No. 13-1314

IN THE
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,
Appellees.

On Writ of Certiorari to the United States District Court for the District of Arizona

BRIEF OF *AMICUS CURIAE* NATIONAL CONFERENCE OF STATE LEGISLATURES IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Conference of State Legislatures ("NCSL"), is a bipartisan organization that represents the legislatures of all of the states and territories in the United States. One of NCSL's core missions is to improve the quality and effectiveness of those bodies. NCSL regularly files *amicus curiae* briefs in cases that, like this one, raise issues of vital concern to state legislatures.[2]

State legislatures, as independent branches of co-equal states in our system of Federalism, are deeply involved in the redistricting process. The creation of congressional districts has traditionally been left to state legislatures under the Elections Clause of the United States Constitution. Consequently, state legislatures consider the redistricting process a core legislative function expressly delegated to them by our Founding Fathers.

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* NCSL affirms that the position it takes in this brief has not been approved or financed by Petitioner, Respondents, or their counsel. Neither Petitioner, Respondents, nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief. Pursuant to Supreme Court Rule 37.3, *amicus curiae* NCSL states that all parties have consented to the filing of this brief; evidence of written consent of all parties has been filed with the clerk.

[2] For example, NCSL submitted *amicus curiae* briefs in *Wood v. Moss*, 572 U.S. ___, 134 S. Ct. 2056 (2014), *Maryland v. King*, 569 U.S. ___, 133 S. Ct. 1958 (2013), and *Filarsky v. Delia*, 566 U.S. __, 132 S. Ct. 1657 (2012).

NCSL has a keen interest in protecting the powers granted to state legislatures by our Constitution. The current case raises questions regarding whether a redistricting process that completely removes the state legislature from congressional redistricting is constitutional. NCSL asserts that it is not, and therefore files this brief in support of Petitioner.

SUMMARY OF THE ARGUMENT

The Elections Clause of the Constitution provides that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof . . . ."[3] Consistent with this clause, this Court long has recognized that districting is "primarily a matter for legislative consideration and determination."[4]

States have implemented this delegation of power in different ways. In thirty-seven states, the legislature draws the congressional redistricting plan. The other thirteen states involve both the legislature and some form of redistricting commission. All but two of these thirteen states respect the Election Clause's delegation by maintaining a substantive role for the legislature. But Arizona and one other state provide the legislature no substantive involvement in redistricting. In fact, Proposition 106, which created Arizona's federal redistricting commission, expressly

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[3] U.S. Const. art. I, § 4, cl. 1.

[4] *White v. Weiser*, 412 U.S. 783, 794 (1973).

serves to "remov[e] redistricting authority from the Arizona Legislature."[5]

Excluding the legislature from substantive involvement in redistricting contravenes the Elections Clause and this Court's consistent "adher[ence] to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment."[6] Consequently, the decision of the court below contravenes this Court's decisions and the intent of the Elections Clause. NCSL therefore respectfully supports Petitioner's challenge to the lower court's decision.

ARGUMENT

I. VIRTUALLY ALL STATES OTHER THAN ARIZONA GIVE THEIR LEGISLATURES A SUBSTANTIVE ROLE IN THE PROCESS OF REDISTRICTING

The Elections Clause states that, unless Congress provides otherwise, "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof . . . ."[7] The Clause gives state

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[5] Betsey Bayless, Ariz. Sec'y of State, *2000 Ballot Propositions & Judicial Performance Review: Proposition 106*, 60 (Sept. 2000), *available at* http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf.

[6] *White*, 412 U.S. at 795 (quoting *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964)).

[7] U.S. Const. art. I, § 4, cl. 1.

legislatures the power to regulate the mechanics of congressional elections.[8]

Consistent with the language of the Elections Clause, the state legislature draws new congressional districts in thirty-seven states. The other thirteen states involve commissions in the congressional redistricting process. These commissions generally fall into four categories. Three of the four categories are consistent with the Elections Clause because they retain a substantive role for the state legislature. In those states, the legislature retains the power either to draw the congressional districting plan itself or to exercise its unfettered discretion to select the majority of the commissioners who will draw the plan. These three categories of commissions are:

(1) advisory commissions, which, as the name implies, advise the legislature on redistricting criteria and proposed plans but cannot themselves enact a plan;

(2) backup commissions, which can enact a plan, but only if the legislature fails to do so in the first instance; and

(3) politician-appointed commissions, most of whose members are either members of the legislature or appointed by members of the legislature, and most of which certify the final redistricting plan without a vote of the legislature.

