No. 24-2811

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA PUBLIC INTEREST RESEARCH GROUP, ET AL.
Plaintiffs-Appellees,

v.

CHRISTI JACOBSEN, in her official capacity, ET AL.
Defendants-Appellants.

Appeal from the United States District Court
for the District of Montana
The Honorable Brian Morris, Presiding
Case No. 6:23-cv-70-BMM

BRIEF OF *AMICUS CURIAE* RESTORING INTEGRITY AND TRUST IN ELECTIONS (RITE) SUPPORTING THE APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Restoring Integrity and Trust in Elections, Inc. (RITE), is a 501(c)(4) non-profit organization. It has no parent corporation, and no publicly held corporation holds a 10% or greater ownership interest in it.

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STATEMENT OF *AMICUS* INTEREST

Restoring Integrity and Trust in Elections, Inc., or "RITE," is committed to ensuring that "[e]lectoral systems" are "designed, safeguarded, and implemented in a manner that reflects the will of our citizens so that electoral results enjoy the public's full faith and confidence." *Our Mission*, Restoring Integrity and Trust in Elections, https://riteusa.org/our-mission/(as last visited June 5, 2024). HB 892 advances these interests. RITE thus has an interest in defending the law's constitutionality.

All parties consented to the filing of this brief. RITE files under Federal Rule of Appellate Procedure 29(a)(2).*

INTRODUCTION AND SUMMARY OF ARGUMENT

Constitutional challenges come in two flavors: facial and as-applied. As-applied challenges ask whether the challenged law is unconstitutional in particular applications. If so, the law can be enjoined in those applications, but not others. In contrast, facial challenges ask whether the law is unconstitutional in *every* application. At least, that is the normal rule. The overbreadth doctrine creates an exception for cases involving the First Amendment's Speech Clause. In challenges alleging deprivations of free-speech rights, parties may win a facial challenge by "'demonstrat[ing] that the [challenged] statute prohibits a substantial amount of protected speech, relative to its plainly legitimate sweep.'" *Tucson v. City of Seattle*, 91 F.4th 1318, 1327 (9th Cir. 2024) (quoting *United States v. Hansen*, 599 U.S. 762, 770 (2023)).

* No party's counsel authored this brief in whole or in part. Nor did any person or entity other than the *amicus curiae* and its counsel contribute money intended to fund this brief's preparation or submission.

The District Court relied on the overbreadth doctrine to preliminarily enjoin HB 892, Montana's law prohibiting registered voters from "purposefully remain[ing] registered to vote in more than one place in" Montana "or another state." 2023 Montana Laws Ch. 742 (HB 892) §1. To reach this conclusion, the Court declared that registering to vote is protected speech. *See* ER-23. It then determined that HB 892 would likely deter some unknown number of citizens from registering. Finally, it determined that the law's restriction on speech is substantial relative to its "legitimate sweep," which the District Court described as preventing double voting. *Id.*

This Court should reverse. This brief addresses two of the many reasons why.

First, registering to vote is not speech, at least not always. The District Court concluded otherwise, believing that citizens engage in protected speech *every time* they register. *Id.* Based on that faulty premise, the Court concluded that HB 892 likely prohibits a substantial amount of speech. *Id.* at 23, 28. The District Court justified the faulty premise with a misleadingly clipped excerpt from *Preminger v. Peake*, 552 F.3d 757 (9th Cir. 2008). In *Preminger*, this Court wrote: "The parties do not dispute that voter registration is speech protected by the First Amendment." 552 F.3d at 765. The District Court omitted the first six words, which show the issue was conceded, not adjudicated. And it failed to note that the Court was speaking about registration campaigns, *not* the prospective voter's act of registering. *Id.* at 764. The District Court further erred by relying on *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), to support its determination that HB 892 will chill a substantial amount of speech. That case presented no constitutional issue and is unpersuasive on its own terms.

Second, HB 892's entire sweep is "legitimate." The District Court seemed to think that the "legitimate sweep" element of the overbreadth doctrine requires courts to determine the importance of the interests the challenged law advances. ER-22–23 That is incorrect. The legitimate-sweep element simply requires courts to identify the law's applications that do not violate the First Amendment—here, the applications of HB 892 that do not burden free-speech rights. Regardless, the District Court gave short shrift to the important state interests that laws forbidding duplicative registration serve, such as preventing fraud, improving election administration, and ensuring that only citizens dedicated to the State's political community vote in its elections.

ARGUMENT

I. The Speech Clause of the First Amendment confers no right to register as a voter.

HB 892 does not "prohibit[] a substantial amount of protected speech." *Tucson*, 91 F.4th at 1327 (quoting *Hansen*, 599 U.S. at 770). The District Court concluded otherwise only because it mistakenly concluded that the Speech Clause confers a right to register to vote, such that any burden on the right to register is a burden on speech. In fact, registering to vote is not (generally, at least) protected speech. As a result, HB 892 hinders very little speech, if any.

