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 OF CALIFORNIA CITIZENS REDISTRICTING COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE ARIZONA INDEPENDENT REDISTRICTING COMMISSION

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INTEREST OF *AMICUS CURIAE*[1]

CALIFORNIA'S CITIZENS REDISTRICTING COMMISSION

California's Citizens Redistricting Commission submits this brief as *amicus curiae* in support of appellee Arizona Independent Redistricting Commission. This brief addresses the first question of this Court: "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?"

Appellee Arizona Independent Redistricting Commission was created by the voters of Arizona, acting pursuant to their legislative power to amend the state constitution and statutes through initiatives, and this commission was given the task of redistricting Arizona's congressional districts and various state districts. Ariz. Const., art. IV, pt. 2, § 1; Prop. 106, adopted November 2000. Similarly, the voters of California used their legislative power of initiative to create the California's Citizens Redistricting Commission with the power to draw congressional districts and state election districts. Cal. Const.,

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its members and counsel have made any monetary contribution for the preparation or submission of the brief. Letters from the parties consenting to the filing of any *amicus curiae* brief are on file with this Court.

art. XXI, §§ 1, 2; Prop. 11, adopted November 2008 and Prop. 11, adopted November 2010.

Appellant Arizona Legislature contends that only it may establish congressional districts in Arizona, and that the decision of the people, pursuant to their initiative power, to have these districts drawn by an independent commission violates federal law. Specifically, appellant argues that shifting the authority to draw congressional districts away from elected state representatives in Arizona, to an independent commission created by their voters' initiative power, violates the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c)

California's Citizens Redistricting Commission has a direct and vital interest in protecting the judgment below, which upheld the creation and redistricting power of Arizona's Independent Redistricting Commission. Any decision by this Court holding that Arizona's redistricting process, enacted by initiative, violates federal law would place in jeopardy California's own redistricting process.

SUMMARY OF ARGUMENT

Traditionally, elected state representatives draw the lines for congressional and state election districts, but in both Arizona and California, voters have replaced the customary redistricting procedures. Through their initiative power to enact legislation, the voters in each state created an independent commission to

draw election districts. The people's power to legislate by initiative and referendum is guaranteed in both California's and Arizona's Constitutions, and the power to legislate by initiative and referendum has been recognized by this Court as demonstrating devotion to democracy and innovation. The use of this initiative power to establish a process by which an independent commission, and not elected state representatives, draws congressional districts does not violate federal law.

"All political power is inherent in the people." Cal. Const., art. II, § 1; Ariz. Const., art. II, § 2. While the California and Arizona Constitutions vest legislative power in the state legislatures, neither state legislature has the exclusive power to make laws. Both state constitutions reserve to the people of each state the powers of initiative and referendum. Cal. Const., art. IV, § 1; Ariz. Const., art. IV, pt. 1, § 1. The electors in both California and Arizona are constitutionally guaranteed the authority to amend their state constitutions and statutes by means of initiative measures. Cal. Const., art. II, §§ 8, 10; Ariz. Const., art. IV, pt. 1, § 1.

The electors in California exercised their legislative power of initiative to create California's Citizens Redistricting Commission (CRC) and to empower CRC to draw congressional and state district lines. *Vandermost v. Bowen,* 53 Cal.4th 421, 438, 269 P.3d 446 (2012). By initiative, the California Constitution was amended by the addition of Article XXI, which created CRC, established the requirements for CRC

Commissioners, and set the standards CRC must follow in line-drawing. In addition, the California Government Code was amended by the addition of Sections 8252 to 8253.6 to Chapter 3.2 of Division 1 of Title 2, which established the selection process for CRC Commissioners and further defined CRC procedures.

Likewise, Arizona's Independent Redistricting Commission (IRC) was created by Arizona's initiative process. Ariz. Const., art. IV, pt. 2, § 1; Prop. 106, adopted Nov., 2000.

The state initiatives creating the CRC and the IRC do not conflict with the Elections Clause of the United States Constitution. This clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof" except as Congress otherwise provides. U.S. Const., art. I, § 4, cl. 1. However, neither the Elections Clause nor any other provision in the federal Constitution or federal law defines what is meant by the term "Legislature." To the contrary, the federal Constitution, with exceptions not applicable here, leaves the states free to determine for themselves their own legislative procedures and form of government, so long as it is a "republican form of government." Guarantee Clause, U.S. Const., art. IV, § 4. Where, as in California, Arizona, and many other states, both the people of the state and the elected state representatives are lawmaking bodies, both constitute the "Legislature" for purposes of the Elections Clause.

