No. 24-A164

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL,
Applicants,
v.
MI FAMILIA VOTA, ET AL,
Respondents.

On Emergency Application for Stay

BRIEF OF KANSAS, WEST VIRGINIA, AND ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, IOWA, INDIANA, KENTUCKY, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS & STATUTES

OTHER AUTHORITIES

INTRODUCTION AND INTEREST OF *AMICI* STATES

The States "bear[] many of the consequences of unlawful immigration." *Arizona v. United States*, 567 U.S. 387, 397 (2012). And for too long, "'federal policies' of nonenforcement" have left "the States helpless before those evil effects." *Id.* at 431 (Scalia, J., concurring in part and dissenting in part). One of those effects is voter fraud. *See* Matthew Tragesser, *Illegal Aliens Are Still Voting in Our Elections*, THE HERITAGE FOUND. (July 10, 2024) (providing examples from Arizona, New Jersey, and Virginia).[1] And "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

Voting by non-citizens, both legal and illegal, is real.[2] The typical rejoinder is to claim that few non-citizens vote. On its own terms, though, the answer at least acknowledges that the problem persists. But it also ignores that even small voting blocs can have outsized effects on electoral outcomes. That effect is most obvious in local elections. *See* Tragesser, *supra*. But non-citizen voting also has national effects. Al Franken, for example, won his Senate seat in Minnesota in 2008 by 312 votes—an amount small enough that voting by aliens likely decided the election.

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[1] *Available at* https://www.heritage.org/election-integrity/commentary/illegal-aliens-are-still-voting-our-elections.

[2] Recently, the Commonwealth of Virginia discovered over 6,300 non-citizen registered voters on its voter rolls. https://www.msn.com/en-us/news/politics/thousands-of-non-citizen-registered-voters-discovered-governor-says/ar-AA1owMwM?ocid=msedgntp&pc=LCTS&cvid=ad1202c34b2a46d8982f8f0de7a1bd76&ei=6

"[P]articipation by 0.65% of non-citizens in [Minnesota] is sufficient to account for the entirety of Franken's margin. Our best guess is that nearly ten times as many voted." Jesse T. Richman et al., *Do Non-Citizens Vote In U.S. Elections?*, 36 ELECTORAL STUD. 149, 154 (2014). And that same study estimated that 1.2 million illegal aliens voted in the 2008 election, while enough voted in North Carolina to provide "reason to believe" they delivered the State's electoral votes to President Obama. *Id.* at 153.

There is every reason to believe this problem of non-citizen voting has gotten worse, as the number of aliens in the United States has undeniably grown. One study suggests there were over 11 million illegal aliens in the country in 2019.[3] But now that the Southwest border, for example, is "out of control," that figure is climbed ever higher. *Florida v. Mayorkas*, 672 F. Supp. 3d 1206, 1209 (N.D. Fla. 2023). Over the last three fiscal years, encounters at the Southwest border have risen from roughly 1.7 million to nearly 2.5 million, with over 1.8 million encounters to date in fiscal year 2024. U.S. Customs & Border Protection, Dep't of Homeland Sec., *Southwest Land Border Encounters*.[4] Indeed, the problem has grown so bad that the Governor of Texas has invoked the Invasion Clause, U.S. CONST. art. I, § 10, to stem, at a state-level, "the ongoing illegal immigration crisis." *United States v. Abbott*, 2024 WL 3580743, at *17 (5th Cir. July 30, 2024) (en banc) (Ho, J., concurring in the judgment

[3] The data are from the Migration Policy Institute, *Unauthorized Immigrant Population Profiles* (last visited Aug. 6, 2024), https://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles. The topline is provided via a download link on the page.

[4] *Available at* https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters.

in part and dissenting in part). The number of lawfully present aliens has also grown. Indeed, every year since 2000, the United States has admitted approximately one million permanent resident aliens.[5]

Each of those aliens represents another possible opening for voter fraud, for each represents a probability—no matter how small—that they will vote illegally. Add to that the other possible sources of noncitizen voting—such as aliens here legally but who cannot vote or who have overstayed their visas—and the magnitude of the problem becomes clear. In fact, it is often the case that lawfully-present aliens register to vote when offered the opportunity at the time they obtain a driver's license. Here, as in every other facet of life, the law of averages applies and dictates that aliens *are* illegally voting in elections to some degree. The debate is simply about the scale of the problem.

