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

BRIEF FOR HONEST ELECTIONS PROJECT, RESTORING INTEGRITY AND TRUST IN ELECTIONS, INC., AND CENTER FOR ELECTION CONFIDENCE, INC. AS *AMICI CURIAE* IN SUPPORT OF APPLICANTS

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The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, which implicates the state legislature's preeminent role in setting the rules for elections.*

Restoring Integrity and Trust in Elections, Inc. is a 501(c)(4) non-profit organization with the mission of protecting the rule of law in the qualifications for, process and administration of, and tabulation of voting throughout the United States. RITE has a particular interest in ensuring that courts do not legislate election rules from the bench—especially mere months before an election. RITE supports laws and policies that promote secure elections and enhance voter confidence in the electoral process. Its expertise and national perspective on voting rights, election law, and election administration will assist the Court in reaching a decision consistent with the Constitution and the rule of law.

Center for Election Confidence, Inc. is a non-profit organization that promotes ethics, integrity, and professionalism in the electoral process. CEC works to ensure that all eligible citizens can vote freely within an election system of reasonable

* In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to its preparation or submission.

procedures that promote election integrity, prevent vote dilution and disenfranchisement, and instill public confidence in election systems and outcomes. To accomplish these objectives, CEC conducts, funds, and publishes research and analysis regarding the effectiveness of current and proposed election methods. CEC is a resource for lawyers, journalists, policymakers, courts, and others interested in the electoral process. CEC also periodically engages in public-interest litigation to uphold the rule of law and election integrity and files *amicus* briefs in cases where its background, expertise, and national perspective may illuminate the issues under consideration.

SUMMARY OF THE ARGUMENT

Like most States, Arizona has long provided opportunities for voters to cast a ballot by mail—with safeguards to ensure that the absentee ballot process maintains its integrity. One of those safeguards is that applicants must provide documentary proof of citizenship to vote by mail. Other voters who have properly registered may still vote in-person, either during Arizona's generous early voting period or on Election Day.

In a novel decision that would disrupt absentee regulations nationwide, the district court held that the National Voter Registration Act preempts Arizona's law and enjoined it. The court identified no express preemption language, but found preemption based on some undefined combination of three elements: the NVRA's requirement that States "accept and use" the Federal Form for voter *registration*, its confirmation that States can require first-time voters to vote by mail, and a couple of its purpose statements about increasing voter registration. None of this individually or in combination suffices to meet the high threshold of showing preemption, especially in an area in which "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them." *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 16 (2013).

The NVRA, unsurprisingly, focuses on voter *registration*, and evidently no court before has held it to preempt state regulations of voting *methods*. As it must, Arizona accepts and uses the Federal Form to register voters for federal elections; it simply requires that voters seeking to vote by mail provide proof of citizenship. Nothing in the NVRA speaks to that choice, much less overrides it. The statute's confirmatory

statement that States may place certain in-person voting requirements on first-time voters does not imply rejection of all other requirements, for again, the statute's focus is on registration. Last, though the NVRA seeks to promote voter registration, it also explicitly seeks to protect election integrity—and all its purposes are tied to registration. The district court erred in extrapolating a purpose statement about registration to mail-in voting and simplistically elevating that purpose above others.

Letting the injunction below stand—based on see-sawing, unreasoned Ninth Circuit orders—would have significant negative repercussions. First, the injunction sows uncertainty across the nation, as its logic imperils commonplace absentee voting regulations. Effectively, the district court's preemption approach would seem to mandate nationwide, no-excuse absentee balloting—and to preempt many other routine election rules, if some party can claim that those rules might keep some people from voting. The injunction poses special harms to Arizona's own significant interest in protecting the integrity of its elections. Absentee balloting is notoriously the type of voting most subject to fraud, mistakes, and manipulation.

Arizona's effort to protect the integrity of the ballot box accords with the Constitution's Elections Clause and with the federal statute. Because this Court is likely to review and reverse the atextual, unprecedented preemption analysis below, and because of the disruption to the State's upcoming elections from that analysis, the Court should enter a stay.

