoting *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 841 (S.D. Ind. 2006))).) The Court agrees with the United States that there is a dispute of material fact about whether an applicant's failure to include her birthplace is material in determining her eligibility to vote. (*See* USA Mot. at 21–23.) The State cites the United States Department of State's Foreign Affairs Manual, which requires passport applicants to provide their birthplace because birthplace is an "integral part of establishing an individual's identity." (State Mot. at 14 (quoting Doc. 365-1, Ex. H, at 107).) But as the State recognizes, it began offering voters the *option* to include their "state or country of birth" in 1979, and there is no indication that this information—or lack thereof—has ever been material in determining an applicant's eligibility to vote. (State Mot. at 13 (citing Doc. 365-1, Ex. G, A.R.S § 16-152(A) (1979)).)

The State argues that how election officials use a person's birthplace is beside the point because "[t]he question is whether a person's state or country of birth is, objectively, 'material to determining the

[19] Mi Familia Vota's Cross-Motion on the materiality of the Checkbox Requirement is moot. The Court need not address the parties' arguments regarding Private Plaintiffs' standing. (*See, e.g.*, RNC Mot. at 11–15.)

eligibility of the applicant.'" (State Reply at 33 (quoting *Browning*, 522 F.3d at 1175).) The State also contends that "[w]hether [birthplace] is material in determining voter eligibility depends on its relevance to eligibility." *Id.* But if, as the State argues, a person's state or country of birth is "objectively relevant" to a person's identity, so too are her father's and mother's names, or her occupation. (*See* State Form at 51 (providing applicants the *option* to include occupation and parents' names).) Whether the Birthplace Requirement violates the Materiality Provision is an issue of fact inappropriate for summary judgment.

C. Vagueness of the Purge Provisions

The State seeks summary judgment on Promise Arizona's claims that the purge provisions of the Voting Laws, A.R.S. § 16-165(a)(10) and (I), are void for vagueness because they do "not provide an election official any guidance to determine whether a person is not a United States citizen" and allow the Attorney General to open a criminal investigation into any person whose voter registration is cancelled. (Doc. 1, 22-cv-1602, Compl. ¶ 139; State Mot. at 15–16.) Specifically, the State contends that the void-for-vagueness doctrine is inapplicable because the Voting Laws do not regulate voter conduct, and that even if the doctrine does apply, the purge provisions are not vague. (State Mot. at 15–16; State Reply at 39–42.)

"The void-for-vagueness doctrine . . . guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). Promise Arizona attempts to frame § 16-165 as a penal statute and asserts that "in order to avoid the punishment of being compared with the [Systematic Alien Verification for Entitle-

ments] program, and subsequently, voter registration cancellation and criminal investigation, the voter is *prohibited* from giving county recorders *any* reason to believe that they are not a United States citizen." (Promise Arizona Resp. at 4–5 (emphasis in original).) A penal law must "provide a reasonable opportunity to know what conduct is prohibited," or be sufficiently definite as to not "allow arbitrary and discriminatory enforcement." *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1019 (9th Cir. 2010) (citation omitted); *see City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). As the Voting Laws are not penal in nature and do not address individual conduct, the Court will grant the State's Motion on this claim.

First, § 16-165(I) is not penal, as "[i]t does not define the elements of an offense, fix any mandatory penalty, or threaten people with punishment if they violate its terms." *United States v. Christie*, 825 F.3d 1048, 1064–65 (9th Cir. 2016); (*see* State Reply at 40). Because the provision "is not a penal statute or anything like one," it cannot be unconstitutionally vague. *Christie*, 825 F.3d at 1064 ("Justice Thomas, in his history of the void-for-vagueness doctrine, cites one case in which the Supreme Court voided a vague statute that he classifies as non-penal." *Id.* at 1064 n.5 (citing *Johnson v. United States*, 576 U.S. 591, 612 (2015) (Thomas, J., concurring in the judgment))).

Second, § 16-165(I) regulates county recorders, not registered voters. (State Reply at 39.) If a law "imposes neither regulation of nor sanction for *conduct*," then "no necessity exists for guidance so that one may avoid the applicability of the law." *Boutilier v. INS*, 387 U.S. 118, 123 (1967) (emphasis added). The void-for-vagueness doctrine is inap-

plicable to the fact of whether a voter is a citizen. *See Martinez-de Ryan v. Whitaker*, 909 F.3d 247, 251 (9th Cir. 2018) (citing *Boutilier* to distinguish between conduct and a "status or condition"); *c.f. Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1184 (9th Cir. 1988) (rejecting argument that a county charter's grant of "unbounded discretion to schedule special elections in 'appropriate circumstances'" was void for vagueness because "Appellants are not at risk of being punished for engaging in ill-defined *proscribed conduct*" (emphasis added)). And a statute "is not vague because it may at times be difficult to prove [a] . . . fact but rather because it is unclear as to what fact must be proved." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citing *United States v. Williams*, 553 U.S. 285, 306 (2008)); *c.f. Kay v. Mills*, 490 F. Supp. 844, 850–52 (E.D. Ky. 1980) (finding statute void for vagueness because it did not notify a presidential candidate of what it meant to be "generally advocated and nationally recognized" in order to be placed on the preferential primary ballot). The void-for-vagueness doctrine is inapplicable, as the Voting Laws clearly require county recorders to investigate a registered voter's citizenship status.[20]

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[20] Even if the void-for-vagueness doctrine applies, § 16-165(I) is not unconstitutionally vague. The "reason to believe" standard in § 16-165(I) is not "so indefinite as to allow arbitrary and discriminatory enforcement," but is common in statutory drafting. *See, e.g.*, 15 U.S.C. § 56(b) ("Whenever the Commission has reason to believe that any person, partnership, or corporation is liable for a criminal penalty under this subchapter, the Commission shall certify the facts to the Attorney General . . . ."); 25 U.S.C. § 3206 (permitting examinations and interviews of children whom law enforcement officials "have reason to believe" were abused).

Promise Arizona's void-for-vagueness argument about § 16-165(A) fails for similar reasons. The county recorder must cancel a voter's registration and refer the matter for investigation only after (1) the county recorder "confirms"[21] that the voter is not a citizen, (2) the county recorder notifies the voter that her registration will be cancelled in 35 days unless the voter provides DPOC, and (3) the voter fails to provide DPOC. § 16-165(A)(10). The first two requirements do not regulate or sanction a voter's conduct, while the third unambiguously informs voters that they must confirm their citizenship status within 35 days to avoid being de-registered and referred for criminal investigation.[22] (*See* State Reply at 39 (arguing § 16-165 regulates county recorders)); *Boutilier*, 387 U.S. at 123.

The Court grants the State's Motion on Promise Arizona's void-for-vagueness claim.

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[21] Promise Arizona argues that § 16-165(A)(10) does not specify when a county recorder "'confirms', i.e., *believes*, that a registered voter is not a U.S. citizen." (Promise Arizona Resp. at 6.) But the provision clearly sets forth the sources of information that may confirm a registrant's non-citizenship.

[22] Promise Arizona's argument that these provisions empower county recorders to "decide" when to subject voters to "criminal liability" is unpersuasive. (Promise Arizona Resp. at 5.) County recorders only notify the attorney general of cancelled voter registrations for "*possible* investigation." § 16-165(A)(10) (emphasis added). It is the attorney general who investigates and must subsequently "prosecute individuals who are found not to be United States citizens" and who registered to vote "knowing" that they are "not entitled to such registration." *See* A.R.S. §§ 16-143(D), 16-182(A).

III. CONCLUSION

The NVRA was designed to enhance eligible voter participation in federal elections and lawfully regulates presidential elections. The Court finds Section 6 preempts H.B. 2492's restrictions on presidential elections and mail-in voting. The Court also concludes that H.B. 2243's systematic removal provisions violate the NVRA's 90-day Provision. The Court also finds that the Voting Laws' purge provisions are not unconstitutionally vague, yet there remain genuine issues of material fact as to whether the purge provisions violate the Civil Rights Act or enable Arizona to contravene Section 8. Lastly, the Court finds that the LULAC Consent Decree precludes Arizona from enforcing H.B. 2492's mandate to reject any State Form without accompanying DPOC.

The Checkbox Requirement does not violate the Materiality Provision as applied to individuals who submit a registration without DPOC. But the Court finds that Arizona may not reject a voter registration that does not contain a checkmark in the box next to the question regarding citizenship when the person provides DPOC and is otherwise eligible to vote. There remain genuine issues of material fact as to the materiality of a person's place of birth in determining eligibility to vote and whether the Birthplace Requirement violates the Materiality Provision.

IT IS ORDERED granting Plaintiffs' Cross-Motion for Summary Judgment that Section 6 of the NVRA preempts H.B. 2492's restriction on registration for presidential elections and voting by mail (Doc. 391; Doc. 393);

IT IS FURTHER ORDERED granting Tohono O'odham Plaintiffs' Motion for Summary Judgment (Doc. 390) and declaring that A.R.S. § 16-123 references A.R.S. § 16-579(A)(1) for a list of documents that satisfy the documentary proof of location of residence requirement in A.R.S. § 16-123. The reference to § 16-579(a)(1) provides examples of documents, but is not an exhaustive list of the documents, that can be used to satisfy A.R.S. § 16-123.

IT IS FURTHER ORDERED declaring that A.R.S. § 16-123 does not require tribal members or other Arizona residents to have a standard street address for their home to satisfy A.R.S. § 16-123.

IT IS FURTHER ORDERED declaring that in addition to the documents listed in A.R.S. § 16-579(A)(1), the following documents satisfy the requirement in A.R.S. § 16-123:

- A valid unexpired Arizona driver license or nonoperating ID ("AZ-issued ID"), regardless of whether the address on the AZ-issued ID matches the address on the IDholder's voter registration form and even if the AZ-issued ID lists only a P.O. Box.

- Any Tribal identification document, including but not limited to a census card, an identification card issued by a tribal government, or a tribal enrollment card, regardless of whether the Tribal identification document contains a photo, a physical address, a P.O. Box, or no address.

- Written confirmation signed by the registrant that they qualify to register pursuant to A.R.S. § 16-121(B), regarding registration of persons who do not reside at a fixed, permanent, or private structure.

IT IS FURTHER ORDERED granting Plaintiffs' Cross-Motion for Summary Judgment that the Voting Laws violate Section 8(c) of the NVRA by allowing systematic cancellation of registrations within 90 days of an election (Doc. 393; Doc. 396);

IT IS FURTHER ORDERED declaring that Arizona must abide by the LULAC Consent Decree and register otherwise eligible State Form users without DPOC for federal elections;

IT IS FURTHER ORDERED denying the RNC's Motion for Summary Judgment as to whether Arizona can reject any State Form without accompanying DPOC (Doc. 397);

IT IS FURTHER ORDERED denying the State's Motion for Summary Judgment as to whether H.B. 2243 violates Section 8(a) by allowing unlawful cancellation of registrations (Doc. 364);

IT IS FURTHER ORDERED granting in part and denying in part the State's Motion for Summary Judgment as to whether the Voting Laws violate Section 8(b) by mandating nonuniform and discriminatory list maintenance procedures (Doc. 364);

IT IS FURTHER ORDERED denying as moot LUCHA's Cross-Motion for Summary Judgment under Sections 6 and 8(a) of the NVRA (Doc. 394);

IT IS FURTHER ORDERED granting in part and denying in part the State's Motion for Summary Judgment as to whether the Voting Laws violate the Materiality Provision of the Civil Rights Act by rejecting voter registrations that do not satisfy the Checkbox Requirement (Doc. 364);

IT IS FURTHER ORDERED declaring that Arizona may not reject a voter registration solely on

the basis that the registration does not contain a checkmark in the box next to the question regarding citizenship, if the applicant provides DPOC and is otherwise eligible to vote;

IT IS FURHTER ORDERED denying the State's Motion for Summary

Judgment as to whether the Voting Laws' Birthplace Requirement violates the Materiality Provision of the Civil Rights Act (Doc. 364);

IT IS FURTHER ORDERED granting the State's Motion for Summary Judgment that the Voting Laws' purge provisions are not unconstitutionally vague (Doc. 364);

IT IS FURTHER ORDERED denying as moot Poder Latinx's Motion for Summary Judgment as to whether the Voting Laws violate § 10101(a)(2)(A) of the Civil Rights Act by applying different standards or procedures to voters that the county recorder has reason to believe are non-citizens (Doc. 397);

IT IS FURTHER ORDERED denying as moot the parties' Motions and Cross-Motions for Summary Judgment as to whether there is a private right of action under § 10101 of the Civil Rights Act (Doc. 367; Doc. 397; Doc. 399).

Dated this 13th day of September, 2023.

/s/Susan R. Bolton
Susan R. Bolton
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: July 18, 2024]

No. 24-3188
D.C. No. 2:22-cv-00509-SRB
District of Arizona, Phoenix

MI FAMILIA VOTA; et al.,

Plaintiffs - Appellees,

v.

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

Defendants - Appellees,

WARREN PETERSEN, President of the Arizona Senate; et al.,

Intervenor-Defendants -Appellants,

ARIZONA REPUBLICAN PARTY,

Intervenor - Pending.

ORDER

No. 24-3559
D.C. No. 2:22-cv-00509-SRB
District of Arizona, Phoenix

MI FAMILIA VOTA; et al.,

Plaintiffs - Appellees,

v.

KRIS MAYES, Arizona Attorney General and STATE OF ARIZONA,

Defendants - Appellants.

ORDER

No. 24-4029
D.C. No. 2:22-cv-00509-SRB
District of Arizona, Phoenix

PROMISE ARIZONA and SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT,

Plaintiffs - Appellants,

and

MI FAMILIA VOTA; et al.,

Plaintiffs,

v.

ADRIAN FONTES; et al.,

Defendants,

and

KRIS MAYES, Arizona Attorney General and STATE OF ARIZONA,

Defendants - Appellees,

WARREN PETERSEN; et al.,

Intervenor-Defendants - Appellees,

ARIZONA REPUBLICAN PARTY,

Intervenor - Pending.

Before: BADE, LEE, and FORREST, Circuit Judges.

The motion to partially stay the district court's May 2, 2024 judgment (Docket Entry No. 50 in No. 24-3188) is granted in part and denied in part. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (defining standard for stay pending appeal).

We conclude that appellants in No. 24-3188 have satisfied the standard for a stay pending appeal with respect to the portion of the injunction barring enforcement of A.R.S. § 16-121.01(C). We conclude that appellants have failed to satisfy the standard for a stay pending appeal in all other respects. The district court's May 2, 2024 judgment is therefore stayed to the extent that it bars enforcement of A.R.S. § 16-121.01(C). This order is subject to reconsideration by the panel assigned to decide the merits of this appeal.

We consolidate and expedite these cross-appeals.

The first briefs on cross-appeal for all defendants are due July 25, 2024. The consolidated second briefs on cross-appeal for plaintiffs are due August 5, 2024. The third briefs on cross-appeal for all defendants are due August 15, 2024. The optional consolidated cross-appeal reply briefs for plaintiffs are due within 7 days after service of the third briefs on cross-appeal.

Arizona Republican Party's motion to intervene (Docket Entry No. 63 in No. 24-3188) is referred to the panel assigned to decide the merits of these cross-appeals.

