Case No. 24-3188
(Consolidated)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MI FAMILIA VOTA, et al.,
Plaintiffs-Appellees,

v.

ADRIAN FONTES, et al.,
Defendants-Appellants,

and

WARREN PETERSEN, et al.
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court for the district of Arizona,
Case No. 2:22-CV-00509-SRB (and Consolidated Cases)
The Honorable Susan R. Bolton

BRIEF OF AMICI CURIAE LEAGUE OF WOMEN VOTERS, LEAGUE OF WOMEN VOTERS OF ARIZONA, SECURE FAMILIES INITIATIVE, AND MODERN MILITARY ASSOCIATION OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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DATED: August 19, 2024

/s/ R. Adam Lauridsen
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I. INTEREST OF *AMICI CURIAE*[1]

A. League of Women Voters

The League of Women Voters (the "League") is a nonpartisan grassroots organization committed to protecting voting rights, empowering voters, and defending democracy.

The League works to ensure that all voters—including those from traditionally underrepresented or underserved communities, such as first-time voters, non-college youth, new citizens, BIPOC communities, the elderly, and low-income Americans—have the opportunity and information they need to exercise their right to vote. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 500,000 members and supporters and is organized in more than 750 communities, all 50 states, and the District of Columbia. The national League includes the League of Women Voters of the United States and the League of Women Voters Educational Fund.

As the leader of the coalition whose work led to the enactment of the National Voter Registration Act of 1993 ("NVRA"), the League is now its foremost defender. Through its state and local affiliates, it continues to work

[1] No party or party's counsel authored the proposed brief in whole or part, and no party or party's counsel contributed money that was intended to fund this brief's preparation or submission. No person other than *amici curiae* or their counsel has made a monetary contribution to fund this brief's preparation or submission.

towards realizing the NVRA's promise through legal advocacy and litigation to enforce its protections. *See, e.g.*, *League of Women Voters of Indiana, Inc. v. Sullivan*, 5 F.4th 714 (7th Cir. 2021) (affirming district court injunction of Indiana's list maintenance law that violated the NVRA). The League also intervenes on behalf of voters in cases where bad actors seek to force unlawful or discriminatory voter removals in defiance of the NVRA's purpose. *See, e.g.*, Mem. In Support of Mot. of Non-Parties Common Cause Pennsylvania and League of Women Voters of Pennsylvania to Intervene as Defs. and for Leave to File Answer on the Same Schedule as Defs., *Judicial Watch, Inc. v. Commonwealth of Pennsylvania, et al.*, No. 1:20-cv-00708-CCC, ECF No. 5 (M.D. Pa. May 11, 2020).

B. League of Women Voters of Arizona

The League of Women Voters of Arizona ("LWV Arizona") is the League's Arizona state affiliate. LWV Arizona is a domestic nonprofit corporation in Arizona. For over 80 years, LWV Arizona has dedicated itself to protecting and promoting democratic government through public service, civic participation, and robust voter education and registration. LWV Arizona consists of both a statewide organization and five local chapters with 900 members statewide.

LWV Arizona supports voters throughout the election process. They register individuals to vote, regularly conducting voter registration drives throughout

Arizona at farmers markets, community colleges, high schools, festivals, fairs, and in partnership with other organizations. During these voter registration drives, they offer both paper voter registration forms and access to online voter registration.

Additionally, LWV Arizona was party to the Settlement Agreement executed in reliance on the Consent Decree issued in *League of United Latin American Citizens of Arizona v. Reagan*, No. 2:17-cv-04102-DGC (D. Ariz. June 18, 2018), ECF No. 37 ("LULAC Consent Decree"). If the LULAC Consent Decree is not upheld, LWV Arizona's interest in ensuring that all potential eligible voters in Arizona have access to legally required voter registration opportunities will be impeded. Collectively, the League and LWV Arizona are participating as *amici* to support Congress's authority to pass laws that protect and empower voters in federal elections, including presidential elections, and to uphold the LULAC Consent Decree.

C. Secure Families Initiative

The Secure Families Initiative ("SFI") is a nonpartisan, nonprofit organization of military spouses and family that encourages its members to advocate for their communities with a particular focus on issues like registering and turning out military voters and defending democracy.

Founded in 2020 to more effectively address voting and civic engagement challenges facing military spouse and family communities, SFI now has nearly 50,000 members and supporters worldwide.

Recognizing logistical barriers to voting faced by many military families, SFI advocates for federal and state policies that would increase voting access for absentee voters, such as military members and their families stationed far from home. This includes advocacy to Congress to expand the protections of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"). SFI also provides voting information and resources to ensure that military families have a meaningful voice in the electoral process, particularly regarding issues that could affect military communities.

SFI is participating as *amicus* to support Congress's authority to pass laws that protect and empower voters—including military and overseas voters—in all federal elections, including for the president and commander-in-chief of the armed forces.

