No. 24-3188

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MI FAMILIA VOTA, *et al.*,

Plaintiffs-Appellees,

vs.

ADRIAN FONTES, *et al.*,

Defendants-Appellees,

and

WARREN PETERSEN, *et al.*,

Intervenor-Defendants-Appellants.

On Appeal from the United States District Court for the District of Arizona
Hon. Susan R. Bolton
Case No. 2:22-cv-00509-SRB (Consolidated)

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR PARTIAL STAY OF INJUNCTION PENDING APPEAL
RELIEF NEEDED BY JULY 16, 2024

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CIRCUIT RULE 27-3 CERTIFICATE

Intervenor-Defendant Appellants Warren Petersen, in his official capacity as President of the Arizona State Senate, Ben Toma, in his official capacity as the Speaker of the Arizona House of Representatives, and the Republican National Committee, by and through undersigned counsel, certify the following information pursuant to Circuit Rule 27-3(c):

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II. Existence and Nature of the Claimed Emergency

The Appellants seek an emergency stay of the district court's injunction against the implementation or enforcement of statutes duly enacted by the Arizona Legislature to set qualifications to vote for presidential electors, *see* U.S. Const. art. II, § 1, and to exercise the privilege of voting by mail, *see* U.S. Const. art. IV, § 4, in the general election that will occur on November 5, 2024.

In 2022, the Arizona Legislature adopted and the Governor signed House Bill 2492 (codified at 2022 Ariz. Laws ch. 99) and House Bill 2243 (codified at 2022 Ariz. Laws ch. 370), which made various changes to Arizona's voter registration laws. The Plaintiffs-Appellees initiated civil actions challenging certain of these provisions, and the district court consolidated the cases into a single proceeding. Both laws became fully effective by January 1, 2023. Among other things, H.B. 2492 (1) requires county recorders, who are responsible for processing voter registrations, to reject Arizona's state-specific voter registration form ("State Form") submissions that lack documentary proof of citizenship, (2) prohibits voters who have not provided documentary proof of citizenship from voting in presidential elections, and (3) prohibits voters who have not provided documentary proof of citizenship from voting by mail.

On September 14, 2023, the district court granted partial summary judgment in favor of Plaintiff-Appellees. *See* Dkt. 534. It held that the National Voter

Registration Act of 1993, 52 U.S.C. § 20501, *et seq.*, preempted H.B. 2492 to the extent H.B. 2492 prohibits voters who lacked documentary proof of citizenship from voting for president or by mail. The district court further concluded that State Form submissions that are not accompanied by documentary proof of citizenship must be processed in accordance with a consent decree entered into by the Arizona Secretary of State and Maricopa County Recorder in *League of United Latin American Citizens of Arizona v. Reagan*, No. 2:17-cv-04102-DGC (D. Ariz.), Doc. 37 (Jun. 18, 2018) (the "LULAC Consent Decree"). If a county recorder receives a voter registration application that lacks documentary proof of citizenship, the LULAC Consent Decree requires him or her to search the Arizona Department of Transportation database, and if proof of citizenship corresponding to the applicant can be located, the applicant must be registered as a full-ballot voter. If the applicant's citizenship status cannot be determined, he or she will be registered to vote only in federal elections.

On October 10, 2023, the Appellants moved that the district court convert its summary judgment rulings into a partial final judgment, pursuant to Federal Rule of Civil Procedure 54(b), so that the Appellants could seek immediate review of those rulings well in advance of the 2024 elections. Dkt. 665. The district court denied the motion on March 7, 2024, five months after the motion was filed and approximately three months after trial on the Plaintiff-Appellees' remaining claims had concluded. Dkt. 710. The district court entered a final judgment pursuant to Federal Rule of

Civil Procedure 54(c) on May 2, 2024, which enjoined the relevant provisions of H.B. 2492 from being implemented or enforced in connection with the upcoming general election on November 5, 2024. Dkt. 720.

On May 17, 2024, the Appellants moved the district court pursuant to Federal Rule of Civil Procedure 62(d) to stay pending appeal its injunction against those provisions of H.B. 2492 that (1) prohibit voter who lacked documentary proof of citizenship from voting for president, (2) prohibit voter who lacked documentary proof of citizenship from voting by mail, or (3) are inconsistent with the LULAC Consent Decree. Dkt. 730. The Secretary of State, the Attorney General, and those Plaintiff-Appellees who had brought claims to which the motion related opposed the requested stay. Dkt. 732, 733, 737, 738. The Appellants waived their right to file a reply brief and requested a ruling by June 14, 2024. Dkt. 744. To date, the district court has neither ruled on the motion nor indicated when it may do so.