The Clerk will place this appeal on the calendar for September 2024. *See* 9th Cir. Gen. Ord. 3.3(g).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed: Aug. 1, 2024]

No. 24-3188

D.C. No. 2:22-cv-00509-SRB
District of Arizona, Phoenix

MI FAMILIA VOTA; VOTO LATINO; LIVING UNITED FOR CHANGE IN ARIZONA; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; ARIZONA STUDENTS' ASSOCIATION; ADRC ACTION; INTER TRIBAL COUNCIL OF ARIZONA, INC.; SAN CARLOS APACHE TRIBE; ARIZONA COALITION FOR CHANGE; UNITED STATES OF AMERICA; PODER LATINX; CHICANOS POR LA CAUSA; CHICANOS POR LA CAUSA ACTION FUND; DEMOCRATIC NATIONAL COMMITTEE; ARIZONA DEMOCRATIC PARTY; ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN AND PACIFIC ISLANDER FOR EQUITY COALITION; PROMISE ARIZONA; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; TOHONO O'ODHAM NATION; GILA RIVER INDIAN COMMUNITY; KEANU STEVENS; ALANNA SIQUIEROS; LADONNA JACKET,

Plaintiffs - Appellees,

v.

ADRIAN FONTES, in his official capacity as Arizona Secretary of State; KRIS MAYES, Arizona Attorney General, in her official capacity as Arizona Attorney General; STATE OF ARIZONA; LARRY NOBLE, Apache

County Recorder, in his official capacity; DAVID W. STEVENS, Cochise County Recorder, in his official capacity; PATTY HANSEN, Coconino County Recorder, in her official capacity; SADIE JO BINGHAM, Gila County Recorder, in her official capacity; SHARIE MILHEIRO, Greenlee County Recorder, in her official capacity; RICHARD GARCIA, La Paz County Recorder, in his official capacity; STEPHEN RICHER, Maricopa County Recorder, in his official capacity; KRISTI BLAIR, Mohave County Recorder, in her official capacity; MICHAEL SAMPLE, Navajo County Recorder, in his official capacity; GABRIELLA CAZARES-KELLY, Pima County Recorder, in her official capacity; SUZANNE SAINZ, Santa Cruz County Recorder, in her official capacity; RICHARD COLWELL, Yuma County Recorder, in official capacity; DANA LEWIS, Pinal County Recorder, in official capacity; POLLY MERRIMAN, Graham County Recorder, in her official capacity; JENNIFER TOTH, in her official capacity as Director of the Arizona Department of Transportation; MICHELLE BURCHILL, Yavapai County Recorder, in official capacity,

Defendants - Appellees,

WARREN PETERSEN, President of the Arizona Senate; BEN TOMA, Speaker of the Arizona House of Representatives; REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendants - Appellants,

ARIZONA REPUBLICAN PARTY,

Intervenor - Pending.

ORDER

No. 24-3559
D.C. No. 2:22-cv-00509-SRB
District of Arizona, Phoenix

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MI FAMILIA VOTA; VOTO LATINO; LIVING UNITED FOR CHANGE IN ARIZONA; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; ARIZONA STUDENTS' ASSOCIATION; ADRC ACTION; INTER TRIBAL COUNCIL OF ARIZONA, INC.; SAN CARLOS APACHE TRIBE; ARIZONA COALITION FOR CHANGE; UNITED STATES OF AMERICA; PODER LATINX; CHICANOS POR LA CAUSA; CHICANOS POR LA CAUSA ACTION FUND; DEMOCRATIC NATIONAL COMMITTEE; ARIZONA DEMOCRATIC PARTY; ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN AND PACIFIC ISLANDER FOR EQUITY COALITION; PROMISE ARIZONA; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; TOHONO O'ODHAM NATION; GILA RIVER INDIAN COMMUNITY; KEANU STEVENS; ALANNA SIQUIEROS; LADONNA JACKET

Plaintiffs - Appellees,

v.

KRIS MAYES, Arizona Attorney General; STATE OF ARIZONA,

Defendants - Appellants,

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ARIZONA REPUBLICAN PARTY,

Intervenor – Pending.

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No. 24-4029
D.C. No. 2:22-cv-00509-SRB
District of Arizona, Phoenix

PROMISE ARIZONA; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT,

Plaintiffs - Appellants,

and

MI FAMILIA VOTA, VOTO LATINO, LIVING UNITED FOR CHANGE ON ARIZONA, LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA, ARIZONA STUDENTS' ASSOCIATION, ADRC ACTION, INTER TRIBAL COUNCIL OF ARIZONA, INC., SAN CARLOS APACHE TRIBE, ARIZONA COALITION FOR CHANGE, UNITED STATES OF AMERICA, PODER LATINX, CHICANOS POR LA CAUSA, CHICANOS POR LA CAUSA ACTION FUND, DEMOCRATIC NATIONAL COMMITTEE, ARIZONA DEMOCRATIC PARTY ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN AND PACIFIC ISLANDER FOR EQUITY COALITION, TOHONO O'ODHAM NATION, GILA RIVER INDIAN COMMUNITY, KEANU STEVENS, ALANNA SIQUIEROS, LADONNA JACKET,

Plaintiffs,

v.

ADRIAN FONTES, LARRY NOBLE, DAVID W. STEVENS, PATTY HANSEN, SADIE JO BINGHAM, SHARIE MILHEIRO, RICHARD GARCIA, STEPHEN RICHER, KRISTI BLAIR, MICHAEL SAMPLE, GABRIELLA CAZARES-KELLY, SUZANNE SAINZ, RICHARD COLWELL, DANA LEWIS, POLLY MERRIMAN, JENNIFER TOTH, MICHELLE BURCHILL,

Defendants,

and

KRIS MAYES, Arizona Attorney General; STATE OF ARIZONA,

Defendants - Appellees,

WARREN PETERSEN; BEN TOMA;
REPUBLICAN NATIONAL COMMITTEE,

Intervenor-Defendants - Appellees,

ARIZONA REPUBLICAN PARTY,

Intervenor - Pending.

Appeal from the United States District Court
for the District of Arizona
Susan R. Bolton, District Judge, Presiding

Before: Kim McLane Wardlaw, Ronald M. Gould, and Patrick J. Bumatay, Circuit Judges.

Dissent by Judge Patrick J. Bumatay.

PER CURIAM:

On July 18, 2024, a motions panel of this court granted in part and denied in part Intervenors-Defendants-Appellants' emergency motion to stay the district court's judgment. Dkt. 76. The motions panel issued a stay pending appeal as to "the portion of the [lower court's] injunction barring enforcement of A.R.S. § 16-121.01(C)," *id.*, a provision of law which, prior to the partial stay, had never taken effect in Arizona. The motions panel concluded that Intervenors-Defendants-Appellants "failed to satisfy the standard for a stay pending appeal in all other respects" and declined to stay any other portion of the district court's judgment. *Id.* The motions panel stated that "[t]his order is subject to reconsideration by the panel assigned to decide the merits of the appeal." *Id.*

Certain non-U.S. Plaintiffs-Appellees filed an emergency motion for reconsideration of the partial stay before the panel assigned to decide the merits of this appeal, seeking relief "as soon as possible." Dkt. 97. The State of Arizona and its Attorney General, who had opposed the issuance of the stay, do not oppose the motion for reconsideration. Dkt. 99, at 1; Dkt. 62, at 1. Intervenors-Defendants-Appellants oppose the motion for reconsideration. Dkt. 100. Plaintiffs-Appellees' emergency motion for reconsideration of the partial stay pending appeal (Dkt. 97) is **GRANTED**. We **VACATE** the motions panel's order to the extent it stays the district court's injunction barring enforcement of A.R.S. § 16-121.01(C). No portion of the district court's judgment shall be stayed pending appeal.

A motion for reconsideration must "state with particularity the points of law or fact which, in the opinion of the movant, the Court has overlooked or misunderstood." Cir. R. 27-10(a)(3).[1] We consider

[1] Intervenors-Defendants-Appellants argue that "[o]nly the en banc Court has authority to review a stay order for error." Dkt. 100, at 1. Intervenors-Defendants-Appellants are incorrect. Federal Rule of Appellate Procedure 35 provides for matters that "may"—not "must"—be reheard en banc. Fed. R. App. P. 35(a). The motions panel expressly provided that its order is subject to reconsideration by the merits panel. Dkt. 76. And the Intervenors-Defendants-Appellants and the moving non-U.S. Plaintiff-Appellees agree that the motions panel's order is "not binding" on the merits panel. Dkt. 100, at 3 (quoting *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 660 (9th Cir. 2021) (en banc)); Dkt. 111, at 3. "[W]hile a merits panel does not lightly overturn a decision made by a motions panel during the course of the same appeal, we do not apply the law of the case doctrine as strictly in that instance." *United States v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986), *abrogated on other grounds by Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816–17 & n.5

four factors with respect to a stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotation omitted). The burden of demonstrating that these factors weighed in favor of a stay lay with the proponent—in this case, the Intervenors-Defendants-Appellants. *Id*. at 433–34. The likelihood of success and irreparable injury "are the most critical" factors. *Id.* These two factors fall on "a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Humane Soc'y of U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008). On one end of the continuum, the proponent must show a "strong likelihood of success on the merits" and at least "the possibility of irreparable injury to the [proponent] if preliminary relief is not granted." *Golden Gate Restaurant Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1116–17 (9th Cir. 2008) (quotation omitted), *application to vacate stay denied*, 2008 WL 11580109 (U.S. Feb. 21, 2008) (Kennedy, J., in chambers). "At the other end of the continuum, the moving party

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(1988). If we are persuaded that the decision of the motions panel "is clearly erroneous and its enforcement would work a manifest injustice," *Gonzalez v. Arizona*, 677 F.3d 383, 396, 389 n.4 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013), or a "showing" otherwise has been "made which compels us to reconsider [the motions panel's] prior decision," *Houser*, 804 F.3d at 568, we may exercise our discretion to set aside the motions panel's decision

must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Id.* (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983)); *see Manrique v. Kolc*, 65 F.4th 1037, 1041 (9th Cir. 2023) (explaining that, "[e]ven with a high degree of irreparable injury, the movant must show 'serious legal questions' going to the merits" to warrant a stay) (citing *Lopez*, 713 F.2d at 1435–36).

We exercise our discretion to reconsider and vacate in part the motions panel's July 18 order. The motions panel's order failed to provide a reasoned analysis of the *Nken* factors with respect to A.R.S. § 16-121.01(C), and we do not see how a balancing of these factors could weigh in favor of a stay. Moreover, the motions panel overlooked "considerations specific to election cases" and misunderstood the extent of confusion and chaos that would be engendered by a late-stage alteration to the status quo of Arizona's election rules in apparent disregard of the Supreme Court's admonitions in *Purcell v. Gonzalez*, 549 U.S. 1, 7 (2006) (per curiam).2

1. Intervenors-Defendants-Appellants have not demonstrated "a strong likelihood of success on the merits." *Golden Gate Restaurant Ass'n*, 512 F.3d at 1115 (quotation omitted). The LULAC Consent Decree remains in force and is binding on the parties. As the district court held, the Decree requires the Secretary of State to direct County Recorders to accept state form registration applications submitted

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[2] Not only did the motions panel fail to acknowledge *Purcell*, it failed to follow the Court's instruction to the Ninth Circuit motions panel whose ruling was reversed in *Purcell* that "[i]t was still necessary, as a procedural matter, to give deference to the discretion of the district court." 549 U.S. at 7.

without documentary proof of citizenship ("DPOC") and to register such applicants consistent with the Decree. *Mi Familia Vota v. Fontes*, No. CV-22-00509, 2024 WL 2244338, at *1 (D. Ariz. May 2, 2024), ECF No. 720; *Mi Familia Vota v. Fontes*, 2024 WL 862406, at *2, *3 n.10 (D. Ariz. Feb. 29, 2024), ECF No. 707. Because it requires County Recorders to reject such applications (and in fact criminalizes those who knowingly fail to do so), A.R.S. § 16-121.01(C) directly contravenes the requirements of the Decree.

Unless the Decree is set aside or modified, Intervenors-Defendants-Appellants are unlikely to prevail. A consent decree approved by a court is an enforceable, final judgment with the force of res judicata. *S.E.C. v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984); *see also Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 391 (1992) ("[A] consent decree is a final judgment that may be reopened only to the extent that equity requires."). Thus, "the equitable decree based on the [parties'] agreement is subject to the rules generally applicable to other judgments and decrees." *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996). As a final judgment, a consent decree "may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Taylor v. United States*, 181 F.3d 1017, 1024 (9th Cir. 1999) (en banc) (quotation omitted).

Intervenors-Defendants-Appellants offered no authority to the contrary before the motions panel. They contended only that the executive arms of the State could not, by agreeing to the LULAC Consent Decree, divest the Arizona Legislature of its sovereign power to change voting registration laws prospectively. Dkt. 50, at 12–14; *see also* Dkt. 100, 4–5 (raising similar arguments in opposition to the instant motion). But

as the movants point out, the Consent Decree has no such effect. It cabins the authority of the parties to the Decree—the Arizona Secretary of State and Maricopa County Recorder—to act contrary to it. We recognized sitting en banc in *Taylor* that "[t]he Constitution's separation of legislative and judicial powers denies [Congress] the authority" to "enact[] retroactive legislation requiring an Article III court to set aside a final judgment." 181 F.3d at 1026; *see also id.* at 1024 ("Congress may change the law and, in light of changes in the law or facts, a *court* may decide in its discretion to reopen and set aside a consent decree . . . but *Congress* may not *direct* a court to do so with respect to a final judgment (whether or not based on consent) without running afoul of the separation of powers doctrine."). Intervenors-Defendants-Appellants offer no authority to suggest that a state legislature may nullify a final judgment entered by an Article III court which Intervenors-Defendants-Appellants have not sought to set aside, modify, or otherwise terminate, and we see no reason why the same principle articulated in *Taylor* should not apply with equal force here. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("Chief Justice Marshall spoke for a unanimous Court in saying that: 'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.'" (quoting *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809))). That the court that entered the decree "did not retain jurisdiction, as it could have done," only supports the view that the Decree is a final judgment under *Taylor*. 181 F.3d at

1023; Dkt. 100, at 6.3 It does not suggest that the preclusive effect of the final judgment disappeared or "expired" after the docket was closed.4

2. Even assuming that Intervenors-Defendants-Appellants had raised "serious legal questions going to the merits" with respect to A.R.S. § 16-121.01(C), *Golden Gate Restaurant Ass'n*, 512 F.3d at 1116 (quotation omitted), they did not show "a high degree of irreparable injury," *Manrique*, 65 F.4th at 1041, or that the balance of equities otherwise tips "sharply" in their favor, *Golden Gate Restaurant Ass'n*, 512 F.3d at 1116 (quotation omitted). Intervenor-Defendant-Appellant Republican National Committee ("RNC") failed to show that the RNC will face irreparable harm absent a stay with respect to A.R.S. § 16-121.01(C). The RNC alleged that the existence of voters who are registered to vote in federal elections (so called "federal-only voters") inflicts irreparable harm upon it. Dkt. 100, at 17. But the RNC has not

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[3] Relying on *Martin v. Wilks*, 490 U.S. 755, 762 (1989), Intervenors-Defendants-Appellants argue that they are entitled to "challenge the consent decree in [this] separate action." Dkt. 100, at 6 (quotation omitted). *Martin* held that non-parties may not be bound by a judgment *in personam* in a litigation in which they were not joined. *See* 490 U.S. at 763–64. As Intervenors-Defendants-Appellants recognize, they are not bound by the final judgment of the LULAC Consent Decree. Dkt. 100, at 7 ("Whatever ongoing obligations the Plaintiffs ascribe to the LULAC Consent Decree do not extend to the Legislature[.]"). No party has sought to bind Intervenors-Defendants-Appellants to that judgment in this action. The principle articulated in *Martin* thus has no bearing on the issues presented in this appeal.

