No. 24A407

IN THE SUPREME COURT OF THE UNITED STATES

SUSAN BEALS, IN HER OFFICIAL CAPACITY AS VIRGINIA COMMISSIONER OF ELECTIONS; JOHN O'BANNON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE STATE BOARD OF ELECTIONS; ROSALYN R. DANCE, IN HER OFFICIAL CAPACITY AS VICE-CHAIRMAN OF THE STATE BOARD OF ELECTIONS; GEORGIA ALVIS-LONG, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE STATE BOARD OF ELECTIONS; DONALD W. MERRICKS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; MATTHEW WEINSTEIN, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE STATE BOARD OF ELECTIONS; JASON MIYARES, IN HIS OFFICIAL CAPACITY AS VIRGINIA ATTORNEY GENERAL; COMMONWEALTH OF VIRGINIA; VIRGINIA STATE BOARD OF ELECTIONS,

Applicants,

v.

VIRGINIA COALITION FOR IMMIGRANT RIGHTS; LEAGUE OF WOMEN VOTERS OF VIRGINIA; LEAGUE OF WOMEN VOTERS OF VIRGINIA EDUCATION FUND; AFRICAN COMMUNITIES TOGETHER; UNITED STATES OF AMERICA,

Respondents.

On Emergency Application for Stay of Injunction Issued by the Eastern District of Virginia Pending Appeal

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AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANT BY THE STATE OF KANSAS AND TWENTY-FIVE OTHER STATES

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Three weeks before a hotly contested election, Respondents filed a lawsuit alleging that Virginia violated the National Voter Registration Act (NVRA) by removing self-identified noncitizens from its voter rolls less than 90 days before the election. Respondents filed their suit more than sixty days after the alleged violation and weeks after early voting had already begun. The district court nonetheless agreed with Respondents' incorrect legal arguments and granted a preliminary injunction twelve days before Election Day, injecting mass confusion into Virginia's election. This Court should grant Virginia's emergency motion and restore the status quo. Doing so would comport with the law and enable Virginia to ensure that noncitizens do not vote in the upcoming election.

This Court has been clear "that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them" and "that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 16-17 (2013) (emphases in original). The district court's mandatory preliminary injunction *requires* Virginia to add individuals back on its voter rolls despite being removed because they are self-identified noncitizens. This sweeping interpretation of the NVRA propounded by Respondents and the courts below converts a procedural statute into a substantive federal regulation of voter qualifications in elections—an interpretation that would raise serious questions about the constitutionality of the NVRA itself.

This Court can avoid these constitutional issues by accepting Virginia's narrower and correct reading of the NVRA's 90-day provision. If the Court is unsure of the best reading of the NVRA, the canon of constitutional avoidance requires avoiding the constitutionally questionable interpretation so long as another one is "fairly possible." *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). The district court's sweeping interpretation of the NVRA would likely render the statute unconstitutional, whereas Virginia offers the "fairly possible"—indeed, correct—view that the NVRA's 90-day period does not apply to removing self-identified noncitizens from the voter rolls. The Commonwealth's interpretation is also consistent with the NVRA's structure as a whole and its legislative history.

For all these reasons, the Court should grant the Application.

INTEREST OF AMICI CURIAE

Amici curiae are the States of Kansas, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming (the States), represented by their attorneys general, are interested in preserving their constitutional authority to determine voter qualifications in elections and in maintaining election integrity by allowing only eligible citizens to vote. The district

court's grant of a preliminary injunction undermines these interests by forcing states to place self-identified noncitizens back onto their voter rolls, potentially allowing them to vote in an election, within the NVRA's "quiet period." The States have a serious interest in ensuring this incorrect holding does not stand.

The States agree with the arguments advanced by Virginia and submit this brief to highlight that the Court should accept the Commonwealth's argument so long as it's a fairly possible reading of the NVRA to avoid the constitutional concerns raised by the district court's injunction.