III. Timing of the Motion

Before seeking relief in this Court, Appellants first requested a stay from the district court, as FRAP 8(a)(1)(A) required them to do. Desiring to obtain appellate review of the issues presented in this Motion well in advance of the 2024 general election, the Appellants moved the district court in October 2023 to enter an appealable partial final judgment, which the district court denied. Dkt. 665, 710.

Appellants accordingly had no feasible procedural mechanism for seeking appellate review prior to the district court's entry of final judgment on May 2, 2024. Dkt. 720.

IV. Notice to the Parties

The undersigned notified the parties' respective counsel of the impending filing of this Motion by email on June 25, 2024, at 8:24 a.m., Arizona time.

The Motion will be served electronically on all counsel of record via CM/ECF and by email.

V. District Court Proceedings

The Appellants filed a motion for a partial stay of the district court's injunction pending appeal on May 17, 2024. Dkt. 730. The Secretary of State, the Attorney General, and those Plaintiff-Appellees who had brought claims to which the motion related opposed the requested stay. Dkt. 732, 733, 737, 738. Despite the Appellants' request for a ruling by June 14, 2024, the district court has not taken any action with respect to the motion.

* * *

Dated: June 25, 2024.

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EMERGENCY MOTION FOR PARTIAL STAY PENDING APPEAL

Pursuant to Fed. R. App. P. 8(a)(2), Appellants President of the Arizona State Senate Warren Petersen, Speaker of the Arizona House of Representatives Ben Toma (together, the "Legislative Leaders"), and the Republican National Committee respectfully move that the Court stay pending appeal the permanent injunction entered by the district court[1] to the extent it prevents any implementation or enforcement of Arizona statutes that:

1. prohibit individuals who have not provided documentary proof of citizenship ("DPOC") from voting for the office of President of the United States, *see* Ariz. Rev. Stat. §§ 16-121.01(E), 16-127(A)(1),
2. prohibit individuals who have not provided DPOC from casting a ballot in any election by mail, *see* Ariz. Rev. Stat. §§ 16-121.01(E), 16-127(A)(2), or
3. require county recorders to reject registration applications on the Arizona state-specific voter registration form (the "State Form") that lack DPOC, *see* Ariz. Rev. Stat. §§ 16-121.01(A), (C), rather than attempt to independently verify the citizenship status of such applicants, pursuant to a consent decree approved by the Secretary of State in *League of United Latin American*

[1] Appellants seek relief from the district court's injunction only in connection with the November 5, 2024 general election and other subsequent elections.

Citizens of Arizona v. Reagan, No. 2:17-cv-04102-DGC (D. Ariz.), Doc. 37 (Jun. 18, 2018) ("LULAC Consent Decree") [attached as Exhibit C].

INTRODUCTION

The U.S. Constitution lodges exclusively in the Arizona Legislature the authority to prescribe the substantive qualifications necessary to participate in the selection of the State's presidential electors. *See* U.S. Const. art. II, § 1, cl. 2. The determination of whether and under what circumstances individuals may exercise the privilege of voting by mail in federal elections likewise is entrusted to the Arizona Legislature, unless and until Congress directs otherwise. *See* U.S. Const. art. I, § 4, cl. 1. In finding that the National Voter Registration Act, 52 U.S.C. § 20501, *et seq*. ("NVRA") ***could*** preempt Arizona's authority to set the qualifications to vote in presidential elections and ***did*** in fact displace Arizona's voting-by-mail strictures, the district court erred twice. Finally, the district court's conclusion that the LULAC Consent Decree could perpetually constrain the lawmaking functions of the Arizona Legislature not only improperly upends the structure of sovereignty within Arizona state government, but collides with the truism that "state-developed [voter registration] forms may require information the Federal Form does not." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 12 (2013) ("*ITCA*").

