No. 12-71

In The
Supreme Court of the United States

STATE OF ARIZONA, ET AL.,
Petitioner,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., AND JESUS M. GONZALEZ, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF RESPONDENTS

WENDY R. WEISER
MYRNA PÉREZ
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Ave. of the Americas
12th Floor
New York, N.Y. 10013
(646) 292-8376
wendy.weiser@nyu.edu

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St. NW, Ste 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

*Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

The following scholars are experts in the field of constitutional law, each of whom has published an article on the Elections Clause or the scope of federal preemption of state law.[2] *Amici curiae* appear to ensure appropriate application of text, structure, history, and meaning of the Elections Clause:

Gabriel J. Chin is a Professor of Law at University of California Davis School of Law. His scholarship includes the areas of constitutional law, federal preemption, civil rights and racial equality issues.

Jack N. Rakove is the William Robertson Coe Professor of History and American Studies, and Professor of Political Science and (by courtesy) Law, at Stanford University. He is the author of six books, including ORIGINAL MEANINGS: POLITICS AND IDEAS IN

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amici curiae* state that all parties have consented to the filing of this brief; blanket letters of consent have been filed with the Clerk of the Court.

[2] Affiliations listed are for identification purposes only.

THE MAKING OF THE CONSTITUTION, which won the Pulitzer Prize in History.

Jamelle Sharpe is an Associate Professor and the Richard W. and Marie L. Corman Scholar at the University of Illinois College of Law. His scholarship includes federal court jurisdiction and federal preemption of state law.

Franita Tolson is the Betty T. Ferguson Professor of Voting Rights at Florida State University College of Law. Her scholarship includes elections and federalism.

INTRODUCTION AND SUMMARY OF ARGUMENT

In writing the Elections Clause more than two centuries ago, our Constitution's Framers concluded that the federal government must have the final say over the mechanics of federal elections, including the rules applicable to voter registration. In lengthy, comprehensive debates – beginning at the Constitutional Convention in Philadelphia, continuing in the State Ratification Conventions, and through the debates over the Amendments to the Constitution proposed in 1789 – the people who wrote and ratified the Constitution made clear that they conferred on Congress the power to "make or alter" state election law in order to protect voting rights in federal elections and allow Congress to set uniform rules for the time, place, and manner of those elections. Where Congress invokes its power to "make or alter" state law, federal law expressly preempts state time, place, and manner regulation,

ensuring that states do not interfere with the people's right to vote for their federal representatives. Unlike other contexts in which federal preemption under the Supremacy Clause might be more difficult to discern, the text of the Election Clause, and its original meaning, are unambiguous when it comes to the Clause's preemptive power.

Arizona contends that the National Voter Registration Act's ("NVRA") requirement that Arizona "accept and use" the Federal Form for mail-in voter registration for federal elections exceeds the scope of Congress' power to regulate federal elections. Az. Br. at 46-53. Arizona's claim cannot be squared with the text and history of the Elections Clause, which give Congress the express power to "make or alter" state election law to correct abuses of state power and ensure that the American people have the right to freely select federal representatives of their choice without interference from the states.

In enacting the NVRA, Congress acted for the very reasons at the core of the text and history of the Elections Clause, using its express power to "make or alter" state law in order to protect the right to vote and ensure a uniform method of voter registration across all fifty states. As the text of the NVRA reflects, Congress chose to "alter" state-law requirements such as Arizona's, requiring all states to "accept and use" the Federal Form for mail-in registration. As Respondents have demonstrated Arizona's Proposition 200 conflicts with the plain terms of the NVRA and must be invalidated. See *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

ARGUMENT

THE TEXT AND HISTORY OF THE ELECTIONS CLAUSE GIVE CONGRESS BROAD POWER TO OVERRIDE STATE LAW IN ORDER TO PROTECT THE RIGHT TO VOTE IN FEDERAL ELECTIONS.

