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 THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, nonpartisan think tank and public interest law institute that seeks to improve the systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote for every eligible citizen and to prevent partisan manipulation of electoral rules. The Center conducts empirical, qualitative, historic, and legal research on redistricting and electoral practices and has participated in a number of redistricting and voting rights cases before this Court.

The Brennan Center takes an interest in this case because a ruling in favor of the Arizona Legislature would undermine the ability of citizens of the states to combat the persistent problem of gerrymandering and enact other electoral reforms.

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[1] The parties have consented to the filing of the Amicus Curiae brief, as evidenced by letters of consent filed with the Clerk. Amicus is not related in any way to any party in this case, and no person or entity other than the Amicus has authored any part of, or made any made any monetary contribution to the preparation of, this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

At stake in this case is the ability of citizens of the states to guard against the pernicious effects of partisan gerrymandering and to pass other election reforms via ballot initiative. Under the Arizona Legislature's novel interpretation, the Elections Clause—designed in part to give Congress the power to combat manipulation of the electoral rules by state legislators—would prohibit the people of Arizona from accomplishing the very same goal by establishing a redistricting commission with the power to draw congressional districts. The Legislature's position finds no support in the text or purpose of the Elections Clause, and it runs contrary to more than two centuries of interpretation and practice.

This Court recently made clear that the Constitution should be interpreted "in light of its text, purposes, and 'our whole experience' as a Nation," and that "the actual practice of Government" should inform that interpretation. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)). Under each of those factors, Arizona's redistricting process is consistent with and permissible under the Elections Clause.

The Arizona Legislature's case depends on a narrow reading of the term "legislature" in the Elections Clause to include only institutional legislative assemblies, and to exclude the people acting via ballot initiative. But the use of the term

"legislature" at the time the Clause was written and debated does not support such a constrained reading. To the contrary, contemporaneous dictionaries, the constitutional debates, and the diverse state constitutions from the founding era all point to an understanding of the term "legislature" that includes all configurations of a state's legislative power.

A broader definition of "legislature" is consistent with the purpose of the Elections Clause, which was to empower Congress to override state election rules, not to restrict the ways states enact legislation. The Framers sought a check on politicians who might manipulate the political system, and a safeguard against the states failing to provide for congressional elections. The provision was not written to direct or restrict the ways states enact their laws.

The Legislature's interpretation is also inconsistent with the whole of the nation's experience, including more than two centuries of practice under the Elections Clause. From the founding through to the present day, the people have exercised legislative power in various forms to regulate the times, places, and manner of congressional elections. Citizen initiatives have been regularly used to regulate federal elections for more than a century without complaint. Congress has approved constitutions that included citizen initiatives, including with the power to regulate federal elections, and this Court has recognized the validity of election laws passed in this manner. To accept the Legislature's reading would require reversing centuries of experience.

To define "legislature" so narrowly would deprive the Elections Clause of its textual meaning, its substantive purpose, and its accepted application throughout history. In its place, the Constitution would be left with a measure far weaker than the one conceived in the founding era and implemented through to the present day. This weakened provision would leave the public with what the authors of the Constitution and the people of Arizona sought to avoid when they respectively wrote the Elections Clause and established the Independent Redistricting Commission: a political system prone to manipulation by entrenched politicians.

ARGUMENT

I. The term "legislature" in the Elections Clause refers to the legislative power, however organized by the states

This Court recently explained that "[t]he Elections Clause has two functions. Upon the States it imposes the duty . . . to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Ariz. v. Inter-Tribal Council of Ariz.*, 133 S. Ct. 2247, 2253 (2013). The question in this case is whether, by using the term "legislature," the Clause regulates states' internal governance and restricts which state actors can fulfill the states' legislative duty to provide for congressional elections.

While the Arizona Legislature suggests that the Court read "legislature" in the Elections Clause to exclude the exercise of legislative power by the people, the text and history of American legislatures in the founding era support a different and far broader reading.

