IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

THE STATE OF TEXAS, *Plaintiff*, v. BRUCE ELFANT, in his official capacity as Travis County Tax Assessor-Collector and Voter Registrar; ANDY BROWN, in his official capacity as Travis County Judge; JEFF TRAVILLION, in his official capacity as Travis County Commissioner, BRIGID SHEA, in her official capacity as Travis County Commissioner; ANN HOWARD, in her official capacity as Travis County Commissioner, MARGARET GÓMEZ, in her official capacity as Travis County Commissioner, *Defendants.*	Case No. 1:24-CV-01096-DII

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR REMAND

For the reasons explained below, Plaintiff's Emergency Motion for Remand [Doc. 2], as supplemented [Doc. 12], should be denied.

INTRODUCTION

The Constitution provides that "Congress may at any time by Law make or alter" regulations enacted by state legislatures regarding the time, place, and manner of federal elections. Congress did so in 1993 with respect to voter registration for federal elections, enacting the National Voter Registration Act ("NVRA"). The NVRA imposes upon "local governments" a "duty" to "promote the exercise of" the "right of citizens of the United States to vote." 52 U.S.C. § 20501(a). The NVRA mandates that each State "accept and use" a uniform, federal voter registration form produced by the federal government. *Id.* § 20505(a)(1). States may also develop

their own forms, but the contents of such forms are strictly regulated by federal law. *Id.* § 20508(b). The NVRA requires each State to designate a chief election official responsible for implementing the NVRA and enforcing compliance with federal law among state and local governments and officials. *Id.* § 20509. Under the NVRA, "[t]he chief election official of a State shall make the [voter registration] forms . . . available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs." *Id.* § 20505(b).

Congress has created a comprehensive mechanism to enforce the NVRA's mandates in federal court. First, it authorized the United States Attorney General to "bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out [the NVRA]." *Id.* § 20510(a). Second, it authorized a private right of action by "[a] person who is aggrieved by a violation" of the NVRA. *Id.* § 20510(b). Third, it made interference with the rights established by the NVRA—including attempts to "intimidate[], threaten[], or coerce[] . . . any person for . . . urging or aiding any person to register to vote, to vote, or to attempt to register to vote"—a federal felony punishable by fine, up to five years imprisonment, or both. *Id.* § 20511.

Texas has sued Defendants—the individual members of the Travis County Commissioners Court as well as Travis County's voter registrar in their official capacities acting on behalf of a "local government" (i.e., a county) — in state court for complying with a "duty" imposed by *federal* law pursuant to the *federal* Constitution to distribute voter registration forms whose content is prescribed by *federal* law in order to promote voter participation in the upcoming November 2024 *federal* election. [Dkt. 1-1]

While Texas attempted to artfully limit the face of its state court complaint to state claims, the dispute in fact arises under federal law. This removal is appropriate under the "complete

preemption" doctrine as well as under the *Grable* doctrine for cases involving a substantial question of federal law.

ARGUMENT

I. Removal is appropriate because the NVRA completely preempts any state laws regarding whether local governments may distribute voter registration forms for federal elections.

Removal of this action to federal court is appropriate because the NVRA completely preempts any state laws regarding whether local governments[1] may distribute federally-prescribed voter registration forms for federal elections. "When a federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law . . . . [and] is removable under § 1441(b)." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Under the complete preemption doctrine, "what otherwise appears as merely a state law claim is converted to a claim 'arising under' federal law for jurisdictional purposes because the federal statute so forcibly and completely displaces state law that the plaintiff's cause of action is either wholly federal or nothing at all." *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011) (quoting *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 330 (5th Cir. 2008)).