A. Registering to vote is generally conduct, not protected speech.

1. "The U.S. Constitution protects an individual's right to vote during an election, not the right to register to vote prior to an election." *Lawson v. Shelby Cnty.*, 211 F.3d 331, 336 (6th Cir. 2000). Of course, States that offer registration cannot regulate

it in a way that burdens other rights. States cannot, for example, limit the ability to register on racial terms, which would violate the Fourteenth and Fifteenth Amendments. Nor can they allow only members of a single party to register, as that would violate the First Amendment's right to association. Similarly, States may not make registration so burdensome that it denies citizens their right to vote. Still, the Constitution confers no freestanding right to register as a voter.

Consider an analogy. Some States require citizens to obtain a permit before exercising their Second Amendment right to bear arms in public. Similarly, nearly all States require citizens to register as voters before exercising their right to vote. (North Dakota is the exception. *See* North Dakota Sec. of State, *Voting in North Dakota*, https://perma.cc/7KVK-QVUJ.) In both contexts, States may improperly infringe the underlying right by making acquisition of the required license or registration too burdensome. Thus, just as gun-carry regimes violate the Second Amendment when they have the effect of prohibiting citizens from carrying in public, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 11 (2022), voter-registration laws violate the right to vote when they have the effect of denying that right, *see Burdick v. Takushi*, 504 U.S. 428, 434 (1992). But in both the voting and gun-toting contexts, there is no freestanding right to register; the relevant question is whether registration requirements infringe the underlying right.

If there were a right to register, from what constitutional provision would it derive? The Constitution nowhere confers the right expressly. The District Court described the right to register as emanating from the First Amendment's Speech Clause. But that is incorrect, at least as a categorical matter.

Generally, registering to vote is conduct, not speech. In that way, it is like registering to carry a firearm, registering to drive, or registering to own a dangerous animal. No doubt, the act of registering may sometimes have expressive dimensions; perhaps registration signals one's eagerness to participate in the democratic process. But, for many people, it will have no expressive dimension. Consider the case of someone who registers to vote only to appease a canvasser or to avoid embarrassment in front of a government official. And often, any "expressive component" of registration "is not created by the conduct itself but by the speech that accompanies it," *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 66 (2006), such as by proudly declaring oneself a registered voter.

The fact that registration is not *inherently* expressive (at least in the typical case) is critically important to assessing the question whether registration laws violate the Speech Clause. The Supreme Court has held that, where "the government does not target conduct on the basis of its expressive content, acts are not" protected by the Speech Clause "merely because they express" an "idea or philosophy." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). Laws (like HB 892) that apply to all registrations do not target registration based on expressive content—they apply *without regard* to the message, if any, the citizen means to convey by registering. As such, these laws, at least in their typical applications, do not implicate the Speech Clause.

The conclusion that completing a voter-registration form is not protected speech finds further support in Supreme Court cases "reject[ing] the notion that the First Amendment confers a right to use governmental mechanics to convey a message." *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). Applying this rule,

the Court once upheld "a State's prohibition on multiple-party or 'fusion' candidates for elected office against a First Amendment challenge." *Id.* (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)). Although "a State's ban on a person's appearing on the ballot as the candidate of more than one party might prevent a party from 'using the ballot to communicate to the public that it supports a particular candidate who is already another party's candidate,'" no one has a "'right to use the ballot itself to send a particularized message.'" *Id.* (quoting *Timmons*, 520 U.S. at 362–63). Voter-registration forms, just like ballots, are part of the mechanics of government—they help States track the individuals entitled to wield part of the States' sovereign power. Just as citizens have no right to use state-created ballots to send particularized messages, they have no right to use state-created voter-registration forms to send particularized messages.

Treating the act of registration as *per se* protected speech leads to absurdities. State codes are full of laws governing registration. Are all those laws now subject to First Amendment scrutiny? Many such laws are content based. Consider, for example, laws stipulating the information that voters must include with their registration forms. *Cf. Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed …"). Are these laws now subject to strict scrutiny? And even for content-neutral laws, like residency requirements, what are the limits? Do citizens have a free-speech right to register to vote in all fifty States? If not, must laws allowing only residents to register survive some form of intermediate scrutiny? And what of other laws regulating other types of registrations? Are driver-license applications also protected

speech, since citizens may use their applications to express themselves (perhaps in the selection of a "gender") or to facilitate expression (perhaps they want the license so they can drive around promoting a candidate)? Can citizens bring compelled-speech challenges to the ATF forms they must complete before purchasing a gun? The list of such questions could continue indefinitely.

