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15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF ARIZONA**

17 MI FAMILIA VOTA, et al.
18 Plaintiffs,

19 v.

20 ADRIAN FONTES, in his official capacity as
21 Arizona Secretary of State, et al.,
22 Defendants,

23 and

24 Speaker of the House Ben Toma and Senate
25 President Warren Petersen,

Intervenor-Defendants.

Case No. 22-00509-PHX-SRB
(Lead)

**DEMOCRATIC NATIONAL
COMMITTEE'S AND ARIZONA
DEMOCRATIC PARTY'S
RESPONSE TO DEFENDANTS'
MOTIONS FOR PARTIAL
SUMMARY JUDGMENT AND
CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT**

No. CV-22-00519-PHX-SRB
No. CV-22-01003-PHX-SRB
No. CV-22-01124-PHX-SRB
No. CV-22-01369-PHX-SRB
No. CV-22-01381-PHX-SRB
No. CV-22-01602-PHX-SRB
No. CV-22-01901-PHX-SRB

28

1 LIVING UNITED FOR CHANGE IN ARIZONA, et al.,
2 Plaintiffs,

3 v.

4 ADRIAN FONTES, in his official capacity as
5 Arizona Secretary of State, et al.,
6 Defendant,

7 and

8 STATE OF ARIZONA, et al.,
9 Intervenor-Defendants,

10 and

11 Speaker of the House Ben Toma and Senate
12 President Warren Petersen,
13 Intervenor-Defendants.

14 PODER LATINX, et al.,
15 Plaintiff,

16 v.

17 ADRIAN FONTES, in his official capacity as
18 Arizona Secretary of State, et al.,
19 Defendants,

20 and

21 Speaker of the House Ben Toma and Senate
22 President Warren Petersen,
23 Intervenor-Defendants.

24 UNITED STATES OF AMERICA,
25 Plaintiff,

26 v.

27 STATE OF ARIZONA, et al.,
28 Defendants,

and

Speaker of the House Ben Toma and Senate
President Warren Petersen,
Intervenor-Defendants.

1 DEMOCRATIC NATIONAL COMMITTEE, et al.,
2 Plaintiffs,

3 v.

4 ADRIAN FONTES, in his official capacity as
5 Arizona Secretary of State, et al.,
6 Defendants,

7 and

8 REPUBLICAN NATIONAL COMMITTEE,
9 Intervenor-Defendant,

10 and

11 Speaker of the House Ben Toma and Senate
12 President Warren Petersen,

13 Intervenor-Defendants.

14 ARIZONA ASIAN AMERICAN NATIVE HAWAIIAN
15 AND PACIFIC ISLANDER FOR EQUITY COALITION,
16 Plaintiff,

17 v.

18 ADRIAN FONTES, in his official capacity as
19 Arizona Secretary of State, et al.,
20 Defendants,

21 and

22 Speaker of the House Ben Toma and Senate
23 President Warren Petersen,

24 Intervenor-Defendants.

25 PROMISE ARIZONA, et al.,
26 Plaintiffs,

27 v.

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

and

Speaker of the House Ben Toma and Senate
President Warren Petersen,

Intervenor-Defendants.

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INTRODUCTION

1
2 Congress enacted the National Voter Registration Act (“NVRA”) to “establish
3 procedures that will increase the number of eligible citizens who register to vote,” to
4 “enhance[] the participation of eligible citizens as voters,” and to “protect the integrity of the
5 electoral process.” 52 U.S.C. §20501(b)(1)-(3). To further these goals, Congress required
6 the creation of a federal voter-registration form for “elections for Federal Office,” *id.*
7 §20508(a)(2), and mandated that all states “accept and use” that form, which is known as the
8 federal form, *id.* §20505(a)(1). In *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S.
9 1 (2013) (“*ITCA*”), the Supreme Court held that Congress intended the federal form to serve
10 as a “backstop” protecting the right to vote, “guarantee[ing] that a simple means of
11 registering to vote in federal elections will be available,” *id.* at 13. The Court also rejected
12 Arizona’s attempts to require the submission of documentary proof of citizenship (“DPOC”)
13 to register, holding that states must treat the federal form—which does not require DPOC—
14 as a “complete and sufficient” application. *Id.* at 9.

15 Brazenly flouting *ITCA*, Arizona has now re-imposed *precisely* the same barrier to
16 registration that the Supreme Court proscribed, again requiring people who register to vote
17 using the federal form to submit DPOC. Those who do not do so can be barred from voting
18 by mail in any election or in presidential elections at all, and can be investigated by law
19 enforcement. Arizona voters can now also be removed from the rolls within 90 days of
20 federal elections. Each of these provisions conflicts with the NVRA and thus is preempted.

21 Indeed, the state, the attorney general, and the secretary of state agree that Arizona’s
22 re-imposition of a DPOC requirement in order to vote in federal elections is partly or wholly
23 preempted. The secretary says that Arizona law violates the NVRA and *ITCA* “by requiring
24 DPOC to register to vote in all federal elections using the Federal Form,” ECF 121 ¶72. And
25 the state and attorney general acknowledge that Arizona law is preempted insofar as it
26 requires voters to submit DPOC in order to vote in presidential elections. ECF 364 at 4.

