No. 22-50692

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CAMPAIGN LEGAL CENTER; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW; DEMOS A NETWORK FOR IDEAS AND ACTION, LTD.,

Plaintiffs-Appellees

v.

JOHN B. SCOTT, in his official capacity as Secretary of the State of Texas,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS INTERVENOR

JOHNATHAN SMITH
Acting Principal Deputy
Assistant Attorney General

TOVAH R. CALDERON
NOAH B. BOKAT-LINDELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-0243

STATEMENT REGARDING ORAL ARGUMENT

Oral argument has been scheduled for August 30, 2022. The United States does not intend to participate in argument unless the Court requests it.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CONSTITUTION:

STATUTES: **PAGE**

LEGISLATIVE HISTORY:

RULE: **PAGE**

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22-50692

CAMPAIGN LEGAL CENTER; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW; DEMOS A NETWORK FOR IDEAS AND ACTION, LTD.,

Plaintiffs-Appellees

v.

JOHN B. SCOTT, in his official capacity as Secretary of the State of Texas,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS INTERVENOR

JURISDICTIONAL STATEMENT

This is an appeal from the district court's August 2, 2022, order issuing a permanent injunction against defendant John B. Scott. The district court had jurisdiction under 28 U.S.C. 1331 and 52 U.S.C. 20510(b). A timely notice of appeal was filed on August 4, 2022. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly held that Section 8(i) of the National Voter Registration Act (NVRA), 52 U.S.C. 20507(i)(1), does not violate the anticommandeering doctrine.[1]

STATEMENT OF THE CASE

1. The NVRA, 52 U.S.C. 20501 *et seq.*, establishes uniform procedures to increase voter registration in federal elections while maintaining accurate voter rolls. Section 8(i), 52 U.S.C. 20507(i), creates a right to public disclosure of records related to States' voter-roll maintenance efforts. The relevant portion provides: "Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. 20507(i)(1).

2. In August 2021, pursuant to a prior settlement agreement, Texas's Attorney General notified plaintiffs, a coalition of advocacy groups, that Texas Secretary of State John B. Scott had created a new program to remove suspected non-citizens from Texas voter rolls. ROA.336-337. When the Secretary's office

[1] The United States does not take a position at this time on any other issue presented in this appeal.

refused to disclose records related to the program, plaintiffs sued under the NVRA, alleging a violation of Section 8(i). ROA.337-338. The Secretary raised several defenses, including that Section 8(i) unconstitutionally commandeers state officials. ROA.340, 346-347. After a bench trial, the district court issued a decision rejecting the Secretary's constitutional challenge (ROA.346-348) and other arguments and granting plaintiffs a permanent injunction. ROA.334.[2]

3. The Secretary appealed. ROA.354. This Court granted a temporary administrative stay and expedited briefing on the merits. The United States now intervenes to defend the constitutionality of the NVRA. See 28 U.S.C. 2403(a).

SUMMARY OF ARGUMENT

The district court correctly held that Section 8(i) of the NVRA does not violate the anticommandeering doctrine.

Section 8(i) is valid Elections Clause legislation. That Clause grants Congress the power, "at any time," to "alter" the "Regulations" enacted by "each

---

[2] Texas filed notice of its constitutional challenge under Federal Rule of Civil Procedure 5.1 on April 12, 2022. See ROA.268-269. The United States filed an advisory on June 9 acknowledging receipt of the notification. ROA.331-332. Recognizing that a decision on intervention may be premature or unnecessary, the United States asked the district court to notify the United States under Rule 5.1 if the court thought it would be necessary to adjudicate the constitutional issue and to give the United States an opportunity to intervene under 28 U.S.C. 2403(a). ROA.332. The court's August 2 decision acknowledged the United States' filing, but stated that "[b]ecause the court will reject the Secretary's constitutional argument, the United States need not intervene in this action." ROA.346 n.5.

