No. 13-1314

In The Supreme Court Of The United States

ARIZONA STATE LEGISLATURE,

APPELLANT,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

RESPONDENTS.

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

AMICUS BRIEF OF THE STATES OF WASHINGTON, CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, IDAHO, MASSACHUSETTS, MISSISSIPPI, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, AND VIRGINIA IN SUPPORT OF RESPONDENTS

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INTRODUCTION

States' sovereign powers rest ultimately with their people, not their legislatures. And in joining our federalist union, States retained the inherent ability to structure their own governments, including their lawmaking processes. The Arizona Legislature asks this Court to abandon both principles, override the will of Arizona voters, and adopt a reading of the Elections Clause that is contrary to precedent and an infringement on States' sovereign prerogatives.

This Court should reject the unworkable reading offered by the Arizona Legislature and instead follow its own holdings, in *Smiley* and *Hildebrant*, that States may use their ordinary lawmaking processes to establish the "Times, Places and Manner" of congressional elections. Relying on that century of precedent, many States have enacted by popular initiative laws that regulate every aspect of election practice, from how voting is conducted, to the redistricting process, to what voter identification is required, to what candidates advance from the primary to the general election. No state legislature played any role in enacting these initiatives. Accepting the Arizona Legislature's argument could call all such laws into question and require a state legislature's stamp of approval for laws enacted by the people even when the people of a State have decided in their state constitution to remove certain authority from the legislature and even when the people of a State reserved the initiative power to themselves before joining the Union. Nothing in the Elections Clause requires this Court to override popular democracy and the will of the people.

INTEREST OF AMICI CURIAE

This Court has long recognized that the sovereign States have "wide discretion" in determining how their citizens will select their members of Congress. *United States v. Classic*, 313 U.S. 299, 310-11 (1941). States have adopted widely varying congressional redistricting systems. Some involve unregulated decisions by the legislature, some allow control by the legislature within strict parameters set by the people, some require state courts or backup redistricting commissions to adopt plans if the state legislature fails to do so, while some States use independent commissions. These systems have been adopted by constitutional convention, by legislative vote, by popular vote after having been proposed by the legislature, or by the people alone. The States have an interest in protecting their sovereign ability to choose the system that is most effective for each of them.

States that have adopted independent redistricting commissions have a special interest in defending the use of such commissions here. Voters in these States have concluded that such commissions advance important goals, such as reducing incumbent protectionism and partisan gerrymandering, and helping avoid redistricting litigation, goals these States are undoubtedly entitled to pursue.

More broadly, the sovereign States are vitally interested in avoiding the harm that would come from adopting the Arizona Legislature's

reading of the Elections Clause.[1] Many States have adopted time, place, and manner laws impacting congressional elections by popular initiative, consistent with those States' constitutions but without any involvement of the state legislature. These laws cover a variety of important election subjects, from primary election processes to voting by mail to voter identification requirements. The variety of these laws shows that the amici States do not always agree with policy choices made by other States. But the amici States do agree that these common election laws are imperiled by the Arizona Legislature's argument that the word "Legislature" in the Elections Clause is a talisman prohibiting lawfully adopted initiatives from regulating congressional elections.

The amici States want the Court to maintain its longstanding reasoning, recognizing the States' authority to use the legislative processes their people have adopted to enact laws concerning congressional elections. The Court should decline to adopt any holding that casts doubt on the validity of state election laws or state constitutional provisions adopted by the people.

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[1] U.S. Const. art. I, § 4, cl. 1. The amici States' arguments thus address the interpretation of the Elections Clause, and do not necessarily apply to other constitutional provisions concerning the state legislative process. *Cf. Smiley v. Holm*, 285 U.S. 355, 366 (1932) (Noting: "Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view.").

SUMMARY OF ARGUMENT

The power to legislate and to amend their own state constitutions is inherent in the people and reserved to them as a matter of bedrock constitutional principle in many States. State constitutions frequently retain for the people the authority to exercise the States' legislative powers.

Recognizing States' sovereign authority to structure their own governments, this Court has held that States may regulate congressional elections through their ordinary lawmaking processes, even if those processes involve entities other than the legislature. In turn, the States have taken widely varied approaches to congressional redistricting, each State reflecting the priorities and judgment of its people. Many States have also adopted, purely by citizen initiative, other laws that address the time, place, or manner of congressional elections.

This Court has long held that legislative actors other than state legislators can play determinative roles in enacting laws regulating congressional elections. If the Court were to accept the Arizona Legislature's argument that the state legislature must play an outcome-defining role in adopting all time, place, and manner laws affecting congressional elections, the Court would not only call into question independent redistricting commissions, but also the States' sovereign prerogative to adopt other laws regulating congressional elections by initiative. The amici States therefore join the Arizona Independent Redistricting Commission in asking the Court to reject the Arizona Legislature's arguments and affirm the three-judge panel's decision.