This Court must clearly decide whether registering to vote is, in and of itself, protected speech. If it is, laws requiring state officials to register voters automatically are unconstitutional. At least four States within this circuit have such laws. *See* Alaska Stat. §15.07.050(a)(5); Nev. Rev. Stat. §293.5768; Or. Rev. Stat. §247.017; Wash. Rev. Code Ann. §29A.08.315. And States throughout the country have similar regimes. *See* Nat'l Conf. of State Legislatures, *Automatic Voter Registration* (Feb. 12, 2024), https://perma.cc/GP8P-5FU6. If the act of registering to vote really is speech, then these statutes *compel* speech. Compelling speech is unconstitutional. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 893 (2018). So, affirming the District Court means establishing the unconstitutionality of automatic-registration laws throughout this circuit.

2. All told, the act of registering to vote is not, by itself, protected speech. That defeats the District Court's overbreadth analysis, as its conclusion that HB 892 prohibits a significant amount of speech rested on the premise that *every* act of registration is protected speech. Without that false premise, the District Court had no basis for concluding that HB 892 "prohibit[s] a *substantial* amount of protected speech." *Tucson*, 91 F.4th at 1327 (quotation omitted, emphasis added). That alone defeats the plaintiffs' overbreadth claim.

The plaintiffs cannot salvage the injunction by pivoting to the argument that HB 892 indirectly impairs the underlying right to vote. For one thing, the District Court did not consider that argument, and this Court ought not do so in the first instance. *See Clark v. Chappell*, 936 F.3d 944, 971 (9th Cir. 2019). In any event, HB 892 does not deny anyone the right to vote. The law applies only to registered voters in Montana who "purposefully" either maintain duplicative registrations or fail to disclose other registrations, *see* HB 892, §1—it does not apply to those who inadvertently maintain or fail to disclose duplicative registrations. Thus, it requires only that voters *attempt* to cancel and disclose duplicative registrations of which voters are *aware*. It insults Montanans' intelligence to suggest that they will refrain from voting instead of complying with these easy-to-meet requirements.

Certainly there is no evidence that HB 892 infringes the right to vote in all of its applications, as it would have to for the plaintiffs to justify the facial injunction they won below. While the overbreadth doctrine applies in some challenges arising under the Speech Clause, it does not apply in most other contexts—even in most other First Amendment contexts, *see Gospel Missions of Am. v. City of Los Angeles*, 419 F.3d 1042, 1051 (9th Cir. 2005)—and no precedent justifies applying the overbreadth doctrine in cases challenging alleged deprivations of the right to vote. Further, because the overbreadth doctrine is a judge-made exception "untethered from the text and history of the First Amendment," *United States v. Sinenang-Smith*, 590 U.S. 371, 383 (2020) (Thomas, J., concurring), "the rule of law" requires "confining" the doctrine "rather than extending it further," *NLRB v. Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Loc. 229, AFL-CIO*, 974 F.3d 1106, 1117 (9th Cir.

2020) (Bumatay, J., dissenting from denial of rehearing *en banc*).

In any event, the opinion below cites no evidence that HB 892 will impair a "substantial" amount of voting. In the absence of such evidence, the overbreadth doctrine would not permit facial relief *even assuming* it applied in cases involving the right to vote. *See Tucson*, 91 F.4th at 1327.

B. The District Court offered no sound basis for concluding that registering to vote is protected speech.

1. *Preminger* does not support the District Court's decision.

The District Court's analysis of the question whether registering to vote is protected speech consists primarily of one declaratory statement: "Courts in the Ninth Circuit have recognized that 'voter registration is speech protected by the First Amendment.'" ER-23 (quoting *Preminger*, 552 F.3d at 765). Even a cursory glance disproves this claim. *Preminger* did not "recognize[]" that voter registration is speech. Here is the full quote: "*The parties do not dispute* that voter registration is speech protected by the First Amendment." *Preminger*, 552 F.3d at 765 (emphasis added). The issue was conceded, not adjudicated. Moreover, the quoted phrase uses "voter registration" to describe registration drives, *not* the act of registration by the prospective voter. *Id.* at 761-62, 764. *Preminger* is inapt.

Any argument that HB 892 infringes the plaintiff-organizations' rights to engage in voter-registration activities fails—which is perhaps why the District Court did not rely on the organizations' rights. The reason this theory fails is simple: HB 892 does not regulate the organizations' speech. They are free to engage in all the speech they engaged in previously. To the extent their speech is less *effective* because fewer people

will register under HB 892—an unproven claim—the First Amendment does not require the government to regulate in a way that maximizes the effectiveness of protected speech.

2. *Common Cause* does not support the decision below.

The District Court also relied heavily on the Seventh Circuit's decision in *Common Cause*, 937 F.3d 944. It is unclear why. *Common Cause* presented no constitutional question, and instead considered the meaning of the National Voter Registration Act, or "NVRA." Regardless, *Common Cause* is unpersuasive on its own terms.

a. Because it is impossible to understand *Common Cause* without some background on the NVRA, this section begins by discussing that law.

