IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

THE STATE OF TEXAS, *Plaintiff,* v. JACQUELYN CALLANEN in her official capacity as Bexar County Election Administrator; PETER SAKAI, in his official capacity as Bexar County Judge; REBECA CLAY-FLORES, in her official capacity as Bexar County Commissioner; JUSTIN RODRIGUEZ, in his official capacity as Bexar County Commissioner; GRANT MOODY, in his official capacity as Bexar County Commissioner; TOMMY CALVERT, in his official capacity as Bexar County Commissioner. *Defendants.*	§ § § § § § § § § § § § § § § § §	Case No. 5:24-cv-1043

STATE OF TEXAS'S REPLY TO DEFENDANTS' OPPOSITION TO EMERGENCY MOTION TO REMAND

INTRODUCTION AND BACKGROUND

In an attempt to deprive a jurisdictionally appropriate state court of the ability to decide whether Defendants acted beyond the scope of their authority, Defendants removed this action to federal court. Dkt. 1. State courts should decide matters of state law. The State, as plaintiff, is the master of its own complaint and pled exclusively state law claims that are not preempted by federal statute. *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002). The NVRA does not preempt—let alone, completely preempt—state law *ultra vires* claims. Instead,

the NVRA is designed to operate alongside state law and does not prohibit Texas from setting and enforcing its own election registration regulations. The Court should therefore grant the State's motion to remand.

ARGUMENT

Defendants have removed this case to federal court for one purpose: to delay judicial review of their illegal conduct. This Court should not allow it. Not only can Defendants identify no basis for invoking this Court's jurisdiction, their attempt at removal undermines the principles of federalism by precluding state courts from interpreting and enforcing a vital question of state law.

I. The NVRA Does Not Preempt—Completely or Otherwise—State Law.

Plaintiff State of Texas is the master of its own complaint, and Texas has chosen to plead only state law claims; that choice bars any removal by Defendants to federal court based on federal question jurisdiction. Defendants have again attempted to obfuscate this simple application of the plain text of the Federal Rules of Civil Procedure by drawing strained analogies to the facts of *Grable* and *Beneficial National Bank*. 545 U.S. 308 (2005); 539 U.S. 1 (2003). These narrow exceptions do not apply.

To prevail on their attempt at removal, Defendants must show *complete* preemption—or, in other words, that Congress has "so forcibly and completely displace[d] state law" that the plaintiff has no state cause of action. *Casey v. Rainbow Group, Ltd.,* 109 F.3d 765 (5th Cir. 1997). The NVRA, however, expressly contemplates the existence of state regulations over voter registration, and Defendants point to no provision in the NVRA authorizing a political subdivision to defend on questions of state law in a federal forum.

Defendants are left arguing ordinary preemption, but the Supreme Court has left no doubt that a plaintiff's suit does not arise under federal law simply because the defendant may raise preemption as a defense. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) ("[I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint,

and even if both parties concede that the federal defense is the only question truly at issue."); *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 273 (2d Cir. 2005). Defendants' removal is inappropriate, and the Court should immediately remand.

A. The NVRA does not preempt state law questions on the face of Texas's complaint.

Defendants' argument for removal fails because Texas's claims are not inescapably federal in character. *See Franchise Tax Bd. of State of Cal.*, 463 U.S. at 27–2 (holding that federal jurisdiction triggers only when "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law"). Arguing to the contrary, Defendants claim that the NVRA has preempted, by necessity, "any state law regarding whether local governments have a duty to distribute voter registration forms for federal elections." Dkt. 15 at 7-8. In support, Defendants cite three provisions of the NVRA as the source of this "duty to distribute voter registration forms." None of these provisions, however, require Defendants to enter into a contract with partisan vendor in violation of both the Election Code and state procurement laws.

The first provision Defendants rely on is 52 U.S.C.A. Section 20501(a)(2), which states: "Congress finds that it is the duty of the Federal, State, and local governments to promote the exercise of [the right to vote]." The plain language of this provision in no way limits the authority of a State to rein in the *ultra vires* conduct of its political subdivisions, nor does this provision mandate such political subdivisions to contract with partisan vendors to mail unsolicited voter registration applications. As proof, the Court need look no further than Defendants' own actions: this case marks the first instance in which Bexar County officials have sought to mail voter registration applications *en masse*, yet the NVRA has been the law since 1993. The NVRA does not compel Defendants' conduct at issue in this lawsuit, and so it cannot foreclose the State's actions to stop that conduct.

