

No. 25-1017

IN THE
Supreme Court of the United States

REPUBLICAN NATIONAL COMMITTEE,
Petitioner,

v.

MI FAMILIA VOTA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE SECRETARIES OF STATE OF
MISSISSIPPI, KENTUCKY, AND NEBRASKA AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*

Amici curiae are the Secretaries of State of Mississippi, Kentucky, and Nebraska. Like Arizona, each of these States have laws that require all voter registration applicants to be United States citizens. The Secretaries of these States have a fundamental interest in ensuring the integrity of their States' elections and in preserving the Constitution's grant of authority to States to define voter qualifications and administer elections. *Amici* submit this brief to explain why Arizona's citizen qualification and the challenged verification laws are consistent with the Constitution and the National Voter Registration Act and why the Ninth Circuit's contrary reading should be reversed.¹

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part. No one other than *amici*, their counsel, and the Honest Elections Project, a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections, has made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case concerns a constitutional boundary the Ninth Circuit erased. The Constitution confers upon States the authority to determine who is qualified to vote, subject to express constitutional limits, while the Elections Clause gives Congress power over the mechanics of federal elections—how they are conducted, not who may participate. That line is reinforced in presidential elections by the Electors Clause. Congress may prescribe voter registration procedures, as it has done in the National Voter Registration Act (“NVRA”). But it may not displace the States’ authority to identify and enforce voter qualifications.

Arizona’s Constitution and laws limit the franchise in federal and state elections to U.S. citizens, as do the laws of all States and the federal government. *See* Ariz. Rev. Stat. § 16-101(A)(1); Ariz. Const., art. VII, § 2; 18 U.S.C. § 611; *see, e.g.*, Miss. Code Ann. §§ 23-15-11; Miss. Const. art. XII, § 241; Ky. Rev. Stat. § 116.025(1); Ky. Const. § 145; Neb. Rev. Stat. § 32-110; Neb. Const. art. VI, § 1. The challenged provisions implement that fundamental qualification in three complementary ways. First, applicants using the state voter registration form (“State Form”) must provide documentary proof of citizenship (“DPOC”) and documentary proof of residence (“DPOR”). Ariz. Rev. Stat. §§ 16-121.01(A), (C), 16-123, 16-166(F). Second, an applicant may register to vote without submitting such documentation using the federal voter registration form (“Federal Form”), but if his citizenship cannot be verified from available records,

he will be registered as a federal-only voter ineligible to vote for presidential electors or by mail until satisfactory evidence is provided. *Id.* §§ 16-121.01(D)–(E), 16-127(A)(1)–(2). Third, Arizona election officials are obligated to conduct recurring database checks and may cancel voter registrations only after officials confirm non-citizenship, provide notice thereof, and allow the affected individual an opportunity to respond. *Id.* § 16-165(A)(10), (G)–(K).

The Ninth Circuit read the NVRA to preempt each of those measures. Pet. App. 32a, 36a, 37a, 41a, 47a, 50a. That reading extends *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), well beyond its holding, collapses the distinction between registration and voting, and treats the NVRA’s 90-day removal safeguard as a prohibition on removing persons who were never eligible to register in the first place. It also converts a statute designed to establish federal registration procedures into a command that disables State election officials from enforcing a State constitutional qualification. Such a construction raises the very “serious constitutional doubts” *Inter Tribal* instructed courts to avoid. 570 U.S. at 17–20.

The Court should reverse. The Constitution grants States the authority to set and enforce voter qualifications, and the NVRA did not silently displace that authority. The canon of constitutional avoidance and the federalism canon confirm that the NVRA cannot be read so broadly as to preempt States’ constitutional authority in this realm. Arizona’s qualification laws reasonably serve the State’s compelling interest in preventing voter fraud and

protecting voter integrity and do not conflict with the text or purpose of the NVRA. For all of these reasons, the NVRA should not be construed to strip Arizona of its constitutional authority to set and enforce voter qualifications.

ARGUMENT

I. The Constitution Gives States Exclusive Authority to Define and Enforce Voter Qualifications

A. State and Congressional Elections

“It is incontestable that the Constitution established a system of ‘dual sovereignty.’” *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). Elections are a central expression of that design. The Constitution assigns to States the power to define the electorate and to administer elections, while granting Congress only limited powers over specified aspects of federal elections.

For State, county, and municipal elections, this Court has long recognized “the historic function of the States to establish, on a nondiscriminatory basis, and in accordance with the Constitution, other qualifications for the exercise of the franchise.” *Carrington v. Rash*, 380 U.S. 89, 91 (1965); *see also Oregon v. Mitchell*, 400 U.S. 112, 125–26 (1970) (Black, J., announcing the judgment of the Court). Like other States, Arizona has exercised that

authority to limit the franchise to United States citizens. *See* Ariz. Const., art. VII, § 2.