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[8] *See Cook v. Gralike*, 531 U.S. 510, 522-23 (2001).

Arizona uses a fourth type of commission. Under Arizona's system, the legislature cannot draw the congressional redistricting plan. The legislative leaders pick the majority of the members of the commission, but the legislative leaders can pick these commissioners only from a list in which the legislature has no input. This fourth type of commission thus excludes the legislature from all substantive aspects of congressional redistricting.

A. The Vast Majority of States That Employ Commissions in Districting Also Substantively Involve the Legislature

1. Advisory Commissions

Advisory Commissions are commissions whose only role is to provide advisory reports, suggestions, or proposed redistricting maps to a state legislature. The state legislature retains its ability to adopt or reject congressional redistricting plans. Four states have advisory commissions: Iowa, New York, Ohio, and Maine.[9]

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[9] Rhode Island had an advisory commission for its 2011-2012 congressional redistricting plan, but the wording of the law strongly suggests that the commission will not be used for future elections. *See* S. 924, 2011 Gen. Assemb., Reg. Sess. (R.I. 2011), *available at* http://webserver.rilin.state.ri.us/PublicLaws/law11/law11100.htm; H. 6096, 2011 Gen. Assemb., Reg. Sess. (R.I. 2011), *available at* http://webserver.rilin.state.ri.us/PublicLaws/law11/law11106.htm; *see also* Press Release, State of Rhode Island General Assembly, New Law Creates Redistricting Commission (June 18, 2014), *available at* http://www.rilin.state.ri.us/pressrelease/_layouts/RIL.PressRele

In Iowa, while the state legislature retains power to approve or reject congressional redistricting plans, the Legislative Services Agency ("LSA"), a nonpartisan support office,[10] undertakes the collection of specified data and information, and provides the legislature with draft congressional redistricting plans.[11] The LSA is assisted by a five-member temporary redistricting advisory commission,[12] which holds public hearings regarding redistricting bills and reports on the hearings.[13]

Once the LSA drafts a congressional redistricting plan, the state legislature may enact it or refuse to enact it, but cannot modify it.[14] If the state legislature refuses to enact the plan, the LSA will submit a second congressional redistricting bill.[15] In the event the state legislature does not approve the second bill, the LSA will submit a third

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ase.ListStructure/Forms/DisplayForm.aspx?List=c8baae31-3c10-431c-8dcd-9dbbe21ce3e9&ID=7017 (announcing that the commission will be used for the 2011 redistricting cycle).

Virginia also had an advisory commission for the 2011-2012 redistricting process. *See About the Commission*, Independent Bipartisan Advisory Commission on Redistricting, http://cnu.edu/redistrictingcommission/about.asp (last visited Dec. 3, 2014). This commission was created by executive order. *See Executive Order No. 31*, Independent Bipartisan Advisory Commission on Redistricting, http://cnu.edu/redistrictingcommission/eo-31.asp (last visited Dec. 3, 2014).

[10] See *Legislative Services Agency (LSA)*, The Iowa Legislature, https://www.legis.iowa.gov/agencies/nonpartisan/lsa (last visited Dec. 3, 2014).

[11] Iowa Code Ann. § 42.2 (West 2014).

[12] *Id*. § 42.5.

[13] *Id.* § 42.6.

[14] *Id.* § 42.3.

[15] *Id*.

congressional redistricting bill.[16] If the state legislature fails to approve the third LSA bill, the state legislature may amend the congressional redistricting plan.[17]

New York recently has adopted an advisory commission for use in the next congressional redistricting cycle.[18] The commission will include ten members, eight of whom will be appointed by the four leaders of the state legislature.[19] Those eight will then appoint the final two members of the commission.[20] As in Iowa, the commission will present a congressional redistricting plan to the state legislature, which may be approved only without amendment.[21] If the first plan is not passed, the commission can then present a second plan to the state legislature.[22] If the legislature does not approve the second bill without amendment, the

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[16] *Id*.