[4] Because we agree with the movants that Intervenors-Defendants-Appellants have failed to demonstrate a likelihood of success on the merits with respect to the LULAC Consent Decree, we do not reach their alternative arguments under the NVRA and the Equal Protection Clause. *See* Dkt. 97, at 5–15.

at any point explained why the use of the State Form to register applicants without accompanying DPOC to vote in federal elections, when identically situated applicants may register for at least federal elections without accompanying DPOC through the Federal Form even with a stay in place, inflicts an irreparable "competitive injury" on the RNC. Simply put, the RNC has not shown that enforcement of A.R.S. § 16-121.01(C) *specifically* will prevent a likelihood of irreparable harm pending appeal.

Intervenors-Defendants-Appellants the President of the Arizona State Senate Warren Petersen and Speaker of the Arizona House of Representatives Ben Toma (together, "the Legislators"), assert that the district court's judgment inflicts an irreparable injury to the State's lawmaking interest by enjoining one of its duly enacted laws. Dkt. 100, at 13–14. The Arizona Attorney General, which represents the State in this action, *see* A.R.S. § 41-193(A)(3), opposed issuance of a stay on the ground that any harm to the State's lawmaking interest was outweighed by the State's law-administering interest in avoiding "confusion and chaos for voters and election officials alike in the upcoming 2024 election cycle." Dkt. 52, Ex. 1, at 2; Dkt. 62 at 2 (citing Dkt. 52). The State maintains this position at the reconsideration stage. Dkt. 99.

The movants and the Attorney General dispute Intervenors-Defendants-Appellants' authority to represent the State's interests in this litigation. *See* Dkt. 97, at 16; Dkt. 62, at 8. No party has disputed the Attorney General's authority. Without reaching the question whether Intervenors-Defendants-Appellants have authority that overlaps with that of the Attorney General to represent the State's interests in

this case, we find that the Legislators have not shown a "high degree of irreparable injury" to the State absent a stay. *Manrique*, 65 F.4th at 1041. Intervenors-Defendants-Appellants have pointed to no binding authority suggesting that enjoining enforcement of a duly enacted law by itself inflicts the "high degree of irreparable injury" on the state required to warrant a stay without a strong showing of likelihood of success on the merits. *Id.* Indeed, the Attorney General has repeatedly represented in this appeal that both the State's law-making and law-administering interests would be "better served by denying a stay." Dkt. 62, at 4. Given the conflicting statements of the State's interests and the lack of persuasive authority offered in support of the stay, Intervenors-Defendants-Appellants failed to demonstrate the "high degree of irreparable injury" required for a stay in the absence of a strong likelihood of success on the merits. *Manrique*, 65 F.4th at 1041.

3. The movants contend that the remaining *Nken* factors strongly favor reconsideration and vacatur of the motions panel's order. We agree. A judicial stay is ordinarily a mechanism to preserve, not upset, the status quo pending appeal. *Nken*, 556 U.S. at 429. That principle applies with even greater force in the elections context, where court orders—especially "bare" orders offering "no explanation"—can "result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5. For that reason, the Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Cmte. v. Democratic Nat'l Cmte.*, 589 U.S. 423, 424 (2020) (per curiam).

The motions panel overlooked this fundamental principle of judicial restraint, resulting in manifest injustice to voters and elections officials alike. Since the LULAC Consent Decree in 2018, elections officials have registered otherwise qualified voters who used the State Form without DPOC as eligible to vote at least in federal elections. Those who submitted a State Form without DPOC yet had DPOC on file with the Motor Vehicles Division were registered for all elections whether they applied with the Federal or State Form. The motions panel's order upset the status quo, altering the voter registration rules just days before Arizona's July 30 primary and well into the registration timeline for the November general election. Parties, including the State of Arizona, its Attorney General, and its Secretary of State, sounded the alarm that such an intervention would "only create confusion and chaos for voters and election officials alike." Dkt. 52, at 4.

Their warnings proved prescient. The practical effect of the stay has been to subject elections officials to a class 6 felony offense for knowingly failing to reject state form registration applications without accompanying DPOC. *See* A.R.S. § 16-121.01(C). Yet officials are also subject to a class 2 misdemeanor offense for failing to abide by the provisions of the Election Procedures Manual ("EPM"), which carries the force of law, *Arizona Public Integrity Alliance v. Fontes*, 475 P.3d 303, 308 (Ariz. 2020), and was adopted in 2023 in compliance with the LULAC Consent Decree, Dkt. 52, Ex. 1, at 2. Consistent with the lower court's judgment in this case and the LULAC Consent Decree, the EPM provides that elections officials must *accept* the registration applications of otherwise qualifying applicants who do

not provide DPOC for at least federal elections.[5] *See generally* Dkt. 97, Ex. 5. In response to the motions panel's stay order, Arizona's County Recorders have announced that they will no longer accept any State Forms without DPOC (in apparent violation of the EPM and the LULAC Consent Decree but consistent with the motions panel's stay order), while the State Forms themselves continue to provide that otherwise eligible applicants without DPOC who use the State Form *will* be eligible to vote in federal elections, consistent with the EPM. Dkt. 97, Ex. 3, at 3. Further, applicants whose documentary proof of citizenship is already on file with the State and is instantly accessible by state elections officials will see their voter registration applications summarily rejected on the incredible basis that they have not provided the State with documentary proof of citizenship. Dkt. 111, at 1; Dkt. 99, at 2.

In *Purcell*, the Court made clear that the uncertainty engendered by judicial disruptions to the status quo in the midst of elections can and often will cause eligible voters to remain away from the polls. 549 U.S. at 4–5. The Court emphasized that "the possibility that qualified voters might be turned away from the polls" should "caution any . . . judge to give careful consideration" before intervening in a state's elections. *Id.* at 4. The motions panel's failure to adhere to the Supreme Court's warning in *Purcell*

[5] Specifically, the EPM provides that an otherwise eligible applicant who does not submit DPOC with their voter registration form but has DPOC on file with the Arizona Motor Vehicles Division will be registered as a full ballot voter whether they apply with the State or Federal Form. All other otherwise eligible applicants will be registered as federal-only voters.

has caused a manifest injustice. Elections officials are now subject to conflicting criminal penalties, orders, and policies. Identically situated voter registration applicants are treated differently depending on the voter registration application form they pick up. Applicants whose DPOC is on file with the State and accessible to state officials will see their registrations denied for failure to provide DPOC to the State. Voters whose registrations were valid prior to the motions panel's stay order but would not be valid if they were submitted after the stay order could be forgiven for wondering whether their registrations remain valid in advance of the upcoming election. And those who seek to register to vote in Arizona in the lead up to the November election may be unwilling to do so given the confusing and uncertain policies applicable under the eleventh-hour intervention of the motions panel. All Arizonans must now navigate an arcane web of shifting and confusing rules that will without a doubt dissuade some who are otherwise eligible and willing from exercising the fundamental right to vote.

Under the circumstances, we are compelled to exercise our discretion to reconsider the motions panel's order and reinstate the status quo in Arizona as it has been since 2018 pending this expedited appeal. Accordingly, we **VACATE**

the portion of the motions panel's order staying in part the judgment of the district court.

IT IS SO ORDERED.

[Filed: Aug 1, 2024]

Mi Familia Vota, et al. v. Petersen, et al., No. 24-3188; 24-3559; 24-4029 BUMATAY, J., dissenting

Election-law disputes are critical in a government based on popular sovereignty. After all, the outcomes of these cases determine how the people will choose who will govern them. But these cases are also the most perilous for courts. When any result may affect the election process, courts risk becoming entangled in political concerns. Thus, we must pay special attention to follow regular order and adjudicate these cases exactly as we would any other—there's no room for judicial innovations, unusual exceptions, or cut corners.

Unfortunately, we abandon regularity here. Before a motions panel of our court, Intervenor-Appellants moved to stay a lower-court injunction. The motions panel unanimously granted it in part. Plaintiffs-Appellees then moved for reconsideration of the motions panel's order. Motions for reconsideration of a motions panel's order are not meant to be a second bite at the apple. On the contrary, they are highly irregular and strongly disfavored, primarily appropriate if there have been "[c]hanges in legal or factual circumstances" since the motions panel addressed the issue. Ninth Cir. R. 27-10(a)(3). Indeed, our standard for reconsideration is so high that, to grant it, we must declare that our colleagues on the motions panel committed a "manifest injustice." *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc) (simplified). It's thus no surprise that reconsideration under these circumstances rarely happens.

Yet facing *identical* legal and factual circumstances on an even more expedited basis, the majority now grants the motion and lifts the partial stay. What's so pressing that makes Plaintiffs-Appellees entitled to the extraordinary remedy of reconsideration when nothing has changed in the case? Why flirt with the perception that we have adjudicated this dispute on something other than its merits? The answer is unclear to me, as it undoubtably will be to those citizens planning to vote in Arizona's election. All the public can take away from this episode is that four judges of the Ninth Circuit have voted to partially stay the injunction here, while two other judges voted against it. The two judges prevail—not because of any special insight, but because of the luck of an internal Ninth Circuit draw.

Regardless, the motions panel had the answer right the first time. Given the majority's rush to act, I outline only the main arguments against granting reconsideration here. In short, Intervenor-Appellants have carried their burden on all four *Nken* factors: likelihood of success on the merits, irreparable harm, the balance of interests, and the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). Reviewing these factors, we should have denied the motion for reconsideration and declined to revisit the partial stay of the injunction.

For these reasons, I respectfully dissent.

I. Background

In Arizona, eligible residents may register to vote in all elections—federal, state, and local—using either a registration form created by the State ("State Form") or one created by the United States Election Assistance Commission ("Federal Form"). *Mi Familia*

Vota v. Fontes, No. CV-22-00509, 2024 WL 862406, at *2 (D. Ariz. Feb. 29, 2024). To vote in state and local elections, Arizona requires eligible voters to provide documentary proof of citizenship ("DPOC"), such as a birth certificate, driver's license, or U.S. passport. *See* Ariz. Rev. Stat. § 16-166(F). The Supreme Court has held that the National Voting Rights Act ("NVRA") prohibits Arizona from requiring DPOC from voters who register with the Federal Form, *see Arizona v. Inter Tribal Council of Ariz. Inc.* ("*ITCA*"), 570 U.S. 1, 20 (2013), and so Arizona requires DPOC only from voters who register with the State Form. Federal Form registrants whose citizenship cannot be verified are given a "Federal-Only" designation that permits them to vote in federal elections, but not state or local ones. *Mi Familia Vota*, 2024 WL 862406, at *1–2. In 2022, the Arizona Legislature enacted Arizona Revised Statutes § 16-121.01(C), which requires state election officials to reject any State Forms which are "not accompanied by satisfactory evidence of citizenship."

Plaintiffs-Appellees challenged this law and others in federal district court. The district court ruled that § 16-121.01(C) is unenforceable for two reasons: First, it is preempted by the NVRA, *Mi Familia Vota*, 2024 WL 862406, at *39–40; and second, it is barred by a consent decree entered into by the Arizona Secretary of State in 2018. *See League of United Latin Am. Citizens of Ariz. v. Reagan*, No. 2:17-cv-04102 (D. Ariz.) (June 18, 2018). This consent decree ("LULAC decree") provides that when a State Form does not come with DPOC, the county recorder must attempt to confirm the applicant's state citizenship by searching the records of the Arizona Department of Transportation. If the applicant's state citizenship can be confirmed, he is registered to vote in all

elections; if it can't, then he is registered as a "Federal-Only" voter. *Mi Familia Vota*, 2024 WL 862406, at *3–4. The district court's permanent injunction was entered in May 2024.

Warren Peterson, in his official capacity as President of the Arizona State Senate; Ben Toma, in his official capacity as the Speaker of the Arizona House of Representatives; and the Republican National Committee ("Intervenor-Appellants") moved for a partial stay of the district court's order, which the district court denied. Intervenor-Appellants then moved for a stay of the district court's injunction. A motions panel of our court partially granted the stay on July 18, 2024, permitting § 16-121.01(C) to go into effect.

A little more than a week later, on July 26, Plaintiffs-Appellees moved for reconsideration on an emergency basis via Ninth Circuit Rule 27-3. We ordered a greatly expedited response from Intervenor-Appellants due just a few days later, on July 29.

II. Motions for reconsideration are strongly disfavored.

To begin, motions for reconsideration are strongly disfavored by our court. *See* Ninth Cir. R. 27-10 Advisory Committee Note (explaining that motions for reconsideration "of orders entered by a motions panel are not favored by the Court"). Beyond general disfavor, our court's rules explain that a motion for reconsideration should be brought only if "in the opinion of the movant, the Court has overlooked or misunderstood" "points of law or fact," or if there have been "[c]hanges in [the] legal or factual circumstances." Ninth Cir. R. 27-10(a)(3).

Under the rules, our reconsideration's stringent standard hasn't been met. While "a motions panel's legal analysis, performed during the course of deciding an emergency motion for a stay, is not binding on later *merits* panels," we are not adjudicating the merits at this stage. *See Innovation Law Lab v. Wolf*, 951 F.3d 1073, 1081 (9th Cir. 2020) (simplified) (emphasis added), *vacated and remanded sub nom. Mayorkas v. Innovation L. Lab*, 141 S. Ct. 2842 (2021). Freeing the merits panel to come to its own determination makes sense. A court at the merits stage has the benefit of lengthy briefing, oral argument, and (perhaps most importantly) time to thoroughly consider and research each issue. But a merits panel deciding a motion for reconsideration *before* the merits stage, as we do here, is no better informed or positioned to decide this issue than the motions panel. We face a similarly abbreviated timeline with similarly limited briefing. Nor have Plaintiffs-Appellees cited any specific facts or points of law that the motions panel misunderstood. And there have been no new developments here since the motions panel issued its order. Indeed, the only thing that has changed is the composition of the panels. And this change shouldn't compel a different result.

Plaintiffs-Appellees make a conclusory assertion that upholding the motions panel's order "will work a manifest injustice." Plaintiffs-Appellees speak of the supposed "judicially created confusion" resulting from the motions panel's order. Such speculation isn't enough to meet our high reconsideration standard. First, none of this is new. Claims of confusion were brought directly to the motions panel. Second, that the 2023 Elections Procedures Manual ("EPM") and the websites of the Arizona Secretary of State and county recorders have not yet been updated to reflect

the motions panel's order (indeed, perhaps because they are awaiting the outcome of this expedited motion for reconsideration) does not indicate that any voters are actually confused. Third, all this is undercut by the Arizona Secretary of State's own admission that "the EPM may memorialize court rulings as of its adoption date, but to the extent such rulings are reversed or modified on appeal, the statutory requirements as interpreted by the court will control over any contrary provisions in the EPM."