27 The arguments offered in defense of this clear disregard of *ITCA* fail. For example,
28 decades of binding precedent foreclose the argument offered by the Republican National

1 Committee (“RNC”) that the NVRA cannot apply to presidential elections. (That argument
 2 also wrongly assumes that the NVRA was enacted only under the Elections Clause, although
 3 *ITCA* shows that the Elections Clause alone suffices to preempt here.) Similarly, the text of
 4 the NVRA—which addresses registration as a means to ensure “participation” in federal
 5 elections, 52 U.S.C. §20501(b)(2)—forecloses defendants’ claim that the NVRA covers *only*
 6 registration and thus cannot preempt Arizona’s ban on mail voting for those who do not
 7 submit DPOC. That argument would gut the NVRA, allowing every state to *register* people
 8 but then impose any limits on *voting* that the state wanted—even a total ban. Finally,
 9 defendants say that Arizona can remove people from the rolls in the run-up to election day
 10 despite the NVRA’s bar on most such removals because otherwise (they argue) non-citizens
 11 might be able to vote. But defendants assume that anyone *suspected* of not being a U.S.
 12 citizen actually isn’t one. The NVRA’s 90-day ban on removals shows that Congress, in
 13 enacting the law, recognized that states might make mistakes (or even deliberately remove
 14 eligible voters), and it balanced that danger against the danger of ineligible people voting, via
 15 the 90-day ban on removals. Arizona cannot flout that congressional judgment.

16 The Democratic National Committee (“DNC”) and the Arizona Democratic Party
 17 (“ADP”) oppose summary judgment for defendants on any claim in the DNC’s and ADP’s
 18 complaint, and cross-move for the following rulings on counts IV and VII of their complaint:

- 19 • The NVRA preempts Arizona’s efforts to bar state residents who do not (or did
 20 not) submit DPOC when registering with the federal form from (1) voting by
 21 mail in any election and/or (2) voting in presidential elections at all.
- 22 • The NVRA preempts Arizona law to the extent that the latter allows removal
 23 of any registered voter from the rolls within 90 days before any federal election
 24 for any reason other than those expressly permitted by the NVRA.

24 BACKGROUND

A. H.B. 2492

25 Enacted in March 2022, Arizona House Bill 2492 (one of the two laws challenged in
 26 this litigation) imposes various restrictions on Arizonans’ ability to register, and hence to
 27 vote. ECF 121, ¶32. For example, if a person submits a federal form without DPOC, the
 28

1 law bars that person from voting in all elections unless election officials—using databases
 2 that are highly unreliable, *id.* ¶36—happen to be able to verify his or her U.S. citizenship.
 3 *See* H.B. 2492, §4. If election officials decide that a person who did not submit DPOC is not
 4 a U.S. citizen, moreover, they must refer the person to law enforcement for possible
 5 prosecution. *See id.* And if officials cannot satisfy themselves that such a person is a citizen,
 6 the person is barred, until DPOC is provided, from voting in *any* federal election by mail (a
 7 right Arizonans have had for decades) and from voting in presidential elections *at all.* *Id.*;
 8 ECF 121, ¶33. The law imposes the same limits on those who registered without providing
 9 DPOC prior to the law’s passage. H.B. 2492, §5; ECF 121, ¶27. Lastly, H.B. 2492 amended
 10 Arizona law to require removal from the rolls of anyone a county recorder determines not to
 11 be a U.S. citizen, with no temporal limitation on such removals. H.B. 2492, §8.¹

12 **B. The NVRA And The Federal Voter-Registration Form**

13 Congress enacted the NVRA in 1993, finding that “discriminatory and unfair
 14 registration laws and procedures can have a direct and damaging effect on voter
 15 participation.” 52 U.S.C. §20501(a)(3). To prevent that, Congress “require[d] States to
 16 provide simplified systems for registering to vote in *federal* elections.” *ITCA*, 570 U.S. at 5.

17 Two NVRA provisions are relevant to this cross-motion and opposition:

18 First, section 6 provides that “[e]ach State” must “accept and use” the federal form to
 19 register “voters in elections for Federal office.” 52 U.S.C. §20505(a). The law also spells
 20 out certain aspects of the federal form’s contents, mandating that it (1) specify each
 21 eligibility requirement (including U.S. citizenship) and (2) require an attestation under
 22 penalty of perjury from any applicant that he or she meets each requirement. *Id.*
 23 §20508(b)(2). And it prohibits requiring other information that is not necessary to assess
 24 eligibility. *Id.* §20508(b)(1). The NVRA otherwise leaves it to federal election officials to
 25

26 ¹ The other law challenged in this litigation, Arizona House Bill 2243, revised this last
 27 provision—including by requiring 35 days’ advance notice to the voter before any such
 28 removal—but did not alter the command to remove from the rolls at any time voters a county
 recorder determines is not a citizen. H.B. 2243, §2 (codified at A.R.S. §16-165(A)(10)).

1 develop the form’s contents in consultation with state officials. 52 U.S.C. §20508(a).

2 Second, section 8 of the NVRA provides that no state may operate a program “to
3 systematically remove the names of ineligible voters from the official list of eligible voters”
4 during the 90 days before any federal election. 52 U.S.C. §20507(c)(2).

5 C. *ITCA And Kobach*

6 In *ITCA*, the Supreme Court invalidated, under the NVRA, Arizona’s prior effort to
7 require DPOC of anyone seeking to register in the state. *See* 570 U.S. at 4-5. The Court
8 held that “a state-imposed requirement of evidence of citizenship not required by the Federal
9 Form is ‘inconsistent with’ the NVRA’s mandate that States ‘accept and use’ the Federal
10 Form,” and therefore is preempted. *Id.* at 15. The “accept and use” language, the Court
11 explained, does not mean that “the State is merely required to receive the form willingly and
12 use it *somehow* in its voter registration process.” *Id.* at 9-10. Rather, it “mean[s] that a State
13 must accept the Federal Form as a complete and sufficient registration application.” *Id.* at 9.

