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 FOR RESPONDENTS THE DEMOCRATIC NATIONAL COMMITTEE AND THE ARIZONA DEMOCRATIC PARTY

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QUESTION ADDRESSED IN THIS BRIEF

Whether the National Voter Registration Act's ban on a State's systematic removal of "the names of ineligible voters" from the voting rolls fewer than 90 days before a federal election (52 U.S.C. §20507(c)(2)(A)) preempts Arizona's mandate for systematic removals during that period of persons that officials claim to have "confirm[ed]" (Ariz. Rev. Stat. §16-165(10)), including by reference to various databases, are not U.S. citizens.

PARTIES TO THE PROCEEDING

Petitioner is the Republican National Committee. It was an intervenor-defendant in the district court. In the court of appeals, it was an appellant in Nos. 24-3188 and 24-3559 and an appellee in No. 24-4029.

Respondents Mi Familia Vota; Voto Latino; Living United for Change in Arizona; League of United Latin American Citizens Arizona; Arizona Students' Association; ADRC Action; Inter Tribal Council of Arizona, Inc.; San Carlos Apache Tribe; Arizona Coalition for Change; Poder Latinx; Chicanos Por La Causa; Chicanos Por La Causa Action Fund; the Democratic National Committee; the Arizona Democratic Party; Arizona Asian American Native Hawaiian and Pacific Islander for Equity Coalition; Promise Arizona; Southwest Voter Registration Education Project; Tohono O'odham Nation; Gila River Indian Community; Keanu Stevens; Alanna Siquieros; and LaDonna Jacket were plaintiffs in the district court and appellees in the court of appeals. Promise Arizona and Southwest Voter Registration Education Project were also cross-appellants in the court of appeals, challenging a ruling that is not at issue here.

The United States (a respondent here) was a plaintiff in the district court proceedings and an appellee in the court of appeals.

Respondents the State of Arizona, the Arizona Secretary of State, the Attorney General of Arizona, Arizona Department of Transportation Director Jennifer Toth, the Apache County Recorder, the Cochise County Recorder, the Coconino County Recorder, the Gila County Recorder, the Graham County Recorder, the Greenlee County Recorder, the La Paz County Recorder, the Maricopa County Recorder, the Mohave

County Recorder, the Navajo County Recorder, the Pima County Recorder, the Pinal County Recorder, the Santa Cruz County Recorder, the Yavapai County Recorder, and the Yuma County Recorder were defendants in the district court and appellees in the court of appeals. The State of Arizona and the Attorney General of Arizona were also appellants in the court of appeals (No. 24-3559), challenging a ruling that is not at issue here.

Respondents Warren Petersen, in his official capacity as the President of the Arizona Senate, and Steve Montenegro, in his official capacity as the Speaker of the Arizona House of Representatives, were intervenor-defendants in the district court and appellants in the court of appeals proceedings.

RULE 29.6 STATEMENT

Neither the Democratic National Committee nor the Arizona Democratic Party has a parent corporation, and neither organization has any stock, meaning that no publicly held corporation owns 10 percent or more of either organization's stock.

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INTRODUCTION

Congress enacted the National Voter Registration Act ("NVRA") to regulate voter registration for federal elections, after finding that "unfair registration laws and procedures can have a direct and damaging effect on voter participation." 52 U.S.C. §20501(a)(3). Among the safeguards Congress enacted, the NVRA prohibits States from operating most programs "to systematically remove the names of ineligible voters from the official lists of eligible voters" less than 90 days before a regular federal election. *Id.* §20507(c)(2)(A). Outside this period, States retain wide latitude to systematically remove voters. States may also remove voters less than 90 days before a federal election, if they do so on an individualized basis. Congress thus balanced the need for States to remove ineligible voters with the risk that a systematic-removal program would ensnare *eligible* voters, recognizing that any voters wrongly removed close to an election would likely not be able to correct the error in time to cast a ballot. In other words, those people would be denied their fundamental constitutional right to vote.

Arizona House Bill ("H.B.") 2243 defies this considered congressional balance, directing precisely what the 90-day provision prohibits: the systematic cancellation of registrations, including through database matching, of persons who election officials claim to have "confirm[ed]" are ineligible voters less than 90 days before a federal election. The Ninth Circuit recognized that this part of H.B. 2243 conflicts with and hence is preempted by the NVRA. Pet.App.45a-46a. In doing so, the court aligned with the Eleventh Circuit's decision in *Arcia* v. *Florida Secretary of State*, 772 F.3d 1335 (11th Cir.

2014), regarding a materially similar database-matching program.

The Republican National Committee ("RNC") and the United States resist this straightforward application of the 90-day provision. They do not dispute, however, that Arizona's removal program meets each of the statute's key terms: It is systematic, its purpose is to cancel registrations on the ground that registered individuals are allegedly ineligible to vote, and but for the decisions below it would operate less than 90 days before a federal election. Indeed, the United States *concedes* (Br.32) that the plain statutory text encompasses programs targeting persons who election officials claim to have confirmed, including by reference to various databases, are noncitizens. Nonetheless, the RNC and the United States argue that the statute's words do not mean what they say.

Specifically, the RNC and the United States contend that the 90-day provision does not apply to noncitizens because noncitizens are not (the RNC and the United States say) "ineligible voters" under the NVRA—even though noncitizens are ineligible to vote. In lieu of the term's plain meaning, the RNC and the United States contend that when Congress said "ineligible voters," it really meant voters who were *once* eligible to vote but are *no longer* eligible. To construct their desired meaning, the RNC and the United States employ a convoluted multistep reading. But the plain text instead mandates the commonsense conclusion that noncitizens, who everyone agrees are ineligible to vote, are "ineligible voters" under the statute. Congress, moreover, plainly knew how to exempt certain individuals from the 90-day provision, because it created express exceptions for removals based on an individual's request, death, criminal conviction, and mental incapacity, 52 U.S.C.

§20507(c)(2)(B). There is no similar exception for citizenship-based removals, confirming that the RNC's and the United States' atextual demand for such an exception should be rejected.

Perhaps recognizing this, the RNC and the United States turn to a consequentialist argument, insisting that the decision below leaves States powerless to remove noncitizens from their rolls at any time. That too is wrong. The Ninth Circuit's reading of the 90-day provision in no way bars the removal of noncitizens, either on an individual basis at any time or through a systematic program at least 90 days before a federal election. Under that reading, all Arizona may not do is run a systematic purge of persons who election officials claim to have "confirm[ed]" are noncitizens (Ariz. Rev. Stat. §16-165(A)(10)) from its voter rolls less than 90 days before a federal election. That prohibition serves the critical role of protecting *eligible* Americans from erroneous last-minute removals that cannot be corrected in time to avoid denying Americans their fundamental right to vote. (Erroneous removals unquestionably occur—far more frequently than voting by noncitizens, in fact—and Arizona's formal requirement to "confirm" noncitizenship before a removal, *id.*, does not foreclose erroneous removals, especially when "confirm[ation]" is by reference to available databases.)

