Nos. 14-3062, 14-3072

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KRIS W. KOBACH, *et al.*,
Plaintiffs-Appellees,

v.

UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.*,
Defendants-Appellants,

and

PROJECT VOTE, INC., *et al.*,
Intervenors-Appellants

On Appeal from the United States District Court
for the District of Kansas
District Court No. 5:13-cv-4095

BRIEF OF *AMICI CURIAE* REPRESENTATIVES NANCY PELOSI, STENY H. HOYER, JAMES E, CLYBURN, XAVIER BECERRA, MARCIA L. FUDGE, RUBEN HINOJOSA, JUDY CHU, AND ROBERT A. BRADY IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

Amici are House Democratic Leader Nancy Pelosi; House Democratic Whip Steny H. Hoyer; House Democratic Assistant Leader James E. Clyburn; Representative Xavier Becerra, Chair of the House Democratic Caucus; Representative Marcia L. Fudge, Chair of the Congressional Black Caucus; Representative Rubén Hinojosa, Chair of the Congressional Hispanic Caucus; Representative Judy Chu, Chair of the Congressional Asian Pacific American Caucus; and Representative Robert A. Brady, Ranking Member of the House Committee on House Administration.

Amici file this brief because, as elected Members of Congress, they have a duty to support the Constitution. In the exercise of that duty, they wish to put before the Court their views regarding Congress's broad and long-recognized authority to regulate federal elections and to protect the right to vote. *Amici* believe that the district court's opinion in this case erroneously limits that authority and thereby calls into question both the validity of legislation that has played a critical role in expanding access to the franchise and Congress's ability to pass further legislation removing unnecessary barriers to voting in federal elections. They

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel has made a monetary contribution intended to fund the preparation or submission of the brief.

accordingly file this brief in support of Appellants and believe that the judgment below should be reversed.

INTRODUCTION

For well over 100 years, Congress, pursuant to its authority under Article I, Section 4, of the Constitution and the Fourteenth and Fifteenth Amendments, has enacted legislation designed to remove barriers that prevent citizens from registering and ultimately exercising their right to vote. *See, e.g.*, *Ex parte Siebold*, 100 U.S. 371 (1879) (upholding provisions of Enforcement Act of 1870 and a supplement to that act proscribing interference with registration and voting for federal elections under Article I, Section 4). Congress's exercise of its constitutional authority has played a pivotal role in expanding the opportunity to vote and removing unnecessary procedural hurdles to voting.[2] The enactment of

[2] *See, e.g.*, Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634; *United States v. Raines*, 362 U.S. 17, 19, 25 (1960) (statute amended by Civil Rights Act of 1957, pursuant to which defendants were charged with discriminating against African Americans "who desired to register to vote in elections conducted" in Georgia, was appropriate legislation under the Fifteenth Amendment); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (requiring, among other things, that records of voting registration be kept); *United States v. Mississippi*, 380 U.S. 128, 140 (1965) ("In authorizing the United States to make a State a defendant in a suit under s 1971, Congress [in the Civil Rights Act of 1960] was acting under its power given in s 2 of the Fifteenth Amendment to enforce that Amendment by appropriate legislation."); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (upholding sections of Voting Rights Act of 1965 as appropriate means of carrying out Congress's authority under the Fifteenth Amendment), *abrogated by Shelby Cnty. v. Holder*,

the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.*, was part of this effort. Millions of citizens have taken advantage of the NVRA to register and to vote.

The decision of the district court in this case, if left standing, could derail Congress's efforts to identify and remove unnecessary barriers to voting in federal elections. The decision calls into question the commands of current federal laws, most notably the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") and the NVRA, that are allowing citizens serving in the military, living abroad, temporarily out of state or confined to their homes to easily register and vote. In recent decades, these laws have been instrumental in opening our democracy to more and more of our citizens. The district court decision casts doubt on clearly delegated congressional authority and would make its exercise open to regular challenge. The decision is inconsistent with the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013) ("*Inter Tribal Council*") and diminishes the historic role that Congress has played in righting past wrongs and assuring that all of our citizens are extended the opportunity to participate in our great democracy. The Constitution and history demand its reversal.