The federal statute implementing the Elections Clause, 2 U.S.C. § 2a(c), makes it even more clear that the process by which a state law is enacted is irrelevant for purposes of determining what state law governs redistricting procedures for congressional districts. This section provides that the congressional districts of a state are to be "redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c). "[T]he law thereof" is not limited to laws enacted by the elected state representatives, but instead encompasses all state laws, including those enacted by initiative. Where, as here, an initiative passed by the voters provides that an independent commission is responsible for establishing congressional districts, the actions of the commission are carried out "in the manner provided by [state] law."

Furthermore, the redistricting process created by initiatives in California and Arizona ensures that a body fairly representing the various political and other interests in the state, by an impartial process open to public view and input, draws congressional lines that comply with federal constitutional and statutory standards, without consideration of political parties or candidates. This process results in congressional and state election districts that are fully consistent with and lawful under federal law.

The decision of the three-judge court should be affirmed.

ARGUMENT

I. STATE LAWS MAY BE ENACTED BY INITIATIVE TO FURTHER DEMOCRACY AND INNOVATIVE GOVERNING, AS CALIFORNIA AND ARIZONA HAVE DONE

A. IN CALIFORNIA AND ARIZONA, ALONG WITH MANY OTHER STATES, THE PEOPLE MAY ENACT LAWS AND AMEND STATE CONSTITUTIONS, AND THIS POWER IS EQUAL TO THAT OF ELECTED STATE REPRESENTATIVES

States retain substantial self-governing authority under our constitutional system, because "our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft,* 501 U.S. 452, 457 (1991).

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Gregory, 501 U.S. at 458.

Under this system of dual sovereignty, nothing in federal law precludes the states from having their voters decide issues that would otherwise be decided

by their elected state representatives. As this Court explained in rejecting a claim that providing for a referendum was an unlawful delegation of power, "[i]n establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976). Both California and Arizona, along with many other states, have reserved to the people the powers of initiative and referendum.[2]

When state constitutions authorize their people to vote directly on laws, by means of initiative and referendum, they increase public participation and "give citizens a voice on questions of public policy." *James v. Valtierri*, 402 U.S. 137, 141 (1991) (discussing the referendum power as a "procedure for democratic decision-making.") See, also, *Schuette v. Coalition to Defend Affirmative Action etc.*, ___ U.S. ___, ___, 134 S.Ct. 1623, 1626 (2014) (plurality opinion),

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[2] "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." Cal Const., art. IV, § 1. "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." Ariz. Const., art. IV, pt. 1, § 1.

where this Court upheld a constitutional amendment enacted by initiative that prohibited the consideration of race in public education, employment, and contracting. "Michigan voters exercised their privilege to enact laws as a basic exercise of their democratic power, bypassing public officials they deemed not responsive to their concerns. . . ." *Schuette*, 134 S.Ct. at 1626.

When the electorate uses its initiative power, it acts as the Legislature. "[I]nitiatives are plainly 'legislation'. . . ." *Cammarano v. United States*, 358 U.S. 498, 505 (1958) (determining that expenses incurred combating initiatives are no different than expenses incurred defeating legislation).

In California, initiatives adopted by the voters are equal to legislation adopted by elected state representatives. As the California Supreme Court has explained, "to the extent that the initiative is the constitutional power of the electors 'to propose statutes . . . and to adopt or reject them' (Cal. Const., art. II, § 8, subd. (a)), it is generally coextensive with the power of the Legislature to enact statutes." *Santa Clara County Local Transportation Authority v. Guardino*, 11 Cal.4th 220, 253, 902 P.2d 225 (1995). See, also, *Professional Engineers in California Government v. Kempton*, 40 Cal.4th 1016, 1042, 115 P.3d 226 (2007). "Apart from procedural differences, the electorate's lawmaking powers are identical to the Legislature's." *State Comp. Ins. Fund v. State Bd. of Equalization*, 14 Cal.App.4th 1295, 1300, 18 Cal.Rptr.2d

526 (1993). See, also, *Jensen v. Franchise Tax Bd.*, 178 Cal.App.4th 426, 440, 100 Cal.Rptr.3d 408 (2009).