"For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in federal elections." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 761 (2018). But "in 1993, with the enactment of the" NVRA, "Congress intervened." *Id.*; *accord* Pub. L. 103-31, 107 Stat. 77 (1993) (codified at 52 U.S.C. §§20501-11).

The NVRA adopts procedures that States must use to maintain the accuracy of their voting rolls. States must, for example, "'conduct a general program that makes a reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence." *Husted*, 584 U.S. at 761 (quoting 52 U.S.C. §20507(a)(4)). This includes clearing the rolls of voters who "request" that their names be removed, §20507(a)(3)(i), along with any voter who "confirms in writing" that he has moved, §20507(d)(1)(A). And States may also remove voters who fail to respond to a statutorily prescribed notice. §20507(d)(1)(B)(i). To use this process,

States must send "preaddressed, postage prepaid 'return card[s]'" to voters they suspect have moved. *Husted*, 584 U.S. at 762. States may remove the names of any voter who does not respond to the notice or fails to vote in any election held before the second post-notice general federal election. *Id.*; §20507(d)(1)(B).

The NVRA has its limits. For one thing, the Act governs removing the names of voters who move or die or who, for their own reasons, no longer wish to be registered. *Husted*, 584 U.S. at 762. It does not, however, speak to whether newly registered voters can be required to cancel old registrations in States where they no longer live. The NVRA is silent on that issue, thus leaving it for the States to address.

HB 892 addresses the issue on which the NVRA is silent. It requires that individuals registered to vote in Montana knowingly maintain just one registration. HB 892 thus tackles the problem of duplicative registrations from another angle; instead of requiring state agencies to disentangle conflicting information and restore the accuracy of their rolls, HB 892 requires citizens to take note of their own registrations. It thus forbids them to claim a share of Montana's sovereign authority if they still consider themselves to be eligible voters (and therefore residents) of another State. No federal statute prohibits such laws. If anything, federal law *blesses* this approach, as the National Mail Voter Registration Form asks applicants if they "*were* registered before" and, if so, for the "address where" they "were registered before." *See* OMB, *Register To Vote In Your State By Using This Postcard Form and Guide* at 3, https://perma.cc/5ASU-2H5E (emphasis added). Notably, these instructions are written in the past tense, implying that a person using the form to register at a new address should no longer be registered at his old address.

b. In *Common Cause*, the Seventh Circuit considered whether the NVRA preempted an Indiana law requiring state officials to immediately remove from the rolls the names of voters the State determined, with a certain degree of confidence, had moved to or registered in another State. *See Common Cause*, 937 F.3d at 948-49. The challengers argued that Indiana's law violated the NVRA by allowing officials to remove voters without first sending them a notice, which they maintained was required by the Act. *Id.* at 949. Indiana countered that its removal procedures did not trigger any notice requirement under the NVRA. *Id.* at 958. States may remove a voter's name from the rolls without sending notice if the voter either "request[s]" to be removed or "confirms in writing" that he moved out of the State. 52 U.S.C. §20507(a)(3)(A), (d)(1)(A). Indiana argued that registering to vote in another State constitutes a constructive request for removal from the rolls in Indiana. *See Common Cause*, 937 F.3d at 959. Further, Indiana argued, when a person registers to vote in another State he thereby "confirms in writing" that he moved out of Indiana. *See id.*

The Seventh Circuit disagreed. First, although it acknowledged that a new registration *implied* a desire for removal, it asserted that such an inference "might be rebuttable." *Id.* at 960. Accordingly, the second registration could not definitively be construed as a request for removal. Next, the Seventh Circuit declared that registering in another State does not "'confirm[] in writing'" that the registrant moved to another State. *Id.* at 961. According to the Seventh Circuit, a voter can "confirm" in writing that he moved *only* in response to a state-issued notice. That is, the confirms-in-writing provision applies only when the voter's writing constitutes "corroborating or verifying" information in response to an inquiry from a State. *Id.* at 961–62.

As this description shows, *Common Cause* does not address any issue relevant to this case, which is about the Constitution rather than the NVRA.

The District Court seemingly latched onto *Common Cause* because of the opinion's discussion of why citizens might desire to maintain voter registrations in multiple States. *See* ER-26–28. *Common Cause*'s discussion is flawed, as addressed in Part II of this brief. But it is also unrelated to this dispute: regardless of whether voters might rationally prefer to maintain their registration in one, two, or all fifty States, the question here is whether the Speech Clause entitles them to do so. It does not, as explained above, and nothing in *Common Cause* suggests otherwise.

