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14 **IN THE UNITED STATES DISTRICT COURT**  
15 **FOR THE DISTRICT OF ARIZONA**

16 Mi Familia Vota, et. al.,  
Plaintiffs,

17 v.

18 Adrian Fontes, et. al.,  
19  
20 Defendants.

No. 2:22-cv-00509-SRB (Lead Case)  
No. 2:22-cv-01124-SRB (Consolidated)

United States’ Partial Motion for  
Summary Judgment and Opposition to  
Defendants’ Motions for Partial  
Summary Judgment

Oral Argument Requested

21 Living United for Change in Arizona, et al.,  
22 Plaintiffs,

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v.  
Adrian Fontes,  
Defendant,  
and  
State of Arizona, et al.,  
Defendants.

Poder Latinx, et al.,  
Plaintiffs,  
v.  
Adrian Fontes, et al.  
Defendants.

United States of America,  
Plaintiff,  
v.  
State of Arizona, et al.,  
Defendants.

Democratic National Committee, et al.  
Plaintiffs,  
v.  
Adrian Fontes, et al.,  
Defendants,  
and  
Republican National Committee,  
Defendant-Intervenor.

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Arizona Asian American Native Hawaiian  
and Pacific Islander for Equity Coalition,  
Plaintiff,

v.

Adrian Fontes, et al.,  
Defendants.

Promise Arizona, et al.,  
Plaintiffs,

v.

Adrian Fontes, et al.,  
Defendants.

Tohono O’odham Nation, et al.,

v.

Kris Mayes, et al.,  
Defendants.

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1           The United States respectfully submits this memorandum in support of its motion  
2 for partial summary judgment on its claim arising under Section 6 of the National Voter  
3 Registration Act and in opposition to the motions for partial summary judgment by the  
4 State of Arizona and the Arizona Attorney General (“State Defendants”) and Defendant-  
5 Intervenors, ECF Nos. 364, 367.

## 6           **I. Introduction**

7           The Court instructed the parties to move for summary judgment only on claims  
8 that involve “legal issues [and] do not require discovery,” March 23, 2023 Sched. Conf.  
9 Tr. at 36:20-22, ECF No. 340. The United States’ claim under Section 6 of the National  
10 Voter Registration Act (“NVRA”) meets those criteria. As State Defendants now  
11 concede, Arizona must “accept and use” the federal voter registration form (“Federal  
12 Form”) without requiring documentary proof of the registrant’s citizenship as a  
13 prerequisite to vote in federal elections, including those for President. Defendant-  
14 Intervenors’ contrary arguments fail. Congress is fully empowered to legislate as to  
15 presidential elections. Accordingly, the NVRA’s command that states “accept and use”  
16 the Federal Form preempts HB 2492’s documentary proof of citizenship requirement for  
17 registrants seeking to vote in presidential elections. Because no material facts are  
18 disputed, the United States’ motion for partial summary judgment on its NVRA claim  
19 should be granted.

20           The United States’ second claim, brought under Section 101 of the Civil Rights  
21 Act (“Materiality Provision”), 52 U.S.C. § 10101(a)(2)(B), cannot be resolved on  
22 summary judgment at this time. The State Defendants have moved for summary

1 judgment as to that claim. ECF No. 364. But their motion raises material fact questions  
2 as to 1) the purported utility of attempting to use birthplace to confirm voter identity, and  
3 the State’s past, current, and expected procedures for doing so, and 2) whether and how  
4 Arizona’s counties have used, do use, or expect to use the citizenship checkbox on  
5 Arizona’s voter registration form to determine citizenship. Discovery has commenced as  
6 to these and other questions that go to the heart of the United States’ Materiality  
7 Provision claim. The United States is currently seeking and analyzing information  
8 essential to opposing the State Defendants’ motion—information that the State  
9 Defendants and County Defendants alone can provide. Accordingly, State Defendants’  
10 motion for partial summary judgment on the United States’ Materiality Provision claim is  
11 at best premature. The Court should deny the State Defendants’ motion and allow  
12 Plaintiffs to take discovery under Fed. R. Civ. P. 56(d). The Court should also deny, or at  
13 least defer ruling on, the State Defendants’ motion for partial summary judgment as to  
14 the NVRA’s impact on HB 2492’s mail voting restrictions. Since the United States’  
15 Materiality Provision claim also challenges those same mail voting restrictions,  
16 delineating the NVRA’s application to them at this time will not resolve the ultimate  
17 question of whether they may be implemented under federal law.

## 18 **II. Background**

19 Arizona House Bill (“HB”) 2492 is an omnibus election law that in part restricts  
20 eligible U.S. citizens’ ability to register and vote. HB 2492 creates new voter registration  
21 requirements for prospective voters in Arizona, whether they register to vote using the  
22 Federal Form or Arizona’s voter registration form (“State Form”). The law also restricts

1 the kinds of federal elections in which voters who registered using the Federal Form  
2 (“federal-only voters”) can cast ballots. The law went into effect on January 1, 2023.

3 **A. HB 2492’s Documentary Proof of Citizenship (“DPOC”) Requirements.**

4 Arizona passed HB 2492 in the wake of a failed prior attempt to impose DPOC  
5 requirements on Federal Form registrants. In 2004, Arizona adopted Proposition 200,  
6 which imposed a DPOC requirement for all voter registration applicants. Litigation over  
7 whether Proposition 200’s DPOC requirement violated the NVRA ended up in the  
8 Supreme Court. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 6–7 (2013)  
9 (“ITCA”). The Court concluded that the DPOC requirement violated Section 6 of the  
10 NVRA because states must “accept and use” the Federal Form as sufficient to register to  
11 vote in federal elections. *Id.* at 15. Arizona must thus ensure that eligible applicants are  
12 registered if a valid Federal Form is timely submitted. It may not reject a completed  
13 Federal Form because an applicant omitted additional information—such as DPOC—that  
14 state law requires for registration. *Id.* at 11–13. The Court held that Arizona’s DPOC  
15 requirements for the Federal Form frustrated the NVRA’s purpose of creating a simple  
16 means to register to vote in federal elections and increasing voter registration among  
17 eligible citizens. *Id.* at 13; *see also* 52 U.S.C.A. § 20501(b).