For congressional elections, the Constitution likewise grants States’ plenary authority to determine voter qualifications. Specifically, Article I, section 2, clause 1 (the “Qualifications Clause”) provides that Electors in each State “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature,” and the Seventeenth Amendment extends that qualification rule for Senate elections. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 227 (1986). Article I, section 4 of the Constitution (the “Elections Clause”) then imposes upon State legislatures a duty to prescribe the “Times, Places and Manner” of congressional elections, and gives Congress preemptive power to “make or alter” State laws as to time or manner (but not place). U.S. Const., art. I, § 4, cl. 1. As *Inter Tribal* recognized, the Election Clause’s plain language thus gives Congress the power to regulate “*how* federal elections are held, but not *who* may vote in them.” *Inter Tribal*, 570 U.S. at 16 (emphasis in original).

The Elections Clause thus imposes upon States a “duty (*shall* be prescribed’) to prescribe the time, place, and manner of electing Representatives and Senators” and also confers “upon Congress...the power to alter those regulations or supplant them altogether.” *Id.* at 8. The Clause’s grant of preemptive power to Congress over State time or manner laws “was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.” *Id.* at 8.

The Elections Clause thus confers upon Congress the “means of its own preservation” so that States cannot “at any moment annihilate [Congress] by neglecting to provide for the choice of persons to administer its affairs.” *Id.* (quoting THE FEDERALIST NO. 59, at 362–63 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

Congress may therefore prescribe election mechanics and prevent State obstruction of congressional elections, but the Elections Clause does *not* empower Congress to preempt voter qualifications enacted under States’ Qualifications Clause and Seventeenth Amendment authority. As *Inter Tribal* succinctly put it: “Prescribing voting qualifications forms no part of the power to be conferred upon the national government’ by the Elections Clause.” *Id.* at 17 (quoting THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961)) (emphasis added); *see also id.*, No. 52, at 326 (James Madison) (“To have reduced the different qualifications in the different States to one uniform rule, would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention.”).

Moreover, as this Court has made clear, “the power to establish voting requirements is of little value without the power to *enforce* those requirements.” *Id.* at 17 (emphasis added). Arizona’s laws challenged here are reasonable voter qualification measures that Congress lacks any power to preempt.

B. Presidential Elections

The States’ authority over presidential elections is defined by Article II, section 1, clause 2 (the “Electors Clause”), which provides that “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors” who choose the President and Vice President. U.S. Const. art. II, § 1, cl. 2. Congress’s only power over the Electoral College, by contrast, is to set the “Time of chusing the Electors” and the “Day on which they shall give their votes.” U.S. Const., art. II, § 1, cl. 4. Thus, “Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes...but otherwise the power and jurisdiction of the state [over the Electoral College] is exclusive,” subject to limited constitutional qualifications not relevant here.² *McPherson v. Blacker*, 146 U.S. 1, 35 (1892); accord *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam); *Chiafalo v. Washington*, 591 U.S. 578, 589–90 (2020).

Giving State legislatures “plenary power” over the “manner” of appointing Electors ensures that “congressional and federal influence [on presidential elections] might be excluded.” *McPherson*, 146 U.S. at

² For example, if a State allows voting for presidential elections, the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments and the Equal Protection Clause constrain who may be excluded. See, e.g., *Bush v. Gore*, 531 U.S. 98, 104–05 (2000). This Court has also held that Congress has broad authority to prevent corruption in national presidential elections. *Buckley v. Valeo*, 424 U.S. 1, 132 (1976); *Burroughs v. United States*, 290 U.S. 534, 544–45 (1934).

25, 35; *accord Bush*, 531 U.S. at 104. If Congress had power to regulate Electors, the President would become dependent on Congress, destroying the horizontal separation of powers. *See* THE FEDERALIST NOS. 68, 71 (A. Hamilton), 51 (J. Madison).

States' power to appoint Electors in the "manner" of State legislatures' choosing necessarily includes the power to determine the qualifications of those who *vote* for Electors, *if* the State chooses to let its citizens vote. As this Court has recognized, "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college." *Bush*, 531 U.S. at 104. Indeed, for many years after ratification, Electors were chosen by State legislatures, not popular vote. *Chiafalo*, 591 U.S. at 584; *Bush*, 531 U.S. at 104. States' "plenary" power under the Electors Clause to select the "manner" for appointing Electors means that "if it so chooses, [a State legislature can] select the electors itself[.]" *Bush*, 531 U.S. at 104. It logically follows, therefore, that if a State legislature chooses to appoint its Electors by a popular vote, it can limit those voters to *citizens only*. Arizona's decision to require citizenship verification before a person may vote for its presidential Electors is thus an exercise of its plenary power under the Electors Clause.

II. The Canon of Constitutional Avoidance Requires this Court to Construe the NVRA's Preemptive Reach Narrowly

These constitutional provisions foreclose the Ninth Circuit's construction of the NVRA. If the NVRA preempts States from imposing and enforcing a citizen *qualification* to vote in their elections, it creates serious constitutional doubt about the constitutionality of the NVRA itself, as this Court intimated in *Inter Tribal*.