ARGUMENT

I. The NVRA does not preempt Arizona's limits on mail-in voting.

When Congress passed the NVRA, it set a minimum national threshold for a

single process: "procedures to register to vote in elections for Federal office." 52 U.S.C. § 20503(a). That's it. The NVRA does not decide how people vote—the manner and means of casting a ballot. Arizona's law addresses a different problem, one that Congress left open for the states: who can vote via a mail-in ballot. Under Arizona law, "[a] person who has not provided satisfactory evidence of citizenship . . . and who is eligible to vote only for federal offices is not eligible to receive an early ballot by mail." Ariz. Rev. Stat. Ann. § 16-127(A)(2). Neither the NVRA's plain text nor its broader purpose addresses how citizens vote, much less guarantees mail-in ballots. The Constitution leaves those choices to the states, for the Elections Clause vests state legislatures with "the duty" to set election rules, and Congress has "not ma[d]e or alter[ed] such Regulations" in the context of mail voting. *Moore* v. *Harper*, 600 U.S. 1, 10 (2023); U.S. Const. art. I, §4. Because nothing in the NVRA says otherwise, that should end the preemption analysis. The district court, however, egregiously erred by taking pieces of the NVRA out of context and invoking a singular legislative purpose to override Arizona's mail-in ballot limits.

Time and again, this Court has explained that preemption "must stem from . . . a valid statute enacted by Congress." *Kansas* v. *Garcia*, 589 U.S. 191, 202 (2020) (collecting cases). The text is what "communicates the scope of Congress's pre-emptive intent." *Inter Tribal Council*, 570 U.S. at 14. That is because the Supremacy Clause requires a plausible textual basis in federal law to preempt state law. See *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993) ("Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue."). Mere "overlap"

or a related regulatory goal is not enough to push state law out. *Garcia*, 589 U.S. at 208, 211. Preemption presents a "straightforward textual question": does the text of federal law preempt state law? *Inter Tribal Council*, 570 U.S. at 9.

Since the NVRA's enactment in 1993, apparently no court has held that the NVRA federalizes any aspect of access to mail-in voting. Until now. The district court below declared that under the NVRA, with one exception, States "may not limit absentee voting." App. 168. Unable to find an explicit textual hook in the statute, the district court tried justifying its preemption analysis with an inference from a single line in the NVRA and an appeal to a "brooding federal interest"[1]—voter participation—that the NVRA addresses only in the context of registration.

First, in the district court's view, since the NVRA allows States to decide whether to require in-person voting after a person first submits a voter registration application by mail, Congress prohibited all other in-person voting requirements. App. 168. Second, the district court relied on cherry-picked statements from the NVRA statement of its purposes—all of which relate to registration—to impliedly preempt Arizona's law about mail-in procedures. App. 168–69. As for the Ninth Circuit, its two orders ignored this issue. App. 12 n.4; App. 45.

The preemption theory adopted below squeezes a regulatory elephant—federally mandated mail-in ballots—into a mousehole of text. See *Virginia Uranium*, 587 U.S. at 771 (opinion of Gorsuch, J.) (citing *Whitman* v. *American Trucking Assns.*, *Inc.*, 531 U.S. 457, 468 (2001)). And it turns the NVRA's national floor for voter

[1] *Virginia Uranium, Inc.* v. *Warren*, 587 U.S. 761, 767 (2019) (opinion of Gorsuch, J.).

registration into a federal trump-card displacing state laws that regulate *voting* procedures. The NVRA's text does not countenance that extraordinary result. Because the decisions below deviate from this Court's repeated recent instructions to adhere to established statutory interpretation principles in preemption cases, this Court is likely to review and reverse—warranting a stay. A stay would properly preserve a valid, important state law—and the NVRA's non-preemptive status quo over mail-in voting rules.