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133 S. Ct. 2612 (2013); Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986).

ARGUMENT

A. *INTER TRIBAL COUNCIL* COMPELS REVERSAL OF THE DISTRICT COURT'S DECISION.

The Supreme Court's decision in *Inter Tribal Council* controls this case and compels the reversal of the district court's decision. In *Inter Tribal Council*, the Supreme Court was presented with the question of whether an Arizona law requiring voter registration officials to reject any application for registration not accompanied by documentary proof of citizenship was preempted by the NVRA's mandate that states accept and use a voter registration postcard form developed and promulgated by the Election Assistance Commission ("EAC"). 133 S. Ct. at 2251. This form, known as the Federal Form, does not require documentary evidence of citizenship. *Id.*

In holding that the NVRA preempted Arizona's requirement, the Court explained that "the fairest reading of the [NVRA] is that a state-imposed requirement of evidence of citizenship not required by the Federal Form is inconsistent with the NVRA's mandate that States accept and use the Federal Form" and noted that "the NVRA forbids States to demand that an applicant submit additional information beyond that required by the Federal Form." *Id.* at 2257 (internal quotation marks omitted); *see also id.* at 2256 ("Arizona's reading would permit a State to demand of Federal Form applicants every additional piece of information the State requires on its state-specific form. If that is so, the Federal

Form ceases to perform any meaningful function . . . ."). The Court thus made clear that states must accept the Federal Form as a means of voter registration.

Having affirmed Congress's broad authority to regulate the conduct of federal elections, the Court in *Inter Tribal Council* noted that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id.* at 2250. This unremarkable statement does no more than preclude Congress from passing a law that would make it impossible for a state to ensure the integrity of its elections. Unless a state can demonstrate that it has been denied the only available means to assess an applicant's qualifications, no constitutional question arises. The NVRA, as the Court noted, provides an avenue for a state to make such a showing.

The Court explained that because "a State may request that the EAC alter the Federal Form to include information the State deems necessary to determine eligibility, and may challenge the EAC's rejection of that request in a suit under the Administrative Procedure Act, no constitutional doubt is raised by giving the 'accept and use' provision of the NVRA its fairest reading." *Id.* at 2259 (internal citations omitted); *accord id.* at 2260 ("Should the EAC's inaction persist, Arizona would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore

under a nondiscretionary duty to include Arizona's concrete evidence requirement on the Federal Form.").

After *Inter Tribal Council* it is clear that, when a state requests an alteration to the Federal Form, the EAC's duty is to determine whether the requested alteration is necessary to enable the state to enforce its voter qualifications. If it is, the EAC must alter the form. But if it is not, the EAC must deny the state's request. The state can appeal any denial in a federal court, which conducts its review under the Administrative Procedure Act. To prevail, a state must show that the Federal Form is insufficient to effectuate its substantive voter qualifications; if—and only if—the Federal Form is insufficient does the EAC have a ministerial duty to grant the requested alteration.

The district court held, contrary to *Inter Tribal Council*, that the EAC always has a ministerial duty to make any change that a state requests, so long as the state certifies that the change is necessary. It found that the EAC had no choice but to approve the states' requests, even if the states produced no evidence that their ability to enforce citizenship qualification was impaired, let alone foreclosed. Indeed, the court held that "the states' determination that a mere oath is not sufficient is all the states are required to establish" and that "the EAC is therefore under a nondiscretionary duty to include the states' concrete evidence requirement

in the state-specific instructions on the federal form." Dist. Ct. Op. at 27 (internal quotation marks omitted).