B. CALIFORNIA AND ARIZONA, BY INITIATIVE, ADOPTED A REDISTRICTING PROCESS CONDUCTED BY A REPRESENTATIVE BODY, IN A MANNER THAT IS IMPARTIAL, OPEN TO THE PUBLIC, WITHOUT POLITICAL CONSIDERATIONS, AND IN FULL COMPLIANCE WITH FEDERAL LAW

California voters, like those in Arizona, exercised their democratic power to legislate by initiative, a power identical to that of the state legislatures' power to legislate, to create an independent commission to draw congressional and state election districts.

> Prior to 2008, redistricting in California was performed by the Legislature subject to the veto [citations omitted.] The electorate, however, dramatically changed the process by ballot measures in 2008 and 2010. Those measures amended California Constitution, article XXI, transferring the redistricting task to a newly created Citizens Redistricting Commission. (Prop. 11, as approved by voters, Gen. Elec. (Nov. 4, 2008) (Proposition 11); Prop. 20, as approved by voters, Gen. Elec. (Nov. 2, 2010) (Proposition 20).)

Vandermost, 53 Cal.4th at 443. Indeed, Proposition 20, which shifts the task of drawing congressional districts to CRC, was approved by over 60% of the

voters in California. (http://www.sos.ca.gov/elections/ballot-measures/pdf/approval-percentages-initiatives.pdf)

The process adopted by the California electorate and governing CRC, as well as that governing IRC, is different than traditional line-drawing procedures, but this process preserves essential values, including having a representative body draw district lines, being transparent, and inviting public input. Furthermore, CRC and IRC are expressly mandated to comply with federal law. Nothing in federal law precludes states from establishing independent commissions to draw congressional districts.

Looking to the process in California, its voters decided that CRC Commissioners must be "independent from legislative influence and reasonably representative of this State's diversity." Cal. Const., art. XXI, § 2(c)(1). Five commissioners are to be from a subpool of those registered with the largest political party in California; five are to be from a subpool of those registered with the second largest political party; and four must not be registered with either of these two parties. Cal. Const., art. XXI, § 2(c)(2). The selection process[3] guarantees a diverse and qualified body, selected on the basis of analytical skills, ability to be impartial, and appreciation for California's

[3] More than 36,000 persons applied to be Commissioners. CRC's Final Report on 2011 Redistricting, p. 1 (Final Report); http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.

diversity, excluding persons with recent and direct political activity, with the applicant subpools selected by independent auditors who were themselves representative of various political parties. Cal. Gov't Code § 8252(d). After the applicant subpools are created, the four legislative leaders have an opportunity to exercise two strikes as to each subpool, that is, a total of eight possible strikes for each subpool. Gov't Code § 8252(e). "The constitutional provision creates a body that excludes career politicians, reflects citizen participation at every level, and is expected to rise above partisanship." *Vandermost*, 53 Cal.4th at 443.

As a result, the CRC Commissioners for the redistricting after the 2010 census are a distinguished and diverse group of citizens, including a former director of the U.S. Census Bureau who served under both Republican and Democratic Presidents, as well as educators, legal scholars, former government officials, business leaders, and other well-qualified voters.[4]

The Commissioners are obliged to apply specified criteria, in a designated order of priority, in drawing the districts. Foremost among these criteria is compliance with federal law, and, specifically, the federal Voting Rights Act. The other criteria are geographic contiguity, geographic integrity of political

[4] The biographies of Commissioner Vincent P. Barabba, former U.S. Census Bureau Director, and the other Commissioners may be viewed at http://wedrawthelines.ca.gov/bios.html.

subdivisions and communities of interest, and compactness. Cal. Const., art. XXI, § 2(d). Political concerns are specifically excluded from consideration in drawing districts. Cal. Const., art. XXI, § 2(e). "Under California Constitution, article XXI, redistricting is now performed by a Citizens Redistricting Commission, whose membership and procedural requirements are carefully designed to ensure that redistricting is undertaken on a nonpartisan basis." *Vandermost*, 53 Cal.4th at 469.