In fact, *Common Cause* never doubted that States may prevent duplicative registrations. To the contrary, the Seventh Circuit recognized the legitimacy of their doing so by noting that States may cancel the registrations of voters who move, provided States do so in compliance with the NVRA. 937 F.3d at 947–48. And the Seventh Circuit again recognized the legitimacy of Indiana's interest in preventing duplicative registrations in a follow-on case, *League of Women Voters of Indiana, Inc. v. Sullivan*, 5 F.4th 714 (7th Cir. 2021). There, the Seventh Circuit held that Indiana could remove from its rolls the names of voters who, when registering in another State, signed forms forwarded by the new State authorizing Indiana to remove the voter from Indiana's rolls. *Id.* at 732. These forms, the court explained, constituted "request[s]" by "the registrant[s]" for removal. 52 U.S.C. §20507(a)(3)(A); *League of Women Voters*, 5 F.4th at 731–32. Recognizing the importance of allowing the State to remove voters who sign authorization-of-removal forms, the Seventh Circuit confirmed that any earlier-issued injunction would not bar such removals. *League of Women Voters*, 5

F.4th at 731–32.

c. Regardless, courts outside the Seventh Circuit should not rely on *Common Cause*.

The flawed portion of *Common Cause* most relevant to this case consists of poorly reasoned *dicta* regarding protective registration, which is the practice of remaining registered in a State after moving away *just in case* one's "personal circumstances change before election day." *Common Cause*, 937 F.3d at 960. The Seventh Circuit suggested that those who move for work or school might want to keep a prior registration in case they are fired or drop out and move back before election day. *Id.* The District Court read this to *bless* protective registration as a constitutional matter. *See* ER-27. In fact, the Seventh Circuit did not bless the practice; it simply speculated that the practice existed and concluded that the NVRA barred one means of preventing it. Regardless, *Common Cause* entirely ignored the sound reasons that States have for barring protective registrations. The court never mentioned the problems that duplicative registrations pose for election administration and fraud prevention. *See below* 15–23. Nor did it address the States' interest in ensuring that only voters entirely committed to their political communities secure the right to wield the People's sovereign authority. *See below* 23–25. Thus, insofar as the Seventh Circuit approved of protective registration, it did so without addressing the States' weighty interests in barring that practice. Those interests are weighty indeed, as addressed below.

II. Duplicative registrations undermine important state interests.

The District Court held "that the legitimate sweep of HB 892 is the prohibition of double voting." ER-23. The court apparently believed that the overbreadth

doctrine's legitimate-sweep element requires assessing the legitimacy of the state interests that the challenged law promotes. Not so. A law's "legitimate sweep" includes all its applications that comport with the Speech Clause. *United States v. Hansen*, 599 U.S. 762, 782 (2023). As explained above, the District Court did not identify applications of HB 892 that violate the Speech Clause. Thus, it appears the law's *entire* sweep is legitimate. At bare minimum, much of the law's sweep is legitimate, as there is little reason to believe HB 892 will deter citizens from registering or that it will burden *the speech rights* of those who are deterred. *See above* 3–9.

Regardless, the District Court overlooked the many legitimate state interests that laws like HB 892 serve. RITE addresses three: (1) preventing fraudulent voting, (2) improving election administration, and, perhaps most importantly, (3) ensuring that only people with a *bona fide* commitment to the political community share in its governance.

A. Duplicative registrations threaten election integrity.

1. A healthy democracy requires "public confidence in the integrity of the electoral process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (op. of Stevens, J.). Public confidence "encourages citizen participation." *Id.* It assures citizens that voting is worth their time—that they need not "fear their legitimate votes will be outweighed by fraudulent ones." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*). Public confidence also breeds acceptance of adverse results. When a society resolves its disputes at the ballot box, it can guarantee "the winners … an honest victory, and the losers … the peace that comes from a fair defeat." *United States v. Windsor*, 570 U.S. 744, 802 (2013) (Scalia, J., dissenting).

The peace that comes from fair defeats requires election results the public trusts. Our nation has persisted for two-and-a-half centuries because the losing sides of political debates could continue making their cases, knowing they can prevail in the long run by winning subsequent elections. If election results cannot be trusted, however, those who come up short are not as likely to take their losses in stride.

Because every State has a compelling interest in protecting our republican form of government, and because that form of government requires public confidence in elections, every State has a compelling "interest in protecting the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 191 (op. of Stevens, J.). This, of course, requires rules that deter, root out, and punish fraud. But it also requires rules that promote trust by reducing *opportunities* for fraud. *See id.* at 193–94; *Brnovich v. DNC*, 594 U.S. 647, 686 (2021). After all, uncovering fraud *after* an election, while important, is less likely to promote public confidence than preventing the fraud from occurring in the first place. *See, e.g.*, *Gomes v. Clemons*, No. FBT-cv-23-6127336-S, 2023 WL 7383217 at *21 (Conn. Super. Ct. Nov. 1, 2023) (overturning election tainted by fraud). It is far better to "detect" and preempt "vulnerabilities" before election day, "bolster[ing] public confidence" that vote tallies accurately capture the people's will. Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* ("Carter-Baker Report") 28–29 (2005), https://perma.cc/VCH4-4P99; *accord Crawford*, 553 U.S. at 193–94 (op. of Stevens, J.).