The Fifth Circuit has held that to establish complete preemption justifying removal, a defendant must show that: (1) "the statute contains a civil enforcement provision that creates a

[1] Under Texas law, a suit against a government official in their official capacity regarding their official actions, as Texas has done in this case, is considered to be a suit against the governmental entity itself. *E.g., Herring v. Houston Nat'l Exch. Bank*, 253 S.W.3d 813, 814-15 (Tex.1923); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009); *Nueces Cnty. v. Ferguson*, 97 S.W.3d 205, 215 n. 11 (Tex. App.—Corpus Christi 2002, no pet.). Travis County is a political subdivision of the State of Texas and is therefore a "local government." *See, e.g., Nueces Cnty. v. San Patricio Cnty.*, 246 S.W.3d 651, 652 (Tex. 2008) (holding all county functions are governmental and entitled to sovereign immunity).

cause of action that both replaces and protects the analogous area of state law," (2) "there is a specific jurisdictional grant to the federal courts for enforcement of the right," and (3) "there is a clear Congressional intent that claims brought under the federal law be removable." *Gutierrez v. Flores*, 543 F.3d 248, 252 (5th Cir. 2008) (cleaned up). Following the Supreme Court's decision in *Anderson*, however, the Fifth Circuit recognized that the third prong of this test must focus not on whether Congress intended the claim to be "removable," but instead on whether it was "Congress's intent that the federal action be exclusive." *Id.*; *see Anderson*, 539 U.S. at 9 n.5 (noting that focus is not on Congress's intent regarding removability but rather its intent as to the exclusivity of the federal law).

This three-part test, however, was developed in the context of assessing statutes enacted pursuant to Congress's Commerce Clause power, which is the only context in which it has to date been presented to the Supreme Court. *See Anderson*, 539 U.S. at 4 (National Bank Act); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (Employee Retirement Income Security Act of 1974 (ERISA)); *Avco Corp. v. Machinists*, 390 U.S. 557 (1968) (Labor Management Relations Act). The test is inapposite in the context of Congress's Elections Clause enactments.

A. When Congress regulates pursuant to the Elections Clause, it necessarily completely preempts state laws .

Congress necessarily completely preempts state laws when it enacts statutes pursuant to its Elections Clause power unless it expressly states otherwise. Where Commerce Clause statutes are at issue, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That rule does not apply to the NVRA, which Congress enacted pursuant to its Elections Clause power. As the Supreme Court explained in considering the NVRA in *Arizona v. Inter Tribal Council of Arizona, Inc.*, "[t]he Clause's

substantive scope is broad" and includes "regulations relating to 'registration.'" 570 U.S. 1, 8-9 (2013) ("*ITCA*"). "In practice, the Clause functions as 'a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.'" *Id.* at 9 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)). In explaining the scope of the Elections Clause, the Supreme Court held that the presumption against preemption that applies to statutes enacted pursuant to other sources of congressional power is irrelevant to Congress's Elections Clause enactments. "That rule of construction rests on an assumption about congressional intent: that Congress does not exercise lightly the extraordinary power to legislate in areas traditionally regulated by the States." *Id.* (cleaned up). The Court explained, however, that "[t]here is good reason for treating Election Clause legislation differently: The assumption that Congress is reluctant to pre-empt does not hold when Congress acts under that constitutional provision, which empowers Congress to 'make or alter' state election regulations." *Id.* at 14 (quoting U.S. Const. art. I, § 4, cl. 1).

The Court explained further that "[w]hen Congress legislates with respect to the 'Times, Places, and Manner' of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the states. Because the power the Elections Clause confers is none other than the power to pre-empt, the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Id.* And the Court reasoned that the "federalism concerns" present in other areas of congressional action are weaker with regard to congressional enactments under the Elections Clause, because "the State's role in regulating congressional elections . . . has always existed subject to the express qualification that it '*terminates* according to federal law.'" *Id.* at 14-15 (quoting *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (emphasis added)).

