No. 24A164

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,

Applicant,

v.

MI FAMILIA VOTA, ET AL.,

Respondent.

Emergency Application for Stay to Hon. Elana Kagan, Circuit Justice for the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE ARIZONA FREE ENTERPRISE CLUB AND AZ LIBERTY NETWORK IN SUPPORT OF APPLICANT

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INTEREST OF AMICI CURIAE[1]

The Arizona Free Enterprise Club ("AZFEC") is a public policy think tank and advocacy organization dedicated to free markets, limited government, and the rule of law. It was instrumental in the drafting and adoption of the statutes at issue in this case, as the district court noted. AZFEC is therefore invested in the outcome of this litigation and brings a unique perspective on the sole motivation behind the laws' adoption: ensuring election integrity and restoring voters' confidence in Arizona elections.

AZ Liberty Network ("AZLN") seeks to increase public knowledge and civic participation with respect to social, cultural and economic issues affecting Arizona. AZLN's Grand Canyon Legal Center was established to champion constitutional rights and structural limitations on government power.

[1] No party or party's counsel authored this brief in whole or part, nor did anyone other than Amici and their members contribute any money to fund the preparation of this brief. Sup. Ct. R. 37.6.

INTRODUCTION

This case is more than the usual last-minute lawsuit to prevent enforcement of a state law for political gain. To be sure, it is that—in violation of *Purcell v. Gonzalez*, 549 U.S. 1 (2006)—but this case is more egregious. The decision below invokes the National Voter Registration Act, 52 U.S.C. § 20501 *et seq.* ("NVRA") as interpreted by this Court in *Arizona v. Inter Tribal Council of Ariz.*, 570 U.S. 1 (2013), to forbid what this Court ***expressly*** authorized in that precedent, namely that States retain plenary authority to regulate every facet of elections outside those preempted by federal statutes that are themselves constitutional. In the case of the NVRA, preemption extends no further than the federal registration form to vote for United States Senators and Representatives. Thus, "States retain the flexibility to design and use their own registration forms" for state offices, *id.* at 12, and they may "deny registration [for any office] based on information in their possession establishing the applicant's ineligibility," *id.* at 15.

Misreading the modest holding of *Inter Tribal Council*, the courts below created a sweeping injunction that goes beyond any federal statute (especially the NVRA) and even beyond the constitutional limits of election preemption. The holdings below enjoin a state law defining who may vote by mail and who may vote in the presidential election—two topics the NVRA does not address. Indeed, many States do not provide mail voting at all without a medical or other justification. The NVRA does not *sub silentio* change the laws in those States, nor does it require mail-in voting for federal-only registrants in Arizona. And the NVRA ***could not*** prescribe

procedures for voting in presidential elections because the NVRA is an exercise of preemption under Article I, § 4, whereas presidential elections occur under Article II, § 1, which limits Congress to setting the day and time of presidential elections.

Compounding the misreading of *Inter Tribal Council*—or perhaps mindful of its indefensibility—the courts below relied on an expired consent decree, entered by the former Secretary of State without any legal authority to bind the legislature, governor, or the county recorders who administer elections. That is so clearly wrong that this Court should not only stay enforcement of the injunction issued below but also summarily reverse it. Otherwise, the hard work of legislating that organizations like Amici undertake can be undone on the flimsiest of grounds—and for just long enough to affect an election.

The objective of each enjoined statute was the same: avoid election fraud and restore faith in Arizona's elections. The district court rejected Respondents' theories of racial animus, leaving only the legal questions of what the Constitution and NVRA leave to the States. The district court and the Ninth Circuit merits panel (over Judge Bumatay's dissent) misread this Court's precedent to forbid election regulations on which the NVRA is silent and the Constitution speaks clearly in favor of the States. Those errors are glaring, and they easily meet the conditions for a stay articulated in *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). If this Court does not grant the application for stay, it will cement the perverse incentive for partisans to challenge neutral laws on the eve of an election with the knowledge that willing district courts

can negate the democratic process that produced those statutes ***and*** the future process that they exist to protect. The Court should grant the stay.