18 Despite *ITCA* and bedrock authority establishing Congress’s power to regulate all  
19 federal elections, Arizona enacted HB 2492 in 2022. State Defs. Statement of Facts at ¶  
20 1, ECF No. 365. HB 2492 again imposes DPOC requirements on some federal-only  
21 voters. The law requires election officials to confirm the citizenship status of voter  
22 registration applicants by cross-checking those applicants against several databases. *Id.* §

1 16-121.01(D). If officials are unable to verify an applicant’s citizenship status, they must  
2 notify the applicant, who must then provide DPOC. *Id.* § 16-121.01(E). Applicants who  
3 fail to provide DPOC are denied the right to vote in presidential elections and by mail in  
4 congressional elections. *Id.*

5 HB 2492 also affects Arizona voters who are already registered to vote in federal  
6 elections. *Id.* at § 16-127(A). The law requires these voters to provide DPOC to vote in  
7 presidential elections and to vote by mail in congressional elections even though the  
8 voters have already successfully registered to vote with the Federal Form. *See id.*

9 **B. HB 2492’s Citizenship Checkbox and Birthplace Requirements.**

10 HB 2492 also impacts prospective voters who register to vote using the State  
11 Form. Ariz. Rev. Stat. § 16-121.01(A), (C). The State Form requires applicants to attest  
12 to their citizenship by checking a box confirming the applicant is a U.S. Citizen  
13 (“citizenship checkbox”). Election officials must reject applications without the  
14 checkbox mark—even if the applicant has provided DPOC. The law similarly requires  
15 election officials to reject any State Forms that do not include the applicant’s state or  
16 country of birth (“birthplace”). *Id.* § 16-121.01(A) (referencing *id.* § 16-152(A)(7)).

17 **C. The Court’s Order Denying State Defendants’ Motions to Dismiss.**

18 In its February 16, 2023, Order denying State Defendants’ motion to dismiss, this  
19 Court found that the United States had properly stated its claims. ECF No. 304.  
20 Regarding the United States’ NVRA claim, the Court found it plausible that *ITCA*  
21 preempts HB 2492’s DPOC requirement for applicants who use the Federal Form to  
22 register to vote. *Id.* at 29-30. Neither the State Defendants’ arguments nor the United

1 States’ response turned on facts—the issue in the motions to dismiss was whether  
 2 Congress has authority to regulate presidential elections. The Court’s Order denying the  
 3 motions to dismiss similarly relied only on these legal arguments. *Id.*

4 As to the United States’ Materiality Provision claim, the Court found it plausible  
 5 that HB 2492 requires duplicate and immaterial information from registrants. *Id.* at 32.  
 6 The Court held that the State Defendants failed to establish as a matter of law that  
 7 birthplace and the citizenship checkbox were material—rather than merely relevant—or  
 8 that the State’s prior methods used to confirm citizenship were unusable. *Id.*<sup>1</sup>

### 9 III. Legal Standard

10 The Court must grant summary judgment if the movant “shows that there is no  
 11 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
 12 of law.” *Armendariz v. Padilla*, No. CV 15-01890-PHX-SRB (MHB), 2017 WL  
 13 7410994, at \*1 (D. Ariz. Mar. 17, 2017) (citing Fed. R. Civ. P. 56(a) and *Celotex Corp. v.*  
 14 *Catrett*, 477 U.S. 317, 322–23 (1986)), *aff’d sub nom. Armendariz v. Auricchio*, 700 F.  
 15 App’x 730 (9th Cir. 2017). The movant must “present[] the basis for its motion and  
 16 identify[] those portions of the record . . . that it believes demonstrate the absence of a

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17  
 18 <sup>1</sup> Defendants subsequently changed their position as to the United States’ NVRA claim.  
 19 By letter dated April 17, 2023, Hayleigh S. Crawford, the then-Deputy Solicitor General  
 20 for the State of Arizona, wrote to counsel for all parties to state that “Attorney General  
 21 Mayes does not intend to continue asserting as a defense to Plaintiffs’ claims that  
 22 Congress lacks the power to regulate presidential elections. That defense is foreclosed by  
 binding authority. . . .Accordingly, the State acknowledges that to the extent H.B. 2492  
 conditions acceptance of the federal mail voter registration form for presidential election  
 registration on documentary proof of citizenship, it is preempted by the federal  
 requirement that States ‘accept and use’ the federal form.” U.S. Statement of Facts ¶ 7,  
 Ex. B.

1 genuine issue of material fact.” *Id.* “If the movant fails to carry its initial burden of  
2 production, the nonmovant need not produce anything.” *Id.* If the moving party “meets  
3 its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence  
4 of a factual dispute and that the fact in contention is material, i.e., a fact that might affect  
5 the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the  
6 evidence is such that a reasonable jury could return a verdict for the nonmovant.” *Id.*  
7 In reviewing the evidence, courts “draw all reasonable inferences in favor of the  
8 nonmoving party, and it may not make credibility determinations or weigh the evidence.”  
9 *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 150 (2000).

#### 10 **IV. Argument**

##### 11 **A. The NVRA Preempts HB 2492’s DPOC Requirements for Registrants 12 Using the Federal Form.**

13 The State Defendants and the United States agree that Section 6 of the NVRA  
14 preempts HB 2492’s DPOC requirement for federal-only voter registration applicants as  
15 a matter of law. State Defs. Mot. at 4, ECF No. 364; Secretary of State Answer at 3, ECF  
16 No. 122; U.S. Resp. Mot. Dismiss at 5-11, ECF No. 152.<sup>2</sup> As long as applicants in  
17 Arizona attest under oath that they are citizens and meet remaining Federal Form  
18 requirements, the NVRA requires Arizona election officials to accept and use that Form.  
19 *ITCA*, 570 U.S. at 9–13 (holding that the NVRA mandates that states accept the Federal  
20 Form “*as sufficient* for the requirement it is meant to satisfy”) (emphasis in original); *see*

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21 <sup>2</sup> The United States addressed the authority establishing Congress’s power to regulate  
22 presidential elections in its Response to Defendants’ Motion to Dismiss, ECF No. 152. It  
incorporates in full its legal arguments from that pleading here.