To preserve Arizona's ability to protect the integrity of its elections pending the Court's final disposition of these consequential questions, the Court should stay the district court's injunction in part.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

For nearly twenty years, Arizona has required new voters to provide documentary proof of citizenship as a condition of eligibility to vote in state and local elections. Because Arizona has since 1996 required applicants for driver's licenses or other state-issued photo IDs to prove their lawful presence in the United States and the Arizona Department of Transportation ("ADOT") maintains such documentation on file, many registrants can satisfy the DPOC requirement simply by providing on their registration form a current Arizona driver license or state ID number. *See* Ariz. Rev. Stat. § 16-166(F)(1). Other acceptable forms of DPOC include a birth certificate, U.S. passport, certificate of naturalization, and certain tribal documents. *See id.* § 16-166(F)(2)-(6).

The Supreme Court held in *ITCA* that the NVRA prohibits Arizona from requiring DPOC when individuals register to vote using the form promulgated by the Election Assistance Commission (the "Federal Form"). *See* 570 U.S. at 20. Arizona accordingly has mandated the provision of DPOC only for applicants who use the State Form; Federal Form registrants whose citizenship status cannot be verified are registered with a "Federal Only" designation that permits them to vote

only in elections for federal office. As of July 2023, there were 19,439 active registered "Federal Only" voters. Dkt. 709 at 2.

In 2018, the then-Secretary of State entered into the LULAC Consent Decree, which provided that when a State Form submission is not accompanied by DPOC, the county recorder must search ADOT records in an attempt to ascertain the applicant's citizenship. If citizenship can be confirmed, the applicant is registered as a full-ballot voter; if it cannot be confirmed, the applicant is registered as a "Federal Only" voter. Dkt. 709 at 4-5.

In 2022, the Legislature adopted House Bill 2492, which, in relevant part, (1) requires county recorders to reject State Form submissions that lack DPOC, and (2) prohibits Federal Only voters from participating in presidential elections or voting by mail. *See* Ariz. Rev. Stat. §§ 16-121.01(A), (C), (E), 16-127(A). The United States and several plaintiff organizations alleged that the NVRA preempted these provisions. Other components of H.B. 2492 and companion legislation, House Bill 2243, were also challenged by various plaintiffs under the Fourteenth and Fifteenth Amendments, the Civil Rights Act of 1964, and the Voting Rights Act of 1965. The district court consolidated the actions. Dkt. 39, 69, 88, 93, 164, 193.

On September 14, 2023, the district court ruled on cross-motions for partial summary judgment that the NVRA prohibits Arizona from restricting Federal Only voters' participation in presidential elections or ability to vote by mail, and that

Arizona must continue processing State Form submissions that lack DPOC in conformance with the LULAC Consent Decree. Dkt. 534 at 9-15, 21, 32-33 [Exhibit B]. On October 10, 2023, Appellants moved that the district court convert these rulings into an appealable judgment under Rule 54(b), which the court denied on March 7, 2024. Dkt. 665, 710. The district court issued post-trial findings and conclusions on February 29, 2024 (Dkt. 709), and entered a final judgment on May 2, 2024. Dkt. 720 [Exhibit A]. The Appellants sought a partial stay of the district court's injunction on May 17, 2024. Dkt. 730. To date, the district court has not acted on the motion.

STANDARD OF REVIEW

When weighing a stay application, the Court must consider "four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted); *see also Duncan v. Bonta*, 83 F.4th 803, 805 (9th Cir. 2023). "The first two factors . . . are the most critical." *Nken*, 556 U.S. at 434; *see also Leiva-Perez v. Holder*, 640 F.3d 962, 966, 968 (9th Cir. 2011) (under this "flexible approach," an applicant must show "a substantial case for relief on the

merits," but not necessarily "that success is more likely than not"). All four considerations recommend a partial stay.

ARGUMENT

I. The Court Is Likely to Find That Neither the NVRA Nor the LULAC Consent Decree Prevents Arizona From Requiring DPOC to Register with the State Form or to Vote for President or by Mail

A. The NVRA Cannot Preempt State Laws Governing Eligibility to Vote for Presidential Electors

The NVRA applies to federal congressional elections, not to presidential elections. The registration rules of the NVRA are classic "Manner" election regulations. U.S. Const. art. I, § 4, cl. 1. But Congress has power to regulate the "Manner" only of congressional elections—the Constitution does not give Congress power to regulate the "Manner" of presidential elections. When it comes to presidential elections, Congress has authority only to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. Const. art II, § 1, cl. 4. Neither Congress nor the courts can constitutionally apply the NVRA to presidential elections.