In fact, the specter of noncitizens who cannot be removed exists only under the RNC's and the United States' reading. It arises from their premise that an "ineligible voter" for purposes of the 90-day provision must also be a proper "registrant," a term found elsewhere in the NVRA and one that the RNC and the United States say narrows the scope of "ineligible voters" under the 90-day provision. The Ninth Circuit did not adopt that premise. The RNC and the United States cannot

persuasively challenge the decision below by ascribing consequences that follow only from *their* (atextual) reading.

Finally, contrary to the RNC's and the United States' contention, the 90-day provision is a limit on the timing and method of list maintenance, not on who may vote. The NVRA leaves States free to set voter qualifications and to enforce them. And Congress's judgment about when bulk removals may proceed falls well within its constitutional authority to regulate the manner of federal elections. Congress drew a line to keep eligible Americans from losing their fundamental right to vote due to errors caught too late. H.B. 2243 crosses that line and thus is preempted.

STATUTORY PROVISIONS INVOLVED

Section 8 of the NVRA, codified at 52 U.S.C. §20507, provides in part as follows:

Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall–

(1) ensure that any eligible applicant is registered to vote in an election–

> (A) in the case of registration with a motor vehicle application under section 20504 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 20505 of this title, if the valid voter registration form of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except–

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of–

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d);

(5) inform applicants under sections 20504, 20505, and 20506 of this title of–

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office–

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 …; and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual–

(A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then

(B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) by establishing a program under which–

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that–

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) to confirm the change of address.

(2) (A) A State shall 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 official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude–

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or

(ii) correction of registration records pursuant to this chapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant–

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail registration under subsection (a)(1)(B). If the card

> is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.
>
> (B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

STATEMENT

A. Statutory Background

The NVRA regulates both voter registration for federal elections and States' maintenance of their voter-registration lists. Of central relevance here, the NVRA's 90-day provision provides that "State[s] shall 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 official lists of eligible voters." 52 U.S.C. §20507(c)(2)(A). The statute creates exceptions to this bar for removals based on a voter's death, request, or (as provided by state law) criminal conviction or mental incapacity. *Id.* §20507(c)(2)(B).

In 2022, Arizona enacted H.B. 2243, which requires officials to check available databases periodically for information about citizenship and to cancel the registrations of persons who election officials say they have "confirm[ed]," including by reference to those databases, are not U.S. citizens. Ariz. Rev. Stat. §16-165(A)(10); *see also id.* §16-165(G)-(K). More specifically, the law provides that each month (to the extent practicable), officials must conduct citizenship checks of two categories of individuals. *Id.* §16-165(I). The first is "federal-only voters," meaning Arizonans who registered using the federal form without submitting documentary evidence of citizenship, and who under state law are accordingly registered to vote in federal elections only, *see* Pet.App.19a. The second category is voters who officials have "reason to believe" are not U.S. citizens. Ariz. Rev. Stat. §16-165(I). The law includes no temporal limitation on when the prescribed cancellations can occur, meaning systematic removals can continue fewer than 90 days before a regular federal election.[*]

B. Procedural Background

The Democratic National Committee ("DNC") and the Arizona Democratic Party ("ADP"), along with the United States, various civic organizations, and Native American tribes, filed eight lawsuits challenging provisions of H.B. 2243 (and H.B. 2492, *see supra* n.*) promptly after the laws' enactment. (The cases were consolidated in the district court as *Mi Familia Vota* v. *Fontes*, No. 22-cv-00509 (D. Ariz.).) As relevant here, the DNC and ADP claimed that H.B. 2243 violates the

[*] Another Arizona statute enacted earlier in 2022, H.B. 2492, also required removing alleged noncitizens from the rolls. That provision of H.B. 2492 was superseded by H.B. 2243. The arguments herein nevertheless apply equally to both laws.

NVRA by allowing—indeed, directing—systematic removals of alleged noncitizens from the voter rolls within 90 days of a federal election. Pet.App.13a, 15a.

After ruling in plaintiffs' favor on several issues at summary judgment and then conducting a two-week bench trial, the district court entered final judgment for plaintiffs on a subset of claims and permanently enjoined the enforcement of certain provisions, including H.B. 2243's systematic-removal provisions. Pet.App.427a-428a, 431a.

The laws' defenders appealed. They asked both the Ninth Circuit and this Court for a stay pending appeal of certain portions of the district court's permanent injunction, but not the bar on systematic removals of noncitizens within the 90-day period. *See* Dkt.730 at 1, *Mi Familia Vota*, 22-cv-00509 (D. Ariz. May 17, 2024); Pet.App.426a.

After briefing and oral argument, a divided Ninth Circuit panel upheld the district court's injunction of the provisions the DNC and ADP challenged, including the systematic-removal provision. The court of appeals held in pertinent part that H.B. 2243 violates the NVRA to the extent it "authorizes systematic cancellation of registrations [of persons who officials have supposedly confirmed are noncitizens] within 90 days before a federal election." Pet.App.47a. Noting both that the NVRA broadly prohibits "any" program of systematic cancellations from operating during that period, 52 U.S.C. §20507(c)(2)(A), and the absence of any textual exception related to U.S. citizenship (despite Congress's inclusion of other exceptions), the court concluded that H.B. 2243's systematic cancellation scheme—which includes no pre-election carveout—is "precisely the type of systematic cancellation program that the 90-day Provision

was meant to preclude," Pet.App.46a. The court also explained that H.B. 2243's removal program is systematic because it rests on computerized matching, specifically, a computer program known as SAVE, for "Systematic Alien Verification for Entitlements." Pet.App.45a (emphasis omitted).

Judge Bumatay dissented from this holding, among others. Pet.App.79a, 119a-127a. The Ninth Circuit subsequently denied rehearing en banc over several dissents. Pet.App.163a.

SUMMARY OF ARGUMENT

I. The plain text of the 90-day provision encompasses H.B. 2243's systematic-removal program. Congress provided in straightforward terms that States must "complete," "not later than 90 days prior to the date" of a federal election, "any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. §20507(c)(2)(A). Every element of this provision is satisfied by the mandate in H.B. 2243 that election officials periodically compare registered voters' names against state and federal databases and cancel the registrations of registered voters supposedly "confirm[ed]"—through that comparison or otherwise—as noncitizens. First (and as no party disputes), the program is systematic, because it rests on computerized database matching rather than individualized investigation. Second (and again as no party disputes), it operates less than 90 days before a federal election, because H.B. 2243 imposes no temporal limit on cancellations. Third, it is a "program" (no party disputes that either) and thus is covered by the provision's reference to "any program." And fourth, its purpose is to remove from the rolls the names of voters who officials have supposedly "confirm[ed]" (Ariz. Rev.

Stat. §16-165(A)(10)), including by reference to various databases, are ineligible because they are not U.S. citizens. That such removals are subject to the 90-day provision is confirmed by the provision's enumerated exceptions, which do not include removals of noncitizens.