1 52 U.S.C. § 20505(a)(1). Defendant-Intervenors assert, however, that the NVRA does  
2 not apply to presidential elections, and that HB 2492’s DPOC requirement is therefore  
3 valid. Def. Int. Mot. at 2–8, ECF No. 367; Joinder by Def. Int. Ariz. Legis. 1-2, ECF No.  
4 369. They are wrong.

### 5 **1. Congress Can Regulate Presidential Elections.**

6 Courts have long recognized Congress’s authority to regulate presidential  
7 elections. See U.S. Resp. Mot. Dismiss at 7–8 (collecting cases); *Burroughs v. United*  
8 *States*, 290 U.S. 534 (1934); see also *United States v. Classic*, 313 U.S. 299, 320 (1941)  
9 (the Necessary and Proper Clause empowers Congress to choose the “means by which its  
10 constitutional powers are to be carried into execution”); *Fish v. Kobach*, 840 F.3d 710,  
11 719 n.7 (10th Cir. 2016) (“[B]oth the Supreme Court and our sister courts have rejected  
12 the proposition that Congress has no power to regulate presidential elections”); *Voting*  
13 *Rights Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995) (“The broad power given to  
14 Congress over congressional elections has been extended to presidential elections”), *cert.*  
15 *denied*, 516 U.S. 1093 (1996).

16 That authority flows from Congress’s broader constitutional authority to regulate  
17 all federal elections. U.S. Const. art. 1, § 4 (Elections Clause); *id.* art. I, § 8 (Necessary  
18 and Proper Clause); *id.* amend. XIV; *id.* amend. XV; see also U.S. Resp. to Mot. Dismiss  
19 at 6–9; *Oregon v. Mitchell*, 400 U.S. 112, 124 n.7 (1970) (Black, J.) (“This power arises  
20 from the nature of our constitutional system of government and from the Necessary and  
21 Proper Clause.”); *ITCA*, 570 U.S. at 9, 14; *Ariz. State Legislature v. Ariz. Indep.*  
22 *Redistricting Comm’n*, 576 U.S. 787, 814–15 (2015) (“The dominant purpose of the

1 Elections Clause, the historical record bears out, was to empower Congress to override  
2 state election rules . . . .”). Indeed, the Framers intended Congress to have preemptory  
3 power over all federal election regulations to preserve the national government. *See*  
4 *ITCA*, 570 U.S. at 8 (quoting *The Federalist* No. 59, at 362–63 (A. Hamilton) (Clinton  
5 Rossiter ed., 1961)) (“‘[E]very government ought to contain in itself the means of its own  
6 preservation,’ and ‘an exclusive power of regulating elections for the national  
7 government, in the hands of the State legislatures, would leave the existence of the Union  
8 entirely at their mercy. They could at any moment annihilate it by neglecting to provide  
9 for the choice of persons to administer its affairs.’”); *U.S. Term Limits, Inc. v. Thornton*,  
10 514 U.S. 779, 808 (1995).

11 Defendant-Intervenors mischaracterize *Oregon v. Mitchell*, 400 U.S. 112 (1970)  
12 and *Burroughs v. United States*, 290 U.S. 534 (1934); both cases reinforce Congress’s  
13 power to regulate presidential elections. In *Oregon v. Mitchell*, the Court concluded that  
14 Congress was authorized to lower the voting age to 18 in federal elections, upheld the  
15 Voting Rights Act’s literacy-test prohibitions, and held that Congress can set residency  
16 requirements and provide for absentee balloting in elections for presidential and vice-  
17 presidential electors. 400 U.S. at 117–18. Justice Black determined that Congress could  
18 lower the voting age and ban residency requirements for presidential elections under its  
19 inherent federal authority to regulate presidential elections as well as its broad Elections  
20 Clause powers. *Id.* at 122–24. The concurring Justices relied on the Reconstruction  
21 Amendments. *See id.* at 135 (Douglas, J., concurring in part and dissenting in part); *id.* at  
22 229–30 (Brennan, J., concurring in part and dissenting in part). All told, eight Justices



1 upheld Congress’s ban on residency requirements *in presidential elections*. *Id.* at 210;  
2 *see also id.* at 286–87 (Stewart, J., concurring in part and dissenting in part) (“Quite  
3 clearly, then, Congress has acted to protect a constitutional privilege that finds its  
4 protection in the Federal Government and is national in character.”). Thus, whether  
5 through Congress’s inherent authority, the Elections Clause, or the Reconstruction  
6 Amendments—all of which undergird the NVRA—*Oregon v. Mitchell* recognizes  
7 Congress’s broad powers to regulate federal elections and maintain a national  
8 government. *Id.* at 134 (Black, J.).

9 Defendant-Intervenor’s criticism of Justice Black for his purported failure to  
10 perceive the “the textual differences between the Elections Clause and the Electors  
11 Clause” fails. Def. Int. Mot. at 6. The Framers drafted the Elections Clause when only  
12 some states held popular elections. Now all do.<sup>3</sup> *See McPherson v. Blacker*, 146 U.S. 1,  
13 28 (1892) (tracing the history of popular elections); *cf. Chiafalo v. Washington*, 140 S.  
14 Ct. 2316, 2321–22 (2020); *Classic*, 313 U.S. at 315–16; U.S. Const. amend. XXIV  
15 (addressing the “right of *citizens of the United States* to vote in any primary or other  
16 election *for President or Vice President*, for electors for President or Vice President, or  
17 for Senator or Representative in Congress”) (emphasis added).