ARGUMENT

A. The States, As Sovereigns, Are Entitled To Structure Their Lawmaking Processes As They See Fit

One of the most fundamental principles of our government is that "'the States entered the federal system with their sovereignty intact[.]'" *Alden v. Maine*, 527 U.S. 706, 713 (1999) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)). The Federal Constitution "reserve[d] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714. As a result, each State has "constitutional responsibility for the establishment and operation of its own government," *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991), "[t]hrough [which . . . the] State defines itself as a sovereign." *Id.* at 460. Members of this Court have described a State's sovereignty to design its own governing structure, including its structure for lawmaking, as "near-limitless." *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1646 (2014) (Scalia, J., concurring) (citing *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978)). A State "is afforded wide leeway when experimenting with the appropriate allocation of state legislative power." *Holt Civic Club*, 439 U.S. at 71 (discussing allocation of lawmaking power to local governments).

As sovereigns that preexisted the Union, or as sovereigns that joined the Union on equal footing with the original States, every State may assign its lawmaking powers in the manner it deems

best. *See Holt Civic Club*, 439 U.S. at 71. And while every State has chosen to create a legislature and assign many lawmaking functions there, virtually every State has also placed significant lawmaking power elsewhere, because political sovereignty is inherent in the people, and they can assign the legislative power as they see fit.

The most prominent and fundamental example is that many States emphatically reserve to their people the legislative power to enact laws through initiative or disapprove laws through referendum. *See, e.g.*, Wash. Const. art. II, § 1 ("The legislative authority of the state of Washington shall be vested in the legislature . . . *but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature*, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature." (Emphasis added.)); *see also* Cal. Const. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."); Or. Const. art. IV, § 1(2)(a); Ohio Const. art. II, § 1.

This reservation of legislative power is based on the principle that the States are founded pursuant to the people's authority to govern themselves. *See Carter v. Lehi City*, 269 P.3d 141, 148 (Utah 2012). The initiative and referendum powers are not rights granted to the people, but powers that the people reserved for themselves. *Rossi v. Brown*, 889 P.2d 557, 560 (Cal. 1995). All

political power is inherent in the people, and they have the authority to allocate lawmaking power in their state constitutions, as well as the authority to retain some of that lawmaking power. *Carter*, 269 P.3d at 148-49. Thus the people's initiative power is coextensive with the power of the legislature in many States. *Id.* at 150 (listing, as examples, cases so holding from Washington, North Dakota, and Oregon); *see also, e.g.*, *Luker v. Curtis*, 136 P.2d 978, 979 (Idaho 1943) (virtually from inception of Idaho's direct legislation provisions, initiated legislation found to be on equal footing with that adopted by legislature).

Justices of this Court have therefore recognized the foundational nature of the States' prerogative to retain some portion of the legislative power for the people. *See, e.g.*, *Kansas v. Marsh*, 548 U.S. 163, 184 (2006) (Scalia, J., concurring) (emphasizing there are circumstances where this Court is called upon to vindicate the will of the people duly expressed through their initiative power).

Most States' constitutions allocate legislative powers to other entities as well. For example, when Governors exercise their veto power, it is a legislative function, not an executive one. *E.g.*, *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371, 1378 (Colo. 1985) ("Certainly the governor possesses legislative power to the extent of that official's ability to veto legislation."); *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 598 (Tex. 1975) ("[Governor's] veto power is a legislative function and not an executive function, and it exists only to the extent granted by the Constitution."); *Wood v. State Admin. Bd.*,

238 N.W. 16, 18 (Mich. 1931) (recognizing state constitution granted a limited legislative veto power to the executive); *Fairfield v. Foster*, 214 P. 319, 320 (Ariz. 1923) (recognizing veto power "was originally based on a similar power exercised by the English sovereign" and that it is "essentially legislative in its nature").

The people of Arizona created the Arizona Independent Redistricting Commission pursuant to this "near-limitless" sovereign authority to structure their own government. It deserves the respect owed to every State's decisions as to distribution of its lawmaking powers.

B. The Elections Clause Does Not Disturb The States' Sovereign Authority To Allocate Lawmaking Power To Entities Other Than The Legislature

Like the States' sovereign power to establish lawmaking processes generally, the States' power to establish laws governing the conduct of congressional elections is broad: "The States possess a broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives, Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) (internal quotation marks omitted).