II.A. The principal response the RNC and the United States offer is that noncitizens are not "ineligible voters" within the meaning of the 90-day provision. But that term means exactly what it says: those who are not eligible to vote. That, everyone agrees, includes noncitizens. The RNC's and the United States' contrary reading hinges primarily on a term ("registrant") that does not even appear in the 90-day provision: They construe "registrant" in a different NVRA provision as meaning only "*properly registered* registrants," and they then leap to the conclusion that "ineligible voters" in the 90-day provision must likewise be limited to "*properly registered* ineligible voters," U.S. Br.35, *i.e.*, people who were eligible to vote when they registered and later became ineligible. But the premise of their argument—that "ineligible voters" under the 90-day provision are a subset of "registrants"—is baseless; again, "registrant" is nowhere in the 90-day provision, and nothing in the NVRA ties the two terms together. Nor is it hard to explain why reading "registrant" as implicitly limited to "*properly registered* registrants" does not require also reading "ineligible voters" as implicitly limited to "*properly registered* ineligible voters," contrary to the United States' assertion (Br.39) that "no explanation [for that distinction] is possible." Confining "registrant" to people who properly attained the status of "registrant" simply limits that term to the genuine instances of the status it names. By contrast, confining "ineligible voters" to people who were once (but are no longer) eligible to vote would not limit the term "ineligible voters"

to genuine instances of ineligibility; to the contrary, it would exclude the persons "ineligible voters" most obviously describes: those who were *never* eligible.

B. The Ninth Circuit's (and the DNC's and the ADP's) reading of the 90-day provision does not immunize noncitizens from removal, as the RNC and the United States assert. Indeed, no court applying that reading has suggested otherwise. The contrary argument rests on a non sequitur: that all "ineligible voters" under the 90-day provision must also be "registrants" under 52 U.S.C. §20507(a)(3), which restricts the removal of "registrants" to enumerated circumstances not including citizenship status. But that is true only under the RNC's and the United States' premise that "ineligible voters" are a subset of "registrants"—a premise the text does not support. The inference does not follow from the ordinary meaning of "ineligible voters," which is the meaning that the Court should hold Congress intended. Whether a separate provision, §20507(a)(3), permits removing a noncitizen from the rolls is, by contrast, a question about the meaning of "registrant"—and although the Court need not construe that term in this case, doing so to exclude noncitizens (and thereby permitting noncitizen removal) would be wholly consistent with the judgment below.

C. The 90-day provision's use of "any program" is not a reference to the "general program" §20507(a)(4) defines and requires. The latter provision mandates a single "general program" limited to removals for death and change of residence, while the 90-day provision reaches "any program" the purpose of which is systematic removal on *any* ground. Congress twice cross-referenced subsection (a)—the subsection that mandates the "general program"—in subsection (c), but it did *not* do so in subsection (c)(2)(A), the 90-day provision itself,

which instead refers to "any program." The RNC's reading would also make the 90-day provision's exceptions superfluous: Congress would have had no reason to make exceptions for removals based on a person's request, conviction, or incapacity, because the bar would never have reached such a person in the first place.

D. Prohibiting last-minute systematic removals is fully consistent with the NVRA's purposes. The 90-day provision exists not to protect ineligible voters (as the RNC and the United States pervasively say) but to protect *eligible* voters from *erroneous* removals discovered too late to correct without denying Americans their fundamental right to vote. And Congress had good reason to extend that protection to people who state or local officials *say* are noncitizens, as erroneous removals are far more common than voting by noncitizens. Nor was it irrational for Congress to exempt from the 90-day bar removals for death or criminal conviction but not alleged noncitizenship: Noncitizenship rarely *occurs* within 90 days of a federal election, whereas convictions and deaths regularly do so. At bottom, the RNC and the United States are simply arguing Congress should have balanced competing concerns differently. That is an argument for Congress.

E. There is no merit to amici's contention that the DNC's and the ADP's reading renders the NVRA unconstitutional (a contention the Court should not entertain in any event because it is raised only by amici). The 90-day provision does not control who is eligible to vote; it regulates how federal elections are held, including registration—an authority the Constitution's Elections Clause expressly commits to Congress. And it leaves States ample means to enforce their citizenship qualifications, both outside the 90-day provision's window and, on individualized evidence, within it.

ARGUMENT

I. H.B. 2243's Removal Program Is Preempted By The NVRA's 90-Day Provision

The NVRA's 90-day provision provides in full that:

> (A) A State shall 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 official lists of eligible voters.
>
> (B) Subparagraph (A) shall not be construed to preclude–
>
> > (i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a); or
> >
> > (ii) correction of registration records pursuant to this chapter.

52 U.S.C. §20507(c)(2). This provision "strikes a careful balance: It permits [individualized removals at any time and] systematic removal programs at any time *except* for the 90 days before an election because that is when the risk of disfranchising eligible voters is the greatest." *Arcia*, 772 F.3d at 1346.

H.B. 2243's removal program does precisely what the 90-day provision was enacted to protect against. The law directs county recorders to periodically—monthly if feasible—compare registered voters' names against a series of state and federal databases, and to cancel the registrations of those supposedly confirmed, through the database matching or otherwise, as noncitizens, unless a person, following receipt of a mailed notice, promptly produces what officials deem satisfactory evidence of

U.S. citizenship. Ariz. Rev. Stat. §16-165(A)(10), (G)-(K); *see* Pet.App.44a. (Those whose registrations are canceled must also be referred to state and local prosecutors for investigation. Ariz. Rev. Stat. §16-165(A)(10).) A straightforward application of the 90-day provision makes clear that H.B. 2243 conflicts with Congress's command and therefore is preempted.

First, H.B. 2243's removal program is "systematic[]," 52 U.S.C. §20507(c)(2)(A), because it rests on the computerized comparison of registrants' names against other databases—including SAVE, the *Systematic* Alien Verification for Entitlements program. Ariz. Rev. Stat. §16-165(G)-(K); Pet.App.45a. Multiple courts have held that removal programs like H.B. 2243's, which compare voter-registration databases to other data sources and use those other sources to cancel registrations, are systematic programs under the NVRA. *E.g.*, *Arcia*, 772 F.3d at 1344-1345; *North Carolina State Conference of NAACP* v. *Bipartisan Board of Elections & Ethics Enforcement*, 2018 WL 3748172, at *6-7 (M.D.N.C. Aug. 7, 2018); *Majority Forward* v. *Ben Hill County Board of Elections*, 509 F.Supp.3d 1348, 1352, 1354-1355 (M.D. Ga. 2020). No court has held otherwise.

Second, because H.B. 2243 does not impose any time limits on cancellations, its removal program would operate less than "90 days prior to" a federal election, 52 U.S.C. §20507(c)(2)(A).

Third, H.B. 2243's removal program is covered by the 90-day provision's reference to "any program," 52 U.S.C. §20507(c)(2)(A). "[T]he word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quotation marks omitted). Indeed, this Court has "given effect to this expansive sense of

'any'" in "case after case." *Home Depot U.S.A., Inc.* v. *Jackson*, 587 U.S. 435, 455 (2019) (Alito, J., dissenting) (citing cases).

Fourth, the purpose of the H.B. 2243 removal program is to remove from the rolls "the names of ineligible voters," 52 U.S.C. §20507(c)(2)(A), specifically noncitizens. That removals for noncitizenship are encompassed by the 90-day provision is confirmed by the provision's enumerated exceptions, which allow systematic removal "at the request of the registrant"; "as provided by State law, by reason of criminal conviction or mental incapacity"; or upon "the death of the registrant." *Id.* §20507(a)(3)-(4), *cited in id.* §20507(c)(2)(B)(i). Congress thus omitted any exception for citizenship-based removals. That omission is "good evidence" that such removals are prohibited, *Arcia*, 772 F.3d at 1345, because if "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent," *Hillman* v. *Maretta*, 569 U.S. 483, 496 (2013).