A. The NVRA's text does not preempt Arizona's mail-in rule.

For preemption, the text of a federal law must override state law according to the rules of "standard English usage." *Garcia*, 589 U.S. at 204. What matters, as in all statutory interpretation questions, is the text's "fairest reading," in context. *Inter Tribal Council*, 570 U.S. at 9–15. To decide that reading, this Court employs its traditional tools of statutory interpretation. See *ibid.* Only after performing that analysis does this Court decide whether the text preempts state law. See *Garcia*, 589 U.S. at 204 (looking for the text's "ordinary" meaning to determine preemptive effect).

To begin, the NVRA does not expressly preempt Arizona's mail-in rule. "Congress may preempt state authority by so stating in express terms." *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983). The NVRA requires that "notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office" by an application attached to a driver's license application, by mail, and in person. 52 U.S.C. § 20503(a). By saying "notwithstanding any other . . . State law," this provision *does*

expressly preempt some state laws. But the provision is about registration, not mail-in voting. So all that the NVRA expressly preempts are state laws that purport to prevent citizens from registering to vote in federal elections in one of the ways that the NVRA requires.

This textual distinction between registration and voting is key. When Congress passed the National Voter *Registration* Act, the deal it struck only standardized a registration process. See 52 U.S.C. § 20503(a) ("establish[ing] procedures to register to vote"). Every substantive section of the NVRA is expressly tied to "registration."[2]

1. The NVRA's "accept and use" requirement does not preempt the mail-in rule.

The NVRA also requires that States "accept and use" the federal "mail voter registration application." *Id.* § 20505(a)(1); see *Inter Tribal Council*, 570 U.S. at 20. While this requirement means that States must "accept the Federal Form as a complete and sufficient registration application," *id.* at 9, it does not mean that federal registration qualifies voters to vote without any limits. By the NVRA's own terms, the Federal Form "may require only such identifying information" as state officials need "to administer voter registration." 52 U.S.C. § 20508(b)(1). Reading the NVRA's requirement to "accept and use" the Form to extend beyond registration and mandate *voting* procedures has no stopping point. *Every* voting regulation—poll hours, locations, early voting and absentee rules, identification rules—could be said

[2] See 52 U.S.C. § 20503 ("procedures for voter registration"); *id.* § 20504 ("Simultaneous application for voter registration"); *id.* § 20505 ("Mail registration"); *id.* § 20506 ("Voter registration agencies"); *id.* § 20507 ("administration of voter registration"). Indeed, when a senator tried to add provisions addressing voting by mail for citizens overseas, its key sponsor defeated the amendment on the ground that the bill "deals with voter registration, not voting." 139 Cong. Rec. S2988-01 (daily ed. Mar. 17, 1993) (statement of Sen. Ford).

to "require" something more than the Federal Form of the registered citizen.

Though some argued below that this provision at least requires Federal Form registrants to be treated as well as anyone else, there's no text to support that rule. Though registration must allow citizens to exercise the "fundamental right" "to vote," 52 U.S.C. § 20501(a)(1), the district court here rejected the claim that Arizona's regulations "impose an undue burden on the right to vote." App. 135–43. And there is no fundamental right to mail-in voting. As courts have consistently held, all forms of mail-in voting are a "privilege," not a right. *Luft* v. *Evers*, 963 F.3d 665, 672 (CA7 2020); see also *McDonald* v. *Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809 (1969) (upholding a state statute denying certain inmates mail-in ballots). Nor could it be otherwise. A right of United States citizens must have content that does not vary. But rules around mail-in voting, including access to it, vary by State, and always have. Indeed, as discussed *infra* Part II, no-excuse mail-in voting was relatively rare when the NVRA became law and is still not universal. It would be passing strange to now learn that a provision in the exhaustively debated NVRA requires uniform mail-in voting rules across the nation. And the right to vote is not a "one-way ratchet," in which every state law innovation with respect to voting is immediately incorporated into the Constitution. *Ohio Democratic Party* v. *Husted*, 834 F.3d 620, 635 (CA6 2016).

Even odder, this reading of the "accept and use" language would require States to give Federal Form users *preferential* treatment. Take a State that conditions access to its permanent vote-by-mail list on registering in-person at the department of motor vehicles, where identity verification procedures are more robust. Under this "most

favored nation" reading of the NVRA's "accept and use" language, the State must let Federal Form users on that list, but not state form registrants who register by mail or at state public assistance agencies.

