No. 24A164

In the Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
Applicants,

v.

MI FAMILIA VOTA, ET AL.,
Respondents.

STATE OF ARIZONA AND ARIZONA ATTORNEY GENERAL'S RESPONSE TO EMERGENCY APPLICATION FOR STAY

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To the Honorable Elena Kagan, Associate Justice and Circuit Justice for the Ninth Circuit Court of Appeals:

The State of Arizona and Arizona Attorney General Kris Mayes (collectively "the State") oppose the emergency application for a stay ("Application") by the Republican National Committee, Arizona Senate President Warren Petersen, and Arizona House Speaker Ben Toma ("Applicants").

"This Court has used different formulations of the factors for granting emergency relief. All formulations basically encompass (1) likelihood of success on the merits (or a fair prospect of success); (2) certworthiness; (3) the harms to the parties; and (4) the equities and public interest." *Labrador v. Poe*, 144 S. Ct. 921, 929 n.2 (2024) (mem.) (Kavanaugh, J., concurring).

The State does not address whether Applicants are likely to succeed on the merits, nor whether this case is worthy of certiorari. Instead the State makes two observations, explained further below:

I. A stay would serve the State's law-making interests but impair the State's law-administering interests.

II. It is the Attorney General, not Applicants, who represents the State in federal court.

These observations bear on how a stay would affect "the parties," as well as "the equities and public interest." *Id.*

I. A stay would serve the State's law-making interests but impair the State's law-administering interests.

As Applicants correctly point out, the State has an interest in defending and enforcing its duly enacted laws. *See* Application at 14–15. Because the district court's permanent injunction prevents this enforcement, a stay would serve this interest.

But the State also has an interest in smoothly administering its laws, especially for elections. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality opinion) (recognizing State's "interest in orderly administration" of election process). Everyone agrees that the State needs "clear guidance" for an "impending election." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

To its credit, the district court provided clear guidance for the upcoming election, despite the complexity of this case and underlying laws. The district court's resulting injunction preserved the status quo in all ways relevant to this Application. In contrast, a stay of the district court's injunction at this time would be destabilizing.

A. The district court preserved the status quo, as did the Ninth Circuit, promoting stability.

This case is unusual because the status quo has been *non*-enforcement of the laws in question. Often, when this Court is asked to stay an injunction of a law, "difficulties emerge when trying to define the status quo." *Labrador*, 144 S. Ct. at 930 (Kavanaugh, J., concurring). For example, the term "status quo" might mean:

a. "the situation on the ground *before* enactment of the new law,"

b. "the situation *after* enactment of the new law, but before any judicial injunction,"

c. "the situation after any district court ruling on a preliminary injunction," or

d. "the situation after a court of appeals ruling on a stay."

Id. (emphasis in original). But here, those definitions all lead to the same place.

1. First, some context. In 2004, Arizona began requiring election officials to "reject" any voter registration form that does not include "satisfactory evidence of United States citizenship." *See* A.R.S. § 16-166(F). But later, this Court held that the proof of citizenship requirement cannot be enforced for applicants who use the *federal* mail registration form to register for *federal* elections, because the National Voter Registration Act ("NVRA") requires States to accept and use such forms as is. *See Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 20 (2013). This Court clarified, however, that "state-developed forms may require information the Federal Form does not" and "can be used to register voters in both state and federal elections." *Id.* at 12. As a result, Arizona developed "two distinct voter registration rolls." Ariz. Op. Att'y Gen. No. I13-011 (Oct. 7, 2013), 2013 WL 5676943, at *3.

Years later, two organizations sued Arizona's Secretary of State and a county official, alleging that election officials in Arizona were processing state registration forms differently from federal mail registration forms and that this difference was unconstitutional. Specifically, applicants who submitted state forms without proof of citizenship were not registered for any election, whereas applicants who submitted federal forms without proof of citizenship were compared with motor vehicle data and, depending on the result, could be registered for at least some elections. *See* LULAC Consent Decree at State App. 1–2.[1]

[1] In this response, citations to "App." refer to the Appendix to the Application, and citations to "State App." refer to the Appendix to this response.