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18  
19 <sup>3</sup> During oral argument on the Defendants’ Motion to Dismiss, Defendant-Intervenors  
20 represented that Arizona voters cast votes for presidential electors and not for presidential  
21 candidates. Mot. to Dismiss Hearing Tr. at 22:4-8, ECF No. 196. But Arizona law  
22 requires that presidential electors cast their vote for the candidate that wins the popular  
vote in the State. In all material respects, therefore, Arizona’s presidential elections are  
identical to its congressional elections, the winners of which are decided by the popular  
vote. Ariz. Rev. Stat. § 16-212(B).

1 Defendant-Intervenors offer nothing to justify disrupting the “long settled and  
2 established practice” that those who vote in congressional elections are also entitled to  
3 vote in presidential elections. *See Chiafalo*, 140 S. Ct. at 2326. This longstanding  
4 tradition should hold “great weight in a proper interpretation of constitutional  
5 provisions.” *Id.* Defendant-Intervenors would discard that tradition and with it the  
6 Framers’ intent to protect the national government and ensure that all eligible citizens can  
7 cast a ballot for their federal representatives. *ITCA*, 570 U.S. at 8; *cf. U.S. Term Limits,*  
8 *Inc.*, 514 U.S. at 803–05; *Classic*, 313 U.S. at 316 (“If we remember that ‘it is a  
9 Constitution we are expounding,’ we cannot rightly prefer, of the possible meanings of its  
10 words, that which will defeat rather than effectuate the Constitutional purpose.”). HB  
11 2492’s attempt to divest qualified voters of their right to vote in presidential elections  
12 should be rejected.

13 Defendant-Intervenors’ use of *Burroughs* also misses the mark. They argue that  
14 *Burroughs* “had nothing to do with the appointment of presidential electors.” Def. Int.  
15 Mot. at 6. *But neither does this case.* The United States’ NVRA claim asserts that  
16 Arizona violates federal law by requiring Federal Form users to submit more than what  
17 federal law requires to be registered for federal elections. Compl. ¶¶ 63–65. Like the law  
18 at issue in *Burroughs*, the NVRA does not “interfere with the power of a state to appoint  
19 electors or the manner in which their appointment shall be made.” *Burroughs*, 290 U.S.  
20 at 289–90. Indeed, no party questions how Arizona appoints its 11 presidential electors;  
21 that issue is not before this Court. *Infra* at Part IV.A.3. *Burroughs* is therefore directly  
22 on point here because it affirms Congress’s power to regulate presidential elections.

1           **2. Congress Passed the NVRA Under its Authority to Regulate Federal**  
 2           **Elections.**

3           Because Congress can regulate all federal elections, it was empowered to pass the  
 4 NVRA. Congress passed the statute, in part, using its authority to regulate federal  
 5 elections under the Elections Clause.<sup>4</sup> Congress also cited its authority to legislate under  
 6 the Reconstruction Amendments. *See* U.S. Resp. to Mot. Dismiss at 10 (collecting cites);  
 7 H.R. Rep. No. 103-9, at 2, 36 (1993), 1993 U.S.C.C.A.N. 105, 106 (noting that despite  
 8 the Voting Rights Act, restrictive registration practices affected voter turnout generally,  
 9 and Black voter turnout specifically); S. Rep. No. 103-6, at 3 (1993) (“This Act seeks to  
 10 remove the barriers to voter registration and participation under Congress’ power to  
 11 enforce the equal protection guarantees of the 14th Amendment to the Constitution.”);  
 12 *Voter Registration: Hearing Before the Subcomm. On Elections of the H. Comm. on H.*  
 13 *Admin.*, 101st Cong., 1st Sess., at 242–44 (1989) (statements of Frank R. Parker and Rep.  
 14 Swift).<sup>5</sup>

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15           <sup>4</sup> *See, e.g., ITCA*, 570 U.S. at 8–9; *League of Women Voters of United States v. Newby*,  
 16 838 F.3d 1, 5 (D.C. Cir. 2016); *Ass’n of Cmty. Orgs. for Reform Now (ACORN) v. Miller*,  
 17 912 F. Supp. 976 (W.D. Mich. 1995), *aff’d*, 129 F.3d 833 (6th Cir. 1996); *ACORN v.*  
 18 *Edgar*, 880 F. Supp. 1215 (N.D. Ill. 1995), *aff’d in relevant part*, 56 F.3d 791 (7th Cir.  
 19 1995); *Wilson v. United States*, 878 F. Supp. 1324 (N.D. Cal. 1995), *aff’d sub nom.*  
 20 *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093  
 21 (1996); *see also Condon v. Reno*, 913 F. Supp. 946, 963 (D.S.C. 1995); *Virginia v.*  
 22 *United States*, No. 3:95-cv-357, 1995 WL 928433 (E.D. Va. Oct. 18, 1995); *ACORN v.*  
*Ridge*, Nos. Civ. A. 94-7671 & 95-382, 1995 WL 136913 (E.D. Pa. Mar. 30, 1995).

20           <sup>5</sup> Congress is not required to meet the “congruence and proportionality” standard outlined  
 21 by Defendant-Intervenors to legislate under Section 2 of the Fifteenth Amendment. *See*  
 22 *South Carolina v. Katzenbach*, 383 U.S. 301, 324–27 (1966) (holding that the Fifteenth

1 Congress passed the NVRA to combat “discriminatory and unfair registration  
2 laws” that “disproportionately harm voter participation by various groups, including  
3 racial minorities.” 52 U.S.C. § 20501(a)(3); *see also, e.g.*, Staff of Subcomm. on Civ. &  
4 Const. Rts. of the H. Comm. on the Judiciary, 98th Cong., 2d Sess., *After the Voting*  
5 *Rights Act: Registration Barriers* (Comm. Print 1984) (H.R. Ser. No. 18, at 2-5); S. Rep.  
6 No. 103-6, at 3–4, 17–18 (1993); *see also Condon*, 913 F. Supp. at 962–63. Courts agree.  
7 *See* U.S. Resp. to Mot. Dismiss, at 9-10 (collecting cases).