Recognizing States' broad authority on this front a century ago in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), this Court held that the people of a State could override the state legislature's redistricting plan through popular

referendum. The Court's rationale was not, as the Arizona Legislature suggests, that the Ohio Legislature retained a sufficient role in redistricting to somehow satisfy the spirit of the Elections Clause. Br. For Appellant at 45. Rather, "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." *Smiley v. Holm*, 285 U.S. 355, 372 (1932) (describing *Hildebrant*). Just a few years later in *Smiley*, the Court confirmed this view, holding that the Elections Clause allows for a gubernatorial veto of a congressional redistricting plan, even though the Governor was not part of the Minnesota Legislature. *Id.* The important thing, the Court emphasized, is that the function contemplated by the Elections Clause "is that of making laws," *id.* at 366, and it is within "the authority of the state to determine what should constitute its legislative process," *id.* at 372.

Finally, as discussed in more detail below, this Court has held that even state courts, far-removed from the state legislature, can craft redistricting systems if other, more traditional legislative actors fail to do so. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) (emphasizing the "legitimacy of state *judicial* redistricting") (citing *Scott v. Germano*, 381 U.S. 407, 409 (1965)).

Under these cases, the important question is not whether the state legislature plays an "outcome-defining role" in establishing a redistricting plan (whatever that means), but rather whether a State used its legislative process to adopt a redistricting system. That requirement is satisfied here, where

the people of Arizona, through their ordinary legislative process, specified how redistricting should be conducted, and allocated that responsibility to a body that acts in a legislative capacity.

C. The Arizona Legislature's Argument Threatens States' Diverse Redistricting Systems, Which Often And For Good Reason Place Significant Power Outside The Legislature

This Court has an "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of [the Constitution], to experiment with solutions to difficult problems of policy." *Smith v. Robbins*, 528 U.S. 259, 273 (2000). Several States perceive problems in redistricting schemes that give the state legislature unfettered power to draw a redistricting plan. These States have exercised their sovereignty to adopt a variety of systems to address these problems. The Elections Clause should not be turned into a one-size-fits-all mandate, yet the Arizona Legislature asks this Court to do just that by adopting a rule that would threaten a wide range of State choices. The Court should decline that request and preserve the sovereign choices of States, including the choice of the people of Arizona.

1. Some States Give Their Courts Authority To Redistrict If The Legislature Fails By A Certain Date

In some States, the courts must wholly create a redistricting plan, without approval from the legislature, if the legislature fails to adopt a plan by a certain date. *E.g.*, Maine Const. art. IX, § 24;

Hippert v. Ritchie, 813 N.W.2d 391, 395 (Minn. 2012). While these systems offer the state legislature the first opportunity to adopt a plan, if the legislature fails, it has no input in or control over the redistricting plan adopted by the court. Maine Const. art. IX, § 24; *Hippert*, 813 N.W.2d at 395; *see also* Nev. Rev. Stat. § 218B.150 (Legislative Counsel Note, indicating Nevada state court special masters created congressional redistricting maps). These examples cannot be dismissed as courts supervising or simply passing judgment on a plan drafted by the legislature. When the legislature fails to adopt a plan, these courts must independently adopt redistricting plans in order for the next congressional election to move forward in that State.

In *Growe*, this Court acknowledged this reality, recognizing that state courts play this "significant role in redistricting." *Growe*, 507 U.S. at 33. It explained that a Minnesota state court could create a congressional redistricting plan where the legislature had failed to do so. *Id.* at 34-36; *see also Lance v. Coffman*, 549 U.S. 437, 438 (2007) (describing state court-adopted redistricting plan); *Wesberry v. Sanders*, 376 U.S. 1, 5 (1964) (Elections Clause does not prevent even federal courts from remedying improper line drawing created by a state legislature).

The Arizona Legislature suggests that *Growe* stands only for the proposition that courts generally may play a remedial role when legislatures fail to redistrict. Br. For Appellant at 51-53. That cannot be correct. If the Elections Clause granted power only to state legislatures, rather than to States more generally, why would this Court so emphatically

have required that state *courts* be given the first opportunity to conduct redistricting before a federal court steps in? As the *Growe* Court itself put it, Appellant's position is "based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts." *Growe*, 507 U.S. at 34.

A hypothetical example demonstrates the flaw in Appellant's claim. Imagine that a divided state legislature in one of these States failed to adopt a redistricting plan by the date specified in the state constitution, and the state courts then adopted a plan that did little to protect incumbents. If the legislature then overcame its partisan differences and passed an incumbent-protection plan, Appellant's argument would require that the incumbent-protection plan be used, because there is no longer a need for a "remedial" court plan. But would this Court really hold that the Elections Clause overrides the process specified in the state constitution under those circumstances?