14 The Court also noted that Arizona was free to request that federal officials add a state-
15 specific DPOC requirement to the federal form. *See ITCA*, 570 U.S. at 20. Arizona did so
16 (along with Kansas), and when officials rejected the request, the states sued. But the Tenth
17 Circuit upheld the rejection, holding among other things that the states had not “advance[d]
18 proof that registration fraud in the use of the Federal Form prevented Arizona and Kansas
19 from enforcing their voter qualifications.” *Kobach v. United States Election Assistance*
20 *Commission*, 772 F.3d 1183, 1188 (10th Cir. 2014), *cert. denied*, 576 U.S. 1055 (2015).

21 PREEMPTION STANDARDS

22 “A fundamental principle of the Constitution is that Congress has the power to
23 preempt state law.” *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).
24 “[A]ny state law, however clearly within a State’s acknowledged power, which ... is
25 contrary to federal law, must yield.” *Felder v. Casey*, 487 U.S. 131, 138 (1987).

26 Preemption can be express or implied. Express preemption occurs when a federal law
27 explicitly precludes or mandates certain content for state law. With express preemption, the
28 courts’ “task is to identify the domain expressly pre-empted,” to decide if a state law falls in

1 that domain. *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 257 (2013) (quotation
 2 marks omitted). “To do so, [courts] focus first on the statutory language, which necessarily
 3 contains the best evidence of Congress’ pre-emptive intent.” *Id.* (quotation marks omitted).

4 In addition, “state laws are preempted when they conflict with federal law,” including
 5 “where the challenged state law ‘stands as an obstacle to the accomplishment ... of the full
 6 purposes ... of Congress.’” *Arizona v. United States*, 567 U.S. 387, 399 (2012). Whether a
 7 state law is such an obstacle is evaluated “by examining the federal statute as a whole and
 8 identifying its purpose and intended effects.” *Chamber of Commerce v. Bonta*, 62 F.4th 473,
 9 482 (9th Cir. 2023). Conflict preemption does not require that “every provision within a[n]
 10 ... enactment is invalid”; rather, some parts of a law can be preempted while others are not.
 11 *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1049 (9th Cir. 2007).

12 Finally, although courts sometimes apply a “presumption against preemption,” no
 13 presumption applies here because this case involves (1) express preemption, *see Puerto Rico*
 14 *v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016), and (2) Congress’s constitutional
 15 authority to “make or alter” state election regulations, *see ITCA*, 570 U.S. at 14.

16 ARGUMENT

17 **I. THE DNC AND ADP ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR NVRA** 18 **“ACCEPT AND USE” CLAIM (COUNT IV)**

19 H.B. 2492 imposes voting restrictions that conflict with the mandate in section 6 of
 20 the NVRA (52 U.S.C. §20505(a)(1)) that states “accept and use” the federal form to register
 21 voters for federal elections. These restrictions include that anyone who registers (or
 22 registered) via the federal form without providing DPOC cannot vote by mail in any federal
 23 election or vote in presidential elections at all. H.B. 2492, §§4, 5. Each is preempted.

24 **A. H.B. 2492’s Ban On Those Who Submit A Federal Form Without DPOC** 25 **Voting In Presidential Elections Or By Mail In Any Federal Election Is** 26 **Preempted By NVRA Section 6, As It Was Properly Construed In ITCA**

27 H.B. 2492 does *exactly* what the Supreme Court has deemed preempted by NVRA
 28 section 6. As explained, *ITCA* held that Arizona could not require those who register using
 the federal form to submit DPOC; in the Court’s words, “requir[ing] state officials to ‘reject’

1 a Federal Form unaccompanied by documentary evidence of citizenship[] conflicts with the
2 NVRA’s mandate that Arizona ‘accept and use’ the Federal Form.” 570 U.S. at 9. *ITCA*
3 forecloses Arizona’s latest effort to deny voters who do not submit DPOC with the federal
4 form the right to vote in presidential elections, or by mail in *any* federal elections. As the
5 Court emphasized, “accept and use” “mean[s] that a State must accept the Federal Form as a
6 *complete and sufficient* registration application.” *Id.* (emphasis added). Arizona is not
7 treating submission of a federal form without DPOC as “complete and sufficient” if it bars
8 the applicant from voting in certain ways or in certain federal elections. To the contrary,
9 Arizona treats the form as *incomplete* (because DPOC is absent) and as *insufficient* to entitle
10 the applicant to the same voting rights that those who submit DPOC have. *ITCA* forbids that.

11 If anything, this is an even stronger case for preemption than *ITCA*, because H.B.
12 2492 does more than limit the voting rights of those who submit a federal form without
13 DPOC. It also threatens such people with investigation and even prosecution. That is
14 directly contrary to Congress’s goals in enacting the NVRA of “increas[ing] the number of
15 eligible citizens who register to vote” and “enhanc[ing] the participation of eligible citizens
16 as voters.” 52 U.S.C. §20501(b)(1)-(2). H.B. 2492’s DPOC requirement thus not only
17 conflicts directly with the NVRA’s “accept and use” mandate but also “stands as an obstacle
18 to the accomplishment and execution of the full purposes and objectives of Congress,”
19 *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016). It is therefore preempted.
20 Summary judgment should accordingly be granted for the DNC and the ADP on their claim
21 that H.B. 2492’s provision denying people who submit a properly completed federal form
22 without also providing DPOC both the right to vote by mail in any federal election and the
23 right to vote at all in presidential elections is invalid and cannot be enforced.²

24 _____
25 ² Because intervenors make constitutional arguments regarding Congress’s authority over
26 presidential elections, the Court may deem it appropriate—under the canon of constitutional
27 avoidance, *see, e.g., Jennings v. Rodriguez*, 138 S.Ct. 830, 844 (2018)—to defer ruling on
28 the presidential-elections issue until after trial. Doing so would leave open the possibility
that the Court would not need to rule on the issue because plaintiffs obtain relief on other
claims that is as broad as or broader than the relief sought on the relevant NVRA claims.