Other absurdities abound from this "most favored nation" reading. It would block states from reserving early voting for registrants who submit proof of citizenship. It would require states to accept the Federal Form as an application for a mail-in ballot if they treat other registration applications in that manner. It would prevent states from offering more polling locations to facilitate voting by the larger number of persons eligible to vote for both state and federal offices who must complete longer ballots. It could even block states from *adding* personnel to polling places dedicated to expediting the processing of non-Federal-only voters. But the NVRA says *nothing* about any of these topics.

In the end, there is no indication in the NVRA or anywhere else that Congress intended to intrude so deeply into states' administration of their own elections. There is no textual or historical support for a reading that specially *privileges* Federal Form registrants. And that reading is especially implausible of other statutory provisions that uniquely burden those registrants. See 52 U.S.C. § 21083(b) (obligating States to require proof of identity from Federal Form users registering by mail, which is not required of voters who register in person). Because the NVRA's text goes "no farther" than establishing voter registration requirements, that is where the statute's preemption ends. *Ex parte Siebold*, 100 U.S. 371, 386 (1879).

2. The NVRA's confirmation that States may limit first-time voters does not preempt Arizona's mail-in rule.

Though several parties below relied on the NVRA's "accept and use" language to argue preemption—and their arguments are rebutted above—the district court did not directly address that language or rely on it for its preemption holding. Instead, it found "direct[] preempt[ion]" by negative implication from 52 U.S.C. § 20505(c), which says that "a State may by law require a" first-time voter "to vote in person if" the person registered to vote by mail, *unless* federal law otherwise gives the person the right not to vote in person. App. 168–69. In the district court's view, because Congress allowed States to require in-person voting after a person registered to vote via mail, that can be the only time States could require in-person voting. See App. 168. In so holding, the district court departed from the textual analysis that this Court mandates. See, *e.g.*, *Garcia*, 589 U.S. at 204; *Inter Tribal Council*, 570 U.S. at 9–13.

The district court's transmogrification of a permissive provision into a prohibitory one is flawed. To start, the district court is wrong to characterize this analysis as "direct[]" preemption, if it meant *express* preemption. App. 169. Any preemption by "inference" (App. 168) would be implied preemption, specifically implied conflict preemption. *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000). Under this branch, "[w]here state and federal law directly conflict, state law must give way." *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 617 (2011) (internal quotation marks omitted).

But there is no contradiction in confirming that States may require first-time voters to vote in-person and States requiring some returning voters to vote in-person. The district court relied on the *expressio unius* canon to hold that the statute's

permission to restrict first-time voters "impl[ies] that a state may not limit absentee voting outside of these prescribed circumstances." App. 168. But as this Court has explained, "the *expressio unius* canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (cleaned up). Here, there is no reason to think that Congress intended to quietly preclude mail-in voting rules across the nation.

The Constitution's default is that States can regulate elections unless Congress explicitly displaces state rules. See U.S. Const. art. I, § 4. Subsection (c) of § 20505 confirms States' authority to require first-time voters to vote by mail, except when those voters have separate federal rights to vote other than in person. On its own terms, subsection (c) only concerns "[f]irst-time voters." 52 U.S.C. § 20505(c). This explicit limit does not say anything about repeat voters. And given how common and well-known to policymakers in-person voting requirements were at the time of the NVRA's enactment, "[i]f Congress thought" they "posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision" saying so. *Wyeth* v. *Levine*, 555 U.S. 555, 574 (2009). "Its silence on the issue, coupled with its certain awareness of the prevalence of state [regulation]"—a prevalence emphasized *infra* Part II—"is powerful evidence that Congress did not intend" subsection (c) "to be the exclusive" allowance for in-person voting. *Id.* at 575. On this point, the district court got it backwards. According to the district court, "[h]ad Congress intended to permit states that allow absentee voting to require in-person voting under additional circumstances," "it could have said so." App. 168. But the more obvious point is that

had Congress intended to preclude commonplace regulations at the heart of states' authority to regulate the manner of elections, it would have been far simpler to just say so rather than hide its intent in negative implications. There is no reason to think that Congress regulates by cypher.