BACKGROUND

On April 20, 1993, Congress passed the NVRA to, among other things, "establish procedures that will increase the number of *eligible citizens*" who register to vote and "implement this chapter in a manner that enhances the participation of *eligible citizens* as voters." 52 U.S.C. § 20501(b)(1)–(2) (emphases added). The statute provides a mechanism to eliminate citizens who are ineligible from a state's voter roll. *See generally* 52 U.S.C. § 20507. The statute further provides that "[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." 52 U.S.C. § 20507(c)(2)(A). The 90-day bar does not apply to programs to remove previously eligible voters who, within the 90-day period, become ineligible due to a disqualifying criminal conviction, mental incapacity, or death. *Id*. § 20507(c)(2)(B).

As was understood at the time it was enacted, the NVRA does not protect noncitizens as part of the relevant universe of voters. When Congress debated the NVRA, many members expressed concern that automatic voter registration would lead to noncitizens voting, going as far as dubbing the NVRA the "auto fraudo" law. *See e.g.*, 139 Cong. Rec. 2429 (1993) (statement of Rep. Hoke); 139 Cong. Rec. 1343 (1993) (statement of Rep. Livingston). The Senate version of the bill, S. 460, included the Simpson Amendment for the purpose of "mak[ing] clear that the bill does not preclude a State from requiring documentary proof of citizenship." S.Amdt.130 to S.460 (withdrawn in Senate). Senator Ford, the sponsor of S. 460 considered that amendment to be "basically ... redundant" because States had other means of requiring proof of eligibility, including citizenship. *See* Ethan J. Leib, James J. Brudney, *The Belt-and-Suspenders Canon*, 105 Iowa L. Rev. 735, 764 (2020) (quoting 139 Cong. Rec. 5099 (March 16, 1993) (remarks of Sen. Ford)). He did not, however, stand in the way of the Amendment, which passed the Senate. *Id.*

The House version, H.R. 2, did not include any provision comparable to the Simpson Amendment. Attempts to add it failed largely because, like Senator Ford, Representatives considered the provision unnecessary. *See, e.g.*, 139 Cong. Rec. 7178 (1993) (statement of Rep. Gutierrez) ("It is against the law for noncitizens to register in the United States today. It was illegal yesterday. It was illegal last week. It will be illegal tomorrow. Even if motor-voter passes."); 139 Cong. Rec. 2435 (1993) (statement of Rep. Becerra) (expressing the view that fears that noncitizens would vote were "unfounded" because States had tools to prevent noncitizen voting). In the

words of Representative Swift, H.R. 2 said "one must be a citizen in order to vote. This is in the bill. The bill says that in three separate and distinct places in the legislation .... [T]he amendment ... is redundant, duplicative, [and] unnecessary .... One must be a citizen to register." 139 Cong. Rec. 2437 (1993) (Statement of Rep. Swift). Thus, the final version of H.R. 2 passed Congress and was signed into law without such language.

Eighteen years ago, the people of Virginia, through their elected representatives, amended their election laws to require the Department of Motor Vehicles (DMV) to send information of any individual who declares himself to be a noncitizen on a DMV form to the Virginia Board of Elections (ELECT). Va. Code Ann. § 24.2-410.1. After a verification process, ELECT sends this information to the local general registrars. App. 85. Virginia law requires "general registrars to delete ... the name of any voter who ... is known not to be a United States citizen." Va. Code Ann. § 24.2-404(A)(4).

ELECT collaborated with the DMV to ensure that individuals who conducted DMV transactions between July 1, 2023 and June 30, 2024, and who had documents on file indicating that they were not citizens were not improperly on the voter roll. App. 87. Before removing those individuals from the voter roll, ELECT took several steps to ensure that each person is not a citizen and thus not an eligible voter. ELECT first verified their current lack of citizenship through a federal government database. App. 87-88. Then, the individual is sent a "Notice of Intent to Cancel" explaining the information the Commonwealth received and providing an opportunity for the

individual to affirm that he or she is in fact a citizen. Va. Code Ann. § 24.2-427(C). Only if the individual did not respond further was he or she removed from the voter roll. App. 86. Even after a voter is removed, Virginia provides mechanisms to correct the removal and return the individual to the voter roll, if the removal was in error. App. 86-87.