BACKGROUND

After this Court decided *Inter Tribal Council* in 2013, policymakers in Arizona set about recalibrating how the State would improve confidence in the electoral process. Those measures included federal-only ballots that allowed individuals to vote in elections for the U.S. House of Representatives and Senate without providing proof of citizenship. The vast majority of voters, who demonstrated their citizenship when registering to vote, obtained full ballots, including state races. That is exactly what this Court authorized in *Inter Tribal Council*. 570 U.S. at 12.

Five years later, the then-Secretary of State entered a consent decree agreeing to register anyone whose application lacked proof of citizenship as a federal-only voter. That decree did not bind anyone else in the Arizona government, including the people's representatives in the legislature. In 2022, the legislature adopted and the governor signed a pair of bills (the "Voting Laws") that would restore the proof-of-citizenship rules that existed both before and after *Inter Tribal Council*. The laws also added additional protections to ensure that individuals who had already established their citizenship through another means (*e.g.,* when applying for a driver's license) and those for whom county recorders obtained evidence of citizenship on their behalf, would be fully registered to vote in all elections.

Under the Voting Laws, county recorders reject only ***state*** forms that are not accompanied by proof of citizenship. *Inter Tribal Council*, 570 U.S. at 12 ("States

retain the flexibility to design and use their own registration forms."). And, to expand the franchise, the Voting Laws require county recorders to utilize several databases to obtain evidence of citizenship when an applicant uses a federal form. If the recorder discovers evidence that the applicant is a citizen, the applicant is fully registered and may vote in all elections. If the county recorder cannot determine whether the applicant is a citizen, the applicant is still registered as a federal-only voter. The objective is not to have fewer full-ballot voters, but to ensure that individuals are voting on the correct ballot.

Moreover, also consistent with *Inter Tribal Council*, Arizona took steps to remove voters from the rolls for whom it possesses affirmative information that the person is ineligible. 570 U.S. at 15. And it concluded that federal-only voters must vote in person, which has the added benefit of instantly qualifying any federal-only voter who provides a qualifying identification—another measure that expands the franchise. As noted, the NVRA says nothing about voting by mail. And it does not and cannot regulate the election of presidential electors, over which Congress exercises a more limited authority, confined to setting "the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. CONST. art. II, § 1; *compare id.* art. I, § 4 ("Times, Places and Manner of holding elections for Senators and Representatives").

The district court accurately identified the State's prerogative to adopt constitutional voter qualifications. It rejected Plaintiffs' baseless theory of racial animus that would indict every State in the nation based on long-past misdeeds in

which the current legislature and policy advocates like Amici had no part. But the district court eviscerated the State's ability to adopt voter qualifications by construing the NVRA and the (now-expired) consent decree to forbid enforcement measures.

On appeal, a Ninth Circuit motions panel unanimously stayed the district court's injunction. But a divided merits panel reversed over Judge Bumatay's compelling dissent. The Intervenor-Defendants then took the only available step to restore the constitutional order before the upcoming election—they asked this Court for a stay. This Court should now join the four Ninth Circuit judges who recognized that a stay is appropriate when the injunction rests on disturbingly obvious legal errors made on the eve of an election. That election could easily change control of the Arizona Legislature and result in the Voting Laws' repeal, meaning that indefensible judicial decisions would carry the day due to the lack of a stay. That possibility illustrates the long-standing wisdom of staying injunctions against voting regulations when elections are imminent.

SUMMARY OF THE ARGUMENT

No one challenges Arizona's qualifications for voting. At issue is whether Arizona can take those qualifications seriously. The Voting Laws are enforcement measures to ensure that only persons who are at least 18 years old, U.S. citizens, and otherwise permitted to vote cast a ballot in Arizona. Three provisions of the Constitution give the States plenary authority to regulate federal elections. Most familiar is Article I's provision that state legislatures set the "Times, Places and Manner of holding Elections for Senators and Representatives . . . but the Congress

may at any time by Law make or alter such Regulations . . . ." U.S. CONST. art. I, § 4. Separately, the States may prescribe the "Qualifications requisite for Electors" in congressional elections, provided they are the same for "the most numerous Branch of the State Legislature." U.S. CONST. art. I, § 2. And, for presidential elections, Congress enjoys even less power, limited to setting the time for choosing presidential electors. U.S. CONST. art. II, § 1. That provision does not include the same preemption language that the Framers included in Article I, which indicates that the same power does not exist in that context. *Russelo v. United States*, 464 U.S. 16, 23 (1983).