State" "prescrib[ing]" the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. Art. I, § 4, Cl. 1. Section 8(i)'s requirement that the Secretary maintain and make publicly available certain voter registration records falls well within the Clause's broad authority to regulate the "Manner of holding [federal] Elections." And because the Clause expressly authorizes Congress to "alter" the "Regulations" enacted by "each State," legislation enacted pursuant to the Clause is not subject to the anticommandeering doctrine. Indeed, the Supreme Court consistently has upheld Elections Clause statutes that could be viewed as issuing direct orders to state governments. The Secretary's contrary arguments run headlong into binding precedent, and his other objections are no more convincing.

Section 8(i) also is a valid means of preventing discrimination in voter registration under the Fourteenth and Fifteenth Amendments. The anticommandeering doctrine does not apply to legislation passed under these Amendments, which were precisely designed to impose limits on state authority.

Even if the anticommandeering doctrine applied, Section 8(i) does not unconstitutionally commandeer state officials. It merely sets standards for preservation and disclosure of whatever records the States receive or create as part of any voter-roll maintenance programs that they conduct.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE NVRA'S PUBLIC DISCLOSURE PROVISION DOES NOT VIOLATE THE ANTICOMMANDEERING DOCTRINE

A. Standard Of Review

Whether the NVRA violates the anticommandeering doctrine is a legal question that this Court reviews *de novo*. *United States* v. *McGinnis*, 956 F.3d 747, 752 (5th Cir. 2020), cert. denied, 141 S. Ct. 1397 (2021).

B. Section 8(i) Of The NVRA Is Valid Elections Clause Legislation And Therefore Not Subject To The Anticommandeering Doctrine

1. Section 8(i) falls within Congress's power to regulate the "Manner" of federal elections under the Elections Clause. U.S. Const. Art. I, § 4, Cl. 1. The Clause provides that the "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, except as to the Places of chusing Senators." *Ibid.* "The Clause's substantive scope is broad." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8 (2013). As the Supreme Court has long recognized, "Times, Places, and Manner" "are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections.'" *Id.* at 8-9 (quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)). This sweeping power embraces, among much else, "regulations relating to 'registration,'" *id.* at 9 (quoting *Smiley*, 285 U.S. at 366), and the

"protection of voters," *Cook* v. *Gralike*, 531 U.S. 510, 523 (2001) (quoting *Smiley*, 285 U.S. at 366).

Section 8(i) falls into both categories. Section 8(i) regulates how States record their efforts to keep accurate registration lists, and it provides a mechanism to ensure that States maintain their registration lists according to the NVRA's other requirements. In doing so, it also protects voters by ensuring that state officials do not abuse their powers over registration to "entrench themselves or place their interests over those of the electorate." *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 815 (2015). In short, Section 8(i) is a valid exercise of Congress's power "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley*, 285 U.S. at 366; accord *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 834 (1995).

2. As valid Elections Clause legislation, Section 8(i) is not subject to the anticommandeering doctrine. The anticommandeering doctrine is "simply" a "recognition" of the Constitution's "limit[s] on congressional authority." *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1476 (2018). Thus, where a particular constitutional provision does not grant Congress the power to "command[] state legislatures to enact or refrain from enacting state law," *id.* at 1478, or "command the States' officers" to "administer or enforce a federal regulatory program," *Printz* v. *United*

States, 521 U.S. 898, 935 (1997), the anticommandeering doctrine applies. In contrast, where a particular constitutional provision expressly authorizes Congress "to issue direct orders to the governments of the States," *Murphy*, 138 S. Ct. at 1476, the anticommandeering doctrine is inapplicable.

Here, the Elections Clause expressly authorizes Congress, "at any time," to "alter" the "Regulations" enacted by "each State" "prescrib[ing]" the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. Art. I, § 4, Cl. 1. Thus, far from being "conspicuously absent," the "power to issue direct orders to the governments of the States" appears in the very text of the Clause. *Murphy*, 138 S. Ct. at 1476. Indeed, because Senators originally were "chosen" by state legislatures, U.S. Const. Art. I, § 3, Cl. 1, Congress could not have regulated the "Times" or "Manner of holding Elections for Senators," *id.* Art. I, § 4, Cl. 1, *other than* by "issu[ing] direct orders" to the state legislatures themselves, *Murphy*, 138 S. Ct. at 1476; see also *Ex parte Siebold*, 100 U.S. 371, 391 (1879) (explaining that state officials "in elections for representatives, owe a duty to the United States, and are amenable to that government as well as to the State").