The second provision Defendants rely on is Section 20501(b)(2), which finds that a purpose of the Act is "to make it possible for . . . governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office."

Here again, the NVRA's plain language does not mandate or preempt, but rather seeks "to make it possible" for NVRA implementation in a helpful, rather than harmful, manner. Section 20501(b)(2) does not deprive states of their authority to regulate elections according to their own laws, nor does it require political subdivision of those states to mail voter registration applications through partisan vendors. Absent such universal proscription or prescription, Section 20501(b)(2) does not completely preempt the State's *ultra vires* claims in this case.

The final provision Defendants rely on is Section 20505(b), which requires "[t]he chief State election official of a State" to "make [voter registration forms] available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs." *Id.* Of the provisions cited by Defendants, this one perhaps puts the matter most pointedly: the NVRA does not regulate political subdivisions, it regulates states. Defendants simply have no good faith argument that the NVRA compels them to make voter registration applications available *in specific ways*, *even if those ways violate state law or otherwise exceed the political subdivision's authority*.[1]

The weakness of Defendants' arguments becomes even more apparent once the full context of the NVRA is taken into account. The plain text of the NVRA expresses an intention to function alongside state voter registration requirements, providing as follows: "Except as provided in subsection (b)[2], notwithstanding any other Federal or State law, ***in addition to any other method of voter registration provided for under State law,*** each State shall establish procedures to register to vote in elections for Federal office" — 52 U.S.C.A. § 20503 (emphasis added). In addition, one of the stated aims of the NVRA is to protect the integrity of elections. § 20501(b)(3). That Congressional objective stands athwart Defendants' ploy to use the NVRA as a shield to prevent

[1] The Election Code enumerates multiple ways in which a political subdivision may distribute voter registration forms. *See*, *e.g.*, Tex. Elec. Code §§ 1.010(b)-(c), 13.031, 13.038, 13.046, 20.001. That Defendants disagree with the State's methods is not sufficient to sustain removal to federal court.

[2] Subsection (b) includes two limited exceptions inapplicable here: 1) where a state has "no voter registration requirement for any voter in the State with respect to an election for Federal office," and 2) where "all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office."

a state court from reviewing the denial of a sovereign state's attempt to protect the integrity of elections by bringing state law claims against a state political subdivision.

Defendants point the Court to *Arizona v. Inter Tribal Council of Arizona, Inc.* for the proposition that "[i]n practice, the [Elections] 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.'" Dkt. 13 at 5 (citing 570 U.S. 1, 9 (2013)). However, "[w]hen there is no federal law that directly conflicts with state law regulating the time, place, and manner of federal elections, then state law controls by default." *Texas Voters Alliance v. Dallas County*, 495 F. Supp. 3d 441, 467 (E.D. Tex. 2020) (citing *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 399 (5th Cir. 2013)). Defendants' position thus assume that the NVRA directly conflicts with state law. But since the state Election Code provisions in this case do not directly conflict with the NVRA and are instead consistent Congressional intent that the NVRA function alongside state law, Defendants' argument fails.

Simply put, the NVRA does not create the sole appropriate manner for state regulation of voter registration. If Congress had so intended, there would not still exist 50 different voter registration schema under 50 different state election codes. States have historically been "delegated substantial authority over Federal elections"; that authority "is particularly potent with regard to procedural regulations and rules to oversee and ensure the integrity of elections, even to Federal office." *Voice of the Experienced v. Ardoin*, No. CV 23-331-JWD-SDJ, 2024 WL 2142991, *38 (M.D. La. May 13, 2024) (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986); also citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995)). Nothing in the NVRA disrupts that balance between federal and state authority.

Defendants, as the party seeking removal, have the burden of "demonstrating that a federal question exists," and so must establish that Congress intended complete preemption of Texas's state claims. *Gutierrez v. Flores*, 543 F.3d 248, 251 (2008) (citing *In re Hot-Hed, Inc.*, 477 F.3d 320, 323 (5th Cir. 2007)). Defendants have failed to carry their burden.

