No. 24A164

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 Pending Appeal from the U.S. Court of Appeals for the Ninth Circuit

To the Honorable Elena Kagan,
Associate Justice of the United States and
Circuit Justice for the Ninth Circuit

AMICUS CURIAE BRIEF OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPLICANTS

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANTS

Amicus Curiae Immigration Reform Law Institute[1] ("IRLI") respectfully submits that the Circuit Justice or the full Court should grant the emergency application to stay the district court's judgment. This Court is likely to grant a petition for a writ of *certiorari*, the Applicants are likely to prevail, and they will suffer irreparable harm without a stay.

IDENTITY AND INTERESTS OF *AMICUS CURIAE*

IRLI is a nonprofit 501(c)(3) public-interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus* briefs in many important immigration cases, including in the district court and Ninth Circuit in this matter and in *Trump v. Hawaii*, 585 U.S. 667 (2018), *United States v. Texas*, 579 U.S. 547 (2016), *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019), *Ariz. Dream Act Coalition v. Brewer*, 855 F.3d 957 (9th Cir. 2017), *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016), and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010). For more than twenty years, the Board of Immigration Appeals has solicited *amicus* briefs drafted by IRLI staff from IRLI's affiliate, the Federation for American Immigration Reform, because the Board considers IRLI an expert in immigration law. For these reasons, IRLI has direct interests in the issues presented here.

INTRODUCTION

The three consolidated appeals of several consolidated district-court cases

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[1] Consistent with FED. R. APP. P. 29(a)(4)(E) and this Court's Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored the brief in whole or in part, nor did any person or entity, other than the *amicus* and its counsel, make a monetary contribution to preparation or submission of the brief.

would benefit from—and arguably *require*—some untangling before the Circuit Justice or full Court considers the emergency stay application. As is often the case, Article III provides a ready solution for the Court to streamline this matter considerably.

Procedural Background

The district court cases consist of an action (No. 2:22-cv-01124-SRB) by the United States against the State of Arizona and its Secretary of State in the Secretary's official capacity (collectively, the "Defendants") and several actions by non-federal plaintiffs (the "Non-Federal Plaintiffs") against the Defendants and some additional defendants. The actions in district court were consolidated by a series of orders, with the first-filed case (No. 2:22-cv-509-PHX-SRB) as the lead case. In their independent pre-consolidation actions, the Non-Federal Plaintiffs named several other official-capacity defendants, including Arizona's Attorney General, the Director of the Arizona Department of Transportation, and County Recorders. Acting through their respective leaders, the two houses of Arizona's Legislature—joined by the Republican National Committee (collectively, the "Applicants")—intervened as defendants. There is a single judgment for all consolidated cases.

There are three consolidated appeals in the Ninth Circuit from the several consolidated actions in district court: (a) in No. 24-3188, the Applicants appeal the final judgment; (b) in No. 24-3559, the State of Arizona and the Arizona Attorney General appeal the final judgment; and (c) in No. 24-4029, two of the Non-Federal Plaintiffs cross-appeal the final judgment. In the Ninth Circuit, a motions panel unanimously stayed the district court's judgment in part, followed by a divided merits panel decision to vacate that stay on the motion of several Non-Federal Plaintiffs.

Jurisdictional Background

Article III deprives federal courts of jurisdiction for advisory opinions, *Muskrat*

v. United States, 219 U.S. 346, 356-57 (1911), and confines them instead to cases or controversies presented by affected parties properly before the court. U.S. CONST. art. III, § 2. "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to ... the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Allen v. Wright*, 468 U.S. 737, 750 (1984) (internal quotation marks omitted).

Article III "standing" requires a judicially cognizable injury, caused by the defendant, and redressable by a court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). The proof required to show standing increases as litigation proceeds. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). Standing must be present from the inception, and it must last until judgment. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) ("case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate"); *accord FBI v. Fikre*, 601 U.S. 234, 244 (2024) ("a federal court's duty to ensure itself of Article III jurisdiction may begin at the inception of a lawsuit, [and] it persists throughout the life of the proceedings"); *Wittman v. Personhuballah*, 578 U.S. 539, 543 (2016). Significantly, courts assess standing claim by claim and defendant by defendant: "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Instead, "a plaintiff must demonstrate standing for each claim he seeks to press" and "for each form of relief" sought. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (internal quotation marks omitted). In a particular case, it is enough if one party has standing *vis-à-vis* a claim and defendant. *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. 497, 518 (2007).

Under *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024), voluntarily diverted resources generally do not establish standing because plaintiffs cannot establish standing through self-inflicted injuries. *Accord Clapper v.*

Amnesty Int'l USA, 568 U.S. 398, 416 (2013). Plaintiffs also generally cannot assert a third party's rights, *Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004), although membership associations can assert the rights of their membership if at least one member has standing, nothing requires the member's individual participation, and the issue is germane to the association's purpose. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). For merits relief, the association must identify one member by name—with sufficient proof of that member's standing—unless the nature of the litigated issue and the association indicate that *all* members have standing. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497-98 (2009). Like all plaintiffs, associational plaintiffs also can suffer injury themselves.