Neither the RNC nor the United States disputes the first or second elements just discussed. Indeed, the United States expressly concedes the first element, stating (Br.43) that H.B. 2243 authorizes "[s]ystematic checks within the 90-day window." The RNC and the United States do dispute the other two elements, but they dispute the third only by misreading "any program" as confined to a specific program described elsewhere in the NVRA, and the fourth only by misreading "ineligible voters" to exclude noncitizens. Those misreadings are discussed in the next section.

One amicus—contradicting the admission just noted from the United States—disputes the first element: that H.B. 2243's removal program is systematic. This Court,

however, "do[es] not ordinarily address issues raised only by *amici*." *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 97 n.4 (1991), *quoted in United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 267 n.4 (2010); *accord United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981). In any event, this argument fails. The American Center for Law & Justice ("ACLJ") contends (Br.16) that H.B. 2243 "does not remove registrants in batches" but "requires an individualized investigation of each potentially ineligible registrant." But *every* systematic program ultimately yields a list of "individuals" for removal. To place such removals outside the scope of the 90-day provision would render the provision a nullity. And as ACLJ admits (Br.17), a program is systematic for these purposes when it "depend[s] on a mass comparison of voter-registration records against other databases, rather than on particularized evidence or an individualized investigation into each registrant's eligibility." As explained (and as ACLJ never denies), that is what H.B. 2243 directs. Nor does the H.B. 2243 notice-and-cure period on which ACLJ relies (Br.18) change the analysis. As the Ninth Circuit explained, a notice issues "only *after* the systematic comparison prompts the mailing, as opposed to it being prompted by an individualized investigation," Pet.App.45a.

In sum, because H.B. 2243 directs state officials to systematically remove the names of alleged noncitizens from voter rolls within the 90 days before a federal election, it violates and thus is preempted by the NVRA's 90-day provision.

II. The Arguments Offered By The RNC And The United States Are Meritless

A. Noncitizens Are "Ineligible Voters"

The RNC and the United States argue that the 90-day provision does not apply to the removal of people from the voting rolls based on supposed noncitizenship. It does not apply, they say, because even though no one disputes that noncitizens are ineligible to vote, noncitizens are nonetheless *not* "ineligible voters" within the meaning of the provision. RNC Br.41; U.S. Br.32-33. That is not correct.

Indeed, as a matter of plain text—which is of course the starting point in any statutory analysis—the United States concedes (Br.32) that "[o]f course, in isolation, the term 'ineligible voter' could describe noncitizens." To reach their preferred conclusion, therefore, the RNC and the United States must impose an atextual limitation, contending that "ineligible voters" describes only those *presently* ineligible voters who *were* eligible to vote at some point in the past. Thus, on their account, the 90-day provision does not apply to the removal of noncitizens "who never should have been on the voter rolls in the first place." RNC Br.41-42; *see also* U.S. Br.33.

Notably, even this limitation of "ineligible voters" would not permit the systematic removal of *all* noncitizens during the 90 days before a federal election, because some noncitizens—those who were denaturalized or renounced their U.S. citizenship—were once eligible to vote. *See Arcia*, 772 F.3d at 1348. In the other direction, U.S. citizens may have been ineligible at the time of registration because they never actually resided in a jurisdiction. Thus, the RNC's and the United States' reading would implausibly make the lawfulness of last-

minute purges turn on distinctions (between noncitizens who were once eligible and noncitizens who never were, and between nonresidents who once resided in a jurisdiction and those who did not) that have no apparent justification and that election officials could not apply without ascertaining facts from years or decades earlier. That would be a surprising distinction for the NVRA to draw, and the statute does not in fact draw it. The DNC and the ADP explained this at the petition stage (BIO 13), yet neither the RNC nor the United States even acknowledges the point, much less addresses it. The arguments they offer instead for their unnatural reading of "ineligible voters" lack merit.

1. The RNC contends (Br.42) that noncitizens are not "ineligible voters" under the 90-day provision because they were not eligible to vote when they were registered and hence are not valid "voters," meaning they cannot be "ineligible voters" (or any other kind of "voter"). But that reading renders the word "ineligible" superfluous; the 90-day provision would have the same meaning if "ineligible" were omitted. That superfluity confirms that the reading is wrong, because courts must "give effect, if possible, to every clause and word of a statute," *Advocate Health Care Network* v. *Stapleton*, 581 U.S. 468, 478 (2017). The proper reading, which gives effect to every word Congress used in the provision, is that "ineligible voters" means *all* people who are not eligible to vote at the time of removal, whether or not they were eligible at some time in the past (such as when they were first registered). That is the natural meaning of "ineligible voters" as again even the United States concedes (Br.32).

2. Forced to search for support outside the 90-day provision, the RNC (Br.42-46) and the United States (Br.33-36) resort to a multi-step argument under which

the term "ineligible voters" is *implicitly* limited to a subset of the "registrants" described in a *different* provision. This argument is remarkably convoluted: Judge Bumatay, for example, needed five pages—and a flowchart—just to explain it. Pet.App.120a-125a. But in brief, the reading is as follows: *First*, a person who successfully registers to vote is nonetheless not a "registrant" for purposes of the section containing the 90-day provision, 52 U.S.C. §20507, unless the person was actually eligible to vote when registering. *Second*, "registrants" comprise both "eligible voters" and "ineligible voters," with the latter being those who *were* eligible when they were registered (otherwise they wouldn't be "registrants") but later *became* ineligible. *Third*, when the 90-day provision bans last-minute systematic removals of "ineligible voters," it is therefore not talking about people who were ineligible to vote when they registered; those people, again, are assertedly not "registrants" and hence cannot be "ineligible voters." Rather, "ineligible voters" denotes only people who were eligible then but later became ineligible, for instance following a conviction or renunciation of their U.S. citizenship.

At the petition stage, the RNC sought to excuse the convolutedness of its argument by asserting that applying "the 'traditional tools' of construction" to a "complex super structure" like the NVRA "requires some explaining." Cert. Reply 12. That is unavailing. As this Court has explained, "[w]hen the words of a statute are unambiguous," the "judicial inquiry is complete." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Nothing about "ineligible voters" is ambiguous. And nothing in the statute limits "ineligible voters" to those who were eligible at the time they registered—understandably so, as that would require election officials to ascertain facts about people from years or decades

earlier. What took Judge Bumatay five pages and a flowchart to explain was not the statute, but the tortuous reading required to reach the outcome that the RNC and the United States now espouse.

Notably, neither the RNC nor the United States contends that the NVRA actually says any part of their reading. To the contrary, the United States acknowledges that its reading depends on construing "ineligible voters" as "*implicitly* limited to properly registered ineligible voters," even though the term "carr[ies] no express modifier" to that effect. Br.35, 39 (emphasis altered). That implicit limitation rests on the RNC's and the United States' assumption that the "ineligible voters" mentioned in the 90-day provision are a subset of their narrow construction of "registrant[s]" described in §20507(a)(3)—that is, that *only* such "registrant[s]" may be "ineligible voters."