It is unsurprising, then, that Elections Clause legislation has never been subjected to anticommandeering principles. To the contrary, the earliest laws passed under the Clause all could be understood as issuing direct orders to state

governments. Congress required state legislatures to draw congressional district maps instead of holding at-large elections, forced them to run their own congressional elections on the same date, and "compelled the two bodies" of each state legislature to "meet in joint convention * * * and vote for a senator until one was elected." *Ex parte Yarbrough*, 110 U.S. 651, 660-661 (1884); see also 2 U.S.C. 9 (requiring since 1871 that all votes for Members of Congress be tabulated "by written or printed ballot"). And the House of Representatives "always" has exercised supervisory powers over state election officers when adjudicating contested elections. *Ex parte Siebold*, 100 U.S. at 389. Yet the Supreme Court consistently has upheld Congress's power to regulate in this manner and has used these historical examples to justify other, similar laws. See *ibid.*; *Ex parte Yarbrough*, 110 U.S. at 661-662.

In *Branch* v. *Smith*, 538 U.S. 254, 279-280 (2003) (plurality opinion), for example, the Court rejected application of the anticommandeering doctrine to a federal reapportionment statute enacted under the Elections Clause. When Mississippi failed to redraw its congressional map, a court redistricted based on criteria laid out in the federal law. *Id.* at 258, 280. While the statute setting out these criteria "envisions legislative action," and thus might otherwise trigger anticommandeering concerns, the controlling plurality held that "in the context of Article I, § 4, cl. 1, such 'Regulations' are *expressly* allowed." *Id.* at 280.

For the same reasons, several circuits already have upheld the NVRA against anticommandeering challenges. See *ACORN* v. *Miller*, 129 F.3d 833, 836-837 (6th Cir. 1997); *ACORN* v. *Edgar*, 56 F.3d 791, 794-796 (7th Cir. 1995); *Voting Rts. Coal.* v. *Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996). All have ruled that, in exercising its Elections Clause authority, Congress "may conscript state agencies to carry out voter registration for the election of Representatives and Senators." *Voting Rts. Coal.*, 60 F.3d at 1415. The Secretary's only response to these NVRA cases (Br. 47) is that they predate *Printz*. But all postdate *New York* v. *United States*, 505 U.S. 144 (1992), the Supreme Court's seminal anticommandeering decision, and their reasoning is still valid today. Accordingly, and consistent with these decisions, Section 8(i) is not subject to the anticommandeering doctrine.

3. The Secretary (Br. 40, 42-43) does not meaningfully contest that Elections Clause legislation is not subject to the anticommandeering doctrine.[3] Thus, although he frames his argument as an anticommandeering defense, his argument (Br. 41-47) is ultimately one about the scope of the Elections Clause—and in particular, the phrase "Manner of holding Elections." In the Secretary's telling (Br. 43, 45), voter registration did not exist at the Founding, and the phrase "Manner of holding Elections" must refer only to "the mechanics of casting and

[3] "Br. _" refers to pages of the Secretary's opening brief.

recording votes on Election Day." But the Secretary acknowledges (Br. 43) that the Supreme Court has interpreted Congress's Elections Clause power broadly, so as to encompass registration regulations. See *Smiley*, 285 U.S. at 366-367 (recognizing that the Elections Clause grants Congress "a general supervisory power over the whole subject" of federal elections (citation omitted)). That precedent refutes his cramped reading of the Elections Clause. See, *e.g.*, *Ex parte Siebold*, 100 U.S. at 381-382, 387 (upholding statute imposing federal sanctions against state officials who interfere with either registration or voting); pp. 5-6, *supra*.[4]

And overturning all that precedent on the scope of the Elections Clause would be a Pyrrhic victory indeed. That is because States have only the same