With consolidated cases, the individual cases remain jurisdictionally distinct. *Hall v. Hall*, 584 U.S. 59, 66 (2018) ("one of multiple cases consolidated under [FED. R. CIV. P. 42(a)] retains its independent character"). Similarly, with respect to intervenors, Article III limits the intervenor to the case brought by the original plaintiff—and the original plaintiff's Article III jurisdiction—unless the intervenor has its own Article III jurisdiction:

> The same [Article III] principle applies to intervenors of right. Although the context is different, the rule is the same: For all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right. Thus, at the least, an intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests. This result follows ineluctably from our Article III case law[.]

Town of Chester v. Laroe Estates, Inc., 581 U.S. 433, 439 (2017).

Substantive Legal Background

The Constitution's Elector-Qualifications Clause has tied voter qualifications for elections for Representatives to the "Qualifications requisite for Electors of the most numerous Branch of the State Legislature" in each State. U.S. CONST. art. I, §

2, cl. 2.[2] In addition, the Elections Clause provides that state legislatures shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. CONST. art. I, § 4, cl. 1, subject to the power of "Congress at any time by Law [to] make or alter such Regulations." *Id.* art. I, § 4, cl. 2. Article II provides that the States "shall 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 Congress: but no Senator or Representative ... shall be appointed an Elector." *Id.* art. II, § 1, cl. 4.

The National Voter Registration Act, 52 U.S.C. §§ 20501-20511 ("NVRA"), was passed to "increase the number of eligible citizens who register to vote for Federal office," and to "protect the integrity of the electoral process." 52 U.S.C. § 20501(b)(3). The NVRA accomplishes these objectives by "requir[ing] States to provide simplified systems for registering to vote in federal elections." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013) (internal quotation marks omitted) ("*ITCA*"). Chief among the NVRA's "simplified system" is the so-called "Federal Form" that States must "accept and use" to register voters. 52 U.S.C. § 20505(a)(1).

The "Materiality Provision" of the Civil Rights Act of 1964 prohibits denying the right to vote based on errors or omissions that are immaterial to determining whether the person is qualified to vote under state law:

> No person acting under color of law shall … deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(B).

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[2] The Seventeenth Amendment applied that to Senators. *Id.* amend. XVII, cl. 2.

Arizona's Legislature enacted Arizona House Bill 2243 ("HB 2243") and Arizona House Bill 2492 ("HB 2492") to improve election integrity by ensuring that voter qualifications are enforced and that voter rolls are accurate. HB 2492 updates voter qualifications to require documentary proof of citizenship, A.R.S. § 16-101(A)(1), and proof of residence. A.R.S. § 16-579(A)(1). HB 2492 further provides that failure to include proof of citizenship on a state voter registration form is grounds for the application to be rejected by the county recorder. A.R.S. § 16-121.01(C). In accordance with *ITCA*, 570 U.S. at 7, these new documentary proofs are not required for applicants using the Federal Form to register to vote in congressional elections.

HB 2243 enumerates the reasons why a voter's registration may be cancelled. It also provides that, before a registration can be cancelled, the election official must provide written notice of the impending cancellation with instructions for the voter to remedy their registration. A.R.S. § 16-165. The notice must "include a list of documents the person may provide" to establish his or her citizenship as well as "a postage prepaid preaddressed return envelope." *Id.* Registration will thus only be cancelled following written notice and an opportunity to establish eligibility. Furthermore, once a registration is cancelled, written notice is again provided to the person explaining the cancellation and including instructions on how to register to vote if the person is qualified. A.R.S. § 16-165(K).

Factual Background

The United States filed a two-count complaint alleging that HB 2492 violates the NVRA—specifically, 52 U.S.C. § 20505—and the Civil Rights Act of 1964—specifically, 52 U.S.C. § 10101(a)(2)(B)—by either requiring documentary proof of citizenship ("DPOC") or by placing restrictions on voters or prospective voters based on their DPOC status or how they completed their registration forms. Compl. 14-16, *United States v. Arizona*, No. 2:22-cv-01124-SRB (D. Ariz. filed July 5, 2022) (ECF

#1). The United States's complaint seeks the following relief:

> (1) [a declaratory judgment] that Sections 4 and 5 of House Bill 2492 violate Section 6 of the National Voter Registration Act of 1993, 52 U.S.C. § 20505(a)(1);
>
> (2) [a declaratory judgment] that Sections 4 and 5 of House Bill 2492 violate Section 101 of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B);
>
> (3) [an injunction prohibiting] Defendants, their agents and successors in office, and all persons acting in concert with them from enforcing the requirements of Sections 4 and 5 of House Bill 2492 that violate Section 6 of the National Voter Registration Act of 1993, 52 U.S.C. § 20505(a)(1);
>
> (4) [an injunction prohibiting] Defendants, their agents and successors in office, and all persons acting in concert with them from enforcing the requirements of Sections 4 and 5 of House Bill 2492 that violates Section 101 of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B);
>
> (5) [an order that] Defendants, their agents and successors in office, and all persons acting in concert with them … take appropriate action to ensure uniform compliance with this Court's order by state, county, and local authorities administering the State's electoral processes[.]