A. The Elections Clause Is Unique in Its Breadth, Structure, and the Power It Grants to Congress.

In designing our federal system, the Framers of our Constitution "split the atom of sovereignty," creating "two orders of governments, each with its own direct relationship, its own privity, its own set of mutual rights and obligations, to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Creating a national government that represents and "owes its existence to the act of the whole people who created it," the Constitution established "a relationship between the people of the Nation and their National Government, with which the States may not interfere." *Id.* at 839, 845 (Kennedy, J., concurring). In setting forth the respective powers of federal and state government to

regulate federal elections in the Elections Clause, the Framers gave paramount power to Congress, recognizing that "the National Government . . . must be controlled by the people without collateral interference by the States." *Id.* at 841 (Kennedy, J., concurring).

The Elections 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.

U.S. CONST., Art. I, §4, cl.1.

The plain text of the Elections Clause confers on states the power to regulate elections for federal representatives – a power they did not have prior to the Constitution – and then gives to the federal government the power to "make or alter" resulting state laws.[3] Where Congress invokes its express power to "make or alter" state law, Congress' chosen regulations supersede and override those of the several states. Indeed, the very point of

[3] There are indisputably other constitutional sources giving Congress a special role with respect to the regulation of elections. *See* U.S. CONST. Amends., XIV, XV, XIX, XX, XXIII, XXIV, XXVI.

congressional action under the Elections Clause is to displace the acts or omissions of the states.

The plain language of "make or alter" confers upon Congress the authority both to originate federal law and supersede state laws regulating federal elections. In Samuel Johnson's 1768 *Dictionary of the English Language*, among the top definitions of "make" is "to create," "to form" or "to produce." "[A]lter" is defined as "to change," "to make otherwise than it is." *See* SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (3rd ed. 1768). Other dictionaries of the Founding-era were to the same effect. *See* THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1780). In writing the Elections Clause, the Framers thus intended for Congress to possess the authority both to *create* new federal law and *change* existing state law governing federal elections. Where Congress acts under the Elections Clause, it expressly preempts state regulation of the time, place, and manner of federal elections.

This broad power both to "make" new federal law and "alter" existing state law is made even more apparent when compared to language elsewhere in the Constitution. While many of the provisions of Article One give Congress the power to regulate both private individuals and the several States, *see, e.g.*, U.S. CONST., Art. I, §8 (giving to Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."), only the Elections Clause "express[ly] delegat[es] . . . power to the States," and then establishes a "safeguard against state abuse by giving Congress the power to 'by Law make or alter

such Regulations.'" *Term Limits*, 514 U.S. at 805, 808. *See* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONVENTION 62 (Jonathan Elliot ed. 1836) ("[I]n the first part of the clause, th[e] power over elections is given to the states, and in the latter part the same power is given to Congress.") (N.C.). Structurally, the raison d'etre of congressional action under the Elections Clause is to "enable[] Congress to alter such regulations as the states shall have made with respect to elections." *Id.* at 68.

Both in its language and its structure, the Elections Clause is unique in giving to Congress the express power to "make or alter" state law, a power that the Framers did not give to Congress generally. *E.g.*, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27-28 (Max Farrand ed. 1911) (rejecting proposal to give Congress a blanket federal "negative" on state laws). "The text of the Constitution unquestionably reveals the Framers' distrust of the States regarding elections," *Term Limits*, 514 U.S. at 811 n.21, and demonstrates the Framers' deliberate intent to establish Congress's important and supreme role in the area of federal elections – elections in which voters "act in a federal capacity and exercise a federal right." *Term Limits*, 514 U.S. at 842 (Kennedy, J., concurring).

The Framers did not grant Congress this broad "make or alter" authority lightly, but viewed federal election regulation as a matter worthy of explicit exception. "The importance of elections was a recurrent theme during the Convention, so Congress's ability to veto state electoral regulations

was widely seen as necessary to prevent the states from destroying the national government without intruding on state sovereignty in the same way that a general negative over state law would have." Franita Tolson, *Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. 1195, 1223-24 (2012).