Arizona's Secretary of State denied that this different treatment was illegal but nevertheless agreed to adopt revised policies in what is known as the LULAC Consent Decree. State App. 2–3. Under the Consent Decree, state-form and federal-form applicants are treated the same with respect to proof of citizenship. The following chart summarizes how election officials treat applicants who do not provide proof of citizenship (but are otherwise eligible to vote) under the Consent Decree:

Chart 1: LULAC Consent Decree

Treatment of applicants who do not provide proof of citizenship

	If applicant submitted a federal form:	*If applicant submitted a state form:*
If MVD shows proof of citizenship:	Fully registered	Fully registered
If MVD indicates non-citizenship:	Not registered at all	Not registered at all
If MVD shows nothing either way:	Registered only for federal elections	Registered only for federal elections

See State App. 8–10, 13–14.[2]

These policies were then incorporated in Arizona's 2019 Elections Procedures Manual, or "EPM." *See* State App. 33, 36–38. The EPM is a series of rules issued by Arizona's Secretary of State after approval by the Governor and Attorney General. *See* A.R.S. § 16-452(B). The EPM is binding on election officials to the extent it addresses topics authorized by statute, and acts as guidance for election officials to

[2] "MVD" refers to the Arizona Department of Transportation's Motor Vehicles Division.

the extent it addresses other topics. *See McKenna v. Soto*, 250 Ariz. 469, 473–74 ¶¶ 20–21 (2021).

2. In 2022, Arizona enacted House Bill 2492, including the laws at issue in this Application. If enforced, these laws would change how election officials in Arizona process registration forms. As Applicants explain:

> First, Ariz. Rev. Stat. § 16-121.01(C) requires elections officials to reject any state-form application that is not accompanied by documentary proof of citizenship.
>
> Second, Ariz. Rev. Stat. §§ 16-121.01(E) and 16-127(A) provide that voters who have not provided documentary proof of citizenship may not vote for president or by mail.

Application at 5. To illustrate, the following chart revises Chart 1 with red text, summarizing how election officials might treat applicants who do not provide proof of citizenship (but are otherwise eligible to vote) under the laws at issue:

Chart 2: House Bill 2492 (selected provisions)

Treatment of applicants who do not provide proof of citizenship

	If applicant submitted a federal form:	*If applicant submitted a state form:*
If MVD shows proof of citizenship:	Fully registered	~~Fully registered~~ Not registered at all
If MVD indicates non-citizenship:	Not registered at all	Not registered at all
If MVD shows nothing either way:	~~Registered only for federal elections~~ Registered only for federal non-President elections; cannot receive early ballot by mail	~~Registered only for federal elections~~ Not registered at all

See A.R.S. §§ 16-121.01(C), 16-121.01(E), 16-127(A).[3]

3. Although the above-described provisions in House Bill 2492 *would*, if enforced, change how election officials process registration forms, election officials *did not*, in fact, change their practices once the statutory provisions were enacted. Instead, facing a multitude of pre-enforcement lawsuits from the United States and other parties, and uncertain about how exactly to proceed, election officials in Arizona continued following the familiar procedures in the 2019 EPM summarized in Chart 1 above.

Applicants acknowledged this non-enforcement when seeking a stay in the Ninth Circuit. Applicants accused election officials of "willfully refusing for more than a year to implement duly enacted state laws, despite the absence of any court order enjoining their enforcement." Emergency Motion for Partial Stay of Injunction Pending Appeal at 21, *Mi Familia Vota et al. v. Petersen et al.*, No. 24-3188 (9th Cir. June 25, 2024), Dkt. #50. While the State would not use quite the same language, the basic factual point is correct: The laws at issue were not enforced during the district court litigation, even though there was no preliminary injunction.

Mid-litigation, in September 2023, the district court issued summary judgment rulings declaring the laws at issue unenforceable. The district court ruled that "Arizona must abide by the LULAC Consent Decree and register otherwise eligible State Form users without DPOC [documentary proof of citizenship] for federal

[3] The State offers this oversimplified chart as an illustration in the context of emergency briefing, not as a definitive interpretation of House Bill 2492.

elections," and also that "Section 6 of the NVRA preempts H.B. 2492's restriction on registration for presidential elections and voting by mail." App. 188–89. These rulings cemented what was already happening: non-enforcement of the laws that are at issue in this Application.

A few months later, in December 2023, Arizona's Secretary of State issued a revised EPM. *See* A.R.S. § 16-452(B) (requiring EPM to be issued by end of odd-numbered year preceding general election). The 2023 EPM comported with the district court's mid-litigation rulings by directing election officials to continue following the procedures summarized in Chart 1 above, as opposed to Chart 2 above. *See* State App. 59, 62–65, 68–70. The 2023 EPM also noted, however, that litigation was ongoing. *See id.* at 59 n.5, 68 n.8, 68 n.9, 70 n.11. In this way, the 2023 EPM further cemented non-enforcement of the laws that are at issue in this Application.[4]

The district court entered final judgment on May 2, 2024, formalizing its summary judgment rulings in a permanent injunction. App. 191–95. Applicants sought a stay in the Ninth Circuit on June 25. Emergency Motion for Partial Stay of Injunction Pending Appeal, *Mi Familia Vota et al. v. Petersen et al.*, No. 24-3188 (9th Cir. June 25, 2024), Dkt. #50. A motions panel granted a partial stay (as to A.R.S. § 16-121.01(C) only) on July 18, but the merits panel vacated it shortly thereafter on August 1. App. 1–46.