The meetings of CRC are subject to strict open meeting laws, guaranteeing transparency and an opportunity for public input. Cal. Const., art. XXI, § 2(b)(1). All meetings are public, with notice and public input; a public outreach program solicits public participation; all records are public and available for public inspection; and all proposed maps must be publicly displayed and available for public comment before final adoption by CRC. Cal. Gov't Code § 8253.[5]

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[5] CRC's redistricting process was "open, transparent and nonpartisan. . . ." *Vandermost,* 53 Cal.4th at 484. As the California Supreme Court described this process in rejecting a challenge to CRC's state senatorial districts:

> The Commission . . . held more than 70 business meetings and 34 public hearings in 32 cities throughout the state. (Final Rep., at p. 4.) Generally, the Commission's hearings were scheduled in the early evening hours at school or government locations in the center of a community, making it convenient for "average citizens" to participate. (*Ibid.*) It regularly allowed public input and comment at its business meetings as well. (*Ibid.*) Its educational materials

(Continued on following page)

And, each map has to be approved by at least nine Commissioners, including at least three Commissioners from each of the two largest political parties and three who are not registered with either of these parties. Cal. Const., art. XXI, § 2(c)(5).

After maps are approved by the Commission, any voter may file a petition if he or she believes a map violates federal or state law, with the California Supreme Court having original and exclusive jurisdiction. Cal. Const., art. XXI, § 3. And, each map is also subject to the people's power of referendum. Cal. Const., art. XXI, § 2(i). Finally, if the Commission

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were broadly distributed in English and six other languages (Spanish, Chinese, Japanese, Korean, Tagalog, and Vietnamese), and it ultimately received, in addition to oral testimony, more than 2,000 written submissions, including maps reflecting statewide, regional, or other districts. (*Ibid.*; see also Final Rep., at 446 pp. 3-5 [listing representative groups providing submissions and other testimony].) The Commission's staff received "written comments, input and suggestions from more than 20,000 individuals and groups." (*Id.,* at p. 5.) The Commission held 23 public input hearings before issuing a set of its draft maps in June of 2011. After a five-day public review period, it held 11 more public input hearings around the state to collect reactions to and comments concerning those draft maps. (*Ibid.*) It held 22 business meetings in Sacramento to discuss the draft maps, at which more than 276 people appeared and commented. All of the Commission's public meetings were "live-streamed," captured on video, and placed on the Commission's Web site for public viewing.

Vandermost, 53 Cal.4th at 445-446.

fails to adopt a map in a proper and timely manner, if a map is subject to a successful referendum, or if the California Supreme Court finds a map to violate federal or state law, that Court is to order appropriate relief, including the appointment of special masters to adjust the map. Cal. Const., art. XXI, § 2(j) and § 3(c).

The entire process is designed to eliminate political influence in line-drawing. The Commissioners must not have been recently involved in political activity and are to be representative of California's diverse population. Cal. Const., art. XXI, § 2(c). In drawing districts, one guiding principle is that "[t]he place of residence of any incumbent or political candidate shall not be considered in the creation of a map. Districts shall not be drawn for the purpose of favoring or discriminating against an incumbent, political candidate, or political party." Cal. Const., art. XXI, § 2(e). Instead, CRC must apply fair and rational line-drawing criteria in a given rank order, including population parity; compliance with the federal Voting Rights Act (42 U.S.C. §§ 1971 *et seq*.); geographic contiguity; common social and economic interests; and geographical compactness. Cal. Const., art. XXI, § 2(d).

This process resulted in congressional districts with an astonishingly high degree of population equality. "[T]he Commission's congressional district maps achieved a total deviation of +/- 1 person. Specifically, 20 of the 53 congressional districts achieved the ideal population of 702,905 persons. Twelve of the 53 districts achieved a population of 702,906 persons,

or one person more than the ideal. Twenty-one of the 53 districts achieved a population of 702,904 persons, or one person less than the ideal." CRC's Final Report on 2011 Redistricting, p. 9; http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_2final_report.pdf.

The provisions governing CRC are quite similar to those of Arizona's IRC. The five-member IRC may include no more than two members of any one political party, with no Commissioner recently holding elective office or involved in politics; three or more votes are required for any official action; meetings have to be open to the public; and proposed maps must be displayed for public comment. Finally, under Arizona law, the IRC must apply specified criteria in its map drawing, including compliance with federal law, equal population, geographic compactness and contiguity, communities of interest, geographic features, local government boundaries, and competitiveness. Ariz. Const., art. IV, pt. 2, § 1. Furthermore, "[p]arty registration and voting history data shall be excluded from the initial phase of the mapping process" and "[t]he places of residence of incumbents or candidates shall not be identified or considered." Ariz. Const., art. IV, pt. 2, § 1(14).

Thus, the redistricting process in both California and Arizona, established by legislation enacted by initiative, are conducted by a representative body, in a transparent process that included public input, in compliance with federal redistricting standards, and without political considerations.

