No. 13-1314

IN THE

Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLEES ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

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QUESTIONS PRESENTED

This Court directed the parties to address the following questions:

1. Do the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona's use of a commission to adopt congressional districts?

2. Does the Arizona Legislature have standing to bring this suit?

PARTIES TO THE PROCEEDINGS

The Plaintiff-Appellant, as listed in the caption, is the Arizona State Legislature.

This brief is filed on behalf of Defendant-Appellees the Arizona Independent Redistricting Commission and Colleen Mathis, Linda J. McNulty, Cid R. Kallen, Scott D. Freeman, and Richard Stertz in their official capacities as members of the Commission. In addition, the Arizona Secretary of State was a Defendant below.

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INTRODUCTION

Partisan gerrymandering—the drawing of legislative district lines to subordinate adherents of one political party and entrench another in power—has long been decried as incompatible with fundamental democratic principles. But a solution has been elusive; this Court has not discerned judicially manageable standards to adjudicate claims of unconstitutional gerrymandering, and legislative bodies controlled by dominant political parties have been largely unrestrained in using the redistricting process for partisan advantage. The result has been increased alienation of voters, as the electorate perceives that legislators place their own interests ahead of those of the true sovereigns.

The People of Arizona have refused to despair of an answer to this problem. They have instead exercised their sovereign lawmaking power to address the vice of partisan gerrymandering, just as they might exercise that power to enact any other measure to secure their political or civil liberties, or to promote governmental accountability. The question presented in this case is whether the People are constitutionally prohibited from doing so with respect to congressional districting because the Constitution assigns the obligation to prescribe the "Times, Places and Manner of holding Elections for … Representatives" in the first instance to each State's "Legislature." U.S. Const. art. I, § 4.

The Constitution does not bar the People from prohibiting partisan gerrymandering, and it does not make state legislatures unassailable citadels of privilege when they engage in such gerrymandering. Appellant's fundamental claim is that, when the People of Arizona exercised their legislative power to assign the authority to draw congressional district lines to a body unlikely to be dominated by self-interested officials, the People "usurped" a legislative power that only their elected representatives may exercise. This usurpation theory is contrary to basic principles of democratic self-rule. Our constitutional democracy was ordained and established by the People and "derive[s] its powers directly from them." *McCulloch* v. *Maryland*, 17 U.S. 316, 404 (1819). The People cannot "usurp" the power of their legislators because the People, and only the People, are "the great source of all power in this country." *Kilbourn* v. *Thompson*, 103 U.S. 168, 192 (1880).

The unspoken premise of Appellant's submission is that there really is no remedy for the abuse of partisan gerrymandering in congressional districts. The courts have declined to provide any redress, and Congress and

state legislatures, dominated by the major political parties, are unlikely to intervene. Now, Appellant says, the People are constitutionally prohibited from implementing a solution, and indeed from reforming any aspect of congressional elections using their own lawmaking power. This Court should not endorse Appellant's depiction of a crippled polity. When the People of Arizona created the Commission through the initiative process "as a basic exercise of their democratic power," *Schuette* v. *Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636 (2014) (plurality opinion), they adopted a practical means to stop a practice that no one defends and that undermines the People's sense of democratic engagement. The People's decision to do so should be upheld.

STATEMENT

A. The Roots And Rise Of Popular Lawmaking

1. The People of Arizona created the Arizona Independent Redistricting Commission to vest the authority for drawing congressional and legislative districts in an expert lawmaking body. In so doing, they exercised a power that the People in a near-majority of States have reserved to themselves: the power to legislate by ballot initiative and "bypass public officials who [a]re deemed not responsive to the concerns of a majority of voters[.]" *Schuette*, 134 S. Ct. at 1636 (plurality opinion). "[T]he basic premise of the initiative process … is that the right to make law rests in the people and flows to the government, not the other way around. Freedom resides first in the people without need of a grant from government." *Hollingsworth* v. *Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting).

This vision of democracy—that the right and power to make law rest ultimately with the People—stretches

back to the Framers of the Constitution. As James Wilson explained, "[a]ll power is originally in the people; and should be exercised by them in person, if that could be done … with little difficulty." 2 *The Works of the Honourable James Wilson* 128 (1804); *see also* Federalist No. 22 (Hamilton) ("The streams of national power ought to flow immediately from [the People;] that pure, original fountain of all legitimate authority."). Although the Framers concluded that direct democracy was impracticable for the "compound republic" of the United States, their understanding that lawmaking power resides in the People is reflected in their decision to have the Constitution ratified by the People. *See* Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 203-243 (1996).

A similar vision prevailed in the States from the beginning. For example, Massachusetts' and New Hampshire's constitutions were enacted in the eighteenth century by a direct vote of the People. Indeed, "[m]ost states in the 1800s … originally adopted their constitutions by popular votes or used the referendum to call for a convention to amend or replace them." Persily, *The Peculiar Geography of Direct Democracy*, 2 Mich. L. & Pol'y Rev. 11, 18 (1997).

In the early twentieth century, the People of several States adopted further mechanisms to exercise lawmaking power. The initiative, which allows the People to enact statutes and constitutional provisions by ballot measure, was adopted as a means "toward the end of removing the corrupting influences which straitjacketed the political system." Persily, *Peculiar Geography*, at 23, 25, 30; *see also* Kang, *De-rigging Elections: Direct Democracy And The Future Of Redistricting Reform*, 84 Wash. U. L. Rev. 667, 700 (2006). Many States also adopted the referendum, which allows

voters to disapprove laws recently passed by the legislature. *See* Persily, *Peculiar Geography*, at 13-14. The initiative and referendum were conceived as means for the People to break the stranglehold of self-interested state legislators; as President Theodore Roosevelt told the Ohio constitutional convention, "the initiative and referendum … should be used not to destroy representative government, but to correct it whenever it becomes misrepresentative." S. Doc. No. 62-348, at 11 (1912).

South Dakota adopted the initiative in 1898, and Oregon in 1902. Persily, *Peculiar Geography*, at 16. Within two decades, the initiative had spread to nearly twenty States, from California to Maine. *Id.* Congress acknowledged this form of popular lawmaking when it enacted the Apportionment Act of 1911, which established redistricting regulations (now codified at 2 U.S.C. § 2a(c)) making clear that congressional districts established through *any* form of state lawmaking are to be treated as equally valid. *See* Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 14; *infra* pp. 27-30.

B. Arizona's Lawmaking Process

The People of Arizona included the initiative and referendum in their constitution even before joining the Union. Indeed, "[t]he most constant thread running through the Arizona Constitution is its emphasis on democracy, on popular control expressed primarily through the electoral process." Leshy, *The Arizona State Constitution* 14 (2d ed. 2013).

Securing the power of direct lawmaking to the People was "the dominant issue" during the selection of delegates to Arizona's constitutional convention. Leshy, *The Making of the Arizona Constitution*, 20

Ariz. St. L.J. 1, 32 (1988). Support for the initiative and referendum "became the litmus test" for delegate candidates, and by the time the convention formally addressed the issue, "it was already practically a given that these devices would be in the constitution." *Id.* at 32, 46, 63-64; *see also id.* at 62 (at the convention, "every time the question was raised, the delegates opted for more democracy, not less"). The delegates voted to include the initiative and referendum in the Arizona Constitution, allowing "the people to bypass the legislature and the governor, and take lawmaking authority directly into their own hands." *Id.* at 63.

The Arizona Constitution reflects this "enthusiastic embrace" of direct democracy. *See* Leshy, *Making*, 20 Ariz. St. L.J. at 59-60. It allocates the State's "legislative authority" to both the Legislature and the People. Ariz. Const. art. IV pt. 1, § 1, cl. 1; *see also Cave Creek Unified Sch. Dist.* v. *Ducey*, 308 P.3d 1152, 1155 (Ariz. 2013) ("The legislature and electorate 'share lawmaking power under Arizona's system of government.'"). Specifically, "the people reserve the power to propose laws and amendments to the constitution … independently of the legislature." Ariz. Const. art. IV, pt. 1, § 1, cl. 1. Placing an initiative on the ballot requires only a small percentage of qualified electors' signatures; to take effect, both statutory and constitutional initiatives require only "a majority of the votes cast thereon." *Id.* cls. 2, 5.

The Arizona legislature retains the power to "refer" potential statutory provisions and constitutional amendments to the voters—that is, to draft the text and put the measure on the ballot. Ariz. Const. art. IV,

pt. 1, § 1, cl. 15; *see also id.* art. XXI, § 1.[1] "The Arizona framers deliberately made their handiwork relatively easy to amend," a fact proved by Arizona's history: there have been roughly 150 amendments to the Arizona Constitution in the last hundred years, "more than 80 percent" of which "resulted from legislative referrals rather than direct citizen initiatives." Leshy, *The Arizona State Constitution* 3, 23, 418. The Legislature also "has a better track record with the voters than citizen petitions"—60% of constitutional amendments sponsored by the Legislature have passed, compared to only 42% of those proposed by voters. *Id.* at 23.

C. The Arizona Independent Redistricting Commission

From the beginning, Arizonans used the initiative to effect election-related reform. The same year Arizona became a State, the voters amended its constitution to grant women the right to vote and hold public office. Leshy, *The Arizona State Constitution* 20, 38. This early initiative was followed by measures that prohibited legislators from being appointed to public office, permitted Arizonans to register to vote when applying for a driver's license, and placed limits on campaign

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[1] Until 1998, the Legislature had the power to "repeal or modify a voter-approved law passed by less than a majority of all registered voters." *Cave Creek*, 308 P.3d at 1155. However, "in the wake of unpopular legislative actions designed to nullify voter-initiated measures, voters adopted the Voter Protection Act, a constitutional amendment that flatly prohibits legislative repeal of initiatives … and that permits legislative amendments only when they 'further the purpose' of the voter-adopted measure and are passed by a super-majority in each house of the Legislature." Bender, *The Arizona Supreme Court and the Arizona Constitution*, 44 Ariz. St. L.J. 439, 445-446 (2012).

contributions.[2] Arizonans have made particular use of the initiative to combat entrenchment and self-interest by the Legislature. Between 1917 and 1972, "[t]he politically sensitive questions of legislative reapportionment and salaries of public officials were the subject of more than a dozen proposed amendments … about half of which were approved." *Id.* at 39.

In 2000, Arizonans turned to the initiative to confront the problems of partisanship and self-dealing by legislators in drawing congressional and legislative districts.[3] The People enacted Proposition 106 to "end[] the practice of gerrymandering and improv[e] voter and candidate participation in elections," and to ensure "fair and competitive … districts." JA50. The electorate voted to amend the legislative article of the state constitution to include "an appointed Redistricting Commission to redraw the boundaries for Arizona's legislative districts … and to redraw the boundaries for

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[2] Leshy, *The Arizona State Constitution* 27; Ariz. Sec'y of State, *Official Canvas, State of Arizona, General Election–November 2, 1982*, at 11, http://www.azsos.gov/election/1982/General/Canvass1982GE.pdf (last visited Jan. 15, 2015); Ariz. Sec'y of State, *State of Arizona Official Canvas–General Election–November 4, 1986*, at 10, http://www.azsos.gov/election/1986/General/Canvass1986GE.pdf (last visited Jan. 15, 2015).

[3] Although Appellant suggests (at 3) that the Legislature consistently drew Arizona's congressional districts in the past, that is not accurate. From its admission to the Union to 1940, Arizona had only one Member of Congress. U.S. Census Bureau, *Apportionment of Membership of the U.S. House of Representatives*, https://www.census.gov/population/apportionment/files/2000%20PHC3%20Table%203.pdf (last visited Jan. 15, 2015). From 1966 to 1970 and 1982 to the early 2000s, the district lines were drawn by a federal court. *See Klahr* v. *Williams*, 313 F. Supp. 148, 149-150, 153-154 (D. Ariz. 1970); Norrander & Wendland, *Redistricting in Arizona* 177, 178-179, *in Reapportionment And Redistricting In The West* (Moncrief, ed. 2011).

the Congressional districts[.]" *See* JA61; Ariz. Const. art. IV, pt. 2, § 1.

The five-person redistricting commission "acts as a legislative body." *Arizona Minority Coal. for Fair Redistricting* v. *Arizona Indep. Redistricting Comm'n*, 208 P.3d 676, 683-684 (Ariz. 2009). Its commissioners "exercise discretion and make policy decisions … [when] they decide where to draw district boundaries … [and their] enactments carry the force of law and have prospective implications." *Id.* at 683-684. Commissioners serve a single, approximately ten-year term, during which their primary duty is to "establish congressional and legislative districts" according to criteria specified in the Arizona Constitution. Ariz. Const. art. IV, pt. 2, § 1, cls. 5, 14, 23.

The Legislature retains significant influence over the Commission. The Legislature's top leadership—the "highest ranking officer" and "minority party leader" in both houses—appoints four of the five commissioners from a pool of twenty-five nominees. Ariz. Const. art. IV, pt. 2, § 1, cls. 5-6. The fifth commissioner is selected by "majority vote from the nomination pool" by the four appointed commissioners. *Id.* cl. 8. They are subject to removal by "the governor, with the concurrence of two-thirds of the senate." *Id.* cl. 10. Further, the Commission is required to publish draft redistricting maps for comment and the Legislature may make recommendations about those maps, which the Commission is required to consider. *See* Ariz. Const. art. IV, pt. 2, § 1, cl. 16.

Finally, the Legislature maintains the power to refer constitutional amendments to the People of Arizona. Ariz. Const. art. IV, pt. 1, § 1, cl. 15; *id.* art. XXI, § 1. The Legislature can, for example, refer to the voters a

redistricting map that would, if approved, supersede the Commission's map. Indeed, the Speaker of the Arizona House of Representatives drafted just such a measure months before Appellant filed suit.[4] Although that proposal has not been submitted to the electorate, it is not unprecedented for the Legislature to refer temporary constitutional amendments to the voters.[5] The Legislature also retains the power to refer an initiative that would eliminate the Commission entirely—the voters of Arizona have previously repealed other constitutional amendments just years after their initial passage. *E.g.*, Leshy, *The Arizona State Constitution* 43 n.57.