So our high standard for reconsideration is, on its own, enough to warrant denying this motion. But the motion is also wrong on the facts and the law. As I discuss below, the *Nken* factors all support the motions panel stay for § 16-121.01(C).

III. The *Nken* factors all favor issuing a partial stay.

We look at four factors when considering an application to stay a district court's injunction: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (simplified). "The first two factors . . . are the most critical." *Id.* Additionally, when the Government is a party to a case, as is the case here, "the balance of the equities and public interest factors merge." *Chamber of Com. v. Bonta*, 62 F.4th 473, 481 (9th Cir. 2023).

The motions panel had it right the first time. Intervenor-Appellants satisfied the *Nken* standard for a stay pending appeal with respect to the portion

of the injunction barring enforcement of § 16-121.01(C). As a result, we should have denied the motion for reconsideration.

a. Likelihood of Success on the Merits

i. The LULAC decree does not bind the Arizona Legislature.

Plaintiffs-Appellees argue that the district court was right to enjoin the enforcement of § 16-121.01(C) because it conflicts with Arizona's obligations under the LULAC decree. Recall that the LULAC decree, entered into by the Arizona Secretary of State, requires Arizona election officials to attempt to determine the state citizenship of State Form registrants who do not provide DPOC, and register them as full-ballot voters if their state citizenship can be validated. *Mi Familia Vota*, 2024 WL 862406, at *3–4. Perhaps Plaintiffs-Appellees' contention that these directives conflict with the election officials' obligations under § 16-121.01(C) is correct. Perhaps not. But their contention that this somehow binds the Arizona Legislature is clearly incorrect.

The notion that any action by a State executive-branch official may forever curtail a State legislature's lawmaking powers presents significant separation-of-powers concerns—concerns that even the district court realized constituted a "serious legal question." For example, imagine a State's executive branch opposes a law passed by the Legislature; if a political ally sues challenging that law, the executive branch will be sorely tempted to settle the case by agreeing that the law is unenforceable. It seems doubtful that the executive branch can circumvent legislative authority in that and similar ways. And the Supreme Court has echoed this concern speci-

fically with respect to consent decrees, recognizing that if they are not properly limited in scope, they have the potential to "improperly deprive future officials of their designated legislative and executive powers." *Horne v. Flores*, 557 U.S. 433, 449–50 (2009) (simplified); *see also Roosevelt Irrigation Dist. v. Salt River Project Agric. Improvement and Power Dist.*, 39 F. Supp. 3d 1051, 1055 (D. Ariz. 2014) (explaining that "political subdivisions" of the State are not bound by agreements or judgments to which the State is a party, absent specific language to the contrary).

While these separation-of-powers concerns would apply to any restriction of the Legislature's law-making powers, they're particularly alarming in the election-law context, where State legislatures have express constitutional authority to act. The Constitution provides that the "Times, Places, and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4. The Supreme Court has stressed that election regulation is a legislative concern. *See Moore v. Harper*, 600 U.S. 1, 10 (2023) (observing that the "state legislatures" have the "'duty' to prescribe rules governing federal elections" (simplified)); *see also Carson v. Simon,* 978 F.3d 1051, 1060 (8th Cir. 2020) ("[T]he Secretary [of State] has no power to override the Minnesota Legislature" by stipulating to the tabulation of absentee ballots received after Election Day.).

These separation-of-powers concerns are likely what animate the many cases signifying that legislative acts must predominate over consent decrees, not the other way around. After all, consent decrees cannot be used to handcuff governments in

perpetuity. As a general matter, consent decrees may need to give way to intervening changes in law, including legislative enactments. *See, e.g.*, *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 388 (1992) ("[A] consent decree must of course be modified if . . . one or more of the obligations placed upon the parties has become impermissible under federal law," and that modification may also be warranted "when the statutory or decisional law has changed to make legal what the decree was designed to prevent"); *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (noting, in the context of consent decrees, that "[t]he court cannot be required to disregard significant changes in law . . . if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong" (simplified)); *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1055 (9th Cir. 2007) (observing that a consent decree "cannot be a means for state officials to evade state law"); *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (explaining that parties to a consent decree "c[annot] agree to terms which would exceed their authority and supplant state law"); *Imprisoned Citizens Union v. Ridge*, 169 F.3d 178, 189 (3d Cir. 1999) (recognizing that subsequent legislative acts can terminate consent decrees premised on a prior legislative act or lack of governing legislative rules). So when a change in statutory law conflicts with a consent decree, we should ordinarily expect that the statute ought to be followed.

Especially because this motion is in emergency posture and requires rapid adjudication, concern for the separation of powers—particularly in the context of regulating elections—counsels against treating the LULAC decree as binding against the Arizona Legis-

lature's ability to set election parameters through § 16-121.01(C). This is reason enough to deny the motion, without even considering the many other arguments raised by Intervenor-Appellants for why the LULAC decree doesn't govern this case.

ii. The NVRA does not preempt Arizona's DPOC requirement.

Because the LULAC decree offers no lawful basis for overriding Arizona's State Form, Plaintiffs-Appellees have to offer some alternative basis to defeat the motions panel's stay. Once again, Plaintiffs-Appellees fail to point to any argument satisfying our stringent standard for reconsideration. Instead, they offer an alternative holding of the district court (taking up less than three pages in a more than 100-page order)—that the NVRA preempts the State's otherwise valid authority in this area. Plaintiffs-Appellees' contention fails on the text of the NVRA and our precedent. In short, the NVRA does not preempt Arizona's DPOC requirement for State Forms.

Start with the NVRA's plain language. To demonstrate preemption a litigant must point to "a constitutional text or a federal statute t[hat] assert[s]" preemptive force. *Puerto Rico Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988); *see also Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 767 (2019) (lead opinion of Gorsuch, J.) ("Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law."). So Congress's expressions are critical.

Plaintiffs-Appellees point to a few textual components of the NVRA to make their case.

To begin, the NVRA directs that "in the administration of voter registration for elections for Federal office, each State shall—. . . ensure that any eligible applicant is registered to vote in an election— . . . if the valid voter registration form of the applicant is" properly submitted, received, or accepted "not later than the lesser of 30 days, or the period provided by State law, before the date of the election." 52 U.S.C. § 20507(a)(1). In short, if an eligible applicant timely submits a valid voter registration form for elections for federal office, the State must ensure that the applicant is registered to vote.

So what does a valid form look like? States must "accept and use" the Federal Form created by the federal government "for the registration of voters in elections for Federal office." *Id.* § 20505(a)(1). At the same time, "[i]n addition to accepting and using the [federal] form" a State may also "develop and use" a State Form "that meets all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office." *Id.* § 20505(a)(2).

That then brings us to § 20508(b), which sets out the substantive standards for a State Form. It "may require only such identifying information . . . and other information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 20508(b)(1). The State Form also "shall include a statement that—" (A) "specifies each eligibility requirement (including citizenship);" (B) "contains an attestation that the applicant meets each such requirement; and" (C) "requires the signature of

the applicant, under penalty of perjury." *Id.* § 20508(b)(2).

So where does this leave us? Rather simply, "state-developed forms may require information the Federal Form does not." *ITCA*, 570 U.S. at 12. "States retain the flexibility to design and use their own registration forms, but the Federal Form provides a backstop: No matter what procedural hurdles a State's own form imposes, the Federal Form guarantees that a simple means of registering to vote in federal elections will be available." *Id.* Moreover, the Court has specifically recognized "Arizona's constitutional authority to establish qualifications (such as citizenship) for voting" and thus to obtain relevant information. *See id.* at 15–16. So "[s]ince the power to establish voting requirements is of little value without the power to enforce those requirements . . . it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id.* at 17.

Arizona has done exactly what the Court recognized as possible in *ITCA*. It has added a requirement to its own form to ensure its ability to verify citizenship. The district court nonetheless issued an injunction premised on a conflict between the NVRA and Arizona's proof-of-citizenship inquiry. Recall that § 20508(b)(1) requires any additional requirements to be "necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 52 U.S.C. § 20508(b)(1). To justify enjoining all applications of the law, the district court determined that Arizona's requirement was not "necessary." *Mi Familia Vota*, 2024 WL 862406, at

*39. Why? Because the requirement applies to new applicants, but not to some other applicants. *Id.* ("The Court cannot reconcile why DPOR would be *necessary* for new applicants when an attestation is *sufficient* to determine the eligibility of registered voters who subsequently obtain an out-of-state identification."). That's it. Even though the NVRA itself identifies "citizenship" as an "eligibility requirement," § 20508(b)(2)(A), the district court was satisfied with its pithy rejoinder to Arizona's asserted interest. *Id.* Indeed, the district court provided no further explanation of why it thought information demonstrating citizenship was unnecessary. Given the deference we should give to States in this arena, this isn't sufficient without an affirmative showing that Arizona's law contradicts Congress's mandate.

The failure of the district court to justify its holding, beyond that cursory statement, would itself validate the motions panel's stay. But the motions panel did not need to rely only on the district court's lack of justification. Our Circuit has in fact *already resolved this question* under similar circumstances.

More than fifteen years ago, we considered, in another extraordinary posture, an Arizona requirement for proof of citizenship as part of the registration process. *Gonzalez v. Arizona*, 485 F.3d 1041, 1046 (9th Cir. 2007). And we could not have been clearer. There, plaintiffs again argued that Arizona law was "preempted by the NVRA because, they say, the NVRA prohibits states from requiring that registrants submit proof of citizenship when registering to vote." *Id.* at 1050. But, as we said then, "[t]he language of the statute does not prohibit documentation requirements." *Id.* "Indeed, the statute permits states to 'require such identifying

information as is necessary to enable election officials to assess the eligibility of the applicant.'" *Id.* (simplified). We observed that the "NVRA clearly conditions eligibility to vote on United States citizenship" and it "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *Id.* at 1050–51.

The district court's order cannot abrogate the plain import of *ITCA* and the even more specific reasoning in *Gonzalez*. At the very least, we shouldn't reconsider the motions panel's stay against the backdrop of those two precedents and decide that the district court's injunction should be reinstated in full. And Plaintiffs-Appellees' arguments otherwise are beside the point. They rely on two out-of-circuit cases, one involving a different provision of the NVRA with a different standard, *Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016), and an Administrative Procedure Act case deferentially reviewing an administrative determination of necessity, *Kobach v. EAC*, 772 F.3d 1183 (10th Cir. 2014). Neither detract from the principles of *ITCA*, our circuit's holding in *Gonzalez*, and the deficit of reasoning from the district court.

In the alternative, the district court noted, and now Plaintiffs-Appellees raise on reconsideration, that the NVRA might preempt the State Form under the limited circumstances when "public assistance agencies" distribute them. *See Mi Familia Vota*, 2024 WL 862406, at *39 (citing 52 U.S.C. § 20506(a)(6)). They rely on language stating that public assistance agencies must provide the Federal Form or "the office's own form if it is equivalent to the [federal] form." *Id.* § 20506(a)(6)(A)(ii). Taking that text in "context and with a view to [its] place in the overall statutory scheme," *King v. Burwell*, 576 U.S. 473, 486

(2015) (simplified), it is likely that "equivalent" is synonymous with a compliant State Form—one "that meets all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office." 52 U.S.C. § 20505(a)(2). Since the district court failed to provide a convincing reason why Arizona's proof-of-citizenship requirement fails the test in § 20508(b), there is little reason to think it cannot also be distributed by public assistance agencies. Again, at the very least, the argument is not so irrefutable that reconsideration is warranted.

In short, the deficit of reasoning to enjoin a state law justified the motions panel's stay. Meanwhile, text and on-point precedent further support the motions panel's order. To grant reconsideration under these circumstances is extraordinary.

iii. The Equal Protection Clause does not prevent Arizona from accepting two different registration forms.

Plaintiffs-Appellees also assert that the partial stay was improper because § 16-121.01(C) violates the Equal Protection Clause of the Fourteenth Amendment. They argue that by rejecting State Forms without DPOC, but accepting Federal Forms without DPOC, Arizona treats similarly situated voters in an "arbitrary and disparate" way.

Plaintiffs-Appellees' invoke *Bush v. Gore*, 531 U.S. 98 (2000), to support their argument. But that doesn't work. *Bush v. Gore*, which the Supreme Court recognized was "limited to the present circumstances," gives little guidance here. *Id.* at 109. And it's easy to see why. *Bush v. Gore* prohibits courts from imposing different standards for counting ballots across a State. *Id.* That has little to do with

whether a state election official can accept two kinds of registration forms.

But more generally, accepting the argument would violate our system of federalism in general and the division of authorities between federal and state governments over election matters in particular. The Constitution itself envisions different sets of rules for federal and state elections. Indeed, neither the Elections Clause nor the Electors Clause gives Congress authority to regulate state election procedures. This reflects the Supreme Court's understanding as well. The Court has made clear that "States retain the flexibility to design and use their own registration forms" and that "[t]hese state-developed forms may require information the Federal Form does not." *ITCA*, 570 U.S. at 12. Nowhere did the Court suggest that the bare existence of differences between the State and Federal Forms' requirements could give rise to an equal protection challenge. So this argument fails as a basis to reconsider the stay on an expedited basis.

b. Irreparable Harm

To start with, the degree of irreparable harm that Intervenor-Appellants Toma and Peterson ("Legislative Leaders") must demonstrate to succeed is lessened because of their high likelihood of success. When considering whether the party seeking the stay will be irreparably harmed by the injunction, our court takes a sliding-scale approach to the analysis. *Nat. Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007) (observing that the likelihood of success and irreparable harm "represent two points on a sliding scale"). "[T]he required degree of irreparable harm increases as the probability of success decreases." *Manrique v. Kolc*, 65 F.4th 1037, 1041

(9th Cir. 2023). The inverse is also true. With high probabilities of success—as is the case here—the degree of irreparable harm that must be shown is lower.

But under any standard, the irreparable harm to the Legislative Leaders is obvious. By failing to stay the district court's injunction with respect to § 16-121.01(C), the Arizona Legislature, which the Legislative Leaders head, would suffer irreparable harm by the non-enforcement of a constitutional legislative enactment. Generally speaking, "*any* time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers) (emphasis added). When the legislative act in question touches a prerogative that is "primarily the duty and responsibility of the State" (such as regulating the manner of elections), "federal-court review" of such "legislation represents a serious intrusion on the most vital of local functions." *Abbott v. Perez*, 585 U.S. 579, 603 (2018) (simplified). So long as the enacted legislation is constitutional and within the authority of the legislature, an "injunction[] barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm the State." *Id*. at 602; *see also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). That is the precise effect of the injunction here—it bars the State from enforcing a statute enacted by the Arizona Legislature, meaning the Legislative Leaders will suffer irreparable harm.