B. The NVRA does not preempt state law questions under the *Gutierrez* test.

Defendants' argument for removal under the three-prong *Gutierrez* test fails for the simple reasons that Congress intended the NVRA to engender—not to eliminate the need for—state law governing voter registration and created federal causes of action designed to supplement—but not replace—state court enforcement of registration regulations. The federal civil enforcement provisions of the NVRA identified by Defendants provide federal claims that the United States Attorney General and private plaintiffs may bring concerning violations of federal law. But Defendants can point to no provision of the NVRA requiring that states litigate questions of state law in federal court, because such a provision does not exist. In fact, the two narrowly bounded, plaintiff-specific federal enforcement mechanisms identified by Defendants undercut their argument. Our canons of statutory construction dictate that expression of one thing is the exclusion of the other. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107–11 (2012). Congress's expression of two federal causes of action, to be litigated in federal court for violations of federal law, demonstrates an intent to leave questions of state voter registration law to state courts.

Consonant with this division of labor between state and federal courts, the substantive provisions of the NVRA make plain that the Act is not intended to be—as Defendants assert—"the exclusive law with regard to whether local governments have a duty (and therefore the authority) to distribute federally-prescribed voter registration forms." Dkt. 15 at 10. The Congressional findings expressed in the NVRA make plain that all levels of government, local governments included, have a duty to promote the exercise of "the right of citizens of the United States to vote." 52 U.S.C.A. § 20501(a). But as discussed above, the NVRA also makes plain that responsibility for establishing the procedures by which citizens register to vote is left to states. *See supra* part I.A. Under this matrix of authority and responsibility, states ensure that their political subdivisions properly implement the voter registration procedures established by state law.

Depriving state courts of jurisdiction to hear such state-law disputes undermines the balance of authority established by the NVRA. As such, removal here is improper.

This system of apportioned federal and state jurisdiction and conjunctive federal and state laws established by the NVRA parallels the system established by other federal statutes. For example, the National Flood Insurance Act (NFIA) created a federal cause of action for claims arising under federal flood insurance policies, thereby preempting state law resolution of such claims. *Alexander v. Woodlands Land Dev. Co. L.P.*, 325 F. Supp. 3d 786, 793 (S.D. Tex. 2018). Defendants in *Alexander* sought to remove to federal court on the basis of complete preemption, arguing that despite having pleaded only state law causes of action, "Plaintiffs are actually challenging FEMA's statutorily-mandated floodplain determinations, and . . . the NFIA provides the sole bases to challenge the determinations." *Id.* The court was "not persuaded," pointing to the face of Plaintiffs' complaint and emphasizing that "nowhere in Plaintiffs' Original Petition do Plaintiffs challenge FEMA's floodplain determinations." *Id.* at 793-94. Furthermore, the court looked to the language of the NFIA and observed that there was not "any language in the NFIA that indicates . . . that the NFIA completely preempts" the state law claims. *Id.* at 794.

By contrast, when Congress intends federal law to completely preempt and abrogate state causes of action, it does so unambiguously. The Employee Retirement Income Security Act (ERISA), for instance, established a "comprehensive legislative scheme" that features "expansive pre-emption provisions" designed to "ensure that employee benefit plan regulation would be exclusively a federal concern" as well an "integrated system of procedures for enforcement" that is "essential to accomplish Congress's purpose of creating a comprehensive statute for the regulation of employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (internal citations omitted). In consequence, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Id.* at 209. Unlike ERISA, the NVRA is explicitly not comprehensive, contains no preemption provision, and

makes its subject—voter registration regulations—a concern of both federal and state governments. Unlike ERISA, the NVRA is not completely preemptive.

C. Defendants' removal is improper under *Grable*.

A defendant may only remove an action filed in state court to federal court if the action is one that could have originally been filed in federal court. See 28 U.S.C. § 1441(a). Since 1887, it has been a well-settled "that a case may not be removed to a federal court on the basis of a federal defense, including the defense of preemption." *Fran. Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 14 (1983).

Into this well-settled corpus of law came *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, where the Supreme Court found a highly specific and limited exception conferring federal question jurisdiction on federal courts in a "special and small" category of cases. 545 U.S. 308 (2005); *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699 (2006). To qualify for inclusion in that category, a dispute must feature a federal issue that is: (1) necessarily raised, (2) disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Defendants have the burden to establish that this case satisfies each of the four *Grable* prongs to justify removal. *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 588 (5th Cir. 2022). Defendants fail to carry that burden under each prong.