The Arizona Legislature's argument that the Elections Clause requires the state legislature to play an outcome-defining role, Br. For Appellant at 40, thus cannot be reconciled with this Court's approval of state-court-drawn plans in *Growe*. In fact, the use of state courts to draw redistricting plans where the legislature has failed to meet a particular deadline can and often does result in state redistricting plans that have had no legislative input whatsoever. *E.g.,* Maine Const. art. IX, § 24; *Hippert*, 813 N.W.2d at 395; *see also* Nev. Rev. Stat. § 218B.150 (Legislative Counsel Note). If the word "Legislature" in the Elections Clause is interpreted

to mean *only* the state legislature and no other legislative actor, the Elections Clause could, for no good reason, deprive the States of this important safety valve when political impasse prevents a legislature from adopting a redistricting plan.

2. Some States Give A Backup Commission Authority To Create A Districting Plan If The Legislature Fails By A Certain Date

Similarly, some state constitutions provide for a backup redistricting commission that creates the redistricting plan if the legislature fails to do so by a particular date. The Arizona Legislature's argument threatens these systems as well.

For example, Indiana provides for a five-member backup commission made up of four legislators and a governor's appointee from the General Assembly. Ind. Code § 3-3-2-2. The commission's plan must be adopted by executive order of the governor, without legislative approval. *Id.* In Connecticut, a backup commission adopts a plan that is not subject to legislative approval, and if the commission fails, the state supreme court then establishes the districting plan. Conn. Const. art. III, § 6(c), (d).

Like state-court-created plans, redistricting plans created by backup commissions are used after the legislature has failed. It is the sovereign authority to create lawmaking processes that allows the States to choose a backup commission as a safety valve rather than a state or federal court. *See Holt Civic Club*, 439 U.S. at 71. Again, if the word "Legislature" in the Elections Clause is interpreted

to mean *only* the state legislature, and no other legislative actor, the Elections Clause would deprive States of this redistricting tool.

3. Several States Have Chosen Independent Commissions To Create Their Redistricting Plans

A number of States besides Arizona redistrict through independent commissions whose members are appointed. While none of these systems is identical, and all differ from Arizona's, the Arizona Legislature's arguments threaten all of them.

For example, Idaho's redistricting commission has six members appointed by legislative and political party leaders. Idaho Const. art. III, § 2(2), (4) (proposed by the 1994 Idaho legislature by a two-thirds vote in each house and ratified by the people). The Idaho Commission's plan is not subject to the legislature's approval. *Id.* art. III, § 2(5).

Hawaii's has eight commission members appointed by certain individual legislative leaders, with a ninth member appointed by the other commissioners. Haw. Const. art. IV, § 2 (originally adopted by 1978 constitutional convention and ratified by the people). The commission's plan becomes law without legislative approval. *Id.*

While Montana currently has only one congressional representative, its constitution provides that a five-member independent redistricting commission shall draw congressional districts, which become law without the legislature's approval. Mont. Const. art. V, § 14 (adopted by constitutional convention 1972).

New Jersey's constitution provides for a thirteen-member redistricting commission. N.J. Const. art. II, § 2(1) (approved by NJ voters in 1995). Twelve members are appointed by individual legislative and political party leaders, while the last member is appointed by the other appointees, or the state supreme court if they cannot agree. *Id.* art. II, § 2(1)(a)-(c). The commission's plan becomes law without the legislature's approval. *Id.* art. II, § 2(3). If the commission cannot approve a plan by a certain date, the state supreme court selects the plan. *Id.*

Washington's constitution provides for a five-member redistricting commission, four appointed by legislative leadership, with the fifth, non-voting chair appointed by the other commissioners. Wash. Const. art. II, § 43 (proposed by 1983 legislature, approved by people). The legislature may amend the redistricting plan adopted by the commission, but doing so requires a two-thirds vote of each house. *Id.* art. II, § 43(7).

California's Constitution creates a fourteen-member redistricting commission consisting of five members who are registered with the largest political party in California based on registration, five who are registered with the second largest party, and four who are not registered with either of the two largest parties. Cal. Const. art. XXI, §§ 1, 2(a)-(c). Commissioners are selected from a pool of qualified candidates through an independent process, although the majority and minority leaders of both houses of the state legislature may each strike up to six candidates from the pool before the selection. Cal. Gov't Code § 8252. The final map

prepared by the commission is subject to referendum in the same way as any other statute. Cal. Const. art. XXI, § 2(g), (i). If the commission fails to adopt a redistricting plan by the deadline, or if the people reject the commission's plan by referendum, then the state supreme court is responsible for appointing special masters to create a plan, which is subject to the court's, but not the legislature's, approval. *Id.* art. XXI, § 2(j).