Id. 16-17. As explained in this *amicus* brief, the United States's complaint is the only jurisdictionally proper complaint in the consolidated cases below.

STANDARD OF REVIEW

Stays pending the timely filing and resolution of petitions for writs of *certiorari* are appropriate when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant *certiorari*; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010); *cf. Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). For "close cases," the Court "will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190.

Appellate courts review jurisdictional issues before merits issues. *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 94-95 (1998) ("requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception") (citations and interior quotations omitted, alteration in original). Appellate courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991). If the record does not establish jurisdiction, remand for dismissal is required:

> [I]f the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co., 523 U.S. at 95 (first and second alterations added, interior quotations omitted). Even if the parties do not dispute jurisdiction, "no action of the parties can confer subject-matter jurisdiction upon a federal court." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Instead, "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (interior quotations omitted). "And if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect." *Id.* (interior quotations omitted). If the district court lacked jurisdiction over any claims or cases, an appellate court must remand with instructions to dismiss them.

SUMMARY OF ARGUMENT

The Non-Federal Plaintiffs lack Article III standing because they have not identified a member with standing for associational standing (Section II.A.1), and

their diverted resources are self-inflicted injuries that cannot support standing (Section II.A.2). Moreover, the Arizona Secretary of State's past settlement with some plaintiffs-respondents provides no *res judicata* benefit—in the form of issue preclusion or collateral estoppel—to this litigation (Section II.A.2.b). Significantly, the consolidation of these actions in the district court does not absolve the plaintiffs in each individual action from Article III's jurisdictional requirements (Section II.A). The United States's two-count complaint presents the only merits issues properly included in these consolidated cases. This Court should reject the first count—namely, that the NVRA preempts HB 2492—because Arizona accepts and uses the Federal Form as required by the NVRA and *ITCA* (Section II.B.2). This Court should reject the second count—namely, that HB 2492 seeks immaterial information under the Civil Rights Act of 1964—because place of birth is material to Arizona's voter qualification laws (Section II.B.3). Finally, although the *Anderson-Burdick* framework[3] is inapposite to these two statutory counts, HB 2492's burdens are minimal and thus permissible under the *Anderson-Burdick* framework, assuming *arguendo* that the framework applied (Section II.B.4).

ARGUMENT

I. THE GRANT OF A WRIT OF *CERTIORARI* IS LIKELY.

This Court is likely to grant a petition for a writ of *certiorari* in this matter, as the Court often does under *Purcell v. Gonzalez*, 549 U.S. 1 (2006) to guard against litigation's interference with elections close to an election. *See*, *e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423 (2020); *Andino v. Middleton*, 141 S.Ct. 9 (2020). Beyond that, the merits issues of the balance between State power to set voter qualifications under the Constitution and the claims in the various cases at

[3] *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

issue here present a significant federal question for this Court to resolve, considering the constitutional doubt that the Court found in *ITCA*, 570 U.S. at 17.

This likelihood would best be shown if the Court deemed the application a petition for a writ of *certiorari* and—so construed—*actually granted* the petition. *See*, *e.g.*, *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 401 (2022) (treating application as a petition, granting petition, and ruling summarily); *United States v. Texas*, 143 S.Ct. 51 (2022) (treating application as petition and granting petition while denying a stay). With major new decisions like *Alliance for Hippocratic Medicine*, the Court can grant, vacate, and remand ("GVR") for the lower courts to apply the new precedent. *Lawrence v. Chater*, 516 U.S. 163, 166 (1996). Indeed, the Court occasionally uses follow-on summary decisions to flesh out issues in recently decided cases. *See*, *e.g.*, *Lambrix v. Singletary*, 520 U.S. 518, 538-39 (1997); Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 694 (2020). All these actions would be appropriate means of granting the emergency relief that Applicants seek.

II. APPLICANTS ARE LIKELY TO PREVAIL

The likelihood of prevailing is the principal factor for determining an entitlement to interim relief. *Hollingsworth*, 558 U.S. at 190; *Winter*, 555 U.S. at 20. Because the Applicants are correct on the merits and the Non-Federal Plaintiffs lack standing, the Applicants are likely to prevail.

A. The courts below lack Article III jurisdiction over the Non-Federal Plaintiffs' actions.

This Court's first obligation is to assure itself not only of its jurisdiction but also of the district court's jurisdiction. *Steel Co.*, 523 U.S. at 95. As explained in this Section, the record here does not affirmatively establish the Non-Federal Plaintiffs' Article III standing. Under *Renne*, 501 U.S. at 316, this Court therefore must assume that jurisdiction is lacking. The parties' willingness to concede standing is irrelevant.