Consistent with these provisions, a federal statute can preempt state law governing the "manner" of conducting elections for the United States Senate and House of Representatives. This Court held that the NVRA did just that with respect to the topic it regulates: voter registration. But the NVRA does not regulate mail-in voting or the procedures for voting in presidential elections (apart from voter registration). The courts below—or, in the Ninth Circuit's case, two judges on one of two panels—erred in concluding that Congress has foreclosed Arizona's election-integrity measures.

The lower courts' fallback position is equally harmful to the constitutional order. It holds that an expired consent decree entered by a former Arizona Secretary of State can prevent a future Arizona Legislature and Governor from adopting legislation that even the consent decree never said was unconstitutional. That approach shreds the separation of powers and robs the States, acting through their

lawmaking branches, of their constitutional prerogative to regulate elections. Like the misconstruction of the NVRA, this error is so glaring and so important that the Court should stay the injunction entered below, if not summarily reverse it. Absent a stay, the Voting Laws will not protect the impending election. That is an unacceptable outcome on its own terms, but it becomes unbearable if that election changes the balance of power and the incoming legislature repeals the Voting Laws before they can be vindicated in the ordinary course. This Court should not permit that travesty of democracy to play out.

ARGUMENT

I. Arizona Is Free to Adopt Non-Discriminatory Voting Laws that Assure Election Integrity and Restore Voter Confidence.

The Constitution assigns to the States—and not the federal government—plenary authority to establish the qualifications for electors. *See Inter Tribal Council*, 570 U.S. at 17. This principle is woven into the fabric of this nation's federalism, as this Court has recognized for well over a century. *See, e.g.*, *McPherson v. Blacker*, 146 U.S. 1, 35 (1892) ("[F]rom the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors."); *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("[T]he state legislature's power to select the manner for appointing electors is plenary; it may, if it chooses, select the electors itself."). Although the decision below hints at this principle, the district court never directly engaged with Arizona's ability to determine the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, § 4, cl. 1, or asked whether specific

provisions in the NVRA genuinely "conflict" with Arizona law, *Ex parte Siebold*, 100 U.S. 371, 384 (1879). As a result, its decision striking down key provisions of the Voting Laws fails to account for Arizona's interest in enforcing constitutional qualifications for voting.

To vote in Arizona, a person must be a United States citizen, a resident of Arizona, and at least eighteen years of age. ARIZ. CONST. art. VII, § 2. No party to the instant suit disputes the legitimacy of these qualifications. And as the district court observed, it is a class 6 felony to register oneself or another person to vote knowing of that person's ineligibility to vote. Arizona has a compelling interest in enforcing and proactively preventing the violation of this law. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2006) ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.").

But while the district court paid lip service to Arizona's authority to set voter qualifications, it drained that authority of meaning by preventing enforcement. Arizona's ability to enforce its voting qualifications is inherent in its ability to establish those qualifications. *See Fitzgerald v. Green*, 134 U.S. 377, 380 (1890) ("Congress has never undertaken to interfere with the manner of appointing electors . . . , to regulate the conduct of such election, or to punish any fraud in voting for electors, but has left these matters to the control of the states."). Without adequate enforcement, the qualifications standing sentinel around the integrity of the vote are reduced to paper tigers.

And, in the context of citizenship, age, residency, and criminal background, the cornerstone of enforcement is information. This Court recognized in *Inter Tribal Council* that "Arizona may obtain information needed for enforcement." 570 U.S. at 17. Although Congress may have chosen a different path with respect to confirming a would-be voter's citizenship in the elections for which it has the ability to preempt state laws, Arizona was under no obligation to demand additional information regarding citizenship for the elections that it regulates. *Id.* at 12, 15.