D. Proceedings Below

In 2012—twelve years after the People of Arizona enacted Proposition 106—Appellant filed suit in the District of Arizona, contending that "the Elections Clause of the United States Constitution prohibits state voters from amending the Arizona Constitution to place the congressional re-districting function" in the Commission. Pet. App. 4, 7 (citation omitted). A three-

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[4] *See* http://www.azleg.gov/legtext/50leg/2r/bills/hcr2053p.pdf (last visited Jan. 15, 2015). Similarly, in January 2015, several members of the Arizona House proposed referring an amendment to the People that would increase the Commission's membership from five to six. *See* http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/52leg/1r/bills/hcr2005p.htm&Session_ID=114 (last visited Jan. 15, 2015).

[5] *See, e.g.*, Ariz. Const. art. IX § 12.1 (section entitled "Temporary taxes; repeal from and after May 31, 2013"); Pitzl, *State's 3-year-old Temporary Sales Tax Ends Today*, The Ariz. Republic, May 31, 2013, http://www.azcentral.com/news/politics/articles/20130530states-year-old-temporary-sales-tax-ends-today.html.

judge district court dismissed the suit for failure to state a claim. *See* Pet. App. 2-3.[6]

The court rejected Appellant's argument that the Elections Clause's use of the word "Legislature" prohibits the People of Arizona from vesting the legislative power to draw district lines in the Commission. Pet. App. 9-10. The majority noted that Appellant did not contest that "the initiative power is a legislative power," that "the people of Arizona used that legislative power to create the" Commission, or that "since its inception, the Arizona Constitution has reserved the initiative power to its people." Pet. App. 8-9. Nor could Appellant "effectively contest that in fulfilling its function of establishing congressional and legislative districts, the [Commission] is acting as a legislative body under Arizona law." Pet. App. 9.

Summarizing this Court's precedent, the majority explained that "states [are] not prohibited from designing their own lawmaking processes and using those processes for the congressional redistricting authorized by the [Elections] Clause." Pet. App. 10-16 (citing, among other cases, *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), and *Smiley* v. *Holm*, 285 U.S. 355 (1932)). Instead, "the relevant inquiry is … whether the redistricting process [Arizona] has designated results from the appropriate exercise of state law"; "[t]o the extent that [Appellant's] argument is a veiled assertion that the [Commission] violates the Guarantee Clause, the argument is not justiciable." Pet. App. 17.

Judge Rosenblatt dissented, although he conceded that "it cannot be disputed that the Elections Clause's

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[6] The panel ruled that Appellant had standing to bring the challenge. *See* Pet. App. 5-6.

reference to 'the Legislature' … refers to the totality of a state's lawmaking function as defined by state law, and that in Arizona a citizen initiative … is an integral part of the state's legislative process." Pet. App. 20-21.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction over Appellant's challenge to the Commission. Appellant principally takes issue with the fact that the Commission was created by the People using the initiative power. As a creature of the State of Arizona, however, the Legislature lacks standing to challenge the distribution of lawmaking power under its State's constitution, which creates Arizona's legislative power and defines it as one shared among the People, the legislative body, and the Commission. Appellant's contention that the Elections Clause does not allow the People to regulate elections is ultimately a challenge to Arizona's form of government, which has always permitted the popular initiative. That claim presents a nonjusticiable political question that belongs in the political arena, not the federal courts.

Moreover, the Legislature has asserted no concrete and particularized injury under *Raines* v. *Byrd*, 521 U.S. 811 (1997). Proposition 106 has not nullified any specific exercise of the Legislature's power. Unless and until such a nullification occurs, the Legislature can allege nothing more than a hypothetical and "abstract dilution of institutional legislative power," *id.* at 826, insufficient to establishing standing.

II. The Elections Clause does not prohibit the People of Arizona from allocating to the Commission the power to draw congressional district lines. The Elections Clause safeguards the close connection between the People and their Representatives. The

Clause's two-part structure first empowers the People by assigning the duty to provide for the holding of congressional elections initially to state lawmakers, who were thought closest to the People. But the Clause's use of the term "Legislature" does not preclude the People from exerting more direct control over the holding of congressional elections through popular lawmaking. The Framers understood that word to mean "the power that makes the laws" under the state constitution, which may include the People themselves. Further, the Framers lodged the authority to prescribe congressional election regulations in state legislatures not because of the Framers' views of state elected officials, but in spite of them. The Framers' concern that state officials might disrupt the direct bond between the People and their Representatives animates the second part of the Elections Clause, which allows Congress to regulate the holding of congressional elections. The Elections Clause thus doubly empowers the People; Appellant's assertion that the People have somehow "usurped" the power from their own state elected officials is misguided.

Congress recognized that the People may directly regulate congressional elections over a century ago, when it enacted the predecessor statute to the current 2 U.S.C. § 2a(c). That statute provides that congressional districts may be "prescribed by the law of [a] State," *id.*, and the statute's legislative history reveals that Congress changed existing law to accommodate the initiative and referendum.

Because Congress exercised its power under the second part of the Clause to allow the type of state lawmaking embodied by Proposition 106, this Court need not consider the meaning of the word "Legislature" in the first part. Nevertheless, this Court has al-

ready done so and rejected Appellant's narrow definition of the word "Legislature." Faced with arguments remarkably similar to those advanced now, this Court in *Hildebrant* rejected the claim that the Elections Clause prevented the People from exercising their referendum power in the context of congressional redistricting. *See* 241 U.S. at 570. And in *Smiley*, this Court held more broadly that "the exercise of the authority [provided by the Elections Clause] must be in accordance with the method which the state has prescribed for legislative enactments." 285 U.S. at 367. This Court's decisions thus establish that the power to prescribe the manner of holding congressional elections is vested in all the lawmaking power of a State, however that power is allocated by the State's constitution.

Nothing about the text of the Elections Clause supports a contrary rule. Although Appellant initially claims support from the "plain text" of the Clause, that argument fails because numerous Founding Era sources show that "Legislature" was used capaciously and understood as "the power that makes the laws." Appellant's argument that "Legislature" in the Elections Clause must have the same scope as in other constitutional provisions (like Article V) has been conclusively rejected by this Court. Appellant's fallback argument—that the Clause requires state legislative bodies to have "primary responsibility" over redistricting—is unmanageable and unmoored from the constitutional text.

A construction of the Elections Clause that allows popular regulation of the times, places, and manner of holding congressional elections is also consistent with key constitutional values. The Commission's rule would promote the direct structural bond between the People and their Representatives in Congress, while

Appellant's rule would elevate state officials over the People. The Commission's rule accords with federalism principles allowing States the freedom to make policy choices on how best to regulate elections, whereas Appellant's rule would severely restrict the States.

The deleterious effects of Appellant's rule would be substantial. The voters of many States have regulated congressional elections for over a century, and numerous longstanding elections provisions, reaching well beyond redistricting, would likely fall if this Court accepts Appellant's arguments. Moreover, Appellant's rule will stymie state-based solutions to the problem of partisan gerrymandering. Because this Court has declined to adjudicate such claims, a decision for Appellant would cut off perhaps the only avenue left for reform. The Elections Clause in no way requires Appellant's counsel of despair.

ARGUMENT

I. THE ARIZONA LEGISLATURE LACKS STANDING TO BRING THIS SUIT

Appellant's challenge to a popularly created Commission is nonjusticiable for two separate but related reasons. *First*, Appellant's real claim is against the People of Arizona—indeed, Appellant's fundamental theory is that the People have "usurped" the Legislature's power (Br. 20). But as an organ established by the People, Appellant lacks standing to challenge the People's decisions about how to allocate lawmaking power, and its grievances are really nonjusticiable political objections to the structure of Arizona's government. *Second*, Appellant alleges only an abstract dilution of institutional power rather than the concrete and personal injury necessary to establish standing.

The Article III standing inquiry is particularly rigorous here, where reaching the merits would require the Court to second-guess fundamental decisions the People of a State have made about how to allocate powers among their organs of self-government. *See, e.g.*, *Taub* v. *Kentucky*, 842 F.2d 912, 919 (6th Cir. 1988) ("Considerations of federalism should signal the same caution in these circumstances as concern for preservation of the proper separation of powers in an 'all federal' action."); *cf. Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997).

A. The Arizona Legislature Has No Standing To Challenge A Limitation On Its Powers Enacted By The People Of Arizona

1. Appellant lacks standing because its dispute is not so much with the Commission as with Arizona itself. Any curtailment of the Legislature's authority over redistricting was caused not by the Commission but by the People of Arizona when they exercised their sovereign power to amend the state constitution. But the federal Constitution gives a state legislature no rights against the State itself. *See Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009).

Appellant identifies no federal case in which a legislature was allowed to sue its own State, let alone attack the state constitution's structuring of the legislative power. That is because, like municipalities and school boards, the Legislature "is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. [The Legislature] remains the creature of the State exercising and holding powers and privileges subject to the sovereign will." *Trenton* v. *New Jersey*, 262 U.S. 182, 187 (1923); *see Williams* v. *Mayor & City Council of Baltimore*,

289 U.S. 36, 40 (1932); *cf. Alden* v. *Maine*, 527 U.S. 706, 752 (1999) ("A State is entitled to order the processes of its own governance[.]").[7]

Federal courts generally have no warrant to interfere with the distribution of powers within a state government. *See Sweezy* v. *New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in result) ("It would make the deepest inroads upon our federal system, for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the … States.").[8] The cases of institutional standing identified by Appellant (at 18-19) generally involve a State or state agency suing the *federal* government alleging improper federal intrusion on the plaintiff's authority or rights; that situation is completely different, because the States do not derive their governmental powers from the federal government, but rather from the People. *See Cook* v. *Gralike*, 531 U.S.

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[7] Appellant has tried to present this suit as one against the Arizona Secretary of State, as though this were a straightforward action under *Ex parte Young*, 209 U.S. 123 (1908). But a *Young* suit by a state legislature against a state officer was "not only anomalous and unheard of at the time of the founding; it was anomalous and unheard of yesterday." *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1648 (2011) (Roberts, C.J., dissenting). Unlike a typical *Young* case, this is not a suit to vindicate individual rights against state interference, but is a pure intra-governmental dispute. *See id.* at 1644 (Kennedy, J., concurring) (noting that allowing such suits to proceed "may present constitutional questions").

[8] *See also Stanley* v. *Darlington Cnty. Sch. Dist.*, 84 F.3d 707, 717 (4th Cir. 1996) ("Federal courts may not be called upon, in the first instance, to adjudicate what is essentially an internal dispute between two local governmental entities." (citations and internal quotation marks omitted)); *Amato* v. *Wilentz*, 952 F.2d 742, 755 (3d Cir. 1991) (discussing "general reluctance of federal courts to meddle in disputes between state governmental units").

510, 519 (2001).[9] The novelty of this case, presenting the odd spectacle of a state legislature claiming its power has been stolen by the very People that created it and whom it is supposed to represent, is reason enough to conclude that this case does not belong to the "judicial power" of the federal courts. *See Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 150 (1951) (Frankfurter, J., concurring); *cf. Federal Mar. Comm'n* v. *South Carolina Ports Auth.*, 535 U.S. 743, 755 (2002) (attributing "great significance" to the fact that certain suits did not exist "at the time of the founding or for many years thereafter").

2. At bottom, Appellant's challenge is to the form of government the People of Arizona have chosen for themselves. The Arizona Constitution, which created the state legislature and defines its powers, makes clear that "[a]ll political power is inherent in the people,

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[9] Although this Court has, on occasion, considered the merits of suits brought by political subdivisions against their parent States, those cases fall into two categories not applicable here. *See City of Hugo* v. *Nichols*, 656 F.3d 1251, 1255-1263 (10th Cir. 2011). First, in some of those cases, state agencies premised their claims on rights affirmatively granted to them by Congress. *See Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632 (2011); *Lawrence Cnty.* v. *Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985). This Court's implied recognition that Congress can grant judicially enforceable rights to state subdivisions does not undermine the understanding, acknowledged in *Trenton*, *Williams*, and *Ysursa*, that the Framers did not intend constitutional provisions to grant political subdivisions their own rights vis-à-vis their parent States. In a second set of cases, the standing requirements were satisfied because of injury to individuals who were also plaintiffs, making it unnecessary to decide whether the state entity had standing. *See, e.g.*, *Romer* v. *Evans*, 517 U.S. 620 (1996); *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982). This Court did not address whether the state agencies were proper plaintiffs in those cases.

and governments derive their just powers from the consent of the governed." *See* Ariz. Const. art. II, § 2. The People of Arizona may, through amendments to the state constitution, allocate their legislative power as they deem appropriate, and they have done so by distributing those powers among the Legislature, the Commission, and the People themselves. *See Arizona Minority Coal. for Fair Redistricting* v. *Arizona Indep. Redistricting Comm'n*, 208 P.3d 676, 683-684 (Ariz. 2009); Ariz. Const. art. IV, pt. 1, § 1, cl. 1.

Appellant argues, in essence, that the People of Arizona have no right to exercise an important part of their legislative power, even where they have determined that state legislators have a vested interest. That is little different than asserting that the initiative is inconsistent with the constitutional guarantee of a "Republican form of Government"—a nonjusticiable question. *See Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U.S. 118, 151 (1912); *see also Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569-570 (1916). Again and again in its briefing, Appellant extols the relative virtues of representative bodies over other forms of lawmaking, *e.g.*, Br. 59, but the decision to allow popular lawmaking, even at the expense of representative lawmakers, is not one with which the federal courts may interfere. This Court should remit that debate to where it belongs—with the People of Arizona.