Following the district court's logic, the EAC must yield to any state's request when the requesting state asserts that its law requires a change in the form. A state might demand a photograph, a utility bill, fingerprints and possibly even a DNA sample before accepting the Federal Form. Such deference to the states' judgment, however, is plainly not what the Court had in mind when it found in *Inter Tribal Council* that a state could *request* that the EAC alter the Federal Form and would have the *opportunity to establish* in a reviewing court that a mere oath would not suffice to effectuate its citizenship requirement. *See* 133 S. Ct. at 2259-60. Indeed, the district court's approach would render the administrative process a charade, a meaningless gesture.

The district court's decision parts company from the Supreme Court's decision in *Inter Tribal Council* in a fundamental way. Unlike the Supreme Court's decision, the district court fails to give any force to the words actually employed by Congress to assure that a person could register to vote by mailing a simple postcard and would not be defeated in her effort by a state's making it more difficult than it needed to be. Congress gave these assurances by compelling a state to demonstrate to the EAC, and potentially to a reviewing court, that without its requirement, the integrity of federal elections in that state would be put into jeopardy—a showing

that the requesters did not and could not make in this case. For this reason alone, the district court's decision needs to be reversed.

B. CONGRESS HAS BROAD AUTHORITY TO REGULATE FEDERAL ELECTIONS, INCLUDING THE MEANS OF ENFORCING VOTER QUALIFICATIONS.

For the reasons set forth above, it is not necessary for this Court to affirm the broad constitutional authority under which Congress enacted the NVRA. Assuming *arguendo* that consideration of congressional authority is necessary, the Court should reaffirm Congress's broad authority to regulate federal elections and hold that any conflict in this case between federal and state law with respect to the *means of enforcing* voter qualifications—as opposed to the *setting* of voter qualifications—must be resolved in favor of federal law.

1. Congress Was Acting Within Its Authority Under the Elections Clause in Enacting the NVRA.

The Elections Clause of the Constitution authorizes Congress to pass legislation to establish or alter the measures that a state may employ to determine whether an individual is qualified to register and to vote. The Elections Clause states that "[t]he 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 Clause's substantive scope is broad. 'Times, Places, and Manner,' [the Supreme Court]

ha[s] written, are 'comprehensive words . . . .'" *Inter Tribal Council*, 133 S. Ct. at 2253 (citation omitted); *accord Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also Foster v. Love*, 522 U.S. 67, 71 (1997) (referring to the "ample limits of the Elections Clause's grant of authority to Congress"); *United States v. Manning*, 215 F. Supp. 272, 283 (W.D. La. 1963) (Wisdom, J., on behalf of three-judge panel) ("Section 4 is a broad and effective grant of authority to Congress over federal elections. There is little regarding an election that is not included in the terms, time, place, and manner of holding it.") (citations omitted).

The Elections Clause "invests the States with responsibility for the mechanics of congressional elections," but it does so "only so far as Congress declines to pre-empt state legislative choices," for "[t]he power of Congress over the 'Times, Places and Manner' of congressional elections is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith." *Inter Tribal Council*, 133 S. Ct. at 2253-54 (internal citations and quotation marks omitted); *accord Ex parte Siebold*, 100 U.S. at 384.

The scope of the authority granted by the Elections Clause is particularly broad in the hands of Congress, which is granted the power by the Necessary and Proper Clause "[t]o make all Laws which shall be necessary and proper for

carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," U.S. Const. art. I, § 8, cl. 18. *See Manning*, 215 F. Supp. at 283 ("Carried with the express authority is the implied power, under the necessary and proper clause, in the language of McCulloch v. Maryland, to accomplish the constitutional objective by all means which are appropriate, which are plainly adapted to that end.") (internal quotation marks omitted); *see also United States v. Classic*, 313 U.S. 299, 315, 320 (1941).

The broad power conferred by the Elections Clause includes the "authority to provide a complete code for congressional elections, including regulations relating to registration." *Inter Tribal Council* 133 S. Ct. at 2253 (internal quotation marks omitted); *accord Smiley*, 285 U.S. at 366 ("It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved."); *see also Cook v.*

Gralike, 531 U.S. 510, 523-24 (2001); *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972).