The district court ignored the limits of congressional power. It ruled that Section 6 of the NVRA—which requires that States "accept and use" the Federal Form to register voters in federal elections—also applies to presidential elections. Dkt. 534 at 9-12. The Court relied on the text of the NVRA, which it said "reflects an intent to regulate all elections for '[f]ederal office,' including for 'President or

Vice President.'" Dkt. 534 at 10 (quoting 52 U.S.C. § § 20507(a)). That would have been the correct starting point if the Constitution had nothing to say on the matter. But it does. And because the Constitution is "the supreme Law of the Land," U.S. Const. art. VI, "the preemption analysis" for election laws "must place particular importance on the first step in the determination as to whether Congress lawfully preempted state law: identifying the enumerated power under which Congress claims to have acted." *Tex. Voters All. v. Dallas Cnty.*, 495 F. Supp. 3d 441, 467 (E.D. Tex. 2020).

"Congress enacted the National Voter Registration Act under the authority granted it in [the Elections Clause]." *Ass'n of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997); *see also ICTA*, 570 U.S. at 7-8. The Elections Clause gives Congress power to regulate "[t]he Times, Places and Manner of holding Elections" for "Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. This power to regulate congressional elections is expansive—it gives Congress authority "to enact the numerous requirements as to procedure and safeguards." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). But the Elections Clause does not extend to presidential elections.

Under the presidential *Electors* Clause, "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. Const. art II, § 1, cl. 4. This power to regulate the presidential elections is far more limited.

Congress has power over only the "Time" of choosing presidential electors. Congress's power does not extend to the "Places and Manner" of presidential elections, as it does with congressional elections. "That omission is telling," because when the Constitution "includes particular language in one section … but omits it in another section," courts "generally presume[]" the drafters acted "intentionally and purposely in the disparate inclusion or exclusion." *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021); *see Pine Grove Twp. v. Talcott*, 86 U.S. 666, 674-75 (1873) (applying the rule to constitutional interpretation). The Constitution's text does not give Congress power to regulate the "Places and Manner" of presidential elections.

H.B. 2492's citizenship verification rules do not run afoul of the NVRA. Those rules apply only to state elections and federal *presidential* elections. *See* Ariz. Rev. Stat. § 16-121.01. The NVRA facially applies to elections for "Federal office," 52 U.S.C. § 20502(2), which include "the office of President or Vice President," *id.* § 30101(3). But the NVRA, like every other act of Congress, must be squared with the Constitution. And Congress cannot "exceed constitutional limits on the exercise of its authority." *Moore v. Harper*, 600 U.S. 1, 19 (2023).

The district court did not engage with the Constitution's text because it thought that it was bound by precedent. But no court has decided this issue. The Supreme Court has never held that Congress possesses power to regulate the "Places and Manner" of presidential elections. Instead, one of the precedents relied on by

the district court *Burroughs v. United States*, 290 U.S. 534 (1934), rested on the premise that if the challenged statute *did* interfere with the "exclusive state power" over presidential elections, it would be unconstitutional. *Burroughs v. United States*, 290 U.S. 534, 544-45 (1934). *Buckley v. Valeo* upheld the campaign finance laws under the "General Welfare Clause" and "the Necessary and Proper Clause." 424 U.S. 1, 90 (1976). But it says nothing about the scope of Congress's power to regulate presidential elections. Other Supreme Court cases confirm that the Electors Clause gives "plenary power to the state legislatures in the matter of the appointment of electors." *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); *see also 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.").

This Court has not deviated from these binding principles. In *Voting Rights Coalition v. Wilson*, the Court considered a challenge to the NVRA based on "[t]hree provisions of the Constitution." 60 F.3d 1411, 1413 (9th Cir. 1995) (citing U.S. Const. article I, § 4; article I, § 2; and the Tenth Amendment). The Electors Clause was not one of them. The Court cited *Burroughs* in passing for the proposition that the "broad power given to Congress over congressional elections has been extended to presidential elections." *Voting Rts. Coal.*, 60 F.3d at 1414. But this "[d]icta that does not analyze the relevant statutory provision cannot be said to have resolved the statute's meaning." *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2498 (2022). A

half-sentence misreading *Burroughs* is no reason to reject binding Supreme Court precedent holding that "the state legislature's power to select the manner for appointing electors is plenary." *Bush*, 531 U.S. at 104.