1 **B. Defendants’ Contrary Arguments Fail**

2 The intervenors (joined by the state and attorney general as to mail voting) assert that
3 the NVRA does not preempt H.B. 2492’s DPOC requirement, such that summary judgment
4 should be granted for *them* on plaintiffs’ relevant claims. Defendants’ arguments lack merit.

5 1. *Voting By Mail*

6 The RNC argues (ECF 367 at 8-9) that the NVRA does not preempt H.B. 2492’s ban
7 on people who register using the federal form without providing DPOC from voting by mail
8 in *any* federal election. That is so, the RNC says, because the NVRA sets only “registration
9 rules,” saying “nothing about the *mechanisms* for ... voting.” *Id.* at 8. This argument (which
10 the state and attorney general barely endorse, *see* ECF 364 at 3-4) is meritless.

11 To start, the argument ignores the NVRA’s text, which is not limited to registration.
12 Congress found that the right “to *vote*” is “fundamental,” that states must “promote the
13 exercise of *that right*,” and that “discriminatory ... registration laws ... can have a damaging
14 effect on *vot[ing]*.” 52 U.S.C. §20501(a) (emphases added). And the NVRA’s purposes
15 include “increas[ing] the number of eligible citizens who register to vote” and “enhanc[ing]”
16 people’s participation “as voters in federal elections.” *Id.* §20501(b). The NVRA thus
17 reflects a “a conviction that Americans ... eligible ... to vote have every right to exercise
18 their franchise,” and that this right “must not be sacrificed to ... chicanery, oversights, or
19 inefficiencies.” *Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 335 (4th Cir. 2012).
20 Put simply, “[r]egistration is indivisible from election,” so a “state could not, by separating
21 registration from voting, ... undermine the power that Article I section 4 grants to Congress.”
22 *ACORN v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995). That is precisely what the RNC’s
23 proposed distinction would do, allowing states to engage in the bait-and-switch of formally
24 *registering* people in compliance with the NVRA, but then imposing barriers to prevent them
25 from actually voting. In this way too, then, H.B. 2492 would “stand[] as an obstacle to the
26 accomplishment ... of the full purposes ... of Congress,” *Puente Arizona*, 821 F.3d at 1103.

27 In fact, if the RNC’s registration/voting dichotomy were valid, the NVRA (and *ITCA*)
28 would be gutted. States could *register* those who submitted the federal form without DPOC,

1 but then sharply limit how those people actually *voted*, such as by letting them vote only in
2 person at midnight, or only hundreds of miles from their homes. Or a state could say that
3 those who did not provide DPOC could not vote, period (or perhaps, as the state and attorney
4 general suggest, could vote in one election so that a state could say those people can “cast a
5 ballot,” ECF 364 at 4). In all these circumstances, people would be registered, so under the
6 RNC’s theory the NVRA would be satisfied, but in effect they could not vote at all. The idea
7 that Congress’s intent in enacting the NVRA—“enhanc[ing] the participation of eligible
8 citizens *as voters in [federal] elections*,” 52 U.S.C. §20501(b)(2) (emphasis added)—can be
9 so easily evaded is absurd. Those who register via NVRA-protected means must have the
10 same ability to vote in federal elections as those who register in other ways a state allows.³

11 Relying on two non-NVRA cases that involved none of the issues addressed by the
12 relevant claims, the RNC argues that mail voting is a mere “privilege.” ECF 367 at 9. That
13 is irrelevant because Congress’s preemption power is not more limited with “privileges.”
14 The argument is also just wrong, because Arizona *guarantees* that “[a]ny qualified elector
15 may vote by early ballot.” Ariz. Rev. Stat. §16-541. Indeed, most Arizonans (roughly 89%)
16 voted by early mail ballot in the 2020 election. ECF 388, ¶60. That underscores the extent
17 to which the RNC’s registration/voting distinction would eviscerate the NVRA’s protections.

18 Next, the RNC—citing nothing that plaintiffs have said or filed—says that plaintiffs’
19 position would require “uniformity among mail-in ballot applications” *nationwide*. ECF 367
20 at 8. In reality, the DNC’s and ADP’s position is simply that, as *ITCA* held, states cannot
21 treat voters who register using the federal form but without providing DPOC any differently
22 in terms of voting in any federal election than those who did provide DPOC.

23 Finally, section 6 of the NVRA also provides that (with specified exceptions) voters

24
25 ³ Indeed, as the Ninth Circuit has observed, the conference report accompanying the NVRA
26 makes clear that Congress viewed a DPOC requirement as inconsistent with the act’s
27 purposes, explaining that a proposed amendment that would have *allowed* states to require
28 DPOC was rejected precisely because it ““could effectively eliminate, or seriously interfere””
with those purposes. *Gonzalez v. Arizona*, 677 F.3d 383, 403 n.29 (9th Cir. 2012) (quoting
H.Rep. No. 103-66, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148).