The choices that Congress is empowered to make plainly may limit the ability of states to choose measures that the state believes are better suited to enforce its qualifications. There is no question that many measures that are properly considered time, place and manner regulations that a state may enact are intended to ensure that only qualified individuals actually vote. Nevertheless, the power of Congress to alter those regulations is beyond question. Unless a state can demonstrate that it has been stripped of all reasonable means of enforcing its qualifications, state law must yield.

2. Consideration of the Constitution as a Whole Demonstrates that Congress Has Authority To Regulate the Means of Enforcing Voter Qualifications.

While the Elections Clause alone establishes Congress's primacy over the regulation of federal elections, Congress's superior authority over federal elections is underscored by the authority granted to each House of Congress to be the judge of elections to its respective body and by several amendments to the Constitution which vest Congress with authority to enforce and protect the right to vote. Taken together, these provisions of the Constitution strongly affirm the conclusion that Congress has the authority to oversee and alter the methods a state may employ to enforce its voter qualifications.

a. The Constitution makes each House the judge of the elections of its members and grants states a narrow power to enforce voting qualifications in federal elections.

The Constitution provides that "[e]ach House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ." U.S. Const. art. I, § 5, cl. 1. Under this provision, "[t]he House is not only 'Judge' but also final arbiter. Its decisions about which ballots count, and who won, are not reviewable in any court." *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985) (Easterbrook, J.); *see also Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (Scalia, J.) ("It is difficult to imagine a clearer case of textually demonstrable constitutional commitment of an issue to another branch of government to the exclusion of the courts than the language of Article I, section 5, clause 1 . . . .") (internal citation and quotation marks omitted). *See generally Roudebush*, 405 U.S. 15 (1972). That the Constitution grants Congress the ultimate power to judge federal elections, including the power to determine which votes count, provides strong confirmation of Congress's broad authority to regulate federal elections and the means of enforcing voter qualifications.

No one disputes that the Constitution implicitly granted states the principal power to establish voting qualifications for federal elections through Article I,

Section 2, Clause 1 (the Qualifications Clause),[3] and the Court found in *Inter Tribal Council* that "the power to establish voting requirements is of little value without the power to enforce those requirements" and that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." 133 S. Ct. at 2258-59. But this designation of authority should not be confused with a grant of superior authority to the states over federal elections.

On the contrary, the Supreme Court's descriptions of the purpose of the Qualifications Clause, while not entirely consistent—it has explained that the Clause was intended "to prevent discrimination against federal electors" and thereby "minimize the possibility of state interference with federal elections," that it was intended "to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections," and that "[a] Congress empowered to regulate the qualifications of its own electorate . . . could

[3] *See* U.S. Const. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); *see also* U.S. Const. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."); *Inter Tribal Council*, 133 S. Ct. at 2257-58.

'by degrees subvert the Constitution'"[4]—make clear that giving states broad authority over federal elections was *not* the purpose of the Clause. *See Inter Tribal Council*, 133 S. Ct. at 2258 ("[B]y tying the federal franchise to the state franchise instead of simply placing it within the unfettered discretion of state legislatures, the Framers avoided rendering too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone.") (internal quotation marks and brackets omitted); *see also Ass'n of Cmty. Organizations for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995) (Posner, J.) ("The requirement that the qualifications be the same for state and federal electors, although primarily designed to prevent the disenfranchisement

[4] *Compare U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808 (1995) ("The Framers feared that the diverse interests of the States would undermine the National Legislature, and thus they adopted provisions intended to minimize the possibility of state interference with federal elections. For example, to prevent discrimination against federal electors, the Framers required in Art. I, § 2, cl. 1, that the qualifications for federal electors be the same as those for state electors. As Madison noted, allowing States to differentiate between the qualifications for state and federal electors would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone.") (internal quotation marks omitted), *with Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 228-29 (1986) ("Far from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections. . . . The fundamental purpose of the Qualifications Clauses contained in Article I, § 2, and the Seventeenth Amendment is satisfied if all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and Members of the House of Representatives."), *and with Inter Tribal Council*, 133 S. Ct. at 2258 (quoting 2 Records of the Federal Convention of 1787, p. 250 (M. Farrand rev. 1966)).