Insurance Corp. of Ireland, 456 U.S. at 702; *In re Kieslich*, 258 F.3d 968, 970 (9th Cir. 2001) ("subject matter jurisdiction cannot be created by waiver or consent"). Each of the Non-Federal Plaintiffs' cases nonetheless retains its own discrete jurisdictional character, *Hall*, 584 U.S. at 66, and each of those cases was—and remains—independently subject to Article III. *Town of Chester*, 581 U.S. at 439. While federal courts have Article III jurisdiction to consider the United States's two claims against Arizona and its Secretary of State, that is the extent of federal jurisdiction.

Moreover, the United States's standing cannot cure the Non-Federal Plaintiffs' lack of standing when the Non-Federal Plaintiffs filed their own independent actions. *See Spencer*, 523 U.S. at 7; *Fikre*, 601 U.S. at 244. Indeed, these independent suits are unnecessary because—if the United States prevails—the relief will extend to all purported members of the Non-Federal Plaintiffs. The only difference will be whether the Non-Federal Plaintiffs' counsel recover fees, *see*, *e.g.*, 42 U.S.C. § 1988(b); 52 U.S.C. § 20510(c), but a question about entitlement to fees "is insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Steel Co.*, 523 U.S. at 107 (internal quotation marks omitted).

1. The Non-Federal Plaintiffs lack associational standing.

Although the Non-Federal Plaintiffs may have members, they do not have associational standing based on their membership's alleged injuries.[4] To show associational standing, a membership organization must have put forward affidavits showing at least one member who has had standing throughout the pendency of the Non-Federal Complainant's case from inception to judgment. *Summers*, 555 U.S. at 497-98. To evade this requirement, the district court cites *Clapper* for the proposition that associational plaintiffs need not identify members if the injury is sufficiently

[4] The district court uses the term "representational" standing as synonymous with "associational" standing. *See* Amended Order 56-57 (Appl. App. 102-03).

imminent:

> [A] plaintiff need not identify specific individuals who are likely to be harmed by the challenged conduct, so long as the future injury alleged is "certainly impending." *Clapper*, 568 U.S. at 409.

Amended Order 58 (Appl. App. 104). In doing so, the district court erroneously conflates imminence with the requirement that an injury be particularized. Certainty of injury *to someone else* is not necessarily an injury to an association or its members unless the challenged law injures the *entire* membership. For example, a union whose members consisted exclusively of drivers with commercial driver's licenses ("CDLs") could challenge a tax on CDLs without identifying a specific member. Here, by contrast, Arizona law does not injure *every member* of any would-be associational plaintiff-respondent. This Court has rejected the district court's approach as "mak[ing] a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers*, 555 U.S. at 497-98. Accordingly, the Non-Federal Plaintiffs' standing required identifying at least one member with standing, as they all failed to do.

With respect to one of a tribal plaintiff-respondent, the district court found "representational" standing to challenge the requirement for documentary proof of location of residence ("DPOR"):

> The Court concludes that the San Carlos Apache Tribe has representational standing to challenge the DPOR Requirement. First, the Tribe's members would have standing to sue in their own right. Given the impending enforcement of the Voting Laws, the Tribe's members face a "realistic danger of sustaining a direct injury" due to the DPOR Requirement. This constitutes an injury-in-fact, which is traceable to H.B. 2492 and redressable by an injunction preventing their enforcement. Second, the Tribe seeks to protect voting rights of its members, which is germane to the Tribe's purpose. And third, the Tribe's

> claim and requested relief do not require the participation of its members in this litigation. In addition, because it is "relatively clear" that at least one of the Tribe's members will be impacted by the DPOR requirement, and because defendants need not know the identity of any particular Tribe member to respond to the Tribe's claims, it is not necessary for the Tribe to identify any specific member who will be injured by the challenged provisions.

Amended Order 61-63 (Appl. App. 107-08) (citations omitted). By treating the tribe as a membership group, the district court's analysis is flawed for the same reason that its private-plaintiff analysis is flawed: it is impossible to know if a single member is truly affected. Under the *Anderson-Burdick* test, moreover, it is impossible to know the scope of the burden imposed without knowing more about the person allegedly injured by the law. *See* Section II.B.4 & n.6, *infra*. Thus, even with respect to the DPOR requirement, the Non-Federal Plaintiffs lack associational standing.