D. Modern Military Association of America

The Modern Military Association of America ("Modern Military") is a nonpartisan, nonprofit organization that educates, advocates, and champions for the rights and well-being of LGBTQ+ service members, veterans, and their families, as well as people living with HIV.

In 2019, Modern Military was founded through merger with other organizations to focus on giving voice to the LGBTQ+ military and veteran community. Modern Military is the result of decades of work, starting in 1993, for the LGBTQ+ and HIV-positive military and veteran community through four organizations: Servicemembers Legal Defense Network, the American Military Partner Association, OutServe, and the Military Partners and Families Coalition. Presently, Modern Military has 60 private membership groups consisting of 16,600+ members and 183,900+ supporters worldwide.

In advocating for its communities, Modern Military works on combatting anti-equality and discrimination, as well as increasing voter participation. This includes military and overseas voting resources, military voter rights, and tactics to increase voter access and participation. Modern Military is committed to ensuring that LGBTQ+ service members, veterans, and their families have a meaningful voice in the electoral process.

Modern Military is participating as *amicus* to support Congress's authority to pass laws that protect and empower voters—especially military voters—in all federal elections, including for the president and commander-in-chief of the armed forces.

II. SUMMARY OF ARGUMENT

In 2022, the Arizona legislature adopted House Bill 2492 ("H.B. 2492"), a law that would disenfranchise current voters and make it harder for new ones to register. Among other restrictions, H.B. 2492 bars individuals who register to vote without submitting Documentary Proof of Citizenship ("DPOC") from voting for president in any federal election and requires the rejection of all state voter registration forms that lack such DPOC. In 2023, Plaintiffs-Appellees successfully challenged H.B. 2492 on several grounds, including preemption by the NVRA and inconsistency with a 2018 consent decree arising from an earlier challenge to voting restrictions in Arizona. Order Granting Cross-Motion for Summary Judgment, *Mi Familia Vota, et al. v. Fontes*, 2024 WL 862406, No. CV-22-00509-PHX-SRB (D. Ariz. Feb. 29, 2024), ECF No. 534; Amended Order, *Mi Familia Vota*, 2024 WL 862406 (D. Ariz. Feb. 29, 2024), ECF No. 709. Intervenors[2] now seek to overturn those conclusions, arguing that Congress lacks authority to regulate presidential elections, including through the NVRA, and that the consent decree should be ignored. The Court should reject Intervenors' efforts which, if

[2] The issues addressed in this brief were raised on appeal only by Intervenors, the Republican National Committee and Arizona House President Ben Toma and Senate President Warren Peterson ("Intervenors"). *See* Principal Br. of Appellants The Republican National Committee, Warren Petersen and Ben Toma, ECF No. 101.

successful, would set off a cascade of disenfranchisement, denying voters—including many uniformed and overseas voters—their fundamental right to vote.

First, courts have repeatedly recognized that the Elections Clause, the Necessary and Proper Clause, and the Fourteenth and Fifteenth Amendments empower Congress to regulate presidential elections—as Congress did with the NVRA. When courts have considered challenges to Congressional authority over federal elections, their decisions have consistently acknowledged, regardless of other disputes, that Congress's power over popular elections for presidential electors is coextensive with its power over congressional elections. The Supreme Court and the Ninth Circuit have both rejected the false distinction on which Intervenors rest their challenge here—that the Constitution grants Congress power over only congressional elections, while leaving it powerless to regulate presidential elections.

Second, the Constitution's history does not support Intervenors' narrow view of Congress's authority. The Framers made clear their general intent to grant Congress ultimate authority over all federal elections, as expressed in the Federalist Papers and indicated in other parts of the Constitution, such as the Electors Clause and the Necessary and Proper Clause. Although the Elections Clause does not expressly mention presidential elections, there was little reason for the Framers to reference them specifically since states had yet to settle on popular

voting as the mechanism for selecting presidential electors. When states did uniformly adopt popular elections for selecting the president, the Supreme Court recognized that Congress's authority to regulate these elections drew not only from the Elections Clause and Electors Clause, but also from the Necessary and Proper Clause, to ensure free, safe, and effective federal elections. Congress derives additional authority to regulate federal elections from the Reconstruction Amendments. Laws enacted based on their grants of remedial authority expressly protect the rights of citizens to participate in elections for all federal offices, including president.

Third, stripping Congress of authority to regulate presidential elections would upend crucial voter registration and protection laws, including the NVRA and statutes aimed at facilitating the participation of service members and overseas voters. Intervenors' attacks on the NVRA, if accepted, would jeopardize the fundamental rights of substantial numbers of voters who rely on these methods to register and vote.