As for the argument that subsection (c) would be surplusage on this reading, not every word of a statute creates new authorities or establishes new prohibitions. See *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 612–13 (1991) (recognizing that when Congress did not comprehensively regulate an area, states could regulate, despite an explicit provision saying states could regulate in a few areas). Statutory language does not become mere surplusage because it merely confirms the existence of preexisting authorities or prohibitions. "[R]edundancies are common in statutory drafting—sometimes in a [legislative] effort to be doubly sure, sometimes because of [a legislature's] inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication." *Barton* v. *Barr*, 590 U.S. 222, 239 (2020); see also *King* v. *Burwell*, 576 U.S. 473, 502 (2015) (Scalia, J., dissenting) ("Lawmakers sometimes repeat themselves—whether out of a desire to add emphasis, a sense of belt-and-suspenders caution, or a lawyerly penchant for doublets (aid and abet, cease and desist, null and void)."); *id.* at 491–92 (majority opinion).

Other principles of statutory interpretation confirm the point. If Congress was actually uniquely concerned about voters who register by mail, and wanted to mandate a sea-change for the major question of mail-in voting, it would not sneak it into a "backwater" provision of a voter registration statute. *W. Virginia* v. *EPA*, 597

U.S. 697, 730 (2022). The district court focused on a single minor provision about first-time voters, offering a bank-shot inference that this single sentence pushes out state laws requiring in-person voting. But nothing in the text or history of the NVRA, a hotly debated law that was vetoed by one president before it became law, suggests that Congress viewed the statute as achieving this result. Cf. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000).

The district court's reading would also produce absurdities. Importantly, registration is not always a continuous process. Some people voluntarily unregister themselves. Others lose their status because they move away or are convicted of a felony. According to the district court, however, subsection (c) *requires* States to permit any returning voters who register by mail to vote by mail, from day one of their return, regardless of why they lost their registration status or for how long. States could not, for example, ask someone who suddenly re-appears in a state to re-appear at a polling location to prove that they in fact live physically within the state. Nothing in the NVRA's text or history supports this result.

Another odd aspect of the district court's negative inference approach is that any inference would have to be limited to access to mail-in voting. Contrary to the broad reading of "accept and use" addressed above, the negative inference here would leave states free to preclude Federal Form registrants from accessing things like permanent vote-by-mail lists, early in-person voting, and a host of other voting-related privileges. There is no reason to think that Congress was uniquely focused on States excluding Federal Form registrants from mail-in voting while ignoring other

types of voting-related distinctions.

If there were any doubt that Congress had no intent to regulate mail-in voting, the legislative history points the same way. That history establishes that Congress intended subsection (c) to assuage concerns regarding "the fraud associated with mail registration," particularly States' ability to confirm the identity of registrants. S. Rep. 103-6, at 13, 54 (1993). This explains why the provision applies only to voters who register by mail. Congress did not have similar concerns about fraud with respect to other people who registered by other means. At the time, approximately twenty states did not permit registration by mail. *Id.* at 42. In those states, the NVRA's directive to "accept and use" applications submitted through the mail would have eliminated their ability to check the identification of at least some applicants at the time of registration. In this context, subsection (c) ensured that states could "ask for identification" at the polls, even if they could no longer do so at the registrar's office. *Id.* at 54. It thus removed any "doubts" about the States' continued ability to enforce their at-the-time of registration identification requirements, notwithstanding the need to comply with the NVRA's liberalized registration rules. *Inter Tribal Council*, 570 U.S. at 17–18. It says nothing about States' ability to enforce other election integrity rules, including identification rules they may wish to enforce at the polls at each election beyond the first.