Importantly, as in the last election case to arise from Arizona, the district court found that the Voting Laws "had not been enacted with discriminatory intent." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2335 (2021). Instead, they reflect a sincere belief—shared by legislators and advocates like Amici—that the Voting Laws were "a necessary prophylactic measure" to ensure that individuals voting in state and presidential elections were, in fact, qualified to do so, and to identify those voting with a federal-only ballot who should be voting a full ballot. *Id.*

The enjoined Voting Laws also reflect the permissible goal of improving the security of mail-in ballots relative to in-person voting. *Id.* at 2347. Requiring federal-only ballots to be cast in person, where a poll worker can verify the individual's identity in a manner consistent with *Crawford* is well within the State's prerogative. The NVRA, which is silent on voting by mail, certainly says nothing to preclude this regulation. And, under the Voting Laws, this in-person requirement also promotes the State's interest in providing full ballots to anyone who qualifies for them by presenting identification that satisfies the State's interest in documented proof of

citizenship. Those voters are immediately presented with a full ballot. Arizona is, of course, under no obligation to permit mail-in voting, just as many other States do not (or did not at the time of the 1982 amendments to the Voting Rights Act). *Id.* at 2339. It is therefore hard to imagine how a measure that regulates mail-in voting in service of promoting election integrity and identifying voters eligible for a full ballot is somehow unlawful.

Insisting on constitutional prerequisites for voting is a legitimate exercise of a State's authority, as are measures that implement those prerequisites by confirming they are satisfied. AZFEC is proud to have supported the Voting Laws' adoption to ensure election integrity in Arizona..

II. Constitutional Text and the Cannon of Constitutional Avoidance Demand Enforcement of the Voting Laws.

Even a cursory review of the NVRA confirms that it does not require States to provide any form of absentee voting, meaning that even for federal elections governed by Article I, § 4, cl. 4, the NVRA does not conflict with Arizona's rule that federal-only voters cast their ballots in person. And a similarly quick glance at the Electors Clause, U.S. CONST. art. II, § 1, shows that States alone regulate the election of presidential electors. Even if the NVRA could be construed, as the district court did, to conflict with the text of the Constitution, the cannon of constitutional avoidance counsels in favor of enforcing the Voting Laws as written.

The dissent in *Inter Tribal Council* presaged the errors in the decision below. In that opinion, Justice Thomas explained that "both the plain text and the history of the Voter Qualifications Clause, U.S. Const., Art. I, §2, cl. 1, and the Seventeenth

Amendment authorize States to determine the qualifications of voters in federal elections, which necessarily includes the related power to determine whether those qualifications are satisfied." 570 U.S. at 23 (Thomas, J., dissenting). Justice Thomas's textual recounting of the meaning of these provisions—along with Justice Alito's in his separate dissent—illustrate the errors in the decision below. In summing up this analysis, Justice Thomas stated:

> The Voter Qualifications Clause, U.S. Const., Art. I, §2, cl. 1, provides that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in elections for the federal House of Representatives. The Seventeenth Amendment, which provides for direct election of Senators, contains an identical clause. That language is susceptible of only one interpretation: States have the authority "to control who may vote in congressional elections" so long as they do not "establish special requirements that do not apply in elections for the state legislature."

Id. at 25–26. The respondents in *Inter Tribal Council* "appear[ed] to concede that States have the sole authority to establish voter qualifications . . . but nevertheless argue[d] that Congress can determine whether those qualifications are satisfied." *Id.* at 28. The dissent warned, however, that "[t]he practical effect of respondents' position is to read Article I, §2, out of the Constitution. As the majority correctly recognize[d], 'the power to establish voting requirements is of little value without the power to enforce those requirements.'" *Id.*

This case crystalizes the threat to States' ability to set qualifications from judicial over-reading of federal election laws. There is no dispute that Arizona's qualifications for voting, specifically the requirement that the voter be a U.S. citizen, are constitutional. And there is no dispute that the NVRA is silent on both mail-in

voting and the selection of presidential electors. Yet, the district court concluded that Arizona cannot fix the "manner" of congressional elections to require in-person voting for federal-only forms. U.S. CONST. art. I, § 4, cl. 1. If the NVRA does not require States to provide mail-in voting, it certainly cannot preempt a state law that regulates the practice.