[4] The Secretary's historical arguments are, to say the least, debatable. For instance, "even in 1787 there was *functional* registration—just no registration *lists*." *Edgar*, 56 F.3d at 793. And as the very sources the Secretary cites confirm, the Federalists defended Congress's Elections Clause power as a means not merely to prevent States from refusing to send representatives to Congress, but also to prevent them from manipulating election laws in ways that deny voters equal rights. See, *e.g.*, 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 26-27, 49-51 (Jonathan Elliot ed., 2d ed. 1836), https://perma.cc/H3ZP-6A93; 3 *id.* at 366-367; Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788*, at 174, 178, 210, 448 (2010); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 224, 401 n.47 (1996). Though many States ratified the Constitution with requests to restrict the Elections Clause's reach—indicating that they understood the Clause's broader scope and ratified in spite of it—Congress did not submit any such amendment to the people. Maier 448, 452-453.

power to regulate federal elections that the Constitution gives Congress. See *Cook*, 531 U.S. at 522 ("Because any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved by, the States.'" (citation omitted)); *U.S. Term Limits*, 514 U.S. at 834; *Smiley*, 285 U.S. at 367. So if the Secretary's historical view of the Elections Clause were correct, then Texas's *own* authority to require voters to register *at all* for federal elections could well disappear—and any federal voter-roll maintenance programs along with it.[5]

C. Section 8(i) Of The NVRA Also Is Valid Fourteenth And Fifteenth Amendment Legislation, Which Likewise Is Not Subject To The Anticommandeering Doctrine

1. The NVRA also validly enforces both the Fourteenth and Fifteenth Amendments. Section 8(i) easily meets both the Fifteenth Amendment's rationality standard, see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966); accord *Shelby County* v. *Holder*, 570 U.S. 529, 555-556 (2013), and the Fourteenth's congruence and proportionality standard, see *Tennessee* v. *Lane*, 541

[5] The Secretary also suggests (Br. 48) that Section 8(i) is really a regulation under the Necessary and Proper Clause. But as already discussed, Section 8(i) falls directly within Congress's Elections Clause power. In any event, where, as here, the underlying power itself authorizes Congress to issue direct orders to state governments, it is not improper for Congress to "carry[] into Execution" that power by issuing such orders under the Necessary and Proper Clause. U.S. Const. Art. I, § 8, Cl. 18; cf. *Printz*, 521 U.S. at 923-924. Thus, even if Section 8(i) were also an exercise of Congress's power under the Necessary and Proper Clause, the anticommandeering doctrine would still be inapplicable.

U.S. 509, 520 (2004). Congress found that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation," particularly among "racial minorities." 52 U.S.C. 20501(a)(3). It based this finding on testimony and evidence of "attempts to keep certain groups of citizens from registering to vote," including through "selective purging of the voter rolls"—attempts that "still exist[ed]" even though the Voting Rights Act, enacted nearly 30 years before the NVRA, banned such discriminatory practices. S. Rep. No. 6, 103d Cong., 1st Sess. 3 (1993).[6] Against these concerns, Section 8(i) only requires States to maintain and disclose records, an extremely "limited" remedy that is "reasonably targeted to a legitimate end." *Lane*, 541 U.S. at 531, 533.

2. Like Elections Clause legislation, statutes passed under the Reconstruction Amendments are not subject to the anticommandeering doctrine. Those Amendments impose specific limitations on state authority and expressly grant Congress the "power to enforce" those limitations against the States. U.S. Const. Amend. XIV, § 5; *id.* Amend. XV, § 2. And those enforcement clauses "expressly give[] authority for congressional interference [with] and compulsion" of any State's "legislative, its executive, or its judicial authorities." *Ex parte*

---

[6] See S. Rep. No. 6, at 18; H.R. Rep. No. 9, 103d Cong., 1st Sess. 2-3 (1993); *Voter Registration: Hearing Before the Subcomm. on Elections of the Comm. on H. Admin.*, 101st Cong., 1st Sess. 138, 155, 241 & n.4 (1989) (witness testimony about recent discriminatory registration practices).