Arizona has been on the front lines of this invasion for decades, as the Court has acknowledged, *see Arizona*, 567 U.S. at 397, and so has long tried to stop aliens from illegally voting. Arizona, like many States—including *amici*, *see*, *e.g.*, KAN. CONST. art. V, § 1—requires, as a qualification to be an elector, that a voter be a United States citizen, *see* ARIZ. CONST. art. VII, § 2, and registered to vote, *see* Ariz. Rev. Stat. §§ 16-120(A), 16-121(A) (requiring registration for a person to be an elector). To enforce that requirement, Arizona does the logical thing: require that a person registering to vote provide documentary proof of citizenship. This

[5] https:// www.migrationpolicy.org/programs/data-hub/charts/pinwheel-number-of-us-legal-permanent-residents

requirement, or something similar, has been around in some form or fashion for at least 20 years. *See Purcell*, 549 U.S. at 2 (per curiam) (discussing the history of Proposition 200).

For an equally long time, though, the federal courts have been chipping away at Arizona's critical protections. For example, in *Arizona v. Inter Tribal Council of Arizona (ITCA)*, 570 U.S. 1, 20 (2013), this Court held that, under the National Voter Registration Act (NVRA), Arizona cannot demand that those filling out a registration form created by the U.S. Election Assistance Commission (the "Federal Form," to be distinguished from the "State Form," which is created under Arizona law) also provide documentary proof of citizenship. On still other occasions, parties have sought to use federal courts to silence Arizonans from even *talking* about the problem of non-citizen voting in their elections. *See, e.g., Arizona Democratic Party v. Arizona Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at *9 (D. Ariz. Nov. 4, 2016) (rejecting claims that Trump campaign's descriptions of voting by "illegal aliens" constituted "intimidation").

This case threatens to continue chipping away Arizona's authority to secure its own elections. In 2022, Arizona passed HB 2492 and HB 2243 to bolster its ability to ensure only qualified individuals—*i.e.*, citizens—could register to vote. Among other changes, the laws restricted Federal Only Voters (that is, voters who had been unable to provide proof of citizenship) to congressional elections—not State or presidential elections. *See* Ariz. Rev. Stat. § 16-127. And it further barred them from voting by mail. *Id.* § 16-121.01(E). The district court held that the NVRA preempted those

rules. *See Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077, 1088–92 (D. Ariz. 2023). So Arizona now faces a higher chance of non-citizens casting votes.

But what happens in Arizona does not stay in Arizona. Aliens who enter illegally at the Southwest border, for example, "proceed to interior States." *See* DHS, *Explanation of the Decision to Terminate the Migrant Protection Protocols* 26 (Oct. 29, 2021).[6] And of course there are non-citizens scattered throughout the country, whether they are tourists, foreign-exchange students, asylees, or others. In all cases, they bring the threat of illegal voting with them—recall again Senator Franken's pivotal votes in Minnesota or President Obama's electoral votes of North Carolina. Thus, interior States like Kansas have tried to implement similar election integrity rules as Arizona—and have also been stymied by the U.S. Election Assistance Commission and the federal courts on similar preemption grounds. *See Fish v. Kobach*, 840 F.3d 710 (10th Cir. 2016); *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014). Still other States like West Virginia have considered additional laws and measures to address non-citizen voting—but those measures could well be defeated right out of the starting gate, too.

Amici States thus have an interest in seeing the federalization and degradation of their election security come to an end and having their constitutional right to police their own elections vindicated. "There is no question about the legitimacy or importance of the [States'] interest in counting only the votes of eligible voters."

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[6] *Available at* https://www.dhs.gov/sites/default/files/2022-01/21_1029_mpp-termination-justification-memo-508.pdf.

Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 196 (2008) (plurality opinion). So States must have the ability to prevent "the diluting effect of illegal ballots." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). Reading the NVRA to stop common-sense election security measures, such as requiring documentary proof that an individual is a citizen as a prerequisite for registration to vote in *some* elections, undermines that interest.