There, the Court considered whether the NVRA preempted a prior Arizona law requiring rejection of voter registration applications that were not accompanied by DPOC, but only as applied to individuals using the Federal Form. *Inter Tribal*, 570 U.S. at 5. The Court held that because the NVRA requires States to “accept and use” the Federal Form, *id.* at 15, it preempted Arizona's DPOC law *only as applied to the Federal Form*, because Arizona's law required applicants to “submit information beyond that required by the [Federal Form] itself.” *Id.* at 20. The NVRA's creation of a Federal Form, reasoned *Inter Tribal*, was designed as a “backstop” that would “guarantee[] that a simple means of registering to vote in federal elections will be available.” *Id.* at 12.

The Court emphasized the narrow reach of its preemption holding, declaring that the NVRA does not “preclude States from denying registration based on information in their possession establishing the applicant's *ineligibility*.” *Id.* at 15 (cleaned up) (emphasis added). In particular, *Inter Tribal*

concluded that the NVRA does *not* preempt State laws establishing voting qualifications for congressional elections. *Id.* at 16–17. If the NVRA *did* preempt State voter qualification laws, the Court reasoned, it would “raise serious constitutional doubts” about the NVRA. *Id.* at 17.

But “[h]appily,” the Court noted in *Inter Tribal*, it was “spared the necessity” of invalidating the NVRA on constitutional grounds because it “provide[d] another means by which Arizona may obtain information needed for enforcement” of its DPOC law. *Id.* at 18. Specifically, the Court observed that the NVRA allows States to request alteration of the Federal Form by the federal Election Assistance Commission (“EAC”) when it is needed to enforce State qualification laws. *Id.* at 19. Arizona had already made such a request, the Court acknowledged, but the EAC split evenly on adding the requested DPOC requirement to Arizona’s version of the Federal Form, and Arizona failed to seek judicial review of the EAC’s decision. *Id.* *Inter Tribal* held that “[s]hould the EAC’s inaction persist,” Arizona could seek review from a federal court to determine whether “a mere oath [of citizenship in the Federal Form] will not suffice to effectuate its citizenship requirement and that the *EAC is therefore under a nondiscretionary duty to include Arizona’s [DPOC] requirement on the Federal Form.*” *Id.* at 20 (emphasis added). In this way, the Court reasoned, the NVRA provided an “alternative means of enforcing [the State’s] constitutional power to determine voting qualifications,” thereby avoiding the need for the Court to decide the NVRA’s constitutionality to resolve the case. *Id.* at 19.

Instead of pursuing that path, Arizona chose to enact the laws at issue here. Thus, if the Ninth Circuit is correct—that Arizona’s qualifications laws are preempted by the NVRA—the constitutional concerns about the NVRA cannot be avoided. Unlike in *Inter Tribal*, Arizona cannot appeal to the EAC because the laws being challenged here require only three things, all of which lie beyond the EAC’s jurisdiction: (1) voters using the *State Form* (not the Federal Form) must provide DPOC, Ariz. Rev. Stat. §§ 16-121.01(C), 16-166(F); (2) State election officials must conduct periodic review and removal of noncitizens who are ineligible to be on its voter registration rolls, Ariz. Rev. Stat. §§ 16-165(A)(10), (G)–(K); and (3) a Federal Form voter who, after being notified that his citizenship cannot be verified, “will not be qualified to vote in a *presidential election or by mail*...in any election until satisfactory evidence of citizenship is provided.” Ariz. Rev. Stat. § 16-121.01(E); *id.* at § 16-127(A)(1)–(2).

Here, allowing the NVRA to preempt Arizona’s laws would prevent Arizona from applying its own *qualifications* for its elections, from obtaining evidence bearing on those qualifications, and from maintaining a lawful voter roll. The NVRA contains no “unmistakably clear” statement that Congress intended to decide for itself who qualifies as an Arizona voter or Elector, or to forbid Arizona from verifying that its qualifications are satisfied. Indeed, if the NVRA did preempt States’ voter qualifications rules (or their ability to enforce them), it would raise a “serious doubt” about the NVRA’s constitutionality, and it is a “cardinal principle” that a court must “first ascertain whether a construction of the statute is

fairly possible by which the [constitutional] question may be avoided.” *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

The canon of constitutional avoidance is especially important in this case. As *Inter Tribal* noted it would raise “serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications.” *Inter Tribal*, 570 U.S. at 17. That is the case here. If the NVRA preempts the laws at issue here, Arizona (and every other State) will be powerless to “obtain[] the information necessary to enforce its voter qualifications.” *Id.* Such a broad construction of the NVRA would obliterate States’ authority to establish (and enforce) voter qualifications and render mere surplusage the Constitution’s careful division of Federal and State power over elections via the Qualifications Clause, the Electors Clause, and the Elections Clause. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the Constitution is intended to be without effect.”).