Because the Constitution provides that federal laws like the NVRA "terminate" analogous state laws, *id.*, it makes little sense to consider the three-part complete preemption test discussed in *Gutierrez*. The Constitution itself answers the question—federal laws enacted pursuant to the Elections Clause completely preempt—indeed they *terminate*—analogous state laws unless Congress provides otherwise. That is the very purpose of the Elections Clause. Given Congress's plenary constitutional power to completely preempt state laws regulating congressional elections, it makes little sense to ask the three questions set forth in *Gutierrez*.

In the context of the Elections Clause, therefore, the presumptions are reversed—the court should presume Congress has intended to completely preempt to the extent of its statutory enactments regulating congressional elections except to the extent it expresses otherwise. Plaintiff objects (Doc. 2, at pg. 6) that Defendants "point to no case law" in this respect regarding the NVRA. But that is because, to Defendants' knowledge, no State has ever—before now—attempted to sue local government officials in state court for complying with their federal law "duty" to distribute voter registration forms to promote participation in federal elections. 52 U.S.C. §§ 20501(a)(2) & (b)(2); 20505(b).

Because the NVRA was enacted pursuant to Congress's Elections Clause power and has "terminate[d]," any state law regarding whether local governments have a duty to distribute voter registration forms for federal elections, *ITCA*, 570 U.S. at 15, Plaintiff's "cause of action is either wholly federal or nothing at all." *Elam*, 635 F.3d at 803. Nothing in the NVRA reflects a congressional purpose *not* to displace state laws on the topic of Plaintiff's suit. The Court should thus conclude the NVRA has completely preempted Plaintiff's state claim.[2]

[2] Indeed, Plaintiff's motion seems to entirely miss the point that the Elections Clause and the NVRA make this case wholly distinct from the run-of-the-mill removal cases where a federal law

B. Even if the three-part *Gutierrez* test applies, the NVRA completely preempts Plaintiff's state claim.

Even if the three-part *Gutierrez* test extends beyond Commerce Clause statutes to Elections Clause statutes, Defendants satisfy each element. Congress, pursuant to its Elections Clause power, made the NVRA the exclusive action for ascertaining the power of governmental officials to distribute voter registration forms for federal elections.[3]

First, the NVRA creates a civil enforcement provision that includes a cause of action that replaces and protects the analogous area of state law. It does so in two ways. First, it authorizes the United States Attorney General—on behalf of the United States and all its citizens—to bring a civil action in federal court "for such declaratory and injunctive relief as is necessary to carry out this chapter." 52 U.S.C. § 20510(a). Second, it expressly creates a private right of action to sue for violations of the NVRA. *Id.* § 20510(b). Plaintiff's claim falls under the NVRA's civil enforcement provisions because it questions the lawfulness of conduct by local government officials that the NVRA expressly regulates: the distribution of federally-prescribed voter registration applications by local governments to promote voter participation in federal elections. *See id.* §§ 20501(a) & 20505(b).

Moreover, the fact that the NVRA's cause of action "replaces and protects the analogous area of state law," *Gutierrez*, 543 F.3d at 252, is made evident by Texas law itself. The Texas legislature enacted its voter registration laws following Congress's enactment of the NVRA, in a law titled "AN ACT relating to implementation of the National Voter Registration Act of 1993."

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is raised as a defense to a legitimate state law claim. The cases upon which Plaintiff relies are inapposite because they deal with an entirely different context.

[3] Plaintiff incorrectly asserts (at 6, 7) that Defendants did not raise complete preemption in their removal notice. Defendants expressly raised complete preemption, explaining that its factors were satisfied. *See* Notice of Removal at 4 ¶ 12, Doc. 1.

See Acts 1995, 74th R.S., ch. 797, H.B. 127. At the same time, the Texas legislature enacted a statute providing that

> [i]f under federal law, order, regulation, or other official action the National Voter Registration Act of 1993 is not required to be implemented or enforced in whole or in part, an affected state law or rule is suspended to the extent that the law or rule was enacted or adopted to implement that Act, and it is the intent of the legislature that the applicable law in effect immediately before the enactment or adoption be reinstated and continued in effect pending enactment of corrective state legislation.