[17] *Id*.

[18] *New York*, All About Redistricting, Loyola Law School, http://redistricting.lls.edu/states-NY.php (last visited Dec. 3, 2014); Jessica Bakeman, *Voters Approve All Three Ballot Propositions*, Capital (Nov. 5, 2014), http://www.capitalnewyork.com/article/albany/2014/11/8556069/voters-approve-all-three-ballot-propositions.

[19] *Proposal One*, State of New York, State Board of Elections, 1, http://www.elections.ny.gov/NYSBOE/Elections/2014/Proposals/ProposalOneFinal.pdf (last visited Dec. 3, 2014).

[20] *Id*.

[21] *Id*. at 2-3.

[22] *Id*.

state legislature may introduce any amendments it deems necessary.[23]

Ohio has a six-member advisory commission.[24] The commission is a legislative task force created to support the congressional redistricting work of the legislature.[25] The president of the senate and the speaker of the house of representatives each appoint three members.[26] No more than two of the three appointees may be members of the same political party as the appointer.[27] And at least one of the three appointees must not be a member of the general assembly.[28]

Like New York, Maine has a single advisory commission. The commission is comprised of fifteen members.[29] The speaker of the house of representatives and the leader of the largest minority party each appoint three members.[30] Similarly, the majority leader of the senate and the leader of the largest minority party in the senate each appoint two members.[31] The remaining five members are "the chairperson of each of the [two] major political parties in the State or their designated representatives; and [three] members from the public generally, one to be selected by each

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[23] *Id.*
[24] Ohio Rev. Code Ann. § 103.51(A) (West 2014).
[25] *Id.* § 103.51(C)(1).
[26] *Id.* § 103.51(A).
[27] *Id.*
[28] *Id.*
[29] Me. Const. art. IV, pt. 3, § 1-A.
[30] *Id.*
[31] *Id.*

group of members of the commission representing the same political party, and the third to be selected by the other [two] public members."[32] The commission drafts the congressional redistricting plan and submits it to the state legislature, which may then enact the commission's plan or a plan of its own by a two-thirds vote.[33]

2. Backup Commissions

As stated above, backup commissions are those that can redistrict only after a state legislature has failed to complete congressional redistricting on its own. Two states currently have backup commissions: Connecticut and Indiana.

In Connecticut, the Reapportionment Committee has responsibility for congressional redistricting should the state legislature not enact a plan by a specified statutory deadline.[34] The Reapportionment Committee has nine members, eight of whom are designated (two each) by the four top legislative leaders.[35] The four legislature leaders are not limited to predetermined list from which to select members, but have wide discretion in their selections. The eight appointees select a ninth member, who must also be an elector of the state.[36]

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[32] *Id.*

[33] Me. Rev. Stat. tit. 21-A, § 1206 (West 2014); *see also* Me. Const. art. IV, pt. 1, § 3; Me. Const. art. IV, pt. 2, § 2.

[34] Conn. Const. art. III, § 6(b).

[35] *Id.* § 6(a).

[36] *Id.* § 6(b).

Once the Reapportionment Committee has a plan that is certified by at least five members of the commission, the plan is sent to the secretary of state, who publishes the plan.[37] Upon publication, the plan becomes law.[38]

Indiana has a five-member backup commission.[39] The five members are the speaker of the state house of representatives, the president pro tem of the state senate, the chairperson of the state senate and house committees responsible for legislative apportionment, and a fifth member appointed by the governor from the general assembly.[40] A plan adopted by the majority of the backup commission is then sent to the governor, who issues an executive order adopting the plan.[41]

3. Politician-Appointed Commissions

Politician-appointed commissions can create congressional redistricting plans without approval by the state legislature. But in every case, the legislature has a substantive role in redistricting because it appoints a majority of the members of the commission (not from a predetermined list). Five states have politician-appointed commissions for congressional redistricting: Hawaii, Idaho, Montana, New Jersey, and Washington.

