No. 12-71

In the

# Supreme Court of the United States

ARIZONA, et al.

*Petitioners*,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC. et al.,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS


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## QUESTIONS PRESENTED

The Ninth Circuit Court of Appeals interpreted the National Voter Registration Act 42 U.S.C. §§ 1973gg *et seq*. as prohibiting states from ensuring that voters in federal elections have the "qualifications requisite for electors of the most numerous branch of the state legislature." The questions presented by this case are:

1. Did Congress intend to prohibit states from ensuring that voters in federal elections have the "qualifications requisite for electors of the most numerous branch of the state legislature?"

2. Does Congress have authority to prohibit states from ensuring that voters in federal elections have the "qualifications requisite for electors of the most numerous branch of the state legislature?"

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## IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in preserving the division of power outlined in the Constitution. The Founders designed this division as a means to protect individual liberty. Nowhere is this more evident than the division between the States and Congress in the regulation of qualifications of voters in federal elections.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Petitioner has filed a blanket consent with the clerk and letters evidencing consent from the other parties have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

Arizona has established qualifications for voting in state elections, including the requirement of citizenship. Ariz. Rev. Stat. § 16-101A.1. To ensure that proposed registrants meet the state qualifications they are required to provide documentary evidence of citizenship. Ariz. Rev. Stat. § 16-166F. Any state issued identification card or any document sufficient to prove citizenship for federal purposes are two possible means of meeting this requirement. *Id.*

The Ninth Circuit Court of Appeals ruled that these state law requirements conflicted with the National Voter Registration Act. According to the court below, that Act (and this application of the Act) were within Congress' powers granted by Article I, section 4 to regulate the time, place, or manner for holding federal elections. The problem with this analysis is that neither the state law nor the Ninth Circuit's interpretation of the National Voter Registration Act concern the time, the place, or the manner of holding an election. Instead, the state law relates to qualification of electors – a matter that the Constitution assigns to state regulation.

Article I, section 2 expressly leaves qualification of electors to state law. Any state law defining voter qualification or establishing a means for determining that the voter meets the qualification is outside the purview of Congress except in the exceedingly narrow circumstance of the exercise of power under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment. There can be no argument for a broad power of Congress under either of these provisions to strip states of the power to regu-

late qualifications, and proof of qualifications, to vote in state and federal elections. The later enacted Seventeenth Amendment continued to recognize the exclusive power of the states to set the qualifications of voters in federal elections. Thus, on the record presented in this case, Congress has no power to set qualifications of electors in state and federal elections nor does it have the power to strip the states of the ability to require proof of qualification to vote at either the time of registration or the time of voting.

## ARGUMENT

### I. THE QUALIFICATION OF ELECTORS CLAUSE IN ARTICLE I, SECTION 2 GOVERNS THIS CASE, NOT THE ELECTIONS CLAUSE OF SECTION 4

The constitutional provisions relating to election of Members of the House of Representatives (and later the Members of the Senate) seek to protect the integrity of the federal government while at the same time protect against tyranny by that same government. By vesting power to override state law on the time, place, and manner of elections, the Constitution protects against state attempts to frustrate formation of the biennial House of Representatives. By denying Congress the authority to set qualification of electors, however, the Constitution protected against the tyranny of a government more intent on preservation of elective office than on securing individual liberty. The court below failed to pay heed to the different purposes of these provisions and thus reached a conclusion that writes the Qualification of Electors Clause out of the Constitution.

### A. The Elections Clause Only Governs the Mechanics of Voting in Federal Elections Once Qualifications To Vote Have Been Established

Article I, section 4 of the Constitution grants power to Congress to override state regulation of the mechanics of federal regulation. Specifically, Congress is given the power to "make or alter" regulations regarding the "times places, and manner of holding elections for Senators and Representatives." U.S. Const., Art. I, § 4. The text is quite explicit in outlining the power of Congress to regulate federal elections. Congress was not given general power over all matters relating to an election. Instead, the text expressly defines only three areas of regulation in which congressional control is appropriate: the time, the place, and the manner of holding the election.