This right to police elections involves a core aspect of State sovereignty. "It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government." *Bluman v. FEC*, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (three-judge district court) (Kavanaugh, J.). Thus, the States, as sovereigns, "may reserve participation in [their] democratic institutions for citizens of this country." *Id.* at 287 (quotations omitted). As sovereigns, each State has an "'obligation to preserve the basic conception of a political community,'" *id.* (quoting *Foley v. Connelie*, 435 U.S. 291, 296 (1978)), by delineating and enforcing the qualifications of electors. The Constitution respects that sovereignty. It, in fact, guarantees it as to State elections, *see* U.S. CONST. amend. X, congressional elections, *see* U.S. CONST. art. I, § 2, cl. 1; amend. XVII, and presidential elections, U.S. CONST. art. II, § 1, cl. 1. It is therefore not something Congress can take away.

Thus, while *Amici* States support Applicants in full, they focus here on the district court's decision that the NVRA preempts Arizona's election integrity rules as it relates to voting in presidential elections and mail-in voting. That determination

is a direct threat to the States' ability to police voter fraud and their sovereign right to define their political communities. It is erroneous, and this Court should grant the requested relief.

ARGUMENT

I. The NVRA Does Not Prohibit States from Ensuring Only Citizens Register to Vote.

The Court could grant relief here just by acknowledging that Arizona has a right to set its own voters' qualifications, and registration is a qualification to vote that the NVRA does not alter. But even if the Court disagrees, there are other, independent reasons why the NVRA does not preempt either the States' sovereign right to regulate presidential elections and or their authority to restrict voting by mail. *Amici* States address each in turn.

A. *ITCA* should not be read to limit States' ability to treat voter registration as a voting qualification.

The district court erroneously concluded that the NVRA preempted Arizona's common-sense election security requirements. Of course, NVRA preemption traces its roots to *ITCA*—and the district court cited it extensively in concluding the NVRA preempted Arizona's new law. *See Mi Familia Vota*, 691 F. Supp. 3d at 1088–92. But there is much reason for the Court to either overrule or cabin that decision, which "brushes aside the constitutional authority of the States and produces truly strange results." 570 U.S. at 38 (Alito, J., dissenting). On a practical level, the Court's reading of the NVRA meant Arizonans' ability to register to vote turns on whether they use the federal form created by the Election Assistance Commission or a state

form. *See id.* at 39. It is "very hard to believe that is what Congress had in mind." *ITCA*, 570 U.S. at 39 (Alito, J., dissenting).

Furthermore, essential predicates of the Court's analysis have been undermined. For example, the Court conceded there would be "serious constitutional doubts if [the NVRA] precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id.* at 17. But the Court said there was no issue because States could get that information by petitioning the Election Assistance Commission (EAC) to change the federal forms and bringing an APA challenge if it does not. *See id.* at 19.

Reliance on agency action to address constitutional concerns is an anomaly among this Court's precedents, which typically reflect suspicion that the "cure" for constitutionally dubious laws lies in the hands of unelected federal bureaucrats. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001). And history has now shown that agency action is not the panacea the *ITCA* majority thought. The States of Kansas and Arizona took the ITCA court at its word and asked the EAC to modify the federal registration form accordingly. However, the EAC refused to require the information the States of Kansas and Arizona thought necessary to determine citizenship in federal registration forms; and the Tenth Circuit affirmed that conclusion. *See U.S. Election Assistance Comm'n*, 772 F.3d at 1194–99.

But *ITCA*'s preemption analysis is, in any event, dubious. The history of voter registration and electoral regulation "from the foundation of the government to our day" is one of State-regulation, with *minor* exceptions. *United States v. Gradwell*,

243 U.S. 476, 484 (1917). "With it thus clearly established that the policy of Congress for so great a part of our constitutional life has been, and now is, to leave the conduct of the election of its members to state laws, administered by state officers," the assumption is that Congress will only "regulate such elections . . . by positive and clear statutes." *Id.* at 485. *Gradwell* very much sounds like a presumption against preemption. At the very least, it applies a requirement akin to the federalism clear-statement rule. The *ITCA* majority disregarded it too casually as a case not involving preemption or not involving congressional regulation of elections. 570 U.S. at 13 n.5. There is no warrant for treating an ambiguous law passed pursuant to the Elections Clause any differently than an ambiguous law passed under another constitutional grant of authority.