C. THE CREATIONS OF CALIFORNIA'S AND ARIZONA'S INDEPENDENT REDISTRICTING COMMISSIONS ARE AN APPROPRIATE MEANS TO PREVENT POLITICAL GERRYMANDERING

Political gerrymandering may violate the federal Constitution, and may also be forbidden by the states. As to federal law, this Court said in *Davis v. Bandemer,* 478 U.S. 109, 125 (1986), political gerrymandering issues are justiciable.[6] In that case, however, the Court declined to find a "sufficiently adverse effect on the appellees' constitutionally protected rights to make out a violation of the Equal Protection Clause." *Id.,* at 130.

This Court again reviewed gerrymandered redistricting plans in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*). The Court recognized that "[f]aced with a Republican opposition that could be moving toward majority status, the state legislature drew a congressional redistricting plan designed to favor Democratic candidates." *LULAC*, 548 U.S. at 411 (Kennedy, J., joined by Roberts, C.J., and Alito, J.). Then this plan was replaced by a plan "to redistrict with the sole purpose of achieving a Republican congressional majority." *Id.,* at 417 (Kennedy, J.). In that case, however, there was

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[6] But see *Vieth v. Jubelirer,* 541 U.S. 267, 281 (2004) (plurality of four Justices would have held that "political gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.").

no agreement as to whether unconstitutional partisan gerrymander existed or was justiciable in that case.

Whatever the status of federal case law limiting political or partisan gerrymandering in redistricting, this is certainly an issue Congress or the states may address, as this Court has already recognized. Under the Elections Clause and the power it reserves to Congress, which "may at any time by law make or alter [the states'] regulations" as to redistricting, Congress itself could, although to date has not, banned political gerrymander. See *Vieth v. Jubelirer,* 541 U.S. 267, 276 (2004) ("Recent history, however, attests to Congress's awareness of the sort of districting practices appellants protest, and of its power under Article I, § 4, to control them. Since 1980 [until 2004], no fewer than five bills have been introduced to regulate gerrymandering in congressional districting. See H.R. 5037, 101st Cong., 2d Sess. (1990); H.R. 1711, 101st Cong., 1st Sess. (1989); H.R. 3468, 98th Cong., 1st Sess. (1983); H.R. 5529, 97th Cong., 2d Sess. (1982); H.R. 2349, 97th Cong., 1st Sess. (1981))."

Furthermore, as this Court has noted, "[t]he States, of course, have taken their own steps to prevent abusive districting practices. A number have adopted standards for redistricting, and measures designed to insulate the process from politics." *Vieth,* 541 U.S. at 277 fn.4. Indeed, "[e]ight states prohibit their redistricting bodies, most of which are commissions, from drawing state legislative districts in order to 'unduly' favor a candidate or political party; the same eight states do the same for congressional

districts. Arizona, California, Iowa, Idaho, and Montana ban considering an incumbent's home address when drawing district lines; many of the same states also limit the use of further political data like partisan registration or voting history." http://redistricting.lls.edu/where-state.php#political.

The voters in California and in Arizona have enacted such legislative measures. The two redistricting commissions are directed not to use political considerations and instead to apply other criteria in drawing districts. This approach is both pioneering and democratic, and far different than the criteria that might otherwise be applied by elected state representatives with ties to political parties. As discussed above, the federal structure of dual sovereignty "allows for more innovation and experimentation in government. . . ." (*Gregory*, 501 U.S. at 458.) The use of the initiative to accomplish these changes in the redistricting process is both legal and fitting.

II. USING INDEPENDENT COMMISSIONS TO DRAW CONGRESSIONAL DISTRICTS, MANDATED BY LAWS ENACTED BY STATE INITIATIVES, DOES NOT VIOLATE FEDERAL LAW

Turning to the specific question this Court has asked, whether 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, the answer depends on the meaning of the

word "Legislature" in the Elections Clause, U.S. Const., art. I, § 4, cl. 1, and its requirement that congressional redistricting "shall be prescribed in each State by the Legislature thereof" and the words in federal law requiring a state to be redistricted "in the manner provided by the law thereof," 2 U.S.C. § 2a(c). The correct answer is that these provisions do not preclude the use of initiatives to enact the laws governing congressional redistricting because the electorate's power to adopt state law by initiative is coextensive with the lawmaking authority of the state elected representatives. The term "Legislature" refers to all bodies authorized to make state law, and includes the electorate when it exercises its power of initiative and referendum.