of state voters in federal elections, also makes it difficult for a state to use its control over qualifications to frustrate the operation of Congress; it would be frustrating its own legislature's operations at the same time.") (internal citation omitted).[5]

Thus, absent the extraordinary circumstance in which "a federal statute precluded a State from obtaining the information *necessary* to enforce its voter qualifications," *Inter Tribal Council*, 133 S. Ct. at 2258-59 (emphasis added), and thereby effectively deprived that state of the ability to set voter qualifications, the implied ability of states to enforce voter qualifications should be narrowly construed and must yield to superior enactments of Congress. *Id.* at 2258 ("One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly."). As Judge Posner wrote in a case involving a challenge to the NVRA:

> The "motor voter" law does not purport to alter the qualifications fixed by the State of Illinois for voters in elections for

[5] The power of the states over federal elections is limited to that power expressly delegated to the states. *See Cook*, 531 U.S. at 522-23 ("Because any state authority to regulate election to [the federal] offices [at stake] could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States.") (internal quotation marks omitted); *see also Inter Tribal Council*, 133 S. Ct. at 2257 ("[T]he federalism concerns underlying the presumption in the Supremacy Clause context are somewhat weaker here. Unlike the States' historic police powers, the States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that it terminates according to federal law.") (internal quotation marks and citation omitted).

> the Illinois Assembly. Indirect effects are possible: the law may, as the state argues, make it more difficult to enforce some of the qualifications, for example those relating to residency, by making it difficult to strike non-residents from the rolls. But the existence of such effects cannot by itself invalidate the law. Such effects are bound to follow from any effort to make or alter state regulations of the times, places, and manner of conducting elections, including the registration phase. If Illinois could show that the law had been designed with devilish cunning to make it *impossible* for the state to enforce its voter qualifications, or that whatever the motives of the draftsmen the law would have that consequence, we might have a different case.

Edgar, 56 F.3d at 794-95 (emphasis added); *see also Classic*, 313 U.S. at 315 ("While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by s 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.'") (internal citations omitted).

It is no surprise that the Founders granted superior authority to Congress with respect to the conduct of *federal* elections. As Justice Kennedy has explained,

> The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, 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); *see also id.* at 841-42 (Kennedy, J., concurring) ("I take to be beyond dispute, that, though limited as to its objects, the National Government is, and must be, controlled by the people without collateral interference by the States. . . . [E]ven though the Constitution uses the qualifications for voters of the most numerous branch of the States' own legislatures to set the qualifications of federal electors, Art. I, § 2, cl. 1, when these electors vote, we have recognized that they act in a federal capacity and exercise a federal right."). Granting broad power to the states to regulate federal elections would have been fundamentally inconsistent with this notion of dual sovereignty, because it would have provided states with the means of undermining the federal government. *Cf. id.* at 808 (majority) ("The Framers feared that the diverse interests of the States would undermine the National Legislature, and thus they adopted provisions intended to minimize the possibility of state interference with federal elections.").

b. Multiple amendments to the Constitution have increased Congress's power over qualifications and reduced that of the states.

Three amendments to the Constitution expressly limit state power to establish qualifications for voting in federal and state elections. No provision of the Constitution has been the subject of more amendments than the authority granted

to states to set qualifications for voting. The Fifteenth, Nineteenth, and Twenty-Sixth Amendments directly limit the ability of states to set voter qualifications on account of "race, color, or previous condition of servitude," "sex," and, for those who are eighteen years of age or older, "age," and they empower Congress to enforce these protections "by appropriate legislation." The Twenty-Fourth Amendment proscribes the denial or abridgement of the right to vote for federal offices "by reason of failure to pay any poll tax or other tax" and empowers Congress to enforce that amendment by appropriate legislation. The Fourteenth Amendment prohibits states from abridging the privileges or immunities of U.S. citizens and denying equal protection of the laws, *see, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972) (striking down durational residence requirement for voting of one year and three months pursuant to the Equal Protection Clause and the right to travel), and grants Congress the power to enforce that amendment by appropriate legislation.