In the debate over the ratification of the Constitution, Alexander Hamilton argued that Congress' power to regulate elections was "expressly restricted to the regulation of the *times*, the *places*, and the *manner* of elections." *The Federalist No. 60* (Alexander Hamilton), (Clinton Rossiter, ed. 1961) at 371 (emphasis in original). James Madison explained that the purpose of the provision was to prevent dissolution of the federal government by state regulation that prevented a House of Representatives from being formed. *James Madison*, *Debates*, reprinted in 10 The Documentary History of the Ratification of the Constitution (Virginia, No. 3) John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan, editors (Univ. Virginia Press 2009) at 1260.

The ratification debates emphasize the limitation on this delegation of power to Congress: "Congress therefore were vested also with the power just given to the legislatures—that is, the power of prescribing merely the circumstances under which elections shall be *holden*, not the qualifications of the electors, nor those of the elected." *A Pennsylvanian to the New York Convention*, *Pennsylvania Gazette*, June 11, 1788, reprinted in 20 The Documentary History, *supra* (New York No. 2) at 1145 (emphasis in original). In essence, this power extends only to the "*when, where,* and *how*" of elections. *Sedgwick*, *Theophilus Parsons: Notes of Convention Debates*, January 16, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3) at 1211 (emphasis in original).

The central concern of the framers was the timing of the elections in the states. Unless there was federal control over that timing, states could prevent a full House from being elected in time to allow a session of Congress. *James Madison*, *Debates*, reprinted in 10 The Documentary History, *supra*, (Virginia, No. 3) at 1260; *The Federalist No. 59* (Alexander Hamilton), *supra* at 362 ("*every government ought to contain in itself the means of its own preservation*." Emphasis in original.); *The Federalist No. 61* (Alexander Hamilton), *supra* at 375. A number of the arguments in the ratification debates use Rhode Island as an example of what a dissenting state might do to prevent the House of Representatives from sitting. *A Pennsylvanian to the New York Convention*, *Pennsylvania Gazette*, 11 June 1788, reprinted in 20 The Documentary History, *supra* (New York No. 2) at 1144; *A Landholder IV*, *Connecticut Currant*, November 26, reprinted in 3 The Documen-

tary History, *supra* (Delaware, New Jersey, Georgia, and Connecticut) at 479. Rhode Island's anti-federalist legislature refused to call a convention to consider the new Constitution. *See Massachusetts Centinel*, *26 December*, reprinted in 5 The Documentary History, *supra* (Massachusetts No. 2). The power of Congress to regulate the time of federal elections prevents states that oppose the federal government from refusing to schedule a federal election. *The Federalist No. 61* (Alexander Hamilton), *supra* at 375; *James Madison*, *Convention Debates*, reprinted in 10 The Documentary History, *supra* (Virginia No. 3) at 1260.

The regulation of the place of federal elections was thought to be a tool against disenfranchisement. *James Madison*, *Convention Debates*, reprinted in 10 The Documentary History, *supra* (Virginia No. 3) at 1260; *Jeremy Belknap: Notes of Convention Debates*, *21 January*, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3); *King*, *Convention Debates*, *21 January*, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3) at 1279. There were several mentions in the ratification debates noting that Charleston. South Carolina had 30 representatives in the state legislature out of a total of 200. Rural areas argued that this arrangement gave all the political power in the state to Charleston. *Id*. Section 4 of Article I was meant to ensure that Congress had the power to prevent similar unequal representation from occurring in the House of Representatives.