Finally, the district court properly held that H.B. 2492 cannot change Arizona's current practice of registering to vote individuals who do not provide DPOC as Federal-Only voters, regardless of whether they use the Arizona state voter registration form ("State Form") or the federal voter registration form

("Federal Form").[3] H.B. 2492's proposed change conflicts with, among other things, the existing 2018 LULAC Consent Decree. Changing the status quo established by the LULAC Consent Decree would significantly negatively impact voter registration in Arizona.

III. ARGUMENT

A. For 140 years, courts have consistently recognized Congress's authority to regulate presidential elections.

When courts have addressed Congress's Constitutional authority to regulate federal elections, their decisions—regardless of other issues in dispute—consistently acknowledge that Congress's power to regulate presidential elections is coextensive with its power over congressional elections. As these cases recognize, the Elections Clause, the Electors Clause, the Necessary and Proper Clause, and the Reconstruction Amendments grant Congress the right to facilitate and safeguard *all* elections for federal office.

In *Burroughs v. United States*, 290 U.S. 534, 544 (1934), the Supreme Court recognized the plainly evident sources of Congress's broad regulatory power over presidential elections. The *Burroughs* petitioners argued the Electors Clause

[3] Under existing Arizona law, if DPOC is unavailable, election officials must place those registrants on a Federal-Only registration list. A.R.S. §16-121.01(C)-(E). This is true whether individuals register to vote using the State Form or the Federal Form. *See* state Election Procedures Manual ("EPM"), the 2019 EPM, and the now-operative 2023 EPM. 2ER-216-222 (2023 EPM); 4-ER-880-885 (2019 EPM).

reserves the power and manner of the appointment of presidential electors to the states, leaving Congress without authority to regulate presidential elections beyond determining "the Time of [choosing] the Electors, and the Day on which they shall give their Votes." *Id.* The Court flatly rejected this literal reading of the Constitution: "So narrow a view of the powers of Congress in respect of the matter is without warrant." *Id.*

The *Burroughs* Court properly recognized that the Court had not previously distinguished between congressional and presidential elections when assessing congressional regulatory authority. *Id.* at 546. For example, in *Ex parte Yarbrough*, 110 U.S. 651 (1884), the Court found that it was the federal government's duty to ensure that "the votes by which its members of congress and its president are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." *Id.* at 662. The *Yarbrough* Court identified this authority in multiple provisions of the Constitution, including the Elections Clause, the Necessary and Proper Clause, and the Fifteenth Amendment. *Id.* at 658–65. Notably, the Court did not limit its holding to congressional elections. Rather, it emphasized the necessity of both the "executive and legislative branches [being] the free choice of the people" "to the successful working of [the federal] government." *Id.* at 666. The *Burroughs* court thus concluded that *Yarbrough* "made no distinction between" the election of

"presidential and vice presidential electors" and "the election of a member of Congress," "and the principles announced, as well as the language employed, are broad enough to include the former as well as the latter." 290 U.S. at 546.

The Supreme Court next touched on Congress's regulatory authority over presidential elections in *Oregon v. Mitchell*, 400 U.S. 112 (1970), as it determined the constitutionality of the Voting Rights Act Amendments of 1970. *Id.* at 117. Justice Black, delivering the Court's judgment but providing his own reasoning, reaffirmed Congress's regulatory authority, remarking that it "cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." *Id.* at 124. Such authority arose from both "the nature of [the] constitutional system of government," as described in *Burroughs* and the Necessary and Proper Clause. *Id.* at 124 n.7. Congress thus had the same scope of authority over presidential elections as it did over congressional elections, which—pursuant to the Elections Clause—was the authority "to provide a complete code" for elections and "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Id.* at 122 (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

Only a few years later, the Supreme Court again affirmed Congress's power to regulate presidential elections in *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court

reaffirmed that "Congress has [the] power to regulate Presidential elections." *Id.* (citing *Burroughs,* 290 U.S. 534). Notably, even the dissenters agreed with this view. Chief Justice Burger "[did] not question the power of Congress to regulate [presidential] elections" under the Necessary and Proper Clause. *Id.* at 247 (Burger, C.J., concurring in part and dissenting in part). And Justice White, referencing *Ex parte Yarbrough* and *Burroughs*, noted that "[i]t is accepted that Congress has power under the Constitution to regulate the election of federal officers, including the President and the Vice President," and to protect electoral procedures from violence and corruption. *Id.* at 257 (White, J., concurring in part and dissenting in part).