Tex. Elec. Code § 31.007(a). If the Texas Secretary of State determines the NVRA has been suspended in whole or part, she is to "modify applicable procedures as necessary to give effect to the suspension and to reinstatement of the procedures of the former law." *Id.* § 31.007(b).

As part of the 1995 "ACT relating to implementation of the National Voter Registration Act of 1993," the legislature required the secretary of state to identify activities that county voter registrars undertake to "implement[] [] the National Voter Registration Act of 1993" Tex. Elec. Code § 19.004(a)(1)(A) & (b); *see also id.* § 20.009. Pursuant to that requirement, the secretary promulgated a regulation titled "Voter Registration Drives Encouraged." Tex. Admin Code § 81.25.[4] That rule provides that "[v]oter registration drive efforts include but are not limited to *mailout of applications to households*, insertion of applications into newspaper, distributing applications at public locations, and other forms of advertising." *Id.* § 81.25(b) (emphasis added).[5] Under the NVRA suspension provision, this statute and rule were enacted *solely because of the NVRA* and will *cease to have legal effect* in the absence of the NVRA. Texas law thus expressly recognizes that activities by local governments to promote voter registration for federal elections—

[4] The Texas Secretary of State's own regulations specifically acknowledge that Section 19.004 of the Texas Elections Code was "amended" by the NVRA. Tex. Admin. Code § 81.28.

[5] Texas law provides that county voter registrars can apply for state funds to offset the cost of these NVRA implementation activities, Tex. Elec. Code § 19.004(a)(1)(A) & (b); *see also* Tex. Admin. Code § 81.25(a), but county commissioners courts may not rely upon receipt of such funds so they must budget for those activities using county funds. *Id.* §§ 1.014 & 19.006.

including specifically mailing voter registration applications to county residents—are undertaken exclusively pursuant to federal law and that absent that federal law the relevant state law automatically disappears. Simply put, Texas's law expressly provides that there *is no state law* on the topic other than what is required to comply with the NVRA. There could be no clearer evidence that a federal civil enforcement scheme "replaces and protects the analogous area of state law," *Gutierrez*, 543 F.3d at 252.

Second, the NVRA contains a specific jurisdictional grant of power to federal courts for its enforcement. *See* 52 U.S.C. § 20510(a) & (b) (authorizing action in "appropriate district court"). Moreover, Congress has granted federal courts jurisdiction to "secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." 28 U.S.C. § 1343(a)(4).

Third, Congress intended the NVRA to be the exclusive law with regard to whether local governments have a duty (and therefore the authority) to distribute federally-prescribed voter registration forms in order to promote participation in federal elections. This conclusion flows directly from the fact that the NVRA was enacted pursuant to Congress's Elections Clause power and thus necessarily "terminate[s]" state law on the topic. *ITCA*, 570 U.S. at 15. But the NVRA likewise makes that clear in other ways. Congress acted to create uniform laws nationwide to apply to voter registration for federal elections. *See Anderson*, 539 U.S. at 10-11 (citing the National Bank Act's purpose of providing uniform rules for federally chartered banks in finding complete preemption). In enacting the NVRA, Congress expressly found that "[i]t is the duty of the Federal, State, and local governments to promote the exercise of" the right to vote and that "discriminatory and unfair registration laws and procedures can have a direct effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups,

including racial minorities." 52 U.S.C. § 20501(a). Congress declared that its purpose was, *inter alia*, "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and "to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." *Id.* § 20501(b)(1) & (2). Congress required states to accept and use a Federal voter registration form and authorized them to create a state form so long as it contained specific, federally-prescribed contents. *Id.* §§ 20505(a) & 20508(b). It required that those forms be made available to governmental and private entities for distribution. *Id.* § 20505(b). And it created a comprehensive scheme of federal enforcement in federal courts—including by the United States Attorney General, by private parties, and through criminal prosecution. *Id.* §§ 20510 & 20511.