B. The NVRA Does Not Preempt State Laws Governing Mail-In Voting

The NVRA does not govern procedures for mail-in voting. By its terms, it sets rules governing "procedures to register to vote in elections." 52 U.S.C. § 20503(a). One of those rules is that States must "accept and use" the federal registration form "for the registration of voters in elections for Federal office." *Id.* § 20505(a). But the NVRA says nothing about the *mechanisms* for mail voting.

Despite the NVRA's express textual limit, the district court extended it beyond registration procedures. The court said that the requirement to use the Federal Form "for the registration of voters," *id.*, also reaches Arizona's requirement that residents who wish to vote by mail provide documentary proof of citizenship. Dkt. 534 at 12-15.

Section 20505(c)(1) does not support the district court's departure from the NVRA's textual limits. That section clarifies that states can "require a person to vote in person if—(A) the person was registered to vote in a jurisdiction by mail; and (B) the person has not previously voted in that jurisdiction." 52 U.S.C. § 20505(c). The district court read this provision to mean that those are the *only* limits that States can imposed on absentee voting. No other court has ever adopted that novel

interpretation. After all, on top of disregarding the NVRA's express limitations, it eliminates States' traditional authority over mail voting. "[V]oting by absentee ballot" is a "privilege" that "make[s] voting easier," not a right secured by the Constitution, the NVRA, or any other federal statute. *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020); *see also McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969). Nor is the district court's approach the best reading of § 20505(c), which clarifies that Congress's provision for *mail-in registration* for first-time voters does not preclude States from requiring *in-person voting* for first-time voters. This reading is confirmed by the provision's specific guarantee that some voters—those "entitled to vote otherwise than in person under any … Federal law"—can vote by mail despite first-time voter laws. 52 U.S.C. § 20505(c)(2). This narrow exception cannot be read as part of a scheme that wipes out mail-voting rules by implication. Arizona thus retains "wide leeway … to enact legislation" governing mail voting. *McDonald*, 394 U.S. at 808

The district court's other argument—that the NVRA aims to increase the number of registered voters—fares even worse. *See* Dkt. 543 at 13-14. The NVRA itself explains that it also aimed to "to protect the integrity of the electoral process." 52 U.S.C. § 20501(b)(3). Legislative history shows that § 20505(c)(1) focused on these "concerns regarding fraud," and that the provision "demonstrates the concern of the Committee that each State should develop mechanisms to ensure the integrity

of the voting rolls." S. Rep. No. 103-6, at 13 (1993). Arizona's proof-of-citizenship requirements for mail voting do just that. The Supreme Court has recognized that "[f]raud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021). But the district court emphasized the other statutory goal to stretch § 20505(c)(1) beyond its text.

C. The LULAC Consent Decree Cannot Perpetually Constrain the Legislature's Exercise of Its Sovereign Powers

Arizona cannot require Federal Form applicants to provide DPOC as a condition of registering to vote in federal elections. *ITCA*, 570 U.S. at 20. But "state-developed forms may require information the Federal Form does not," and "[t]his permission works in tandem with the requirement [in Section 6 of the NVRA] that States 'accept and use' the Federal Form." *Id.* at 12; *see also Gonzalez v. Arizona*, 677 F.3d 383, 399 (9th Cir. 2012) (Section 9, which governs the permissible contents of the State Form for registering voters in federal elections, "gives a state more options" by permitting it to add mandatory informational items beyond those included in the Federal Form). Because "determining whether an individual is a United States citizen is of paramount importance when determining his or her eligibility to vote," *Gonzalez v. Arizona*, 435 F. Supp. 2d 997, 1002 (D. Ariz. 2007), the NVRA permits Arizona to incorporate a DPOC mandate into its State Form and to reject non-compliant registrations.

The LULAC Consent Decree requires county recorders to attempt to ascertain the citizenship status of State Form applicants who do not provide DPOC, and if citizenship can be validated, register them as full-ballot voters. Dkt. 709 at 4-5; Exh. C. This directive collides with H.B. 2492, which instructs the county recorders to "reject any [State Form] application for registration that is not accompanied by satisfactory evidence of citizenship." Ariz. Rev. Stat. § 16-121.01(C).

