No. 14-1164

In the

Supreme Court of the United States

KRIS W. KOBACH, *et al.*

Petitioners,

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.*,

Respondents.

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

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

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QUESTIONS PRESENTED

1. Does Congress have power under the Elections Clause to interfere with a state's efforts to ensure 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 the structural design 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 addressing core issues of separation of powers and federalism, including *Arizona v. Inter Tribal Council of Arizona*, 133 S.Ct. 2247 (2013); *N.L.R.B. v. Noel Canning*, 134 S.Ct. 2550 (2014); *Bond v. United States*, 134 S.Ct. 2077 (2015); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center's extensive expertise in the political theory of the Constitution makes it particularly well qualified to elaborate up the vital importance of preserving the divisions of power outlined in the Constitution, including specifically the assignment to the States of the power to determine the qualifications of voters that is at issue in this case. The Founders designed this division as a means to protect individual liberty.

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[1] Pursuant to this Court's Rule 37.2(a), all parties were given notice amicus's intent to file at least 10 days prior to the filing of this brief and all parties have consented to the filing of this brief. 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.

Nowhere is this more evident than the division between the States and Congress in the regulation of qualifications of voters in federal elections.

SUMMARY OF ARGUMENT

As this Court foresaw in *Arizona v. Inter Tribal Council of Arizona*, the Elections Assistance Commission did not have enough members in place to act on the application of a state seeking to add state-specific information to the federal voter registration form. *Inter Tribal*, 133 S.Ct., at 2060 n.10. That is exactly what took place in this case. *Kobach v. United States Election Assistance Commission*, 772 F.3d 1183, 1192 (10th Cir. 2014).

Kansas and Arizona submitted their requests to the Commission as required by this Court's ruling in *Inter Tribal*. Although there was not a quorum of Commissioners in office, the States' applications were denied. In place of the Commission, the Commission's Chief Operating Officer assumed the role of "Acting Executive Director." Usurping the powers of a Principal Officer of the United States to rule in place of the Commission, this "Acting Executive Director" decided that the States did not need documentary proof of citizenship in order to enforce their voter qualifications. There is little evidence that Congress intended to enact such a policy. Indeed, Congress has no such power.

Article I, section 2 expressly leaves the power to establish the 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 regulate qualifications, and proof of qualifications, to vote in state and federal elections. Indeed, the later enacted Seventeenth Amendment continued to recognize the exclusive power of the states to set the qualifications of voters in federal elections. Thus, 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.

REASONS FOR GRANTING REVIEW

I. The Question in this Case Involves a Sensitive Balance Between State and Federal Power Under the Constitution

"Prescribing voting qualifications … 'forms no part of the power to be conferred upon the national government'" by the Elections Clause. *Inter Tribal*, 133 S.Ct., at 2258. The Constitution explicitly assigns the power over voter qualifications to the States. U.S. Const. Art. I, § 2. That reservation of power to the states is an empty promise, however, if the States do not also have the power to enforce voter qualification requirements. *Inter Tribal*, 133 S.Ct., at 2258. Thus, this Court did not decide in *Inter Tribal* that the National Voter Registration Act (NVRA) gave Congress the power to decide voter qualifications. Instead, that decision only required states to submit their registration requirements to the Election Assistance Commission for inclusion in the federal registration form. *Id.*, at 2259.

This Court noted that the Commission did not have discretion to reject the State request where the State establishes that a simple oath is insufficient to prove qualification to vote. *Id.*[2] Further, this Court noted that a failure to grant a State's request to add a requirement for documentary proof of citizenship to the federal form may well be "arbitrary and capricious" in light of the fact that the Commission has granted permission to other States to require such information. *Id.*, at 2260.

The States have good reason to be concerned about the integrity of their elections. This Court has acknowledged the "large number of aliens" living in Arizona "who do not have a lawful right to be in this country." *Arizona v. United States*, 132 S.Ct. 2492, 2497 (2012). The Court noted that the population of "unauthorized aliens" may account for up to six percent of the state population. *Id.* at 2500.

In 1982 this Court noted: "Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an ef-

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[2] The Court held that this procedure for State submission of a request to the Election Assistance Commission to add state-specific requirements to the federal voter registration form removed "constitutional doubt" about the NVRA command that States accept and use the federal form. *Inter Tribal*, at 2259. The dissenters argued that even this ruling was inconsistent with the Constitution because it requires States to apply to a federal agency for permission to exercise a power committed exclusively to the States. *See id.* at 2269 (Thomas, J., dissenting). But both the dissent and the majority agreed that rejection by the Election Assistance Commission of a State's request to include on the federal form requirements for information necessary for the State to implement its voter qualification requirements would be unconstitutional. *Id.*, at 2259.

fective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders." *Plyler v. Doe*, 457 U.S. 202, 218 (1982). The problem has only gotten worse in the three decades since *Plyler*. One federal court estimates that the number of aliens living unlawfully in the United States has tripled since the *Plyler* decision. *Texas v. United States*, 2015 WL 648579, *1 (S.D. Tex. 2015).