At a minimum, the history of State control of election regulations generally, and voter registration more specifically, reflects "congressional acceptance of a broad scope of" State authority in the area. *Dames & Moore v. Regan*, 453 U.S. 654, 677 (1981). States have "broad powers to determine the conditions under which the right of suffrage may be exercised," and federal authorities have no "general right to review and veto state enactments" in the election sphere. *See Shelby County v. Holder*, 570 U.S. 529, 542-43 (2013) (cleaned up). "It is quite unlikely that" Congress meant to fundamentally alter these practices and principles when it passed the NVRA. *Id.* "'[W]here a government practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.'" *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*,

597 U.S. 1, 36 (2022) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in judgment)). The Court should respect the States' leading role in the context of voter registration—and their sole role in creating and enforcing voter qualifications—by not interpreting the Elections Clause to undermine clear-statement rules that preserve their sovereign authority.

Granting the Application (and thus finding that Applicants are likely to succeed on the merits of their claim) does not, to be sure, require overruling *ITCA*. The Court should certainly do so at some point, and this case might be the right one in which to do it should the case eventually come before the Court. But at a minimum, the Court should not extend *ITCA*'s reasoning; to the contrary, the Court should respect the expressly narrow reach of the decision. The *ITCA* majority acknowledged that "[p]rescribing voter qualifications" and enforcing them is constitutionally reserved to the States. 570 U.S. at 17; *see also id.* at 28 (Thomas, J., dissenting). And more importantly, the Court did not say whether the result would be different if the "voter qualification Arizona [sought] to enforce" was registration as opposed to citizenship. *Id.* at 17 n.9.

The latter point is sufficient to sustain Applicants' request. Under Arizona law, registration is itself a qualification: "An elector shall not vote in an election called pursuant to the laws of this state unless the elector has been registered to vote . . . ." Ariz. Rev. Stat. § 16-120(A). Registration is both a means of enforcing the citizenship qualification, *see* ARIZ. CONST. art. VII, § 2(a), as well as being a substantive requirement in that it is a necessary condition for exercise of the franchise. Simply

put, registration is as "fundamental to the definition of [Arizona's] political community," *Bluman*, 800 F. Supp. 2d at 288, as the citizenship requirement itself. The State legislature has made it a prerequisite to voting, and it "secure[s] the purity of elections and guard[s] against abuses of the elective franchise," ARIZ. CONST. art. VII, § 12.[7]

B. The NVRA does not preempt Arizona's right to regulate its presidential elections, which is plenary under the terms of the Electors Clause.

The Court has long said that the Electors Clause, U.S. CONST. art. II, § 1, cl. 2, which says that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct" its electors, means what it says: "[T]he appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *see also Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (citing *McPherson* for the proposition that "the state legislature's power to select the manner for appointing electors is plenary"). In

[7] To further illustrate the mischief that *ITCA* has engendered, the Tenth Circuit ignored those facts and *ITCA*'s express terms to conclude that registration is a "procedural requirement[]" and so not "a qualification to vote." *Fish*, 840 F.3d at 750. The line between the procedural and the substantive, and between the procedural as a key enforcement mechanism of the substantive and just procedural, is at best blurry. This is a poor way to set the line between what Congress may do under the Elections Clause and what the establishment of voter qualifications that is reserved to the States.

Dispensing with this false procedural versus substantive dichotomy does not leave States free to set whatever procedural qualifications it wishes. Constitutional amendments provide substantive limits and confer on Congress some regulatory power. *See* U.S. CONST. amends. XIV, XV, XIX, XXIV, XXVII; *ITCA*, 570 U.S. at 26 (Thomas, J., dissenting). And unreasonable, discriminatory qualifications would also be subject to constitutional challenge. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

other words, the Electors Clause specifically "authorize[s] States to conduct and regulate … Presidential elections." *Trump v. Anderson*, 601 U.S. 100, 112 (2024).

Applying that authority to Arizona's law concerning voting for presidential electors is simple. Per Arizona law, the only people who may vote in presidential elections are those who provide documentation of citizenship when they registered via the State Form or, if they are registering with the Federal Form, who have had their citizenship verified. Ariz. Rev. Stat. § 16-121.01(E); *see also* § 16-127(A). Thus, the Arizona Legislature directed that Arizona's presidential electors will be selected by only those voters who have proven U.S. citizenship. *See* §§ 16-121.01(E), 16-212, 16-127(A). That is as the Electors Clause allows.