Subordinating the statute to the then-Secretary's bilateral agreement with private litigants inverts Arizona's construct of sovereignty. The notion that an executive officer can irrevocably forfeit any portion of the lawmaking power, particularly in the realm of elections, is dissonant with the U.S. Constitution, the Arizona Constitution, the relevant case law, and separation of powers precepts. *See Moore v. Harper*, 143 S. Ct. 2065, 2074 (2023) (the "state legislatures" have the "'duty' to prescribe rules governing federal elections."); *Carson v. Simon*, 978 F.3d 1051, 1060 (8th Cir. 2020) ("[T]he Secretary [of State] has no power to override the Minnesota Legislature" by stipulating to the tabulation of absentee ballots received after Election Day).

And the LULAC Consent Decree itself manifests no such relinquishment. *See Doe v. Pataki*, 481 F.3d 69, 78 (2d Cir. 2007) ("[P]roper regard for state authority requires a federal court to have a clear indication that a state has intended to surrender its normal authority to amend its statutes."); *Roosevelt Irr. Dist. v. Salt*

River Project Agric. Imp. & Power Dist., 39 F. Supp. 3d 1051, 1054-55 (D. Ariz. 2014) (consent decree did not purport to bind all political subdivisions of the state). Regardless, the district court's jurisdiction to enforce the LULAC Consent Decree expired on December 31, 2020. *See* Exh. C at 16. It follows that "the judgment . . . was executed. The case is over." *Taylor v. United States*, 181 F.3d 1017, 1023 (9th Cir. 1999).[2] Even by its own terms, it exerts no ongoing force.

II. The Partial Nullification of H.B. 2492 Irreparably Injures the Legislative Intervenors as Representatives of the State and of the Legislative Institution, and Inflicts a Competitive Injury on the RNC

A. The Suspension of Duly Enacted Laws Inflicts Both Sovereign and Institutional Harms

The injunction exacts two variants of irreparable injury: one to the State itself and one to the legislative institution that the Legislative Intervenors represent.

1. Arizona Law Empowers Legislative Intervenors to Defend the Constitutionality of Arizona's Duly Enacted Laws

An "injunction[] barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm the State," if the statute is ultimately determined to be valid. *Abbott v. Perez*,

[2] Central to *Taylor*'s apprehension of a potential separation of powers problem in the congressional termination of an existing consent decree was the fact that the judgment at issue "awarded no prospective relief." 181 F.3d at 1025. Here, the Appellants do not wish to "reopen," *id*., the Decree or to retroactively nullify voter registrations conducted under its auspices. Rather, they seek only a recognition that it cannot prospectively prohibit amendments to Arizona statutes.

585 U.S. 579, 602 (2018); *see also Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (citation omitted)).

This axiom of sovereignty—which derives from a confluence of federalism protections and separation of powers principles—is not the province of any single state actor. To the contrary, "a State is free to 'empowe[r] multiple officials to defend its sovereign interests," and "the State's executive branch" does not necessarily "hold[] a constitutional monopoly on representing [its] practical interests in court."'" *Berger v. N.C. State Conference of the NAACP*, 597 U.S. 179, 192, 194 (2022) (citation omitted). Rather, federal courts must look to state law to discern the dispersion of this authority, and must heed "a State's chosen means of diffusing its sovereign powers among various branches and officials." *Id.* at 191. While the Attorney General may represent the State's interests in judicial proceedings, *see* Ariz. Rev. Stat. § 41-193(A)(3), the Arizona Legislature "has also reserved to itself some authority to defend state law on behalf of the State." *Berger*, 597 U.S. at 194.

At least two specific provisions of Arizona law undergird the Legislative Leaders' standing to contest the district court's suspension of the Legislature's enactments. First, Ariz. Rev. Stat. § 12-1841—which is substantively identical to the North Carolina statute that the Supreme Court found "expressly authorized the