A. Founding-era dictionaries define "legislature" as sovereign legislative power rather than a specific form of assembly

Eighteenth-century dictionaries defined "legislature" not as legislative assemblies or chambers but rather as a broader term encompassing lawmaking power. Samuel Johnson's dictionary defined the word simply as "the power that makes laws." Samuel Johnson, *A Dictionary of the English Language, 2* vols. (1st ed. 1755). Another prominent dictionary defined legislature as "the Authority of making laws, or Power which makes them." Nathan Bailey, *An Universal Etymological English Dictionary* (14th ed. 1757). A third, narrower dictionary definition is still broader than that proposed by the Arizona Legislature in this case: "the persons empowered to make, abolish, alter, or amend the laws of a kingdom or people." Thomas Dyche & William Pardon, *A New General English Dictionary* (12th ed. 1760).

To the extent that this Court's understanding is guided by these sources, they indicate that the word "legislature" carried a broader meaning than simply body that meets in a state capitol. There is no evidence to support the Arizona Legislature's argument that the term should be narrowly

circumscribed to its modern colloquial meaning.[2]

B. In the debates over the Elections Clause "legislature" often was used interchangeably with "State" and "State Government"

The terminology used during the debates over the Elections Clause further supports a broad interpretation of the term "legislature." In discussing the Clause, the people of the founding era frequently used the word "legislature" interchangeably with "State" and "State Government," suggesting they did not understand the term to constrain who within a state could exercise the legislative power to regulate congressional elections in the first instance. Indeed, in our search of the *Documentary History of the Constitution of the United States*, the terms "State" and "State Government" were used roughly half the time in reference to the first part of the Elections Clause.[3]

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[2] Notably, while the brief of the Arizona Legislature looks to dictionary definitions to discern the meaning of other words in the Elections Clause, it is conspicuously silent when it comes to the eighteenth-century meaning of the word "legislature." *See* Appellant's Brief, pp. 31–36.

[3] Our search of the *Documentary History of the Ratification of the Constitution Digital Edition* for the terms "times, places, and manner" and "time, place, and manner" produced a sample of approximately thirty excerpts from state constitutional debates and related materials that discussed the Elections Clause. Of these, seven focused on the term legislature, five discussed the states generally, six were ambiguous or mentioned both terms, and ten mentioned Congress without mentioning the states or legislatures at all. This count excludes those instances where "legislature" is mentioned as a quotation

For instance, in the Virginia ratification debates, while Delegate Nicholas discussed how "the *State Legislature* . . . [might] not appoint a place for holding elections." Later, in the same debate, he refers to the prospect of Congress "chang[ing] the time, place, and manner, established by *the States*." IX *The Documentary History of the Ratification of the Constitution Digital Edition* 920 (John P. Kaminski et al. eds., 2009) [hereinafter Kaminski] (emphasis added).

In the same debates, James Madison similarly refers both to "State Legislatures" and "State Governments" in the context of the Elections Clause. For example, in explaining the need for the Elections Clause, Madison told the Virginia convention that a congressional override was important because were the time, place, and manner of federal elections "exclusively under the controul of the State Governments, the General Government might easily be dissolved." Yet, he also referred also to the "State Legislatures." X Kaminski 1260.[4]

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of the provision. This count was complicated by the fact that a number of the historic documents cover multiple topics. The *Documentary History* includes documents from Connecticut, Delaware, Georgia, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and Virginia, in addition to selected commentaries from other states and the Philadelphia convention. *The Documentary History of the Ratification of the Constitution Digital Edition* (John P. Kaminski et al. eds., 2009).

[4] Other examples include a Massachusetts author who speculated "that the obstinacy of one state might lead them to refuse to elect [congressional representatives] at all" but then describes how "in others… the legislature might abuse the inhabitants" with burdensome regulations, V Kaminski 734,

C. Founding-era state constitutions had diverse legislative structures and early elements of direct democracy

The actual structure of state legislative power at the time of ratification of the Constitution also supports a broader interpretation of "Legislature" than urged by the Arizona Legislature. The argument that "Legislature" should be narrowly construed, indeed, is flatly inconsistent with the Framers' express rejection of the idea that there should be uniformity in the form of state governments.

During the Revolution, there had been debate both at the Continental Congress and in the states about whether the newly independent states should have uniform constitutions. Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 Suffolk U. L. Rev. 759, 781 (2014). Ultimately, there was no agreement on what such a constitution would look like, and the idea fell by the wayside. *See* Willi Paul Adams, *The First American Constitutions* 55–56 (1980).