That assumption is the crux of their position. But there is no basis for it. The use of "ineligible voters" to describe *some* "registrant[s]" in one part of the NVRA (§20507(a)(4)) does not mean that *all* "ineligible voters" anywhere in the NVRA must be "registrant[s]." This is the "fallacy of composition," *i.e.*, that because something is true of some members of a group, it must be true of all group members. *Fallacies of Composition/Division*, Oxford Dictionary of Philosophy (3d ed. 2016). Here, what makes a "registrant" an "ineligible voter[]" is that she does not meet a state eligibility criterion. *See* 52 U.S.C. §20507(a)(4). An individual who *never* met an eligibility criterion is no less an "ineligible voter." That "ordinary meaning" is the correct one, *Wisconsin Central Limited* v. *United States*, 585 U.S. 274, 277 (2018), because nothing in the NVRA requires (or even suggests) departing from it.

In fact, if all "ineligible voters" were "registrants," as the RNC and the United States narrowly cabin that term, then §20507(c)(2)(B)(i) would make little sense, as it exempts from the 90-day bar three of the four grounds on which the general-removal provision permits removing a registrant—request, criminal conviction or mental incapacity, and death—leaving only change of residence. 52 U.S.C. §20507(a)(3). Congress knew how to denote registrants ineligible by reason of a change in residence where it intended that narrow category. *See id.* §20507(a)(4)(B). General application of the 90-day provision to "ineligible voters" confirms a broader definition.

3. Evidently recognizing this, the United States speculates (Br.40) that it was some sort of legislative compromise for Congress to amend the previously unqualified removal ban with exceptions "nearly covering the waterfront of proper registrants," rather than enact "a wholesale rewrite to target only those registrants who later moved," even though the latter is what Congress actually meant. But while it is plausible that adding exceptions to the bar was a compromise balancing election-integrity concerns with concern about erroneous removals, it is *not* plausible—and there is no basis to surmise—that there was any compromise to surreptitiously transform a broad bar into one reaching a single ground, or to silently exclude from the bar's protection all persons who were improperly registered. Even putting aside that there is no evidence of any such compromise in the extensive legislative history, the United States' reading is untenable because Congress "does not hide elephants in mouseholes by alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Sackett* v. *EPA*, 598 U.S. 651, 677 (2023) (quotation marks omitted).

The United States alternatively speculates (Br.40-41) that drafting the 90-day bar as a general prohibition qualified by enumerated exceptions might have "serve[d] a distinct function" in that if Congress had instead drafted the bar to reach only registrants who changed residence, any later expansion of the grounds for removing registrants would have required amending the bar as well. But it offers no evidence that Congress had any such design, and it ultimately claims (Br.41) only that its account is "at least as plausible" as the DNC's and ADP's. An inference that is merely as plausible as the alternative cannot justify departing from what Congress actually wrote—which was "ineligible voters," not "properly registered voters who later became ineligible."

4. The RNC and the United States next seek support from the label Congress attached to the voter rolls. In particular, they argue that because §20507 uses the term "official lists of eligible voters," a person who appears on such a list must have been eligible to vote when she was added. RNC Br.48; U.S. Br.33. This argument, in other words, assumes that the "official list[] of eligible voters" does not contain people who improperly registered to vote because they were "ineligible voters" at the time of registration. But it is obviously possible for ineligible applicants to be registered mistakenly and appear on the "official list[] of eligible voters." Indeed, the whole premise of H.B. 2243 (and of the RNC's and the United States' position) is that noncitizens have in fact been registered and appear on Arizona's rolls. The NVRA itself even refers to "ineligible voters" who appear on the "official lists of eligible voters." 52 U.S.C. §20507(a)(4). The latter phrase is thus simply a label for the roll as it exists, not an impossible warranty about everyone whose name appears on it.

5. The United States' hypothetical about a university policy barring "any person ineligible to play at a game" from riding the team bus (Br.37) does not show otherwise. The hypothetical shows only what no one disputes: that a general term can carry an unstated limitation. But the hypothetical's limitation is not the one the United States needs. A coach could board the bus under the hypothetical policy not because she was once eligible to play and later lost that status, but because she is not a candidate to play at all; eligibility to play is simply not a category that describes her relationship to the game. Registered noncitizens are not in that position. They are on the voter rolls—again, that is the premise of H.B. 2243—and the only reason anyone speaks of them here is that, *despite* appearing on the rolls, they are not eligible to vote. The apt comparison is thus a player who is listed on the team's roster but never enrolled at the university. No one would say that that player is allowed to ride the bus under a policy barring "any person ineligible to play at a game." Yet that is what the United States' argument requires.

6. Equally unavailing is the United States' objection (Br.39) that the DNC and the ADP "provide no explanation why 'registrant'" in 52 U.S.C. §20507(a)(3) "is implicitly limited to *properly registered* registrants, but 'ineligible voter' in the 90-day bar should not likewise be implicitly limited to *properly registered* ineligible voters." The (obvious) explanation is that the two asserted limitations are not alike—which is why the DNC and the ADP need not dispute the RNC's and the United States' reading of "registrant" in other provisions of the NVRA in order to prevail on the meaning of "ineligible voters." The limitation the RNC and the United States apply to "registrant" would simply confine that term to people who were properly qualified to be registered—that is, to

the genuine instances of the status the word names. That limitation, moreover, might be drawn from language in the subsection where the word "registrant" appears: Section 20507(a)(1) directs States to "ensure that any *eligible* applicant is registered to vote" upon the timely submission of a "*valid* voter registration form" (emphases added). But the limitation the RNC and the United States ask this Court to read into "ineligible voters" is entirely different. It does not confine "ineligible voters" to those who are genuinely ineligible to vote. To the contrary, it excludes from "ineligible voters" the very persons the phrase most obviously describes: those who were *never* eligible to vote. And nothing in the neighboring provisions supplies the limitation; the RNC and the United States instead infer it from their narrow reading of "registrant," a term the 90-day provision does not use.

7. Finally, the RNC argues (Br.46) that "ineligible voters" must be read narrowly because Congress used different language in §20507(b)(2), which bars a state program from removing "the name of any *person* … by reason of the person's failure to vote" (emphasis added). But the difference in wording reflects the different work the two provisions do. Section 20507(b)(2) protects every name on the roll—without consideration of eligibility to vote—against removal on a single forbidden ground. Congress could not have keyed that protection to "ineligible voters" without excluding the very people it most obviously exists to protect: eligible voters who did not vote. The 90-day provision, by contrast, identifies the programs States must complete by reference to their purpose, that purpose being to remove ineligible voters. Describing that purpose as the removal of "persons," as the RNC suggests Congress could have done, would have made the purpose unintelligible. Describing

the purpose as the removal of "ineligible persons" likewise would not have made sense, as it would have left unstated the respect in which those persons are ineligible; "voters" is the word that makes the meaning clear. That the phrase fixes what a person is ineligible for—voting—says nothing about when she became so.

