

April 29, 2022

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BY CERTIFIED U.S. MAIL AND EMAIL

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The Honorable Katie Hobbs  
Arizona Secretary of State  
1700 West Washington Street, Floor 7  
Phoenix, Arizona 85007

The Honorable Mark Brnovich  
Arizona Attorney General  
2005 North Central Avenue  
Phoenix, Arizona 85004

Re: Notice of Arizona's Non-Compliance with the National Voter Registration Act Arising  
from Enactment of House Bill 2492

Dear Secretary Hobbs and Attorney General Brnovich:

Pursuant to 52 U.S.C. §20510(b), and on behalf of the Democratic National Committee (“DNC”) and the Arizona Democratic Party (“ADP”), I write to notify you that Arizona law, as modified by House Bill 2492, violates the National Voter Registration Act of 1993 (“NVRA” or “the Act”), 52 U.S.C. §20501 *et seq.*, as well as the Fourteenth Amendment to the U.S. Constitution. The DNC and the ADP are each an aggrieved person within the meaning of the NVRA and unless the issues enumerated in this letter are resolved, the DNC and the ADP intend to file an action for declaratory and injunctive relief.

The NVRA and the First and Fourteenth Amendments

Section 8 of the NVRA addresses states' administration of their systems for registering voters for federal elections. It requires that “[a]ny State program or activity to ... ensur[e] the maintenance of an accurate and current voter registration roll for elections for Federal office” be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.” 52 U.S.C. §20507(b)(1). In addition, section 8 limits the reasons that a state or political subdivision may remove a registered voter from the rolls, *id.* §20507(a)(3)-(4), and establishes that, before any voter is removed, he or she must be given notice, in writing, and can be removed only if he or she fails both to respond to the notice and to vote in “2 or more consecutive general elections for Federal office.” *Id.* §20507(b)(2), (d). No systematic removal of voters can occur within 90 days before a federal election. *Id.* §20507(c)(2)(A).

The First and Fourteenth Amendments prohibit states from imposing laws or procedures that unduly burden an individual's fundamental right to vote. In particular, burdens imposed by such laws must be justified by an overriding state interest. Moreover, the Due Process Clause protects

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voters from being deprived of their right to register to vote, to vote, or to have their vote counted without adequate justification and procedural rights.

### House Bill 2492's Voter Removal System

H.B. 2492, signed into law by Governor Ducey on March 30, 2022, amends Arizona law to restrict the ability of any voter to vote who has not provided “satisfactory evidence of citizenship,” including voters who vote only for federal officers (“federal-only voters”). H.B. 2492 §5. The system created by H.B. 2492 violates the federal requirements outlined above in several ways.

*First*, the system violates the NVRA because the relevant portions of the law are non-uniform and discriminatory with respect to federal-only voters. Specifically, H.B. 2492: makes federal-only voters who have not provided documentary proof of citizenship ineligible to receive an early ballot by mail, H.B. 2492 §5; singles out federal-only voters for investigation and potential prosecution by the Arizona Attorney General, *id.* §7; and imposes additional proof-of-citizenship requirements on voters who register with the NVRA voter-registration form beyond those required by the NVRA itself, *id.* §4.

*Second*, H.B. 2492 violates the NVRA's specific provisions regarding federal-only voters, which limit any necessary proof of citizenship to an attestation under penalty of perjury that a registrant is a U.S. citizen. 52 U.S.C. §20504(c)(2)(B)(i)-(ii). By requiring more than this attestation for federal-only voters, section 2 of H.B. 2492 undermines the NVRA's command that only the minimal information necessary be required to register to vote for federal officials.

*Third*, H.B. 2492 violates the NVRA by failing to prohibit the removal of voters from the rolls under the newly instituted system less than 90 days from any primary or general election for federal office.

*Fourth*, H.B. 2492 violates the Due Process Clause of the Fourteenth Amendment by failing to mandate notice of a failure to provide documentary proof of citizenship in time for a voter to provide such proof prior to his or her removal from the voter rolls. H.B. 2492 also violates the Equal Protection Clause of the Fourteenth Amendment insofar as it discriminates (in conjunction with existing Arizona law regarding “federal only” voting eligibility) against voters on the basis of race, national origin, age, or disability status.

Each of these violations is elaborated in the balance of this letter.