### 8 **3. The Electors Clauses and the Tenth Amendment Are Irrelevant Here.**

9 Defendant-Intervenors rely on the Constitution’s Electors Clauses and the Tenth  
10 Amendment to argue that states—and not Congress—have the authority to regulate  
11 presidential elections. But the Constitution’s Electors Clauses regulate presidential  
12 electors only; these Clauses are therefore not relevant to this NVRA challenge. And  
13 states do not have reserved powers under the Tenth Amendment related to presidential  
14 elections.

15 Defendant-Intervenors appear to conflate the meaning and purpose of “Electors”  
16 as used in the Constitution’s Electors Clauses with “presidential elections.” *See*  
17 *generally* Def. Int. Mot. at 3–6. Article II requires States to appoint “a Number of  
18 Electors, equal to the whole Number of Senators and Representatives to which the State  
19 \_\_\_\_\_  
20 Amendment is self-executing). And if Congress passed the NVRA under the Fourteenth  
21 Amendment, it has met the standard. The historical and legislative record establishes  
22 persistent patterns of discrimination in voter registration practices, necessitating  
Congressional action to pass uniform voter registration processes for federal elections.  
U.S. Resp. to Mot. Dismiss, at 9–11.

1 may be entitled in the Congress.” U.S. Const. art. II, §1, cl. 2. Congress then determines  
2 the time of choosing presidential “Electors” and the day on which the electors “shall give  
3 their vote.” U.S. Const. art. II, §1, cl. 4. Both Clauses refer only to presidential electors,  
4 which in Arizona are the 11 electors appointed by “[t]he chairman of the state committee  
5 of a political party that is qualified for representation on an official party ballot at the  
6 primary election and accorded a column on the general election ballot.” Ariz. Rev. Stat.  
7 § 16-344; *id.* § 16-341; *cf. Chiafalo*, 140 S. Ct. at 2324 (reiterating that the Electors  
8 Clause gives states authority to appoint electors, who differ from the state’s individual  
9 voters); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 710 (D. Ariz. 2020) (finding that  
10 presidential electors “fulfill a ministerial function, which is extremely limited in scope  
11 and duration, and that they have no discretion to deviate at all from the duties imposed by  
12 the statute”); Ariz. Rev. Stat. § 16-212(B) (presidential electors must cast their vote for  
13 the candidate who received the highest number of individual votes).

14 The NVRA does not regulate the country’s 538 presidential “Electors”; it  
15 regulates voter registration for the country’s *individual voters*. The Electors Clauses are  
16 thus irrelevant to this case because they do not regulate individual voters in Arizona. *Cf.*  
17 *Chiafalo*, 140 S. Ct. at 2324; Ariz. Const. art. VII, § 1 (referring to “elections by the  
18 people”).

19 Congress has authority to regulate presidential elections. *Supra* at 9; United States  
20 Resp. Mot. Dismiss at 8–9. The Supreme Court has squarely rejected Defendant-  
21 Intervenors argument that, because the Constitution does not expressly assign to  
22 Congress the power to regulate the “places and manner” of presidential elections, this

1 power resides with the states. Def. Int. Mot. at 4; *Burroughs*, 290 U.S. at 544-45; see  
2 also *Anderson v. Celebrezze*, 460 U.S. 780, 795 (1983). Defendant-Intervenors’ Tenth  
3 Amendment arguments, Def. Int. Mot. at 3-4, are similarly inapt. The power to regulate  
4 presidential elections “is not within the ‘original powers’ of the States, and thus is not  
5 reserved to the States by the Tenth Amendment.” See *Cook v. Gralike*, 531 U.S. 510, 522  
6 (2001) (states have no residual authority to regulate federal elections); *U.S. Term Limits*,  
7 *Inc.*, 514 U.S. at 800, 805 (holding that “the power to regulate the incidents of the federal  
8 system is not a reserved power of the States, but rather is delegated by the Constitution”);  
9 1 Story § 627 (“It is no original prerogative of state power to appoint a representative, a  
10 senator, or president for the union”). Defendant-Intervenors have “neither text nor  
11 history on [their] side” to argue that the Tenth Amendment confers to Arizona the  
12 exclusive authority to regulate voter registration in presidential elections. *Chiafalo*, 140  
13 S. Ct. at 2328. The power to regulate federal elections, including presidential elections,  
14 “spring[s] out of the existence of the national government, which the constitution does  
15 not delegate to [the states]. . . . No state can say, that it has reserved, what it never  
16 possessed.” *U.S. Term Limits, Inc.*, 514 U.S. at 802. The very notion of a national  
17 federal government was a sea change from the pre-existing Articles of Confederation; in  
18 the new national government, the Framers envisioned that representatives—above all, the  
19 President—owed allegiance to the people *of the Nation*, not to the people of a State. *Id.*  
20 at 803–04. Therefore, states have no residual Tenth Amendment authority to regulate  
21 presidential elections.  
22

1 Defendant-Intervenors’ theories as to why Arizona alone—and not Congress—has  
2 authority to regulate presidential elections in the State should be rejected.

3 **4. The United States’ Challenges to HB 2492’s Mail Voting Provisions**  
4 **Cannot Be Resolved on Summary Judgment.**

5 The State Defendants and Defendant-Intervenors argue that the NVRA does not  
6 preempt Arizona’s laws regulating mail voting. State Defs. Mot. at 4; Def. Int. Mot. at 8–  
7 9. Federal-only voters properly established their citizenship status by using the Federal  
8 Form to successfully register to vote in federal elections. *ITCA*, 570 U.S. at 9–13; 52  
9 U.S.C. § 20505(a)(1). HB 2492 requires these voters to prove their citizenship status  
10 again to vote in those elections by mail, a method of voting that was otherwise available  
11 to all eligible voters prior to HB 2492’s enactment. *See* Ariz. Rev. Stat. § 16-127(A)(2)  
12 (requiring federal-only voters to provide DPOC in accordance with Section 16-166 to  
13 vote by mail in federal elections); Ariz. Rev. Stat. § 16-166 (including the requirements  
14 necessary to establish “satisfactory evidence of citizenship” for purposes of voter  
15 registration); Ariz. Rev. Stat. § 16-541A (“Any qualified elector may vote by early  
16 ballot.”). HB 2492’s requirement that registered federal-only voters also satisfy  
17 Arizona’s DPOC *voter registration* requirements—which exceed those required by the  
18 Federal Form—endruns Section 6 of the NVRA. 52 U.S.C. § 20501(b) (a core purpose  
19 of the NVRA is to “enhance[] the participation of eligible citizens as voters in elections  
20 for Federal office.”).