Election Day is November 5, 2024. August 7, 2024, is ninety days before that election, and early voting in Virginia began on September 20, 2024, forty-five days before Election Day. If Respondents had concerns with Virginia's practice, they had ample time to challenge it. Yet both Respondents waited until October 2024 to file suit, and until October 15 and 16—just three weeks before Election Day—to move for preliminary injunctions. App. 22–27. On October 25, 2024, the district court granted the preliminary injunction. App. 7–10. Among other relief, the injunction ordered Virginia to inform "the registrant that their voter registration has been restored" and that they "may cast a regular ballot on Election Day in the same manner as other eligible voters." App. 9. Virginia immediately sought an emergency stay of the injunction at the Fourth Circuit Court of Appeals, which was denied on October 27, 2024. App. 1–6. Virginia then sought emergency relief from this Court. *See* Br. of Applicant Virginia, *Beals, et al. v. Virginia Coalition for immigrant Rights, et al.*, No. 24A407 (Oct. 28, 2024).

ARGUMENT

I. Respondents' Interpretation of the NVRA Casts Constitutional Doubt Upon the Statute

When it comes to elections, "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." U.S. Const. Art. I, § 4, cl. 1. But as this Court has acknowledged, the authority for Congress to regulate "times, places, and manner of holding elections" does not give it any authority to determine *who* gets to vote in a federal election within each state. *Inter-Tribal Council of Arizona*, 570 U.S. at 16–17.

On the contrary, our constitutional structure leaves "no doubt" that States establish "qualifications for the exercise of the franchise." *Carrington v. Rash*, 380 U.S. 89, 91 (1965). The Constitution expressly gives States the authority to determine voter qualifications for all federal elections. *See* U.S. Const. art. I, § 2, cl. 1 (elections for the U.S. House of Representatives); U.S. Const. art. III, § 1, cl. 1 (elections for president); U.S. Const. amend. XVII (elections for the U.S. Senate); *see also Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 780 (2018) (Thomas, J., concurring). Those constitutional provisions make clear that Congress, even through the NVRA, "cannot control … voting qualifications in federal elections." *Inter-Tribal Council of Arizona*, 570 U.S. at 16 (quoting *Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part) (collecting cases)).

The historical record shows the Framers intentionally chose to use the term "Manner of holding Elections" in Art. I, § 4 rather than the term "Manner of Elections," in order to deny Congress the power to establish qualifications of voters. *See* Natelson, The Original Scope of the Congressional Power to Regulate Elections, 13 U. Pa. J. Constitutional L. 1, 10–18 (2010). James Madison specifically stated that "the right of suffrage is very justly regarded as a fundamental article of republican government" and that to leave "it open for the occasional regulation of the Congress, would have been improper." Federalist No. 52, p. 323 (C. Rossiter ed. 1961). He also noted that 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." *Id.* In other words, except for certain constitutional requirements not relevant here, the qualifications of voters are left up to the states; not to Congress.

This Court has already recognized that Congress can dictate the "how" of voting but not "who" gets to vote. *Inter-Tribal Council of Arizona*, 570 U.S. at 16; *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995) ("Madison [] explicitly contrasted the state control over the qualifications of electors with the lack of state control over the qualifications of the elected[.]"). A federal statute that determines substantive voter qualifications instead of deferring to a state's qualifications would be unconstitutional. The Court should avoid reading the NVRA to do that if an alternative interpretation is available. *See Inter-Tribal Council of Arizona*, 570 U.S. at 17–18. ("Since the power to establish voting requirements is of

little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications. If, but for Arizona's interpretation of the 'accept and use' provision, the State would be precluded from obtaining information necessary for enforcement, we would have to determine whether Arizona's interpretation, though plainly not the best reading, is at least a possible one").

The interpretation of the so-called "quiet period" of the NVRA urged by Respondents and accepted by the courts below necessarily results in Congress forcing a State to allow voting by noncitizens over the objection of that State. It converts the NVRA into a federal mandate that states allow noncitizens to vote in the upcoming election—in violation of state law and in violation of federal law itself—whenever a putative voter's noncitizen status is discovered within ninety days of the election. If that is really what the NVRA requires then the statute is unconstitutional. Congress lacks the authority to require noncitizen voting. This Court recognized in *Inter-Tribal Council of Arizona* that setting voter qualifications would be meaningless if states did not have the ability to enforce those requirements. 570 U.S. at 17. Yet if Respondents were correct, it would mean Virginia has no power to enforce its prohibition on noncitizens voting whenever they discover noncitizens on the voter rolls within ninety days of a federal election. [1]