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[37] *Id.* § 6(c).
[38] *Id.*
[39] Ind. Code Ann. § 3-3-2-2 (West 2014).
[40] *Id.*
[41] *Id.*

Hawaii's commission has existed since 1968. The commission includes nine members.[42] The senate president and speaker of the house each select two members. "Members of each house belonging to the party or parties different from that of the president or the speaker" select a member from each house, and these two designees each select two additional members for the commission.[43] The eight members, with a vote of six, select the ninth member, who serves as chairperson of the commission.[44] The commission prepares a congressional redistricting plan, conducts public hearings on each island about the plan, and modifies it as necessary after the hearings.[45] The commission then files a final congressional redistricting plan, which, after public notice and a time period set by statute, becomes effective.[46]

Idaho's approach is similar to Hawaii's. The Idaho commission consists of six members.[47] The minority and majority leaders of the two largest parties in each of the two houses of the state legislature select one member apiece.[48] The chairpersons of the two largest political parties also select one member apiece.[49] The commission prepares a final congressional redistricting plan,

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[42] Haw. Const. art. IV, § 2.
[43] *Id.*
[44] *Id.*
[45] Haw. Rev. Stat. § 25-2(b) (West 2014).
[46] *Id.*
[47] Idaho Const. art. III, § 2(2).
[48] *Id.*
[49] *Id.*

which must be approved by two-thirds of the commission.[50]

Montana also vests congressional redistricting authority in a politician-appointed commission. Montana's commission consists of five members. Four are appointed (one each) by the majority and minority leaders of each of the two legislative houses.[51] The fifth member is selected by the other four members.[52] The commission has ninety days after release of the final decennial census figures to file a final congressional redistricting plan with the secretary of state, after which the plan becomes law.[53]

New Jersey's commission has thirteen members.[54] Twelve of the thirteen are selected by politicians and political parties.[55] Two are appointed by the president of the senate, two by the speaker of the general assembly, two by the minority leader of the senate, and two by the minority leader of the general assembly.[56] Four members are appointed, two each, by the chairperson of the state party whose candidate received the largest number of votes in the most recent gubernatorial election and the state party whose candidate received the next largest number of votes.[57] The thirteenth member is an

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[50] *Id.* § 2(4).
[51] Mont. Const. art. V, § 14(2).
[52] *Id.*
[53] *Id.* § 14(3).
[54] N.J. Const. art. II, § 2, ¶ 1(a).
[55] *Id.* ¶ 1(b)(1)-(4).
[56] *Id.*
[57] *Id.* ¶ 1(b)(5).

independent member who is elected by seven of the other twelve members.[58]

The New Jersey commission chooses a new congressional redistricting plan by majority vote in a public meeting.[59] If the commission does not do so by the statutory deadline, the New Jersey Supreme Court selects and certifies whichever of the two plans that received the most votes most conforms to the requirements of United States law.[60] The selected plan must have received at least five votes.[61]

Washington's commission consists of five members.[62] Four are chosen by the legislative leaders of the "two largest political parties" in each house of the state legislature.[63] These four members select the fifth member, who serves as the non-voting chairperson of the commission.[64] The commission's final plan must be approved by at least three of the commission's members.[65] The legislature may amend the plan with a two-thirds vote of each house.[66] "Any amendment must have passed both houses by the end of the thirtieth day if the first session convened after the commission has submitted its plan to the legislature."[67]

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[58] *Id.* ¶ 1(c).
[59] *Id.* ¶ 3.
[60] *Id.*
[61] *Id.*
[62] Wash. Const. art. II, § 43(2).
[63] *Id.*
[64] *Id.*
[65] *Id.* § 43(6).
[66] *Id.* § 43(7).
[67] *Id.*

B. Only Arizona and One Other State Completely Divest Their Legislatures of Their Authority to Redistrict

In contrast to the three types of commissions described above, two states have independent commissions that wholly deprive the state legislature of any meaningful role in the redistricting process: California and Arizona.