[4] There were also provisions in House Bill 2492 that the district court had *not* declared unenforceable by the time the 2023 EPM was issued. Accordingly, the 2023 EPM directed election officials to enforce those provisions. The present Application does not involve any such provisions.

As far as the State can tell, this two-week period (between when the motions panel granted a partial stay and when the merits panel vacated it) is the only time election officials in Arizona were enforcing laws that are at issue in this Application. Even then, enforcement was only for A.R.S. § 16-121.01(C)—i.e., only for applicants who submitted state registration forms without proof of citizenship in that two-week period. *See* Chart 2 (right-hand column).

4. In sum: Although in many cases "difficulties emerge when trying to define the status quo," *Labrador*, 144 S. Ct. at 930 (Kavanaugh, J., concurring), there is no difficulty here. The status quo has been non-enforcement. The district court's permanent injunction, as well as the Ninth Circuit's ultimate decision not to stay the injunction pending appeal, preserved the status quo in a way that promoted stability.

B. A stay at this time would be destabilizing.

As Arizona's Secretary of State explains, a stay of the district court's permanent injunction at this time would contravene the State's interest in smooth administration of its laws shortly before an election. *See generally* Appellee Adrian Fontes' Response to Emergency Motion for Partial Stay of Injunction Pending Appeal, *Mi Familia Vota et al. v. Petersen et al.*, No. 24-3188 (9th Cir. June 27, 2024), Dkt. #52.[5] The Secretary's concern about stability is especially apt given the history of election officials following the procedures in Chart 1 as opposed to Chart 2—

[5] The State cites the Secretary's filing in the Ninth Circuit, recognizing that the Secretary may also file something similar in this Court.

including, most recently, as directed in the 2023 EPM, which itself comports with the district court's summary judgment rulings and ultimate permanent injunction.

1. Consider House Bill 2492's instruction to "reject" state voter registration forms that do not include proof of citizenship. *See* A.R.S. § 16-121.01(C). If the district court's injunction against this provision were stayed, election officials would be in a strange situation. This is because election officials have the ability to instantly check, via an electronic connection, whether someone has provided proof of citizenship to MVD. Indeed, another part of House Bill 2492 requires election officials to do this check for *federal* registration forms that do not include proof of citizenship. *See* A.R.S. § 16-121.01(D)(1). So if the injunction against A.R.S. § 16-121.01(C) were stayed, election officials would apparently need to reject *state* registration forms that lack proof of citizenship even if the official can see that the applicant provided proof of citizenship to MVD. *See* Chart 2 (right-hand column, top row).

2. Consider also House Bill 2492's restriction on voting by mail for federal-only voters. *See, e.g.*, A.R.S. § 16-127(A)(2).[6] If the district court's injunction against this provision were stayed, election officials would, at minimum, face hard questions.

For context, voters in Arizona can sign up to get early ballots by mail, by joining the Active Early Voting List, or "AEVL." *See* A.R.S. § 16-544(A). Election officials generally send pre-ballot notices to AEVL members 90 days before the primary election. *See* A.R.S. § 16-544(D); State App. 82–83. The notices confirm the voter's

[6] The term "federal-only voters," as used here, means individuals who did not provide proof of citizenship when registering to vote and thus may vote only in elections for federal office. *See* Application at 4.

address, specify the date(s) on which the ballot(s) will be mailed, and specify the date(s) of the upcoming election(s), among other things. *See* A.R.S. § 16-544(D); State App. 82–83. For example, AEVL members in Maricopa County were sent a 90-day notice in May, specifying that their ballot for the July 30 primary election would be mailed in early July and that their ballot for the November 5 general election would be mailed in early October. *See* State App. 101–02.