21 In any event, the Court should not determine the lawfulness of HB 2492’s mail  
22 voting prohibitions on summary judgment. The United States properly alleged that HB

1 2492’s mail voting restrictions violate the Materiality Provision, U.S. Compl. ¶ 69,  
2 *United States v. Arizona*, No. 2:22-cv-01124-SRB (D. Ariz. July 5, 2022) (ECF No. 1),  
3 and needs the opportunity to adduce sufficient facts during discovery to establish that  
4 violation. *See infra* at Part IV.B.3., Brailey Decl. ¶¶ 14, 15. Accordingly, the Court need  
5 not delineate the NVRA’s effect on HB 2492’s restrictions on mail voting because the  
6 State Defendants’ ultimate ability to enforce those restrictions will remain unresolved  
7 until the Court determines the United States’ Materiality Provision claim. *See, e.g., Sec.*  
8 *& Exch. Comm’n v. Montano*, No. 6:18-CV-1606-GAP-GJK, 2020 WL 5534671, at \*4  
9 (M.D. Fla. July 31, 2020), *report and recommendation adopted*, 2020 WL 5887648  
10 (M.D. Fla. Oct. 5, 2020) (“When a proposed partial summary judgment does not advance  
11 ultimate resolution of a case, the motion may be denied on that basis[.]”); *id.* (finding that  
12 “partial summary judgment may be denied where it does not result in judicial  
13 efficiency”).

14 **B. Summary Judgment is Unwarranted for the United States’ Claim Under**  
15 **the Materiality Provision of the Civil Rights Act.**

16 The State Defendants’ summary judgment motion as to the United States’  
17 Materiality Provision claim raises material facts unavailable to the United States at this  
18 time. Because discovery as to those facts is essential to the United States’ ability to  
19 oppose that motion, and because the State Defendants and County Defendants solely  
20 possess those facts, this Court should deny the State Defendants’ summary judgment  
21 motion on that claim pursuant to Fed. R. Civ. P. 56(d). *See, e.g., Burlington N. Santa Fe*  
22 *R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Rsrv.*, 323 F.3d 767, 773 (9th Cir.



1 2003) (noting that when “a summary judgment motion is filed so early in the litigation,  
2 before a party has had any realistic opportunity to pursue discovery relating to its theory  
3 of the case,” the district court should grant requests by non-movants to take discovery  
4 prior to considering the motion for summary judgment).

5 **1. The State Defendants’ Summary Judgment Motion as to HB 2492’s**  
6 **Citizenship Checkbox Requirement Should be Denied Because the United**  
7 **States Lacks Information Essential to Opposing that Motion.**

8 Eligible Arizonans who register to vote with the State Form must provide DPOC,  
9 which Arizona law recognizes as satisfactory proof of citizenship. *See* Ariz. Rev. Stat.  
10 § 16-166(F) (DPOC is “satisfactory evidence of citizenship.”); *see also* Ariz. Rev. Stat.  
11 § 16-152(A)(23) (requiring DPOC to accompany the State Form). Under HB 2492, the  
12 State Form requires applicants who provide DPOC to also affirm their citizenship by  
13 checking the citizenship box. If a voter fails to complete the citizenship checkbox, their  
14 voter registration application is rejected even though election officials can confirm the  
15 applicant’s citizenship from the DPOC.

16 The State asserts that HB 2492’s citizenship checkbox requirement complies with  
17 the Materiality Provision because: (1) the requirement to check a box attesting to one’s  
18 citizenship status is material because it helps confirm a voter’s citizenship status, and (2)  
19 even if the checkbox requirement seeks duplicative information, that does not mean that  
20 it seeks immaterial information. *State Defs. Mot.* at 12–13. Both arguments fail, and the  
21 first argument raises material fact questions that foreclose summary judgment.

22 First, whether the State Form’s mandatory citizenship checkbox provides election  
officials with information distinct from the DPOC that the voter already provided is a

1 question of material fact. A voting requirement is material under the Materiality  
2 Provision if it goes to determining a voter’s substantive qualifications to vote. *See, e.g.,*  
3 *Martin v. Crittenden*, 347 F.Supp.3d 1302, 1308 (N.D. Ga. 2018); *Wash. Ass’n of*  
4 *Churches v. Reed*, 492 F.Supp.2d 1264, 1270 (W.D. Wash. 2006). In Arizona, these  
5 qualifications are limited to age, citizenship, residency, ability to write one’s name or  
6 make one’s mark, and lack of criminal convictions or adjudications deeming one  
7 incapacitated. Ariz. Const. art. VII, § 2, cl. A; Ariz. Rev. Stat. § 16-101. Moreover, a  
8 voting requirement must be more than just relevant to be “material.” *E.g., Int’l Bhd. of*  
9 *Teamsters v. United States*, 240 F.2d 387, 390 (9th Cir. 1956) (distinguishing between  
10 “relevant” and “material” for purposes of IRS subpoena, and requiring agents to satisfy  
11 the Court that what they seek “may be actually needed”); *see also Anderson v. Liberty*  
12 *Lobby, Inc.*, 477 U.S. 242, 248 (1986) (defining “material fact” for the purposes of  
13 summary judgment motions as facts that “might affect the outcome” of the case); U.S.  
14 Resp. Mot. Dismiss at 17 (collecting cases).