III. The Federalism Canon Requires That the Court Reverse the Ninth Circuit’s Determination that the NVRA Preempts States’ Voter Qualification Laws

Even assuming *arguendo* that the Constitution would permit Congress to preempt States’ voter qualifications laws, the federalism canon requires this Court to reverse the Ninth Circuit’s holding that the

NVRA preempts such laws because, unlike in *Inter Tribal*, Congress has not made its intent to preempt unmistakably clear. See, e.g., *Learning Resources v. Trump*, 607 U.S. 229, 275 (2026) (Gorsuch, J., concurring) (using the “federalism canon” nomenclature); *Med. Marijuana, Inc. v. Horn*, 604 U.S. 593, 635 (2025) (Kavanaugh, J., dissenting) (same).

In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), this Court reaffirmed that a “fundamental principle” of the Constitution is that it established a “system of dual sovereignty between the States and the Federal Government.” *Id.* at 457. To preserve that dual sovereignty, *Gregory* held that whenever a federal law “would upset the usual constitutional balance of federal and state powers,” it is “incumbent upon the federal courts to be certain of Congress’ intent before finding that federal law overrides” that balance. *Id.* at 460 (citation omitted). The Court thus will not construe federal law to “pre-empt the historic powers of the States” absent an “unmistakably clear” statement in the statute evincing Congress’s intent to do so. *Id.* at 460–61 (citation omitted). The federalism canon is a “well-established...background principle” of statutory construction that is routinely applied to federal laws regulating areas of traditional state authority. *Bond v. United States*, 572 U.S. 844, 858 (2014) (citing cases). The Canon helps reinforce “basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute.” *Id.* at 859.

Arizona’s authority to define (and enforce) the qualifications of its electorate is precisely the kind of

“historic power[] of the States” that cannot be preempted absent an “unmistakably clear” statement from Congress. *Gregory*, 501 U.S. at 460–61; *see, e.g.*, THE FEDERALIST NO. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961) (“It was incumbent on the convention...to define and establish this right [of suffrage] in the Constitution. To have left it open for the occasional regulation of Congress would have been improper”); *Mitchell*, 400 U.S. at 125 (“It is a plain fact of history that the Framers never imagined that the national Congress would set voter qualifications for voters in every election from President to local constable or village alderman”).

Inter Tribal declined to apply the federalism canon, but for reasons that are inapposite here. It held that “there is good reason for treating Elections Clause legislation differently” because “when Congress acts under that constitutional provision,” the “assumption that Congress is reluctant to pre-empt does not hold[.]” *Inter Tribal*, 570 U.S. at 14. In that specific context, the Court reasoned, the “federalism concerns underlying the presumption [against preempting areas traditionally regulated by the States] are somewhat weaker” because “States’ role in regulating congressional elections—while weighty and deserving of respect—has always existed subject to the express qualification that it ‘terminates according to federal law’” as provided in the Elections Clause. *Id.* at 14–15 (quoting *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 347 (2001)). In other words, because the Elections Clause expressly “empowers Congress to ‘make or alter’ state election regulations” relating to time, place, or manner, it “*necessarily* displaces some

element of a pre-existing legal regime erected by the States.” *Id.* at 14 (emphasis in original).

Inter Tribal thus declined to apply the federalism canon in the narrow context of the *Elections Clause*, analyzed in isolation. Specifically, because Congress had express authority “under *that constitutional provision*” to preempt State laws regarding the “Times, Places, and Manner” of holding congressional elections, there was no need to invoke the federalism canon. *Id.* at 14 (emphasis added). Thus, because Arizona’s DPOC requirement for the Federal Form conflicted with the NVRA’s clear command that a State must “accept the Federal Form as a complete and sufficient registration application,” it was preempted by the authority of the Elections Clause. *Id.* at 9, 10–15.

Here, by contrast, there is no unmistakably clear statement in the NVRA that Congress intended to preempt States’ traditional authority to establish DPOC requirements for registration using their *State Forms* and enforce their DPOC laws effectively. Indeed, *Inter Tribal* carefully limited its preemption holding—and its concomitant avoidance of the federalism canon—to situations where Congress, acting under the Elections Clause, regulates the “manner” of congressional elections by requiring States to “accept and use” the Federal Form. *Id.* at 15 (“We conclude that...a state-imposed requirement of evidence of citizenship not required by the Federal Form is ‘inconsistent with’ the NVRA’s mandate that States ‘accept and use’ the Federal Form.”). At the same time, however, the Court made clear that States

can continue to use their own State Forms that “may require information that the Federal Form does not,” including “proof-of-citizenship.” *Id.* at 12. And the Court reaffirmed that “the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.” *Id.* at 16 (emphasis in original). *Inter Tribal* never held that the Elections Clause trumped the Qualifications Clause or the Electors Clause; neither of those provisions informed its narrow holding.