Since the NVRA's enactment in 1993, lower courts including the Ninth Circuit have relied and expanded upon these Supreme Court decisions to uphold the NVRA's constitutionality. In rejecting a constitutional challenge to the NVRA, the Seventh Circuit noted that the Elections Clause did not reference presidential elections, as general elections for the president were not contemplated in 1787. *Ass'n of Cmty. Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995). Nor did it mention voter registration, which did not exist as a separate stage of the electoral process at the time. *Id.* However, the Court found these omissions unimportant in "teasing out the modern meaning of [the Elections Clause]" given that the Supreme Court interpreted Article II Section 1 "to grant

Congress power over Presidential elections coextensive with that which [the Elections Clause] grants it over congressional elections." *Id.*

One month after *Edgar*, this Circuit followed suit and upheld the NVRA in *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1414 (9th Cir. 1995). It held that Congress had broad power over both congressional and presidential elections and that the NVRA "fit[] comfortably within [the Elections Clause's] grasp." *Id.* The Sixth Circuit also upheld the NVRA's constitutionality, stating that Congress had authority to regulate presidential elections despite the Elections Clause only mentioning the election of senators and representatives. *ACORN v. Miller*, 129 F.3d 833, 836 n.1 (6th Cir. 1997). And most recently, the Tenth Circuit agreed in a similar case concerning whether the NVRA preempted a state law requiring DPOC for voter registration. *Fish v. Kobach*, 840 F.3d 710, 715 (10th Cir. 2016). It emphasized that the Supreme Court and multiple circuit courts "have rejected the proposition that Congress has no power to regulate presidential elections," despite the Elections Clause's literal terms. *Id.* at 719 n.7.

District courts in the Eighth and Second Circuits have similarly recognized Congress's constitutional authority to regulate presidential elections. The Western District of Missouri described Congress's power to regulate presidential elections as "coextensive" with its powers under the Elections Clause. *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2007 WL 1115204 (W.D. Mo. Apr. 13, 2007).

The Northern District of New York shared that understanding of the Elections Clause, stating that it "has been deemed to extend Congressional power in regulating presidential elections." *United States v. New York*, 700 F. Supp. 2d 186, 200 n.8 (N.D.N.Y. 2010).

Finally, the Supreme Court's most recent discussion of the Elections Clause as it relates to the NVRA confirms this long-standing view of congressional authority over presidential elections. In *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), Justice Scalia, writing for the majority, explained that "the Elections Clause empowers Congress to regulate *how* federal elections are held" without drawing any distinction between congressional and presidential elections. *Id.* at *2. Though Justice Thomas disagreed with the majority's view, his interpretation of the Elections Clause—only a footnote in his dissent—has never been adopted by the Court. *Id.* at *35 n.2 (Thomas, J., dissenting).

Ultimately, based on more than a century of authority, this Court should affirm the District Court's decision that Congress may rightfully regulate presidential elections, including through the NVRA.

B. Constitutional history is consistent with the precedent that Congress has power to regulate presidential elections.

1. Congress has authority to regulate presidential elections under the Elections Clause, Electors Clause, and Necessary and Proper Clause.

The historical context in which the Framers drafted the Constitution and subsequent changes in states' methods of selecting presidential electors affirm that the Elections Clause, the Electors Clause, and the Necessary and Proper Clause all provide Congress with authority to regulate presidential elections. Intervenors' unduly constrained reading of the Elections Clause ignores the status of federal elections when the Clause was drafted and when Congress began to exercise its election-regulating authority. The Elections Clause grants Congress the power to "at any time by Law make or alter [state] Regulations" as to the times and manner of "Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. Although the Framers did not specifically note Congress's power to regulate presidential elections, their silence does not indicate absence of such authority. To the contrary, the Clause reflects their conviction that preserving ultimate federal control over federal elections was necessary to the union's survival. As stated in Federalist No. 59:

> Nothing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy. They could at any moment annihilate it, by neglecting to provide for the

choice of persons to administer its affairs.

The Election Clause's textual omission of presidential elections is attributable not to any desire of the Framers to withhold authority from Congress, but to the nature of presidential elections at the time the clause was drafted.

At the founding, congressional regulation of presidential elections was not a pressing concern because not all states held popular votes to choose presidential electors.[4] *See Edgar*, 56 F.3d at 793 (Posner, J.) (citing Records of the Federal Convention, reprinted in *The Founders' Constitution* 536–38 (Philip B. Kurland & Ralph Lerner eds., 1987) (James Madison's notes of June 1–July 17)) ("There is no reference to the election of the President, which is by the electoral college rather than by the voters at the general election; general elections for President were not contemplated in 1787."). Rather, a different Constitutional article—the Electors Clause—provided that "a Number of Electors" for president may be appointed by each state in "such Manner as the Legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. Congress, however, still retained the ability to "determine the Time of

[4] Only ten of thirteen states put forth electors to vote in the first presidential election in 1789. *The Electoral Count for the Presidential Election of 1789*, WASHINGTON PAPERS, https://washingtonpapers.org/resources/articles/the-electoral-count-for-the-presidential-election-of-1789/ (citing 1–4 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS, 1788-1790 (Merrill Jensen et al., eds., 1976-1989)). Of those ten states, half held popular elections to determine their electors and half appointed electors at the discretion of the legislature or state executive. *Id.*

chusing the Electors, and the Day on which they shall give their Votes." U.S. Const. art. II, § 1, cl. 4.