B. The Ninth Circuit's Reading Of The 90-Day Provision Does Not Immunize Noncitizens From Removal

The RNC and the United States contend that the Ninth Circuit's reading of the 90-day provision would immunize noncitizens from removal altogether: If noncitizens are "ineligible voters," they say (RNC Br.51; U.S. Br.4, 33-35), then noncitizens must be "registrants" too, and the general-removal provision—which contains no time limit—would forbid removing them from the rolls not merely within 90 days of an election but at any time. That is incorrect.

The argument's key step is, again, saying that if noncitizens are "ineligible voters" then they must also be "registrants," such that, under subsection (a)(3), they can be removed from voter rolls only by request or by reason of criminal conviction, mental incapacity, death, or change in residence. But that is true only under the RNC's and the United States' assumption that "ineligible voters" are by definition a subset of "registrants." There is no reason, however, to tie those terms together. Neither the RNC nor the United States (nor Judge Bumatay) identifies anything in the NVRA that makes a person's status as a "registrant" a precondition to being an "ineligible voter." They simply assume the link and then attribute to the DNC and the ADP a consequence that follows only from that assumption—an

assumption the DNC and the ADP reject, as did the Ninth Circuit.

The Eleventh Circuit has rejected this same argument. In *Arcia*, Florida likewise asserted that "either non-citizens may be excluded at any time, or not at all." 772 F.3d at 1346. The court disagreed, explaining that it was "not convinced … that the Secretary's perceived need for an equitable exception" in the general-removal provision, which prohibits States from removing "registrants" from official voter rolls except for certain enumerated reasons, "also requires us to find the same exception in the 90 Day Provision." *Id.* at 1346-1347. The United States characterizes that rejection (Br.38) as a concession that an "equitable exception" is needed. That is wrong; the court simply declined to decide a question the case did not present. And on the question the case did present, *Arcia* rejected the premise on which the RNC and the United States rely: "that the NVRA distinguishes between the removals of registered voters who become ineligible to vote and registrants who were never eligible in the first place." 772 F.3d at 1348.

C. The 90-Day Provision's Reference To "Any Program" Is Not Limited To The "General Program" Required By §20507(a)(4)

The RNC contends (Br.47) that when the NVRA instructs States to complete "any program" by 90 days before a federal election, it is referring only to the "general program" described in §20507(a)(4), *i.e.*, the NVRA's requirement that every State "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of … death" or "change in … residence." On that reading, the only program a State must finish before the 90-day window is a program to remove voters

who have died or moved—meaning that Arizona's citizenship-based program could operate at any time. Again, both the statutory text and precedent foreclose this argument.

Textually, what the 90-day provision says States must complete within 90 days of a federal election is not the "general program" required in §20507(a)(4), but "any program" for systematically removing voters. "[A]ny" such program is a description far broader than the "general program" specified in §20507(a)(4). The latter involves removals only for one of two specific reasons (death or relocation of a voter); the former encompasses systematic removals for any reason. The RNC's argument ignores these textual differences, no doubt because this Court has made clear that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended," *Roberts* v. *Sea-Land Services, Inc.*, 566 U.S. 93, 102 n.5 (2012).

That presumption is nigh-conclusive here because subsection (c)—which contains the 90-day provision—*does* cite subsection (a), which contains the general-program provision. Indeed, it does so twice, and one of the two is a cite in the 90-day provision itself: The provision states that its ban on 90-day removals does not bar death-based removals as "described in paragraph … (4)(A) of subsection (a)"—the general-program provision. *See also* 52 U.S.C. §20507(c)(1) ("A State may meet the requirement of subsection (a)(4) by …."). This Court has deemed similar circumstances to foreclose an argument like the RNC's, rejecting a request to read the words "act or omission" into one exception in the Federal Tort Claims Act because "two of the Act's other exceptions specifically reference an 'act or omission,'" making it "clear that Congress knew how to specify 'act or

omission' when it wanted to." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004). The Ninth Circuit made the same observation here about the NVRA section at issue, contrasting §20507(c)(1), which "limits the applicable program to 52 U.S.C. §20507(a)(4)," with the 90-day provision, which "does not limit the applicable programs to a specific provision and instead enumerates exceptions." Pet.App.42a-43a.

The consequences of the RNC's reading confirm that it is wrong. To start, that reading "offends the canon against superfluity." *Roberts*, 566 U.S. at 111. As noted, the 90-day provision states that it "shall not be construed to preclude … the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) … of subsection (a)"—that is, removals at the registrant's request and removals for criminal conviction or mental incapacity. Neither is a ground on which §20507(a)(4) requires a "general program" of removal. 52 U.S.C. §20507(c)(2)(B)(i). So on the RNC's reading, neither would ever have been barred, and Congress had no reason to except either one.

Under that reading, moreover, the 90-day provision would reach *only* removals for death and change of residence (because, as noted, those are the only grounds for removal covered by the general-program provision). But as explained, the 90-day provision expressly carves out death-based removals. *See* 52 U.S.C. §20507(c)(2)(B)(i). Under the RNC's reading, then, the phrase "any program" in the 90-day provision would refer *only* to a program to remove voters who have moved. The Eleventh Circuit sensibly rejected that interpretation because it "would functionally eviscerate the meaning of the phrase 'any program' in the 90 Day Provision." *Arcia*, 772 F.3d at 1348. "Surely when Congress wrote that the 90 Day Provision applied to 'any program,'" the

court reasoned, "it intended for the provision to apply to more than just programs aimed at voters who have moved." *Id.* "If Congress wanted such a limited result, it could have said so." *Id.*

Ignoring much of the foregoing, the RNC asserts (Br.47-48) that the general-program provision and the 90-day provision must "describe the same thing" because they share the phrase "remove the names of ineligible voters from the official lists of eligible voters." It is certainly true that "parallel text" in statutory provisions "counsel[s] in favor of interpreting [those] provisions consistently." *Lawson* v. *FMR LLC*, 571 U.S. 429, 459 (2014). But as just explained (and again as the RNC largely ignores), the relevant text in the provisions here *differs*: One provision says "any program" while the other refers specifically to one "general program." That the two provisions share other language—because they address the same *general* subject (removals from the rolls)—cannot erase that key textual difference.

The RNC also notes (Br.47) that the general-program provision directs residence-based removals to proceed "in accordance with" the 90-day provision, 52 U.S.C. §20507(a)(4)(B). That does not help the RNC. The language just quoted means that removals under the general-program provision must *comply* with (among other things) the 90-day ban. That does not limit the scope of the 90-day provision to the general-program provision.

Indeed, this language refutes the RNC's argument. The language requires residence-based removals to proceed "in accordance with subsections (b), (c), and (d)." If that meant that the reference in subsection (c)(2)(A)—the 90-day provision—to "any program" speaks only to the general-program provision, it would have to mean

the same for subsection (b). But subsection (b) provides (with an exception not relevant here) that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll … shall not result in the removal of the name of any person … by reason of the person's failure to vote." That would make subsection (b) meaningless: It would say that "[a]ny State program" regarding removals (a phrase that under the RNC's reading means only the general-removal program concerning removals for death or change of residence alone) shall not result in removals based on failure to vote.