2. The Non-Federal Plaintiffs lack their own standing.

The district court found standing based on the organizational plaintiffs' self-inflicted injury of diverting their resources. *See* Amended Order 57-61 (Appl. App. 103-07). Such injuries are simply not a basis that qualifies as a cognizable injury caused by the defendants. *All. for Hippocratic Med.*, 602 U.S. at 395; *Clapper*, 568 U.S. at 416. To the extent that the lower courts relied on the Non-Federal Plaintiffs' diverted resources, the district court's judgment provides no basis for relief.

a. *Havens* is inapposite here for the same reasons as in *Alliance for Hippocratic Medicine.*

The Non-Federal Plaintiffs based their standing primarily on their voluntarily diverted resources, Amended Order 57-61 (Appl. App. 103-07), which are mere self-inflicted injuries. *All. for Hippocratic Med.*, 602 U.S. at 395 (distinguishing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982), for resources spent advocating against the challenged action); *see also Clapper*, 568 U.S. at 416-18 (self-censorship due to fear of surveillance insufficient for standing); *Pennsylvania v. New Jersey*, 426

U.S. 660, 664 (1976) (financial losses state parties could have avoided insufficient for standing); *cf. Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere advocacy by an organization does not confer standing to defend "abstract social interests"). This Court has an obligation to confine the lower courts to their Article III jurisdiction.

b. *Res judicata* principles do not provide standing for the Non-Federal Complainants.

The fact that the Non-Federal Plaintiffs were viewed to have had standing for a prior settlement or consent decree says nothing about their standing here.

Res judicata principles such as collateral estoppel and issue preclusion can be abandoned if not asserted. *Arizona v. California*, 530 U.S. 392, 410 (2000). The Non-Federal Plaintiffs have not claimed preclusive standing. Nor could they, as shown below. Further, "settlements ordinarily occasion no issue preclusion (sometimes called collateral estoppel), unless it is clear, as it is not here, that the parties [so] intend." *Id.* at 414. Finding issue preclusion in Arizona requires a final judgment:

> Collateral estoppel or issue preclusion is applicable when the issue or fact to be litigated was actually litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it, provided such issue or fact was essential to the prior judgment.

Chaney Bldg. Co. v. Tucson, 148 Ariz. 571, 573 (1986). The parties did not litigate the Non-Federal Plaintiffs' standing—or anything else—to final judgment.

Even if the Non-Federal Plaintiffs and their settlement had envisioned future preclusion, the parties' agreement would not withstand the change in controlling law under the supervening *Alliance for Hippocratic Medicine* decision. Arizona "generally follow[s] the Restatement [of Judgments] absent statutes or case law to the contrary," *Barnes v. Outlaw*, 192 Ariz. 283, 285 (1998), and the Restatement recognizes a change in the law as cutting short the otherwise-preclusive effect of a prior judgment.

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> …
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) *a new determination is warranted in order to take account of an intervening change in the applicable legal context*.

State v. Whelan, 208 Ariz. 168, 172-73 (App. 2004) (quoting RESTATEMENT (SECOND) OF JUDGMENTS ¶ 28, (emphasis in *Whelan*); *accord Corbett v. Manorcare of Am. Inc.*, 213 Ariz. 618, 626 (App. 2006) (citing *Montana v. United States*, 440 U.S. 147, 155 (1979)). In short, the Non-Federal Plaintiffs past litigation with Arizona's Secretary of State provides no basis for them to assert standing here.

B. HB 2492 complies with federal law.

The right to vote has long been recognized as a fundamental right of U.S. citizens. *See*, *e.g.*, *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("voting is of the most fundamental significance under our constitutional structure"); *Wesberry v Sanders*, 376 U.S. 1, 17 (1964) ("[o]ther rights, even the most basic, are illusory if the right to vote is undermined"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (right to vote is "preservative of all rights"); *cf. Foley v. Connelie*, 435 U.S. 291, 296 (1978) (recognizing the "right[] of the people to be governed by their citizen peers"). The fundamental nature of the right to vote requires rules and regulations to ensure fairness and faith in elections. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes").

1. The States have plenary power over voter qualifications.

States have compelling interests in protecting the integrity and reliability of

the electoral process by deterring and detecting voter fraud and—relatedly—safeguarding voter confidence. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008); *Purcell*, 549 U.S. at 4 ("[a] State has a compelling interest in preserving the integrity of the election process") (internal quotation marks omitted). Accordingly, "States … must regulate their elections to ensure that they are conducted in a fair and orderly fashion." *Buckley v. Am. Const'l Law Found.*, 525 U.S. 182, 206 (1999). Notwithstanding that valid federal law supersedes state law when the two conflict, U.S. CONST. art. VI, cl. 2, the Constitution vests control over voting qualifications and—outside of time-place-manner issues—election provisions in the States.

Specifically, the power of Congress to regulate the "time, place, and manner" of elections in one section of Article I neither applies to nor limits the States' plenary power to set elector qualifications elsewhere in Article I. *Compare* U.S. CONST. art. I, § 2, cl. 2 *with id.* art. I, § 4, cl. 2. On voter qualifications, State law controls:

> One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly. "It is difficult to see how words could be clearer in stating what Congress can control and what it cannot control. Surely nothing in these provisions lends itself to the view that voting qualifications in federal elections are to be set by Congress."