The California Redistricting Commission ("CRC") was originally created to focus on legislative redistricting.[68] In 2010, the CRC's charge was expanded to include congressional redistricting after the passage of California Proposition 20.[69] The CRC has fourteen members, a number arrived at from an original pool of sixty candidates: twenty from each of the two largest political parties and twenty who belong to neither party.[70] After the sixty are

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[68] Letter from Kathay Feng, Jeannine English, and David Fleming to Patricia Galvan, Initiative Coordinator, Attorney General's Office (Oct. 22, 2007) *available at* http://ag.ca.gov/cms_pdfs/initiatives/i746_07-0077_Initiative.pdf.

[69] *Proposition 20*, Text of Proposed Laws, *available at* http://www.wedrawthelines.ca.gov/downloads/voters_first_act_for_congress.pdf (last visited Dec. 3, 2014).

[70] *See* Cal. Const. art. XXI, § 2(c)(2); Cal. Gov't Code § 8252 (West 2014). "Each commission member shall be a voter who has been continuously registered in California with the same political party or unaffiliated with a political party and who has not changed political party affiliation for five or more years immediately preceding the date of his or her appointment. Each commission member shall have voted in two of the last three statewide general elections immediately preceding his or her application." Cal. Const. art. XXI, § 2(c)(3).

selected, the singular and minimal input from the state legislature occurs. The majority and minority leader from each house may eliminate up to two candidates from each of the three groups, for a total of eight eliminations from each of the three groups.[71]

After the legislature's role is completed, eight members (three from each major party and two registered with neither party) are selected randomly from the remaining candidates.[72] These eight commissioners then select six additional commissioners (two from each group), each of whom must have received a simple majority vote from the existing eight commissioners.[73] The final plan is approved by a minimum of nine votes of the commission, which must be comprised of at least three commissioners registered with the largest political party, three registered with the second largest political party, and three registered with neither party, and must then be approved by a public referendum.[74]

Unlike the California commission, which originally participated only in legislative redistricting, from the start Arizona's Independent Redistricting Commission (the "AIRC") has been charged with redistricting both Arizona's congressional and legislative districts. The AIRC originated in 2000, when Arizona's voters approved Proposition 106, which amended the state

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[71] Cal. Gov't Code § 8252(e) (West 2014).
[72] *Id.* § 8252(f).
[73] *Id.* § 8252(g).
[74] Cal. Const. art. XXI, § 2(c)(5).

constitution by "remov[ing] congressional redistricting authority from the Legislature and vest[ing] that authority in [the AIRC]."[75]

The AIRC has five independent members.[76] The commissioners are selected from an original pool of twenty-five candidates.[77] The twenty-five candidates must include ten from each of the two largest political parties in the state and five who are not registered with either party.[78] The candidates

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[75] *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1048 (D. Ariz. 2014); *see also* David K. Pauole, Comment, *Race, Politics & (In)equality: Proposition 106 Alters the Face and Rules of Redistricting in Arizona*, 33 Ariz. St. L.J. 1219, 1222 (2001) ("The obvious consequence of Proposition 106 is the displacement of the legislature by an independent redistricting commission in the redrawing of congressional and legislative districts.").

[76] Ariz. Const. art. IV, pt. 2, § 1(3) ("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.").

[77] *Id.* § 1(5).

[78] *Id.*

are selected not by the state legislature or any of its members; instead, they are selected by the Arizona state commission on appellate court appointments,[79] which does not include any legislators among its members.[80]

Each of the four legislative leaders then chooses one commissioner from the pre-selected list of 25 candidates.[81] The four commissioners chosen by the legislative leaders then select the fifth commissioner, who may not be registered in the same party as any of the four commissioners.[82]

There is a critical difference between the Arizona redistricting commission and the politician-appointed commissions described above. In the case of the politician-appointed commissions, the designated legislators can choose whomever they want as commissioners. In Arizona, however, the legislative leaders must pick from a pre-selected list of candidates, which effectively prevents the legislature from picking the commissioners of its choice.[83]

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[79] *Id.*

[80] *Id.* art. VI, § 36.

[81] *Id.* art. IV, pt. 2, § 1(6).

[82] *Id.* § 1(8).