More importantly, *Inter Tribal* “avoid[ed] serious constitutional doubt” about the NVRA by directing Arizona to “request anew that the EAC include such a [citizenship] requirement among the Federal Form’s state-specific instructions,” and if unsuccessful, “seek judicial review of the EAC’s decision under the Administrative Procedure Act.” *Id.* at 20. In this way, Arizona could seek to vindicate its authority under the Qualifications Clause *as to the Federal Form*. Because Arizona had an unpursued avenue to vindicate its authority under the Qualifications Clause to set and enforce voter qualifications, the Court was able to punt “serious constitutional doubts” about the NVRA and reach a narrow preemption holding. *Id.* at 19.

Here, Arizona law requires DPOC to register to vote using Arizona’s *State Form*, not the Federal Form. Ariz. Rev. Stat. §§ 16-121.01(A), (C); 16-166(F). That distinction alone puts this case on an entirely different constitutional footing than *Inter Tribal* because not just the Elections Clause alone, but also the Qualifications Clause, is directly at issue. The other two challenged provisions of Arizona law do not

implicate only the Elections Clause: They implicate both the States' authority to determine qualifications of presidential Electors under the Electors Clause, and the States' authority to enforce their citizen-only qualification rule under the Qualifications Clause. *See id.* §§ 16-121.01(D)–(E), 16-127(A)(1)–(2) (Federal Form applicants whose citizenship cannot be verified remain eligible for federal-only registration but may not vote for presidential electors or by mail until satisfactory proof of citizenship is provided); *id.* § 16-165(A)(10), (G)–(K) (requiring recurring database checks to ensure eligibility to vote and permitting cancellation of registration only after officials obtain and confirm non-citizenship, give notice, and allow time to provide DPOC).

Because of these fundamental differences, *Inter Tribal's* avoidance of the federalism canon is not binding here. *Amici* urge the Court to invoke the canon to protect States' historical, constitutionally granted authority to determine and enforce voter qualifications via both the Qualifications Clause and the Electors Clause.

IV. States Have a Compelling Interest in Preventing Voter Fraud and Arizona's Laws Reasonably Serve that Interest

As of July 2023, Arizona had 4,198,726 registered voters, 19,439 of whom were active Federal-Only voters who had not provided DPOC. Pet. App. 190a. Arizona's November 2020 presidential election was decided by only 10,457 votes. *Id.*

Those figures do not establish that any noncitizen voters voted in Arizona’s recent election; the district court found that noncitizen voting in Arizona is “rare.” Pet. App. 229a. But they do explain why Arizona enacted measures designed to verify eligibility before any ballot is cast and to protect confidence in elections.

“There is no question about the legitimacy and importance of the State’s interest in counting only the votes of eligible voters” and its “interest in ordering administration and accurate recordkeeping” likewise “provides a sufficient justification for carefully identifying all voters participating in the election process.” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (plurality opinion). Indeed, the States’ interest in preventing voter fraud is “compelling.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam); see *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) (same). And “it should go without saying that 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 Comm.*, 594 U.S. 647, 686 (2021); accord *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (“Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively”).

States also have an independent interest in protecting “public confidence in the integrity of the electoral process...because it encourages citizen participation in the democratic process.” *Crawford*, 553 U.S. at 197. “Voter fraud drives honest citizens out

of the democratic process and breeds distrust of our government” because “[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.” *Purcell*, 549 U.S. at 4. Public confidence in the integrity of our elections is therefore “essential to the functioning of our participatory democracy.” *Id.*; see also *Brnovich*, 594 U.S. at 672 (“Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome.”).

A. What Arizona’s Laws Do

First, Arizona’s DPOC/DPOR law preserves both the State Form and Federal Form voter registration pathways. State Form applicants must provide DPOR and DPOC under Ariz. Rev. Stat. §§ 16-121.01(A), (C), 16-123, 16-166(F). The State Form thus supplies information Arizona has chosen to administer its own elections and to identify applicants eligible for a full ballot. Federal Form applicants remain able to register to vote without DPOC or DPOR. If the State cannot verify citizenship using available resources, the applicant is registered as a Federal-Only Voter, and they may vote in federal elections in person, but not in presidential elections or by mail until satisfactory evidence of citizenship is provided. Ariz. Rev. Stat. §§ 16-121.01(D)–(E), 16-127(A)(1)–(2).