ITCA, 570 U.S. at 16 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part)). While Congress's authority under the Elections Clause to enact time-place-manner requirements is broad, *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 799 (2018) (Breyer, J., dissenting), Congress has only the authority "to regulate *how* federal elections are held, but not *who* may vote in them." *ITCA*, 570 U.S. at 16 (emphases in original).

2. The NVRA does not preempt HB 2492.

The United States's first count claims that 52 U.S.C. § 20505 preempts HB 2492. Neither the NVRA nor *ITCA* should be read to infringe on States' constitutional

authority over voter qualifications in federal elections, nor to bar States from performing their constitutional duty to safeguard election integrity. Nothing in the NVRA or *ITCA* requires States conclusively to presume the truth of any assertion made on a Federal Form, forbids States from verifying assertions made on the form, or precludes States from purging their voter rolls of ineligible voters.

a. HB 2492 does not conflict with the NVRA's requirement that States accept and use the Federal Form.

This Court confirmed that—by requiring that "[e]ach State accept and use the" Federal Form for voter registration, 52 U.S.C. § 20505(a)(1)—the NVRA precludes States from requiring applicants using the Federal Form to provide information beyond that required by that form. *ITAC*, 570 U.S. at 15 ("a state-imposed requirement of evidence of citizenship not required by the Federal Form is inconsistent with the NVRA's mandate that States 'accept and use' the Federal Form"). HB 2492 does not conflict with that requirement, as this Court interpreted it in *ICTA*.

Specifically, the NVRA's "accept and use" requirement "does not preclude States from deny[ing] registration based on information in their possession establishing the applicant's ineligibility." *ITAC*, 570 U.S. at 15. To the contrary, the "NVRA clearly contemplates that not every submitted Federal Form will result in registration." *Id.* HB 2492 complies with the NVRA and *ITCA* because HB 2492 does not interfere with Arizona's accepting and using the Federal Form.

Arizona does not require Federal Form applicants to submit evidence of citizenship or residence; those requirements apply only to the state registration form. For state form applicants, HB 2492 requires automatic rejection without evidence of citizenship, but that requirement expressly excludes applicants who submit the Federal Form. *See* A.R.S. § 16-121.01(C) (requiring rejection where proof of citizenship is lacking "[e]xcept for [applications submitted via] a form produced by the United States election assistance commission").

For the Federal Form, election officials must "use all available resources to verify the citizenship status of the [Federal Form] applicant." *Id.* § 16-121.01(D). Those resources include—without limitation—databases for the Department of Transportation, Social Security Administration, and the United States Citizenship and Immigration Service Systematic Alien Verification for Entitlements Program. *See id.* § 16-121.01(D)(1)-(5). If citizenship cannot be verified from that information, the election official must provide written notice that "the applicant will not be qualified to vote in a presidential election or by mail with an early ballot in any election until satisfactory evidence of citizenship is provided." *Id.* § 16-121.01(E). But, unless the election official affirmatively determines that the applicant is not a U.S. citizen, the applicant is otherwise registered. *Id.* These procedures do not conflict with the mandate that States "accept and use" the Federal Form as clarified in *ITCA*.

b. States retain the power to create and use their own mail-in voter registration forms under the NVRA.

Although the NVRA requires States to "accept and use" the Federal Form, the NVRA permits States to "develop and use a mail voter registration form that meets all of the criteria stated in section 9(b)[.]" 52 U.S.C. § 20505(a)(2). Thus, although "the NVRA imposes certain mandates on states, describing those mandates in detail[,]" the NVRA "still leaves [the States] room for policy choice." *Young v. Fordice*, 520 U.S. 273, 286 (1997). Arizona has made a "policy choice" that the NVRA does not preempt.

Under the Elector-Qualifications Clause, Arizona permissibly chose to require proof of citizenship on its state mail voter registration form, which the NVRA allows. First, the NVRA provides what a mail registration form "may require ... to assess the eligibility of the applicant." 52 U.S.C. § 20508(b)(1). But "[t]he NVRA does not list, for example, all other information the State may—or may not—provide or request." *Young*, 520 U.S. at 286. Because Section 9(b) does not contain any prohibitions on requiring that documentary evidence be submitted in conjunction with a mail voter

registration, States are free to require such information. Accordingly, the fact that the Federal Form does not require documentary proof of citizenship does not preclude States from requiring such information on their own forms.

Second, the NVRA indicates what mail registration forms must contain. It provides that the registration form "shall include a statement that specifies each eligibility requirement (including citizenship); contains an attestation that the applicant meets such requirement; and requires the signature of the applicant, under penalty of perjury." 52 U.S.C. § 20508(b)(2). The NVRA's only prohibition provides that the registration form "may not include any requirement for notarization or other formal authentication." 52 U.S.C. § 20508(b)(3). The Arizona mail voter registration form does not violate anything expressly in the NVRA.