In sum, the district court wrongly interpreted the NVRA, contrary to its text and the Elections Clause's default rule. Unlike the Ninth Circuit's rubber-stamp, this Court should not "abdicat[e]" its "proper role" by "off-loading to lower courts the final

word on whether to green-light" or preempt Arizona's in-person voting requirements. *Labrador* v. *Poe*, 144 S. Ct. 921, 930 (2024) (Kavanaugh, J., concurring).

B. The NVRA's purposes do not preempt Arizona's mail-in rule.

The district court's other rationale was that "obstacle preemption bars the statute's enforcement" because the statute "impedes Arizona's 'promot[ion] of the right' to vote." App. 169 (quoting 52 U.S.C. § 20501(a)). The district court believed that "the findings and purposes included in the NVRA reflect an intent to increase voter turnout." *Ibid.* But "[a] sound preemption analysis cannot be as simplistic as that." *Virginia Uranium*, 587 U.S. at 778 (opinion of Gorsuch, J.). The district court's use of selective purpose statements about *registration* to assume that federal law single-mindedly pursues a goal about *voting* and thus preempts state law that might pursue overlapping goals contradicts this Court's precedents.

In the preemption analysis, "the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress." *Garcia*, 589 U.S. at 202. "[P]reemption cannot be based on 'a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Ibid.* (quoting *Chamber of Com. of U.S.* v. *Whiting*, 563 U.S. 582, 607 (2011)). "[S]uch an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Whiting*, 563 U.S. at 607 (internal quotation marks omitted). For that reason, this Court's "precedents establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Ibid.* (cleaned up). After all, "no law pursues its purposes at all costs." *Pulsifer* v. *United States*, 601 U.S. 124, 152 (2024) (cleaned up).

The district court's analysis here exemplifies the pitfalls of a purposes-based preemption approach. The NVRA expresses four purposes:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C. § 20501(b). It also expresses Congress's "find[ing]" that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups." *Id.* § 20501(a).

None of these can show preemption here, even putting aside that there appears to be no record evidence that reserving access to the vote-by-mail system affects voter turnout. See App. 138. These purpose statements are all tied to *registration*. They do not speak to increasing ballot access directly, much less guaranteeing mail-in ballots for all voters. No doubt, the statute broadly seeks to increase registration and even "enhance[d]" "participation," though only via other provisions limited to registration. And the statute also speaks "of eligible citizens," balancing the increased registration goal against a countervailing purpose of "protect[ing] the integrity of the electoral process." 52 U.S.C. § 20501(b). The district court ignored the focus on registration and countervailing purposes, elevating the remaining statements of purpose above the

operative text of the statute.

In many ways and in many cases, this Court has squarely rejected that approach to interpretation: "No statute pursues a single policy at all costs, and [the courts] are not free to rewrite this statute (or any other) as if it did." *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 81 (2023).[3] What's more, the district court's logic has no stopping point. Under that logic, the NVRA would preempt not only a commonplace mail-in voting rule like this one, but nearly every law that regulates elections. Many states impose photographic identification requirements on voters or invalidate ballots that do not arrive with required indications of validity, like witness certifications and secrecy envelopes. The district court's rule would seemingly preempt these laws, along with a myriad of other rules and regulations States impose on voting, because they *might* have a negative effect on voter turnout.

"Always, the question [courts] face is *how far* Congress has gone in pursuing one policy or another." *Harrington* v. *Purdue Pharma LP*, 144 S. Ct. 2071, 2084 (2024). Here, the district court's maximalist reading disregards how the statute advances its registration-centered purposes. And it disregards other statements of purpose that point the opposite direction. There is no reason to think that one purpose statement about registration implies preemption of all the mail-in vote regulations across the nation. "The mere fact that state laws like the [Arizona] provisions at issue overlap

[3] See also, *e.g.*, *Luna Perez* v. *Sturgis Pub. Sch.*, 598 U.S. 142, 150 (2023) ("It is quite mistaken to assume, too, that any interpretation of a law that does more to advance a statute's putative goal must be the law"; "[l]aws are the product of compromise." (cleaned up)); *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."); see generally *Virginia Uranium*, 587 U.S. at 778–79.

to some degree with federal [voter registration] provisions does not even begin to make a case for conflict preemption." *Garcia*, 589 U.S. at 211.