In Iowa, the non-partisan Legislative Service Agency by statute is responsible for drawing the redistricting plan. Iowa Code § 42.3. The plan is then presented to the legislature, which can approve or disapprove, but cannot amend, the agency's plan. *Id.* If the first plan is disapproved, the agency must submit a second plan. *Id.* The legislature becomes able to amend the agency's plan only after it has previously rejected two plans. *Id.*[2]

The people of these States perceived a number of benefits from adopting redistricting commissions. For one, the people of these States have found their redistricting commissions less likely than state legislators to engage in gerrymandering to protect incumbents or to manipulate the redistricting process for partisan gain. *See, e.g.*, Nicholas D. Mosich, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting*

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[2] New York very recently adopted a constitutional amendment under which a redistricting commission must propose a redistricting plan to be approved by the legislature. N.Y. Const. art. III, §§ 4 to 5-b. The legislature can amend the plan only after it has twice rejected the commission's proposals. *Id.*

Commission, 79 S. Cal. L. Rev. 165, 171-72 (Nov. 2005) (describing partisan and incumbent Gerrymandering in Texas and California that resulted from those state legislatures' redistricting). While the Arizona Legislature and its amici embrace these problems as necessary evils, the sovereign States surely have authority to find that incumbent and partisan gerrymandering restrict electoral competition and lead to government that has less incentive to be responsive to the people. Mosich, 79 S. Cal. L. Rev. at 173, 175.

Some States have also found that commissions help avoid costly, time-consuming litigation challenging redistricting plans or resulting from political impasses and thus help ensure that redistricting is completed on time and not ongoing throughout the decade because of legal challenges. Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical / Bipartisan Legislative Redistricting Commissions*, 13 Kan. J.L. & Pub. Pol'y 115, 131-32 (Winter 2003/2004) (describing the higher number of court challenges to legislature-drawn plans versus commission-drawn plans); *see also Essex v. Kobach*, 874 F. Supp. 2d 1069, 1073-75, 1079 (2012) (three-judge panel was forced to independently draw a redistricting plan after Kansas Legislature could not do so because of ideological impasse); Nev. Rev. Stat. § 218B.150 (Legislative Counsel Note).

Though the Arizona Legislature never says so explicitly, its arguments amount to an attack on all of these systems and the benefits they provide. The Arizona Legislature claims that every state legislature must be able to "dictate, ordain, or direct"

the contents of a redistricting plan, and that legislators' ability to appoint commission members is insufficient. Br. For Appellant at 39-40. But this Court has already held that the Elections Clause does not prohibit States from giving actors other than the legislature—such as the people and the Governor—a crucial role in redistricting, rejecting the narrow rule Appellant advances. *See Smiley*, 285 U.S. at 372; *Hildebrant*, 241 U.S. at 567-68. And it has held that state courts can adopt redistricting plans themselves. *See Growe*, 507 U.S. at 32. These holdings are likewise consistent with the Court's more general principle that States have "wide leeway when experimenting with the appropriate allocation of state legislative power," *Holt Civic Club*, 439 U.S. at 71, and broad discretion to experiment with solutions to problems like gerrymandering, *Smith*, 528 U.S. at 273. States that have adopted commission systems are undoubtedly using the powers contemplated by our federalism. An overly restrictive reading of the Elections Clause should not be permitted to undermine this valid exercise of their authority to govern their own lawmaking process.

D. The Arizona Legislature's Argument Threatens Innumerable Laws Regulating The Time, Place, And Manner Of Congressional Elections That States Have Enacted By Initiative

Late in the brief, the Arizona Legislature candidly admits that its argument is not "limited to redistricting, as *any* prescription of the regulations concerning the times, places, and manner of congressional elections is just as surely a legislative task." Br. For Appellant at 49 (emphasis added). The

Arizona Legislature thus challenges not just redistricting systems adopted by the people, but also any state statute or constitutional amendment regulating congressional elections adopted by initiative. Multiple States have such rules, covering virtually every aspect of congressional elections. The variety of these laws reveals sometimes diverging policy choices, but while the substance of these laws varies, all of these States have relied on their sovereign right to adopt laws by initiative. The Court should follow its own precedent, reject Appellant's position, and preserve the sovereign States' right to regulate congressional elections through their ordinary legislative processes, including by direct democracy.

The time, place, and manner laws governed by the Election Clause cover a broad range of topics. They include matters involving "'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (quoting *Smiley*, 285 U.S. at 366). Laws governing primaries and voter registration procedures are also generally regarded as falling under the Elections Clause. *United States v. Classic*, 313 U.S. 299, 317 (1941) (primaries generally fall under Elections Clause); *Ass'n of Cmty. Orgs. For Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793-94 (7th Cir. 1995) (registration is embraced within the "manner" of holding elections).