The NVRA—enacted pursuant to the Elections Clause—evinces a plain intent to be the exclusive law with respect to whether local governments have the duty (or authority) to distribute federally-prescribed voter registration forms to promote participation in federal elections. Because there can *be* no state law on this question, Congress has "so forcibly and completely displace[d] state law that the plaintiff's cause of action is either wholly federal or nothing at all." *Elam*, 635 F.3d at 803.

II. Removal is appropriate under the *Grable* doctrine.

Removal is also appropriate under the *Grable* doctrine. In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, the Supreme Court held that a state law quiet title action that depended upon resolution of question involving federal tax law could be removed to federal court even though there was no federal cause of action. 545 U.S. 308, 310 (2005). In so holding, the Court explained that it had recognized "for nearly 100 years that in certain cases

federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Id.* at 312. The Court explained that in determining whether removal is appropriate, "the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Id.* at 314; *see also Gunn v. Minton*, 568 U.S. 251, 258 (2013) (noting that four considerations are whether federal issue is (1) "necessarily raised," (2) "actually disputed," (3) "substantial," and (4) "capable of resolution in federal court without disrupting the federal-state balance approved by Congress"). Here, each of these elements is satisfied.

The NVRA is "necessarily raised" by Plaintiff's suit. The NVRA is "necessarily raised" by Plaintiff's suit. Plaintiff alleges that Texas law contains no express authorization for local governments, including county voter registrars, to mail voter registration forms to eligible, unregistered residents, and therefore state law must be interpreted as *prohibiting* them from aiding their residents in registering to vote for the November 2024 federal election. *See* Doc. 1-1. But the same Texas law Plaintiff cites as failing to authorize Defendants to mail voter registration forms on its face acknowledges that it exists solely to implement the requirements of the NVRA. The Texas legislature enacted its voter registration laws following Congress's passage of the NVRA, and it entitled its legislation "AN ACT relating to implementation of the National Voter Registration Act of 1993." *See* Acts 1995, 74th R.S., ch. 797, H.B. 127. That law expressly requires the Secretary of State to identify activities by county voter registrars that "implement[] [] the National Voter Registration Act of 1993." Tex. Elec. Code § 19.004(a)(1)(A) & (b); *see also id.* § 20.009. Pursuant to that requirement, the secretary of state has identified "*mailout of applications to households*, insertion of applications into newspaper, distributing applications at public

locations, and other forms of advertising," Tex. Admin. Code § 81.25(b) (emphasis added), as types of voter registration drive activities undertaken by local governments in order to implement the NVRA. Under Texas law, therefore, the allegations in Plaintiff's Complaint expressly relate to "implementation of the National Voter Registration Act." Tex. Elec. Code § 19.004(a)(1)(A) & (b); Tex. Admin. Code § 81.25(b) and Tex. Admin. Code. § 81.28 (recognizing that the NVRA "amended" Tex. Elec. Code § 19.004). It is difficult to imagine a clearer example of a federal law issue being "necessarily raised" by purported state law claim than where the state law on its face stating that it exists to implement the federal law.

But here it does get even clearer. That is because Texas law expressly provides that its state laws regarding the promotion of voter registration for federal elections exist against its will, are solely in place to comply with Congress's enactment of the NVRA, and are to be automatically suspended in the event the NVRA ceases to apply in part or in full. Tex. Elec. Code § 31.007(a). Texas law thus *disclaims* any state interest in the topic of local governments promoting voter registration for federal elections by distributing federally-prescribed voter registration applications, and provides that any relevant state laws will *disappear* if the NVRA ever ceases to apply.

Plaintiff contends that it "is simply seeking to invoke its intrinsic right to enact, interpret, and enforce its own laws against one if its political subdivisions." Doc. 2 at 8 (cleaned up). But Plaintiff elides the fact that, as explained above, the state laws it cites in its complaint "necessarily raise" Defendants' duties and authority under the NVRA—and do so on their face.