There are a few mentions of different election mechanical issues regarding the manner of holding election. One supposed it could require a paper bal-

lot rather than a voice vote. *Thomas McKean*, *Convention Debates*, reprinted in 2 The Documentary History, *supra* (Pennsylvania) at 537; *U.S. Term Limits v. Thorton*, 514 U.S. 779, 833 (1995) (*quoting* Madison during convention debates). Another argued that the provision allowed Congress to choose between a majority or a plurality vote requirement. *Federal Farmer: An Additional Number of Letters to the Republican*, New York, 2 May 1788, reprinted in 20 The Documentary History, *supra* (New York No. 2) at 1021. The common feature is that all of these concerns are with the mechanics of the actual election rather than the qualifications of the electors. *Convention Debates*, *21 January*, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3) at 1279 ("for the power of controul given by this sect, extends to the *manner* of election, not the *qualifications* of the electors." (Emphasis in original)).

This Court's opinions on the reach of section 4 are not to the contrary. This Court has acknowledged that section 4 gives Congress to set a uniform national date for elections. *Foster v. Love*, 522 U.S. 67, 68-72 (1997). The Court has long-recognized that the "manner" of election included a power to compel selection of representatives by district. *Ex parte Siebold*, 100 U.S. 371, 384 (1879). Congress also has power over redistricting and political gerrymandering pursuant to this section. *Branch v. Smith*, 538 U.S. 254, 259 (2003); *Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004).

Justice Black argued in *Oregon v. Mitchell*, 400 U.S. 112 (1970) that the power in Section 4 to override state regulation also extended to overriding state elector qualifications identified in Section 2.

*Id*. at 315 (Black, J.) No other justice of this Court accepted this reasoning. Indeed, Justice Harlan convincingly demonstrated that such a result was contrary to the intent behind Section 2. *Id*. at 210 (Harlan, J.). Justice Harlan was correct. Section 2 expressly recognizes state control over voter qualifications.

### B. Article I, Section 2 places Exclusive Control of Regulating Qualification To Vote in Federal Elections in the States

While the Constitution assigned ultimate control over the mechanics of federal elections to Congress, states were assigned exclusive control over the *qualifications* of the electors. This was, in part, a recognition that the new Constitution created a government that was both "federal" and "national" in character. States already controlled the qualification of voters for the state legislature. The Framers and Ratifiers saw no good reason to create a national uniformity on voter qualification. There was express recognition that different states would have different voter qualification requirements. *King*, *Theophilus Parsons: Notes of Convention Debates*, *17 January*, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3) at 1240-41. So long as the qualification was tied to the state qualification to vote for the most numerous branch of the state legislature, the people had the ability and motive to protect their franchise. *A Landholder IV*, *Connecticut Courant*, *26 November*, reprinted in 14 The Documentary History, *supra* (Commentaries on the Constitution, No. 2) at 233 ("Your own assemblies are to regulate the formalities of this choice, and unless they betray you, you cannot be betrayed"). On the other hand, there were good

reasons to keep the power out of the hands of Congress.

At the convention, James Madison argued forcefully against granting Congress the power to dictate the qualifications of electors. If Congress could regulate the qualifications of electors, Madison argued, "it can by degrees subvert the Constitution." *Oregon*, 400 U.S. at 210 (Harlan, J.) *quoting* Madison during Convention Debates. Madison made a similar argument in the Federalist Papers. Leaving qualification of electors to Congress would have "violated a fundamental article of republican government." *The Federalist No. 52* (James Madison), *supra* at 325-26.

Even beyond this political design, the commitment of voter qualification to state law served another purpose during the ratification debate. One of the chief fears of those arguing against ratification was that the new federal government would annihilate the states. This was a significant fear and was addressed in the ratification debates in Connecticut, Massachusetts, and Virginia. *A Landholder IV*, *Connecticut Currant*, November 26 reprinted 14 The Documentary History (Commentaries No. 2) at 233; *Gen. Brooks*, *Convention Debates*, January 24, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3); *Virginia Independent Chronicle*, November 28, reprinted in 8 The Documentary History, *supra* (Virginia No. 1) at 177-78. The Elector Qualification Clause was seen as the chief argument against this fear.