2. The "maintenance of accurate and up-to-date voter registration lists" is a critical step in preventing fraud and maintaining public confidence. FEC, *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and*

Examples 18, 56 (1994), https://perma.cc/22TY-CL2M. Duplicative registrations thwart the maintenance of accurate lists.

For one thing, duplicative registrations create opportunities for fraud even by people other than the individuals with multiple registrations. Consider Chicago. In the early 1980s, the federal government successfully prosecuted Chicago politicians found to have cast *thousands* of illegal ballots in a single election. The politicians carried out this scheme, in part, by casting votes in the names of voters who had died or moved. *See United States v. Howard*, 774 F.2d 838, 840 (7th Cir. 1985); *United States v. Olinger*, 759 F.2d 1293, 1297 (7th Cir. 1985). Duplicative registrations create opportunities for more of the same.

Beyond this, voters can and do use duplicative registrations to vote twice in elections, allowing them to influence election results in at least one State where they do not reside. In 2023 alone, at least eight defendants either pleaded guilty to doing so or admitted guilt as a condition for entering a diversion program. *See* Pre-Trial Intervention Contract, *Florida v. Rider*, No. 2021-CF-001506-A (Fla. 5th Cir. Ct. Jan. 19, 2023), https://perma.cc/2XVW-YCDY; Order and Judgment of Conviction, *Ohio v. Gelman*, Geauga Cnty. No. 22 C 000281 (Ohio Ct. Comm. Pleas June 23, 2023), https://perma.cc/34B9-SY8D; John Karlovec, *Woman Charged with Voting in Ohio and Florida*, Geauga County Maple Leaf (Jan. 5, 2023), https://perma.cc/PFU8-PMM3; Agreement for Pretrial Diversion, *West Virginia v. Sink*, WVSOS File No. 20211104.01 (Mar. 27, 2023), https://perma.cc/A47J-93C8; West Virginia Sec. of State, *Warner Announces Conviction of Kanawha County Man for Illegal Voting in 2020 General Election* (Sept. 19, 2023), https://perma.cc/QX82-EYG7; West Virginia Sec.

of State, *Mac Warner Announces Conviction of Randolph County Man for Voter Fraud* (Aug. 30, 2023), https://perma.cc/MM38-554U; West Virginia Sec. of State, *Fayette County Man Pleads Guilty to Illegal Voting in 2020 General Election* (May 25, 2023), https://perma.cc/RJS8-S4Q4; Kelli Arseneau and Chris Ramirez, *75-year-old Fond du Lac man convicted of election fraud in 2020 election*, The Post-Crescent (Aug. 18, 2023), https://perma.cc/9UA6-8VHC; Cory Shaffer, *Shaker Heights attorney who supported Trump jailed for felony voter fraud*, Cleveland.com (Aug. 22, 2023), https://perma.cc/7QAX-BFKV.

That number, of course, should be zero, so eight is too high. But eight is also lower than the actual number. Many instances of double voting are never detected, let alone prosecuted to a conviction or plea. One recent audit in Maryland "identified 134 voters who voted more than once and 1,371 voters who attempted to vote multiple times." Maryland Off. of Legis. Audits, *Audit Report, State Board of Elections* 2 (2023), https://perma.cc/M2ZE-LRF6. Florida recently identified "approximately 1,177 voters who appear to have voted in Florida and" another State "in the same election." Florida Dept. of State Office of Election Crimes and Security Report 5 (Jan. 14, 2023), https://perma.cc/DY2H-HMKM. And Georgia, Nevada, and Ohio have similarly identified numerous cases of potential double voting in recent elections. *See* Georgia Sec. of State, *Secretary Raffensperger Referring 17 Cases of Suspected Double Voting to Local District Attorneys* (Jan. 16, 2024), https://perma.cc/MB4G-BFAM; Nevada Sec. of State, *2024 Election Investigations Quarter 1 Report*, https://perma.cc/X6QM-EB3V; Ohio Sec. of State, *New Round of Investigations Shows 75 More Individuals Who Allegedly Voted Twice* (Oct. 17, 2022), https://perma.cc/G7SL-

JSBA.

The current electoral and political landscape makes double voting more likely to occur. This follows for two reasons.

First, no-excuse, mail-in voting, which is becoming more widespread, allows voters to cast ballots in more than one State without the burden of traveling to those States. As a law becomes easier to break, violations become more likely. Additionally, the ability of officials to scrutinize mail-in ballots for potential fraud is inversely proportional to the volume of such ballots. As the volume grows, the chances of fraudulent votes evading detection grows as well, diminishing the law's deterrent effect.