* * *

As all this shows, the preemption analysis below is hard to describe, much less defend. The idea seems to be that three detached NVRA provisions, each incapable of preemption on its own, together form a preemptive mash tailored to this case—and inexplicable otherwise. According to this analysis, the purpose statement suggests preemption of any regulation that might decrease voter turnout, but the "accept and use" clause limits that preemptive effect to Federal Form voters and subsection (c) further limits it to mail-in voting. That some qualification is needed at every stage to make the argument plausible undercuts the notion that these provisions were meant to have preemptive force. And each qualification is unexplainable as a matter of congressional intent or commonsense. Neither the district court nor the challengers made any effort to rationalize these three components into any coherent scheme Congress might have intended either to protect Federal Form registrants generally or to regulate mail-in voting. The district court egregiously erred in enjoining Arizona's mail-in rule on this vague amalgamation of non-preemptive provisions.

II. Allowing the decision below to remain in effect would create massive uncertainty nationwide and threaten the integrity of Arizona's elections.

Letting the unprecedented approach to preemption taken by the district court keep Arizona's law enjoined this year would cast doubt on commonplace absentee voting rules across the nation. It would also undermine Arizona's critical interest in protecting the integrity of its elections by regulating mail-in voting, which is uniquely

vulnerable to manipulation.

A. Declining to issue a stay would create significant uncertainty about mail-in vote rules long applied in many States.

Since the NVRA's enactment in 1993, *amici* are unaware of any decision using it to preempt a state law that regulates access to different methods of voting—until now. And that is not because such state laws are innovations. Far from it. In 1993, many states reserved access to mail-in voting to those who may be absent from the jurisdiction or were too ill or disabled to make it to the polls.[4] Only eleven states permitted no-excuse in-person early voting.[5] States have often reserved access to early voting systems to the elderly or those with disabilities.[6] Such laws are still commonplace throughout the country.[7] What's more, courts have routinely upheld these laws against a variety of legal challenges. See, *e.g.*, *Texas Democratic Party* v. *Abbott*, 961 F.3d 389 (CA5 2020); *Tully* v. *Okeson*, 977 F.3d 608 (CA7 2020).

The logic of the decision below, however, would seemingly doom all these longstanding state laws that require additional information and excuses to vote absentee, at least as applied to Federal Form registrants. It would also seemingly doom this Court's own precedent in *McDonald*, which upheld a state statute limiting voting privileges of inmates, who may very well have registered through the mail, and is relied on today. 394 U.S. at 809; see *Tully* v. *Okeson*, 78 F.4th 377, 378 (CA7

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[4] J. Fortier, *Absentee and Early Voting, Trends, Promises, and Perils* 26 (Am. Enter. Inst. Press 2006).
[5] D. Biggers & M. Hanmer, *Who Makes Voting Convenient? Explaining the Adoption of Early and No-Excuse Absentee Voting in the American States*, 15 State Pol. & Pol'y Q. 192, 199 (2015), https://tinyurl.com/3rvkjb5c.
[6] R. Stein & P. Garcia-Monet, *Voting Early but Not Often*, 78 Soc. Sci. Q. 657, 657 (1997).
[7] National Conference of State Legislatures, *Table 2: Excuses to Vote Absentee* (Jan. 3, 2024), https://perma.cc/R955-ZGG8; see, *e.g.*, Conn. Gen. Stat. § 9-135; Del. Code tit. 15, § 5502; N.Y. Elec. Law § 8-400.

2023); *Texas Democratic Party* v. *Abbott*, 978 F.3d 168, 185 (CA5 2020).