Instead, state constitutions differed from one another in many ways, including how they structured legislative power. There was no monolithic model of a "legislature" or the state legislative power. Rhode Island and Connecticut, for

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and a Pennsylvania pamphleteer referred to the Elections Clause and described how "the time, place, and manner of electing Representatives are to be fixed by each state itself." II Kaminski 216.

example, still used their colonial royal charters, with some modifications, well into the nineteenth century. In both states, legislative bodies formally included the Governor and assistants. *See* Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 Minn. L. Rev. 1543, 1550 (1997); Richard A. Hogarty, *Separation of Powers in State Constitutional Law, When Legislators Become Administrators: The Problem of Plural Office-Holding*, 4 Roger Williams U. L. Rev. 133, 148 (1998).

Other states, by contrast, had begun to develop a more defined separation of powers. By 1787, New York and Massachusetts allowed governors to exercise a right to veto legislation. Further, a number of states had begun to divide their legislatures into upper and lower chambers, with each chamber elected on a different basis.[5]

Despite differences in the ways they structured legislative processes, however, early state constitutions shared a skepticism about politicians and generally sought to use early versions of direct democracy to ensure that the people and not the political class remained in control. *See* G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition* at 4 (Working Paper), *available at* http://camlaw.rutgers.edu/statecon/

[5] In Massachusetts, for example, the lower house was elected on the basis on population equality, while the number of senators a district elected varied depending on the amount of taxes paid by the people of the district. Mass. Const., part II, ch. 1, § 2, art. 1. Maryland, by contrast, used a system of electors to pick the members of its upper chamber. Md. Const. of 1776, arts. II, XIV, XV.

publications/people.pdf. These mechanisms arose in the context of a robust Revolutionary-era focus on the nature of representation and a rejection of British notions of indirect "virtual" representation. *See* Gordon S. Wood, *Creation of the American Republic, 1776-1787* at 162–96 (Rev. ed. 1998).

Consistent with this growing emphasis on representation, and the right of the people to govern themselves, most Revolutionary-era state constitutions contained strong statements that power rested not with politicians in legislatures, but with the people.[6] *See, e.g.*, Va. Const. of 1776, Dec. of Rights, § II ("That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them."); Penn. Const. of 1776, Dec. of Rights, § IV; *cf. id.* § III ("That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."); N.C. Const. of 1776, Dec. of Rights, § II ("That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof.").

These early constitutions sought to assure the proximity of government to the people. In five states, citizens of a legislative district could issue binding instructions to their elected representatives, and "the practice was widespread even in states that did not expressly recognize it in their constitutions." G. Alan Tarr, *Understanding State Constitutions* 84 (2000).

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[6] This is mirrored, of course, in the new federal Constitution's invocation of "We the people" in its preamble and in the Ninth Amendment's reservation of rights "retained by the people."

States took other measures, as well. By 1789, all had moved to annual elections for their lower houses. and seven had adopted annual elections for their upper houses as well, to ensure greater popular control over legislative outcomes. *Id.* at 83. Pennsylvania and Vermont (which joined the Union shortly after it was created) required that non-emergency legislation not take effect until there had been an intervening election. *Id.* at 82–83.

II. The word "legislature" should be read consistently with the Election Clause's purpose, which is to empower Congress to override electoral rules for federal elections, not to restrict the ways states enact legislation

The purpose of the Elections Clause is to give Congress the power to override state electoral rules. All the founding era debates around the provision centered on this issue.

The Framers wanted to empower Congress for two reasons. First, the Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." *Inter-Tribal Council of Ariz.*, 133 S. Ct. at 2253 (citing The Federalist No. 59 (Alexander Hamilton)). Equally important, the Clause acted as a safeguard against the possibility that politicians and factions in the states would manipulate electoral rules to preserve their advantages – and, in doing so, prevent the House of Representatives from being the "mirror of the people in miniature" famously envisioned by John Adams.

John Adams, *Thoughts on Government*, Apr. 1776 Papers 4:86–93 (discussing the idea that legislatures ideally should closely resemble the people being represented).