These restrictions on federal-only voters are both logical and constitutional. Not allowing individuals who fail to provide DPOC to vote in presidential elections is permissible under the Electors Clause, which gives State legislatures “plenary power” over

the “manner” of appointing Electors. *McPherson*, 146 U.S. at 35; *accord Bush*, 531 U.S. at 104. And not allowing such individuals to vote by mail is a logical way to further the State’s “compelling interest” in preventing voter fraud, *Purcell*, 549 U.S. at 4, and in enforcing its exclusive constitutional authority to establish and enforce voter qualification criteria. *Inter Tribal*, 570 U.S. at 17. As this Court and others have acknowledged, voting by mail is particularly susceptible to fraud. *Brnovich*, 594 U.S. at 685; *see also Crawford*, 553 U.S. at 195–96 (noting one State’s experience with fraudulent voting involved “absentee ballots and not in-person fraud”); *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004) (Posner, J.) (“Voting fraud is a serious problem in U.S. elections...and it is facilitated by absentee voting...In this respect absentee voting is to voting in person as a take-home exam is to a proctored one.”).

Second, Arizona’s law requires recurring database checks and permits cancellation of registration only after officials obtain and confirm non-citizenship, give notice, and allow time to provide DPOC. Ariz. Rev. Stat. § 16-165(A)(10), (G)–(K). There are extensive resources available to States to help verify an individual’s citizenship, and Arizona’s law requires its State election officials to compare its registration information against all of them, including the Arizona Department of Transportation driver’s license and identification card databases; the Social Security Administration’s databases; the U.S. Citizen and Immigration Services’ Systematic Alien Verification for Entitlements (“SAVE”) database; the National Association for Public Health Statistics and

Information Systems (“NAPHSIS”) database; and any other State, city, town, county or federal database to which the official has access. Ariz. Rev. Stat. § 16-121.01(D). If a Federal Form is received without satisfactory evidence of citizenship, the individual must be given notice of such missing information and state officials “shall use all available resources to verify the citizenship status of the applicant,” including all of the databases listed above. *Id.*

Arizona’s law likewise requires recurrent monthly checks of voter registration lists against available death, driver’s license, and SSA databases. *Id.* at § 16-165(E), (G), (H). If an election official has reason to believe that a registered individual is not a U.S. citizen, he is obligated to query the SAVE and NAPHSIS databases, if accessible, to help verify citizenship status. *Id.* at § 16-165(I), (J). If an official obtains and confirms information that a registrant is a noncitizen, the county recorder must give written notice by forwardable mail, advise that the individual has thirty-five days to provide DPOC, and include a list of documents that the individual may provide (along with a postage prepaid preaddressed return envelope) before registration may be cancelled. *Id.* § 16-165(A)(10).

At each stage, therefore, Arizona’s law includes a path for correction of mistakes. Applicants receive prompt notice of missing information and an opportunity to cure; registrants receive notice, a list of acceptable documents, and time to respond; and cancellation follows only after confirmation and failure to respond.

**B. Arizona’s Burden of Production Is
Reasonable and Based on Longstanding
Tradition**

Arizona’s law does not make an applicant bear the ultimate burden of persuasion. Instead, it assigns a limited burden of production—the obligation to come forward with evidence—while the State retains responsibility for identifying a reliable predicate, checking available databases, providing notice, and deciding whether the predicate is confirmed. *See* Ariz. Rev. Stat. § 16-165(A)(10) (cancellation of registration allowed only after “the county recorder obtains information...and confirms that the person registered is not a United States citizen” and after notice and opportunity to respond); *id.* at § 16-165(G), (H), (J) (requiring official to check specified databases as part of due diligence obligation); *id.* at § 16-121.01(A)–(B) (establishing a presumption of proper registration rebuttable only by “clear and convincing evidence”).

Placing a burden of production on an applicant is reasonable because the relevant fact—citizenship status—is within their knowledge. An applicant is best positioned to identify and produce documents showing whether he was born a citizen, naturalized, or holds a passport or other recognized document. The common law has long placed the burden of production on the party with superior access to proof. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 626 (1993); *Alaska Dep’t of Env’t Conservation v. EPA*, 540 U.S. 461, 494 n.17 (2004); *Campbell v. United States*, 365 U.S. 85, 96 (1961) (the “ordinary rule” is to place the burden of the

party with peculiar knowledge of the facts); *see also* WRIGHT & MILLER, FED. PRAC. & PROC. § 5122 (among other things, courts “look to see whether one party has superior access to the evidence needed to prove the fact” when assigning burden of proof) (citing cases).

The State, by contrast, would have difficulty proving a negative—i.e., that an individual is *not* a citizen—from dispersed and imperfect records. In such instances, it is a “general rule of evidence” that when “the subject matter of a negative averment” (such as “X is not a U.S. citizen”) “lies peculiarly within the knowledge” of one party, that averment will be “taken as true, unless disproved by that party.” *United States v. Denver & RGR Co.*, 191 U.S. 84, 92 (1903) (citation omitted); *accord Selma, R. & D.R. Co. v. United States*, 139 U.S. 560, 567–68 (1891).