B. Appellant Has Failed To Allege Concrete And Particularized Injury

Legislatures lack standing to challenge "abstract dilution[s] of institutional legislative power." *Raines*, 521 U.S. at 825-826. That is all Appellant alleges here. *See, e.g.*, JA19 ("Prop. 106 eliminates entirely the Legislature's prescriptive role in congressional redistrict-

ing, and creates a new and extremely limited role[.]"). Proposition 106 may have diminished the Arizona Legislature's control over the redistricting process, but it nullified no concrete exercise of the Legislature's power, as *Raines* requires. Appellant's attack on the Arizona Constitution is merely a "generalized grievance" that the State is not following the law. *Lance* v. *Coffman*, 549 U.S. 437, 441-442 (2007).

Appellant relies (at 22 n.5) on *Coleman* v. *Miller*, 307 U.S. 433 (1939), but that decision is a narrow exception to the rule articulated in *Raines*, and is inapplicable here. *Coleman* stands "at most … for the proposition that legislators whose votes would have been sufficient to defeat (or enact) *a specific legislative Act* have standing to sue if that legislative action goes into effect (or does not go into effect)." *Raines*, 521 U.S. at 823 (emphasis added). Appellant cannot point to any specific legislative act that would have taken effect but for Proposition 106.[10] Thus, Appellant asks this Court to review a hypothetical and "abstract dilution of institu-

[10] This is not a situation, for example, where the Legislature, believing itself vested with sole authority to adopt a redistricting plan, did so and submitted it to the Secretary of State for implementation. Had the Legislature done so, then the Secretary of State presumably would have had to decide whether to implement the Legislature's plan or the Commission's (assuming they were different). *Compare Smiley v. Holm*, 285 U.S. 355, 361-362 (1932) (no question of justiciability raised where state legislature passed redistricting bill and, despite subsequent gubernatorial veto, delivered the bill to Secretary of State for implementation), *with Goldwater* v. *Carter*, 444 U.S. 996, 997-998 (1979) (Powell, J., concurring in the judgment) (dispute over President's treaty-termination power was unripe, absent specific action taken by Senate to challenge it, because "we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches").

tional legislative power" of the sort this Court declined to review in *Raines*. *Id.* at 826.

Appellant incorrectly asserts (at 16, 22 n.5) that complete removal of the state legislature's authority to redistrict is sufficient to establish a cognizable harm regardless of whether a specific vote was nullified. Even if true, the Legislature could not demonstrate such injury here because Appellant maintains significant control over redistricting. Its leadership appoints four of five commissioners;[11] the Senate, with the Governor, may remove commissioners for cause; both houses of the Legislature can comment on the Commission's proposed map; and the Legislature can enact its own temporary redistricting plan or regain the redistricting power by referring a constitutional amendment to the People of Arizona. *See supra* pp. 9-10.

Appellant argues (at 40) that the Legislature's power to refer constitutional amendments to the People is illusory, analogizing the possibility to Congress's power to propose constitutional amendments to the States. But the comparison is inapposite; unlike the federal Constitution, the Arizona Constitution was designed to be, and has been, frequently amended. *See supra* pp. 5-7; *compare* Ariz. Const. art. XXI § 1 (amendment put on the ballot when approved by a simple legislative majority, and ratified by a majority of the people voting on it) *with* U.S. Const. art. V. Contrary to Appellant's assertion (at 41), the state constitution does not bar the Legislature from submitting an

[11] The Legislature chooses its own leadership, so the prerogative to select commissioners ultimately belongs to the Legislature. *See* Ariz. Const. art. IV, pt. 2, § 1, cl. 6; *see also* NCSL Br. 17 (acknowledging constitutionality of commissions where legislative leaders choose commissioners).

amendment to the People that modifies a prior amendment; it provides the Legislature with the power to submit constitutional amendments "to the vote of the people," Ariz. Const. art. XXI, § 1, and preserves the right of the Legislature to refer "*any* measure" "to the people at the polls." Ariz. Const. art. IV, pt. 1, § 1, cl. 15 (emphasis added).

Appellant also contends (at 21) that without standing here it will lack an adequate remedy. But Appellant could accomplish its goal through political means, which is how, as this Court has reiterated, political disputes should be resolved. The Legislature often puts constitutional amendments on the ballot, and they usually pass. *See supra* pp. 6-7. Appellant's voice can be heard in the political debate; it is hardly a powerless actor for whom the traditional rules of standing must be relaxed. *Cf. Goldwater* v. *Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment) ("Here … we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.").[12]

[12] The *Raines* Court attached "some" importance to the fact that the case was brought by individual legislators; it offered no further explanation of its weight, 521 U.S. at 811, but the overwhelming majority of the opinion focused on the lack of concrete nullification, the availability of a political solution, and historical practice.

II. THE ELECTIONS CLAUSE AND 2 U.S.C. § 2a ALLOW THE PEOPLE OF ARIZONA TO PRESCRIBE THE MANNER OF CONGRESSIONAL REDISTRICTING

A. The Elections Clause Was Designed To Secure The People's Influence Over The National Government, Not To Entrench State Legislators' Privileges

The Elections Clause provides: "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. The two-part structure of the Clause reflects the Framers' judgment about how to ensure that the House of Representatives remained closely bound to the People, while also preventing the States from impairing the national government. The Elections Clause vests the initial duty to regulate congressional elections in state-based lawmaking, as close to the People as possible, but also authorizes Congress to intervene to prevent state election regulations from being manipulated by state officials (as the Framers feared they might be). That structure prevents self-interested state officials from interposing themselves between the People and their national representatives. *See U.S. Term Limits* v. *Thornton*, 514 U.S. 779, 808 (1995).

Congress affirmed this understanding of the Elections Clause when it authorized redistricting by initiative. This Court too has upheld the power of the People to regulate congressional elections. Appellant now proposes that this Court ignore the original understanding of the Clause and upend a century of precedent, to take the authority to regulate congressional elections under state law away from the People and

lodge it exclusively in the hands of state officials in the first instance. But Appellant's core argument—that the Arizona Legislature's duty to prescribe the time, place, and manner of elections has been "usurped" by the People of its own State—fundamentally misunderstands the Elections Clause and the constitutional functions and values it serves.

There was little discussion during the Founding Era of the first part of the Elections Clause, which delegates the responsibility to regulate elections to each State's "Legislature." It is clear, however, that the Framers intended the obligation to regulate congressional elections to be placed close to the People in the first instance. *See* Natelson, *The Original Scope of Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 31 (2010); *cf.* Federalist No. 68 (Hamilton) (notwithstanding its use of the word "Legislature," touting Article II's Electors Clause as providing that "the people of each State shall choose a number of persons as electors").

After considering whether to assign that duty to state or federal lawmakers, the Framers opted to align it primarily with the state lawmaking process because it was closest to the People, and because it was already the means of regulating state elections. *See, e.g.*, Federalist Nos. 59, 61 (Hamilton). But they did so *despite* their well-documented concerns that state-based political actors would improperly influence or corrupt the People's ability to elect a national government. *See* Federalist No. 59 (Hamilton).[13] Permitting local elect-

[13] Madison, for example, viewed state legislatures with extreme suspicion, arguing for a congressional veto over *all* state laws. *E.g.*, *Letter from James Madison to Thomas Jefferson, Mar. 19, 1787*, *in* 2 *The Writings of James Madison* 324, 326 (Hunt, ed.

ed representatives to regulate congressional elections was not an end in itself, as Appellant suggests (at 32-35), but only a means of vesting that power close to the People.

The Framers did not, however, exclude other means of state lawmaking that would ensure that elections fairly represented popular choice. The Elections Clause's reference to state "Legislature[s]"—a term that meant, simply, "the power that makes the laws," *infra* pp. 39-40—signifies the state-level lawmaking process that is closest to the People, and that has always been left to them to structure as they see fit. The initiative and referendum did not exist in 1787. But the Framers did not require the States to adopt any specific configuration of governmental power. Instead, they allowed the People to structure state governmental power as they wished—a decision that accords with basic federalism principles. *See, e.g.*, Federalist No. 43 (Madison); *see also infra* pp. 46-48.

The second part of the Elections Clause reinforces these points by safeguarding the direct relationship between the People and their national representatives. *See Cook*, 531 U.S. at 528 (Kennedy, J., concurring); *Thornton*, 514 U.S. at 821. Giving States the exclusive duty to regulate congressional elections, the Framers believed, "would leave the existence of the Union entirely at their mercy." Federalist No. 59 (Hamilton); *Records of the Federal Convention*, *in* 2 *The Founders' Constitution* 248 (Kurland & Lerner eds., 1987) (Madi-

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1901); *see also Letter from James Madison to Thomas Jefferson, Oct. 24, 1787*, *in* 5 *The Writings of James Madison* 17, 27 ("The injustice of [the acts of state legislators] has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism.").

son explaining that state governments may "refuse to consult the common interest" when regulating elections due to "their local conveniency or prejudices"). The Framers therefore made Congress's power to regulate federal elections "paramount," to be exercised "to any extent which it deems expedient." *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253-2254 (2013); *see also Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2636 n.2 (2013). Congress's Elections Clause power serves as "the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress," *Inter Tribal*, 133 S. Ct. at 2253, or otherwise interfere with the relationship between national representatives and those they serve. And Congress has exercised this power numerous times. *See, e.g.*, Natelson, *Original Scope*, at 5 & nn.13-16.

Both parts of the Elections Clause stem from the fundamental premise that all political power flows from the People. *McCulloch* v. *Maryland*, 17 U.S. 316, 404-405 (1819). When the Framers "split the atom of sovereignty," they ensured that each order of government, state and federal, would have "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." *Thornton*, 521 U.S. at 838 (Kennedy, J., concurring). Under the Elections Clause, the People are doubly empowered: controlling the state lawmaking process in the first instance and retaining the ability to seek federal intervention from their national representatives if necessary.

Viewed in this light, the notion that the People can somehow "usurp" the duty imposed by the Elections Clause from state officials by engaging in popular lawmaking is not simply wrong, but bizarre. Appellant's

proposed rule, which would place state elected officials above the People themselves at the expense of the direct relationship between them and their federal representatives, is fundamentally inconsistent with the Framers' design. For just that reason, it has been rejected by this Court and by Congress.

B. Congress Invoked Its Elections Clause Power In 2 U.S.C. § 2a(c) To Permit Redistricting Decisions To Be Made By Voter Initiative

Congress spoke to the exact issue raised here in 2 U.S.C. § 2a(c), which provides a ground on which to dispose of this case without determining the meaning of the word "Legislature" in the Elections Clause. At a minimum, that statute reflects Congress's long-held interpretation of the Clause.

Congress authorized the People to regulate the manner of congressional elections by initiative over a century ago when it enacted what is now Section 2a(c), which provides that Representatives "shall be elected from the districts then prescribed *by the law of such State*." (Emphasis added.) When Congress enacted the first version of the statute including that language, the Apportionment Act of 1911, it invoked its Elections Clause power to permit redistricting by initiative. The 1911 Act's language was drafted "for the express purpose, in so far as Congress had power to do it, of excluding the possibility" that redistricting via a direct democracy mechanism would be declared invalid. *Hildebrant*, 241 U.S. at 568-569.

1. Congress altered the text of § 2a(c)'s predecessor statute to allow for redistricting by initiative

The text of the Apportionment Act of 1911, the direct predecessor of Section 2a(c), makes plain that Congress invoked its Elections Clause power to permit States to regulate redistricting using direct democracy mechanisms like the initiative. The 1911 Act laid out the apportionment of Representatives following the 1910 census; Section 4 provided that

> in the case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law *until such State shall be redistricted in the manner provided by the laws thereof*[.]

Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 14 (emphasis added).

This Court has twice recognized that this wording was a deliberate change from the language in the prior Apportionment Act of 1901. Section 4 of the 1901 Act provided that new Representatives

> shall be elected by the State at large, and the other Representatives by the districts now prescribed by law *until the legislature of such State in the manner herein prescribed, shall redistrict such State*[.]

Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734 (emphasis added); *see also Branch* v. *Smith*, 538 U.S. 254, 274 (2003) (plurality opinion) (noting that 1882 and 1891 apportionment acts used language similar to 1901 Act).

The *Hildebrant* Court explained that Congress in the 1911 Act "plainly intended" that in States where direct democracy mechanisms existed, they constituted "part of the legislative power … for the purpose of creating congressional districts by law." 241 U.S. at 568-569. This Court reaffirmed its conclusion sixteen years later, pronouncing that "the act of 1911, in its reference to state laws" serves as a "legislative recognition of the nature of the authority deemed to have been conferred by" the Elections Clause. *Smiley* v. *Holm*, 285 U.S. 355, 372 (1932).[14]

The legislative history confirms that Congress intended the 1911 Act to permit redistricting by initiative. *See* 47 Cong. Rec. 673-675, 701-703, 3436-3437, 3507-3508 (1911). For example, Representative Edgar Crumpacker of Indiana, a proponent of omitting the phrase "by the legislature thereof," explained that the change would ensure that the "States shall have the right to [have redistricting performed by a vote of the people] if they see fit to do so." 47 Cong. Rec. 674-675; *see also id.* at 702 (statement of Rep. Bartholdt)

[14] Dicta in *Smiley* suggests that "Congress had no power to alter [the Elections Clause] and that the act of 1911, in its reference to state laws, could but operate as legislative recognition of the nature of the authority deemed to have been conferred by the constitutional provision." 285 U.S. at 372. That statement was unnecessary to the decision in *Smiley*, which did not present the issue of Congress's power under the Elections Clause and which upheld the principle that a state legislature's power over congressional redistricting is subject to limitations in the state constitution—there, the gubernatorial veto. *Id.* at 367-368. It also must not be read to contradict *Hildebrant*'s conclusion that Congress in 1911 had acted "in so far as [it] had power to do it" to permit redistricting by direct democracy mechanisms and that "the Constitution expressly gave [it] the right to do [so]." 241 U.S. at 568-569.

(Crumpacker amendment "propose[d] to leave the matter of redistricting to the people themselves").