For over a century, States have adopted statutes and constitutional amendments falling

within these categories by initiative, and this Court has never questioned their ability to do so. For example, two States, Arizona and Oregon, granted women suffrage through constitutional amendments initiated by the people. Or. Const. art. II, § 2 (amendment proposed by initiative petition in 1910 and adopted by voters in November 1912);[3] Ariz. Const. art. VII, § 2 (approved November 1912).[4] Oregon adopted a primary election system by initiative in 1904.[5] In 1912 and again in 1918, South Dakota voters enacted initiatives modifying their primary election systems.[6] In 1932, Washington voters adopted an initiative providing for permanent voter registration.[7]

This long tradition has continued nationwide, covering a wide range of topics. In Washington, for example, the people adopted Washington's current

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[3] http://arcweb.sos.state.or.us/pages/exhibits/1857/after/initiative.htm (Oregon State Archives, *Crafting The Oregon Constitution*).

[4] Zachary A. Smith, *Politics and Public Policy in Arizona* 128-29 (2002).

[5] http://bluebook.state.or.us/state/elections/elections10.htm (*Initiative, Referendum and Recall: 1902-1906*, Oregon Blue Book).

[6] *South Dakota Political Almanac* 34, 36, *available at* http://sdsos.gov/elections-voting/assets/BallotQuestions1890-2010.pdf.

[7] Washington Voters' Pamphlet 3 (1932), *available at* http://www.sos.wa.gov/elections/voters-pamphlets.aspx (click on 1932); *see* 1932 Election Results (Wash), http://www.sos.wa.gov/elections/results_report.aspx?e=102&c=&c2=&t=&t2=5&p=&p2=&y=.

primary system by initiative. Wash. Initiative Measure 872 (2005).[8] In upholding this system against a constitutional challenge, this Court emphasized that the law was popularly enacted and expressed a reluctance to nullify the will of the people. *Washington State Grange v. Washington Republican Party*, 552 U.S. 442, 446-47, 458 (2008).

Both Arizona and Mississippi have enacted voter identification requirements by initiative.[9] Mississippi's Initiative 27 amended the Mississippi Constitution in 2011 without any legislative approval.[10] Miss. Const. art. XII, § 249a. It requires voters to present government-issued identification in order to vote. *Id.* In 2004, Arizona voters adopted Proposition 200, requiring voters to present identification in order to vote. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2252 (2013).[11] Like Mississippi, exercise of Arizona's initiative power does not require participation or approval of the legislature. Ariz. Const. art. IV, pt. 1, § 1.

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[8] www.secstate.wa.gov/elections/initiatives/text/i872.pdf (text of Initiative 872).

[9] As noted, the amici States are not endorsing the policy choices reflected in all of these laws, but simply noting the wide range of laws enacted by initiative that regulate congressional elections.

[10] http://www.sos.ms.gov/Initiatives/Voter%20Identification-PW%20revised.pdf (voter identification pamphlet describing the initiative and Mississippi's initiative process).

[11] The *Inter Tribal Council* Court held that federal law preempted a portion of Arizona's legislation. *Inter Tribal Council*, 133 S. Ct. at 2260.

There are countless examples of other state constitutional amendments adopted by the people that regulate congressional elections. Ohio has both adopted a voter registration provision and abolished straight ticket voting through popular initiatives to amend its constitution. Ohio Const. art. V, § 1 (elector failing to vote in four years must re-register),[12] art. V, § 2a (requiring candidates for office in general election to be arranged in a group under that office and each candidate must be voted separately), art. II, § 1g (permitting people to propose and adopt constitutional amendment without legislative approval); *State ex rel. Duffy v. Sweeney*, 89 N.E.2d 641, 642 (Ohio 1949) (explaining article V, section 2a was adopted by popular initiative in the November 1949 general election).

Similarly, Arkansas has adopted at least two constitutional provisions impacting the time, place, and manner of congressional elections by popular initiative. In 1938, the people adopted a provision addressing how candidates obtain access to the ballot, and in 1962 the people adopted an amendment permitting the use of voting machines. Ark. Const. amend. 29, § 5 (initiative petition approved at November 1938 election), amend. 50, §§ 2, 4 (initiative petition approved at November 1962 election), amend. 7 (reserving to the people the power to propose amendments to the constitution without input from the legislature).

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[12] http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110877.aspx (listing Ohio's 1977 constitutional amendments proposed by initiative petition).

Oregon voters again amended the Oregon Constitution's provision addressing the qualifications of electors by initiative in 1986. *See* Or. Const. art. II, § 2 (amendment proposed by initiative petition July 1986 and adopted by voters November 1986).[13] Oregon also enacted its highly successful vote-by-mail requirement for biennial primary and general elections through popular initiative. 2007 Or. Laws, ch. 154 § 1 (Measure 60); *see also* Or. Const. art. IV, § 1 (reserving initiative power to enact laws independently of the legislature).