By 1832, however, all but one state allowed voters to determine presidential electors by popular vote, and a more pressing need for congressional regulation arose. As more and more states allowed popular presidential elections, states jockeyed to schedule their election dates strategically to gain more influence in a contest's outcome. *See* Bruce Ackerman, *As Florida Goes…*, N.Y. TIMES, Dec. 12, 2000. In 1845, Congress passed the first law setting a uniform day for the election of presidential electors—the first Tuesday after the first Monday in November, now known as Election Day. *See* Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (1850). By 1864, each state in the union held a popular vote to select presidential electors on Election Day.

Once every state decided to select presidential electors in the same manner as it selected members of Congress,[5] and Congress acted to place all these elections on the same day, it also became *necessary* for Congress to regulate presidential elections to effectuate its power under the Elections Clause. The final clause of Article I, Section 8 of the Constitution gives Congress power "[t]o make

[5] Only members of the House of Representatives were elected by popular vote at this time. It was not until the ratification of the Seventeenth Amendment in the 1913 that Senators were also elected by popular vote. U.S. Const. amend. XVII, § 1.

all Laws which shall be necessary and proper for carrying into Execution" the other federal powers granted by the Constitution. U.S. Const. art. I, § 8, cl. 18. The word "necessary" as it relates to "necessary and proper" does not mean "absolutely necessary." *United States v. Comstock*, 560 U.S. 126, 134 (2010) (citing *Jinks v. Richland Cnty., S.C.*, 538 U.S. 456, 462 (2003)). The Clause has been found to support a variety of acts that, despite not being specifically enumerated in the Constitution, were "necessary and proper" to promote the legitimate, constitutional ends of Congress. *See M'Culloch v. Maryland*, 17 U.S. 316, 416 (1819) ("But there is no phrase in the instrument which, like the [A]rticles of [C]onfederation, excludes incidental or implied powers; and which requires that every thing granted shall be expressly and minutely described.").

Indeed, shortly after congressional and presidential elections were set for the same day, the Supreme Court, in *Ex parte Yarbrough*, recognized that Congress draws its authority over presidential elections not only from the Elections and Electors Clauses, but also from the Necessary and Proper Clause. Questions of Congress's power to regulate in this sphere "answer[ed] themselves," the Court concluded, "and it is only because the congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the states, refrained from the exercise of these powers that they are now doubted." *Ex parte Yarbrough*, 110 U. S. at 662.

In *Ex parte Yarbrough*, the Court rejected a strictly textual challenge to Congress's authority premised on the idea that, for Congress to have a certain power, "the advocate of the power must be able to place his finger on words which expressly grant it." *Id.* at 658. Instead, the Court concluded that under the Necessary and Proper Clause, when Congress "finds it necessary to make additional laws for the free, the pure, and the safe exercise of [the] right of voting," such laws "are to be upheld." *Id.* at 662.

Intervenor's efforts to restrict Congress's authority to regulate presidential elections, if successful, would subvert almost two centuries of constitutional history and open the door to an absurd result—a Congress powerless to protect federal elections from the confusion and chaos that would result from a state setting different rules for voters participating in presidential elections at the same time as congressional elections. *See infra* Section C.

2. The Reconstruction Amendments further augmented Congress's authority to regulate presidential elections.

Congress also has authority to regulate presidential elections pursuant to the Reconstruction Amendments. The Reconstruction Amendments provide explicit limits on state and federal power to restrict the right to vote, including in presidential elections. To effectuate these limits, the Reconstruction Amendments deliberately contain nearly identical enforcement clauses, drafted to confer broad remedial authority to Congress. *Compare* U.S. Const. amend. XIV, § 5 ("The

Congress shall have power to enforce, by appropriate legislation, the provisions of this article.") *with* U.S. Const. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation."); *see also* Mathews, John, Legislative and Judicial History of the Fifteenth Amendment at 21 (1909) (noting that the Fifteenth Amendment "surely and safely supplied . . . a new grant of power from the nation in the form of a suffrage amendment to the Constitution which [] contain[ed] the authorization to Congress to enforce its provisions").

Congress's authority under the Reconstruction Amendments to regulate presidential elections is well-established. *See, e.g.*, Ku Klux Klan Act of 1871, Ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985–1986) (criminalizing, among other conduct, two or more persons working together to "prevent any citizen of the United States lawfully entitled to vote from giving his support or advocacy in a lawful manner towards or in favor of the election of any lawfully qualified person as an elector of President or Vice-President of the United States"*); Yarbrough,* 110 U.S. at 665.

Though Congress already had authority to regulate the time, place, and manner of presidential elections, the Reconstruction Amendments bolstered its authority to act to protect the right to vote in federal elections, particularly when it acts to protect equal access to voting from interference by the states. The NVRA falls squarely within that authority, as it was explicitly enacted based partly on a

finding 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, including racial minorities." 52 U.S.C. § 20501(a)(3).