This second concern was even more central to the purpose of the Elections Clause because it was rooted in a Revolutionary era belief in the need for representative governments and the corollary that government works best when it is closest to the people. *See* The Federalist Nos. 59, 61 (Alexander Hamilton). Having just emerged from a Revolution fought in large part because of the unrepresentative nature of the British electoral system, the Framers wanted to make sure that government would actually be representative of the people at large. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution* 167 (1971) (discussing how the colonists came to view British arguments of virtual representation "with "derision"); Wood, *supra*, at 176 (discussing how "Americans . . . immediately and emphatically rejected" the idea of virtual representation). They feared that state legislators, might manipulate electoral rules to entrench themselves or place their interests over those of the general public just as British political elites had done.. *See* Bailyn, *supra* at 167–75 (discussing the weaknesses of the British theories of virtual representation); *infra* p. 14. The Elections Clause was designed as a check against these potential abuses, and as a way to keep government close to the people it represented.[7]

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[7] As the brief for the Arizona Independent Redistricting Commission points out, this proximity to both the federal and

At the Constitutional Convention, Madison was explicit in arguing this rationale. He worried that state legislatures might impose rules to skew the outcomes of federal elections. Without the Elections Clause, he suggested that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." 2 Records of the Federal Convention of 1787, p. 241 (M. Farrand rev. ed. 1966) [hereinafter Farrand]. (Madison spoke in response to a motion by South Carolina's delegates to strike out the federal power. They did so because that state's coastal elite had malapportioned their legislature, and wanted to retain the ability to do so. Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, 223 (1996).

These arguments were carried into the public debate over ratification. Theophilius Parsons, a delegate at the Massachusetts ratifying convention, likewise argued that the Clause was needed to combat what today might be characterized as partisan gerrymandering, when he warned that, "when faction and party spirit run high," a legislature might take actions like "mak[ing] an unequal and partial division of the state into districts for the election of representatives." VI Kaminski 1218. Timothy Pickering of Massachusetts similarly posited that the Clause was necessary because "the State governments may abuse their power, and regulate elections in such manner as would be highly inconvenient to the people, [and] injurious to the

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state governments "doubly empowered" the public under the Elections Clause. *See* Appellee's Brief, p. 26.

common interests of the States." Letter from Timothy Pickering to Charles Tillinghast, Philadelphia, 24 December 1787, *in* XIV Kaminski 197 .

Fears of such abuses flowed from the Framers' clear eyed understanding of politicians. They were skeptical of many elected officials, especially at the state level, and debaters denounced them as self-interested, self-dealing, and as "Men of indigence, ignorance, & baseness." 1 Farrand 132. In the Constitutional Convention debate over direct election of congressional representatives, James Wilson of Pennsylvania stated, for example, that he did not want to "increase the weight of the State Legislatures by making them the electors of the national Legislature." 1 Farrand 49. Madison feared that if state legislatures controlled the appointment of the House of Representatives, "the people would be lost sight of altogether." 1 Farrand 50. Hamilton observed that "State administrations" would be attractive to those "capable of preferring their own emolument and advancement to the public weal." The Federalist No. 59 (Alexander Hamilton).

The common thread in these concerns over political abuses and the men who perpetrated them is that they all would make government more remote from the people and less representative than the Framers believed it should be. The Elections Clause was written to protect that very principle. With the Elections Clause, however, state politicians would be circumspect. Rufus King and Nathaniel Gorham wrote that because the Clause acted as a check, "the States . . . will do all that is necessary to keep up a Representation of the People; because they know

that in the case of omission the Congress will make the necessary provision." Rufus King and Nathaniel Gorham, Response to Elbridge Gerry's Objections, post-31 October, *in* IV Kaminski 188. Pickering further supported the Clause as a way to "[e]nsure to the *people* their rights of election." Letter from Timothy Pickering to Charles Tillinghast, Philadelphia, 24 December 1787, *in* XIV Kaminski 197.[8]

If the Elections Clause were read in the manner proposed by the Arizona Legislature would undermine and pervert the very goal of the clause by giving free rein to elected politicians to do the very thing that people of the founding generation loathed. The driving force behind the Clause was a desire to ensure truly representative government. These were leaders who sought to prevent politicians from manipulating the political system, not grant them the express power to do so.

[8] At the same time, the Framers understood that, in a sprawling nation, it was not practical for the federal government to be initially responsible for federal election rules. They knew, in Madison's words, that "the state governments [are] best acquainted with the situation of the people" and thus best suited to decide things like where to have polling places, the days of elections, and the like. X Kaminski 1260.

III. Since the nation's founding, states, this Court, and Congress have understood that states have authority to give the people the ability to regulate the times, places, and manner of congressional elections.

In the more than two centuries since 1787, the legislative power has included colonial-era charters, citizen votes on legislation, and the initiative power used to create Arizona's Independent Redistricting Commission. That legislative power often has been used to shape election laws, and Congress and this Court have long acknowledged that power as legitimate.