Second, and perhaps more important, voters today have greater incentive to engage in election fraud—and sophisticated operatives thus have incentive to encourage and facilitate fraud. This is the direct result of political polarization. Americans are more polarized politically than at any time in recent memory. On "average, Democrats and Republicans are farther apart ideologically today than at any time in the past 50 years." Drew Desilver, *The polarization in today's Congress has roots that go back decades*, Pew Research Center (Mar. 10, 2022), https://perma.cc/7KPP-3RVA. America is polarizing even faster than other Western countries. Levi Boxell, et al., NBER, *Cross-Country Trends in Affective Polarization* 2 (2021), https://perma.cc/5WUV-UYJM.

Polarization begets fraud. "When societies grow so deeply divided that parties become wedded to incompatible worldviews, and especially when their members are so socially segregated that they rarely interact, stable partisan rivalries eventually give way to perceptions of mutual threat." Carolyn Shapiro, *Democracy, Federalism, and*

the Guarantee Clause, 62 Ariz. L. Rev. 183, 215–16 (2020) (quotation omitted, alteration accepted). "Such perceptions lead parties to view one another as mortal enemies, which means that the stakes of political competition heighten dramatically, undermining the normal operation of democratic give-and-take." *Id.* (quotation omitted, alteration accepted). "Losing ceases to be a routine and accepted part of the political process and instead becomes a full-blown catastrophe." *Id.* (quotation omitted).

The questions being decided in this era of heightened polarization are also increasingly fundamental. It is one thing to lose an election that might affect whether a State's revenue will be driven by property, sales, or income taxes. It is quite another when people perceive their physical freedoms and lives to be at stake. *See* John Hanna, *States' push to define sex decried as erasing trans people*, Associated Press (Feb. 15, 2023), https://archive.is/HB2dj; Brendan Pierson, *Lockdown backlash curbs governors' emergency powers*, Reuters (June 22, 2021), https://perma.cc/9DFW-NKEM.

This raising of the stakes affects the risk-reward calculus when it comes to fraud. The greater the threat, the more willing activists and others will be to defeat it through lawbreaking. Does anyone doubt that otherwise law-abiding citizens would be more willing to break the law to stop a politician they saw as an existential threat to themselves, their families, and their communities? As Americans polarize, the tendency will be for more citizens to seek opportunities to illegally increase their influence in elections.

B. Duplicative registrations hinder election administration.

In addition to protecting public confidence in elections, cutting down on

duplicative registrations fosters smooth election-administration. Indeed, three separate blue-ribbon, election-reform commissions have concluded that inaccurate voting rolls generally, and duplicative registrations particularly, impede election administration. That, in turn, makes elections costlier and impairs the voting experience. Congress, apparently inspired by the report from one such commission, enacted legislation partially addressing the issue. In sum, the need to assure that elections are efficiently run provides another reason to bar duplicative registrations.

In exploring this issue further, it makes sense to begin with the 2001 report from the National Commission on Federal Election Reform. *To Assure Pride and Confidence in the Electoral Process* (2001), https://perma.cc/ZZ4S-8JJ9. That commission—co-chaired by former Presidents Gerald Ford and Jimmy Carter, among others—issued its report in the aftermath of the controversial 2000 election. The commission reported that "[s]ignificantly inaccurate voter lists add millions of dollars in unnecessary costs to already underfunded election administrators," leading to mistakes and delays that "undermine public confidence in the integrity of the election system and the quality of public administration." *Id.* at 27. The commission specifically praised efforts to pursue the "elimination of duplicate voter registration records." *Id.* at 102. Congress obliged in 2002, passing the Help America Vote Act, which contains provisions requiring that States remove "duplicate names" from their rolls. Pub. L. No. 107-252, §303(a)(2)(B)(iii), 116 Stat. 1666, 1709 (2002).

Another report from a bipartisan commission—this one co-chaired by Carter and former Secretary of State James Baker—soon followed. That report deemed inaccurate rolls the "root of most problems encountered in U.S. elections." *Carter-Baker*

Report at 10. Duplicative, outdated registrations contributed to this problem. And while the Help America Vote Act partially helped prevent *intrastate* duplicative registrations, the commission lamented that the problem of *interstate* duplications remained unsolved. *See id.* at 12.

The problems remained in 2014, when President Obama's Presidential Commission on Election Administration released its own report. President Obama assembled this commission to address election-administration issues, including what many perceived to be unacceptably long lines at various polling locations. The commission concluded that "[i]mproving the accuracy of registration rolls … can expand access, reduce administrative costs, prevent fraud and irregularity, and reduce polling place congestion leading to long lines." Presidential Comm'n on Election Admin., *The American Voting Experience*, Cover Letter (2014), https://perma.cc/T653-MRNH. The commission zeroed in on "[b]loated and inaccurate voter registration lists" as "the source of many downstream election administration problems." *Id.* at 1. It explained that "incorrect records can slow down the processing of voters at polling places resulting in longer lines." *Id.* at 23. That makes sense; the more names officials must sift through before verifying someone's ability to vote, the longer the task is likely to take.