By the very nature of the Clause's text and structure, when Congress acts pursuant to the Elections Clause, it expressly supersedes state law. This preemptive force has been amply recognized by this Court. *See Ex Parte Siebold*, 100 U.S. 371, 384 (1879) ("[T]he power of Congress over the subject [of federal elections] is paramount. . . . When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to 'make or *alter*.'") (emphasis in original); *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) ("Congress may supplement . . . state regulations or may substitute its own. It may impose additional penalties . . . or provide independent sanctions. It 'has a general supervisory power over the whole subject.'") (quoting *Siebold*, 100 U.S. at 387).

At the Founding, the breadth of Congress' express power to "make or alter" state regulation of federal elections was understood by supporters and detractors alike. The plain text of the Elections Clause, as James Madison explained at the Constitutional Convention, uses "words of great latitude," recognizing that "it was impossible to foresee all the abuses that might be made of the [states'] discretionary power." 2 RECORDS OF THE

FEDERAL CONVENTION OF 1787 at 240. As Madison explained, "[w]hether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet in one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures and might materially affect the appointments." *Id.* at 240-41; *see also* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS at 535 (Pa.) Thus, the Framers' understanding was that Congress would have final say over questions of balloting, location of polling places, districting, and other of "the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Opponents of the Elections Clause, too, understood that the Clause gave Congress strong powers to regulate federal elections, explaining that their "great difficulty" was that "the power given by the 4th section was unlimited," 2 DEBATES IN THE SEVERAL STATE CONVENTIONS at 25 (Mass.), and "admits of the most dangerous latitude." 3 *id.* at 175 (Va.); *see also* 4 *id.* at 55 ("[T]hey are words of very great extent. This clause provides that a Congress may at any time alter such regulations, except as to the places of choosing senators.") (N.C.).

In the ensuing debates over ratification of the Constitution, the Elections Clause was vigorously challenged, with Anti-federalists arguing that the Elections Clause "strike[s] at the state legislatures, and . . . take[s] away that power of elections which

reason dictates they ought to have among themselves." 4 *id.* at 51 (N.C.). In their view, "Congress ought not to have the power to control elections." 2 *id.* at 23 (Mass.).

Pressed to persuade their fellow Americans that the Elections Clause was an appropriate aspect of federal power properly included in the Constitution, the new Constitution's supporters justified the necessity of this power in order to protect voting rights in federal elections from state infringement and to promote appropriate uniformity in election administration. These arguments carried the day, establishing the constitutional framework for federal regulation of federal elections that still governs more than two centuries later.

B. The Elections Clause Was Written to Give Congress Power to Protect Voting Rights In Federal Elections From State Infringement.

The text and history of the Elections Clause give the federal government "final say," *Foster v. Love*, 522 U.S. 67, 72 (1997), over the broad mechanics of federal elections, rejecting the "idea of state interference with the most basic relation between the National government and its citizens, the selection of legislative representatives." *Term Limits,* 514 U.S. at 842 (Kennedy, J., concurring). The Framers of the Elections Clause recognized that strong federal powers were needed to empower Congress to "intervene against acts of injustice within the states," JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE

CONSTITUTION 224 (1997), and ensure that states did not deny or abridge the right to vote in the federal elections guaranteed by the Constitution. *See* FEDERALIST NO. 57 ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.") (Madison).

During the debates over the Elections Clause at the Constitutional Convention, James Madison explained that the grant of strong federal power to protect the right to vote in federal elections was necessary because "State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices." 2 RECORDS OF THE FEDERAL CONVENTION at 240. Madison explained that "the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections." *Id.* To prevent abuses by the states, Madison argued in favor of giving "a controuling power to the Natl. legislature." *Id.* at 241.