Through the amendment process, the balance of power with respect to federal elections has shifted—in a fashion that has confirmed Congress's superior role in protecting and enhancing the right to vote. Each time that the Constitution has been amended to expand the right to vote, the amendment vested in Congress the authority to assure through appropriate legislation that the objectives of the amendment were achieved. As a result of these amendments, the qualifications for

voting are nearly uniform throughout the country. The right to vote, expanded and protected by amendment, is today more a consequence of citizenship than a product of state law. In mandating a simple form of mail registration, Congress clearly acted in keeping with the powers granted to it to assure that the right to vote is broadly enjoyed.

3. Congress Has Used Its Broad Authority To Regulate Federal Elections To Remove Unnecessary Barriers to Voting.

Congress's broad authority to regulate federal elections has permitted it to remove unnecessary barriers to registration in federal elections and thereby expand the franchise. *See supra* pages 2-3. These efforts have been extensive, as the court in *Condon v. Reno*, 913 F. Supp. 946 (D.S.C. 1995), recounted:

> Congress has repeatedly attempted to deal with the problem of registering as a deterrent to voting. The First and Second Enforcement Acts, in 1870 and 1871, 16 Stat 140, made it a crime for state registration officials to interfere with registration. The 1957 and 1960 Civil Rights Acts took further action focused on registration, and the 1964 Civil Rights Act provided that no one could be denied registration because of errors that were not material in determining eligibility. 42 U.S.C. § 1971(a)(2)(B). This was necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age. The Voting Rights Act of 1965 temporarily suspended literacy tests in a group of states (later made a permanent ban and expanded to all states) and in extreme cases authorized the Attorney General to take the registration process out of state officials' hands and perform the registration process through federal officials.

Id. at 949-50.

The NVRA itself relies on Congress's broad authority under the Elections Clause and the Fourteenth and Fifteenth Amendments. The Supreme Court has definitively resolved that the Elections Clause is a source of congressional authority for the NVRA. *Inter Tribal Council*, 133 S. Ct. at 2253; *see also Ass'n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997). In addition, the NVRA expressly states Congress's finding that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities," 42 U.S.C. § 1973gg(a)(3), and the purposes of the legislation included "establish[ing] procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and making it possible for the statute to be implemented "in a manner that enhances the participation of eligible citizens as voters in elections for Federal office," *id.* § 1973gg(b)(1)-(2). Moreover, the legislative history of the NVRA confirms that this legislation was intended to address both the lingering effects of and active discrimination against certain groups of citizens, including African Americans. *See* S. Rep. No. 103-6, at 3 (1993) (explaining that several witnesses testified at hearings in the 102nd Congress "that registration procedures in the United States are not uniform and that discriminatory and restrictive practices that deter potential voters are employed by

some States"; that "[t]hroughout the history of this country there have been attempts to keep certain groups of citizens from registering to vote"; that the Voting Rights Act of 1965 made many restrictive practices illegal but "discriminatory and unfair practices still exist and deprive some citizens of their right to vote"; and that "[t]his legislation will provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act").[6] Indeed, the Report of the Senate Committee on Rules and Administration stated that "[t]his Act seeks to remove the barriers to voter registration and participation under Congress' power to enforce the equal protection guarantees of the 14th Amendment to the Constitution." *Id.* at 3.