Third, "state-developed forms may require information the Federal Form does not." *ITCA*, 570 U.S. at 12. Therefore, under the NVRA, "States retain the flexibility to design and use their own registration forms." *Id.* Nothing in the NVRA prohibits Arizona's requiring more information—including documentary evidence—in its own mail registration form than the Federal Form requires. *Id.* The purpose of the Federal Form is to provide a simple, streamlined method for voter registration, not to interfere with the States' authority to conduct elections.

c. NVRA does not prevent the States from purging ineligible voters from the voter rolls.

The NVRA requires that States "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of the death of the registrant; or a change in address of the registrant." 52 U.S.C. § 20507(a)(4). The NVRA further provides examples of how States may conduct these programs, including the requirement that such programs be completed "not later than 90 days prior to the date of a primary or general election for Federal office." 52 U.S.C. § 20507(c). Finally, names are not to be removed for

change of residence reasons absent written confirmation of an address change or failure to respond to written notice combined with failure to vote. 52 U.S.C. § 20507(d). HB 2492 complies with these requirements. Because the NVRA does not prohibit the States from removing voters based on ineligibility, Arizona is free to remove persons it has determined are not U.S. citizens.

3. HB 2492 does not violate the Materiality Clause.

The United States's second count claims that HB 2492 violates the Civil Rights Act of 1964's "Materiality Provision," 52 U.S.C. § 10101(a)(2)(B), by denying the right to vote based on the omission of immaterial information. The United States's argument that the information is not material to Arizona's interest under the Elector-Qualifications Clause in identifying noncitizens is simply not credible. Arizona wants to identify people not born in the United States analogously to why Willie Sutton robbed banks: "that's where the money is." Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 683 (1992). Here, instead of money, the search is for noncitizens, who are exponentially more prevalent among those born outside the United States than among those born in the United States. Thus, identifying the subset of people *not born in the United States* obviously provides useful information.

The United States's "materiality" count asks whether an applicant's place of birth is or "is not material in determining whether such individual is qualified under State law to vote in such election[.]" 52 U.S.C. § 10101(a)(2)(B); *accord* Civil Rights Act of 1964, PUB. L. NO. 88-352, §101(a), 78 Stat. 241. The phrase "not material" or "immaterial" means "lacking any logical connection with the consequential facts." BLACK'S LAW DICTIONARY 896 (11th ed. 2019); *cf. Basic Inc. v. Levinson*, 485 U.S. 224, 239 (1988) ("[n]o particular event or factor short of closing the transaction need be either necessary or sufficient by itself to render merger discussions material")

(discussing necessity and sufficiency in the context of materiality in securities transactions). When Congress enacted the Civil Rights Act of 1964, immateriality was a real thing. *See*, *e.g.*, Gloria J. Browne-Marshall, THE VOTING RIGHTS WAR: THE NAACP AND THE ONGOING STRUGGLE FOR JUSTICE 110 (2016) (requiring prospective Black voters "to count the number of jelly beans in a large jar just by looking at it"). As a simple matter of statutory construction and leaving aside the lack of a federal interest under the Elector-Qualifications Clause, the United States's claim that foreign birth is *immaterial* to citizenship exceeds what Congress meant in 1964.

Although *ITCA* rejected a full-fledged presumption against preemption for Elections Clause legislation, *ITCA,* 570 U.S. at 13-14 ("[we] have never mentioned such a principle in our Elections Clause cases") (*citing Ex parte Siebold,* 100 U.S. 371, 384 (1880)), *ITCA* did not reject deference to State law or federalism as tools of statutory construction. *See id.* To the contrary, even without a presumption against preemption, Elections Clause precedents require clear congressional statements to displace State authority. Under *Siebold*—on which *ITCA* relied—courts "presume that Congress has [exercised its authority] in a judicious manner" and "that it has endeavored to guard as far as possible against any unnecessary interference with State laws." *Siebold,* 100 U.S. at 393. Similarly, Elections Clause precedents not only require Congress to "have expressed a clear purpose to establish some further or definite regulation" before supplanting State authority over elections but also "consider[] the policy of Congress not to interfere with elections within a state except by clear and specific provisions." *United States v. Bathgate,* 246 U.S. 220, 225-26 (1918); *United States v. Gradwell,* 243 U.S. 476, 485 (1917); *cf. United States v. Bass*, 404 U.S. 336, 349 (1971) (requiring clear congressional statement before statute "will … be deemed to have significantly changed the federal-state balance"); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (same). *Siebold, Gradwell,* and *Bathgate* clarify that

courts construing federal election statutes must weigh States' independent authority and federalism, even without a full-fledged presumption against preemption.