1 can be required by state law to vote in person *if* they registered to vote by mail *and* have not
 2 previously voted in person in the relevant jurisdiction. 52 U.S.C. §20505(c)(1). If the RNC
 3 were correct that the NVRA imposes no restrictions on states’ ability to limit *how* people
 4 vote, this provision would be unnecessary—and in fact meaningless. But “one of the most
 5 basic interpretive canons” is that a “statute should be construed so that effect is given to all
 6 its provisions, so that no part will be inoperative or superfluous, void or insignificant.”
 7 *Corley v. United States*, 556 U.S. 303, 314 (2009). The provision thus shows that the RNC
 8 is wrong. Moreover, under another fundamental interpretive canon—that “[t]he expression
 9 of one thing implies the exclusion of others,” *Jennings*, 138 S.Ct. at 844—the provision
 10 makes clear that voters who submit a federal form can be required to vote in person (i.e., can
 11 be denied a state-law right to vote by mail) *only* in the circumstance that section 6 describes.
 12 H.B. 2492’s limit on voting by mail goes beyond that circumstance. It is thus preempted.

13 2. *Voting In Presidential Elections*

14 The RNC argues (ECF 367 at 3-8) that the NVRA cannot apply to presidential
 15 elections because (1) Congress enacted the law only under the Elections Clause, and (2) that
 16 clause gives Congress no authority over presidential elections. Hence, the RNC says, the
 17 NVRA cannot stop states from *registering* people to vote but then denying them the ability
 18 to *actually* vote in presidential elections if they do not provide DPOC. Neither part of the
 19 argument is correct: The NVRA was not enacted solely under the Elections Clause, and—as
 20 decisions of the Supreme Court, the Ninth Circuit, and other courts recognize—multiple
 21 provisions of the Constitution give Congress the authority to regulate presidential elections.⁴

22 a. Binding precedent recognizes Congress’s power to regulate 23 presidential elections

24 Supreme Court cases affirming congressional authority to regulate presidential

25
 26 ⁴ The RNC does not reprise (and hence has waived) other arguments that the state and
 27 attorney general made in moving to dismiss, including that the NVRA should be read “to
 28 apply only to Congressional elections,” ECF 127 at 23, and that H.B. 2492 does not regulate
 congressional elections, *id.* at 22, 24. Those arguments failed in any event for the reasons
 the DNC and ADP gave in opposing dismissal, *see* ECF 151 at 5.

1 elections date back many decades. For example, in *Burroughs v. United States*, 290 U.S.
2 534 (1934), the Court held that “Congress, undoubtedly, possesses” the “power to pass ...
3 legislation to safeguard [a presidential] election ... from impairment,” rejecting an argument
4 (much like the RNC’s) that Congress cannot regulate presidential elections, *id.* at 545. In
5 fact, the Court observed that it had rejected the same argument—which it labeled “‘a
6 proposition so startling as to arrest attention’”—50 years earlier. *Id.* at 546 (quoting *Ex parte*
7 *Yarbrough*, 110 U.S. 651, 657 (1884)). More recently, the Court cited *Burroughs* in noting
8 that it had “recognized broad congressional power to legislate in connection with the
9 elections of the President and Vice President.” *Buckley v. Valeo*, 424 U.S. 1, 13 n.16 (1976)
10 (per curiam). Finally, in *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court upheld a law
11 lowering the voting age for *all* federal elections and limiting registration and absentee-voting
12 deadlines for presidential elections, *see id.* at 124 (Black, J., op.); *id.* at 141-144 (Douglas, J.,
13 op.); *id.* at 238 (Brennan, J., op.).

14 Relying on many of these decisions, the Ninth Circuit long ago rejected a facial
15 challenge to the NVRA’s constitutionality, explaining that “[t]he broad power given to
16 Congress over congressional elections has been extended to presidential elections.” *Voting*
17 *Rights Coal. v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995). Other circuits agree. *See*
18 *ACORN v. Miller*, 129 F.3d 833, 836 n.1 (6th Cir. 1997); *ACORN v. Edgar*, 56 F.3d at 793.
19 Indeed, the RNC cites no case holding that Congress *cannot* regulate presidential elections.

20 Nor do any of the RNC’s attempts to deal with the wall of (largely binding) adverse
21 precedent have merit. For example, the RNC asserts (ECF 367 at 6) that *Burroughs* “had
22 nothing to do with the appointment of presidential electors.” To the contrary, *Burroughs* (as
23 noted) expressly rejected an argument nearly *identical* to the RNC’s claim here, stating:

24 The only ... constitutional objection necessary to be considered is that the
25 power of *appointment of presidential electors* and the manner of their
26 appointment are expressly committed by § 1, Art. II ... to the states, and ...
27 the congressional authority is thereby limited to determining “the Time of
28 chusing the Electors, and the Day on which they ... Vote[]....” So narrow
a view of the powers of Congress in ... the matter is without warrant.

290 U.S. at 544 (emphasis added). The RNC cannot avoid this flat rejection of its argument

1 by closing its eyes to the language and baldly asserting that *Burroughs* “had nothing to do
2 with the appointment of presidential electors.” Nor can it prevail by wrongly claiming, in
3 direct contradiction to the language just quoted, that “the Supreme Court has never held that
4 Congress possesses power to regulate the ‘Places and Manner’ of presidential elections.”
5 ECF 367 at 5. And it certainly cannot prevail by making the misleading claim that
6 *Burroughs* recognized an “‘exclusive state power’ over presidential elections.” *Id.* at 6
7 (quoting *Burroughs*, 290 U.S. at 545). What *Burroughs* said was not that states have any
8 “‘exclusive ... power’ over presidential elections,” *id.*, but rather that the law challenged
9 there “in no sense invades any exclusive state power.” 290 U.S. at 545. That does nothing
10 to support the RNC’s argument—which, again, *Burroughs* explicitly rejected.