legislative leaders to defend the State's practical interests in litigation," *Berger*, 597 U.S. at 193 (citing N.C. Gen. Stat. Ann. § 1-72.2 (2021))—reserves for the Legislative Leaders an "entitle[ment] to be heard," in any proceeding implicating the constitutionality of a state law, to include "interven[ing] as a party" or "fil[ing] briefs in the matter." Ariz. Rev. Stat. § 12-1841(A), (D). The statute embodies Arizona's "policy decision to vest in its legislative leaders an interest in defending the constitutionality of the legislature's enactments" in federal and state courts. *Isaacson v. Mayes*, 2:21-cv-1417, 2023 WL 2403519, at *1 (D. Ariz. Mar. 8, 2023); *see also* Dkt. 535 at 6 ("[T]he Speaker and the President are authorized to defend Arizona's statutes and the Court declines to limit their right to represent the Arizona Legislature's interests"). Because the district court's partial injunction "implicat[es] the constitutionality" of H.B. 2492 in relation to Congress' and the States' respective powers under the Presidential Electors Clause, *see* U.S. Const. art. II, § 1, the Elections Clause, *see id.* art. I, § 4, and the Supremacy Clause, *see id.* art. VI, Arizona law expressly entitles the Legislative Leaders to protect the State's sovereign interests by defending the constitutionality of Arizona's voting laws in federal court.

Second, the Arizona Constitution incorporates explicit protections of state sovereignty against unconstitutional federal incursion. *See* Ariz. Const. art. II, § 3. The provision affirms that the State may "pursu[e] any . . . available legal remedy" to counter perceived unconstitutional federal overreach, and contemplates that "the

people or their representatives [may] exercise" authority to that end. *Id.* This intended bulwark against unlawful federal encroachment is vested collectively in the elected branches of Arizona state government. When, as here, a federal court or a federal statute truncates powers that arguably are entrusted to the State, legislative "representatives" may seek appropriate relief on its behalf.

2. Curtailment of the Legislature's Authority to Select Presidential Electors and to Structure Methods of Registration and Voting in Arizona Elections Irreparably Injures the Institution

The Legislative Leaders may seek redress of injuries to the legislative institution they represent. An extrinsic constraint on a legislative body's lawmaking functions inflicts a cognizable institutional injury, and the Arizona Legislature has inherent autonomy to pursue and defend claims in furtherance of its institutional interests and prerogatives. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) (Arizona Legislature had standing to bring claim that initiative measure "strips the Legislature of its alleged prerogative to initiate redistricting"); *Forty-Seventh Legislature v. Napolitano*, 143 P.3d 1023, 1028 (Ariz. 2006).

The injunction thwarts the Legislature from disallowing individuals who have not proved their U.S. citizenship from participating in Arizona's selection of its presidential electors or from utilizing Arizona's generous mail-in voting option. It also elevates the Secretary of State's improvident promises in the LULAC Consent

decree over the laws of the State. In doing so, the injunction abrogates the Arizona Legislature's constitutional power to prescribe qualifications to vote for presidential electors, U.S. Const. art. II, § 1; *Carson*, 978 F.3d at 1060 ("[W]hen a state legislature enacts statutes governing presidential elections, it operates 'by virtue of a direct grant of authority' under the United States Constitution" (citation omitted)), to presumptively determine the "manner" of voting in federal elections, *see* U.S. Const. art. I, § 4 (state "Legislature" may regulate the "manner" of federal elections, subject to congressional "alter[ation]"), and to safeguard the purity of all elections in Arizona, *see* Ariz. Const. art. VII, § 12; *Priorities USA v. Nessel*, 978 F.3d 976, 981-82 (6th Cir. 2020) (citing parallel provision in Michigan Constitution and explaining that, when an election law is enjoined, "[t]he legislature has lost the ability to regulate that election in a particular way").

In short, the Arizona Legislature has sustained an injury because its "specific powers are disrupted" by the injunction. *Id.* at 982. The Legislative Leaders may seek redress of this harm on the institution's behalf, as both chambers have adopted rules empowering the Legislative Intervenors to "bring or assert in any forum on behalf of the[ir houses] any claim or right arising out of any injury to [their houses'] powers or duties under the Constitution or Laws of this state." State of Arizona, *Senate Rules*, 56th Legislature 2023-2024, Rule 2(N), https://bit.ly/3WXFLDv;

State of Arizona, *Rules of the Ariz. House of Representatives*, 56th Legislature 2023-2024, Rule 4(K), https://bit.ly/3HuL9bz.