Virginia, 100 U.S. 339, 347-348 (1879) (upholding law fining state officials who fail to seat minority jurors); see *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) ("When Congress acts pursuant to" the enforcement clauses, "not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."). Hence, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" *City of Rome* v. *United States*, 446 U.S. 156, 179 (1980).

D. NVRA Section 8(i) Does Not Commandeer State Officials

Even if the anticommandeering doctrine applied to Section 8(i), its recordkeeping and disclosure requirements would not violate that principle. To be clear, Section 8(i) does not require States to create or compile records. Nor does it require Texas to conduct the program at issue here.[7] Rather, Section 8(i) simply requires States to "maintain" and "make available for public inspection" "all records" they have "concerning the implementation of" whatever "programs and

[7] The NVRA does, validly under the Elections Clause, require States to create (and compile records on) programs to remove from the federal voter rolls residents who have died or moved. See 52 U.S.C. 20507(a)(4), (d), and (i)(2). But the program at issue in this case is based on suspected non-citizenship. Such programs are entirely optional on Texas's part. Cf. 52 U.S.C. 20507(b) and (c)(2).

activities" they decide to "conduct[]." 52 U.S.C. 20507(i)(1). As the Supreme Court recognized in *Printz*, statutes "which require only the provision of information" do not entail "the forced participation of the States' executive in the actual administration of a federal program." 521 U.S. at 918; see also *id.* at 936 (O'Connor, J., concurring) (contrasting the provisions invalidated in *Printz* with federal statute "requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice"). Neither do statutes that simply set a minimum period for which records already "received" or otherwise in a State's "possession" must be "maintained." *Voting for Am., Inc.* v. *Steen*, 732 F.3d 382, 399 (5th Cir. 2013).[8]

Moreover, Section 8(i) "does not require the States in their sovereign capacity to regulate their own citizens." *Reno* v. *Condon*, 528 U.S. 141, 151 (2000). States are free to decide for themselves whether to create appropriate additional voter-roll accuracy measures. Rather than commandeering state officials, then, the provision merely "regulates the States as the owners of data bases." *Ibid.*

The Secretary asserts (Br. 39-40) that this Court's decision declaring unconstitutional 25 U.S.C. 1915(e), a recordkeeping provision in the Indian Child

---

[8] These requirements comport with other, similar mandates under both Texas and federal law. See 52 U.S.C. 20701; Tex. Elec. Code §§ 1.012(c) and (d), 13.101-13.102 (2021).

Welfare Act (ICWA), dooms Section 8(i). See *Brackeen* v. *Haaland*, 994 F.3d 249, 268 & n.5 (5th Cir. 2021) (en banc) (per curiam), cert. granted, 142 S. Ct. 1205 (2022) (argument scheduled for Nov. 9, 2022). But Congress enacted ICWA pursuant to its power over Indian affairs—which, unlike the congressional powers at issue here, is subject to the anticommandeering doctrine. And in declaring Section 1915(e) unconstitutional, this Court did not dispute that laws imposing only "an obligation to 'provide information'" do not violate the anticommandeering doctrine. *Brackeen*, 994 F.3d at 408-409 (majority opinion of Duncan, J.).[9]

[9] The federal government is currently challenging this Court's decision declaring Section 1915(e) unconstitutional in the Supreme Court. Gov't Br. at 45-47, *Haaland* v. *Brackeen*, No. 21-376 (S. Ct. Aug. 12, 2022). *Brackeen* does not control this case, but if this Court thinks otherwise, it should withhold decision until the Supreme Court resolves the case.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's ruling that the NVRA does not violate the anticommandeering doctrine.

Respectfully submitted,

JOHNATHAN SMITH
Acting Principal Deputy
Assistant Attorney General

s/ Noah B. Bokat-Lindell
TOVAH R. CALDERON
NOAH B. BOKAT-LINDELL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-0243

CERTIFICATE OF SERVICE

I certify that on August 24, 2022, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Noah B. Bokat-Lindell
NOAH B. BOKAT-LINDELL
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS INTERVENOR:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3367 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2019, in 14-point Times New Roman font.

s/ Noah B. Bokat-Lindell
NOAH B. BOKAT-LINDELL
Attorney

Date: August 24, 2022