11 The RNC fares no better in discussing the other cases cited above. For instance, the
12 RNC resorts to yet another bald (and false) claim in stating that “[n]o binding authority”
13 holds that the Elections Clause gives Congress power to regulate presidential elections. ECF
14 367 at 6. That is not only what *Burroughs* held, but also what the Ninth Circuit held in
15 *Wilson*. The RNC buries *Wilson* in a “*cf.*” clause, describing the case as “citing *Burroughs*
16 in passing for the proposition that the Constitution gives ‘broad congressional power’ over
17 presidential elections.” *Id.* This ploy to dismiss binding precedent via (mis)characterization
18 is baseless. In support of its holding that the NVRA is facially constitutional, *Wilson* stated
19 that “[t]he broad power given to Congress over congressional elections has been extended to
20 presidential elections.” 60 F.3d 1414 (citing *Burroughs*). That statement was “necessary to
21 th[e] result” in *Wilson*—rejection of a challenge to the constitutionality of a law regulating
22 presidential elections—and hence constitutes binding precedent. *Seminole Tribe of Fla. v.*
23 *Florida*, 517 U.S. 44, 67 (1996). That precedent requires rejection of the RNC’s challenge.

24 b. Multiple provisions of the Constitution give Congress the power to
25 regulate presidential elections

26 The binding cases just discussed dispose of the RNC’s claim regarding Congress’s
27 power to regulate presidential elections. But the argument also fails on first principles.

28 Congress’s constitutional power to regulate presidential elections has several sources.

1 First, the Elections Clause gives Congress vast authority to regulate federal elections. “[T]he
2 history of the Clause ... tells a clear story” that “[i]t was understood from the start to give
3 Congress extraordinary power over federal elections.” Sweren-Becker & Waldman, *The*
4 *Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 1001-
5 1002 (2021). This history is consistent with the Supreme Court’s longstanding view that the
6 clause is “comprehensive,” “embrac[ing] authority to ... to enact the numerous requirements
7 ... necessary in order to enforce the fundamental rights involved.” *Smiley v. Holm*, 285 U.S.
8 355, 366 (1932). And because Congress has chosen to have presidential and congressional
9 elections held simultaneously, 2 U.S.C. §7; 3 U.S.C. §1, applying the NVRA to presidential
10 elections is a “Necessary and Proper” way, U.S. Const., art. I, §8, cl. 18, to regulate the
11 “manner” of congressional elections, *id.* art. I, §4. In particular, it is necessary to avoid
12 chaos from the proliferation of conflicting regimes for voting in such elections—not just
13 within any one state, but nationwide. *See generally* Stephanopoulos, *The Sweep of the*
14 *Electoral Power*, 36 Const. Comment. 1, 53-55 & nn.308, 310 (2021). In fact, the Elections
15 Clause “has long been interpreted to give Congress power over so-called ‘mixed elections’—
16 that is, to permit Congress to regulate all aspects of an election ... used even in part to select
17 members of Congress.” Karlan, *Section 5 Squared*, 44 Hous. L. Rev. 1, 17 (2007); *see also*
18 *In re Coy*, 127 U.S. 731, 751-752 (1888). Congress thus has authority to ensure states do not
19 concoct cumbersome or error-prone systems that could interfere with elections for federal
20 office, including the presidency. *See* Sweren-Becker & Waldman, *supra*, at 1029-1033.

21 Second, regulating registration for presidential elections is a necessary and proper
22 exercise of Congress’s authority under the Electors Clause both to “determine the Time of
23 ch[oo]sing” the presidential electors, U.S. Const. art. II, §1, cl. 4, and to “count” those
24 electors’ votes, *id.* cl. 3. While Congress has, as noted, exercised this authority to mandate
25 simultaneous presidential and congressional elections, the authority goes beyond timing, to
26 encompass steps necessary and proper to ensure that the selection process is “beneficial[ly]”
27 carried out, *M’Culloch v. State*, 17 U.S. 316, 409 (1819). Congress’s determination that one
28 voter-registration process should apply to all federal elections is certainly a “means ...

1 rationally related to the implementation of” Congress’s power under the Electors Clause,
2 *United States v. Comstock*, 560 U.S. 126, 134 (2010). Indeed, although the DNC and ADP
3 made these same arguments at the motion-to-dismiss stage, ECF 151 at 6-7, the RNC does
4 not even attempt to explain why setting minimum registration requirements across all federal
5 elections would *not* be “convenient,” “useful” or “conducive” to the exercise of Congress’s
6 authority to set the time for choosing electors—which is all that is required to bring it within
7 the scope of the Necessary and Proper Clause, *Comstock*, 560 U.S. at 133-134.

8 Third (and more generally), Congress’s power over presidential elections is essential
9 to “preserve the departments and institutions of the general government”—including the
10 presidency—“from impairment.” *Burroughs*, 290 U.S. at 545. The Founders understood
11 that “every government ought to contain in itself the means of its own preservation.” *The*
12 *Federalist* No. 59, p.362 (C. Rossiter ed. 1961). Ensuring that voters can effectively register
13 and vote, and preventing states from using voter-registration requirements to disenfranchise
14 people, are appropriate means of preserving the democratic process and ensuring that the
15 presidential-selection process is not impaired. Recognizing this, “courts have construed the
16 Electors Clause coextensively with the Elections Clause, holding that the former endows
17 Congress with the same authority over presidential elections that the latter grants it over
18 congressional races.” Stephanopoulos, *supra*, pp.54-55; *see also supra* pp.9-11.