How could Congress do away with the States when the States had so much control over the election of federal representatives? "Congress cannot be organized without repeated acts of the legislatures of

the several states." *Gen. Brooks*, *Convention Debates*, January 24, reprinted in 6 The Documentary History, *supra* (Massachusetts No. 3). The same point was argued in Virginia and other states. *An Impartial Citizen VI*, *Petersburg Virginia Gazette*, March 13, reprinted in 8 The Documentary History, *supra* (Virginia No. 1) at 495 ("How can there be a House of Representatives, unless its members be chosen? How can its members be chosen, unless it be known and ascertained who have a right to vote in their election?"); *A Landholder IV*, *Connecticut Currant*, November 26 reprinted in 3 The Documentary History, *supra* (Delaware, New Jersey, Georgia, and Connecticut) at 480 ("The national Representatives are to be chosen by the same electors, and under the same qualifications, as choose the state representatives; so that if the state representation be dissolved, the national representation is gone of course. State representation and government is the very basis of the congressional power proposed.")

## II. NEITHER SECTION 5 OF THE FOURTEENTH AMENDMENT NOR SECTION 2 OF THE FIFTEENTH AMENDMENT GIVE CONGRESS POWER TO PROHIBIT STATES FROM ENSURING ONLY CITIZENS VOTE IN FEDERAL ELECTIONS

Both the Fourteenth and Fifteenth Amendments grant Congress power to enforce Equal Protection and Voting Rights. Neither, however, strips states of the power to determine the qualifications of electors that are not themselves discriminatory. Indeed, state power to define voter qualifications in federal elections was repeated in the later-enacted Seventeenth Amendment. U.S. Const. Amend. 17 ("The

electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.").

Section 5 of the Fourteenth Amendment (and by extension, Section 2 of the Fifteenth Amendment) give Congress the authority to *enforce* the substantive provisions of the amendment. Thus, Congress can outlaw racially discriminatory voting practices. *City of Rome v. United States*, 446 U.S. 156, 173-74 (1980). The enforcement power, however, is remedial and must be proportionate to the harm sought to be remedied. *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80-83 (2000); *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 225-26 (2009); *Coleman v. Court of Appeals of Maryland*, __ U.S. __, 132 S. Ct. 1327, 1333-34 (2012).

The question in this case is whether Arizona can enforce its laws prohibiting noncitizens from voting. Ariz. Rev. Stat. § 16-101. There is no evidence that Congress enacted the National Voter Registration Act to require states to open voting to noncitizens. Indeed, the Act specifically recognizes citizenship as a legitimate voter qualification. 42 U.S.C. § 1973gg-7(b)(2)(A). Congress further authorized requirements that individuals registering to vote provide "other information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

There is nothing here showing that Congress attempted to invoke authority under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment. Congress neither sought to require states to permit noncitizens to vote nor to prohibit

states from collecting the information necessary to establish citizenship.

More to the point, Congress would have no power to require states to allow noncitizens to vote in either state or federal elections. Congress cannot define the disenfranchisement of noncitizens as a violation of the Equal Protection Clause. *See City of Boerne*, 521 U.S. at 518-19. The Fifteenth Amendment itself restricts the franchise to "citizens." U.S. Const., Amend 15 (The right of *citizens* of the United States to vote shall not be denied." (emphasis added)). This theme is also carried in the decisions of this Court. *See*, *e.g.*, *Reynolds v. Simms*, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote."); *Baker v. Carr*, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote ... [is] a right secured by the Constitution.").

Congress did not and could not invoke its power under Section 5 of the Fourteenth Amendment or Section 2 of the Fifteenth Amendment to prohibit Arizona from requiring proof of citizenship of applicants for voter registration.

## CONCLUSION

The court below analyzed the question in this case as one of time, place, or manner of an election. That was clearly wrong. Arizona's statute requires proof that an applicant is qualified to vote. It is a regulation of elector qualification. As such, it is a regulation that the Constitution assigns to the states. Congress has no power, unless it seeks to remedy a violation of the Fourteenth or Fifteenth Amendment, to set voter qualifications. States have

the power to set the qualifications and to require proof of those qualifications at the time of registration and on election day.

DATED: December, 2012.

Respectfully submitted,

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