While no case law appears to address directly whether congressional redistricting may be the subject of an initiative,[7] the counterpart to the initiative

[7] California's Attorney General did, however, directly opine on this precise issue more than half a century ago, and concluded that nothing in the federal Constitution or statutes precluded California using an initiative to adopt congressional redistricting. "Since, in California, the initiative is an exercise of lawmaking authority reserved to the people, a congressional districting law, like other exercises of the lawmaking power, may be proposed and enacted by means of an initiative." 51 Ops. Cal. Atty. Gen. 11, 14 (1951). The primary question addressed in that opinion was whether congressional redistricting was subject to referendum, and the opinion concluded that it was, relying upon *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565.

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power is the referendum power,[8] and congressional redistricting by state legislatures may clearly be the subject of a referendum. This precise issue was addressed in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), where the court determined that a congressional redistricting plan drawn by the state legislature was subject to referendum. The Court looked to the law of Ohio and found that in the Ohio Constitution, "the legislative power was expressly declared to be vested not only in the senate and house of

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But the opinion further considered the power of initiative and concluded that a congressional redstricting law could be enacted by initiative without violating federal law.

> [T]he electors' power to adopt initiative statutes is coextensive with the lawmaking authority of the Legislature. Article I, section 4 of the Federal Constitution delegates to the Legislature of each state the power to regulate the places and manner of electing congressmen. As we have seen, the delegation does not run to the Legislature as an agency separate from the people, but to the lawmaking authority of the state, to be exercised in the manner provided by the state's own organic law.

51 Ops. Cal. Atty. Gen. 11, 14.

Attorney General opinions construing state law are entitled to great weight. (*Ennabe v. Manosa*, 58 Cal.4th 697, 717 fn.14, 319 P.3d 201 (2014); *Lexin v. Superior Court*, 47 Cal.4th 1050, 1087 fn.17, 222 P.3d 214 (2010).)

[8] California reserves both the power of initiative and the power of referendum to the voters. "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." Cal. Const., art. II, § 8(a). "The referendum is the power of the electors to approve or reject statutes or parts of statutes. . . ." Cal. Const., art. II, § 9(a).

representatives of the state, constituting the general assembly, but in the people, in whom a right was reserved by way of referendum." *Id.*, at 566. Furthermore, it looked to the understanding of Congress in enacting the predecessor to 2 U.S.C. § 2a(c) and the language requiring that the redistricting should be made by a state "in the manner provided by the laws thereof," and held that these words encompass the whole of state law, whether enacted by the electorate or a legislative body. *Id.*, at 568. It concluded that while the Elections Clause grants congressional redistricting authority to the Legislature, where, as here, the state reserves legislative power to the people, the state's legislative power does not rest exclusively in the state legislature. See, also, *Hawke v. Smith,* 253 U.S. 230-231 (1920), where, referring to *Ohio ex rel. Davis v. Hildebrant,* the Court said: "[a]s shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional." The California Supreme Court has similarly recognized the right of the people to reject legislative redistricting plans through their reserved power of referendum. See *Assembly v. Deukmejian,* 30 Cal.3d 638, 652, 639 P.2d 939 (1982).

Additional support for the proposition that the use of the word "Legislature" in the Elections Code

does not mean that the redistricting power rests exclusively with a state's elected representatives is found in *Smiley v. Holm*, 285 U.S. 355 (1932), where this Court considered the effect of a governor's veto and rejected the argument that the word "Legislature" in the Elections Clause excluded the Governor's participation. As the Court explained, [w]herever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view." *Smiley* at 366. "As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.*, at 367.

In addition, the word "Legislature" cannot be limited to state legislative bodies to the exclusion of all other state entities, as state courts have also been held to have the power to draw redistricting plans. "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Scott v. Germano,* 381 U.S. 407, 409 (1920) (*per curiam*). The California Supreme Court has affirmed its jurisdiction to order special masters to draw redistricting plans where the Legislature fails to do so or the Governor vetoes the plans. See *Wilson v. Eu,* 54 Cal.3d 471, 473, 816 P.2d

1306 (1920); *Legislature v. Reinecke,* 10 Cal.3d 396, 400, 516 P.2d 6 (1973).[9]

As this Court stated in *Growe v. Emison,* 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier,* 420 U.S. 1, 27 (1975)), "[w]e say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature ***or other body***, rather than of a federal court." (Emphasis added.)