19 Finally, the Fourteenth and Fifteenth Amendments further expand Congress’s power
20 over presidential elections, and the NVRA (including as applied to those elections) is a valid
21 exercise of that power, because “Congress may use any rational means to effectuate the
22 constitutional prohibition of racial discrimination in voting,” *South Carolina v. Katzenbach*,
23 383 U.S. 301, 324 (1966). Although Congress need not invoke its power under the amend-
24 ments when legislating—there need only be “some legislative purpose or factual predicate”
25 to support the exercise of that power, *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18 (1983)—
26 Congress *did* invoke that power here. In fact, both “the legislative history and the text ... are
27 clear” that Congress relied on that power under to enact the NVRA. *Condon v. Reno*, 913
28 F.Supp. 946, 962 (D.S.C. 1995). Congress’s express findings include that “discriminatory

1 and unfair registration laws and procedures ... disproportionately harm voter participation by
2 various groups, including racial minorities.” 52 U.S.C. §20501(a)(3). And the Senate report
3 accompanying the law stated that the law sought “to remove the barriers to voter registration
4 and participation under Congress’ power to enforce the equal protection guarantees of the
5 14th Amendment.” S.Rep. No. 103-6, at 3 (1993); *see also* H.Rep. No. 103-9, at 3 (1993)
6 (deeming the NVRA necessary to complete the work of the Voting Rights Act (“VRA”).

7 The RNC answers all this by asserting (1) that Congress enacted the NVRA *only*
8 under the Elections Clause, i.e., did not purport to invoke its authority under any of the other
9 provisions just discussed, and (2) that the NVRA is not valid remedial legislation under the
10 Fourteenth and Fifteenth Amendments. ECF 367 at 3, 6-8. Both arguments fail.

11 As to the former, there is no basis to conclude that Congress enacted the NVRA only
12 under the Elections Clause. That clause surely was *one* source of authority Congress relied
13 on, and hence *ITCA* and some other cases have discussed the Elections Clause in deciding
14 NVRA cases. But the RNC cites no case holding that Congress relied *only* on the Elections
15 Clause in enacting the NVRA, nor does it provide any basis for so holding. In fact, the cases
16 the RNC cites on this point—principally *ITCA*—had no need to consider other sources of
17 power, because they each held that the Elections Clause alone sufficed to sustain the NVRA
18 against the challenge before it. Other cases, meanwhile, have rejected the RNC’s argument,
19 citing additional powers Congress drew on to enact the NVRA. *See ACORN v. Miller*, 912
20 F.Supp.976, 984 (W.D. Mich. 1995); *ACORN v. Edgar*, 880 F.Supp. 1215, 1221 (N.D. Ill.
21 1995). These cases reflect the established principle that “Congress’s power to legislate may
22 ... stem from more than one enumerated power.” *United States v. Park*, 938 F.3d 354, 363
23 (D.C. Cir. 2019) (citing four Supreme Court cases); *accord Armstrong v. Wilson*, 942
24 F.Supp. 1252, 1263 (N.D. Cal. 1996), *aff’d*, 124 F.2d 1019 (9th Cir. 1997). That principle
25 further forecloses the RNC’s novel “Elections-Clause-only” argument.

26 Equally flawed is the RNC’s claim (ECF 367 at 7) that the NVRA is not reasonably
27 tailored to preventing race discrimination. Mandating a simplified system for registering to
28 vote in federal elections and restricting states’ ability to purge voters from the voting rolls

1 are assuredly “rational means,” *Katzenbach*, 383 U.S. at 324, of preventing “discriminatory
2 and unfair registration laws and procedures,” 52 U.S.C. §20501(a)(3). The RNC asserts
3 (ECF 367 at 7) that the proper standard is *not* rational means but rather “congruence and
4 proportionality,” *City of Boerne v. Flores*, 521 U.S. 507 (1997). That is wrong; even after
5 *City of Boerne*, the Supreme Court has applied *Katzenbach* when Congress sought to remedy
6 racial discrimination or protect voting rights. *See Lopez v. Monterey Cnty.*, 525 U.S. 266,
7 283 (1999). Courts have thus recognized that “*Katzenbach* has yet ... to be overruled or
8 otherwise ... modified by the Supreme Court,” and hence that its “rational means” standard
9 governs in cases involving the Fifteenth Amendment. *Janis v. Nelson*, 2009 WL 5216902, at
10 *8 (D.S.D. Dec. 30, 2009). Regardless, the NVRA *is* congruent and proportional. Disputing
11 this, the RNC claims (ECF 367 at 7) that the NVRA is under-inclusive because it did not
12 address state elections. But Congress need not address every aspect of a problem at once.
13 *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955). Moreover, at the same time
14 that it faults Congress for *failing* to include state elections, the RNC argues that Congress
15 *cannot* constitutionally regulate state elections. ECF 367 at 4. That is wrong (as the Voting
16 Rights Act’s and Civil Rights Act’s coverage of all elections makes plain), but the point for
17 the moment is that it obviously cannot be that a law lacks congruence and proportionality
18 because Congress did not try to apply the law to matters beyond its constitutional purview.