The RNC's final argument on this point (Br.49) is that the word "any" "doesn't expand the kind of 'program' covered," because the term "modified by 'any' is still defined by its ordinary meaning." That attacks a strawman. The position of the DNC and the ADP is not that the word "any" changes what a "program" is, but instead that "any" forecloses interpreting the 90-day provision to apply to just one program out of the many possible programs designed to "systematically remove the names of ineligible voters from the official lists of eligible voters," 52 U.S.C. §20507(c)(2)(A).

Amicus Advance Colorado presses this same argument by way of legislative history, contending (Br.13) that the drafting record shows Congress was focused on address-verification mailings and certain door-to-door canvasses. True or not, that history does not narrow the words Congress enacted. The Eleventh Circuit recognized this, quoting this Court's cases in explaining that its task was "to honor the broad statutory language in the 90 Day Provision," because "'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils,'" and "'[t]he fact that a statute can be

applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Arcia*, 772 F.3d at 1347 (quoting *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998), and *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206, 212 (1998)). In any event, the enumerated exceptions refute Advance Colorado's argument: Congress would have had no occasion to include the exceptions it did in the 90-day provision (*i.e.*, removals at the registrant's request or for criminal conviction or mental incapacity) if the provision reached only address-verification programs. Advance Colorado ultimately concedes as much, acknowledging (Br.14) that "[r]esidence is not the only subject of" the 90-day provision.

D. The Ninth Circuit's Reading Of The 90-Day Provision Is Consistent With The NVRA's Purpose

1. The RNC (Br.52) derides the plain-language reading of the 90-day provision as "'grant[ing], and then protect[ing], the franchise of persons not eligible to vote'" (quoting *Bell* v. *Marinko*, 367 F.3d 588, 592 (6th Cir. 2004)). That is baseless. The 90-day provision does not exist because Congress wanted ineligible people to vote, any more than the right to confront one's accusers or to a jury trial exists to protect the guilty. Those rights exist to reduce the chances of the government wrongly convicting the *innocent*. Likewise, the 90-day provision exists to reduce the chance of States wrongly removing those who *are* eligible to vote too close to an election for the voter to learn of the error and correct it, thereby increasing the risk of denying those Americans their fundamental right to vote. And as courts have explained (including the Ninth Circuit here), the 90-day provision balances the NVRA's competing purposes

"with care," permitting systematic removal programs at all times except when "[e]ligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote." Pet.App.46a; *accord Arcia*, 772 F.3d at 1346.

Congress, moreover, had good reason to extend the 90-day provision's protection to alleged noncitizens, because *erroneous* removals (including on citizenship grounds) are far more common than voting by noncitizens. As the record here reflects, voting by noncitizens is exceedingly rare. Pet.App.227a-229a. The district court noted, for example, that there were only "15 indictments for non-citizen voting" during a four-year period in which "200 million votes were cast in federal elections." Pet.App.227a-228a. (And even an indictment, of course, does not mean that voting by a noncitizen actually occurred.) Mistakes regarding registered voters' eligibility—including based on citizenship—are much more frequent. For instance, one district court found that under Alabama's citizenship-based program, "more than 2,000 of the 3,251 voters originally on the list were inaccurately inactivated," an error rate "well more than 50 percent." Mot. Hr'g Tr. (Dkt.91) at 13, *Alabama Coalition for Immigrant Justice* v. *Allen*, No. 2:24-cv-01254 (N.D. Ala. Oct. 16, 2024). Likewise in *Virginia Coalition for Immigrant Rights* v. *Beals*, 2024 WL 4601052 (4th Cir. Oct. 27, 2024), the Fourth Circuit recounted the district court's finding there that "eligible citizens … have had their registrations canceled and were unaware that this was even so," *id.* at *2 (subsequent history omitted). As the Eleventh Circuit put it in *Arcia*, then, the identification of noncitizens for removal is "far from perfect." 772 F.3d at 1339.

A recent federal effort starkly illustrates the point. In July, the Department of Homeland Security informed

Nevada that a systematic review of the State's voter-registration records "revealed that there may be as many as 15,903 non-citizens registered to vote in Nevada," including 8,576 registrants whose "name, date of birth, address and Social Security number match a non-citizen in our files." Letter from Markwayne Mullin, Secretary of Homeland Security, to Francisco Aguilar, Nevada Secretary of State (July 16, 2026). But after manual review, the number DHS claimed to have confirmed as noncitizens cratered, plummeting all the way to 185—barely two percent of the original number alleged. Corasaniti, *From 16,000 to 185 to Zero: Trump's Claims of Illegal Voting in Nevada Fizzle*, N.Y. Times (Sept. 24, 2026). Then, when Nevada election officials examined those 185 registrations individually, they reported that their records showed *every one* of those individuals to be a citizen. *Id.* Had Arizona officials conducted a similarly botched systematic review, they would have removed many thousands of *eligible* Americans from the rolls. And had that happened within the 90 days before a federal election, as the RNC and the United States say the NVRA permits, some of those thousands of voters likely would not have learned of and been able to correct Arizona's mistake in time to avoid losing their fundamental right to vote in that election. Indeed, without the 90-day provision, Arizona would be free to conduct that purge after the registration deadline, all but ensuring eligible voters would be disenfranchised.

2. The RNC and the United States tellingly dispute none of this—which is enough to reject their position. Instead, echoing Judge Bumatay's dissent (Pet.App.126a-127a), the RNC says (Br.48) that it would be "strange" for the 90-day provision to bar last-minute removal for mistaken or fraudulent registration while

permitting it for death, criminal conviction, and incapacity. The United States similarly contends (Br.36) that Congress would not have afforded greater protection to those who were never properly registered. These arguments fail for three reasons.

First, as Judge Bumatay, the RNC, and the United States each acknowledge, because legislation often "reflect[s] … compromise," a law does not "pursue[] its purposes at all costs." Pet.App.102a; *see also* RNC Br.50; U.S. Br.41. Hence, it "frustrates rather than effectuates legislative intent," Pet.App.102a, to place weight on the fact that a law could have (in the post-hoc view of a judge or litigant) achieved its purposes more thoroughly or effectively. And any argument that a balance different from the one Congress struck in the 90-day provision would better serve the NVRA's purpose is for Congress, not this Court.

Second, it was entirely sensible for Congress to decide that there is a lower risk of erroneous removals for death or criminal conviction than for alleged noncitizenship. The RNC (Br.48) and the United States (Br.42) each assert that noncitizenship is discerned as reliably as death or criminal conviction. But that is wrong, as the Nevada example just described shows clearly. Death and conviction are established by a record of the event itself, a record that (for convictions) follows public proceedings and is embodied in a judicial judgment that is rarely subject to genuine dispute. By contrast, noncitizenship is not a discrete event that necessitates the State recording it in a comparable manner. Instead, a person's noncitizenship is a status that is subject to change, meaning that a State's record of a person's lack of citizenship can become stale. Nor is citizenship as "readily ascertainable" as the United States suggests (Br.42); indeed, the fact that Arizona law affords notice

and an opportunity to respond before canceling for noncitizenship but *not* for other reasons, *see* RNC Br.49, confirms that citizenship verification is not a simple task.