Plaintiffs-Appellees assert that the Legislative Leaders are not the State and thus lack the authority to allege an irreparable harm to the State's sovereign interests. That's not the case. Begin with state law. *See Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 191 (2022) (explaining that courts must always respect "a State's chosen means of diffusing its sovereign powers among various branches and officials"). Arizona law grants the Legislative Leaders authority to contest an injunction suspending the Legislature's enactments. *See* Ariz. Rev. Stat. § 12-1841. Under the law, the Legislative Leaders are "entitled to be heard" in proceedings implicating the constitutionality of a state law and "may intervene as a party" or "file briefs in the matter. *Id.* § 12-1841(A), (D); *see, e.g.*, *Arizonans for Fair Elections v. Hobbs*, 335 F.R.D. 269, 274 (D. Ariz. 2020) ("[T]here is some force to the argument that, at least under Arizona law, the House Speaker and Senate President possess a unique stature that resembles that of the Attorney General[.]"); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) (observing that the Arizona Legislature had Article III standing to seek redress for injuries); *Forty-Seventh Legislature v. Napolitano*, 143 P.3d 1023, 1028 (Ariz. 2006) (en banc) ("[T]he Legislature has alleged a direct institutional injury and has standing"). Given all this, the Legislative Leaders may assert irreparable harm on behalf of the State. At the very least, it would be surprising to hold in this truncated proceeding—for the first time—that the Arizona House Speaker and Arizona Senate President lack the ability to assert injury in federal cases on behalf of the State.

c. Public Interest/Balance of Equities

Finally, the joint balance-of-interests factor favors the Intervenor-Appellants. It is well-established that "[s]tates have 'an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes.'" *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 954 (9th Cir. 2020) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997)). Equally fundamental is "a state's interest in running its elections without judicial interference." *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1372 (11th Cir. 2022) (citing *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurral)). This interest is strengthened by the *Purcell* doctrine, which "heightens the showing necessary . . . to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurral).

Plaintiffs-Appellees are quick to point out that *Purcell* cuts against Intervenor-Appellants here because § 16-121.01(C) was not enforced *before* the district court's injunction. So, they claim, the stay of the injunction is what constitutes "late, judicially imposed changes" to Arizona's election laws and procedures. But this argument backs into self-contradiction. If the status quo was the voluntary non-enforcement of § 16-121.01(C) without any court order, then the partial stay of the injunction doesn't cause them any injury. It presumably would just return to the status quo before the district court's injunction.

But even so, *Purcell* does not help Plaintiffs-Appellees. As Justice Kavanaugh observed, "[c]orrecting an erroneous lower court injunction of a state election law does not itself constitute a *Purcell* problem." *Id.* at 882 n.3. Indeed, the argument to the contrary "defies common sense and would turn *Purcell* on its head." *DNC v. Wis. State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurral). While we give some deference to district courts, in our judicial system, we do not give them the last word. *Purcell* thus doesn't prevent us from correcting the district court's erroneous injunction.

And Plaintiffs-Appellees do not demonstrate a countervailing interest that could challenge the State's interest to protect the integrity of its elections free from judicial interference. The district court found no "'concrete evidence' to corroborate that [Arizona's DPOC requirement] will in fact impede any qualified voter from registering to vote or staying on the voter rolls," *Mi Familia Vota*, 2024 WL 862406 at *49 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 201 (2008)), nor any evidence that Arizona's election-law statutes "impose an excessive burden on any specific subgroup of voters," *id.* at *51.

The balance of interests favors Intervenor-Appellants.

IV. Conclusion

With the political nature of this case, we should be *especially* careful to avoid the use of unconventional or disfavored procedures. In my mind, that concern alone should have been enough to deny Plaintiffs-Appellees' motion for reconsideration. But even so, the motions panel got the answer right. Intervenor-Appellants make a compelling showing of all the

Nken factors, and so that panel's partial stay of the district court's injunction should stand.

For these reasons, I respectfully dissent from the grant of the motion for reconsideration.

APPENDIX G

(ORDER LIST: 603 U.S.)

THURSDAY, AUGUST 22, 2024

ORDER IN PENDING CASE

24A164 REPUBLICAN NAT. COMM., ET AL. V. MI FAMILIA VOTA, ET AL.

The application for stay presented to Justice Kagan and by her referred to the Court is granted in part and denied in part. The district court's May 2, 2024 judgment is stayed only to the extent it enjoins enforcement of Ariz. Rev. Stat. Ann. § 16-121.01(C) (2023) pending disposition of the appeals in the United States Court of Appeals for the Ninth Circuit and disposition of a petition for a writ of certiorari, if any such writ is timely sought. Should certiorari be denied, this stay shall terminate automatically. In the event certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. The application is denied as to Ariz. Rev. Stat. Ann. §§ 16-121.01(E) and 16-127(A).

Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application in full.

Justice Sotomayor, Justice Kagan, Justice Barrett, and Justice Jackson would deny the application in full.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-22-00509-PHX-SRB

MI FAMILIA VOTA, et al.,

Plaintiffs,

v.

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

Defendants.

AND CONSOLIDATED CASES

FINAL JUDGMENT

This case arose out of eight consolidated lawsuits challenging various provisions of H.B. 2492 and H.B. 2243, enacted in 2022 ("Challenged Laws"). *See Mi Familia Kota v. Fontes*, No. 2:22-cv-00509-SRB (D. Ariz. Mar. 31, 2022); *Living United for Change in Ariz. v. Fontes*, No. 2:22-cv-00519-SRB (D. Ariz. Mar. 31, 2022); *United States v. Arizona*, No. 2:22-cv-01124-SRB (D. Ariz. July 5, 2022); *Poder Latinx v. Fontes*, No. 2:22-cv1003-MTL (D. Ariz. June 9, 2022); *Democratic Nat'l Comm. v. Fontes*, No. 2:22-cv01369-SRB (D. Ariz. Aug. 15, 2022); *Ariz. Asian Am. Native Hawaiian & Pac. Islander for Equity Coal. v. Fontes*, No. 2:22-cv-01381-SRB (D. Ariz. Aug. 16, 2022); *Promise Ariz. v. Fontes*, No. 2:22-cv-01602-SRB (D. Ariz. Sept. 20, 2022); *Tohono O'odham Nation v.*

Mayes, No. 2:22-cv-01901-SRB (D. Ariz. Nov. 7, 2022).

Defendants in this litigation are the State of Arizona, Adrian Fontes, in his official capacity as Arizona Secretary of State, Attorney General Kris Mayes, in her official capacity, the county recorders for each county in Arizona, Intervenor-Defendant Republican National Committee, and Intervenor-Defendants House Speaker Ben Toma and Senate President Warren Petersen.

On September 14, 2023, the Court entered a partial summary judgment order. (Doc. 534.) On February 29, 2024, after a bench trial, the Court issued findings of fact and conclusions of law. (Doc. 709.) In accordance with those rulings, the Court hereby **ORDERS, ADJUDGES, AND DECREES** as follows:

1. **IT IS ORDERED AND DECLARED** that H.B. 2492's restrictions on registration for presidential elections and voting by mail, *see* A.R.S. §§ 16-121.01(E), 16-127(A), are preempted by Section 6 of the National Voter Registration Act, 52 U.S.C. § 20505. It is **FURTHER ORDERED** that Defendants, their officers, agents, servants, employees, and attorneys, and anyone else in active concert or participation with them are **PERMANENTLY ENJOINED** from enforcing such restrictions.

2. **IT IS ORDERED AND DECLARED** that H.B. 2492's mandate to reject any State Form without accompanying Documentary Proof of Citizenship ("DPOC"), *see* A.R.S. § 16-121.01(C), may not

be enforced given the LULAC Consent Decree.1 It is **FURTHER ORDERED** that Defendants, their officers, agents, servants, employees, and attorneys, and anyone else in active concert or participation with them are **PERMANENTLY ENJOINED** from enforcing this mandate and that Arizona must abide by the LULAC Consent Decree and register eligible State Form users without DPOC for federal elections.

3. **IT IS ORDERED AND DECLARED** that H.B. 2492's checkbox requirement, *see* A.R.S. § 16-121.01(A), violates the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B), when enforced as to a person who provides DPOC and is otherwise eligible to vote. It is **FURTHER ORDERED** that Defendants, their officers, agents, servants, employees, and attorneys, and anyone else in active concert or participation with them are **PERMANENTLY ENJOINED** from enforcing the checkbox requirement when a person provides DPOC and is otherwise eligible to vote.

4. **IT IS ORDERED AND DECLARED** that H.B. 2492's requirement that individuals who register to vote using the State Form must include their place of birth, *see* A.R.S. § 16-121.01(A), violates the Materiality Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(B). It is **FURTHER ORDERED** that Defendants, their officers, agents, servants, employees, and attorneys, and anyone else in active concert or participation with them are **PERMANENTLY ENJOINED** from enforcing this requirement and may not reject State Form registrations

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[1] *League of United Latin American Citizens of Arizona et al. v. Reagan et al.*, Case No. 2:17-cv-04102-DGC (D. Ariz.), Doc. 37 (6/18/18).

that lack an individual's place of birth and must register an individual if that individual is found eligible to vote.

5. **IT IS ORDERED AND DECLARED** that, with respect to H.B. 2492's proof of location of residence requirement, *see* A.R.S. § 16-123:

a. A.R.S. § 16-123 references A.R.S. § 16-579(A)(1) for a list of documents that satisfy the documentary proof of location of residence requirement in A.R.S. § 16-123. The reference to § 16-579(A)(1) provides examples of documents, but is not an exhaustive list of the documents, that can be used to satisfy A.R.S. § 16-123.

b. A.R.S. § 16-123 does not require tribal members or other Arizona residents to have a standard street address for their home to satisfy A.R.S. § 16-123.

c. In addition to the documents listed in A.R.S. § 16-579(A)(1), the following documents satisfy the requirement in A.R.S. § 16-123:

- A valid unexpired Arizona driver license or nonoperating ID ("AZ-issued ID"), regardless of whether the address on the AZ-issued ID matches the address on the ID-holder's voter registration form and even if the AZ-issued ID lists only a P.O. Box.

- Any Tribal identification document, including but not limited to a census card, an identification card issued by a tribal government, or a tribal enrollment card, regardless of whether the Tribal identification document contains a photo, a physical address, a P.O. Box, or no address.

- Written confirmation signed by the registrant that they qualify to register pursuant to A.R.S. § 16-121(B), regarding registration of persons who do not reside at a fixed, permanent, or private structure.

6. **IT IS ORDERED AND DECLARED** that H.B. 2492's requirement that individuals registering to vote with the State Form must include documentary proof of location of residence to register for federal elections, *see* A.R.S. § 16-121.01(A), violates Sections 6 and 7 of the NVRA, 52 U.S.C. §§ 20505, 20506. It is **FURTHER ORDERED** that Defendants, their officers, agents, servants, employees, and attorneys, and anyone else in active concert or participation with them are **PERMANENTLY ENJOINED** from enforcing this requirement and may not reject State Form registrations that lack documentary proof of location of residence but must register an otherwise eligible voter registrant as a Federal-Only Voter.

7. **IT IS ORDERED AND DECLARED** that H.B. 2243's provisions requiring the systematic investigation and removal of registered voters within 90 days of a federal election, *see* A.R.S. § 16-165(A)(10), violate Section 8(c) of the NVRA, 52 U.S.C. § 20507(c)(2)(A). It is **FURTHER ORDERED** that Defendants, their officers, agents, servants, employees, and attorneys, and anyone else in active concert or participation with them are **PERMANENTLY ENJOINED** from enforcing these requirements within the 90-day period prior to the date of an election for federal office.

8. **IT IS ORDERED AND DECLARED** that H.B. 2243's requirement that county recorders conduct a citizenship check using USCIS's SAVE

system when they have reason to believe a registered voter is not a U.S. citizen, *see* A.R.S. § 16-165(I), violates the Different Standards, Practices, or Procedures Provision of the Civil Rights Act, 52 U.S.C. § 10101(a)(2)(A), and Section 8(b) of the NVRA, 52 U.S.C. § 20507(b). It is **FURTHER ORDERED** that Defendants, their officers, agents, servants, employees, and attorneys, and anyone else in active concert or participation with them are **PERMANENTLY ENJOINED** from enforcing this requirement and may not conduct citizenship checks using USCIS's SAVE system on registered voters whom county recorders have reason to believe lack U.S. citizenship.

9. **IT IS FURTHER ORDERED** that judgment is otherwise entered in favor of Defendants on all other claims addressed in the Court's September 14, 2023 partial summary judgment order (Doc. 534) and February 29, 2024 Amended Order (Doc. 709). The Court does not reach the plaintiffs' alternative claims against the Challenged Laws already declared unlawful in the Court's partial summary judgment order or plaintiffs' constitutional claims for those sections of the Challenged Laws ruled unlawful on statutory grounds. (*See* Doc. 600, Minute Entry for 10/24/23 Pretrial Conference (limiting claims to be presented at trial); Doc. 607, Supplement to the Joint Pretrial Order (identifying claims to be presented at trial); Doc. 608, Order Approving Joint Pretrial Order as Amended by Supplement; Doc. 709, Amended Order (findings of fact and conclusions of law) at 89 n.58 and at 108.)

10. **IT IS FURTHER ORDERED** that this Court shall retain jurisdiction to enforce the terms of this Final Judgment and to award such other relief as may be appropriate.

Dated this 2nd day of May, 2024.

/s/Susan R. Bolton
Susan R. Bolton
United States District Judge

APPENDIX I

Article I, Section 2, Clause 1 of the United States Constitution

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Article I, Section 4, Clause 1 of the United States Constitution

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article II, Section 1, Clause 2 of the United States Constitution

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Article III, Section 1 of the United States Constitution

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for

their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III, Section 2 of the United States Constitution

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 11 of the Judiciary Act of 1789

And be it further enacted, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. And shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than thus whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions herein after provided.

Article VII, Section 2 of the Arizona Constitution

Section 2. **A.** No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of eighteen years1 or over, and shall have resided in the state for the period of time preceding such election as prescribed by law, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex.

B. The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

C. No person who is adjudicated an incapacitated person shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

Section 20501 of Chapter 52 of the United States Code Findings and purposes

(a) Findings

The Congress finds that-

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

(b) Purposes

The purposes of this chapter are-

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

Section 20503 of Chapter 52 of the United States Code National procedures for voter registration for elections for Federal office

(a) In general

Except as provided in subsection (b), notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office--

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 20504 of this title;

(2) by mail application pursuant to section 20505 of this title; and

(3) by application in person--

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 20506 of this title.

(b) Nonapplicability to certain States

This chapter does not apply to a State described in either or both of the following paragraphs:

(1) A State in which, under law that is in effect continuously on and after August 1, 1994, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.

(2) A State in which, under law that is in effect continuously on and after August 1, 1994, or that was enacted on or prior to August 1, 1994, and by its terms is to come into effect upon the enactment of this chapter, so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

Section 20505 of Chapter 52 of the United States Code Mail registration

(a) Form

(1) Each State shall accept and use the mail voter registration application form prescribed by the

Federal Election Commission pursuant to section 20508(a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 20508(b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms

The chief State election official of a State shall make the forms described in subsection (a) available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters

(1) Subject to paragraph (2), a State may by law require a person to vote in person if--

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person--

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act;

(B) who is provided the right to vote otherwise than in person under section 20102(b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices

If a notice of the disposition of a mail voter registration application under section 20507(a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 20507(d) of this title.

Section 20506 of Chapter 52 of the United States Code
Voter registration agencies

(a) Designation

(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies--

(A) all offices in the State that provide public assistance; and

(B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.