In *Morrison v. California*, 291 U.S. 82 (1934), this Court considered a State criminal law that prohibited noncitizens from owning land. The State law declared that the government must allege “the alienage and ineligibility to United States citizenship of such defendant,” at which point “the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant.” *Id.* at 84. The Court held that the “decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant.” *Id.* at 88. The Court stated that “upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden [onto defendant] will be found to be an aid to the accuser [i.e., the government] without subjecting the

accused to hardship or oppression.” *Id.* at 89 (citing 5 WIGMORE, EVIDENCE §§ 2486, 2512). When the issue to be proved is citizenship, the Court held, “[o]ne who lays claim to it as his, and does this in justification or excuse of an act otherwise illegal, may fairly be called upon to prove his title good.” *Id.*; accord *Tot v. United States*, 319 U.S. 463, 469–70 (1943) (criminal defendant may bear burden of production “where the defendant has more convenient access to the proof, and requiring him to go forward with proof will not subject him to unfairness or hardship.”).

Arizona’s law follows this longstanding common law. A would-be voter, as the party with peculiar knowledge of his own citizenship, is asked to supply documentary proof of the same. Ariz. Rev. Stat. §§ 16-121.01(C); 16-166(F). If he does not, and used the State Form, he is not registered but notified of and prompted to submit the missing information. *Id.* §§ 16-121.01(C), 16-134(B). If he does not, and used the Federal Form, then assuming the election official does not “match[] the applicant with information that [he] is not a United States citizen,” he is registered as a federal-only voter subject to the presidential election and mail-in voting restrictions. *See id.* § 16-121.01(D)–(E). In the latter event, the election official “shall notify the applicant that [she] could not verify that the applicant is a United States citizen” and advise him that the above restrictions will apply until the registrant comes forward with DPOC. *Id.* § 16-121.01(E).

Sensibly enough, once a voter has gone through the above process and successfully registered to vote, he

enjoys a presumption of proper registration. Ariz. Rev. Stat. § 16-121.01(A)–(B). At that point, election officials must obtain and confirm evidence of non-citizenship before requiring a registered voter to come forward with DPOC to remain on the rolls. Ariz. Rev. Stat. § 16-165(A)(10). As in the criminal context, placing the burden on a voter to proffer DPOC, after the State’s own investigation flags that individual as a noncitizen, will not subject that individual to “hardship or oppression.” *Morrison*, 291 U.S. at 89.

Indeed, Arizona’s law is generous to the individual asked to provide DPOC, allowing multiple types of documents to establish “satisfactory evidence of citizenship,” including a driver’s license or state identification card issued after October 1, 1996 (if it indicates that the applicant provided satisfactory proof of citizenship), a birth certificate, a passport, naturalization documents, any document or method of proof established by the federal Immigration and Reform Control Act of 1986, or various forms of tribal identification. Ariz. Rev. Stat. § 16-166(F). The applicant also has a prompt opportunity to cure omissions before an election and a separate Federal Form pathway for federal-only registration. *See id.* §§ 16-121.01(D)–(E), 16-134(B).

The extensive protections provided by Arizona’s law explain why *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020), does not control. *See id.* at 1127–37. *Fish* involved a different NVRA provision and a trial record showing more than 31,000 blocked registrations. *Id.* at 1127. Here, by contrast, the record does not establish that Arizona’s system will deny or cancel registration

of eligible voters who lack every form of DPOC; Federal-only voters may still register and vote without DPOC and their registration may be cancelled only after confirmed non-citizenship, notice, and failure to respond. *Cf. id.* at 1129 (noting lack of “safety valve” or “backup option for [plaintiffs] to cast votes”).

In short, Arizona’s laws are carefully tailored; they seek information before an ineligible vote is cast, preserve a registration route via the Federal Form, permit in-person voting where DPOC has not been provided, and give notice and an opportunity to cure. The Ninth Circuit erred by treating that approach as a categorical disenfranchisement. Arizona has chosen a reasonable evidentiary arrangement by placing the burden to produce proof of U.S. citizenship on the person with superior access to documents demonstrating citizenship status. That arrangement allows Arizona to enforce its voter qualification laws in a meaningful and reasonable way.

C. The NVRA Does Not Conflict with Arizona’s Laws

Neither the NVRA’s text nor its stated purposes conflict with Arizona’s laws. NVRA Section 9 permits the Federal Form to “require only such identifying information...as is necessary to enable the appropriate State election official to assess the eligibility of the applicant[.]” 52 U.S.C. § 20508(b)(1). As Judge Bumatay correctly pointed out, the use of “minimum amount of information necessary” elsewhere in the NVRA means that “there’s no reason to read ‘necessary’ information as meaning only the

bare minimum amount of information,” as the Ninth Circuit majority did. Pet. App. 111a. But more fundamentally, just because the NVRA uses the term “necessary” does not mean that it sets the standard for its own constitutionality. That would be fatally circular. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (“Congress does not enforce a constitutional right by changing what the right is.”). Because *Inter Tribal* identified a serious constitutional doubt arising from potential infringement of States’ constitutional authority to set voter qualifications, what is “necessary” for a State to enforce those qualifications is a matter of *constitutional*, not statutory interpretation.