Likewise, the NVRA's silence on presidential electors is necessary to comply with the Constitution's express assignment of that field to the States, without the preemption language that applies to federal congressional elections. U.S. CONST. art. II, § 1. The district court erred in expanding the NVRA to address presidential elections, thus creating a constitutional defect in the NVRA that does not exist. As Justice Thomas succinctly noted, "[c]onstitutional avoidance is especially appropriate in this area because the NVRA purports to regulate presidential elections, an area over which the Constitution *gives Congress no authority whatsoever*." *Inter Tribal Counsel*, 570 U.S. at 35 n.2. Few cases have engaged the issue of States' ability to regulate presidential as compared to congressional elections. But that does not make the issue a close call. The distinctions on which Arizona relied appear on the face of the Constitution itself.

A second error in the district court's decision that threatens the constitutional order is deference to an expired consent decree that should have no bearing here. The consent decree at issue expired on December 31, 2020. The fact that the district court gave it any weight at all—let alone controlling deference—is deeply troubling. By its own terms, an expired consent decree is a nullity. If the law were otherwise—*i.e.,* if

the district court was correct to continue enforcing an expired decree—it would extend the power of an earlier officeholder in the executive branch to bind the hands of the present-day executive and legislature. Permitting a single executive official to surrender a State's ability to regulate elections would weaken the constitutional allocation of election regulation beyond recognition. As a separation-of-powers issue, this possibility is so offensive that it has earned denunciation from both the federal executive branch[2] as well as the judiciary.[3]

Highlighting the error in this case is the fact that the consent decree did not even represent that the statute at issue, Ariz. Rev. Stat. § 16-166(F), was unconstitutional. It instead declared that, under that statute, the Secretary could permissibly accept full-ballot applications without proof of citizenship. The Arizona Legislature disagreed with that interpretation and passed the Voting Laws to remove whatever ambiguity the Secretary used to conclude that proof of citizenship was unnecessary. This interplay between the branches of government, with each interpreting the law independently, is perfectly healthy, as long as one executive

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[2] The prior presidential administration rolled back the use of consent decrees at the DOJ because of this very concern. *See, e.g.*, Office of Att'y Gen., Memorandum for Heads of Civil Litigating Components United States Att'ys, *Principles and Proc. for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities* (Nov. 7, 2018), https://www.justice.gov/opa/press-release/file/1109681/dl.

[3] *See, e.g.*, *United States v. Michigan*, 68 F.4th 1021, 1023 (6th Cir. 2023) (discussing an expired consent decree that was extended indefinitely by a court, and noting that "[m]uch has been written about the perniciousness of consent decrees," which "provide[] the legitimacy of a judicial decision without the reality of a judicial decision") (citations omitted).

office cannot give itself the last word by entering a consent decree that removes the legislature's power to draft new laws accomplishing what it intended.

Ultimately, the district court used an expired consent decree between a private party and a single executive official to withdraw the State of Arizona's ability to prescribe the manner of holding elections. That outcome defies even the terms of the consent decree and portends much worse for States' ongoing ability to exercise their constitutional authority. Once again, absent a stay, the district court's misuse of the consent decree could be self-concealing if it enables opponents of the Voting Laws to seize power and repeal them before any appellate review of the underlying merits.

* * *

The NVRA "was meant to facilitate voter registration drives, not to take away the States' traditional authority to decide what information registrants must supply." *Inter Tribal Counsel*, 570 U.S. at 46 (Alito, J., dissenting). Here, the district court construed the NVRA to deepen the constitutional tension between that law and state statutes in areas in which the NVRA is silent, namely mail-in ballots and presidential elections. That was erroneous on its own, but it is especially egregious in light of the canon of constitutional avoidance. No precedent from this Court precedent has construed the NVRA to require a State to surrender its ability to enforce constitutional voter qualifications for the offices over which it has plenary authority. This Court should reverse the district court's injunctions that break new and constitutionally dangerous ground.

CONCLUSION

This Court should stay the injunction below to the extent it encumbers the full enforcement of the Voting Laws.

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Respectfully submitted,

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