In 2010, Florida voters amended their constitution to provide criteria that the state legislature must follow in congressional redistricting. Fla. Const. art. III, § 20 (adopted at the November 2010 general election as a result of a proposed initiative petition); *see also id.* art. XI, § 3 (permitting constitutional amendment by popular initiative).

Other States have adopted statutes affecting congressional elections by popular initiative. In 1990, Massachusetts adopted an initiative changing the law to ease the requirements for establishing new political parties. 1990 Mass. Acts page nos. 744-46 (ch. 269); *see also* Mass. Const. amend. art. XLVIII, The Initiative, pt. V, § 1 (permitting the people to propose statutes by initiative and adopt them by popular vote, even if Massachusetts Legislature failed to adopt the proposed law). More recently, Alaska voters amended statutes addressing the process for temporary replacement of a United States

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[13] *See also* http://bluebook.state.or.us/state/constitution/constitution02.htm (information page).

Senator. State of Alaska, Official Election Pamphlet 98-99 (2004), *available at* www.elections.alaska.gov/doc/oep/2004/2004_oep_reg_3.pdf; Alaska Const. art. XI.[14]

This Court's recognition that popularly enacted laws express the will of the people is not hollow rhetoric. *See Washington State Grange*, 552 U.S. at 446-47, 458. Direct democracy is an established and critical aspect of state sovereignty throughout the United States. If this Court holds that only a state legislature can adopt a law that affects the time, place, or manner of congressional elections, the Court will throw a cloud of uncertainty over initiative-adopted election laws going back to 1904. *See* Br. For Appellant at 49 (acknowledging that the Elections Clause applies to any regulations concerning the time, place, and manner of congressional elections). The Court should refuse to read the Elections Clause to impose such a restriction on States' sovereign power.

E. Respecting State Sovereignty To Choose Lawmaking Processes Serves Important Federalism Values

At times, the Arizona Legislature seeks to frame this as a narrow case, solely about whether a State may "completely divest" its legislature of control over redistricting (a misleading formulation given the Arizona Legislature's appointment power). Elsewhere, the Arizona Legislature suggests that the legislature must "dictate" not only redistricting

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[14] *See also* http://www.elections.alaska.gov/results/04GENR/data/results.htm (information page).

plans, but any law regulating congressional elections. Br. For Appellant at 39-40, 49. The Court should reject this shifting argument and follow the reasoning in its prior Elections Clause cases, which allows States to use their chosen legislative processes to enact laws regulating congressional elections. Doing so would preserve our federalism where States, as sovereigns, choose their own lawmaking processes, including as to congressional redistricting. At the very least, this Court should avoid any broad holding that would call into question States' ability generally to use popular democracy to adopt laws regulating congressional elections.

"It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). This principle is especially strong when it comes to the States' power to structure their governments and legislative processes. *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991); *Holt Civic Club*, 439 U.S. at 71. The values recognized in *Younger*, *Gregory*, and *Holt Civic Club* are just as important here.

Once again, this Court must consider the "proper respect for state functions" and recognize "the fact that the entire country is made up of a Union of separate state governments, and . . . the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger*, 401 U.S. at 44. As in *Younger,* the federalism that animates the Federal Constitution must be "sensitiv[e] to the legitimate interests of

both State and National Governments" and that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that *will not unduly interfere with the legitimate activities of the States*." *Younger*, 401 U.S. at 44-45 (emphasis added).

One way that the Court can maintain these principles of federalism in this case is to determine that the Arizona Legislature is asking the Court to address a non-justiciable political question. The Court similarly held in *Hildebrant* that whether exercise of the people's lawmaking power in the course of redistricting violates the guarantee of a republican form of government is a question exclusively for Congress. *Hildebrant*, 241 U.S. at 569-70. Indeed, this Court has long held that questions related to the Guarantee Clause are squarely political, not judicial questions. *Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cnty.*, 281 U.S. 74, 79-80 (1930) (listing cases). Included, of course, are questions related to whether the exercise of the people's power through initiative and referendum violates this guarantee. *Kiernan v. City of Portland*, 223 U.S. 151, 163-64 (1912) (declining to exercise jurisdiction over whether exercise of the then-new initiative and referendum powers violated the republican form of government).