Madison was particularly concerned that states would use their power to regulate elections to skew the outcomes of federal elections. "Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 RECORDS OF THE FEDERAL CONVENTION at 241. Along similar lines, Gouverneur Morris observed that "the States might make false returns and then

make no provisions for new elections." *Id.*; *see also* FEDERALIST NO. 59 (arguing that, without the Elections Clause, states "could at any moment annihilate [the Union] by neglecting to provide for the choice of persons to administer its affairs") (Hamilton). By the close of debate at the Convention, the overwhelming consensus was that the Constitution should "give the Natl. legislature a power . . . to alter the provisions of the States, but [also] to make regulations in case the States should fail or refuse altogether." 2 RECORDS OF THE FEDERAL CONVENTION at 242.

In the ensuing debates over ratification of the Constitution in the states, the Constitution's supporters justified "Congress's power over elections as a way of correcting unjust state voting systems and defending the people right's to equal voting power." PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 210 (2010).

For example, in the Virginia ratifying convention, James Madison stressed the importance of the federal role in securing equal voting rights. "Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. . . . Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." 3 DEBATES IN THE SEVERAL STATE CONVENTIONS at 367. Other delegates to the Virginia convention worried that states would simply not hold elections for federal office, preventing the popular vote demanded by the Constitution. *Id.* at

10 ("If the state legislature . . . would not appoint a place for holding elections, then there might be no election . . . ."). These abuses "could only be guarded against by giving this discretionary power to Congress of altering the time, place, and manner of holding the elections." *Id.*

Likewise, in the Massachusetts Convention, Federalists argued that the Elections Clause was necessary both for "preserving the union" and "securing to the people their equal rights of election." 2 *id.* at 26. They also recognized that public political participation was at stake, because "when faction and party spirit run high," states might "introduce such regulations as would render the rights of people insecure and of little value. They might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors." *Id.* at 27. Supporters of the Elections Clause pointed to "inconsiderable" public participation in state elections and town meetings to argue that "Congress ought to have an interposing power to awaken the people when thus negligent" or "apt to neglect this right [to vote]." *Id.* at 24.

The Constitution's supporters recognized that "[w]ithout these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, . . . who will hear impartially, and preserve and restore to the people their equal and sacred rights of election." *Id.* at 27; *see also id.* at 25-26 (arguing that the Elections Clause was "as highly

prized as any [section] in the Constitution" because "the *right* of electing persons to represent the *people* in the federal government" is "an important and sacred right") (emphasis in original); *id.* at 32 (arguing that in the event "the state legislature could not appoint electors," a "power to provide for such elections" was "necessary to be lodged in the general Congress"); *id.* at 51 (arguing that, because of inequality of representation in South Carolina, "representatives . . . from that state, will not be chosen *by the people*, but will be the representatives of a faction of that state. If the general government cannot control in this case, how are the people secure?").[4]

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[4] Similar arguments in favor of federal power over federal elections were made in other states conventions as well. *See* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS at 441 (arguing that, in the event a state legislature should order a state-wide election to be held in one city, "ought not the general government to have the power to alter such improper election of one of its own constituents parts?") (Pa.); 4 *id.* at 53-54 (recognizing need for an "ultimate power in Congress" in case "a few powerful states should combine and make regulations concerning elections which might deprive many of the electors of a fair exercise of their rights") (N.C.); *id.* at 303 ("Congress should have this superintending power, lest, by the intrigues of a ruling faction . . ., the members of the House of Representatives should not really represent the people of the state . . . .") (S.C.).

In the First Congress, the Framers, once again, affirmed the need for strong federal power to protect the right to vote in federal elections from denial or abridgement by the states. During debates over proposed Amendments to the Constitution, the Framers rejected a proposed Amendment to the Elections Clause, which would have eliminated the power of Congress to protect the right to vote in federal elections. Reaffirming the importance of congressional power over federal elections, the Framers defeated a proposed Amendment that would have forbidden Congress from regulating federal elections except when a "State shall refuse or neglect, or be unable . . . to make such election." Annals of Congress, 1st Cong., 1st Sess. 797 (1789).