(3)(A) In addition to voter registration agencies designated under paragraph (2), each State shall designate other offices within the State as voter registration agencies.

(B) Voter registration agencies designated under subparagraph (A) may include--

(i) State or local government offices such as public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and offices not described in paragraph (2)(B) that provide services to persons with disabilities; and

(ii) Federal and nongovernmental offices, with the agreement of such offices.

(4)(A) At each voter registration agency, the following services shall be made available:

(i) Distribution of mail voter registration application forms in accordance with paragraph (6).

(ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

(B) If a voter registration agency designated under paragraph (2)(B) provides services to a person with a disability at the person's home, the agency shall provide the services described in subparagraph (A) at the person's home.

(5) A person who provides service described in paragraph (4) shall not--

(A) seek to influence an applicant's political preference or party registration;

(B) display any such political preference or party allegiance;

(C) make any statement to an applicant or take any action the purpose or effect of which is to

discourage the applicant from registering to vote; or

(D) make any statement to an applicant or take any action the purpose or effect of which is to lead the applicant to believe that a decision to register or not to register has any bearing on the availability of services or benefits.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall--

(A) distribute with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance--

(i) the mail voter registration application form described in section 20508(a)(2) of this title, including a statement that--

(I) specifies each eligibility requirement (including citizenship);

(II) contains an attestation that the applicant meets each such requirement; and

(III) requires the signature of the applicant, under penalty of perjury; or

(ii) the office's own form if it is equivalent to the form described in section 20508(a)(2) of this title,

unless the applicant, in writing, declines to register to vote;

(B) provide a form that includes--

(i) the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?";

(ii) if the agency provides public assistance, the statement, "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.";

(iii) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote (failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)), together with the statement (in close proximity to the boxes and in prominent type), "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.";

(iv) the statement, "If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private."; and

(v) the statement, "If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with.", the blank being filled by the name, address, and telephone number of the appropriate official to whom such a complaint should be addressed; and

(C) provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with

regard to the completion of its own forms, unless the applicant refuses such assistance.

(7) No information relating to a declination to register to vote in connection with an application made at an office described in paragraph (6) may be used for any purpose other than voter registration.

(b) Federal Government and private sector cooperation

All departments, agencies, and other entities of the executive branch of the Federal Government shall, to the greatest extent practicable, cooperate with the States in carrying out subsection (a), and all non-governmental entities are encouraged to do so.

(c) Armed Forces recruitment offices

(1) Each State and the Secretary of Defense shall jointly develop and implement procedures for persons to apply to register to vote at recruitment offices of the Armed Forces of the United States.

(1) A recruitment office of the Armed Forces of the United States shall be considered to be a voter registration agency designated under subsection (a)(2) for all purposes of this chapter.

(d) Transmittal deadline

(1) Subject to paragraph (2), a completed registration application accepted at a voter registration agency shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the

appropriate State election official not later than 5 days after the date of acceptance.

Section 20507 of Chapter 52 of the United States Code Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall--

(1) ensure that any eligible applicant is registered to vote in an election--

(A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later

than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except--

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from **the** official lists of eligible voters by reason of--

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of--

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance

of an accurate and current voter registration roll for elections for Federal office--

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual--

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which--

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that--

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude--

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant--

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of **the** notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant--

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the

same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the

official list of eligible voters by reason of such a change of address except as provided in subsection (d).

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 20509 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include--

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means--

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic area of the consolidated municipalities or other geographic units.

Section 20508 of Chapter 52 of the United States Code Federal coordination and regulations

(a) In general

The Election Assistance Commission--

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this chapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this chapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this chapter.

(b) Contents of mail voter registration form

The mail voter registration form developed under subsection (a)(2)--

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that--

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application--

(i) the information required in section 20507(a)(5)(A) and (B) of this title;

(ii) a statement that, if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes; and

(iii) a statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

Section 16-101 of the Arizona Revised Statutes
Qualifications of registrant; definition

A. Every resident of this state is qualified to register to vote if the resident:

1. Is a citizen of the United States and has provided satisfactory evidence of citizenship as prescribed in § 16-166.

2. Will be eighteen years of age or more on or before the date of the regular general election next following his registration.

3. Is a resident of this state twenty-nine days next preceding the election, except as provided in § 16-126.

4. Is able to write the resident's name or make the resident's mark, unless prevented from so doing by physical disability.

5. Has not been convicted of treason or a felony, unless restored to civil rights.

6. Has not been adjudicated an incapacitated person as defined in § 14 5101.

B. For the purposes of this title, "resident" means an individual who has actual physical presence in this state, or for purposes of a political subdivision actual physical presence in the political subdivision, combined with an intent to remain. A temporary absence does not result in a loss of residence if the individual has an intent to return following his absence. An individual has only one residence for purposes of this title.

Section 16-121.01 of the Arizona Revised Statutes Requirements for Proper Registration; Violation; Classification

A. A person is presumed to be properly registered to vote on completion of a registration form as prescribed by section 16-152 that contains at least the name, the residence address or the location, proof of location of residence as prescribed by section 16-123, the date and place of birth and the signature or other statement of the registrant as prescribed by section 16-152, subsection A, paragraph 20 and a checkmark or other appropriate mark in the "yes" box next to the question regarding citizenship. Any application for registration, including an application on a form prescribed by the United States election assistance commission, must contain a checkmark or other appropriate mark in the "yes" box next to the question regarding citizenship as a condition of being properly registered to vote as either a voter who is eligible to vote a full ballot or a voter who is eligible to vote only with a ballot for federal offices. The completed registration form must also contain the person's Arizona driver license number, the nonoperating identification license number issued pursuant to section 28-3165, the last four digits of the person's social security number or the person's affirmation that if an Arizona driver license number, a nonoperating identification license number or the last four digits of the person's social security number is not provided, the person does not possess a valid Arizona driver or nonoperating identification license or a social security number and the person is hereby requesting that a unique identifying number be assigned by the secretary of state pursuant to section 16-152, subsection A, paragraph 12, subdivision (c). Any application that does not include all of the

information required to be on the registration form pursuant to section 16-152 and any application that is not signed is incomplete, and the county recorder shall notify the applicant pursuant to section 16-134, subsection B and shall not register the voter until all of the information is returned.

B. The presumption in subsection A of this section may be rebutted only by clear and convincing evidence of any of the following:

1. That the registrant is not the person whose name appears on the register.

2. That the registrant has not resided in this state for twenty-nine days next preceding the election or other event for which the registrant's status as properly registered is in question.

3. That the registrant is not properly registered at an address permitted by section 16-121.

4. That the registrant is not a qualified registrant under section 16-101.

C. Except for a form produced by the United States election assistance commission, any application for registration shall be accompanied by satisfactory evidence of citizenship as prescribed in section 16-166, subsection F, and the county recorder or other officer in charge of elections shall reject any application for registration that is not accompanied by satisfactory evidence of citizenship. A county recorder or other officer in charge of elections who knowingly fails to reject an application for registration as prescribed by this subsection is guilty of a class 6 felony. The county recorder or other officer in charge of elections shall send a notice to the applicant as prescribed in section 16-134, subsection B.

D. Within ten days after receiving an application for registration on a form produced by the United States election assistance commission that is not accompanied by satisfactory evidence of citizenship, the county recorder or other officer in charge of elections shall use all available resources to verify the citizenship status of the applicant and at a minimum shall compare the information available on the application for registration with the following, provided the county has access:

1. The department of transportation databases of Arizona driver licenses or nonoperating identification licenses.

2. The social security administration databases.

3. The United States citizenship and immigration services systematic alien verification for entitlements program, if practicable.

4. A national association for public health statistics and information systems electronic verification of vital events system.

5. Any other state, city, town, county or federal database and any other database relating to voter registration to which the county recorder or officer in charge of elections has access, including an electronic registration information center database.

E. After complying with subsection D of this section, if the county recorder or other officer in charge of elections matches the applicant with information that verifies the applicant is a United States citizen, is otherwise qualified as prescribed by section 16-101 and has met the other requirements of this section, the applicant shall be properly registered. If the county recorder or other officer in charge of elections

matches the applicant with information that the applicant is not a United States citizen, the county recorder or other officer in charge of elections shall reject the application, notify the applicant that the application was rejected because the applicant is not a United States citizen and forward the application to the county attorney and attorney general for investigation. If the county recorder or other officer in charge of elections is unable to match the applicant with appropriate citizenship information, the county recorder or other officer in charge of elections shall notify the applicant that the county recorder or other officer in charge of elections could not verify that the applicant is a United States citizen and that the applicant will not be qualified to vote in a presidential election or by mail with an early ballot in any election until satisfactory evidence of citizenship is provided.

F. The county recorder or other officer in charge of elections shall record the efforts made to verify an applicant's citizenship status as prescribed in subsections D and E of this section. If the county recorder or other officer in charge of elections fails to attempt to verify the citizenship status of an applicant pursuant to subsections D and E of this section and the county recorder or other officer in charge of elections knowingly causes the applicant to be registered and it is later determined that the applicant was not a United States citizen at the time of registration, the county recorder or other officer in charge of elections is guilty of a class 6 felony.

Section 16-165 of the Arizona Revised Statutes Causes for cancellation; report

A. The county recorder shall cancel a registration:

1. At the request of the person registered.

2. When the county recorder is informed and confirms that the person registered is dead.

3. If the person has been adjudicated an incapacitated person as defined in § 14-5101.

4. When the person registered has been convicted of a felony, and the judgment of conviction has not been reversed or set aside. The county recorder shall cancel the registration on receipt of notice of a felony conviction from the court or from the secretary of state or when reported by the elector on a signed juror questionnaire that is completed pursuant to § 21-314.

5. On production of a certified copy of a judgment directing a cancellation to be made.

6. Promptly after the election if the person registered has applied for a ballot pursuant to § 16-126.

7. When a person has been on the inactive voter list and has not voted during the time periods prescribed in § 16-166, subsection C.

8. When the county recorder receives written information from the person registered that the person has a change of residence within the county and the person does not complete and return a new registration form within twenty-nine days after the county recorder mails notification of the need to complete and return a new registration form with current information.

9. When the county recorder receives written information from the person registered that the person has a change of address outside the county, including when the county recorder either:

(a) Receives a form from the person pursuant to subsection E of this section on which the person has confirmed that the person is not a resident of this state.

(b) Receives a summary report from the jury commissioner or jury manager pursuant to § 21-314 indicating that the person has stated that the person is not a resident of the county. Before the county recorder cancels a registration pursuant to this subdivision, the county recorder shall send the person notice by forwardable mail and a postage prepaid pread-dressed return form requesting the person confirm by signing under penalty of perjury that the person is a resident of the county and is not knowingly registered to vote in another county or another state. The notice shall inform the person that failure to return the form within thirty-five days will result in the person's registration being canceled. If the person fails to return the notice within thirty-five days the county recorder shall cancel the person's registration.

10. When the county recorder obtains information pursuant to this section and confirms that the person registered is not a United States citizen, including when the county recorder receives a summary report from the jury commissioner or jury manager pursuant to § 21-314 indicating that a person who is registered to vote has stated that the person is not a United States citizen. Before the county recorder cancels a registration pursuant to this paragraph, the county recorder shall send the person notice by

forwardable mail that the person's registration will be canceled in thirty-five days unless the person provides satisfactory evidence of United States citizenship pursuant to § 16-166. The notice shall include a list of documents the person may provide and a postage prepaid preaddressed return envelope. If the person registered does not provide satisfactory evidence within thirty-five days, the county recorder shall cancel the registration and notify the county attorney and attorney general for possible investigation.

11. When the county recorder receives confirmation from another county recorder that the person registered has registered to vote in that other county.

B. If the county recorder receives credible information that a person has registered to vote in a different county, the county recorder shall confirm the person's voter registration with that other county and, on confirmation, shall cancel the person's registration pursuant to subsection A, paragraph 11 of this section.

C. If the county recorder cancels a registration pursuant to subsection A, paragraph 8 of this section, the county recorder shall send the person notice that the registration has been canceled and a registration form with the information described in § 16-131, subsection C attached to the form.

D. When proceedings in the superior court or the United States district court result in a person being declared incapable of taking care of himself and managing his property, and for whom a guardian of the person and estate is appointed, result in such person being committed as an insane person or result in a person being convicted of a felony, the clerk of

the superior court in the county in which those proceedings occurred shall file with the secretary of state an official notice of that fact. The secretary of state shall notify the appropriate county recorder and the recorder shall cancel the name of the person on the register. Such a notice shall name the person covered, shall give the person's date and place of birth if available, the person's social security number, if available, the person's usual place of residence, the person's address and the date of the notice, and shall be filed with the recorder of the county where the person last resided.

E. Each month the department of health services shall transmit to the secretary of state without charge a record of the death of every resident of the state reported to the department within the preceding month. This record shall include only the name of the decedent, the decedent's date of birth, the decedent's date of death, the decedent's social security number, if available, the decedent's usual legal residence at the time of death and, if available, the decedent's father's name or mother's maiden name. The secretary of state shall use the record for the sole purpose of canceling the names of deceased persons from the statewide voter registration database. In addition, the department of health services shall annually provide to the secretary of state from the statewide electronic death registration system without charge a record of all deaths of residents of this state that are reported to the department of health services. The records transmitted by the department of health services shall include only the name of the decedent, the decedent's date of birth, the decedent's social security number, if available, the decedent's usual legal residence at the time of death and, if available, the decedent's father's name

or mother's maiden name. The secretary of state shall compare the records of deaths with the statewide voter registration database. Public access to the records is prohibited. Use of information from the records for purposes other than those required by this section is prohibited. The name of each deceased person shall promptly be canceled from the statewide voter registration database and the secretary of state shall notify the appropriate county recorder and the recorder shall cancel the name of the person from the register.

F. Each month the department of transportation shall furnish to the secretary of state without charge a list of persons who the department has been notified have been issued a driver license or the equivalent of an Arizona nonoperating identification license in another state. Within ten days after receiving the list of persons from the department of transportation, the secretary of state shall provide to the appropriate county recorder a list of registered voters in that county who have been issued a driver license or the equivalent of an Arizona nonoperating identification license in another state. The county recorder shall promptly send notice by forwardable mail to each person who has obtained a driver license or the equivalent of an Arizona nonoperating identification license in another state and a postage prepaid preaddressed return form requesting the person confirm by signing under penalty of perjury that the person is a resident of this state and is not knowingly registered to vote in another state or confirm that the person is not a resident of this state. The notice shall inform the person that failure to return the form within ninety days will result in the person's registration being placed in inactive status. If the person returns the form within ninety days con-

firming that the person is a resident of this state, the county recorder shall maintain the registration in active status. If the person fails to return the form within ninety days, the county recorder shall place the person's registration in inactive status.

G. Each month the secretary of state shall compare the statewide voter registration database to the driver license database maintained by the department of transportation. The secretary of state shall notify the appropriate county recorder if a person who is registered to vote in that county has changed the person's residence address or is not a United States citizen.

H. To the extent practicable, each month the county recorder shall compare the county's voter registration database to the social security administration database.