While the Crumpacker amendment—which would have simply stricken the words "by the legislature thereof" from what became § 4 of the 1911 Act—did not ultimately pass, a similar amendment proposed by Senator Theodore Burton of Ohio did. Senator Burton explained that using the words "by the law of such State" in the 1911 Act would give "to each State full authority to employ in the creation of congressional districts *its own laws* and regulations." 47 Cong. Rec. 3437 (emphasis added). He worried that, without amendment, the statute would "send[] the message, 'Do it in only one specified way; that is, by your legislature.'" *Id.* Senator Burton's successful amendment, by contrast, "simply [left] the question [of redistricting] to the laws and methods of the States. If they include initiative, it is included." *Id.* at 3508. Senator Burton's and others' statements "leave[] no room for doubt" that the 1911 Act was intended to ensure that States could use popular lawmaking to regulate redistricting. *See Hildebrant*, 241 U.S. at 568-569.

2. Section 2a(c) is derived from the 1911 Act, remains operative, and is constitutional

The 1911 Act is the direct "predecessor to the current § 2a(c)," Appellant Br. 55, and so its text and legislative history inform how Section 2a(c) should be read. Indeed, this Court has recognized the link between the two statutes. *See Branch*, 538 U.S. at 274 (plurality opinion) (describing earlier apportionment acts as "prior versions of §2a(c)"); *id.* at 295 (O'Connor, J., concurring in part and dissenting in part) ("The 1911 statute—the one in effect at the time Congress enacted the pre-

sent version of § 2a(c)—is almost word for word the same as the current statute.").

The current language in Section 2a(c) can be directly traced to the 1911 Act. When Congress next enacted a reapportionment statute, it did not disturb the key language in the 1911 Act. *See* Act of June 18, 1929, ch. 28, § 22, 46 Stat. 26; *Smiley*, 285 U.S. at 373-375 (explaining that 1929 Act repealed only laws "inconsistent with its provisions," which Section 4 of 1911 Act was not). The next and final major change came in 1941, when Congress added the current language that Representatives "shall be elected from the districts then prescribed *by the law of such State*." Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761-762 (emphasis added). That language, closely related to that in the 1911 Act, recognized the permissibility of redistricting by initiative. The most natural interpretation of the statutory text, especially given its history, is that it authorizes redistricting by any means allowed under "the law" of each State. *See id.*[15]

Appellant acknowledges that Section 2a(c) is still operative, *see* Br. 54-55,[16] but argues (at 56) that if Sec-

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[15] Because *Branch* involved judicial redistricting, the Court naturally focused on § 2a(c)'s applicability to courts. *See* 538 U.S. at 258, 274. Accordingly, Appellant's argument (at 56) that this Court "construed th[e] modification [in the 1911 Act's language] as encompassing *judicial* redistricting" is true but irrelevant; redistricting by initiative was not at issue in *Branch*. Nothing in the statute's text suggests the odd proposition that Congress's accommodation of state redistricting power was confined to the state judiciary.

[16] Six Justices in *Branch* agreed that Section 2a(c) had not been impliedly repealed. 538 U.S. at 274-275 (plurality opinion), 282 (Kennedy, J., concurring), 292-293, 298 (O'Connor and Thomas, JJ., concurring in part and dissenting in part).

tion 2a(c) has "any relevance" to this case—that is, if it is an invocation of Congress's Elections Clause power—then it is "plainly unconstitutional" because it tramples on state legislatures' prerogatives. That argument is wrong. *See Hildebrant*, 241 U.S. at 569 (holding that "the Constitution expressly gave [Congress] the right to" permit redistricting by direct democracy mechanisms). The Framers granted Congress the ultimate supervisory power over congressional elections precisely *because* state legislatures might try to manipulate the federal elections system in a way that would attenuate the connection between Congress and the People. *See supra* pp. 23-27. But it would not be practicable for Congress to regulate every aspect of federal elections in States where such a threat might lurk, nor would it be logical for the Constitution to give Congress the Hobson's Choice of either regulating election minutiae itself or surrendering its power under the Elections Clause. Congress's power under the Clause allows it to enlist another entity within the States that must be presumed loyal to the national government: the People.

Appellant (at 56-57) cites statements by supporters of the Constitution at the North Carolina ratifying convention about whether Congress might use the Elections Clause to "extend the terms of Representatives and Senators beyond those specified in the Constitution." Such hypothetical abuse of Congress's power is plainly inapposite here; as the North Carolina Federalists pointed out, the length of the terms of Representatives and Senators are prescribed by specific constitutional provisions, *see* U.S. Const. art. I, §§ 2-3, and so a law extending the terms "would be a palpable violation of the Constitution." *Debate in North Carolina Ratifying Convention, 25 July 1788*, *in* 2 *The Founders' Constitution* at 275 (Mr. Maclaine); *see also id.* at 271 (Mr.

Iredell). Nor does this case involve any misuse of Congress's Elections Clause Power to affect matters beyond the "Times, Places and Manner" of holding elections, such as by influencing the outcome of elections, *cf. Cook*, 531 U.S. at 523-524, or adding qualifications beyond those in the Qualifications Clauses, *see Powell* v. *McCormack*, 395 U.S. 486 (1969). Congress and the States have long treated redistricting as falling within their powers under the Elections Clause. In enacting Section 2a(c), Congress permissibly exercised its authority to allow States to exercise *theirs* through popular lawmaking.

C. This Court's Precedent Holds That The Word "Legislature" In The Elections Clause Means "Lawmaking Power"

Even if Congress had not expressly spoken to this issue under its own Elections Clause authority and provided that the People may regulate congressional districting by initiative, Appellant's submission that the People may not do so would still fail. This Court has already rejected the narrow definition of "Legislature" that Appellant proposes, namely that the term refers exclusively to a body of elected representatives.[17] In both *Hildebrant* and *Smiley*, this Court explained that the Elections Clause does not bar state entities other than a representative body from prescribing the manner of congressional elections. Both cases make clear that congressional elections may be so regulated through the lawmaking process of a State, pursuant to that State's constitution.

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[17] Appellant's brief eventually implicitly concedes that this definition cannot be squared with this Court's precedent and offers another flawed definition of "Legislature" that is disconnected from the constitutional text. *See infra* pp. 42-44.

1. In *Hildebrant*, this Court rejected virtually all of the arguments Appellant advances in this case. In 1912—as numerous States were adopting the initiative and referendum—the People of Ohio amended their state constitution to provide for a veto by referendum over acts of the state assembly. 241 U.S. at 566. Several years later, the People rejected an assembly-backed redistricting law, and a relator brought suit, arguing that the Elections Clause required that the assembly's districts be enforced, notwithstanding the referendum. *Id.* at 566-567.[18]

Petitioner's arguments there were strikingly similar to Appellant's here: An adverse ruling would allow "the power to prescribe the 'times, places and manner' of electing representatives [to] be taken away from the legislature or controlled by State constitutions"; "there is but one 'legislature' empowered to act under" the Elections Clause; and "the power exclusively given to the legislature by the supreme organic law of the United States cannot either be delegated or assumed in any manner by the people of the state of Ohio." *Hildebrant*, Pet. Br. 30, 56, 60; *compare* Appellant Br. 24-27, 50-51.

This Court rejected those submissions. After explaining that the referendum was a valid legislative act by the People under the Ohio constitution and that Congress had "treated [such referenda] to be the state legislative power for the purpose of creating congressional districts by law" in the Act of 1911, the Court addressed "the contention … that to include the refer-

[18] The present case thus presents the other side of the same coin as *Hildebrant* with respect to the power of elected legislators. Even now, Appellant can refer its own redistricting plan to the People, which would take effect if approved by a majority of the voters. *See supra* pp. 9-10.

endum within state legislative power for the purpose of apportionment is repugnant to § 4 of article 1 of the Constitution and hence void," and found that assertion to be "without substance." 241 U.S. at 258-259. The petitioner's argument was ultimately an attack on Ohio's chosen form of government—an assertion that "to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power." *Id.* But because the People's veto was a valid legislative act, any further inquiry raised only nonjusticiable questions.

Here, as in *Hildebrant*, the People of Arizona have set redistricting policy by exercising the legislative power reserved to them in their state constitution. *Arizona Minority Coal.*, 208 P.3d at 683-684. That the People used their lawmaking power to create the Commission—a separate legislative body housed within the Arizona Constitution's legislative article—and to prescribe the process by which it engages in redistricting does not change the analysis. The manner in which Arizona redistricting decisions are made (*i.e.*, by the Commission) and the criteria by which the Commission makes them were determined in the first instance by the People. *See supra* pp. 8-9. Appellant has not disputed that the People's creation of the Commission was a legislative act.

2. *Smiley* confirmed the rule announced in *Hildebrant*, making it even clearer that the Elections Clause grants the power to regulate elections to the "lawmaking power" of a State, and not simply to a representative body alone. 285 U.S. at 371.

In *Smiley*, the Governor of Minnesota vetoed a redistricting plan passed by the state legislature. The Secretary of State enforced the plan anyway, arguing

that the legislature's action was all that was required. The Minnesota Supreme Court agreed. *See id.* at 364-365. Again, the respondents in *Smiley* made similar arguments to those Appellant advances. They contended that "[t]he provisions of the constitution of the state cannot take the power from the legislature of the state …," and that "[i]f the framers of the constitution had intended that the lawmaking power of the state, including the power of gubernatorial veto, should be exercised in prescribing the times, places and manner of holding elections for senators and representatives, they would have used the word 'state' or some expression such as 'law making power of the state,' or 'by the legislature with the approval of the executive.'" *Smiley*, Resp. Br. 24, 31-32; *compare* Appellant Br. 28-30, 42; Coolidge-Reagan Br. 4-20.

Again, as in *Hildebrant*, this Court rejected those arguments. The Court noted that the Constitution uses the word "Legislature" in several different places in relation to the exercise of different powers, and explained that the meaning of that term must be discerned by examining the specific "function to be performed" in a particular constitutional provision. *Smiley*, 285 U.S. at 365-366. For example, in choosing senators before the Seventeenth Amendment, the "Legislature" acted as an "electoral body"; in considering Article V amendments, it acts as a ratifying body. *Id.* (citing *Hawke* v. *Smith*, 253 U.S. 221, 231 (1920)). Under the Elections Clause, the function delegated "is that of making laws"—that is, legislating "a complete code" governing elections. *Id.* at 366. And because the Elections Clause deals with lawmaking authority, "the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* at 367.

This Court thus held squarely that the Elections Clause does not "endow the Legislature of the state with power to enact laws *in any manner other than that in which the Constitution of the state has provided* that laws shall be enacted." 285 U.S. at 368 (emphasis added). How States structure that lawmaking process is "a matter of state polity," the specifics of which the Elections Clause "neither requires nor excludes." *Id.* The *Smiley* Court made clear that its holding included popular lawmaking, citing *Hildebrant* and explaining that "it was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections[] was sustained." *Id.* at 372. Indeed, the Court had made that same point in an earlier ruling. *See Hawke*, 253 U.S. at 230-231 ("[T]he referendum provision of the state Constitution [in *Hildebrant*] … was not unconstitutional. Article 1, section 4, plainly gives authority to the state to legislate within the limitations therein named.").[19]

This Court has expressed no doubts about these principles, explaining in other contexts that "reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*, rather than of a federal court." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993) (emphasis added); *see also Colorado Gen. As-*

[19] Appellant's own citations (at 25) demonstrate that this Court has repeatedly referred to the Elections Clause power as one conferred on the "States" generally. *Inter Tribal*, 133 S. Ct. at 2253 (Clause "invests the States with responsibility for … congressional elections"); *Cook*, 531 U.S. at 522 ("Through the Elections Clause, the Constitution delegated to the States the power to regulate[.]"); *Thornton*, 514 U.S. at 805 (Elections Clause is an "express delegation[] of power to the States").

sembly v. *Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari) ("the function referred to by Article I, § 4, was the lawmaking process, which is defined by state law"; judicial redistricting is problematic because it lacks "participation in the process by a body representing the people, *or the people themselves in a referendum*" (emphasis added)). In light of *Hildebrant* and *Smiley*, the result in this case is clear: The Commission may draw congressional district lines because it was created by the People using Arizona's lawmaking process, as defined by the state constitution, and was directed to exercise the State's legislative power in this area.

D. The Text Of The Elections Clause Does Not Require Appellant's Proposed Rule

Appellant initially argues in favor of a purported "plain text" reading of the Elections Clause, contending (at 23-28) that the word "Legislature" in the Clause refers "to one entity alone: 'the Legislature' of a State." That argument fails on its own terms; as Founding Era sources (and this Court's prior decisions) reveal, that term was used to refer to the entire lawmaking power of a State, whether or not vested in an elected body. Perhaps recognizing the difficulties with that textual argument, as well as its inconsistency with precedent and historical practice in the States, Appellant later abandons it and instead suggests the Elections Clause requires that state legislatures have "primary responsibility" for regulating elections (*see* Br. 53, 59). That unworkable standard has no relationship to the constitutional text. Rather, the text, this Court's decisions, constitutional principles, and practice all point to one answer: The word "Legislature" in the Elections Clause encompasses all the lawmaking power of the State.

1. The word "Legislature" in the Elections Clause encompasses all the lawmaking power of the State

Numerous sources, from dictionaries to the statements of the Framers, make clear that writers and speakers of the Founding Era used the word "Legislature" in several different ways, depending on the context, and often used it capaciously to refer to the entirety of lawmaking power within a polity.[20] For example, James Wilson, in discussing the Elections Clause during the ratification debates, used "state legislature," "state government," and "state" interchangeably to describe the body in which primary authority for election regulation was vested. *See Debate in the Pennsylvania Ratification Convention, Oct. 28, 1787, in* 2 *The Founders' Constitution* 250-251. More broadly, Charles Pinckney explained at South Carolina's Ratifying Convention that America is "[a] republic, where the people at large, either collectively or by representation, form the legislature." *See* 4 Elliot, *The Debates in the Several State Conventions on the Adoption of the Constitution* 328 (1836).[21]

Founding Era dictionaries, including several cited by Appellant (at 39), similarly stated that the word

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[20] Appellant relies on out-of-context quotations from Founding Era statesmen expressing the aspiration that elected assemblies should be "'select bodies'" of the "'*best men*.'" Br. 27. But those statements do not purport to define the word "Legislature" or to relate to the Elections Clause.