“Necessary” must be interpreted not on a blank slate but consistently with its use in other constitutional contexts and with the Court’s other election-related jurisprudence. The Court has long held that the word “necessary,” as used in the Necessary and Proper Clause, means “appropriate” or “conducive” to exercising the power in question rather than “*absolutely* necessary.” *United States v. Comstock*, 560 U.S. 126, 134 (2010) (quoting *M’Culloch v. Maryland*, 17 U.S. 316 (1819)). This broad construction of necessary has been adopted in several cases addressing States’ Elections Clause authority. *See, e.g., Smiley v. Holm*, 285 U.S. 355, 366 (1932) (Elections Clause gives States authority to enact “numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved”); *Roudebush v. Hartke*, 405 U.S. 15, 24–25 (1972) (upholding Indiana’s recount measure because the

State “found...that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount”).

The Court’s longstanding election integrity jurisprudence, discussed at length in section IV, *supra*, reinforces that broad definition of necessity. As the Court has held time and again, States may prophylactically regulate voting to address their important interests in election integrity and voter confidence without an empirical showing that the contemplated harm is occurring or would occur without the measure in question. *See supra* § IV.

The Ninth Circuit did not even analyze whether Arizona’s documentary requirements were necessary to enforce its qualifications with respect to mail-in voting. Its analysis as to proof of residence and citizenship for state-form registration was deficient because, selectively relying on dictionary definitions, it interpreted “necessary” as “essential,” which the foregoing analysis demonstrates is overly restrictive. *See* Pet. App. 37a, 50a. Had it adopted the correct interpretation of “necessary,” it would have concluded that requiring registrants to provide additional documentation (1) before they could vote by mail, a method inherently more susceptible to fraud; (2) when registering to vote for the first time as opposed to confirming continued eligibility; and (3) to backstop a simple checkbox attestation of citizenship are all “appropriate” and “conducive” to enforcing Arizona’s voter qualifications, *Comstock*, 560 U.S. at 134, and thus both “necessary to enable the appropriate State election official to assess the eligibility of the

applicant” to vote and consistent with NVRA Section 9. 52 U.S.C. § 20508(b)(1).

Nor does the 90-day quiet period in NVRA Section 8(c)(2)(A) require Arizona to retain a person who was never eligible to register. That provision requires a State to “complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters” from the State’s voter registration list. 52 U.S.C. § 20507(c)(2)(A). Read with Section 8(a)(1), which requires registration only of “eligible applicant[s],” *id.* at § 20507(a)(1), and with the Act’s express purpose of “protect[ing] the integrity of the electoral process” and “ensur[ing] that accurate and current voter registration rolls are maintained,” *id.* § 20501(b)(3)–(4), the better reading is that the 90-day quiet period protects *eligible voters* and persons who once qualified but may be erroneously removed, not persons who were *never eligible* to vote because they were not citizens. *See* Pet. App. 120a–126a. Otherwise, the statute would convert a safeguard against erroneous late purges into a prohibition on removing noncitizens, minors, and other persons categorically ineligible to vote. That result is both anomalous and constitutionally doubtful.

NVRA Section 8(b) does not change that conclusion. It requires list-maintenance programs to be uniform, nondiscriminatory, and compliant with the Voting Rights Act; it does not prohibit a State from verifying citizenship or require officials to ignore information in their own records. 52 U.S.C. § 20507(b)(1). Arizona’s recurring database checks,

confirmation requirement, notice, and cure procedures are consistent with those commands. The Ninth Circuit therefore had no basis to invalidate them categorically.

NVRA Section 6 likewise does not conflict with Arizona law. It requires each State to “accept and use” the Federal Form “for the registration of voters in elections for Federal office.” 52 U.S.C. § 20505(a)(1). *Inter Tribal* held that this language prevents Arizona from demanding DPOC as an additional condition of registering a Federal Form applicant. 570 U.S. at 9–15, 20. But *Inter Tribal* did not hold that the Federal Form displaces the State Form, forbids a State from obtaining information after registration, or dictates the manner in which a registered voter must cast a ballot. To the contrary, the Court recognized that State Forms “may require information the Federal Form does not.” *Id.* at 12.

That distinction resolves the State Form and mail-voting provisions. Arizona accepts and uses the Federal Form; it does not impose Arizona’s DPOC requirement on that form as a condition of *federal-only registration*. It uses the State Form to administer state elections and to identify voters eligible for a full ballot. And for a federal-only voter who has not provided DPOC, Ariz. Rev. Stat. § 16-127(A)(1)–(2) directs the voter to vote in person rather than by mail and withholds participation in presidential elections until citizenship is satisfactorily established. Those are qualification-enforcement and election-administration rules, not a refusal to accept the Federal Form.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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SEPTEMBER 4, 2026