I. To the extent practicable, each month the county recorder shall compare persons who are registered to vote in that county and who the county recorder has reason to believe are not United States citizens and persons who are registered to vote without satisfactory evidence of citizenship as prescribed by § 16-166 with the systematic alien verification for entitlements program maintained by the United States citizenship and immigration services to verify the citizenship status of the persons registered.

J. For persons who are registered to vote without satisfactory evidence of citizenship as prescribed in § 16-166, the county recorder shall compare the electronic verification of vital events system maintained by a national association for public health statistics and information systems, if accessible, with the information on the person's voter registration file.

K. To the extent practicable, the county recorder shall review relevant city, town, county, state and federal databases to which the county recorder has access to confirm information obtained that requires cancellation of registrations pursuant to this section.

L. After canceling a registration pursuant to this section, the county recorder shall send a notice by forwardable mail informing the person that the person's registration has been canceled, the reason for cancellation, the qualifications of electors pursuant to § 16-101 and instructions on registering to vote if the person is qualified.

M. The secretary of state shall report the following information to the legislature at the end of each quarter:

1. The number of deaths reported to the secretary of state by the department of health services, the number of voter registration cancellation notices issued by the secretary of state to the county recorders as a result of those reports and the number of registrations canceled as a result of those notices.

2. The number of persons reported to the secretary of state who have been issued a driver license or the equivalent of an Arizona nonoperating identification license in another state, the number of notices sent pursuant to subsection E of this section and the number of voter registrations that have been placed in inactive status and the number of voter registrations that have been canceled as a result of those notices.

3. The number of persons who have stated on a jury questionnaire that the person is not a United States citizen, the number of notices sent pursuant to subsection A, paragraph 10 of this section and the

number of registrations that have been canceled as a result of those notices.

4. The number of persons who have stated on a jury questionnaire that the person is not a resident of the county, the number of notices sent pursuant to subsection A, paragraph 9, subdivision (b) of this section and the number of registrations that have been canceled as a result of those notices.

5. The number of registrations on the inactive voter list that have been canceled pursuant to subsection A, paragraph 7 of this section.

Section 16-166 of the Arizona Revised Statutes
Verification of registration

A. Except for the mailing of sample ballots, a county recorder who mails an item to any elector shall send the mailing by nonforwardable first class mail marked with the statement required by the postmaster to receive an address correction notification. If the item is returned undelivered, the county recorder shall send a follow-up notice to that elector within three weeks of receipt of the returned notice. The county recorder shall send the follow-up notice to the address that appears in the general county register or to the forwarding address provided by the United States postal service. The follow-up notice shall include an appropriate internet address for revising voter registration information or a registration form and the information prescribed by § 16-131, subsection C and shall state that if the elector does not complete and return a new registration form with current information to the county recorder or make changes to the elector's voter registration information that is maintained online within thirty-five days, the

elector's registration status shall be changed from active to inactive.

B. If the elector provides the county recorder with a new registration form or otherwise revises the elector's information, the county recorder shall change the general register to reflect the changes indicated on the new registration. If the elector indicates a new residence address outside that county, the county recorder shall forward the voter registration form or revised information to the county recorder of the county in which the elector's address is located. If the elector provides a new residence address that is located outside this state, the county recorder shall cancel the elector's registration.

C. The county recorder shall maintain on the inactive voter list the names of electors who have been removed from the general register pursuant to subsection A or E of this section for a period of four years or through the date of the second general election for federal office following the date of the notice from the county recorder that is sent pursuant to subsection E of this section.

D. On notice that a government agency has changed the name of any street, route number, post office box number or other address designation, the county recorder shall revise the registration records and shall send a new verification of registration notice to the electors whose records were changed.

E. The county recorder on or before May 1 of each year preceding a state primary and general election or more frequently as the recorder deems necessary may use the change of address information supplied by the postal service through its licensees and the information provided by an electronic voter regis-

tration information center to identify registrants whose addresses may have changed. If it appears from information provided by the postal service or an electronic voter registration information center that a registrant has moved to a different residence address, the county recorder shall send the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form or an appropriate internet address for revising voter registration information by which the registrant may verify or correct the registration information. If the registrant fails to revise the information or return the form postmarked not later than thirty-five days after the mailing of the notice, the elector's registration status shall be changed from active to inactive. If the notice sent by the recorder is not returned, the registrant may be required to provide affirmation or confirmation of the registrant's address in order to vote. If the registrant does not vote in an election during the period after the date of the notice from the recorder through the date of the second general election for federal office following the date of that notice, the registrant's name shall be removed from the list of inactive voters. If the registrant has changed residence to a new county, the county recorder shall provide information on how the registrant can continue to be eligible to vote.

F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:

1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation

or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.

2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

G. Notwithstanding subsection F of this section, any person who is registered in this state on the effective date of this amendment to this section is deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of

citizenship unless the person is changing voter registration from one county to another.

H. For the purposes of this section, proof of voter registration from another state or county is not satisfactory evidence of citizenship.

I. A person who modifies voter registration records with a new residence ballot shall not be required to submit evidence of citizenship. After citizenship has been demonstrated to the county recorder, the person is not required to resubmit satisfactory evidence of citizenship in that county.

J. After a person has submitted satisfactory evidence of citizenship, the county recorder shall indicate this information in the person's permanent voter file. After two years the county recorder may destroy all documents that were submitted as evidence of citizenship.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV17-4102-PHX DGC

LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF ARIZONA; ARIZONA STUDENTS' ASSOCIATION,

Plaintiffs,

v.

MICHELE REAGAN, in her official capacity as Secretary of State of Arizona; ADRIAN FONTES, in his official capacity as Maricopa County Recorder,

Defendants.

CONSENT DECREE

Before the Court is the Joint Motion Requesting Entry of Consent Decree, filed by Plaintiff League of United Latin American Citizens of Arizona ("LULAC-Arizona"), Plaintiff Arizona Students' Association ("ASA"), Defendant Michele Reagan, in her official capacity as Secretary of State of Arizona (the "Secretary"), and Defendant Adrian Fontes, in his official capacity as Maricopa County Recorder ("Recorder Fontes"). Doc. 36. All Plaintiffs and Defendants shall hereafter be referred to as the "Parties."

On November 7, 2017, LULAC-Arizona and ASA initiated this action against the Secretary and Recorder Fontes. The complaint alleged that

Arizona's dual voter registration policies violate the First and Fourteenth Amendments to the United States Constitution. Specifically, LULAC-Arizona and ASA alleged that Arizona treats voter registration applicants differently depending on whether they use Arizona's state registration form (the "State Form") or the national registration form (the "Federal Form"). At the time the lawsuit was filed, fourteen of Arizona's County Recorders rejected State Form applications submitted without valid documentary proof of citizenship ("DPOC"). Federal law required the County Recorders to accept Federal Form applications, even when they are submitted without DPOC. The Motor Vehicles Department ("MVD") Proxy Table was then electronically checked through an automated process to determine whether the Federal Form applicants had a valid driver's license, which indicates that DPOC is supposed to be on file with the MVD. Those with DPOC on file are eligible to vote in both state and federal elections ("Full Ballot Voter"). Those who did not have DPOC on file with the MVD were only able to vote in federal elections ("Fed Only Voter").

As a result, whether one who does not present valid DPOC is registered to vote in federal elections is entirely dependent on which form the applicant uses to register. Those using the Federal Form but not providing DPOC, are registered to vote in federal elections; and, depending on the results of the Secretary's automated review of the MVD database, may be registered to vote in state elections as well. But those using the State Form, and not providing valid DPOC, are not registered to vote in any elections because the application is rejected in its entirety. LULAC-Arizona and ASA alleged that this

dual voter registration process violated the First and Fourteenth Amendments.

The Secretary denies that Arizona's voter registration policies violate the First and Fourteenth Amendments or are otherwise illegal under state or federal law. The Secretary asserts that Federal and State Form applicants are not similarly situated for equal protection purposes. The Secretary asserts that Arizona is constitutionally permitted to require those applying to register to vote using the State Form to personally provide DPOC at the time that they submit their State Form. The Secretary further asserts that there is no constitutional or statutory requirement that Arizona election officials register applicants for federal elections when they have chosen to use the State Form to register to vote rather than the Federal Form.

Nevertheless, the Secretary and Recorder Fontes desire to make it as easy possible for Arizona's citizens to register to vote, while remaining consistent with Arizona and federal law and also providing necessary safeguards to deter those who would commit voter registration fraud. Having reviewed the applicable law, the Secretary and Recorder Fontes have concluded that current technology allows the Secretary, Recorder Fontes, and the other Arizona County Recorders to treat State Form applications exactly as they treat Federal Form applications, and that because of current technology such treatment is consistent with the provisions of Arizona law, including the requirements of Proposition 200, codified at A.R.S. §§ 16-166(F) and 16-152(A)(23). The Secretary and Recorder Fontes agree that treating Federal Form and State Form applications the same will make it easier for

Arizona's citizens to register to vote, while also providing important safeguards to prevent unlawful voter registration. Accordingly, on February 8, 2018, the Secretary and Recorder Fontes through their counsel notified counsel for LULAC-Arizona and ASA of their desire to enter into an agreement that will resolve the underlying litigation and also benefit Arizona's citizens.

The Parties have negotiated in good faith and agree to the entry of this Consent Decree as an appropriate resolution. Accordingly, the Parties stipulate and agree as follows:

PRELIMINARY RECITALS

1. LULAC-Arizona is the Arizona-based branch of the oldest and largest national Latino civil rights organization. LULAC is a non-profit membership organization with a presence in most of the fifty states. Founded in 1929, it works to advance the economic condition, educational attainment, political influence, health and civil rights, including voting rights, of the Hispanic population of the United States.

2. ASA is a student-led, non-partisan membership organization created to represent the collective interest of the over 140,000 university students and over 400,000 community college students in Arizona. ASA advocates at the local, state, and national levels for the interests of students. As a part of its mission, ASA encourages students throughout Arizona to register to vote through voter registration activity.

3. Michele Reagan is the Arizona Secretary of State. The Secretary of State is responsible for supervising voter registration throughout the state and providing binding regulations and guidelines for

voter registration. A.R.S. § 16-142. Secretary Reagan was sued in her official capacity only.

4. Adrian Fontes is the Maricopa County Recorder, an elected countywide officer. Recorder Fontes is responsible for conducting voter registration in Maricopa County. A.R.S. §§ 16-131, -134. Recorder Fontes was sued in his official capacity only.

5. This action was brought by LULAC-Arizona and ASA to vindicate First and Fourteenth Amendment rights relating to voter registration.

6. Arizona's practice of treating Federal Form and State Form applications differently, described above, arose from past Arizona election officials' understanding of the effect of Proposition 200, which was passed by Arizona's voters in 2004 and codified at A.R.S. §§ 16-166(F), 16-152(A)(23), in conjunction with the technology available at the time. Since the passage of Prop. 200 in 2004, a new statewide voter registration database has been implemented and provides additional tools to election officials.

7. Arizona's voter registration technology, including its voter registration database, now allows DPOC already on file with the MVD database to be associated near-instantaneously with voter registration applications submitted without DPOC, irrespective of whether the applications are State Forms or Federal Forms.

8. The Secretary denies that prior practices, challenged in this lawsuit, were unlawful. By agreeing to this Consent Decree, the Secretary and Recorder Fontes seek to serve Arizona's citizens by (1) continuing to comply with Arizona law while

(2) making the voter registration process using the State Form easier.

DEFINITIONS

1. "ADOT" means the Arizona Department of Transportation, which is established pursuant to A.R.S. § 28-331. It has the responsibility to "provide for an integrated and balanced state transportation system." The Arizona Motor Vehicles Division is a division of ADOT. A.R.S. § 28-332(C).

2. "AHCCCS" means the Arizona Health Care Cost Containment System, which is established pursuant to A.R.S. § 36-2902. AHCCCS is Arizona's Medicaid agency that offers health care programs to serve Arizona residents.

3. "Applicant" means an individual who has submitted an application to register to vote in the State of Arizona.

4. "AVID Database" means the voter registration database, currently being developed for the state of Arizona and intended to replace the current Database. The AVID Database is projected to be operational sometime in 2019 or early 2020, but shall be operational no later than July 1, 2020 except as provided in subparagraph (a), below.

(a) The date of July 1, 2020, contemplated for the operational function of the AVID Database, is contingent on the vendor with whom the Secretary has contracted to develop AVID fulfilling its obligations to have AVID operational in 2019 or early 2020 at the latest. Should the vendor be unable to meet this contingency, or should the implementation of the AVID Database otherwise be delayed, the Secretary shall notify the Court and the Parties to

this Consent Decree, in writing, and shall indicate in writing the date by which the vendor believes that AVID will be operational. Plaintiffs retain the right to seek a remedy from the Court to enforce this agreement if the implementation of the AVID database is unduly delayed.

(b) The provisions in this consent decree that apply to the AVID database will also apply to any future voter registration system adopted by the Secretary of State's office.

5. "County Recorder" means the County Recorder of each of Arizona's fifteen counties, and includes all county election officials working in or in conjunction with their offices.

6. "Database" means the existing electronic storage system developed and administered by the Secretary that contains the official voter registration record for every voter in the state. *See* A.R.S. § 16-168(J).

7. "DES" means the Arizona Department of Economic Security, which is established pursuant to A.R.S. § 41-1952.

8. "Designated voter registration agencies" are agencies that are required to provide voter registration services pursuant to the National Voter Registration Act.

9. "DHS" means the Arizona Department of Health Services, which is established pursuant to A.R.S. § 36-102.

10. "DPOC" means documentary proof of citizenship, and is limited to the forms of satisfactory evidence of citizenship listed in A.R.S. § 16-166(F).

11. "F-type License" means the designation that the MVD uses in its database to distinguish Arizona driver's license holders who, at the time that their driver's licenses were issued, were presumed by MVD to not be United States citizens.

12. "Fed Only Voter" means an individual who is registered to vote solely in Arizona elections for federal office.

13. "Federal Form" means the National Mail Voter Registration Form, provided by the U.S. Elections Assistance Commission and used to register to vote in elections for federal office, as well as the Federal Write-in Absentee Ballot and Federal Post Card Application as those terms are used in 52 U.S.C. §§ 20302 and 20303.

14. "Federal Office" means the office of President or Vice President; or of Senator or Representative in, or Delegate or Resident Commissioner to, the United States Congress. 52 U.S.C. § 20502(2).

15. "Full Ballot Voter" means an individual who is registered to vote in Arizona elections for federal, state, and local office.

16. "Guidance" means formal guidance on voter registration procedures that the Secretary of State will provide to the County Recorders pursuant to her role as chief election official responsible for prescribing uniform procedures for voting. *See* A.R.S. § 16-142. The Secretary will provide Plaintiffs' counsel with copies of her Guidance before it is sent to the County Recorders.

17. "MVD" means the Arizona Motor Vehicles Division.

18. "MVD database" means the electronic storage system developed and administered by the Arizona Motor Vehicle Department.

19. "MVD Proxy Table" means the MVD data provided to the Secretary of State that includes the nightly updates of MVD transactions that occurred in the past twenty-four hours that MVD sends to the Secretary in batch form.