B. The Injunction Inflicts a Competitive Injury on the RNC

In overriding the Legislature's determination that Federal Only voters may not vote for Arizona's presidential electors or vote by mail, the injunction distorts the competitive environment underpinning the 2024 election in a manner that is unfavorable to the RNC and Republican candidates. "Competitive standing recognizes the injury that results from being forced to participate in an 'illegally structure[d] competitive environment.'" *Mecinas v. Hobbs*, 30 F.4th 890 898 (9th Cir. 2022) (citation omitted); *see also Owen v. Mulligan*, 640 F.2d 1130, 1132 (9th Cir. 1981) (holding that "the potential loss of an election" due to allegedly unlawful attributes of the electoral system is an injury). "Voluminous" authority shows that candidates and parties suffer injury when their "chances of victory would be reduced." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 & n.4 (5th Cir. 2006) (collecting cases).

According to Plaintiffs/Appellees' own expert, only 14.3% of Federal Only voters are registered as members of the Republican Party, while Republicans comprise 34.5% of the total active registered voter population in Arizona. *See* Trial Ex. 340, attached as Exhibit D. The judicially mandated inclusion of these individuals in the presidential electorate necessarily impairs the relative competitive

position of the Republican presidential nominee. *See Mecinas*, 30 F.4th at 898 ("ongoing, unfair advantage conferred to. . . rival candidates" was an injury).[3]

III. The Balance of Equities and Public Policy Support a Partial Stay

When, as here, a governmental party seeks a stay, "its interest and harm merge with that of the public." *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017); *see also E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 668 (9th Cir. 2021) (preliminary injunction context). The administration of the 2024 election in accordance with safeguards devised by Arizonans' elected representatives to limit the franchise to verified United States citizens is a public interest of the highest order. *See Mi Familia Vota v. Hobbs*, 977 F.3d 948, 954 (9th Cir. 2020) ("States have 'an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes.'" (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997))).

There is no countervailing harm that an injunction is necessary to remediate. The district court found that "Plaintiffs offered no witness testimony or other 'concrete evidence' to corroborate that the Voting Laws' DPOC Requirements will in fact impede any qualified elector from registering to vote or staying on the voter rolls," Dkt. 709 at 92, and that "[t]he Voting Laws do not impose an excessive

[3] *See also Priorities USA v. Nessel*, 860 Fed. Appx. 419, 421 (6th Cir. 2021) (it suffices for just one appellant to demonstrate injury).

burden on any specific subgroup of voters," *id.* at 95. *See A. Philip Randolph Institute of Ohio v. LaRose*, 831 Fed. App'x 188, 192 (6th Cir. 2020) (concluding that stay of order authorizing counties to deploy ballot drop-boxes "is unlikely to harm anyone" by preventing them from voting).

Finally, the Supreme Court's admonition against last-minute judicially imposed alterations to a state's election procedures, *see Purcell v. Gonzalez*, 549 U.S. 1 (2006), does not apply here. If the district court's injunction was erroneously issued, *Purcell* is no barrier to appellate intervention. *See Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022) (Mem.) (Kavanaugh, J., concurring) ("Correcting an erroneous lower court injunction of a state election law does not itself constitute a *Purcell* problem."). Indeed, if anything, it is the district court's injunction—which was issued just three months before the primary election and dilutes statutory election safeguards—that implicates *Purcell* concerns. *See* 549 U.S. at 4 ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.").

And the state and county parties cannot contrive a putative *Purcell* problem by willfully refusing for more than a year to implement duly enacted state laws, despite the absence of any court order enjoining their enforcement. *Purcell* encapsulates a maxim of federalism: federal courts should refrain from dictating state election procedures in temporal proximity to an election. *See Democratic Nat'l*

Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring) ("It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent."). If the district court erred in interdicting the implementation of voter registration reforms adopted nearly two years ago (and it did), *Purcell* neither requires nor licenses this Court to compound the federal judiciary's mistaken incursion into Arizona's democratic process.

CONCLUSION

The Court should stay the district court's injunction pending appeal to the extent the injunction prohibits the implementation or enforcement of Arizona statutes that (1) restrict Federal Only voters from voting for president; (2) restrict Federal Only voters from voting by mail, or (3) are inconsistent with the LULAC Consent Decree.

Dated: June 25, 2024

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CERTIFICATE OF COMPLIANCE

This Motion complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 5,191 words, excluding the parts that can be excluded. This Motion further complies with the typeface requirements of Rules 27(d)(1)(E) and 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using the Microsoft Word in 14-point Times New Roman font.

Dated: June 25, 2024 */s/ Thomas Basile*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 25, 2024. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: June 25, 2024 */s/ Thomas Basile*