As against that, the district court said there is only the NVRA. But Congress enacted the NVRA pursuant to its power under the Elections Clause to regulate the "Times, Places and Manners of holding Elections for Senators and Representatives." *See ITCA*, 570 U.S. at 8. The "ability, care, and fulness of details" that marked the drafting of the Constitution makes it appropriate to apply "the maxim, *Expressio unius est exclusion alterius*." *Township of Pine Grove v. Talcott*, 86 U.S. (19 Wall.) 666, 674–75 (1873). Thus, the Elections Clause's express reference to "Elections for Senators and Representatives" limits the authority the Clause confers to *only* "Elections for Senators and Representatives." See Michael T. Morley, *Dismantling the Unitary Electoral System? Uncooperative Federalism in State and Local Elections*, 111 Nw. U.L. Rev. Online 103, 108 (2017). Going beyond the Clause itself underscores the validity of that conclusion. To reiterate, the Constitution *expressly*

provides for the selection of presidential electors in the Electors Clause, which is located in Article II (as opposed to Article I, like the Elections Clause). In contrast, the Electors Clause vests full authority in the States (not Congress) to "appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. CONST. art. II, § 1, cl. 2. Thus, Congress cannot use its Elections Clause power to regulate presidential elections; it is "limited to" what is enumerated therein. *United States v. Lopez*, 514 U.S. 549, 566 (1995).

No precedent from this Court says otherwise, as Applicants correctly note. That includes *Burroughs v. United States*, 290 U.S. 534 (1934), on which the district court relied. *See Mi Familia Vota*, 691 F. Supp. 3d at 1089. *Burroughs* presumed that a law interfering "with the power of a state to appoint" presidential elections would be constitutionally questionable. 290 U.S. at 544. It thus stands for the principle that the federal government's interest in federal elections justifies federal law ensuring their integrity. *See id.* at 547. That is plainly correct, and it is equally plain that the federal government can protect that interest and ensure the integrity of presidential elections. But that in no way undermines the fact the Electors Clause "gives the States far-reaching authority over presidential electors." *Chiafolo v. Washington*, 140 S. Ct. 2316, 2324 (2020).

At its core, what the Constitution creates—and what this Court's precedent supports—is a particular, mandated relationship "between federal and state" responsibilities in the selection of presidential electors that requires a "clear

statement" from Congress before a federal law can be read to alter it. *United States v. Bass*, 404 U.S. 336, 349 (1971). A presidential election is not "an ordinary election." *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring). "The right to vote in presidential elections under Article II inheres not in citizens but in states." *Att'y Gen. of Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984). That is, in a presidential election, the *State* is the voter. It follows that how a State exercises its right to vote is left to its discretion, *see*, *e.g.*, *McPherson*, 146 U.S. at 35, and, as a corollary, that federal laws governing voter registration do not limit the States' discretion. At the very least, they do not absent a clear statement that Congress intended to tee up the constitutional conflict. *See*, *e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988).

The NVRA, which rests on Congress's power to regulate the "Times, Places and Manners of holding Elections for Senators and Representatives," U.S. CONST. art. I, § 4, cl. 1, in no way provides such a statement. To the contrary, the law's reliance on the Elections Clause strongly suggests the contrary. The district court erred in concluding otherwise.

C. The NVRA does not preempt Arizona's sovereign right to regulate how elections are conducted in the State.

As Applicants note, the district court's decision to invalidate Arizona's decision to limit mail-in voting only to those voters whose citizenship has been confirmed, *see* Ariz. Rev. Stat. § 16-121.01(E), is textually inexcusable. After all, the NVRA specifically provides that States retain the right to "establish" their own "procedures" for registering to vote in the three described ways. 52 U.S.C. § 20503(a). That's all

Arizona has done. And more to the point, the NVRA concerns *registering* by mail, not *voting* by mail. 52 U.S.C. § 20505.

But the district court's overreach is particularly obvious for state elections. Section 16-121.01(E) bars mail-in voting for "any election," which includes State elections, in the absence of proof of citizenship. The district court's order, however, is not confined to federal elections. In its summary judgment decision, the district court said "the NVRA preempts HB 2492's restriction on … voting by mail." *Mi Familia Vota*, 691 F. Supp. 3d at 1104. In its final judgment, the district court concluded "that H.B. 2492's restrictions on … voting by mail … [is] preempted by" the NVRA. *Mi Familia Vota v. Fontes*, 2024 WL 2244338, at *1 (D. Ariz. May 2, 2024). That is incorrect. "[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991) (quotations omitted).