Because neither the Elections Clause nor any other provision of the federal Constitution or federal law defines what is meant by the term "Legislature" as used in the Elections Clause, and because the

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[9] As the *Reinecke* decision noted, the use of the Court and special masters has the advantage of avoiding partisanship in line drawing.

> The most frequently voiced objection to all plans recommended by the Legislature, including the reapportionment plan for the Senate that the Governor found tolerable, was that those plans were designed primarily to favor incumbents and to obtain partisan advantage for one or the other of the major political parties. It was evident that there was widespread public cynicism about the political process, and it was frequently stated that the Masters were in a singularly advantageous position unavailable to legislators, who cannot escape the inevitable force of self-interest. Many who appeared expressed the belief that any plans promulgated by the Court or by the Masters would be less incumbent-oriented or politically motivated than the plans recommended by the Legislature or others with special interests in reapportionment.

Reinecke, 10 Cal.3d at 409.

federal Constitution, with exceptions not applicable here, leaves the states free to determine for themselves their own legislative procedures and form of government, so long as it is a "republican form of government" (U.S. Const., art. IV, § 4), the decision of each state as to what constitutes its lawmaking body should be respected. Where, as in California and Arizona, both the people of the state and the elected state representatives may enact laws, both are properly considered the "Legislature," and should be considered so for purposes of the Elections Clause.

Similarly, as to the words in federal law requiring a state to be redistricted "in the manner provided by the law thereof," (2 U.S.C. § 2a(c)), "the law thereof" is not limited to laws enacted by the elected state representatives, but instead encompasses all state laws, including those enacted by initiative. So, where, as here, an initiative passed by the voters provides that an independent commission is responsible for establishing congressional districts, the actions of the commission in drawing congressional districts are carried out "in the manner provided by [state] law."

Moreover, it should be noted that the decision of California voters to create the California Redistricting Commission includes explicit provisions for the continued involvement of their elected state representatives. Legislative leaders have specified veto authority to remove applicants from the selection subpools. Cal. Gov't Code § 8252(c). Also, the California Legislature, working with the Commission, may amend the provisions of the initiative, subject to

statutory requirements. Cal. Gov't Code § 8251(c). Indeed, the California Legislature, at the request of CRC, has already enacted legislation amending certain provisions of the redistricting process. See Senate Bill No. 1096 (2010-2011), enacted as Cal. Stats. 2011, Ch. 271, making amendments to improve the operation of the redistricting process. And, finally, the California Senate must participate in any removal of a Commissioner. Cal. Gov't Code § 8252.5(a). So, elected state representatives continue to play a role in the line-drawing process.

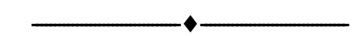
This decision by the voters in California and Arizona to revise the redistricting process to create independent redistricting commissions, to eliminate partisanship, and to base district lines on established criteria may be innovative, but it should be respected. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez,* 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). As this Court explained in its unanimous opinion in *Bond v. United States,* 564 U.S. ___, ___, 131 S.Ct. 2355, 2364 (2011), this distribution of power protects "the integrity, dignity, and residual sovereignty of the States."

> Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically

> granted to the Federal Government are reserved to the States or citizens. Admit. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." *Bond v. United States,* 564 U.S. ___, ___, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011).

Shelby County v. Holder, ___ U.S. ___, ___, 133 S.Ct. 2612, 2623 (2013).

California and Arizona, exercising their sovereign power, have first determined, in their state constitutions, that legislation may be enacted either by vote of the state's elected representatives or by vote of the people pursuant to their power of initiative. Then, in each state, legislation enacted by the voters' power of initiative has established a redistricting commission, the voters having determined that the needs of their states were best served by a redistricting process that rules out political gerrymander. As explained in *Reinecke*, 10 Cal.3d at 417, "the objective of reapportionment should not be the political survival or comfort of those already in office." The voters of Arizona and California have voiced this same concern in creating independent commissions to accomplish redistricting, and their determinations should be respected.



CONCLUSION

For the foregoing reasons, the decision below should be affirmed. This Court should affirm that although Arizona, through the initiative process and vote of its citizens, has departed from traditional redistricting practices, this does not violate federal law. Nothing in federal law precludes Arizona, or California from enacting, by initiative, an innovative system that provides for redistricting to be carried out by independent commissions, thus removing partisanship from that process yet still ensuring that districts satisfy federal law.

Respectfully submitted,

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