Third, it was reasonable for Congress to strike a different balance concerning the bases for removal that frequently both arise *and* trigger removal less than 90 days before a regular federal election, namely death, criminal conviction, and adjudication of mental incapacity. By contrast, any change of address arising less than 90 days before a regular federal election cannot trigger removal until after the NVRA's multi-year protective process, so systematic list maintenance close to an election will not both catch and remove last-minute movers. Similarly, failure to meet initial eligibility requirements arises at the time of registration and may typically be addressed before the 90-day provision goes into effect. Put another way, unlike with death, conviction, or adjudication of mental incapacity, people do not (certainly as far as the record here shows) regularly *become* noncitizens within 90 days of a federal election.

3. Congress's desire to minimize erroneous removals via the 90-day provision confirms that the RNC's and the United States' reading of that provision—excluding from its coverage anyone who was not eligible at the time of registration—makes little sense. Mistakes about a person's eligibility (whether citizenship-based or otherwise) can obviously be made both where officials mistakenly think a person was never eligible and where they mistakenly think the person had been eligible at the time of registration but later became ineligible. The DNC and the ADP made this point at the petition stage as well (BIO 19), and again the RNC and the United States do not respond, never explaining why Congress would have been concerned about erroneous removals only in the latter situation.

The RNC warns, however (Br.51), that on the Ninth Circuit's reading, "even when a State discovers a data error permitting thousands of noncitizens to register—as New Jersey discovered just last month—the State couldn't remove those noncitizens from the rolls." Citing the same example, amicus Center for Election Confidence ("CEC") adds (Br.24) that "New Jersey could not correct its errors now, before the November 2026 election." Both are incorrect. The 90-day provision bars only programs that *systematically* remove names. It does "not bar a state from investigating potential noncitizens and removing them on the basis of individualized information, even within the 90-day window." *Arcia*, 772 F.3d at 1348; *accord* Pet.App.43a. A State that discovers noncitizens on its rolls on the eve of an election thus is not powerless; it simply must proceed on more reliable, individualized evidence rather than by (error-prone) group purges. Indeed, that is what occurred in a case the RNC cites repeatedly (Br.51-52). *See Bell*, 367 F.3d at 590-591. New Jersey's experience illustrates the point: After learning of the software error that registered people who had indicated they were not citizens, the State did not simply strike all those people from the rolls. Instead, the State referred those with any sign of eligibility—such as a separate registration or a record of voting—to county election officials for individualized review, because, as the governor explained, "our initial review indicates that a number of these individuals may be citizens." Statement by Governor Mikie Sherrill (July 28, 2026); *see* New Jersey Division of Elections, *Guide to MVC Voter Registration Error* 2 (Aug. 19, 2026). Here, by contrast, nothing in section 16-165 requires *individualized* review to "confirm[]" that a registered voter is not a U.S. citizen, Ariz. Rev. Stat. §16-165(A)(10), so H.B. 2243 invites precisely the kind of pre-election mass

removals that the 90-day provision is intended to prevent—rather than the individualized procedures New Jersey followed.

CEC separately argues (Br.28) that "a hypothetical citizen wrongly removed from the rolls can generally cast a provisional ballot and provide proof of citizenship later." But federal provisional-ballot requirements came into being years after Congress enacted the NVRA, *see* 52 U.S.C. §21082, so they do not aid interpretation of the 90-day provision. In any event, CEC's argument rests on the dubious assumption that a voter both will promptly learn of the removal and can get state officials to fix their mistake quickly enough to have a provisional ballot included in the count. That will often not be the case, and hence, as the Eleventh Circuit explained, voters "removed days or weeks before Election Day will likely *not* be able to correct the State's errors in time to vote," *Arcia*, 772 F.3d at 1346 (emphasis added). CEC's argument also assumes that a provisional ballot is the equivalent of a regular one. But provisional ballots are often rejected when cast by a person who is not properly registered to vote in the first place, as would be the case for a person whose registration is canceled through H.B. 2243's program. *See Provisional Ballots*, National Conference of State Legislatures (Apr. 16, 2024). Moreover, CEC's (unstated) assumption that a provisional ballot is equivalent to a regular one is unwarranted, because a provisional ballot, unlike a regular one, is counted only if the voter carries a burden of satisfying election officials' demand for certain information—information the voter may not have the opportunity or the money to provide, much less in the short time frame that is almost invariably involved. Recognizing all this, courts have treated relegation to provisional voting as itself a burden warranting relief. *E.g.*, *Majority Forward*, 509 F.Supp.3d at

1353. Yet again, the RNC and the United States do not engage with any of this.

4. In the end, the RNC's purpose-based argument reduces to a claim that Congress should have struck a different balance between the need to remove genuinely ineligible voters from the rolls and the need *not* to erroneously remove eligible Americans close to an election. That, again, is a matter for Congress, not this Court. And the balance Congress struck leaves States ample room, as discussed, to keep noncitizens off their voter rolls. States may conduct systematic removal programs at least 90 days before a federal election, and they may act on individualized evidence at any time. Pet.App.43a. The Ninth Circuit's reading of the 90-day provision thus "does not in any way handcuff a state from using its resources to ensure that noncitizens are not listed in the voter rolls." *Arcia*, 772 F.3d at 1348. All States may not do is run a systematic purge less than 90 days before a federal election, when an error is least likely to be caught and most likely to cost an eligible citizen her vote. That is not a flaw in the NVRA's design; it is the design.

E. The Ninth Circuit's Reading Of The 90-Day Provision Does Not Make The NVRA Unconstitutional

No one argued below that the reading of the 90-day provision the Ninth Circuit embraced renders the provision unconstitutional. That is dispositive because "[a]bsent unusual circumstances—none of which is present here—[this Court] will not entertain arguments not made below." *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 38 (2015) (citing *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992)); *accord*, *e.g.*, *Rivers* v. *Guerrero*, 605 U.S. 443, 458 (2025). And even in this Court, the argument is made only by amici (save for one passing

mention in the RNC's introduction (Br.3)). That is the proverbial final nail in the coffin, because this Court, as explained, does not ordinarily address issues raised only by amici. *See supra* pp.18-19. There is no reason to make an exception here, both because of the parties' failure to raise the issue below as well as in this Court, *see FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216, 226 n.4 (2013), and because "judging the constitutionality of an Act of Congress is the gravest and most delicate duty that this Court is called on to perform," *Northwest Austin Municipal Utility District Number One* v. *Holder*, 557 U.S. 193, 204 (2009) (quotation marks omitted).

In any event, the constitutional argument fails. Its entire premise is that the 90-day provision lets Congress control "'*who* may vote'" in federal elections. States Br.24 (quoting *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 16 (2013)). But the provision does no such thing. It regulates "*how* federal elections are held," *Arizona*, 570 U.S. at 16, an authority the Elections Clause commits to Congress and one that reaches "registration," *id.* at 8-9 (citing U.S. Const. art. I, §4, cl. 1).

CONCLUSION

The Ninth Circuit's decision regarding preemption by the NVRA's 90-day provision should be affirmed.

Respectfully submitted.

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