Texas's suit raises no federal issue. The State brought this action under Texas law, in a Texas court, to vindicate the authority of Texas over one of its political subdivisions and to secure the integrity of Texas elections. That the Defendants now raise, as a defense to their unlawful actions, an allegation that federal law supersedes Texas's enforcement of its own law does not make "plain that a controversy respecting the construction and effect of the [federal] laws is involved." *Grable*, 545 U.S. at 316 (quoting *Hopkins v. Walker*, 244 U.S. 486, 489 (1917)). That the Texas Election Code serves partly to implement the NVRA does not mean that a federal issue is

presented—rather, it reinforces the State's position that a Texas court should apply the Texas law to determine whether Defendants' actions are *ultra vires*.

While Defendants' pleadings allege a dispute over Defendants' obligations and authority under the NVRA, no such live dispute exists in this case. No provision of the NVRA requires a political subdivision to mass-mail unsolicited voter registration applications in violation of state law. By contrast, the NVRA requires *states*—not political subdivisions of states—to "establish procedures to register to vote in elections for Federal office" and to designate subordinate bodies to carry out "the registration of voters in elections for Federal office." 52 U.S.C.A. §§ 20503, 20506. Implicit in this congressionally established structure is a recognition that political subdivisions of a state must comply with the registration procedures established by state law. And state courts should decide questions of state law.

This suit does not implicate a substantial federal interest under the meaning of *Grable*. Voting rights are certainly an important federal interest, but determining the means and manner of conducting elections, including voter registration, is an essential state function and a matter of Texas's sovereignty. *See Shelby Cnty., Ala. v. Holder,* 570 U.S. 529, 543 (2013) ("[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("A State indisputably has a compelling interest in preserving the integrity of its election process."). Congress recognized this sovereignty in the NVRA by designing the statute to work in conjunction with—not against—state regulations balancing access to the ballot box with election integrity measures. Defendants' reading of the statute actually undermines federal interests by sweeping away Congress's carefully constructed statutory scheme in favor of one that vitiates the state interests Congress sought to protect.

Finally, permitting removal of this action to federal court would disrupt the federal-state balance in contravention of the fourth *Grable* prong. Defendants' contention that the NVRA creates a limited federal cause of action is insufficient to establish complete preemption. Defendants do not, and cannot, point to an NVRA provision authorizing political subdivisions to

defend against state-law questions in a federal forum. Congress's creation of an NVRA enforcement mechanism demonstrates that had Congress wished to sweep disputes like this one into federal court, it could have. That Congress has declined to do so demonstrates that just as Congress meant the NVRA's substantive provisions to work in conjunction with state law, it also meant federal courts to address causes of action arising under the NVRA and state courts to address controversies arising under state law.

II. Defendants' actions constitute an emergency necessitating emergency relief.

Defendants contend that there "is no emergency." Dkt. 15 at 17. This assertion is utterly without merit. The State filed its original action to enjoin Defendants from undertaking action that would cause tremendous harm to the State's elections—namely, using a partisan vendor to mail unsolicited voter registrations *en masse*, regardless of whether the recipients are eligible to vote or not. Dkt. 6-1 at 2 ¶ 2. This harm is already occurring in real time.

As Defendants, devoid of authority, indiscriminately send voter registration applications to an unknown contingent of Bexar County residents, the proverbial bell cannot be un-rung. Defendants are plainly using the removal to delay necessary emergency relief that the State could and should receive from the state courts. *See* Dkt. 2 at 10; Dkt. 18 at 1–3. The circumstances therefore demonstrate an imminent emergency, and if this matter is further delayed by Defendants' frivolous removal, the State will not be able to rectify the harm that Defendants have caused. Such circumstances require an immediate remand to the appropriate state court. *See Clear Channel Commc'ns, Inc. v. Citigroup Glob. Markets, Inc.*, 541 F. Supp. 2d 874, 876 (W.D. Tex. 2008) (remanding an improperly removed case to state court for lack of subject-matter jurisdiction on an expedited timeline due to the imminent threat of "tremendous damages" to the plaintiff).

CONCLUSION

For the foregoing reasons, Plaintiff State of Texas respectfully requests that the Court swiftly remand this action to the appropriate state court so that justice may be served. For the reasons previously expressed, the State respectfully requests a ruling by October 3, 2024.

Date: October 1, 2024

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on October 1, 2024, and that all counsel of record were served by CM/ECF.

/s/ Ryan G. Kercher
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