C. Eliminating congressional authority to regulate presidential elections would undermine federal elections and voting access.

Stripping Congress of its long-held authority to regulate presidential elections would undermine federal voting rights legislation, causing voter confusion and making it more difficult to vote. Courts have recognized that preventing voter confusion is an important interest. *E.g.*, *Arizona Libertarian Party v. Hobbs*, 925 F.3d 1085, 1093 (9th Cir. 2019) (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986)) (noting that "interests in preventing voter confusion …are important interests"). Requiring voters to navigate one set of requirements for congressional elections and another set for presidential elections would cause confusion, discourage participation, and ultimately undermine confidence in elections. Moreover, it would result in voter disenfranchisement, as all individuals registered as Federal-Only voters would not be able to vote in presidential elections. Intervenors' attack on Congress's authority, if successful, would undermine not just the NVRA, but other key voter rights legislation, including the Uniformed Overseas Citizens Absentee Voting Act ("UOCAVA") and the Military and Overseas Voter Empowerment ("MOVE") Act.

1. The NVRA

Millions of eligible citizens have registered to vote in federal elections, including presidential elections, using the voter registration process Congress imposed through the NVRA. *See* 52 U.S.C. §§ 20504, 20505, 20506. If the Court were to find that the NVRA applies only to congressional elections, it would disenfranchise voters who rely upon NVRA procedures to register to vote and would and cause significant confusion regarding NVRA voter registration opportunities.

Congress passed the NVRA with bipartisan support to "increase the number of eligible citizens who register to vote in elections for Federal office," enhance voter participation, and protect the electoral process. 52 U.S.C. § 20501(b)(1). The NVRA defines "Federal office" to include "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." 52 U.S.C. § 20502(2) (citing 52 U.S.C. § 30101(3)). The statute thus makes clear that the federal government has a duty to establish a system for nationwide voter registration procedures for congressional as well as presidential elections. 52 U.S.C. §§ 20501(b)(2), 20502(2).

For decades, the NVRA has successfully increased the number of eligible Americans registered to vote. For example, Section 5 of the NVRA has long been used to register large numbers of voters through state motor vehicle agencies, 52

U.S.C. § 20504, leading many to refer to the NVRA as the "motor voter" law. Section 6 expanded voter registration by establishing a federal mail voter registration application that could be used across the country. 52 U.S.C. § 20505. And Section 7 further expands the NVRA's impact by requiring voter registration opportunities through state public assistance agencies, disability services, and armed forces recruitment offices. 52 U.S.C. § 20506. The NVRA's successful outcomes are no accident. Legislative history shows that "[b]y combining the driver's license application approach with mail and agency-based registration" (in Sections 5, 6, and 7 of the NVRA, respectively), Congress intended the NVRA to reach as many eligible voters as practicable. *See* H.R. Rep. No. 103-9 at 5, *reprinted in* 1993 U.S.C.C.A.N. 105, 119.

According to recent Election Assistance Commission ("EAC") biennial reports, states collect a total of almost 80 million to more than 100 million total registrations. Of the EAC's total reported voter registrations, those received through state motor vehicle agencies (required by Section 5), through mail, email, or fax (required by Section 6), and through public assistance agencies, disability services offices, and armed forces recruitment offices (required by Section 7), accounted for more than half to almost two-thirds of the total received. *See infra* n.6.

Specifically, EAC biennial reporting[6] shows that states cumulatively received:

- 2021-2022:
  - 80,764,222 total voter registrations
  - 44,051,378 motor vehicle voter registrations
  - 7,340,458 mail voter registrations
  - 1,229,559 public assistance voter registrations

- 2019-2020:
  - 103,701,513 total voter registrations
  - 39,705,812 motor vehicle voter registrations
  - 13,253,501 mail voter registrations
  - 1,745,749 public assistance voter registrations

A finding that the NVRA's procedures are inapplicable to presidential elections would fundamentally undermine these registration efforts. The door could open for other states to implement a bifurcated voter registration process separating eligibility to vote for president from eligibility to vote in all other federal elections. Such a discordant result risks massive confusion among voters who depend upon NVRA voter registration opportunities and have long voted concurrently in presidential and congressional elections.

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[6] *See* U.S. Election Assistance Comm'n, Election Admin. & Voting Survey 2022 Comprehensive Report, Voter Registration Table 2, at 168-71, *available at* https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf ("2022 EAC Report"); U.S. Election Assistance Comm'n, Election Admin. & Voting Survey 2020 Comprehensive Report, Voter Registration Table 2 at 145-48, *available at* https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf ("2020 EAC Report").