15 Here, the crux of the United States’ Materiality Claim is whether the citizenship  
16 checkbox requirement is actually used to *determine* a voter’s citizenship status—a matter  
17 of disputed fact—and not whether citizenship itself is a qualification. The parties do not  
18 dispute the latter proposition. State Defs. Mot. at 12. The quintessential example of  
19 practices the Materiality Provision sought to eradicate—requiring voters to cite the exact  
20 number of months and days in their age, *see Fla. State Conf. of NAACP v. Browning*, 522  
21 F.3d 1153, 1173 (11th Cir. 2008)—illustrates this distinction: a voter’s age in months and  
22 days was nominally relevant to and duplicative of establishing the voter’s age, the latter

1 of which is a substantive voter qualification. A voter’s age in months and days, however,  
2 was not material because age could already be established with other information in the  
3 application. The requirement therefore did not ensure that eligible voters were registered  
4 to vote; instead, it resulted in eligible voters having their registration applications rejected  
5 based on immaterial information. *See Martin*, 347 F.Supp.3d at 1308–09 (finding  
6 provision of birth year on a ballot envelope immaterial where a voter’s age was already  
7 confirmed).<sup>6</sup>

8 The State insists that the checkbox “still serve[s] a useful role” in determining a  
9 voter’s qualifications. State Defs. Mot. at 12. However, that is a material fact question  
10 the subject of live discovery requests. Brailey Decl. ¶¶ 14, 15, Exs. B, C (outstanding  
11 discovery requests seeking this information); Scheduling Order at ¶¶ 4, 5 (ECF No. 338).  
12 Leaving aside important legal distinctions between what is “useful” in commercial  
13 activities like signing mortgage documents, State Defs. Mot. at 12, and in preserving the  
14 fundamental right to vote, the State’s argument raises material fact questions as to the  
15 role and “usefulness” of the checkbox in determining a voter’s qualifications. The State  
16 presents no record evidence supporting its assertions. But the United States cannot rebut  
17 those assertions because it is currently seeking information essential for doing so and  
18 engaging with an expert to analyze that information. And information relating to that  
19 “useful[ness]” is possessed solely by the State Defendants and County Defendants. The  
20

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21 <sup>6</sup> The State’s comparison of the State Form and the Federal Form’s checkbox  
22 requirements, State Defs. Mot. at 11, is inapt for the same reason: the Federal Form does  
not require applicants to provide DPOC *in addition* to checking the citizenship box.

1 Court should therefore deny summary judgment, or in the alternative, defer ruling on the  
2 motion until the parties have completed discovery. Fed. R. Civ. P. 56(d); *see also*  
3 *Burlington N.*, 323 F.3d at 773–74 (finding that “lightning-quick summary judgment  
4 motions can impede informed resolution of fact-specific disputes” and that Rule 56(d)  
5 relief for more discovery should be granted “almost as a matter of course”  
6 (quoting *Wichita Falls Off. Ass’n v. Banc One Corp.*, 978 F.2d 915, 919 n.4 (5th Cir.  
7 1992))).

8         Second, there is no support for the State’s claim that it may freely seek duplicative  
9 citizenship evidence when the failure to provide that evidence results in  
10 disenfranchisement. The State’s sole citation is to *Diaz v. Cobb*, 435 F.Supp.2d 1206  
11 (S.D. Fla. 2006), that, if anything, *supports* the United States’ Materiality Provision  
12 claim. *Diaz* analyzed whether Florida’s voter registration form violated the Materiality  
13 Provision where applicants were required to both check boxes confirming they met each  
14 eligibility requirement to vote and also sign a general oath indicating they are eligible to  
15 vote and truthfully completed the form. 435 F.Supp.2d at 1211-12. Specifically, the  
16 *Diaz* plaintiffs sued because they failed to check the boxes confirming their mental  
17 capacity on Florida’s form, and the failure to check these boxes resulted in their rejection.  
18 *Id.* at 1208. The Florida district court held that checking a *specific* box is not duplicative  
19 of signing a *generalized* oath, in part because the checkboxes verified each required voter  
20  
21  
22

1 qualification while the oath was a general affirmation of eligibility.<sup>7</sup> *Id.* at 1211.

2 Importantly, Florida did not *also* require prospective voters to provide documentary proof  
3 of any of the qualifications listed in the check boxes.

4 *Diaz* does not stand for the proposition that duplicative requirements for the same  
5 voter eligibility information are lawful. The case merely held that Florida could verify  
6 specific voter eligibility information in the form of checkboxes, and also require a  
7 generalized oath. Similarly, Arizona may seek proof of voter eligibility through  
8 checkboxes on the State Form and may require applicants to sign the form. Arizona may  
9 not, however, reject a form with an incomplete checkbox when the voter also provided—  
10 and the State thus has full knowledge of—that *same information* by way of DPOC. *See*  
11 *Diaz*, 435 F.Supp.2d at 1212.

## 12 **2. Unavailable Facts Regarding HB 2492’s Birthplace Requirement Preclude** 13 **Summary Judgment.**

14 The State’s contention that birthplace is material to confirming a voter registration  
15 applicant’s identity, State Defs. Mot. at 14, is a disputed question of fact that requires the  
16 parties to build an evidentiary record. The State has presented this novel argument with

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17 <sup>7</sup> In *Diaz*, the general oath read:

18 I do solemnly swear (or affirm) that I will protect and defend  
19 the Constitution of the United States and the Constitution of  
20 the State of Florida, that I am qualified to register as an elector  
21 under the Constitution and laws of the State of Florida, and that  
22 all information provided in this application is true.

435 F.Supp.2d at 1212. The mental capacity checkbox at issue read:

I affirm that I have not been adjudicated mentally incapacitated  
with respect to voting or, if I have, my competency has been  
restored.

*Id.* at 1215.

1 no factual record to rebut or confirm, and discovery is necessary to ascertain whether  
2 election officials actually use birthplace to identify or confirm the identity of a voter, and,  
3 if so, how they do that. Brailey Decl. ¶¶ 14, 15, Exs. B, C (outstanding discovery  
4 requests seeking this information). The record thus far shows that prospective voters  
5 using the State Form are required to provide their legal names, residence and mailing  
6 addresses, and date of birth; registrants may also provide an identification number, such  
7 as the last four digits of their Social Security Number (“SSN”), a license number, tribal  
8 identification number, A-number, naturalization certificate number, or citizenship  
9 certification number. *See* Arizona Voter Registration Form, ECF No. 365-1, Exhibit D.  
10 But no factual record has been established as to how many people provide these unique  
11 identification numbers. Brailey Decl. ¶¶ 14, 15; *see also* Scheduling Order at ¶¶ 4, 5  
12 (deadline for fact discovery is July 14 and expert discovery is September 28).