20. "Procedures Manual" means the State of Arizona Elections Procedures Manual, which provides the rules related to voting and the conduct of elections. A.R.S. § 16-452. The Secretary is required to develop the Procedures Manual in conjunction with the fifteen County Recorders. *Id*. The Procedures Manual has the force of law. A.R.S. § 16-452(C). The Procedures Manual, 2018 Edition, has been drafted by the Secretary and submitted to the Governor and Attorney General as required by law for their review. *Id*.

21. "Protected Voter Registration" means the program to ensure anonymity to survivors of stalking, domestic violence, and sexual assault through the Address Confidentiality Program provided by A.R.S. § 41-161, et seq., and certain other individuals pursuant to A.R.S. § 16-153.

22. "Secretary" means the Arizona Secretary of State and her office, as well as successors in office.

23. "State Form" means the options for voter registration created and provided by the State of Arizona and its agencies, including but not limited to the online registration available through Service Arizona, the paper application available on the Secretary of State's website, the paper application

available at all County Recorder offices, and the Protected Voter Registration process.

24. "State Office" means any elected statewide, county-wide, or municipal public office, other than a Federal Office, for which a voter registered in the State of Arizona is eligible to vote.

ORDER

Accordingly, the Parties having freely given their consent, and the terms of the Consent Decree being fair, reasonable, and consistent with the requirements of state and federal law,

IT IS ORDERED as follows:

1. The Joint Motion for Approval of Consent Judgment (Doc. 36) is **granted.**

2. **The Procedures Manual.** The Parties are aware that the draft Procedures Manual, 2018 Edition has been submitted by the Secretary to Arizona's Governor and Attorney General for their review as required by statute. *See* A.R.S. § 16-452(B). Within thirty days after entry of this Consent Decree, the Secretary shall revise the Procedures Manual to incorporate the terms of this Consent Decree ("Procedures Manual Revisions") and send the Procedures Manual Revisions, together with the Secretary's recommendation of approval, to the Governor and Attorney General for their review, *see* A.R.S. § 16-452(B), and also to Plaintiffs' counsel. If Plaintiffs determine that the Procedures Manual Revisions do not comply with this Consent Decree, Plaintiffs may seek review by this Court through the Court's procedures for motions. If the Governor and Attorney General do not approve the Procedures Manual Revisions or

request modifications, the Secretary will send the Attorney General and/or Governor's rejections or proposed modifications to Plaintiffs' counsel. If those rejections or proposed modifications are in any respect inconsistent with this Consent Decree, Plaintiffs may use any available legal remedies to secure compliance with this Consent Decree.

2. **State Form Applications Submitted Without DPOC.** Within thirty days after entry of this Consent Decree, the Secretary shall, in writing:

a. provide guidance to the County Recorders to accept State Form applications submitted without DPOC;

b. provide guidance to the County Recorders to enter all such applications in the Database (or, in the case of Maricopa County and Pima County, to enter all such applications in their county voter registration databases and transmit such entries to the Database);

c. provide guidance to the County Recorders to immediately register the applicants for federal elections, provided the applicant is otherwise qualified and the voter registration form is sufficiently complete; and

d. check all State Form applications submitted without DPOC against the MVD database Proxy Table, via the automated processes in the Database, to determine whether the MVD has DPOC on file for the applicants. If DPOC is located, the Secretary shall promptly notify the applicable County Recorder via the automated processes in the Database that the State Form applicant has DPOC on file with

the MVD and so must be made a Full Ballot Voter via the automated process in the Database.

i. if the Secretary's check performed by the automated processes in the Database against the MVD database Proxy Table indicates that a State Form applicant holds an F-Type License, the Secretary shall promptly notify the applicable County Recorder of that fact via the automated processes of the Database. The automated processes of the Database will also flag this issue so that the County Recorder will know to change that applicant's voter registration status to "not eligible." The Secretary shall provide guidance to the County Recorders that the County Recorders shall notify the applicant by U.S. Mail within ten business days after receiving notice via the automated process in the database, according to information on file with the MVD database, that the applicant holds an F-Type License indicating non-citizenship and so will not be registered to vote. The notification from the County Recorder shall also inform the applicant that the applicant can provide valid DPOC to the County Recorder in order to become a Full Ballot Voter. The notification will be accompanied by the form described in Paragraph 3 (the "DPOC Submission Form"). The applicant may submit DPOC to the County Recorder through the process described in Paragraph 3 to become a Full Ballot Voter.

ii. if the Secretary's check via the automated features of the Database determines that a State Form applicant does not hold an F-Type License, but also does not have DPOC on file with the MVD, the Secretary shall promptly notify the applicable County Recorder of that result via the automated processes of the Database. The County Recorder shall notify these applicants by U.S. Mail within ten business days after receiving notice from the Secretary that (1) the County Recorder does not have the requisite DPOC to process their application; (2) they must submit DPOC if they wish to be a Full Ballot Voter; and, (3) until such time as they submit DPOC, they will be a Fed Only Voter and so will only be eligible to vote in Federal elections. The notification shall be accompanied by the form described in Paragraph 3 (the "DPOC Submission Form"). The applicant may submit DPOC to the County Recorder through the process described in Paragraph 3 to become a Full Ballot Voter. Until and unless the applicant submits valid DPOC, the County Recorders shall cause those voter registration applicants to be made Fed Only Voters.

3. **Provision of DPOC After the Submission of a State Form Application.** Applicants who do not submit DPOC with their State Form application and do not have DPOC on file with MVD, and are notified by the applicable County Recorder that they will be Fed Only Voters unless and until they submit DPOC, may submit valid DPOC to become a Full

Ballot Voter. To do so, they shall submit their DPOC to the County Recorder with a form provided to them by that official. This form (the "DPOC Submission Form"), which shall be developed by the Secretary and the County Recorders within thirty days after entry of this Consent Decree, shall contain sufficient information to allow the County Recorder to link the voter registration applicant's DPOC with his or her State Form application already on file in the Database.

A. Applicants who submit their State Form application at least twenty-nine days before an election as required by statute, A.R.S. §§ 16-120(A), -134(C), and whose valid DPOC with the DPOC Submission Form is received by their County Recorder by 5 p.m. local time on the Thursday before the election, will be made Full Ballot Voters by the County Recorder and may vote in the upcoming election as a Full Ballot Voter. The registrations of such applicants shall be deemed to have occurred on the date that they originally submitted their State Form application. If the County Recorder has already transmitted a Fed Only early ballot to that voter, the voter will have the option to vote either that Fed Only early ballot or else vote a provisional Full Ballot at the polling place or vote center and comply with the rules regarding provisional ballots.

B. Applicants who submit their State Form application at least twenty-nine days before an election, and whose valid DPOC is received by 5 p.m. local time on the Thursday before the election, but who do not submit the DPOC Submission Form, may be made Full Ballot Voters by the County Recorder if the County Recorder has sufficient information to link the voter registration applicant's DPOC with the

applicant's State Form application already on file in the Database. If the County Recorder makes such an applicant a Full Ballot Voter, and if the County Recorder has already transmitted a Fed Only early ballot to that voter, the voter will have the option to vote either that Fed Only early ballot or else vote a provisional Full Ballot at the polling place or vote center and comply with the rules regarding provisional ballots.

C. Applicants who do not submit their State Form application at least twenty-nine days before an election as provided by statute, or whose valid DPOC is received by their County Recorder after 5 p.m. local time on the Thursday before the election, will not be made Full Ballot Voters for the upcoming election. The County Recorder shall make such applicants Full Ballot Voters within five business days after processing provisional ballots, and they shall be Full Ballot Voters for subsequent elections.

D. For all applicants who submit State Form applications without valid DPOC, but subsequently submit valid DPOC and do not submit the DPOC Submission Form, the County Recorder may make the applicant a Full Ballot Voter if the County Recorder has sufficient information to link the voter registration applicant's DPOC with the applicant's State Form application already on file in the Database. If the County Recorder lacks sufficient information to link the DPOC to the voter's application in order to make the applicant a Full Ballot Voter, the County Recorder may follow up with the applicant to seek the missing information if the County Recorder has sufficient information to do so. Applicants who subsequently provide the missing information necessary to link their DPOC to their

applications shall be made Full Ballot Voters by the County Recorder within ten business days.

4. **State Form Applications Submitted On or After January 1, 2017.** This Consent Decree will govern all voter registration applications submitted after entry of this Consent Decree, including applications submitted within thirty days after entry of this Consent Decree. However, within thirty days after entry of this Consent Decree, the Secretary shall also provide written guidance to all County Recorders except the Maricopa County Recorder that, pursuant to the Consent Decree, they may, at their discretion, implement the new procedures outlined in Paragraphs 2–3 of this Consent Decree for State Form applications dating back to January 1, 2017, provided that they have the capability to ensure that such applicants have not moved, become deceased, or otherwise subsequently already registered to vote. Any applicants whose applications were filed before entry of this Consent Decree who are newly registered as Fed Only or Full Ballot Voters as a result of that process will be given the proper notice of their new registration status by U.S. Mail.

Within ninety days of entry of this Consent Decree, the Maricopa County Recorder shall implement the new procedures outlined in Paragraphs 2–3 of this Consent Decree for State Form applications dating back to January 1, 2017. This process shall include: (1) entering all State Forms submitted without DPOC into the database and immediately registering those applicants for federal elections, (2) checking the applicants' status against the MVD database, and (3) sending the applicants notification of their new registration status.

5. **Federal Form Applications.** Within thirty days after entry of this Consent Decree, the Secretary shall provide written guidance to the County Recorders to promptly register all applicants who submit their Federal Form application with valid DPOC as Full Ballot Voters and promptly register all applicants who submit their Federal Form application without valid DPOC as Fed Only Voters. From the date of the entry of the Consent Decree, the Secretary shall also cause all new Federal Form applications submitted without DPOC to be checked against the MVD Proxy Table promptly upon entry into the Database, via the automated processes in the Database, to determine whether the MVD has DPOC on file for such Federal Form applicants, and take the following steps:

a. If this check determines that the MVD Proxy Table has DPOC on file for any Federal Form applicant, the Secretary shall promptly notify the applicable County Recorder via the automated process in the Database that the applicant has DPOC on file with MVD and so must be made a Full Ballot Voter via the automated process in the Database.

b. If this check determines that the MVD Proxy Table has information indicating that any Federal Form applicant holds an F-Type License, the Secretary shall promptly notify the applicable County Recorder of that fact via the automated processes of the Database and flag this record for the County Recorder to change that applicant's voter registration status to "not eligible." The County Recorder shall notify the applicant by U.S. Mail within ten business days after receiving notice from the Secretary that, according to information on file with the MVD database, the applicant holds an F-Type License indi-

cating non-citizenship and so will not be registered to vote. The County Recorder's notice shall also inform the applicant that, if this information is not correct, the applicant may provide valid DPOC in order to become a Full Ballot Voter. The notification will be accompanied by the DPOC Submission Form descrybed in Paragraph 3. The applicant may submit valid DPOC to the County Recorder through the process described in Paragraph 3 to become a Full Ballot Voter.

c. If this check determines for any applicant that the MVD database does not have DPOC on file and also that the applicant does not hold an F-Type License, the Secretary shall promptly notify the applicable County Recorder of that result via the automated processes of the Database. The County Recorder shall notify these applicants by U.S. Mail within ten business days after receiving notice from the Secretary that (1) the County Recorder does not have the requisite DPOC to process their application; (2) they must submit valid DPOC if they wish to be a Full Ballot Voter; and, (3) until such time as they submit valid DPOC, they will be a Fed Only Voter and so will only be eligible to vote in Federal elections. The notification will be accompanied by the DPOC Submission Form described in Paragraph 3. The applicant may submit valid DPOC to the County Recorder through the process described in Paragraph 3 to become a Full Ballot Voter. Until and unless the applicant submits valid DPOC, the County Recorders shall cause those voter registration applicants to be made Fed Only Voters.

d. Federal Form applicants who subsequently submit valid DPOC shall be made Full Ballot Voters

according to and in conformity with the process described in Paragraph 3.

6. **Registered Voters Who Move From One Arizona County to Another.** The AVID Database or another voter registration database similar to the AVID Database shall be operational as described, and according to the terms set forth, in the Definitions section of this consent decree. When the AVID Database is operational, the Secretary and County Recorders will be able to verify DPOC and append that information to applicants' voting records when those applicants change voter registration from one Arizona county to another. Consequently, once the AVID Database is operational and in use by the Secretary and the County Recorders, registered Full Ballot Voters will not be required to independently submit DPOC to their new County Recorder, so long as their DPOC is in the AVID Database.

7. **Application to Other Forms of Registration.** The procedures outlined above for processing voter registration applications submitted without valid DPOC will apply equally to all forms of voter registration, including voter registration through designated voter registration agencies, the Federal Post Card Application (FPCA), the Federal Write-In Absentee Ballot, and the In-Person EZ Voter Registration system.

8. **Education of the Public.** The Secretary shall continue to make reasonable efforts to better educate the citizens of Arizona concerning their opportunities to register to vote, including opportunities presented by the Federal Form. The Secretary will provide Plaintiffs' counsel with a copy of the planned notice that she intends to place on her website. Within

thirty days after the entry of this Consent Decree, the Secretary shall:

a. Update her website to explain that:

i. the State Form requires valid DPOC for state elections only;

ii. submission of a sufficiently complete State Form with valid DPOC will make the applicant a Full Ballot Voter;

iii. submission of a sufficiently complete State Form without DPOC will make the applicant a Fed Only Voter;

iv. the Federal Form does not require DPOC;

v. submission of the Federal Form without valid DPOC will make the applicant a Fed Only Voter; and

vi. submission of the Federal Form with valid DPOC will make the applicant a Full Ballot Voter.

b. Provide guidance to the County Recorders that they should provide the information required in this Section 8 on their websites;

c. Notify ADOT, DHS, AHCCCS, and DES of the changes in voter registration procedures outlined in this Consent Decree;

d. Within four months after the entry of this Consent Decree, the Secretary shall create a new State Form that explains that citizens who do not submit DPOC with their registration forms will be registered only for federal elections until the appropriate proof of citizenship is provided or acquired. The Secretary will provide notice to Plaintiffs' counsel regarding the form of the explanation des-

cribed in the previous sentence. The Secretary will create the new State Form within three months if the Secretary determines that it is possible to do so. The Secretary shall provide guidance to the County Recorders and all State Offices that disseminate voter registration forms, including designated voter registration agencies, that they should utilize the new State Form as soon as practicable. *See* A.R.S. § 16-352(C). Within thirty days after entry of the Consent Decree, the Secretary will provide written notice to the County Recorders that there will be changes made to the State Form within four months after the date the Consent Decree was entered.

10. **Continuing Jurisdiction**. The Court shall retain jurisdiction over this action until December 31, 2020 to enter such further relief as may be necessary for the effectuation of the terms of this Consent Decree.

11. **Attorneys' Fees and Costs.** The Parties will continue to confer regarding what amount, if any, the State Defendants should pay to Plaintiffs for their attorneys' fees and costs. If the Parties are unable to agree privately upon payment of fees and costs, Plaintiffs will file a motion for attorneys' fees and costs pursuant to 42 U.S.C. § 1988 within forty-five days after entry of this consent decree.

The Clerk of Court is directed to terminate this action.

Dated this 18th day of June, 2018.

/s/David G. Campbell
David G. Campbell
Unite States District Judge