[21] Likewise, John Adams, in his treatise on republican constitutions, called the Swiss Canton of Zug, which used an initiative-type system of direct popular lawmaking, a "democratical republic," where the electorate constituted a "general assembly" in which "the sovereignty resides." Adams, *A Defence of the Constitutions of Government of the United States of America* 31 (1787).

"legislature" means "[t]he power that makes laws"—not necessarily an elected, representative body. *E.g.*, 2 Johnson, *A Dictionary of the English Language* (10th ed. 1792); *see also, e.g.*, Webster, *A Compendious Dictionary of the English Language* 174 (1806) ("Legislature, n. the power that makes laws"). And the Northwest Ordinance of 1787—a seminal legal document of the period—defined the word "legislature" more broadly than simply an elected, representative body, stating that it "shall consist of a governor, legislative council and a house of representatives."[22] These references show that the term "Legislature" was, for the Framers, multifaceted, and readily susceptible to the broader definition this Court has already embraced: "legislative power."[23]

Appellant nonetheless argues (at 28-29) that the word "Legislature" must have the same meaning every time it appears in the Constitution, and must always refer to the State's elected body of representatives. But this Court has already rejected that approach, *see supra* p. 36, explaining that the meaning of "Legislature" must be examined with attention to the context and purpose of the specific provision in which it falls. *See Smiley*, 285 U.S. at 365-366. Thus, while "Legisla-

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[22] An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio ¶ 11 (July 13, 1787), *available at* http://www.ourdocuments.gov/doc.php?flash=true&doc=8&page=pdf.

[23] Appellant's argument (at 50) that the Commission is asking this Court to view it as "*a* Legislature" also fails. The phrase "the Legislature" encompasses the entire legislative power of a State, however the People have allocated it in their Constitution. The Commission thus exercises *the* legislative power of the State of Arizona, just as the Arizona Legislature does, and just as the People do when legislating by initiative.

ture" in the Elections Clause *does* include popular lawmaking by initiative, given that that Clause refers to the broad lawmaking power of the State, *see Hildebrant*, 241 U.S. at 569-570, "Legislature" as used in Article V's constitutional amendment process *does not* allow States to submit proposed constitutional amendments to a popular vote, because Article V encompasses a much narrower ratifying or consenting role for the state legislature, *see Hawke*, 253 U.S. at 229-231.[24] Here, the function at issue is lawmaking, and thus the word "Legislature" means the legislative power, as the State allocates it. Just as this Court held in *Smiley* and *Hawke*, the fact that the word "Legislature" is used elsewhere in the Constitution to accomplish a completely different function is not determinative here.

The *Smiley* analysis also illustrates why Appellant's Seventeenth Amendment argument (at 29-30) lacks merit. The function of the Legislature in choosing Senators prior to the enactment of the Amendment was "electoral," *Smiley*, 285 U.S. at 365, and the Framers specifically vested the power to choose Senators in state legislatures because they wanted Senators to be a step removed from popular influence. *See, e.g.*, Federalist No. 63 (Madison). The opposite intent influenced the Framers' design of the Elections Clause; the power to regulate congressional elections was initially vested in state legislatures because they were comparatively closer to the People. *See supra* pp. 23-25.[25]

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[24] For similar reasons, Appellant's reliance (at 26-28) on the fact that the Constitution also contains terms like "State" and "Executive Authority" is unavailing. A similar argument was made in *Smiley* (*see Smiley* Resp. Br. 34-35) and did not prevail.

[25] Appellant also contends (at 48) that calling the Commission a legislative body merely because it engages in redistricting is cir-

2. Appellant's "primary responsibility" standard is unmanageable and has no relationship to the constitutional text

Perhaps recognizing the need to reconcile its position with this Court's decisions in *Hildebrant* and *Smiley*, Appellant shelves its "plain text" argument midway through its brief, and submits instead that the Framers meant the word "Legislature" to require a "continuing role" for the State's representative body in regulating elections, in which that body has "'primary responsibility.'" Br. 44, 51. But Appellant cites nothing to support such a reading, and it would be unmanageable as a constitutional rule.[26] Adopting such a nebulous standard would invite Elections Clause challenges to a host of election regulations, which in the States are often the product of rules set by initiative, traditional state legislation, administrative regulations, and local ordinances. Each case would require this Court to examine the particular political dynamic among an elected legislature, the People, and other political actors to determine who had "primary" responsibility, and whether the role of

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cular. But that is not the only reason why the Commission is a legislative body. Rather, as the Arizona Supreme Court has explained, the Commission is a legislative body because its "acts bear 'the hallmarks of traditional legislation' in that commissioners exercise discretion and make policy decisions" and because "Commission enactments carry the force of law and have prospective implications, other hallmarks of traditional legislation." *Arizona Minority Coal.*, 208 P.3d at 683-684. That traditional understanding of the legislative power is not unlimited; it excludes, for example, unilateral gubernatorial regulation of congressional elections.

[26] Appellant draws its "primary responsibility" language from cases that relate to judicial redistricting, *e.g.*, Br. 16 (citing *Maryland Comm. for Fair Representation* v. *Tawes*, 377 U.S. 656 (1964)), and that say nothing about the ability of the People to exercise legislative power under the Elections Clause.

elected officials was sufficiently "continuing." This Court has rejected similar inquiries as too unwieldy to guide judicial inquiry. *See Vieth* v. *Jubelirer*, 541 U.S. 267, 288 (2004) ("predominant intent" standard for partisan gerrymandering claims was unmanageable).

The National Conference on State Legislatures' amicus brief highlights the point. In the NCSL's view, States like Idaho, where legislative leaders select two thirds of a six-member redistricting commission and unelected political party chairs select the other two, do not offend the Elections Clause. NCSL Br. 11-12. But, according to the NCSL, Arizona's Commission, where 80% of the body is selected by elected legislative leaders, offends the Clause because Arizona's legislative leaders must choose from a limited pool of potential commissioners and thus do not have "unfettered" discretion to appoint. *Id.* at 4, 10. No principled distinction can be drawn between these virtually identical entities. Indeed, it is not at all clear that Arizona's redistricting scheme even violates Appellant's "primary responsibility" rule, for the Legislature maintains substantial influence over the redistricting process. *See supra* pp. 9-10.

Appellant also tries (at 39-40) to support its new standard by arguing that the constitutional requirement to "prescribe" election regulations is not satisfied unless the Legislature has primary responsibility over redistricting. But that assertion simply assumes that the word "Legislature" excludes popular lawmaking—the very question in this case. Moreover, Appellant's own definition of "prescribe" would seemingly require state legislatures to have total, not simply primary, power to "'dictate, ordain, or direct'" election rules, (Br. 39), and would force them to regulate every election issue, no matter how minor. That prospect is not only

contrary to Appellant's "primary responsibility" theory, it is unworkable in practice and unsupported by the constitutional text or this Court's decisions.

The better rule—one that is consistent with the cases, and the constitutional text, purpose, and structure—is that "Legislature" means the State's legislative power as defined by that State's constitution.

E. Popular Regulation Of Congressional Elections Is Consistent With Core Constitutional Principles

Appellant's rule is at odds with core constitutional principles. *First*, it would conflict with the purpose of the Elections Clause, which was meant to protect the direct relationship between Congress and the People from potential interference by state officials. *Second*, Appellant's position would restrict state policymaking and impose structural requirements on state governmental forms, in violation of principles of federalism. *Third*, Appellant's position denigrates popular sovereignty.

1. The Elections Clause protects the People's direct relationship with Congress, not state officials' privileges

A fundamental principle of Article I is that Members of Congress are the "immediate Representatives of the People." *Letter from T. Pickering to C. Tillinghast, Dec. 24, 1787, in* 1 *The Founders' Constitution* 252. That direct bond between Congress and the People, unmediated by the States, is central to the Constitution's architecture. *See* U.S. Const. art. I, § 2; *Thornton*, 514 U.S. at 821 ("[T]he Framers … conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen di-

rectly, not by States, but by the people."); *Cook*, 531 U.S. at 528 (Kennedy, J., concurring); 1 Story, *Commentaries on the Constitution of the United States* § 627 (5th ed. 1994) (representatives are "neither created by, dependent upon, nor controllable by the states").

The Framers were concerned that state officials might interfere with, or even destroy, that link. That concern led them to draft not only the second part of the Elections Clause, but also other provisions designed to prevent local interference with the accountability of federal legislators. *See, e.g.*, *Thornton*, 514 U.S. at 808 (Qualifications Clause and congressional salary). The Framers chose to entrust congressional election regulation to state lawmaking processes in the first instance *despite* their concerns with the potential corruption of state legislative bodies. *See supra* pp. 23-27.

In Appellant's view, the Elections Clause was intended to protect the Constitution (and, in particular, the Congress) *from the People* by placing control over congressional elections in the hands of elected state legislators. But that approach to the Clause is the opposite of the Framers'. Although, as Appellant notes, the Framers were concerned about unchecked popular passions and therefore designed a complex republican form of government for the Nation, there can be no doubt that they intended Congress, and in particular, the House of Representatives, to be broadly responsive to popular sentiment rather than to state officials' interests. Appellant's rule would permit state legislators to block popular lawmaking efforts designed to maintain a close, responsive relationship between the People and their representatives. But "nothing in the Constitution ... supports the idea of state interference with the most basic relation between the National Government and

its citizens, the selection of legislative representatives." *Cook*, 531 U.S. at 528 (Kennedy, J., concurring).

2. Allowing the People to regulate congressional elections through state constitutional lawmaking processes serves principles of federalism

One of the innovations of American government is a flexible system of federalism, whereby a national republic coexists with state governments and each (with limited exceptions) may chart its own course based on the will of its People. *See, e.g.*, Federalist No. 51 (Madison); *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). Properly read, the Elections Clause is consistent with these principles, for it allows the full breadth and diversity of state lawmaking power to be used for the regulation of elections, subject to the intervention of Congress. Appellant's narrow reading of the Clause is inconsistent with a robust system of federalism.

First, it would severely restrict state policymaking. Appellant's rule would, at a minimum, eliminate all regulation of congressional elections by initiative and referendum. That prohibition would not be limited to congressional redistricting; it would bar the People from enacting many kinds of reforms intended to protect the right to vote for Congress. *See infra* pp. 51-54. It is no answer that state legislatures might enact the same kinds of laws; the fundamental insight behind popular lawmaking is that state legislators may be reluctant to enact legislation that would empower and benefit the People. Moreover, the freedom to experiment is one of federalism's greatest benefits. *See Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism …. allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in

shaping the destiny of their own times[.]"); *cf. New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Second, it would restrict the ability of States to structure their policymaking apparatuses as they see fit. Under Appellant's reading, the Elections Clause creates a substantive requirement that all States both have a representative body of elected officials, *and* use only that body to create election legislation. The Framers did not contemplate such an incursion into state lawmaking processes. *See New York* v. *United States*, 505 U.S. 144, 174-177 (1992). They in fact rejected the idea that the Constitution provides "a pretext for alterations in the State governments, without the concurrence of the States themselves." Federalist No. 43 (Madison).

The Framers' general regard for representative government does not support reading the Elections Clause as a straitjacket that confines the ways in which States may allocate their legislative powers. The Framers wished to convince the Nation (and indeed the world) that a large, national republic would be politically stable, and for that reason they extolled the virtues of a *national* legislature. *See* Federalist No. 10 (Madison); *see also* Wood, *The Creation of the American Republic 1776-1787*, at 499-500 (1998). But they did not purport to force their vision on the States. *See* Federalist No. 43 (Madison) ("Whenever the States may choose to substitute other republican forms, they have a right to do so[.]"); *see also Mayor of Phila.* v. *Educ. Equal. League*, 415 U.S. 605, 615 n.13 (1974); *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902). And whereas the Framers designed Congress as a representative assembly to avoid the impracticalities of direct democracy on so large a scale, they did not require that the method

of *electing* Representatives be shielded from popular influence. To the contrary, the Framers protected popular influence in the election of Representatives by requiring that Members be chosen frequently and by a broad body of electors. *See* U.S. Const. art. I, § 2, cl. 1.

This deference to the form in which state constitutions define the legislative power is logical because many state constitutions predated the federal constitution. Some had forms markedly different from the federal system. Pennsylvania, for example, had a unicameral legislature and a twelve-member "executive council" in place of a governor. *See* Pennsylvania Constitution of 1776, *in Colonies to Nation 1763-1789*, at 339-345 (Greene, ed. 1975). Other States were admitted to the Union with no constitution at all. *See, e.g., Luther* v. *Borden*, 48 U.S. 1, 35 (1849) (Rhode Island governed under a Royal Charter from King Charles II until the 1840s). To assert that the Elections Clause implicitly requires the States to employ any particular lawmaking process defies historical reality as well as principles of federalism.

3. Permitting the People directly to enact election regulations is consistent with the constitutional conception of a sovereign people

It is a basic tenet of American political theory that all sovereignty flows from the People. *See McCulloch*, 17 U.S. at 404-405. This is no less true of state governments than the national government. *See Thornton*, 514 U.S. at 838 (Kennedy, J., concurring). Appellant's repeated accusation (at 11, 16, 19, 20, 39) that the *People* of the State of Arizona have somehow "usurp[ed]" the state legislature's authority turns this foundational principle on its head.