Defendants' NVRA responsibilities are actually disputed. There can be no dispute that that Defendants' NVRA responsibilities are actually disputed. Plaintiff contends that Defendants have no authority to mail voter registration forms to eligible, unregistered Travis County

residents.[6] Defendants contend that the NVRA recognizes that, as the elected officials of the Travis County "local government," they have a "duty . . . to promote the exercise of [the right vote]" and must fulfill that duty "in a manner that enhances the participation of eligible citizens as voters in elections for Federal office," 52 U.S.C. § 20501(a) & (b), including through "distribution" of voter registration forms "with particular emphasis on . . . organized voter registration programs," *id.* § 20505(b). Indeed, this is now the dispute of two federal court actions—this matter and a separate suit in which the Defendants in this matter are Plaintiffs suing Attorney General Paxton and Secretary of State Nelson regarding the NVRA's requirements. *See Brown, et al. v. Paxton, et al.*, Case No. 5:24-cv-01095 (W.D. Tex. 2024). This plainly constitutes an "actual dispute" among the parties related to whether the NVRA imposes upon Defendants the duty—or at the very least the authority—to engage in the conduct about which Plaintiff complains.

Defendants' NVRA obligations raise a substantial question of federal law. Whether Defendants—as the elected representatives of Travis County—have a federal law duty or authority to promote voter registration for federal elections raises a substantial question of federal law. This

[6] For political purposes and dramatic effect, Texas—by its Attorney General Ken Paxton—repeatedly asserts that Defendants have mailed voter registration forms to residents "regardless of the recipient's eligibility." Doc. 2 at 5; *see also* Doc. 2 at 2 (contending that providing residents with voter registration form is "inviting illegal voter registration with the imprimatur of the County seal"). But as Plaintiff acknowledges, Defendants' voter registration program aims to aid "Travis County residents [who are] at least 18 years of age, a US citizen and not already registered to vote." Doc. 2 at 2. Plaintiff's supplemental motion for remand—highlighting a single error in Travis County's mailings—is a red herring. *See* Doc. 12. Indeed, its filing demonstrates that the system is working as it should. The recipients of that mistaken mailing did not engage in a fraudulent scheme to register a deceased voter. The NVRA protects against that potential by (1) requiring Texas to "specif[y] each eligibility requirement" on its form, 52 U.S.C. § 20508(b)(2)(A), and (2) making the "submission of voter registration applications that are known by the person to be materially false, fictitious, or fraudulent" a federal crime, *id.* § 20511(2)(A). Congress balanced the risk of ineligible voters registering and determined that local governments had a duty to distribute voter registration applications to promote voter registration for federal elections.

inquiry looks not at the importance of the issue to the parties themselves, but rather "to the importance of the issue to the federal system as a whole." *Gunn*, 568 U.S. at 259. That the federal issue here is a substantial one is self-evident.

First, the NVRA was enacted pursuant to an express grant of authority to Congress to displace state laws. *See* U.S. Const. art. I, § 4, cl. 1. When Congress acts pursuant to the Elections Clause, it exercises "broad" power to preempt state law. *ITCA*, 570 U.S. at 9. That the Constitution itself specifically authorizes Congress to enact the NVRA itself speaks to the importance of Elections Clause legislation to the federal system.

Second, Congress expressed the importance of promoting voter registration in the NVRA itself. In the "Findings" section of the law, Congress provided that "the right of citizens of the United States to vote is a fundamental right," that "it is the duty of the Federal, State, and local governments to promote the exercise of that right," and that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(1)-(3). In the "Purpose" section of the law, Congress provided that the NVRA would, *inter alia*, "establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office," and "make it possible for Federal, State, and local governments to implement [the NVRA] in a manner that enhances participation of eligible citizens in elections for Federal office." *Id.* § 20501(b)(1) & (2). Congress was clear that it was enacting the NVRA to protect the "fundamental right" to vote in federal elections, an indisputably substantial interest in the federal system.