In the debate that ensued, James Madison argued that "the constitution stands very well as it is" and that the proposed amendment would "tend to destroy the principles and efficacy of the constitution." *Id.* at 798, 800. Others affirmed that the power to regulate federal elections was "one of the most justifiable of all the powers of Congress; it was essential to a body representing the whole community, that they should have the power to regulate their own elections, in order to secure a representation from every part, and prevent any improper regulations . . . ." *Id.* at 797.

This Court has confirmed what the text and history make clear: the Constitution provides for broad congressional power to regulate federal elections in order to create a "safeguard against state abuse." *Term Limits*, 514 U.S. at 808-09; *see also Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004)

(plurality opinion); *Oregon v. Mitchell*, 400 U.S. 112, 119-24 (1970) (opinion of Black, J.). *See* Gonzalez Resp. Br. at 44-48; Inter Tribal Council Resp. Br. at 30-34, 48-50.

C. The Elections Clause Was Written to Give Congress Power to Promote Uniformity in Election Administration.

The text and history of the Elections Clause also demonstrates the power of Congress to establish "uniform rules for federal elections, binding on the States." *Foster*, 522 U.S. at 69. Rejecting the argument that the Elections Clause impinged on the proper role of state governments in our federalist system, James Madison and others repeatedly made the point that the text had been framed to give Congress a "superintending power," 4 DEBATES IN THE SEVERAL STATE CONVENTIONS at 303 (S.C.), to alter state rules that improperly threatened the federal interest in a uniform system of federal elections.

From New York to North Carolina, supporters of the Elections Clause argued for Congress' ability to provide for uniformity in election administration. The concerns were practical, recognizing that wild diversity in administration would stifle the people's will, *see, e.g.*, 2 *id.* at 326 (N.Y.), open the door to the deprivations of rights, *see, e.g.*, *id.* at 535) (Pa.), and cause inconvenience, *see, e.g.*, 4 *id.* at 60 (N.C.), and delay, *see, e.g.*, 3 *id.* at 10-11 (Va.).

At the New York ratifying convention, for example, Governor Clinton argued that "Congress . . . was to speak the will of the people, and that will was law, and must be uniform." 2 *id.* at 326 (N.Y.). In Pennsylvania, supporters of the Elections Clause advocated that the time, place, and manner of regulations ought to be uniform "to prevent corruption and influence," 2 *id.* at 535 (Pa.), as well as to "ensure to the *people* their rights of election and establish a uniformity in the mode of constituting the members of the Senate and House of Representatives." Letter from Timothy Pickering, Delegate, Pennsylvania Ratifying Convention, to Charles Tillinghast, Dec. 24, 1787, quoted in 2 LIFE OF TIMOTHY PICKERING 357 (1873) (emphasis in original).

Uniformity was also identified as a matter of "greatest consequence" in North Carolina, where supporters insisted that election regulations "ought . . . not to be different in one state from what they are in another" because it would be "more convenient to have the manner uniform in all states." 4 DEBATES IN THE SEVERAL STATE CONVENTIONS at 60. And at the Virginia ratifying convention, James Madison argued that "the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent." 3 *id.* at 367; *see also id.* at 11 (noting that "the power of Congress to make the times of elections uniform in all the states, will destroy the continuance of any cabal").

In enacting the NVRA, Congress acted squarely within its constitutionally granted authority to "make or alter" laws related to federal elections.

As explained in the briefs of the Respondents, *see* Gonzalez Resp. Br. at 7-8, 11-12, 42-44, 55; Inter Tribal Council Resp. Br. at 3-8, 40-42, the NVRA furthers the goals of voter protection and uniform administration at the heart of the Elections Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

WENDY R. WEISER
MYRNA PÉREZ
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Ave. of the Americas
12th Floor
New York, N.Y. 10013
(646) 292-8376
wendy.weiser@nyu.edu

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
*Counsel of Record
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Ste 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amici Curiae

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