In fact, acts of popular lawmaking have a special primacy in our legal order. *See* Rakove, *Original Meanings* 101. State constitutional development, energized by the autonomy and flexibility of federalism, has given rise to forms of self-government, such as the initiative, that reassert the primacy of the People in our system of government. *See, e.g.*, Inaugural Address of California Gov. Hiram W. Johnson, Jan. 4, 1911, *in Journal of the Senate of the Legislature of the State of California* 64 (1911) (calling the initiative "the first step in our design to preserve and perpetuate popular government"). Indeed, advocates of direct democracy reforms like the initiative viewed these mechanisms as extensions of Founding Era principles. *See* Dinan, *The American State Constitutional Tradition* 89 (2009) (quoting one New Hampshire advocate as arguing that popular lawmaking would bring "our whole fabric of government into larger fullness in accord with that great foundation principle that all just governments among men derive their power from the consent of the governed"). These legislative mechanisms have often been used for political reform—from women's suffrage to the adoption of the secret ballot. *See infra* pp. 51-54.

As this Court recently reaffirmed, in upholding a measure passed by initiative, "voters exercise[] their privilege to enact laws as a basic exercise of their democratic power." *Schuette*, 134 S. Ct. at 1636. It would be bizarre if the Constitution elevated state elected officials above the polity that constituted them, and allowed them to bypass a self-governing People.[27]

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[27] Congress implicitly sanctioned lawmaking by initiative when it voted to admit Arizona to the Union, after substantial debate over the merits of the State's initiative system. *See, e.g.*, 47 Cong. Rec. 4229 (1911) (Rep. Davenport: "[S]o far as the initiative

4. Appellant misunderstands the nature of the Commission

Viewed in light of these constitutional values, Appellant's arguments directed at the nature of the Commission fail. Appellant argues (at 49) that the Commission is fundamentally undemocratic. But the Commission was *created* by the People and vested by them with legislative power under the Arizona Constitution pursuant to the State's lawmaking process. Congressional districting by a popularly enacted body, which can be disbanded or modified by the People at any time, and which is composed of members mostly chosen by the state legislative leadership, is hardly "dangerous" to the People who created it in the first place. *See, e.g.*, *Letter of Jefferson to William Charles Jarvis, Sept. 28, 1820*, *in* 12 *The Works of Thomas Jefferson* 161, 163 (1905) ("I know no safe depositary of the ultimate powers of the society but the people themselves.").

Appellant also contends (at 49-51) that redistricting by elected representatives ensures greater citizen representation in the districting process than does the Commission. But the choice made by the People of Arizona to establish the Commission in the first place is powerful evidence that Appellant's contention is false. Indeed, the concern underlying Proposition 106—state legislators entrenching their interests at the People's expense—stretches back to the Founding Era. *See*,

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and referendum are concerned, I am for them[.]"); *id.* at 4120, 4125 (Senate debates); *see also* Leshy, *Making*, 20 Ariz. St. L.J., at 58; *cf. Luther*, 48 U.S. at 42 ("[W]hen the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government[.]").

e.g., 2 *The Records of the Federal Convention of 1787* at 241 (Farrand, ed. 1911) (Madison expressing fear that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mold their regulations as to favor the candidates they wished to succeed"). Meanwhile, Appellant's complaint that the Commission improperly "locks in" the two major parties, even if accurate, ignores this Court's clear statement that States may "enact reasonable election regulations that may, in practice, favor the traditional two-party system." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). At bottom, Appellant cannot reconcile the argument that the Commission is undemocratic with the fact that it was enacted by the People of Arizona themselves, whom the Elections Clause was designed to serve.

F. Appellant's Rule Is Contrary To Longstanding Practice, Will Invalidate Numerous State Laws, And Will Stymie Election Reform

1. The People have long used initiatives to regulate congressional elections

Appellant presents this case as though the use of the initiative to regulate congressional elections were a novel idea. The opposite is true. Voters have used the initiative for more than a century to improve the system of electing Members of Congress. Arizona was a leader in this respect; in 1912, when the State joined the Union, the People of Arizona guaranteed women the right to vote for all elected officials, including Members of Congress. *See* Leshy, *Making*, 20 Ariz. St. L.J., at 111. Even earlier, in 1904, the voters of Oregon adopted by initiative the primary system for nominating congressional candidates. Indeed, primary elections, born of the same reformist impulse as the initia-

tive, were frequent subjects of initiatives in the early twentieth century.[28]

Use of the initiative to reform election laws continues to this day, and Appellant's rule would invalidate numerous state laws regulating many aspects of congressional elections—not just redistricting. Appellant contends (at 47) that, for congressional elections, "the state legislature, subject to generally applicable constraints in the ordinary legislative process, is the body that is to prescribe electoral regulations." That reading of the Elections Clause will render unconstitutional *all* ballot initiatives governing congressional elections.

For example, the People of Ohio amended their constitution over a half-century ago to require voting for individual candidates rather than for party slates. *See* Ohio Const. art. V, § 2a; *State ex rel. Duffy* v. *Sweeney*, 89 N.E.2d 641 (Ohio 1949) (discussing amendment). The People of Arkansas amended their constitution fifty years ago to permit voting machines in addition to the traditional paper ballots.[29] And the electorates of both Ohio and Oregon enacted constitutional amendments decades ago to reduce the period of time in which a person must register to vote prior to an election. *See* Or. Const. art. II, § 2 (20 days); Ohio

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[28] *See* The Initiative and Referendum Institute, *Statewide Initiatives Since 1904–2000*, *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Historical/Statewide%20Initiatives%201904-2000.pdf (last visited Jan. 15, 2015).

[29] *See* Ark. Sec'y of State, 2011 Arkansas Constitution Amendments at 117-121 (quoting Amendment 50 to the Arkansas state constitution), http://www.sos.arkansas.gov/elections/Documents/Constitution%202011%20Amendments.pdf (last visited Jan 15, 2015).

Const. art. V, § 1 (30 days).[30] Appellant offers no reason why those laws—referred to the electorate by the voters, enacted by the voters, and not directly repealable by state legislatures—would survive a decision in their favor. Still other States have constitutional provisions enacted by constitutional conventions requiring voting by most electors to be "secret," "by ballot," or "by secret ballot." App. B, *infra* pp. 11a-23a. Others required their legislatures to create regulations permitting absentee voting, provided for the registration of voters, or mandated that candidates need receive merely a plurality of all votes to prevail in an election. App. B, *infra* pp. 23a-29a. These provisions would all presumably be unconstitutional under Appellant's rule.

A decision in Appellant's favor would also burden States that wish to continue regulating local elections by popular initiative, requiring them to operate two (potentially inconsistent) systems of election laws. Thus, depending on the source of the election regulations, voter registration for state and congressional elections might be available at different places, polls might be open at different times, and ballots might require different formats. Nothing in the Elections

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[30] In recent years too, many States have amended their constitutions to reform election rules. For example, the People of California voted to institute a top-two primary system in 2010. *Chamness* v. *Bowen*, No. CV 11-01479 ODW (FFMx), 2011 WL 3715255, at *1-3 (C.D. Cal. Aug. 23, 2011) (discussing the reform). Although the California legislature referred the matter to California voters, it is not clear that the top-two primary system would be valid under Appellant's rule since the state legislature is unable modify or repeal it without a vote of the People. *See* Cal. Const. art. 18, §§ 1, 4. And Mississippi's recent adoption of Voter ID laws by initiative, *see, e.g.*, Mott, *Where Voter ID Stands in Mississippi*, Jackson Free Press (Aug. 29, 2012), would also be unconstitutional under Appellant's rule.

Clause condemns the States to such inefficiency. *See Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986).

2. A decision in Appellant's favor would stymie political reform

Arizona, like several other States, has concluded that partisan political gerrymandering seriously undermines public confidence in political institutions.[31] Faced with legislative gridlock and this Court's disinclination to adjudicate partisan gerrymandering claims, *see Vieth*, 541 U.S. at 268, 292, the People of Arizona have turned to the best, and perhaps the only, practical method of reforming politics—one based in the democratic process. *E.g.*, *id.* at 363 (Breyer, J., dissenting) ("[W]here state governments have been unwilling or unable to act, 'an informed, civically militant electorate,' has occasionally taken matters into its own hands, through ballot initiatives or referendums." (quoting *Baker* v. *Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting))).

Appellant's submission, if accepted, would bring those reform efforts to an abrupt end, perhaps forever. If, as Appellant suggests (at 39-40), congressional election regulations must be "prescribe[d]" by elected state

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[31] There was no disagreement among the Justices of this Court in *Vieth* that "severe partisan gerrymanders" are incompatible with "democratic principles." 541 U.S. at 292 (Scalia, J.) (plurality opinion); *id.* at 312, 316-317 (Kennedy, J., concurring in the judgment) ("The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government[.]."); *id.* at 326, 330 (Stevens, J., dissenting) ("Gerrymanders subvert that representative norm[.]"); *id.* at 345 (Souter, J., dissenting) ("[P] artisan redistricting has damaged the democratic process[.]"); *id.* at 361 (Breyer, J., dissenting) ("The democratic harm of unjustified entrenchment is obvious.").

officials, then it is difficult to see how any serious effort at eliminating partisan gerrymandering can survive, for no entity other than the legislature could draw the final congressional district maps. Arizona and California have independent redistricting commissions created by initiative, but five other States have politician-appointed commissions that would also be at risk. Although amicus NCSL suggests those commissions are valid because they provide state legislatures with the "unfettered" ability to appoint commissioners, NCSL Br. 5, 17, 23, in fact, four of those States place popularly enacted limits on who can be appointed, based on considerations such as political party and prior political service. App. C, *infra* pp. 31a-39a; *see also* NCSL Br. 17 n.83. Those commissions are also at risk under NCSL's rule—and they would be even if the NCSL were right as a factual matter, for in those States the legislature still does not enact district lines.

Appellant's reading of the Constitution, as prohibiting the People from removing an obstacle to their full representation in Congress, is a counsel of despair. It would fortify the suspicion that nothing can be done to make the National Government more responsive to the People. The Court should turn aside that submission and allow the People to exercise the "democratic power," *Schuette*, 134 S. Ct. at 1636, which is the lifeblood of the Republic.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 4, cl. 1

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.

2 U.S.C. § 2a—Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

* * *

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law

of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Ariz. Const.

art IV—Legislative Department

pt. 1—Initiative and Referendum

§ 1—Legislative authority; initiative and referendum

(1) Senate; house of representatives; reservation of power to people. The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

(2) Initiative power. The first of these reserved powers is the initiative. Under this power ten per centum of the qualified electors shall have the right to propose any measure, and fifteen per centum shall have the right to propose any amendment to the constitution.

* * *

(5) Effective date of initiative and referendum measures. Any measure or amendment to the constitution proposed under the initiative, and any measure to which the referendum is applied, shall be referred to a vote of the qualified electors, and shall become law when approved by a majority of the votes cast thereon and upon proclamation of the governor, and not otherwise.

* * *

(15) Legislature's right to refer measure to the people. Nothing in this section shall be construed to deprive or limit the legislature of the right to order the submission to the people at the polls of any measure, item, section, or part of any measure.

* * *

pt. 2—The Legislature

§ 1—Senate; house of representatives; members; special session upon petition of members; congressional and legislative boundaries; citizen commissions

* * *

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for

three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

(4) The commission on appellate court appointments shall nominate candidates for appointment to the independent redistricting commission, except that, if a politically balanced commission exists whose members are nominated by the commission on appellate court appointments and whose regular duties relate to the elective process, the commission on appellate court appointments may delegate to such existing commission (hereinafter called the commission on appellate court appointments' designee) the duty of nominating members for the independent redistricting commission, and all other duties assigned to the commission on appellate court appointments in this section.

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. Each such official shall have a seven-day period in which to make an appointment. Any official who fails to make an appointment within the specified time period will forfeit the appointment privilege. In the event that there are two or more minority parties within the house or the senate, the leader of the largest minority party by statewide party registration shall make the appointment.

(7) Any vacancy in the above four independent redistricting commission positions remaining as of March 1 of a year ending in one shall be filled from the pool of nominees by the commission on appellate court appointments or its designee. The appointing body shall strive for political balance and fairness.

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or its designee, striving for political bal-

ance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair.

(9) The five commissioners shall then select by majority vote one of their members to serve as vice-chair.

(10) After having been served written notice and provided with an opportunity for a response, a member of the independent redistricting commission may be removed by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

(11) If a commissioner or chair does not complete the term of office for any reason, the commission on appellate court appointments or its designee shall nominate a pool of three candidates within the first thirty days after the vacancy occurs. The nominees shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment, and the appointment other than the chair shall be made by the current holder of the office designated to make the original appointment. The appointment of a new chair shall be made by the remaining commissioners. If the appointment of a replacement commissioner or chair is not made within fourteen days following the presentation of the nominees, the commission on appellate court appointments or its designee shall make the appointment, striving for political balance and fairness. The newly appointed commissioner shall serve out the remainder of the original term.

(12) Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting com-

mission shall conduct business in meetings open to the public, with 48 or more hours public notice provided.

(13) A commissioner, during the commissioner's term of office and for three years thereafter, shall be ineligible for Arizona public office or for registration as a paid lobbyist.

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

A. Districts shall comply with the United States Constitution and the United States voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;

F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping pro-

cess but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

(16) The independent redistricting commission shall advertise a draft map of congressional districts and a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. Either or both bodies of the legislature may act within this period to make recommendations to the independent redistricting commission by memorial or by minority report, which recommendations shall be considered by the independent redistricting commission. The independent redistricting commission shall then establish final district boundaries.

(17) The provisions regarding this section are self-executing. The independent redistricting commission shall certify to the secretary of state the establishment of congressional and legislative districts.

(18) Upon approval of this amendment, the department of administration or its successor shall make adequate office space available for the independent redistricting commission. The treasurer of the state shall make $6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote.

(19) The independent redistricting commission, with fiscal oversight from the department of administration or its successor, shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(20) The independent redistricting commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the independent redistricting commission. The independent redistricting commission shall have sole authority to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan.