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[6] *See also* H. Rep. No. 103-9, at 2-4 (1993) (explaining that "[r]estrictive registration laws and administrative procedures were introduced in the United States in the late nineteenth and early twentieth centuries to keep certain groups of citizens from voting"; that "[i]n the South, . . . the black vote dropp[ed] from 44 percent to essentially zero percent"; that "the Voting Rights Act of 1965 eliminated the more obvious impediments to registration, but left a complicated maze of local laws and procedures, in some cases as restrictive as the outlawed practices, through which eligible citizens had to navigate in order to exercise their right to vote"; that "[t]he unfinished business of registration reform is to reduce these obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process"; that, in extensive hearings on similar legislation in the 101st Congress, witnesses testified "that registration procedures in the United States were not uniform, were not nondiscriminatory and, in some cases, were interpreted in such a manner as to deny eligible citizens their right to vote"; and that because "there was substantial evidence that [registration by mail] not only increased registration but successfully reached out to those groups most under-represented on the registration rolls, this method of registration was considered appropriate for a national standard"); *Condon v. Reno*, 913 F. Supp. at 949-50.

Courts considering the NVRA have rightly recognized that the Fourteenth and Fifteenth Amendments provided sources of congressional authorization for the act. *Condon v. Reno*, for instance, explained that "[t]he legislative history and the text of the NVRA are clear that Congress was utilizing its power to enforce the equal protection guarantees of the Fourteenth Amendment." 913 F. Supp. at 962. Pointing out that Congress had "identified a nationwide problem of low electoral participation," "identified registration laws as a barrier to electoral participation," and "identified racial minorities and disabled persons as particularly disadvantaged by the operation of registration laws," the court found that "Congress had a sound basis on which to conclude that a federal voter registration law was an appropriate means of furthering the protections of the Fourteenth and Fifteenth Amendments." *Id.* at 967; *see also Ass'n of Cmty. Organizations for Reform Now v. Miller*, 912 F. Supp. 976, 984 (W.D. Mich. 1995) ("Even if the NVRA violated the Tenth Amendment, it would still pass Constitutional muster under the Fourteenth and Fifteenth Amendments."), *aff'd*, 129 F.3d 833 (6th Cir. 1997); *Ass'n of Cmty. Organizations for Reform Now (ACORN) v. Edgar*, 880 F. Supp. 1215, 1221 (N.D. Ill.) (stating that Civil War Amendments "sought to erase pre-existing discrimination by extending the franchise to blacks," that "[i]mplementation of that purpose validated the Voting Rights Act of 1965," and that the NVRA "was aimed

at the same target of disproportionately lower voter participation by racial minorities"), *aff'd as modified*, 56 F.3d 791 (7th Cir. 1995).

For much of our nation's history, state law was used to diminish or deny qualified citizens the right to vote. The Constitution was amended to correct that wrong and to empower Congress to take appropriate steps to ensure that history does not repeat itself. Whether the authority is found in Article I, Section 4, or in the aforementioned amendments, Congress's authority to override state law in matters of election procedures for federal elections is beyond doubt.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

Dated: June 3, 2014

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CERTIFICATION OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(d), because it contains 5,871 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief 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 Microsoft Word 2010 in Times New Roman 14-point type.

s/ Joshua L. Kaul
Joshua L. Kaul

Dated: June 3, 2014

CERTIFICATION OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF OF *AMICI CURIAE* REPRESENTATIVES NANCY PELOSI, STENY H. HOYER, JAMES E. CLYBURN, XAVIER BECERRA, MARCIA L. FUDGE, RUBÉN HINOJOSA, JUDY CHU, AND ROBERT A. BRADY IN SUPPORT OF APPELLANTS AND REVERSAL, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, and has been scanned with the most recent version of Microsoft Endpoint Security and is virus-free.

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I certify that on June 3, 2014, I caused the foregoing BRIEF OF *AMICI CURIAE* REPRESENTATIVES NANCY PELOSI, STENY H. HOYER, JAMES E. CLYBURN, XAVIER BECERRA, MARCIA L. FUDGE, RUBÉN HINOJOSA, JUDY CHU, AND ROBERT A. BRADY IN SUPPORT OF APPELLANTS AND REVERSAL to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the appellate CM/ECF system. I certify that counsel for the parties in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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