[83] California and Arizona only permit the legislature, or members of the legislature, to select commission members from preselected lists of candidates. Other congressional redistricting commissions may limit or provide guidelines for the potential pool from which candidates may be selected, but do not limit the legislature to a preselected list. Such limitations and guidelines may include: excluding past or current elected officials for a period of time; taking into account

II. THE CONSTITUTION REQUIRES THAT STATE LEGISLATURES BE INVOLVED SUBSTANTIVELY IN THE REDISTRICTING PROCESS

A. This Court Long Has Recognized That Redistricting Is Primarily the Province of State Legislatures

"From the beginning, [this Court] ha[s] recognized that 'reapportionment is primarily a matter for legislative consideration and determination.'"[84] This Court thus consistently has "adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment."[85]

This longstanding recognition has arisen at least in part from the reality that political judgment is necessary to balance the competing interests posed by redistricting,[86] and that this "inevitably political decision[] must be made by those charged with the task," i.e., elected representatives.[87] For these reasons, this Court "ha[s] never denied that

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geographical, ethnic, and racial considerations in commissioners; or including only voters registered for a certain period of time.

[84] *White*, 412 U.S. at 794 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *see also Ely v. Klahr*, 403 U.S. 108, 114 (1971) ("[A]s we have often noted, districting and apportionment are legislative tasks in the first instance . . . .").

[85] *White*, 412 U.S. at 795 (quoting *Md. Comm. for Fair Representation*, 377 U.S. at 676).

[86] *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

[87] *White*, 412 U.S. at 796-97.

apportionment is a political process . . . ."[88] To the contrary, the Court has expressly recognized that "[p]olitics and political considerations are inseparable from districting and apportionment."[89] In fact, the involvement of politics in redistricting is so inherent that this Court has declined to strike down politically motivated redistricting plans, even in cases where the evidence of partisanship was overwhelming: "Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State was *conscious* of that fact."[90]

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[88] *Karcher v. Daggett*, 462 U.S. 725, 739 (1983); *see also id.* at 740 (recognizing that "avoiding contests between incumbent Representatives" is a permissible state redistricting policy).

[89] *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *see also Vieth v. Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion) ("The Constitution clearly contemplates districting by political entities, *see* Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.").

[90] *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (citing *Bush v. Vera*, 517 U.S. 952, 968 (1996)); *Shaw v. Hunt*, 517 U.S. 899, 905 (1996); *Miller*, 515 U.S. at 916; *Shaw v. Reno*, 509 U.S. 630, 646 (1993); *see also Vieth*, 541 U.S. 267 (upholding a Pennsylvania congressional redistricting plan that was challenged as a pro-Republican gerrymander); *Davis v. Bandemer*, 478 U.S. 109 (1986) (upholding an Indiana legislature plan alleged to be a partisan gerrymander); *Gaffney*, 412 U.S. at 752 (upholding a Connecticut legislature plan alleged to be a bipartisan gerrymander).

That redistricting is inherently political does not, however, make redistricting a non-justiciable political question. *See Baker v. Carr*, 369 U.S. 186 (1962).

The principle that redistricting is primarily the province of state legislatures is so fundamental that courts defer to legislative determinations regarding districting whenever possible. Thus, if a court determines that a districting plan violates a constitution or statute and that there is sufficient time for the legislature to correct the violation in advance of an election, the court will remand to the legislature to correct the plan.[91]

Even if there is insufficient time for the legislature to cure the violation before the next election, (1) the court will amend the legislature's plan only as far as necessary to correct the violation and (2) the court's plan will be in place only until the legislature enacts a proper plan.[92] It therefore is

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[91] *See, e.g.*, *Md. Comm. for Fair Representation*, 377 U.S. at 675 (finding it inappropriate to discuss remedial questions because with the next election a year away, "sufficient time exist[ed] for the Maryland Legislature to enact legislation reapportioning seats"); *Davis v. Mann*, 377 U.S. 678, 692-93 (1964) ("We find it unnecessary and inappropriate to discuss questions relating to remedies at the present time. Since the next election of Virginia legislators will not occur until 1965, ample time remains for the Virginia Legislature to enact a constitutionally valid reapportionment scheme for purposes of that election.").