(21) Members of the independent redistricting commission are eligible for reimbursement of expenses pursuant to law, and a member's residence is deemed to be the member's post of duty for purposes of reimbursement of expenses.

(22) Employees of the department of administration or its successor shall not influence or attempt to influence the district-mapping decisions of the independent redistricting commission.

(23) Each commissioner's duties established by this section expire upon the appointment of the first member of the next redistricting commission. The independent redistricting commission shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.

art XXI—Mode of Amending

§ 1—Introduction in legislature; initiative petition; election

Any amendment or amendments to this constitution may be proposed in either house of the legislature, or by initiative petition signed by a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for governor at the last preceding general election. Any proposed amendment or amendments which shall be introduced in either house of the legislature, and which shall be approved by a majority of the members elected to each of the two houses, shall be entered on the journal of each house, together with the ayes and nays thereon. When any proposed amendment or amendments shall be thus passed by a majority of each house of the legislature and entered on the respective journals thereof, or when any elector or electors shall file with the secretary of state any proposed amendment or amendments together with a petition therefor signed by a number of electors equal to fifteen per centum of the total number of votes for all candidates for governor in the last preceding general election, the secretary of state shall submit such proposed amendment or amendments to the vote of the people at the next general election (except when the legislature shall call a special election for the purpose of having said proposed amendment or amendments voted upon, in which case the secretary of state shall submit such proposed amendment or amendments to the qualified electors at said special election,) and if a majority of the qualified electors voting thereon shall approve and ratify such proposed amendment or amendments in said regular or special election, such amendment or amendments shall become a part of this constitution.

* * *

APPENDIX B

STATE CONSTITUTIONAL PROVISIONS GOVERNING ELECTIONS

State Constitutional Provisions Requiring Voting By Ballot

Ala. Const. art. VIII, § 177, cl. (d) (1901), *as amended* (2012)

(d) The right of individuals to vote by secret ballot is fundamental. Where state or federal law requires elections for public office or public votes on referenda, or designations or authorizations of employee representation, the right of individuals to vote by secret ballot shall be guaranteed.

Alaska Const. art. V, § 3 (1956)

Section 3. Methods of Voting; Election Contest

Methods of voting, including absentee voting, shall be prescribed by law. Secrecy of voting shall be preserved. The procedure for determining election contests, with right of appeal to the courts, shall be prescribed by law.

Ariz. Const. art. VII, § 1 (1912)

1. Method of voting; secrecy

All elections by the people shall be by ballot, or by such other method as may be prescribed by law; Provided, that secrecy in voting shall be preserved.

Ark. Const. amend. 50, § 2 (1962)

§ 2. Elections by ballot or voting machine required

All elections by the people shall be by ballot or by voting machines which insure the secrecy of individual votes.

Cal. Const. art. II, § 7 (1879), *as amended* 1976

Sec. 7. Voting shall be secret

Colo. Const. art. VII, § 8 (1876), *as amended* 1945

Section 8. Elections by ballot or voting machine. All elections by the people shall be by ballot, and in case paper ballots are required to be used, no ballots shall be marked in any way whereby the ballot can be identified as the ballot of the person casting it. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested election in which paper ballots are required to be used, the ballots cast may be counted and compared with the list of voters, and examined under such safeguards and regulations as may be provided by law. Nothing in this section, however, shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, provided that secrecy in voting is preserved.

Conn. Const. art. VI, § 5 (1965)

Sec. 5. In all elections of officers of the state, or members of the general assembly, the votes of the electors shall be by ballot, either written or printed, except that voting machines or other mechanical devices for voting may be used in all elections in the state, under such regulations as may be prescribed by law. No voting machine or device used at any state or local election shall be equipped with a straight ticket device. The right of secret voting shall be preserved.

Del. Const. art. V, § 1 (1897)

Section 1. The general election shall be held biennially on the Tuesday next after the first Monday in the month of November, and shall be by ballot; but the General Assembly may by law prescribe the means, methods and instruments of voting so as best to secure secrecy and the independence of the voter, preserve the freedom and purity of elections and prevent fraud, corruption and intimidation thereat.

Fla. Const. art. VI, § 1 (1968), *as amended* 1998

Section 1. Regulation of Elections.

All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law; however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate's name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Ga. Const. art. II, § 1, ¶ 1 (1983)

Paragraph I. Method of Voting. Elections by the people shall be by secret ballot and shall be conducted in accordance with procedures provided by law.

Haw. Const. art. II, § 4 (1978)

Section 4. The legislature shall provide for the registration of voters and for absentee voting and shall prescribe the method of voting at all elections. Secrecy of voting shall be preserved; provided that no person shall be required to declare a party preference or nonpartisanship as a condition of voting in any primary or special primary election. Secrecy of voting and choice

of political party affiliation or nonpartisanship shall be preserved.

Idaho Const. art. VI, § 1 (1890)

§ 1. Secret ballot guaranteed. All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect.

Ill. Const. art. III, § 4 (1970)

Section 4. Election Laws

The General Assembly by law shall define permanent residence for voting purposes, insure secrecy of voting and the integrity of the election process, and facilitate registration and voting by all qualified persons. Laws governing voter registration and conduct of elections shall be general and uniform.

Ind. Const. art. II, § 13 (1851)

Section 13. All elections by the *People* shall be by ballot; and all elections by the General Assembly, or by either branch thereof, shall be *viva voce*.

Iowa Const. art. II, § 6 (1857)

Sec. 6. All elections by the people shall be by ballot.

Kan. Const. art. IV, § 1 (1861), *as amended* 1974

§ 1. Mode of voting

All elections by the people shall be by ballot or voting device, or both, as the legislature shall by law provide.

Ky. Const. § 147 (1891), *as amended* 1944

Sec. 147. The General Assembly shall provide by law for the registration of all persons entitled to vote in cities and towns having a population of five thousand or more; and may provide by general law for the registration of other voters in the State. Where registration is required, only persons registered shall have the right to vote. The mode of registration shall be prescribed by the General Assembly. In all elections by persons in a representative capacity, the voting shall be viva voce and made a matter of record; but all elections by the people shall be by secret official ballot, furnished by public authority to the voters at the polls, and marked by each voter in private at the polls, and then and there deposited, or any person absent from the county of his legal residence, or from the state, may be permitted to vote in a manner provided by law. Counties so desiring may use voting machines, these machines to be installed at the expense of such counties. The word "elections" in this section includes the decision of questions submitted to the voters, as well as the choice of officers by them. The General Assembly shall pass all necessary laws to enforce this section, and shall provide that persons illiterate, blind, or in any way disabled may have their ballots marked or voted as herein required.

La. Const. art. XI, § 2 (1974)

Section 2. In all elections by the people, voting shall be by secret ballot. The legislature shall provide a method for absentee voting. Proxy voting is prohibited. Ballots shall be counted publicly and preserved inviolate as provided by law until any election contests have been settled. In all elections by persons in a representative capacity, voting shall be viva-voce.

Me. Const. art. II, § 1 (1819)

Sec. 1. Every male citizen of the United States of the age of twenty-one years and upwards, excepting paupers, persons under guardianship, and Indians not taxed, having his residence established in this State for the term of three months next preceding any election, shall be an elector for Governor, Senators and Representatives, in the town or plantation where his residence is so established; and the elections shall be by written ballot. But persons in the military, naval or marine service of the United States, or this State, shall not be considered as having obtained such established residence by being stationed in any garrison, barrack, or military place, in any town or plantation; nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the town or plantation where such seminary is established. No person, however, shall be deemed to have lost his residence by reason of his absence from the State in the military service of the United States, or of this State.

Md. Const. art. I § 1 (1867), *as amended* 2008

Section 1. All elections shall be by ballot. Except as provided in Section 3 of this article, every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which the citizen resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until the person shall have acquired a residence in another election district or ward in this State.

Mich. Const. art. II, § 4 (1963)

Sec. 4. The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

Minn. Const. art. VII, § 6 (1957)

Sec. 6. All elections shall be by ballot except for such town officers as may be directed by law to be otherwise chosen.

Miss. Const. art. XII, § 240 (1890)

Sec. 240. All elections by the people shall be by ballot.

Mo. Const. art. VIII § 3 (1945), *as amended* 1976

§ 3. Methods of voting—secrecy of ballot—exceptions

All elections by the people shall be by ballot or by any mechanical method prescribed by law. All election officers shall be sworn or affirmed not to disclose how any voter voted; provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers

may be required to testify and the ballots cast may be opened, examined, counted, and received as evidence.

Mont. Const. art. IV, § 1 (1889)

Section 1. Ballot. All elections by the people shall be by secret ballot.

Neb. Const. art. VI § 6 (1875), *as amended* 1972

Sec. 6. Votes, how cast. All votes shall be by ballot or by other means authorized by the Legislature whereby the vote and the secrecy of the elector's vote will be preserved.

Nev. Const. art. II § 5 (1864)

Sec. 5. Voting by ballot; voting in elections by legislature.

All elections by the people shall be by ballot, and all elections by the Legislature, or by either branch thereof shall be "Viva-Voce."

N.M. Const. art. VII, § 5 (1910), *as amended* 2004

Sec. 5. A. All elections shall be by ballot.

N.Y. Const. art. II, § 7 (1939), *as amended* 2002

§ 7. [Manner of voting; identification of voters]

All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved. The legislature shall provide for identification of voters through their signatures in all cases where personal registration is required and shall also provide for the signatures, at the time of voting, of all persons voting in person by ballot or voting machine,

whether or not they have registered in person, save only in cases of illiteracy or physical disability.

N.C. Const. art. VI, § 5 (1970)

Sec. 5. Elections by people and General Assembly

All elections by the people shall be by ballot, and all elections by the General Assembly shall be viva voce. A contested election for any office established by Article III of this Constitution shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law.

N.D. Const. art. II, § 1 (1978)

Section 1.

The general election of the state shall be held biennially as provided by law.

Every citizen of the United States, who has attained the age of eighteen years and who is a North Dakota resident, shall be a qualified elector. When an elector moves within the state, he shall be entitled to vote in the precinct from which he moves until he establishes voting residence in another precinct. The legislative assembly shall provide by law for the determination of residence for voting eligibility, other than physical presence. No elector shall lose his residency for voting eligibility solely by reason of his absence from the state.

The legislative assembly shall provide by law for secrecy in voting, for absentee voting, for administration of elections and for the nomination of candidates.

Ohio Const. art. V, § 2 (1851)

Section 2. All elections shall be by ballot.

Or. Const. art. II, § 15 (1857)

Section No. 15. In All elections by the Legislative Assembly, or by either branch thereof, votes shall be given openly or viva voce, and not by ballot, forever; and in all elections by the people, votes shall be given openly, or viva voce, until the Legislative Assembly shall otherwise direct.

Pa. Const. art. VII, § 4 (1968)

Methods of Elections; Secrecy in Voting.

All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.

S.C. Const. art. II, § 1 (1971)

§ 1. Elections to be by secret ballot; protection of right of suffrage.

All elections by the people shall be by secret ballot, but the ballots shall not be counted in secret. The right of suffrage, as regulated in this Constitution, shall be protected by laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult, or improper conduct.

S.D. Const. art. VII, § 3 (1889), *as amended* 1974

§ 3. Elections

The Legislature shall by law define residence for voting purposes, insure secrecy in voting and provide for the registration of voters, absentee voting, the administration of elections, the nomination of candidates and the voting rights of those serving in the armed forces.

Tenn. Const. art. IV, § 4 (1870)

Sec. 4. Ballots. In all elections to be made by the General Assembly, the members thereof shall vote viva voce, and their votes shall be entered on the journal. All other elections shall be by ballot.

Tex. Const. art. VI, § 4 (1876), *as amended* 1967

Sec. 4. In all elections by the people, the vote shall be by ballot, and the Legislature shall provide for the numbering of tickets and make such other regulations as may be necessary to detect and punish fraud and preserve the purity of the ballot box; and the Legislature shall provide by law for the registration of all voters.

Utah Const. art. IV, § 8 (1895), *as amended* 2011

Sec. 8. [Ballot to be secret]

(1) All elections, including elections under state or federal law for public office, on an initiative or referendum, or to designate or authorize employee representation or individual representation, shall be by secret ballot.

(2) Nothing in this section may be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election, as long as secrecy in voting is preserved.

Va. Const. art. II, § 3 (1971)

Section 3. Method of voting.

In elections by the people, the following safeguards shall be maintained: Voting shall be by ballot or by machines for receiving, recording, and counting votes cast. No ballot or list of candidates upon any voting machine

shall bear any distinguishing mark or symbol, other than words identifying political party affiliation; and their form, including the offices to be filled and the listing of candidates or nominees, shall be as uniform as is practicable throughout the Commonwealth or smaller governmental unit in which the election is held.

In elections other than primary elections, provision shall be made whereby votes may be cast for persons other than the listed candidates or nominees. Secrecy in casting votes shall be maintained, except as provision may be made for assistance to handicapped voters, but the ballot box or voting machine shall be kept in public view and shall not be opened, nor the ballots canvassed nor the votes counted, in secret. Votes may be cast in person or by absentee ballot as provided by law.

Wash. Const. art. VI § 6 (1889)

§ 6. Ballot

All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

W.Va. Const. art. IV § 2 (1872)

2. In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote by either open, sealed or secret ballot, as he may elect.

Wis. Const. art III, § 3 (1986)

Section 3. All votes shall be by secret ballot.

Wyo. Const. art. VI, § 11 (1889)

Sec. 11. Manner of holding elections. All elections shall be by ballot. The legislature shall provide by law

that the names of all candidates for the same office, to be voted for at any election, shall be printed on the same ballot, at public expense, and on election day be delivered to the voters within the polling place by sworn public officials, and only such ballots so delivered shall be received and counted. But no voter shall be deprived the privilege of writing upon the ballot used the name of any other candidate. All voters shall be guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory.