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#### A. NVRA Uniformity And Non-Discrimination Requirements

The NVRA requires states to “conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters.” 52 U.S.C. §20507(a)(4). But the NVRA mandates that any such programs “be uniform [and] nondiscriminatory.” *Id.* §20507(b)(1). The statute’s “uniform[ity]” requirement is violated where a voter-roll maintenance program singles out one group of voters for different treatment. *See Project Vote v. Blackwell*, 455 F.Supp.2d 694, 703 (N.D. Ohio 2006). And the statute’s nondiscrimination requirement is violated where a voter-roll maintenance program targets specified classes of people (either facially or as applied). *See id.*

The system H.B. 2492 creates does not comply with either the uniformity or the nondiscrimination requirements. H.B. 2492 creates a voter-removal program that applies only to some Arizona voters (federal-only voters), meaning that Arizona now has two different systems for voter removal: one for federal-only voters and one for all other voters. Such a system is obviously not uniform, and hence violates the NVRA. Further, because H.B. 2492 singles out a selected class of voters, it also violates the NVRA’s nondiscrimination requirement to the extent that it (in conjunction with existing Arizona law regarding federal-only voting eligibility) discriminates against voters on the basis of race, national origin, age, or disability status.

#### B. NVRA Minimal Registration Requirements

The NVRA requires states to allow individuals to register to vote when they apply for driver’s license. 52 U.S.C. §20504. It further provides that for such registration a state may “require only [the] minimum amount of information necessary to (i) prevent duplicate voter registrations; and (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” *Id.* §20504(c)(2)(B)(i)-(ii). Furthermore, as to citizenship, the NVRA provides that the registration form “shall include a statement that (i) states each eligibility requirement (including citizenship); (ii) contains an attestation that the applicant meets each such requirement; and (iii) requires the signature of the applicant, under penalty of perjury.” *Id.* §20504(c)(2)(C)(i)-(iii).

H.B. 2492 requires proof of citizenship that is beyond the “minimum amount of information necessary” to “assess the eligibility of the applicant,” 52 U.S.C. §20504(c)(2)(B)(i)-(ii). In particular, H.B. 2492 requires documentary proof of citizenship in place of the attestation under penalty of perjury that the NVRA requires. This heightened requirement violates the NVRA’s minimal requirements provision and otherwise does not comply with the NVRA’s attestation provision for federal only voting registration.

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### C. NVRA Timing Restrictions

The NVRA prohibits states from operating “any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters” at any point within “90 days” of the “date of a primary or general election for Federal office.” 52 U.S.C. §20507(c)(2)(A). The system that H.B. 2492 creates fails this requirement, placing no time limit on either the County Clerks’ or Attorney General’s review of the federal-only voter rolls or the removal of voters from the rolls based on such a review.

### D. Constitutional Requirements

The Due Process Clause of the Fourteenth Amendment prohibits Arizona from depriving citizens of their right to vote (or their right to have their votes counted) without sufficient procedural protections. *Arizona Democratic Party v. Hobbs*, 485 F.Supp.3d 1073, 1093 (D. Ariz. 2020); *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). While H.B. 2492 requires notice to voters that they have been deemed ineligible to vote, it includes no protections to ensure that voters are not removed from voter rolls without a meaningful opportunity to contest their removal. This is particularly problematic if a voter is removed from the rolls less than 29 days before the election—and thus after the state deadline to register to vote, *see* Ariz. Rev. Stat. §16-120(A).

H.B. 2492’s process of removing voters from the rolls without timely notice or a timely opportunity to be heard also unconstitutionally burdens Arizonans’ right to vote. The burden is in fact the most severe possible—disenfranchisement—and thus can be justified only if required to satisfy a compelling state interest. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). H.B. 2492 identifies no compelling interest in avoiding these simple procedural protections.

Finally, to the extent that the system created by H.B. 2492 discriminates (in conjunction with existing Arizona law regarding “federal only” voting eligibility) against voters on the basis of race, national origin, age, and/or disability status, it violates the Equal Protection Clause of the Fourteenth Amendment and section 2 of the Voting Rights Act, 52 U.S.C. §10302. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

\* \* \*

The DNC and the ADP look forward to working with your offices to address these concerns and ensure that the state meets its obligations under the NVRA and the Constitution. As stated, absent resolution of the violations just described, we will promptly take legal action to protect Arizona voters’ rights. Please contact me with any questions or to discuss these issues.

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Yours sincerely,

*Seth P. Waxman*

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