The error illustrates the federalism concerns inherent in any federal interference with State electoral laws. While the Constitution mandates that valid congressional acts are supreme, it is "expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power." *Ex parte Siebold*, 100 U.S. 371, 392 (1879). And thus congressional acts are presumed to have avoided "as far as possible … unnecessary interference with State laws and regulations, with the duties of State officers, or with local prejudices." *Id.* at 393. "The true interest of the people of this country requires that both the

national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution." *Id.* at 394. And Arizona has made a reasonable judgment in its elections that the special dangers of mail-in voting warrant extra protection. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 195–96 (2008) (noting how an election fraud scheme "perpetrated using absentee ballots … demonstrate[d] that not only is the risk of voter fraud real but that it could affect the outcome of a close election").

The district court ignored those principles, a point its obstacle preemption analysis, *see Mi Familia Vota*, 691 F. Supp. 3d at 1091, underscores. Obstacle preemption is strong medicine to be very cautiously used. "No more than in field preemption can the Supremacy Clause be deployed … to elevate abstract and unenacted legislative desires above state law." *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 778 (2019) (opinion of Gorsuch, J.). The district court, to be sure, pointed to the NVRA's enacted findings and purposes, *see Mi Familia Vota*, 691 F. Supp. 3d at 1091, but "[c]ongressional … musings … do not satisfy the Article I, § 7, requirements for enactment of federal law and, therefore, do not pre-empt state law under the Supremacy Clause," *Wyeth v. Levine*, 555 U.S. 555, 587–88 (2009) (Thomas, J., concurring in judgment). That is for good reason. "No legislation pursues its purposes at all costs and every statute purposes, not only to achieve certain ends, but also to achieve them by particular means." *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 637 (2012) (quotations and alterations omitted). Yet an implicit premise of the

district court's decision is that the NVRA does just that; that Congress intended to displace State law "to increase voter turnout" regardless of the risk of election fraud. *Mi Familia Vota*, 691 F. Supp. 3d at 1091.

Nothing justifies the district court's leap of logic. Indeed, given the States' historic primacy in election regulation, *see*, *e.g.*, *Gradwell*, 243 U.S. at 484–85, the better conclusion is that the NVRA left as much as possible to the States, including regulation of mail-in voting. What was noted above bears repeating: "There is no question about the legitimacy or importance of the [States'] interest in counting only the votes of eligible voters." *Crawford*, 553 U.S. at 196 (plurality opinion). To hold, as the district court did, that a federal purpose to increase voter turnout neuters the tools that Arizona put in place to do just that is precisely the vice of obstacle preemption, and why the district court improperly invoked it here.

II. The Irreparable Harms to Arizona's Sovereign Interests Justify Granting Applicants' Request.

Absent requested relief, Arizona will experience sovereign injuries that are all too familiar to *Amici* States. The reasons States have an "interest in counting only the votes of eligible voters," *Crawford*, 553 U.S. at 196 (plurality opinion), are manifest. For one, it is a decision that goes "'to the heart of representative government.'" *Gregory*, 501 U.S. at 461 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). Those interests are in no way attenuated because the district court's decision mostly focused on federal elections. In presidential elections, for example, the States are the voters. *See supra*. Arizona—like every other State—has chosen to select its electors via a popular election. It has an interest in ensuring that the

results of that election truly do represent the will of the qualified voters of the State; like "the most important government officials," the States have "the authority … to determine qualifications of their" electors. *Id.* at 463; *see also* U.S. CONST. art. II, § 1, cl. 2.

Likewise, the States have an interest in preventing voter fraud, including in congressional elections. It is well within their sovereign prerogatives to institute "generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself," *Anderson*, 460 U.S. at 788 n.9, and equally in their interests not to have those rules upended by ambiguous federal laws focused on increasing the ease of voter registration. That is especially true where, as in many cases, the rules are enforced via criminal prohibitions. *See*, *e.g.*, Kan. Stat. Ann. § 25-2416. The district court simply ignored the States' "sovereign power … to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). This Court has "long held that, 'any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring in the grant of the stay) (alterations omitted) (quoting *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers) (quoting another source)); *see also Ohio v. EPA*, 144 S. Ct. 2040, 2053 (2024).

CONCLUSION

The Court should grant Applicants' request for a stay.

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Respectfully submitted,

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