Accordingly, federal-only voters who are AEVL members have already received a notice specifying when their general election ballot will be mailed. And some of them presumably voted by mail in the recent primary election. But if the injunction against A.R.S. § 16-127(A)(2) were stayed, such voters would lose the ability to vote by mail in the general election. *See* Chart 2 (left-hand column, bottom row). This would raise hard practical questions for election officials. For example, when and how should such voters be notified that they can no longer vote by mail, so that they can either (1) provide proof of citizenship or (2) plan to vote in person? Given the circumstances, is it possible to notify all such voters in a way that avoids "voter confusion"? *Purcell*, 549 U.S. at 4–5.

3. Consider also House Bill 2492's restriction on voting in Presidential elections for federal-only voters. *See, e.g.*, A.R.S. § 16-127(A)(1). Here, too, if the district court's injunction against the provision were stayed, election officials would, at minimum, face hard questions.

For context, in Arizona the primary election for Presidential candidates is the Presidential Preference Election. A.R.S. § 16-241. It happened in March. *See id.*

Federal-only voters were allowed to participate, assuming they properly registered with a political party. *See* State App. 110. And presumably some of these voters did, in fact, vote for a Presidential candidate.

But if the injunction against A.R.S. § 16-127(A)(1) were stayed, such voters would lose the ability to vote for President in the general election. *See* Chart 2 (left-hand column, bottom row). This, too, would raise hard practical questions for election officials. When and how would such voters be notified that they can no longer vote for President, despite having been able to vote for a Presidential candidate months ago? Again, given the circumstances, is it possible to notify all such voters in a way that avoids "voter confusion"? *Purcell*, 549 U.S. at 4–5.[7]

4. Bottom line: In this situation, the State's interests are better served by denying a stay and allowing the normal appellate process to play out. The Ninth Circuit has already expedited consideration of the issues presented in this Application, and oral argument is set for September 10. *See* Notice of Oral Argument, *Mi Familia Vota et al. v. Petersen et al.*, No. 24-3188 (9th Cir. July 18, 2024), Dkt.

[7] In addition, logistical problems would arise if this Court were to issue a stay after August 22. Applicants correctly identify August 22 as an important date. *See* Application at 2, 19. It is the ballot printing deadline for some of Arizona's counties. *See, e.g.*, *Progress Ariz. v. State*, Arizona Supreme Court No. CV-24-0179-AP/EL, Scheduling Order (Aug. 8, 2024) ("Court staff has been informally advised that the ballot printing deadline is August 22, 2024."), available at https://apps.supremecourt.az.gov/aacc/appella/ASC/CV/CV240179.PDF. If this Court were to issue a stay after August 22 requiring counties to do what Applicants suggest—either "not print the presidential candidates on federal only ballots" or "configure [their] tabulation machines not to count presidential votes on federal only ballots" (Application at 2–3)—that could disrupt administration of the general election in Arizona.

#77. Applicants will have an opportunity to persuade the Ninth Circuit, and perhaps eventually this Court, to reverse the district court's summary judgment rulings and the resulting permanent injunction. That process would serve the State's law-making interests as well as its law-administering interests.

II. It is the Attorney General, not Applicants, who represents the State in federal court.

Two of the Applicants—Senate President Warren Petersen and House Speaker Ben Toma (hereafter "Legislative Leaders")—argue that Arizona law entitles them to "protect against harms to the State's sovereign interest." Application at 15. To the extent the Legislative Leaders purport to speak for the State as a whole, they are mistaken.

Arizona law is clear. Unless otherwise provided by statute, the Attorney General "*shall* . . . [r]epresent this state in *any* action in a federal court." A.R.S. § 41-193(A)(3) (emphasis added). This arrangement is not new or controversial. As this Court observed decades ago: "Under Arizona law, the State Attorney General represents the State in federal court." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 51 n.4 (1997) (citing A.R.S. § 41-193(A)(3)).

This is not to say the Legislative Leaders cannot defend the challenged state laws in this case. The Legislative Leaders sought to intervene near the beginning of discovery out of concern that the Attorney General would not fully defend parts of state law; no party opposed permissive intervention; and the Court granted intervention. *See* D. Ariz. 2:22-cv-00509, Docs. 348, 354, 355, 363.

In defending state laws in this case, however, the Legislative Leaders do not speak for the State as a whole. That responsibility belongs solely to the Attorney General.

The source of authority cited by the Legislative Leaders—A.R.S. § 12-1841—does not suggest otherwise. *See* Application at 15. That statute permits the Senate President and House Speaker to intervene as parties or to file briefs in certain proceedings, but does not authorize them to represent the State as a whole. It is consistent with Arizona's longstanding decision that the Attorney General represents the State in federal court.

Accordingly, the State's position on the Application is contained in this response, not the Application itself. The State opposes the request for a stay.

Respectfully submitted,

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