If this Court does reach the merits, however, the approach that is properly sensitive to the sovereign role of the States is found in *Smiley* and *Hildebrant*. The Elections Clause contemplates exercise of the States' lawmaking power, whether exercised by the state legislature or other actors. *See*

Smiley, 285 U.S. at 368-69, 371. States retain their sovereign powers to use referenda when it is part of the State's lawmaking powers under its constitution. *Hildebrant*, 241 U.S. at 568-70. This recognition is critical, because many States have, for over a century, retained and reserved legislative power to their people in their state constitutions. *See supra* pp. 19-21 (listing examples). Still other States have reserved power to the people to amend the State's constitution. Ariz. Const. art. XXI, § 1; Cal. Const. art. XVIII, § 3; Mont. Const. art. XIV, § 9. These lawmaking powers are the very legislative power contemplated by the Elections Clause, when it is read to serve the purposes of our federalism.

In contrast, the Arizona Legislature's position that every state legislature must play an outcome-defining role in congressional redistricting cannot be reconciled with our federalism and the broad sovereign state powers contemplated by the framers. This "outcome-defining" test would threaten all independent redistricting commissions whose plans are not subject to legislative approval, as well as plans adopted by backup commissions, courts, special masters, or any other situation where the legislature itself has not dictated the outcome. Equally troubling, it would imperil any state laws regulating the time, place, and manner of congressional elections that were adopted by initiative or constitutional amendment. And the vagueness of the "outcome-defining" test would require this Court to address more questions, such as whether a legislature's power to amend a commission's plan by a two-thirds vote is a sufficiently "outcome-defining" role. Wash. Const. art. II, § 43(7) (providing for

legislative amendment of a redistricting plan only when the legislature can muster a two-thirds vote of each house within thirty days). Or, is it a sufficiently "defining role" if a legislature proposed the constitutional amendment that led to the redistricting commission? Wash. Const. art. II, § 43; Idaho Const. art. III, § 2; N.J. Const. art. II, § 2(1).

Not surprisingly, the Arizona Legislature also proffers a softer argument, stating that it is concerned only with the complete and permanent divestiture of a legislature from congressional redistricting. *E.g.*, Br. For Appellant at 36. This test might serve the result-driven goal of overcoming the Arizona Constitution (though not necessarily, given the legislature's power to appoint the commission in Arizona), and it would probably cause less collateral damage to the States. But it is an unprincipled, result-driven view that still would mean that the Elections Clause was adopted to interfere with the future States' inherent sovereign power to determine their own lawmaking processes.

The amicus National Council of State Legislatures asks the Court to craft a rule that depends upon whether legislators have unrestrained ability to choose redistricting commission members, rather than choosing from a list as in Arizona. Br. of Amicus NCSL at 4-5. This analysis does not withstand scrutiny and finds no basis in precedent. If "the Legislature" can simply mean certain individual legislators who select commission members, why can it not also mean the voters of a State, who have chosen a redistricting system by popular vote? It also could lead to all sorts of bizarre line-drawing, e.g., what if the tie-breaking redistricting commissioner is

not appointed by a legislator at all? *See* Haw. Const. art. IV, § 2 (commission appointees appoint tiebreaker); N.J. Const. art. II, § 1(c), 2 (same); Ill. Const. art. IV, § 3 (supreme court can appoint tiebreaker); Ind. Code § 3-3-2-2 (governor appoints tiebreaker). In the end, the NCSL proposal is best viewed as a policy option, but far from a constitutional imperative required by the Elections Clause.

Last, the amicus Coolidge-Reagan Foundation suggests that it is the manner in which the Arizona constitutional amendment was adopted—by the people—that matters. Br. of Amicus Coolidge-Reagan Found. at 2. But this argument draws an artificial line between commissions adopted by legislative proposal and those adopted by state constitutional convention, like Hawaii's and Montana's. Haw. Const. art. IV, § 2; Mont. Const. art. V, § 14. This ignores the fundamental purpose of federalism and sovereign States, which is to preserve liberty and powers for the people. Provisions adopted by constitutional convention are hardly less valid than constitutional provisions proposed by a legislature.

Thus, to best protect our federalism, the amici States ask this Court to adhere to its own prior cases. As in *Smiley*, the relevant question here is "whether the function contemplated by Article 1, § 4, is that of making laws." *Smiley*, 285 U.S. at 366. Arizona and all of the other States that have chosen to solve a difficult policy problem with independent redistricting commissions are working within the powers contemplated by our federalism. If this harms the National Government, Congress may step

in and exercise its express powers to regulate this aspect of redistricting.[15]

CONCLUSION

The Court should affirm and conclude that Arizona's constitutional provision adopting its Independent Redistricting Commission is consistent with the Elections Clause.

RESPECTFULLY SUBMITTED.

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[15] We also agree with the Arizona Independent Redistricting Commission that Congress has invoked its Elections Clause power in 2 U.S.C. § 2a(c) to permit States to regulate redistricting by initiative. Br. For Appellees at 27-33.

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APPENDIX

Article I, Section 4, Clause 1 of the United States Constitution 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.