State Constitutional Provisions Requiring A Plurality Of Votes For Victory In All Elections

Ariz. Const. art. VII, § 7 (1912), *as amended* 1992

Sec. 7 In all elections held, by the people, in this State, the person, or persons, receiving the highest number of legal votes shall be declared elected.

Mont. Const. art IV, § 5 (1889)

Section 5. Result of Elections. In all elections held by the people, the person or persons receiving the largest number of votes shall be declared elected.

Or. Const. art II, § 16 (1908)

Section 16. When person declared elected; proportional representation.

In all elections authorized by this constitution until otherwise provided by law, the person or persons receiving the highest number of votes shall be declared elected, but provision may be made by law for elections by equal proportional representation of all the voters for every office which is filled by the election of two or more persons whose official duties, rights and powers

are equal and concurrent. Every qualified elector resident in his precinct and registered as may be required by law, may vote for one person under the title for each office. Provision may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office. For an office which is filled by the election of one person it may be required by law that the person elected shall be the final choice of a majority of the electors voting for candidates for that office. These principles may be applied by law to nominations by political parties and organizations.

State Constitutional Provisions Requiring State Legislatures To Provide For Absentee Voting

Haw. Const. art II § 4 (1978)

Registration; voting

The legislature shall provide for the registration of voters and for absentee voting and shall prescribe the method of voting at all elections. Secrecy of voting shall be preserved; provided that no person shall be required to declare a party preference or nonpartisanship as a condition of voting in any primary or special primary election. Secrecy of voting and choice of political party affiliation or nonpartisanship shall be preserved.

La. Const. art. XI, § 2 (1974)

§2. Secret Ballot; Absentee Voting; Preservation of Ballot

Section 2. In all elections by the people, voting shall be by secret ballot. The legislature shall provide a method for absentee voting. Proxy voting is prohibited. Ballots shall be counted publicly and preserved in-

violate as provided by law until any election contests have been settled. In all elections by persons in a representative capacity, voting shall be viva-voce.

N.D. Const. art. II, § 1 (1978)

Section 1. The general election of the state shall be held biennially as provided by law.

Every citizen of the United States, who has attained the age of eighteen years and who is a North Dakota resident, shall be a qualified elector. When an elector moves within the state, he shall be entitled to vote in the precinct from which he moves until he establishes voting residence in another precinct. The legislative assembly shall provide by law for the determination of residence for voting eligibility, other than physical presence. No elector shall lose his residency for voting eligibility solely by reason of his absence from the state.

The legislative assembly shall provide by law for secrecy in voting, for absentee voting, for administration of elections and for the nomination of candidates.

Penn. Const. art. VII, § 14 (1957), *as amended* 1997

Absentee Voting. Section 14.

(a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county em-

ployee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

Mich. Const. art. II, § 4 (1963)

Sec. 4. The legislature shall enact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames.

State Constitutional Provisions Requiring Voter Registration

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identification of candidates for the same office who have the same or similar surnames.

Miss. Const. art XII, § 249 (1890)

Section 249. No one shall be allowed to vote for members of the legislature or other officers who has not been duly registered under the Constitution and laws of this state, by an officer of this state, legally authorized to register the voters thereof. And registration under the Constitution and laws of this state by the proper officers of this state is hereby declared to be an essential and necessary qualification to vote at any and all elections.

N.C. Const. art. VI, § 3 (1971)

Sec. 3. Registration.

Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.

Va. Const. art. II, § 2 (1971)

Section 2. Registration of voters.

The General Assembly shall provide by law for the registration of all persons otherwise qualified to vote who have met the residence requirements contained in this article, and shall ensure that the opportunity to register is made available. Registrations accomplished prior to the effective date of this section shall be effective hereunder. The registration records shall not be closed to new or transferred registrations more than thirty days before the election in which they are to be used.

Applications to register shall require the applicant to provide the following information on a standard form: full name; date of birth; residence address; social security number, if any; whether the applicant is presently a United States citizen; and such additional information as may be required by law. All applications to register shall be completed by or at the direction of the applicant and signed by the applicant, unless physically disabled. No fee shall be charged to the applicant incident to an application to register.

Nothing in this article shall preclude the General Assembly from requiring as a prerequisite to registration to vote the ability of the applicant to read and complete in his own handwriting the application to register.

Wash. Const. art. VI, § 7 (1889)

Section 7 Registration. The legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote; Provided, that this provision is not compulsory upon the legislature except as to cities and towns having a population of over five hundred inhabitants. In all other cases the legislature may or may not require registration as a pre-requisite to the right to vote, and the same system of registration need not be adopted for both classes.

W. Va. Const. art. IV, § 12 (1872), *as amended* 1902

Registration laws provided for.

The Legislature shall enact proper laws for the registration of all qualified voters in this state.

Wyo. Const. art. VI, § 12 (1889)

Sec. 12. Registration of voters required. No person qualified to be an elector of the State of Wyoming, shall be allowed to vote at any general or special election hereafter to be holden in the state, until he or she shall have registered as a voter according to law, unless the failure to register is caused by sickness or absence, for which provisions shall be made by law. The legislature of the state shall enact such laws as will carry into effect the provisions of this section, which enactment shall be subject to amendment, but shall never be repealed; but this section shall not apply to the first election held under this constitution.

APPENDIX C

REDISTRICTING COMMISSIONS WHERE LEGISLATURE IS LIMITED IN WHOM IT CAN APPOINT

Idaho Const. art. III, § 2 (1889), *as amended* 1994

Section 2. MEMBERSHIP OF HOUSE AND SENATE. (1) Following the decennial census of 1990 and in each legislature thereafter, the senate shall consist of not less than thirty nor more than thirty-five members. The legislature may fix the number of members of the house of representatives at not more than two times as many representatives as there are senators. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may, from time to time, be divided by law.

(2) Whenever there is reason to reapportion the legislature or to provide for new congressional district boundaries in the state, or both, because of a new federal census or because of a decision of a court of competent jurisdiction, a commission for reapportionment shall be formed on order of the secretary of state. The commission shall be composed of six members. The leaders of the two largest political parties of each house of the legislature shall each designate one member and the state chairmen of the two largest political parties, determined by the vote cast for governor in the last gubernatorial election, shall each designate one member. In the event any appointing authority does not select the members within fifteen calendar days following the secretary of state's order to form the commission, such members shall be appointed by the Supreme Court. No member of the commission may be an elect-

ed or appointed official in the state of Idaho at the time of designation or selection.

(3) The legislature shall enact laws providing for the implementation of the provisions of this section, including terms of commission members, the method of filling vacancies on the commission, additional qualifications for commissioners and additional standards to govern the commission. The legislature shall appropriate funds to enable the commission to carry out its duties.

(4) Within ninety days after the commission has been organized or the necessary census data are available, whichever is later, the commission shall file a proposed plan for apportioning the senate and house of representatives of the legislature with the office of the secretary of state. At the same time, and with the same effect, the commission shall prepare and file a plan for congressional districts. Any final action of the commission on a proposed plan shall be approved by a vote of two-thirds of the members of the commission. All deliberations of the commission shall be open to the public.

(5) The legislative districts created by the commission shall be in effect for all elections held after the plan is filed and until a new plan is required and filed, unless amended by court order. The Supreme Court shall have original jurisdiction over actions involving challenges to legislative apportionment.

(6) A member of the commission shall be precluded from serving in either house of the legislature for five years following such member's service on the commission.

Mont. Const. art. V, § 14 (1889), *as amended* 1984

Section 14. DISTRICTING AND APPORTIONMENT. (1) The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

(2) In the legislative session following ratification of this constitution and thereafter in each session preceding each federal population census, a commission of five citizens, none of whom may be public officials, shall be selected to prepare a plan for redistricting and reapportioning the state into legislative and congressional districts. The majority and minority leaders of each house shall each designate one commissioner. Within 20 days after their designation, the four commissioners shall select the fifth member, who shall serve as chairman of the commission. If the four members fail to select the fifth member within the time prescribed, a majority of the supreme court shall select him.

(3) The commission shall submit its plan to the legislature at the first regular session after its appointment or after the census figures are available. Within 30 days after submission, the legislature shall return the plan to the commission with its recommendations. Within 30 days thereafter, the commission shall file its final plan with the secretary of state and it shall become law. The commission is then dissolved.

N.J. Const. art. 2, § 2 ¶ 1 (1947), *as amended* 1995

1. (a) After each federal census taken in a year ending in zero, the Congressional districts shall be established by the New Jersey Redistricting Commission.

The commission shall consist of 13 members, none of whom shall be a member or employee of the Congress of the United States. The members of the commission shall be appointed with due consideration to geographic, ethnic and racial diversity and in the manner provided herein.

(b) There shall first be appointed 12 members as follows:

(1) two members to be appointed by the President of the Senate;

(2) two members to be appointed by the Speaker of the General Assembly;

(3) two members to be appointed by the minority leader of the Senate;

(4) two members to be appointed by the minority leader of the General Assembly; and

(5) four members, two to be appointed by the chairman of the State committee of the political party whose candidate for the office of Governor received the largest number of votes at the most recent gubernatorial election and two to be appointed by the chairman of the State committee of the political party whose candidate for the office of Governor received the next largest number of votes in that election.

Appointments to the commission under this subparagraph shall be made on or before June 15 of each year ending in one and shall be certified by the respec-

tive appointing officials to the Secretary of State on or before July 1 of that year.

Each partisan delegation so appointed shall appoint one of its members as its chairman who shall have authority to make such certifications and to perform such other tasks as the members of that delegation shall reasonably require.

(c) There shall then be appointed one member, to serve as an independent member, who shall have been for the preceding five years a resident of this State, but who shall not during that period have held public or party office in this State.

The independent member shall be appointed upon the vote of at least seven of the previously appointed members of the commission on or before July 15 of each year ending in one, and those members shall certify that appointment to the Secretary of State on or before July 20 of that year. If the previously appointed members are unable to appoint an independent member within the time allowed therefor, they shall so certify to the Supreme Court not later than that July 20 and shall include in that certification the names of the two persons who, in the members' final vote upon the appointment of the independent member, received the greatest number of votes. Not later than August 10 following receipt of that certification, the Supreme Court shall by majority vote of its full authorized membership select, of the two persons so named, the one more qualified by education and occupational experience, by prior public service in government or otherwise, and by demonstrated ability to represent the best interest of the people of this State, to be the independent member. The Court shall certify that selection to the Secretary of State not later than the following August 15.

(d) Vacancies in the membership of the commission occurring prior to the certification by the commission of Congressional districts or during any period in which the districts established by the commission may be or are under challenge in court shall be filled in the same manner as the original appointments were made within five days of their occurrence. In the case of a vacancy in the membership of the independent member, if the other members of the commission are unable to fill that vacancy within that five-day period, they shall transmit certification of such inability within three days of the expiration of the period to the Supreme Court, which shall select the person to fill the vacancy within five days of receipt of that certification.

Wash. Const. art. II, § 43 (1983)

SECTION 43 REDISTRICTING. (1) In January of each year ending in one, a commission shall be established to provide for the redistricting of state legislative and congressional districts.

(2) The commission shall be composed of five members to be selected as follows: The legislative leader of the two largest political parties in each house of the legislature shall appoint one voting member to the commission by January 15th of each year ending in one. By January 31st of each year ending in one, the four appointed members, by an affirmative vote of at least three, shall appoint the remaining member. The fifth member of the commission, who shall be nonvoting, shall act as its chairperson. If any appointing authority fails to make the required appointment by the date established by this subsection, within five days after that date the supreme court shall make the required appointment.

(3) No elected official and no person elected to legislative district, county, or state political party office may serve on the commission. A commission member shall not have been an elected official and shall not have been an elected legislative district, county, or state political party officer within two years of his or her appointment to the commission. The provisions of this subsection do not apply to the office of precinct committee person.

(4) The legislature shall enact laws providing for the implementation of this section, to include additional qualifications for commissioners and additional standards to govern the commission. The legislature shall appropriate funds to enable the commission to carry out its duties.

(5) Each district shall contain a population, excluding nonresident military personnel, as nearly equal as practicable to the population of any other district. To the extent reasonable, each district shall contain contiguous territory, shall be compact and convenient, and shall be separated from adjoining districts by natural geographic barriers, artificial barriers, or political subdivision boundaries. The commission's plan shall not provide for a number of legislative districts different than that established by the legislature. The commission's plan shall not be drawn purposely to favor or discriminate against any political party or group.

(6) The commission shall complete redistricting as soon as possible following the federal decennial census, but no later than January 1st of each year ending in two. At least three of the voting members shall approve such a redistricting plan. If three of the voting members of the commission fail to approve a plan within the time limitations provided in this subsection, the

supreme court shall adopt a plan by April 30th of the year ending in two in conformance with the standards set forth in subsection (5) of this section.

(7) The legislature may amend the redistricting plan but must do so by a two-thirds vote of the legislators elected or appointed to each house of the legislature. Any amendment must have passed both houses by the end of the thirtieth day of the first session convened after the commission has submitted its plan to the legislature. After that day, the plan, with any legislative amendments, constitutes the state districting law.

(8) The legislature shall enact laws providing for the reconvening of a commission for the purpose of modifying a districting law adopted under this section. Such reconvening requires a two-thirds vote of the legislators elected or appointed to each house of the legislature. The commission shall conform to the standards prescribed under subsection (5) of this section and any other standards or procedures that the legislature may provide by law. At least three of the voting members shall approve such a modification. Any modification adopted by the commission may be amended by a two-thirds vote of the legislators elected and appointed to each house of the legislature. The state districting law shall include the modifications with amendments, if any.

(9) The legislature shall prescribe by law the terms of commission members and the method of filling vacancies on the commission.

(10) The supreme court has original jurisdiction to hear and decide all cases involving congressional and legislative redistricting.

(11) Legislative and congressional districts may not be changed or established except pursuant to this section. A districting plan and any legislative amendments to the plan are not subject to Article III, section 12 of this Constitution.