The confusion created by a finding that Congress cannot regulate presidential elections also could lead to widespread disenfranchisement of voters who unexpectedly find themselves unable to vote in presidential elections or chilled from doing so. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (noting that "voter confusion" could lead to "consequent incentive to remain away from the polls"). This outcome would be inconsistent with the right to vote, s*ee, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 786–88 (1983) (noting that the right to vote is a "fundamental" constitutional right guaranteed by the First and Fourteenth Amendments), and the NVRA's purpose to increase the number of eligible citizens registered to vote in all federal elections.

2. UOCAVA and the MOVE Act

A finding that Congress cannot regulate presidential elections would also threaten other key voting rights legislation, including UOCAVA, 52 U.S.C. §§ 20301–20311, and the MOVE Act, Pub. L. No. 111-84, §§ 577–83(a), which protect voting access for uniformed and overseas voters.

Congress enacted UOCAVA to "eliminat[e] procedural roadblocks, which historically prevented thousands of service members from sharing in the most basic of democratic rights." *United States v. Alabama*, 778 F.3d 926, 928 (11th Cir. 2015). UOCAVA protects the voting rights of an "estimated 1.33 million active-duty members and approximately 573,000 military spouses and voting-age

dependents" and "2.6 million voting-age U.S. citizens who live, study, or work overseas." EAC 2022 Report at 194–95. In 2009, Congress further strengthened these protections with the MOVE Act, which amended UOCAVA by establishing additional electronic registration, ballot request, and ballot transmission procedures. *Id.* at 195–96. Like the NVRA, UOCAVA applies to all elections for "Federal office," defined as "the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress." 52 U.S.C. § 20310 (UOCAVA).

UOCAVA and the MOVE Act have successfully provided better access to registration and voting for uniformed voters, their families, and other overseas voters and voters stationed far from home. For example, UOCAVA Section 10 provides a mechanism for uniformed services members and overseas citizens to cast a "Federal write-in absentee ballot" ("FWAB") in "elections for Federal office." *See* 52 U.S.C. § 20303. The FWAB is a "back-up" ballot that UOCAVA voters may cast if they timely applied for, but have not received, their regular absentee ballot from their state or territory. *Id.* at § 20303(a)(1),(2). The FWAB currently contains an option to vote for President and Vice President, in addition to congressional offices. *See* Federal Write-In Absentee Ballot, FEDERAL VOTING ASSISTANCE PROGRAM, available at https://www.fvap.gov/uploads/FVAP/Forms/fwab.pdf.

Per biennial EAC reporting, hundreds of thousands of eligible individuals regularly take advantage of the federally guaranteed voter registration and voting opportunities provided by UOCAVA and the MOVE Act:[7]

- 2021-2022:
  - 737,438 total registered UOCAVA voters
  - 267,403 UOCAVA voters returning regular absentee ballots
  - 4,089 UOCAVA voters submitting FWABs

- 2019-2020:
  - 1,253,629 total registered UOCAVA voters
  - 911,614 UOCAVA voters returning regular absentee ballots
  - 33,027 UOCAVA voters submitting FWABs

If this Court restricts congressional authority to regulate federal elections to congressional elections only, the crucial voting protections of UOCAVA and the MOVE Act could be severely undermined. Hundreds of thousands of uniformed voters, their families, and other overseas voters would be left with only the option to vote in congressional elections, but not elections for the highest office in the land. Active-duty members of the armed forces stationed overseas could paradoxically be left unable vote for their own commander-in-chief.

D. Enforcement of H.B. 2492's DPOC regulations would violate the LULAC Consent Decree.

The district court correctly held, for the reasons articulated by this Court and LUCHA Plaintiffs-Appellees, that "the LULAC Consent Decree precludes Arizona

[7] *See* 2022 EAC Report, Appendix A, 211–12 tbl. 1, 219–21 tbl.3, 221–25 tbl.4; 2020 EAC Report, Appendix A, 189–91 tbl.1, 198–200 tbl.3, 201–03 tbl.4.

from enforcing H.B. 2492's mandate to reject any State Form without accompanying DPOC." *Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077, 1103 (D. Ariz. 2023); *see also Mi Familia Vota v. Fontes*, No. 24-03188, 2024 WL 3618336, at *2 (9th Cir. Aug. 1, 2024); Second Br. of Plaintiffs-Appellees at 32–37, *Mi Familia Vota v. Fontes*, No. 24-3188 (9th Cir. Aug. 12, 2024), ECF No. 146.1.[8]

Changing the status quo established by the LULAC Consent Decree would significantly undermine the effectiveness of ongoing voter registration in Arizona. For example, *amicus* LWV Arizona regularly conducts voter registration drives throughout Arizona. In reliance on the LULAC Consent Decree and its protections for State Form users, LWV Arizona primarily uses the State Form rather than the Federal Form.

There are clear reasons why voter registration organizations use primarily the State Form. At only four pages, the State Form is efficiently formatted and user-friendly. *See* Arizona Voter Registration Form, ARIZ. SEC'Y OF STATE, available at https://azsos.gov/sites/default/files/docs/az_voter_registration_form_standard_202

[8] The LULAC Consent Decree has governed since 2018. Its required procedures were incorporated into a 2018 addendum to the EPM, the 2019 EPM, and the now-operative 2023 EPM. 2ER-216-222 (2023 EPM); 4-ER-880-885 (2019 EPM).