The sheer novelty of the district court's holding is compelling evidence that it is wrong. See *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) ("Perhaps the most telling indication of" error "is the lack of historical precedent."). It is also a compelling reason for this Court to step in and avoid the immediate uncertainty that allowing the injunction to remain in effect would create in all these States with established absentee ballot rules. The district court's broad preemption approach would effectuate a revolution in election law. For more than forty years, plaintiffs challenging voting rules and regulations have had to establish that their burdens were not outweighed by state goals and objectives. See *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983); *Burdick* v. *Takushi*, 504 U.S. 428 (1992). Under the district court's holding, however, this nuanced analysis becomes unnecessary. Challengers need only show that a state regulation *might* fail to "increase voter turnout" or "promote the exercise" of the right to vote, and voilà, obstacle preemption precludes the state regulation. On this reading, the NVRA would swallow the entirety of the jurisprudence surrounding the federal right to vote, effectively overturning many of this Court's decisions. The rights of voters to participate in elections run according to the rules of their States—and safeguarded by those rules—are too important to let this uncertainty reign. The Court should grant a stay.

B. Declining to issue a stay would undermine Arizona's important interest in protecting the integrity of its elections.

Last and on a related note, Arizona has a profound responsibility to ensure that only U.S. citizens vote in its elections. States "indisputably [have] a compelling

interest in preserving the integrity of [their] election process." *Purcell* v. *Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); see *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992) ("[A] State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process."). Laws designed to protect the integrity of the election, at any stage in the process, fulfill a critical policy goal: instilling public confidence in the electoral process, which "encourages citizen participation in the democratic process." *Crawford* v. *Marion County Election Bd.*, 553 U.S. 181, 197 (2008).

As this Court recently explained in the context of absentee ballots, a "State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich* v. *Democratic Nat'l Committee*, 594 U.S. 647, 686 (2021). As Judge Posner explained, historically "[v]oting fraud [has been] a serious problem in U.S. elections generally," sometimes "facilitated by absentee voting." *Griffin* v. *Roupas*, 385 F.3d 1128, 1130–31 (CA7 2004). Judge Posner warned that absentee voters "are more prone to cast invalid ballots than voters who, being present at the polling place, may be able to get assistance from the election judges if they have a problem with the ballot." *Id.* at 1131.

Mail-in voting creates more links in the chain between a ballot being created and a ballot being cast. This creates more opportunities for honest mistakes *and* political chicanery, and partisan actors of all political stripes use this increased opportunity to engage in fraud and intimidation to gain an electoral advantage. For example, in the 2018 race for the North Carolina's ninth congressional district, "the election

results were overturned by the state after an investigation into an absentee ballot operation on [the Republican candidate's] behalf suggested that" ballots had been "improperly collected and possibly tampered with" by a political operative—resulting in a new election.[8] In an Arizona example, the former Democrat Mayor of San Luis, Guillermina Fuentes, pleaded guilty in 2022 to ballot harvesting charges.[9] Fuentes was a political figure in her community and worked as a political consultant.[10] Using that influence, Fuentes persuaded voters to allow her to collect their ballots and, in some instances, fill out ballots on behalf of the voters.[11] Such activity is prohibited under Arizona law, see Ariz. Rev. Stat. § 16-1005, and it was possible only because of the opportunities presented by mail-in and no-excuse absentee balloting.

As is evident from the above examples, voting and election fraud—especially with respect to absentee ballots—remains a problem that States have a duty to prevent. Again, the NVRA itself recognizes the fraud potential of mail-in votes, with its confirmatory provision that States may require some voters to vote in-person. 52 U.S.C. § 20505(c). Arizona's mail-in rule is another effort to address this same problem and fulfill the State's vital interest in protecting the integrity of its elections. Letting that rule remain enjoined by function of unreasoned, see-sawing Ninth Circuit panel orders undermines that important interest.

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[8] R. Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR (July 30, 2019), https://perma.cc/VU86-6G8J.
[9] B. Christie, *Former San Luis Mayor Pleads Guilty to Illegally Collecting Early Ballots in 2020 Primary*, AZCentral (June 2, 2022), https://perma.cc/ML8R-P6EW.
[10] Guillermina Fuentes, Voter Fraud Report, The Heritage Foundation (last visited Aug. 12, 2024) https://perma.cc/3DLB-HMS4.
[11] *Ibid.*

CONCLUSION

For these reasons, the Court should grant a stay.

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