[92] *See Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971) (finding that the lower court had erred because the court-ordered redistricting plan modified the legislature's plan more than was necessary to correct the constitutional violations); *Reynolds*, 377 U.S. at 586 (finding that a district court faced with an unconstitutional plan should act "so as not to usurp the primary responsibility for reapportionment which rests with the legislature" and affirming that court's decision to issue only temporary relief).

well established that the legislature has primary responsibility for federal redistricting.

B. That This Court Has Approved Involvement by the People and the Executive Branch Does Not Belie the Need for Substantive Legislative Involvement

The court below found that this Court's decisions in *Ohio ex rel. Davis v. Hildebrant*[93] and *Smiley v. Holm*[94] demonstrate that state legislatures need not be included in the redistricting process. The court below was mistaken. *Smiley* and *Hildebrant* establish only that the public or state executive officials may weigh in on redistricting. In neither of those cases did the Court suggest, much less hold, that the legislature may be substantively excluded from the redistricting process. Accordingly, these cases are not contrary to the longstanding recognition that districting is inherently political and that the legislature has primary jurisdiction over districting. *See supra* Section II.A.

In *Hildebrant*, this Court held that the people of Ohio could constitutionally disapprove the legislature's redistricting plan by referendum where Ohio law granted the people the right to "approve or disapprove by popular vote any law enacted by the general assembly."[95] This decision did not divest the legislature of its primary role in redistricting.

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[93] 241 U.S. 565 (1916).
[94] 285 U.S. 355 (1932).
[95] 241 U.S. at 566.

Rather, it approved Ohio's ability under its delegated powers to give the people a voice in redistricting.

Similarly, in *Smiley*, this Court found that the governor of Minnesota could use his state-granted veto power to veto the legislature's passage of a redistricting act. The Court did not grant the governor complete control over districting; it merely recognized that the powers delegated to the states through the Elections Clause permit a state to include the executive branch in redistricting.

Neither of these rulings is at odds with the longstanding recognition that districting is inherently political and that the legislature holds primary jurisdiction over districting. In fact, most states' redistricting commissions demonstrate that there are many ways to redistrict that do not exclude the legislature's substantive involvement. *See supra* Section I.A.

But Proposition 106, which created the AIRC completely – and intentionally – divests the state legislature of substantive involvement in redistricting[96] and "vest[s] the primary redistricting responsibility" in the AIRC.[97] This fact distinguishes

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[96] *See* Bayless, *supra* note 5 ("A 'yes' vote shall have the effect of creating a [five]-member 'Citizens' Independent Redistricting Commission' with no more than [two] members from each political party and no more than [three] members from each county, to draw legislative and congressional district boundaries and removing redistricting authority from the Arizona Legislature.").

[97] *Cf. Ariz. State Legislature*, 997 F. Supp. 2d at 1055-56.

the present case from *Hildebrant* and *Smiley*, where the state legislature "still retained *some role* in the choice of congressional districting."[98] Indeed, as the dissent in the court below pointed out, these cases "involved situations in which the state legislature participated in the redistricting decision-making process in some very significant and meaningful capacity. . . . [Neither] held that the Elections Clause can be so broadly interpreted as to permit a state to remove all substantive redistricting authority from its legislature."[99] Thus, *Hildebrant* and *Smiley* are entirely consistent with the argument NCSL makes here – that Article I, Section 4 requires either that the state legislature pass the congressional redistricting plan or that it have unfettered discretion to choose whomever it wants to be the majority of the members of the redistricting commission.

In short, the AIRC is at odds with both the Elections Clause and the longstanding recognition that redistricting is inherently political and primarily the province of the legislature. Proposition 106 and the resulting redistricting commission in Arizona therefore should be struck down.

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[98] Richard L. Hansen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 Hastings Const. L.Q. 599, 618 (2008).

[99] *Ariz. State Legislature*, 997 F. Supp. 2d at 1057.

III. CONCLUSION

For the reasons set forth above, NCSL respectfully requests that this Court reverse the decision of the United States District Court for the District of Arizona.

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Respectfully submitted,

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