The majority of the states are concerned that the federal government is doing little to alleviate this problem and is, instead, encouraging illegal immigration. In a lawsuit filed by 26 States, the States allege that the Executive Branch adopted policies that encouraged smuggling children across the Texas-Mexico Border. *Texas v. United States*, No. 1:14-cv-00254, Amended Complaint for Declaratory and Injunctive Relief (Document No. 14) at ¶ 26. The States further contend that unilateral actions by the Executive Branch caused "an enormous wave of undocumented immigrants" to cross the border from Mexico to the United States. *Id.* at ¶31. Rather than enforce the border, the Executive Branch has decided on its own to grant a form of amnesty to millions of individuals that are in the country illegally. As a result of unilateral Executive Branch actions, millions of noncitizens are being provided government documents that will be (and are being) used to obtain official government identification of that kind that have traditionally been used as proof of citizenship (and hence eligibility to vote). Not surprisingly, States on the front lines of this problem determined that it is not enough for a State to rely on an oath as

the sole enforcement of a citizenship requirement for voting.

To protect against these very real threats to election integrity, the States in this case enacted laws requiring documentary proof of citizenship as a prerequisite to voter registration. The court below, however, enjoined the States' efforts to protect the election process. This Court should pay special heed when a lower federal court prevents a State from enforcing the laws "enacted the representatives of its people." *Maryland v. King*, 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). A State's request for Supreme Court review when a federal court prohibits enforcement of a state law should be accorded special respect. *Maricopa County v. Angel Lopez-Valenzuela*, 135 S.Ct. 428 (2014) (Thomas, J., statement respecting denial of stay); *Jankow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1177 (1996) (Scalia, J., dissenting from denial of certiorari).

That special concern is heightened in this case because of the manner in which the agency acted. This Court noted that the Commission did not have a quorum of members at the time of the decision in *Inter Tribal*. The Court noted that the lack of such a quorum was not a defense against a State's constitution power to enforce its voter qualification laws. *Inter Tribal*, 133 S. Ct., at 2260 n.10.

The Commission also lacked a quorum of Commissioners sufficient to take action on the applications of Kansas and Arizona in this case. *Kobach*, 772 F.3d, at 1192. The Chief Operating Officer, act-

ing in the role of "Acting Executive Director" undertook to rule on the applications in place of the Commission. *Kobach v. United States Election Assistance Commission*, 6 F. Supp. 3d 1252, 1256 (D. Kan. 2014).

Since there were no Commissioners (and no Executive Director"), the Chief Operating Officer exercised these powers without supervision. Justice Alito recently observed: "The Court has held that someone "who exercis[es] significant authority pursuant to the laws of the United States" is an "Officer," and further that an officer who acts without supervision must be a principal officer." *Dep't of Trans. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1238 (2015) (Alito, J., concurring).

In this case, a government employee without supervision undertook to exercise significant authority – the authority that Congress vested in the Election Assistance Commission. Further, the individual acted in a sensitive area where the limited power of Congress was already butting up against the powers specifically reserved to the States by the Constitution. Nothing in the law shows that Congress intended such a decision to be made by a mere employee. This Court should grant review in this case because of the manner in which the authority of the Election Assistance Commission was exercised to thwart the exercise of power explicitly assigned to the States by Article I, section 2 of the Constitution.

II. The Qualification of Electors Clause In Article I, Section 2 Governs this Case, Not the Elections Clause of Section 4

The Tenth Circuit misunderstood this Court's decision in *Inter Tribal* and the interplay between the Time, Place, and Manner of Elections Clause and the Qualification of Electors Clause. 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 protecting 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 effectively 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 to Congress the power to override state regulation of the mechanics of federal elections. 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 Documentary 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. The delegates to the Massachusetts ratifying convention focused on the fact 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 by designating the place of the election.

Ratifying convention delegates also noted different election mechanical issues regarding the manner of holding election. One supposed it could require a paper ballot 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 acknowledge that section 4 gives Congress power 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"). The purpose of this provision was to protect against an aristocracy in federal officials. *A Freeman No. 11*, reprinted in THE AMERICAN MUSEUM OR REPOSITORY OF ANCIENT AND MODERN FUGITIVE PIECES, vol. 3, no. 1 (Matthew Carey, 1788) at 143 ("The state legislatures and constitutions must determine the qualifications of the electors for both branches of the federal government …. Wisdom, on this point which lies entirely in our hands, will per-

vade the whole system, and will be a never failing antidote to aristocracy, oligarchy and monarchy."). 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 ratification debates reveal that the commitment of voter qualification to state law served another purpose. 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 elec-

tion 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.").

CONCLUSION

The Tenth Circuit's decision below thwarts the States in the exercise of a power expressly and deliberately given to them in the Constitution, one that serves an important structural purpose in the overall federalism design of the Constitution. Review of that decision by this Court is therefore warranted and vitally important.

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Respectfully submitted,

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