[1] The U.S. Court of Appeals for the Fourth Circuit made a puzzling suggestion that Virginia could still "prevent noncitizens from voting by canceling registrations on an individualized basis." App. 6. The court did not elaborate further on what this "individualized basis" entails and rejected every

Any assertion that the Respondents are not seeking to prevent Virginia from enforcing its voter qualification laws is undercut by their own arguments. In the district court, Respondent United States stated that "the Quiet Period Provision does govern removals based on failure to meet initial eligibility criteria, including programs that attempt to remove noncitizens." U.S. PI. Br. at 3 (Dist. Ct. Dkt. 9-1). The Organizational Respondents go a step further, arguing that "the statute and case precedent confirm that states may not implement any voter removal program or any step in such a program during this period." Org. Pl. Br. at 10 (Dist. Ct. Dkt. 26-1). The district court agreed with these arguments and required Virginia to send a remedial mailing to anyone removed from its voter roll during the "quiet period"—including noncitizens—that explains "the registrant may cast a regular ballot on Election Day in the same manner as other eligible voters." App. 9. Although the mailing also states that noncitizens remain ineligible to vote, the injunction leaves Virginia with effectively no way to enforce its laws on voter qualifications. It forces Virginia to allow noncitizens to vote in the election the same way as any qualified voter even after confirming that those noncitizens are unqualified.

But again, Congress has no authority to require a State to allow a noncitizen to voting in federal elections. Nor does it make any constitutional difference whether the federal force is applied nine months before the election or within ninety days of the election. Were it otherwise, then late-discovered noncitizens on the voting rolls

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reasonable method Virginia utilized to remove noncitizens from its voter roll as "systemic." App. 2-3. Therefore, this theoretical alternative remedy is not feasible, especially with only eight days remaining until Election Day.

would be statutorily entitled to vote in violation of state and federal law, while all other noncitizens are appropriately barred from voting. The only action a state could take against late-discovered noncitizens would be prosecuting the offending individuals after the fact—*after* their votes played a role in determining the election's winner. But prosecution is no remedy—the damage has already been done because an unqualified voter has cast a ballot, thus irreparably nullifying a citizen's ballot. Such a vote-first-punish-later regime is not what the Framers intended. And this Court should not tie Virginia's hands in exercising its authority to enforce its voter qualifications to artificially accommodate Respondents' unconstitutional interpretation of the NVRA.

II. The Court Should Accept Applicant Virginia's Interpretation as it is, at a Minimum, a Permissible Interpretation of the NVRA

Respondents' view that the NVRA unconstitutionally mandates noncitizen voting is easily avoided by adopting Virginia's narrower-and-correct interpretation of the NVRA's "quiet period" provision. This Court need not invalidate the NVRA's 90-day bar in order to correct the district court's error because there is an alternative interpretation of the provision. Virginia highlights many of those reasons in its brief. Br. of Applicant Virginia at 14. Amici States will not repeat Virginia's arguments here. Instead, Amici States highlight that Virginia's argument that the NVRA's 90-day bar does not apply to removing noncitizens from its voter roll follows the purpose and legislative history of the NVRA as well as other federal statutes. Because of that,

Virginia's interpretation is at least "fairly possible" and should be adopted by the Court to avoid the constitutional issues presented by Respondents' interpretation.

The NVRA is built on three Congressional findings codified in law. First, that "the right of *citizens of the United States* to vote is a fundamental right." 52 U.S.C. § 20501(a)(1) (emphasis added). Second, that "it is the duty of the Federal, State, and local governments to promote the exercise of that right." *Id.* § 20501(a)(2). And third, that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." *Id.* § 20501(a)(3).

In light of these findings, Congress passed the NVRA for four purposes that are also statutorily codified: (1) to establish procedures that will increase the number of *eligible citizens* who register to vote in elections for Federal office; (2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of *eligible citizens* as voters in elections for Federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained." *Id.* § 20501(b) (emphases added). The upshot is that the NVRA was designed to protect the voting rights of American citizens—not to mandate noncitizen voting or otherwise regulate how states prevented noncitizen voting.