40613.pdf. The State Form, moreover, has clear instructions in English and Spanish about Arizona's registration requirements. *See id.*

By contrast, the current version of the Federal Form is a relatively cumbersome 27-page document, including state-specific instructions for all fifty states and the District of Columbia. *See* National Mail Voter Registration Form, U.S. ELECTION ASSISTANCE COMM'N, *at* https://www.eac.gov/voters/national-mail-voter-registration-form, (Jan. 2024); 52 U.S.C. § 20508. While the Federal Form is available in Spanish, the translations are not incorporated into the same form, but in separate 27-page forms. S*ee id.* A single form incorporating Spanish offers advantages to groups like *amici* LWV Arizona that run extensive voter registration drives often using paper registration forms.

Arizona state and county entities also use the State Form extensively. As the current Arizona EPM explains, each "County Recorder shall make available State Forms (at no cost) to all federal, state, county, local, and tribal government agencies, political parties, and private organizations located within the County Recorder's jurisdiction that conduct voter registration activities," and these State Forms shall be supplied "without charge" to "any qualified person requesting registration information." 2023 EPM. By contrast, the EPM notes that the "Secretary of State and County Recorders may place reasonable restrictions on the

number of [federal] forms to be provided to individuals or organizations," *id.* at 2, indicating that State Forms would be used more widely.

Lastly, Arizona public assistance agencies also use the State Form to comply with their NVRA Section 7 obligations. Section 7 creates several requirements for state public assistance and other agencies, including an obligation to effectively distribute registration applications to clients. 52 U.S.C. § 20506(a)(4)(A)(i). In August 2021, following a notice letter asserting ongoing NVRA violations, LWV Arizona, some of the undersigned counsel, and others entered into a Settlement Agreement with the Arizona Secretary of State and two Arizona public assistance agencies, Arizona Health Care Cost Containment System ("AHCCCS"), and Arizona Department of Economic Security ("DES"). A copy of the Agreement is provided in the Appendix as Exhibit 1. This Settlement Agreement allows AHCCCS and DES to distribute State Forms to applicants. *See* Ex. 1, Section 2.14.

During settlement negotiations, the parties understood that the LULAC Consent Decree allowed potential voters to register at least as Federal-Only voters using the State Form, and as such, that providing copies of the State Form would comply with the NVRA's distribution requirements. In reliance on the LULAC Consent Decree, the parties ultimately agreed that AHCCCS and DES could distribute only State Forms to their clients.

Consistent with the Settlement Agreement, the EPM, and the NVRA's requirements, these agencies currently distribute a large number of State Forms. According to an October 5, 2023 Secretary of State Report, included in the Appendix as Exhibit 2, AHCCCS and DES distributed 258,511 voter registration forms to public assistance clients for one quarter in 2023, or an average of about 86,000 forms each month.[9]

If the provisions of H.B. 2492 requiring the rejection of State Forms lacking DPOC are enforced in direct violation of the LULAC Consent Decree, the current voter registration practices of Arizona public assistance agencies will be significantly curtailed. Indeed, potential voters without access to DPOC will not receive a voter registration form they can use, as required by Section 7 of the NVRA, and will be deprived of the opportunity to register to vote. Ultimately, rolling back the LULAC Consent Decree's long-established protections for applicants who use the State Form could have substantial consequences for Arizona public assistance agencies and their clients, in addition to organizations involved in voter registration and the individuals they assist.

[9] This is the total of the number of registration forms mailed to individuals who request them (6,457), and the number of forms provided to clients who do not answer the registration question (252,054). These individuals must receive a registration form per Section 3.12 of the Agreement, Ex. 1, and the NVRA's requirements. *See, e.g. Valdez v. Squier*, 676 F.3d 935, 945-47 (10th Cir. 2012).

IV. CONCLUSION

The Court should affirm the District Court's decision that Congress has the power to regulate all elections for federal office and that the LULAC Consent Decree should remain enforceable.

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and Federal Circuit Rule 29(b). The brief contains 6,789 words according to the word count of the word-processing system used to prepare the brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a 14-point, proportionally spaced Times New Roman font.

Dated: August 19, 2024

/s/ R. Adam Lauridsen
R. ADAM LAURIDSEN

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF AMICI CURIAE LEAGUE OF WOMEN VOTERS, LEAGUE OF WOMEN VOTERS OF ARIZONA, SECURE FAMILIES INITIATIVE, AND MODERN MILITARY ASSOCIATION OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on August 19, 2024. All participants in the case are registered ACMS users, and service will be accomplished by the appellate ACMS system.

Dated: August 19, 2024

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