Indeed, the Supreme Court has emphasized the importance of the right to vote: "[n]o right is more precious in a free country than that of having a voice in the election of those who make

the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 16 (1964). The substantiality of the fundamental right to vote—including Congress's effort to require local governments to promote voter registration—far surpasses the issue the Supreme Court found substantial in *Grable*—the propriety of IRS notice in a quiet title action. 545 U.S. at 315. While that was no doubt substantial to the federal government's revenue, the issue in this case goes to fundamental questions of democracy—whether a State may use its state courts to prevent local governments from complying with federal laws—enacted by specific constitutional authority to displace state law—to promote participation in federal elections. The importance of this issue to the federal system is paramount.

Federal court resolution will not disrupt Congress's federal-state balance. Resolution of this case by this Court will not disrupt any federal-state balance set by Congress. In fact, Congress has plainly spoken that the allegations at issue in this case should be heard in federal, not state, court. First, Congress so spoke by enacting the NVRA in the first place—pursuant to its power to "terminate" state laws regulating congressional elections. *ITCA*, 570 U.S. at 15; U.S. Const. art. I, § 4, cl. 1. The Framers settled any debate between which sovereign the final time, place, and manner elections powers will be held (the federal government) and which branch of the federal government would wield such power (Congress). *See* U.S. Const. art. I, § 4, cl.1. The Constitution thus itself establishes that, for laws Congress enacts pursuant to the Elections Clause, a federal—not state—forum is appropriate. Thus, as the Supreme Court held in *ITCA*, "federalism concerns" are "weaker" when Congress acts pursuant to its Elections Clause powers. 570 U.S. at 14.

Indeed, Congress created a comprehensive enforcement system for ensuring that the NVRA's commands were followed—and each aspect specifies a federal judicial forum. *See* 52

U.S.C. § 20510(a) (authoring the U.S. Attorney General to sue in federal court); *id.* § 20510(b) (authorizing private right of action in federal court); *id.* § 20511 (creating federal felony offenses for violations of NVRA that would be prosecuted in federal court). There can be no doubt that Congress expressly chose that a federal—not state—forum should determine whether local government officials are duty-bound, or at least authorized, to promote voter registration in federal elections by distributing federally-prescribed voter registration applications.

Moreover, "it will be the rare state [*ultra vires*] case that raises a contested matter of federal law," and thus recognizing federal court jurisdiction in this case "will portend only a microscopic effect on the federal-state division of labor." *Grable*, 545 U.S. at 315. Although Plaintiff suggests (at 9) the possibility of an "enormous shift" of state law *ultra vires* claims to federal tribunals if removal is permitted in this case, it identifies *no other case* that would be affected. Indeed, Defendants are not aware of a single state court lawsuit—in any state—in which a State Attorney General has sought to prevent local governments from fulfilling their express duties under the NVRA to distribute federally-prescribed voter registration forms to promote participation in federal elections. Undoubtedly this is because the NVRA is so clear. And perhaps as well because Congress made interfering with local governments' efforts to aid people to register to vote *a federal crime*. Regardless, there will be no avalanche of state *ultra vires* cases shifting to federal court by recognizing federal jurisdiction in this case.

III. There is no emergency.

Plaintiff's lawsuit is not an emergency—it is instead a press release masquerading as a lawsuit that will have the effect of discouraging voter registration. Indeed, Plaintiff has not acted as if this is an emergency. Travis County announced publicly in June that it was planning to mail voter registration cards to citizens identified as eligible but unregistered. Local registrars have

mailed out registration cards for decades. This summer, Travis County undertook a pilot program utilizing an outside vendor, all in the clear light of the day. After that program showed promise, Travis County, through public meetings and a public contracting process, hired a vendor to expand the program. Therefore, the fact we are involved in litigation in the final weeks of the election, a few weeks away from the October 7 voter registration deadline is not the result of Defendants' actions who are between federal law and consistent but pre-empted state laws on one side and a state attorney general who wishes the laws were different on the other.