19 Lastly, the RNC says that “the NVRA’s ‘legislative record lacks examples of modern
20 instances’ of discrimination on account of proof of citizenship required for registration.”
21 ECF 367 at 7. But the case it quotes in making this argument contrasted the record under-
22 lying the statute in that case with “the record which confronted Congress ... in the voting
23 rights cases.” *City of Boerne*, 521 U.S. at 530. And in enacting the NVRA, Congress relied
24 on an extensive record of discrimination in voting registration, similar to that underlying the
25 VRA. *See* S.Rep. No. 103-6, at 3; H.Rep. No. 103-9, at 3-4. The Ninth Circuit has held that
26 the record supporting the VRA confirms that that law’s prophylactic elements are a
27 congruent and proportional means of addressing discrimination in voting. *See United States*
28 *v. Blaine Cnty.*, 363 F.3d 897, 904-909 (9th Cir. 2004). The same is thus true of the NVRA.

* * *

The RNC’s attempt to cabin congressional authority over presidential elections is foreclosed by binding precedent and baseless as a matter of constitutional first principles. If the Court reaches the RNC’s argument, *see supra* n.2, the argument should be rejected.

II. THE DNC AND ADP ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR NVRA “90-DAY” CLAIM (COUNT VII)

As discussed, *see supra* p.3, the NVRA provides that states cannot “systematically remove the names of ineligible voters from the official lists of eligible voters” less than “90 days prior to” any federal election, save on the grounds specified. 52 U.S.C. §20507(c)(2). H.B. 2492 violates this bar because—as the secretary has conceded, ECF 121, ¶39—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, H.B. 2492, §8.⁵

The state and attorney general argue (ECF 364 at 9), that “the NVRA does not prohibit states from cancelling registrations of voters who do not meet such requirements.” That is *exactly* what the 90-day provision prohibits: systematically canceling registrations during the 90-day period for any reason other than those enumerated (e.g., because a voter died). The same point answers the state’s and attorney general’s concomitant claim (*id.*) that “if the limit on grounds for cancellation does not prohibit states from cancelling registrations for noncitizens, neither should the 90-day quiet period.” But the state and attorney general are again just closing their eyes to the plain text, which is crystal clear in barring the removal of voters from the rolls during the 90-day period, save for the reasons specifically allowed.

The state and attorney general also cite *United States v. Florida*, 870 F.Supp.2d 1346 (N.D. Fla. 2012), which concluded that the 90-day period does not apply *at all* to voters “who were not properly registered in the first place,” *id.* at 1350. That, again, cannot be

⁵ As noted, *see supra* n.1, H.B. 2243 revised the language that H.B. 2492 added to Arizona Revised Statutes §16-165 requiring removal from the rolls of a voter whom a county recorder finds not to be a U.S. citizen. But H.B. 2243 left in place the relevant command, providing that a county recorder “shall cancel [a voter’s] registration” anytime the recorder “confirms” that the voter “is not a United States citizen.” A.R.S. §16-165(A)(10). H.B. 2243 thus does not change the preemption analysis provided in the balance of this Part II.

1 squared with the statutory text, which has no such limit. The *Florida* court, moreover (like
2 the state and attorney general), simply assume that anyone *suspected* of being a non-U.S.
3 citizen is in fact not a citizen. But the court provided no basis for that assumption (nor have
4 defendants here), because there is none. The 90-day provision shows that Congress under-
5 stood that states may well err in deeming people ineligible—and that any such error, if made
6 within 90 days of an election, might not be corrected quickly enough to avoid improperly
7 (and irreversibly) denying a qualified voter her fundamental right to vote in a federal
8 election. Hence, Congress enacted the 90-day provision to “strike[] a balance” between
9 preventing ineligible people from voting “while ensuring that legitimate voters are able to
10 vote.” *U.S. Student Ass’n Found. v. Land*, 546 F.3d 373, 388 (6th Cir. 2008). The *Florida*
11 district court simply ignored all this—perhaps explaining the abrogation of that case by the
12 Eleventh Circuit in *Arcia v. Florida Secretary of State*, 772 F.3d 1335 (11th Cir. 2014).
13 There the court of appeals held that systematically removing people from the rolls based on
14 citizenship within the 90-day period is prohibited by the NVRA, *id.* at 1345-1346.

15 Contrary to defendants’ suggestion (ECF 364 at 9 n.15), the mandate in Arizona
16 Revised Statutes §16-165(A)(10) that county recorders notify a voter that their registration
17 will be canceled 35 days before the cancellation does nothing to avoid NVRA preemption.
18 That provision (which was added to the statute by H.B. 2243) only provides *notice* to voters;
19 the removal from the voter rolls that the NVRA bars is still allowed—and in fact required.

20 Lastly, the state and attorney general say (ECF 364 at 10) that this Court could simply
21 *construe* H.B. 2492 as not permitting removals within the 90-day period. But that is not
22 what H.B. 2492 says, and the federal courts cannot “rewrite a state law to conform it to
23 constitutional requirements.” *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1988).
24 The proper course is thus to hold that, because of the NVRA’s 90-day provision, removal
25 under H.B. 2492 cannot be conducted during the 90-day period before any federal election.

26 CONCLUSION

27 The DNC’s and ADP’s motion for partial summary judgment should be granted and
28 defendants’ requests for summary judgment in their favor should all be denied.

1 Dated this 5th day of June, 2023.

2 Respectfully submitted,

3 PAPETTI SAMUELS WEISS MCKIRGAN LLP

4 /s/ Bruce Samuels

5 Bruce Samuels

6 WILMER CUTLER PICKERING

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8 Seth P. Waxman (*pro hac vice*)

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CERTIFICATE OF SERVICE

On this 5th day of June, 2023, I caused the foregoing to be filed and served electronically via the Court’s CM/ECF system upon counsel of record.

/s/ Bruce Samuels
Bruce Samuels