Congress was concerned solely with States removing *eligible citizens* from the voting rolls. To the extent the Court consults legislative history, the Congressional

record makes clear the specific concern was for "purging" voters solely on the basis that they had not voted in a recent election, as well as purging voters who had moved recently and whose registration needed to be updated on that basis. S. Comm. on Rules and Admin, National Voter Registration Act of 1993, S. Rep. 103-6 at 19 (1993); *see also Pub. Int. Legal Found., Inc. v. N. Carolina State.* of *Elections*, 996 F.3d 257, 264 (4th Cir. 2021). The Committee reported, however, that the 90-day bar "would not prevent a State from making the appropriate changes to the official lists pursuant to the Act during the 90[-]day pre-election period." S. Rep. 103-6 at 19. Such an "appropriate change" would obviously include removing a self-reported noncitizen who was confirmed to be ineligible to vote.

The Senate Report stated:

> "States are required to conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists by reason of death or a change in residence. *Any program which the States undertake to verify addresses must be completed not later than 90 days before a primary or general election*." *Id.* at 18 (emphasis added). But the 90-day bar "would *not* prevent a State from making the appropriate changes to the official lists pursuant to the Act during the 90[-]day pre-election period." *Id.* at 19 (emphasis added).

The House Report on H.R. 2 contains similar remarks:

> "The section requires that a State complete any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters at least 90 days before a primary or general election for Federal office," but it "does not prohibit a State during that 90-day pre-election day period from removing names from the official list of eligible voters on the basis of the request of the registrant, as provided by State law for criminal conviction or mental incapacity, death, or any other correction of registration records pursuant to the Act." H. Comm. on House Admin, National Voter Registration Act of 1993, H.R. Rep. 103-9 at 16 (1993), reprinted in U.S.C.C.A.N. 105, 120.

Noncitizens are not eligible voters. They were not eligible voters before Congress passed the NVRA, they were not eligible when Congress passed the NVRA, and they are not eligible voters today. Congress was clearly concerned with State laws that removed previously eligible citizens from the voter rolls. But it was assumed by the NVRA's supporters that noncitizens would not register in the first place, and at no point did Congress express concern that States would follow their laws and remove self-reported noncitizens who did register from the lists.[2]

Interpreting the NVRA to mandate that States retain noncitizens on their voter rolls is also inconsistent with the rest of federal law. Indeed, Respondents' alternative would be anomalous, given that federal law—like Virginia law—expressly prohibits noncitizens from voting in elections. *See* 18. U.S.C. § 611 ("It shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner."). If the Respondents' interpretation of the NVRA 90-day bar were accepted, that statute would effectively force States to aid and abet a noncitizen's violation of federal criminal law by leaving on the voting rolls every noncitizen voter they discover within 90 days of an election. Such a construction of the NVRA would be exceedingly bizarre and likely unconstitutional. This Court should reject it.

[2] *See, e.g.*, Ga. Stat. Ann. § 21-2-216(g)(1) (2009); Ala. Code § 31-13-28(c) (2011); Kan. Stat. Ann. § 25-2309(l) (2011); Tenn. Code Ann. § 2-2-141(a) (2011).

***

The upcoming election is hotly contested and has caused division around the country. Perhaps the division would be lower if the federal government were not interfering with the election via last-minute attacks on State efforts to police voter qualifications. Respondent United States sued Applicant Virginia on the eve of the election—weeks after early voting already began—despite knowing about the Commonwealth's supposed NVRA violation for at least 60 days prior to its lawsuit.

This Court should reject Respondents' effort to change the rules in the middle of the game and restore the status quo ante. The Framers understood the problems associated with federal control over a state's voter qualification laws—problems on full display here. The Constitution leaves decisions about voter qualifications to the people of Virginia. And the people of Virginia have decided that noncitizens are not permitted to vote.

CONCLUSION

This Court should reject Respondents' attempt to keep noncitizens on Virginia's voter rolls and grant the Application.

October 28, 2024

Respectfully submitted,

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CERTIFICATE OF COIMPLIANCE

This brief for *amicus curiae* complies with the word limit of Supreme Court Rule 33.

This document contains 4,097 words.

Date: October 28, 2024

/s/ Abhishek S. Kambli

Abhishek S. Kambli