13         The State posits that providing birthplace “can help confirm the voter’s identity,”  
14 State Defs. Mot. at 14, but it provides no facts in support. It does not explain what  
15 birthplace data election officials might possess to compare a new voter registrant’s  
16 information against. Nor does it point to any undisputed facts on how, for example, two  
17 people who have identical names, birth dates, and residential addresses would be  
18 distinguished based on a state or country of birth. *Id.* No expert analysis or witness  
19 testimony has been put forth to establish whether or how birthplace could ever be used to  
20 confirm a voter’s identity. These are unsupported assertions that the United States cannot  
21 test or rebut without discovery. And again, information relating to the role that birthplace  
22 plays, and the manner in which election officials use or will use birthplace to establish a

1 voter's identity, is possessed solely by the State Defendants and County Defendants.  
2 Without factual and expert discovery, the State Defendants' motion cannot be  
3 appropriately resolved at this stage. Brailey Decl. ¶¶ 14, 15, Exs. B, C (outstanding  
4 discovery requests seeking this information); *see also* Scheduling Order at ¶¶ 4, 5 (ECF  
5 No. 338); Fed. R. Civ. P. 56(d); *Jacobson v. U.S. Dep't of Homeland Sec.*, 882 F.3d 878,  
6 883–84 (9th Cir. 2018) (vacating summary judgment because plaintiffs were entitled to  
7 seek discovery that calls into question defendant's stated rationale).

8 The State Defendants' comparison to passport applications is inapposite. State  
9 Defs. Mot. at 14. Congress barred states from rejecting voting materials based on errors  
10 or omissions not material to establishing a voter's qualifications because voting is a  
11 fundamental right at the core of our form of government; no similar law applies to  
12 passport applications. The State also notes that four states "appear" to require birthplace  
13 on their state-specific voter registration forms, inferring that this supports Arizona's  
14 birthplace requirement. *Id.* But the United States does not challenge Arizona's ability to  
15 seek an applicant's birthplace on the State Form, something the State has done for many  
16 years; what the United States challenges is HB 2492's command that applications  
17 missing a birthplace be rejected. U.S. Compl. ¶¶ 11, 67. Accordingly, summary  
18 judgment is inappropriate as to this claim because material fact questions exist.

19 **3. Summary Judgment Is Also Unwarranted for the United States' Claim**  
20 **That HB 2492's DPOC Requirement for Registered Federal-Only Voters**  
21 **Violates the Materiality Provision.**

22 HB 2492 requires registered federal-only voters to provide additional proof of  
citizenship to vote in presidential elections or by mail in congressional elections. These

1 voters already attested to their citizenship when they registered to vote using the Federal  
2 Form, which is sufficient to prove citizenship under Federal Law. 52 U.S.C.  
3 § 21083(b)(4)(A) (requiring citizenship attestation for the Federal Form); Election  
4 Assistance Comm’n, Mem. of Decision at 29–31, Docket No. EAC-2013-0004 (Jan. 17,  
5 2014), <https://perma.cc/8EX8-P58G> (finding that sworn statements—like the attestation  
6 in the Federal Form—carry the force of law and Arizona already accepts sworn  
7 statements as sufficient for other election-related purposes).

8         The State Defendants argue that DPOC is material to determining a voter’s  
9 eligibility “because U.S. citizenship is a requirement for voting in Arizona.” State Defs.  
10 Mot. at 13. As a threshold matter, the State conflates voter qualifications with  
11 enforcement of those qualifications. Citizenship is a voter qualification, Ariz. Const. art.  
12 VII, § 2; DPOC is a way to enforce that qualification, *ITCA*, 570 U.S. at 6. Simply  
13 stating that “U.S. citizenship is a requirement for voting in Arizona,” State Defs. Mot. at  
14 13, therefore does not answer the factual question of whether DPOC is material to  
15 establishing citizenship status for a voter who previously proved their citizenship when  
16 registering to vote.

17         The arbitrary distinction between federal-only voters who wish to vote in  
18 presidential elections and those who wish to vote in congressional elections suggests that  
19 the DPOC requirement cannot be material to determining voter eligibility when voter  
20 eligibility for presidential and congressional elections is the same. The United States is  
21 currently seeking discovery on these factual questions, specifically on how exactly State  
22 and local election officials plan to use HB 2492’s requirements to establish voters’



1 qualifications. Because the information sought is essential to opposing the State  
2 Defendants' motion, the State's motion for summary judgment on this claim should be  
3 denied. Fed. R. Civ. P. 56(d).<sup>8</sup>

4 **V. Conclusion**

5 For the foregoing reasons, the United States respectfully requests that the Court  
6 grant its Motion for Partial Summary Judgment on its NVRA claim and deny the State  
7 Defendants' and Defendant-Intervenors' Motions for Partial Summary Judgment on the  
8 United States' Materiality Provision claim (ECF Nos. 364, 367). The Court should also  
9 deny, or at least defer consideration of, the State Defendants' partial summary judgment  
10 motion as to the NVRA's application to HB 2492's mail voting restrictions.

11  
12 Date: June 5, 2023

13 Respectfully submitted,

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<sup>8</sup> As this Court already found, Private Plaintiffs may also sue to enforce the Materiality Provision. *See* Order on Motions to Dismiss at 32–33 (ECF No. 304); *see also* United States' Brief in Support of Plaintiff-Appellee at 8–14, *Vote.org v. Paxton*, No. 22-50536 (5th Cir. Nov. 2, 2022), <https://perma.cc/8G6W-NSGB>.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 5, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to counsel of record.

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