If Congress wants to update the Civil Rights Act to cover information that a State considers important under the Elector-Qualifications Clause, but where the federal Department of Justice disagrees, Congress perhaps could write that law. In doing so, Congress would be working against the canon against constitutional doubt, *ITCA*, 570 U.S. at 17 (quoted *infra*), and the recent demise of the *Chevron* doctrine. *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2273 (2024) (overruling deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-45 (1984)). But it stretches credulity to argue that Congress in 1964 meant the phrase "not material" to include Arizona's wanting to know whether applicants were born abroad to narrow the field of applicants who warrant further inquiry about their citizenship status. There is an obvious "logical connection" between the two issues.

4. The *Anderson-Burdick* test does not apply, but HB 2492 meets the test in any event.

The United States's two claims arise under the NVRA and the Civil Rights Act of 1964's "Materiality Provision." Those claims do not arise under the Constitution. As such, *amicus* IRLI respectfully submits that the *Anderson-Burdick* framework for analyzing constitutional issues in the voting context is simply inapposite.[5]

Under the *Anderson-Burdick* framework, "[w]hen the burdens on voting imposed by the government are severe, strict scrutiny applies," *Dudum*, 640 F.3d at 1106, although "voting regulations are rarely subjected to strict scrutiny." *Id.* When the burdens are not severe, "less exacting review, and a State's important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions."

[5] *See Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) (First Amendment, Due Process & Equal Protection Clauses); *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (First & Fourteenth Amendments); *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1195 (9th Cir. 2021) (similar).

Id. Neither the NVRA nor the Materiality Provision compel anything more than traditional tools of statutory construction. Indeed, with respect to federal laws that impede or encroach upon Arizona's ability to enforce the Elector-Qualifications Clause, a federal court should consider the doubt canon that *ITCA* invoked:

> Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that *it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications*.

ITCA, 570 U.S. at 17 (emphasis added). Even without applying the doubt canon to the United States's position, the United States's two claims do not call into question any heightened scrutiny against Arizona law. At best for the United States, the question is simply what the two statutes—the NVRA and the Materiality Provision—mean. As shown in Sections II.B.2-II.B.3, *supra*, the United States's claims must fail.

To the extent that the *Anderson-Burdick* framework would apply to the United States's statutory claims, the burden that HB 2492 imposes on qualified voters is minimal. By way of comparison, for voter-identification laws, the trip to a licensing authority, gathering paperwork, and posing for a photograph—far more than is required here—hardly even registered as a burden:

> For most voters who need them, the inconvenience of making a trip to the [licensing authority], gathering the required documents, and posing for a photograph surely *does not qualify as a substantial burden on the right to vote*, or *even represent a significant increase over the usual burdens of voting*.

Crawford, 553 U.S. at 198; *Burdick*, 504 U.S. at 433-34 ("[e]lection laws will invariably impose some burden upon individual voters"). "Lesser burdens … trigger less exacting review, and a State's important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Indeed, "because a government has

such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Burson v. Freeman*, 504 U.S. 191, 210 (1992) (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)) (alteration in *Burson*). The United States's claims here are wholly unwarranted by the minimal burden at issue.[6]

III. APPLICANTS WILL SUFFER IRREPARABLE HARM, AND THE EQUITIES FAVOR A STAY.

Enjoining Arizona's voter-qualification standards close to an election would irreparably harm Applicants. Arizona's Legislature would suffer unauthorized intrusion into the method it selected for Arizona to exercise the Legislature's vote in the presidential election. *See* U.S. CONST. art. II, § 1, cl. 4. The Republican National Committee will be denied an election pursuant to the duly authorized laws, *see id.*; *id.* art. I, § 4, cl. 1, a denial the Committee has standing to contest in federal court. *See*, *e.g.*, *Mecinas v. Hobbs*, 30 F.4th 890, 897-900 (9th Cir. 2022); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020); *cf. Clinton v. City of New York*, 524 U.S. 417, 433 n.22 (1998) (unequal-footing injuries apply outside equal-protection context). Indeed, the electoral interests of the Committee seem likely to be especially harmed by any increase in votes cast by aliens, since its presidential candidate is widely seen as favoring border security far more than his opponent. For all Applicants, a "do over" election will not be available if the Ninth Circuit denies their respective rights to a fair and lawful 2024 election now and they end up prevailing in the future. In a word, their threatened injuries are "irreparable."

In close cases—and this is not a close case—appellate courts should balance

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[6] Similarly, if the Court determines any of the Non-Federal Plaintiffs have standing for a constitutional claim, the lack of burden here should suffice under the *Anderson-Burdick* framework.

the equities. *Hollingsworth*, 558 U.S. at 190. But where the parties dispute the lawfulness of government actions, the public interest collapses into the merits. *See*, *e.g.*, *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). Given Arizona's greater interest in voter qualifications and its compliance with federal law, *see* Section II.B, *supra*, the case is neither close nor one where the equities tip away from Applicants' clear interests.

CONCLUSION

For the foregoing reasons and those argued by Applicants, the Circuit Justice or the full Court should grant the emergency application.

Dated: August 15, 2024

Respectfully submitted,

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