As all this shows, multiplicative registrations hinder the sound operation of American elections. Even setting aside any risk of fraud, bloated rolls create more work for election administrators, slowing the process and introducing more opportunities for mistakes. All of this creates the appearance that elections are poorly run, undermining the public's faith in the process.

C. Duplicative registrations are inconsistent with America's federalist structure.

Allowing duplicative registrations poses another problem as well: duplicative registrations undermine the significance of state residency.

In this country, "the people are sovereign." *Gamble v. United States*, 587 U.S. 678, 688 (2019). And "the people, by adopting the Constitution, 'split the atom of sovereignty.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)). "'It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.'" *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

This division of sovereign authority requires "distinguish[ing] precisely between 'the people of *a State*' and 'the people of all the States'"—"between the 'sovereignty which the people of *a single state* possess' and the sovereign powers 'conferred by the people of the United States on the government of the Union.'" *Gamble*, 587 U.S. at 689 (alteration accepted, emphases added) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 428, 429–30,435 (1819)).

Americans, no matter where they live, are part of the "people of the United States." But their residence bears directly on their being part of the "'people of *a State*.'" *Id.* (emphasis added) (quoting *McCulloch*, 4 Wheat. at 428). "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of *the State* wherein they reside." U.S. Const., amend. XIV, §1 (emphasis added). Any American may, "'of his own volition, become a citizen of any State of the Union, … with the same rights as other citizens of that

State.'" *Saenz*, 526 U.S. at 503 (quoting *Slaughter-House Cases*, 16 Wall. 36, 80 (1872)). But he may do so only by establishing "a *bonâ fide* residence therein." *Id.* (quoting *Slaughter-House Cases*, 16 Wall. at 80). Residency in one State is exclusive of residency in any other; Americans are citizens of the nation and of "the State," not the *States*, where they reside. U.S. Const., amend. XIV, §1.

A newly arrived citizen may exercise his share of his State's sovereignty by voting. Through elections, the people of a State choose who will wield sovereign power on their behalf. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892). And in States that make law by initiatives and referenda, the people wield sovereign power directly. *See Love v. King Cnty.*, 181 Wash. 462, 469 (1935). By these acts, every voter has a say in the disposition of the property, the liberty, and the lives of everyone subject to his State's coercive power. Registering to vote is thus a civically significant and consequential endeavor. It is how one claims a share in the "sovereignty which the people of a single state possess." *McCulloch*, 4 Wheat. at 429.

No functioning sovereign need allow non-residents to exert such awesome, potentially life-altering powers over the sovereign and its citizens. The law should be applied to reinforce these precepts, which are too fundamental to give way to notions of convenience or preference, let alone electoral opportunism. For this reason, the Supreme Court has long recognized that "the States have the power to require that voters be bona fide residents of the relevant political subdivision" so as "to preserve the basic conception of a political community." *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972).

In sum, "registration of an elector is the first step in the process of voting which

is a sovereign act, in fact the highest act of sovereignty that can be exercised by an American citizen." *State ex rel. Gandy v. Page*, 125 Fla. 348, 357 (1936). And the people of any State can reasonably demand that, before their citizens take this first step toward the "highest act of sovereignty," *id.*, they establish their commitment to the "political community." *Dunn*, 405 U.S. at 344; *see also id.* at 334 (noting the uncontested nature of Tennessee's "power to restrict the vote to bona fide Tennessee residents").

That commitment may entail canceling voter registrations in other States; it is reasonable to question an individual's commitment to a political community if he insists upon retaining the power to undertake sovereign acts in another jurisdiction. Indeed, the United States, for years, *stripped the citizenship* of Americans who "vot[ed] in a political election in a foreign State." Nationality Act of 1940, Pub. L. 76-853, §401(e), 54 Stat. 1137, 1169 (1940). While the Supreme Court later determined that this stripping of citizenship violated the Fourteenth Amendment, *see Afroyim v. Rusk*, 387 U.S. 253, 267–68 (1967), it never questioned the legitimacy of forbidding citizens to vote in or retain other political ties with foreign sovereigns.

States, as sovereigns all their own, have a similarly strong interest in ensuring that only individuals committed to being part of their political communities exercise their sovereign power. States have an interest, in other words, in rejecting a cosmopolitan sort of state citizenship—a citizenship in which Americans can, without committing to a State, secure and retain the ability to exercise a share of that jurisdiction's sovereign authority. Laws prohibiting duplicative registrations promote that interest.

CONCLUSION

The Court should reverse the District Court's decision.

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