Especially troubling is Plaintiff's contention that Defendants have removed this case "to avoid imminent and unfavorable state court rulings." Doc. 2 at 9. Plaintiff was already denied an emergency temporary restraining order hearing by the state trial court in this case. The State was also denied injunctive relief after a contested hearing in its similar case against Bexar County *See The State of Texas v. Jacquelyn Callanen, et al.,* Case No. 5:24-cv-1043 (W.D. Tex. 2024). Why does the State pronounce that it *will* be prevailing in the newly constituted Texas Fifteenth Court of Appeals.? For their part, Defendants did not remove this case because they thought they would lose on appeal in the Texas state court system—indeed, they had already prevailed in the only adjudication to date—rather, Defendants rightfully placed a federal issue in federal court, giving effect to the constitutional text of the Elections Clause and concomitant federal legislation under the NVRA.

Moreover, it is not without irony that the State is in court arguing that election rules should change within weeks of the election. Usually the State is decrying late-breaking changes to election rules. *See, e.g.*, *Tex. Alliance for Retired Ams. v. Hughes*, 976 F.3d 564 (5th Cir. 2020) (raising *Purcell* argument). To be fair, there are times when the State has tried to change the election rules at a late date, and cast aside any of the federalism concerns it invokes in this removal—like when

it sought to overturn *Pennsylvania's* election results after the fact. *See Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020) (Mem.) (denying Texas's lawsuit to overthrow Pennsylvania's presidential election results because "Texas has not demonstrated a judicially cognizable interest in the manner in which another State conducts its elections"). But usually, the State is trying to prevent late-breaking changes in election law.

It is far too close to the October 7 voter registration deadline for this Court to rush to facilitate the—federally prohibited—election law changes Plaintiff seeks.

IV. Plaintiff's request for attorneys' fees is unsupported.

The Court should reject Plaintiffs' request for attorneys' fees under 28 U.S.C. § 1447(c). The Supreme Court has held, "absent unusual circumstances, attorneys' fees should not be awarded when the removing party has an objectively reasonable basis for removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 135 (2005). The event horizon of federal issues appropriately removed to federal court is not easily observed. In fact, in one authority the state cites in its motion to remand, the Fifth Circuit held: "Unfortunately, the meaning of this seemingly simple standard [arising under federal law] has resisted all efforts by the courts to arrive at a coherent, easily applicable characterization. As noted by Wright and Miller, "[t]he most difficult single problem in determining whether federal question jurisdiction exists is deciding when the relation of federal law to a case is such that the action may be said to be one 'arising under' that law.' 13B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3562 (1984). The phrase 'masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.'" *Casey v. Rainbow Group, Ltd.*, 109 F.3d 765, 768 (5th Cir. 1997) (cleaned up).

As the above arguments demonstrate, it is baseless for Plaintiff to suggest that Defendants lacked an objectively reasonable basis to remove this case, particularly in light of the Supreme Court's on-point opinion in *ITCA*. Texas law expressly states that its provisions related to voter registration activities by voter registrars is solely a function of the NVRA's requirements and that those laws *disappear* automatically if the NVRA ever ceases to apply. It should come as no surprise to Texas then that its lawsuit aimed at interfering with Defendants' *federal* law "duty" to aid eligible residents in registering to voter using a *federally*-prescribed form to encourage participation in a *federal* election has landed Plaintiff in *federal* court.

CONCLUSION

For the foregoing reasons, Plaintiff's motion to remand should be denied.

Dated: September 23, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2024, I electronically filed the foregoing document with the Clerk of the United States District Court for the Western District of Texas, Austin Division, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Chad W. Dunn
Chad W. Dunn