A. This Court's precedents confirm a sufficiently broad interpretation of "legislature" to encompass the legislation at issue here

Only twice before has this Court construed the first part of the Elections Clause, and in both cases the Court recognized states' flexibility to structure their legislative power in different ways.[9] In both

[9] Few cases have addressed the Elections Clause. Most address the scope of Congress's power, including the meaning of "Times, Places, and Manner," rather than the allocation of state legislative power. *See*, e.g., *Ariz. v. Inter-Tribal Council of Ariz.*, 133 S. Ct. 2247 (2013) (upholding Congress's power to override state policies with respect to voter registration in federal elections); *Foster v. Love*, 522 U.S. 67 (1997) (invalidating Louisiana's open primary system because it conflicted with federal law, authorized by Elections Clause, setting a uniform federal Election Day); *United States v. Roudebush*, 405 U.S. 15 (1972) (holding that recounts are covered under "times, places, and manner" language); *United States v. Classic*, 313 U.S. 299

Hildebrant and *Smiley*, this Court upheld state legislation under the Elections Clause pursuant to mechanisms that the Framers may not have recognized and that are inconsistent with the definition of "legislature" urged by the Arizona Legislature. *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916); *Smiley v. Holm,* 285 U.S. 355 (1932).

Hildebrant concerned whether the Elections Clause allowed Ohio's constitution to authorize voters to call a referendum to override the state legislature's redistricting plan. In 1912, Ohio wrote this referendum power into its constitution as part of a package of reforms introduced at a constitutional convention. Ohio Const. art. II, § 1. Three years later, the state's legislature passed a set of new congressional districts. Pursuant to the state's new referendum power, the districting plan was submitted to the electorate, which rejected it. The petitioner brought suit to force Ohio to implement the districts, arguing that "the referendum vote was not and could not be a part of the legislative authority if the state, and therefore could have no influence" on congressional redistricting. *Hildebrant*, 241 U.S. at 567.

The Court upheld Ohio's system, holding that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power." *Id.* at 568. The decision further noted that to hold the referendum as blocked by the Elections Clause would "rest upon the assumption

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(1941) (holding that Elections Clause covers primary elections for federal office); *Ex parte Siebold* 100 U.S. 371 (1879) (clarifying Congress's supervisory power over federal elections).

that to include the referendum in the scope of the legislative power" would "in effect annihilate[] representative government." *Id.* at 569. The Court was not concerned about whether the legislative mechanism at issue empowered particular state actors, but rather whether that mechanism preserved the representative government that was at the heart of the Framers' concerns.

Similarly, in *Smiley,* the Court addressed the question of whether the Minnesota governor's ability to veto a legislatively passed redistricting plan meant that it had been enacted inconsistently with the Elections Clause. *Smiley*, 285 U.S. at 362. As with the referendum in *Hildebrant*, the Court upheld the governor's veto power as consistent with the Elections Clause. The decision found "no suggestion in [the Elections Clause] of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 367. In so holding, the *Smiley* Court acknowledged the long history of states adopting different legislative forms and the principle that "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning." *Id.* at 369.

As the Arizona Legislature appears to acknowledge, under these decisions, the Arizona's redistricting process is plainly constitutional. This Court should decline Appellant's invitation to overrule *Hildebrant* both because the case was correctly decided and because overruling it would

upend more than a century of established practice under the Elections Clause.[10]

B. Use of initiative to pass electoral laws

As the Court made clear in both *Hildebrant* and *Smiley*, as well as in *Noel Canning* last Term, history does not stop after 1787. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). Rather, "the longstanding 'practice of the government' . . . can inform our determination of 'what the law is'." *Id.* at 2560. It is also "an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era." *Id.*

Here, the flow of history is clear: states increasingly allocated ever greater legislative power to the people. That power encompassed the regulation of elections history. The initiative that

[10] In addition to challenging legislation by ballot initiative, the Arizona Legislature argues that the redistricting commission itself has been impermissibly tasked with exercising legislative power. Appellant's Brief, pt. II(C). But that argument proves too much. Nothing in the Elections Clause prohibits a state legislative body from delegating a portion of its legislative power to a committee, agency, or commission. Indeed, state legislatures routinely delegate large swaths of "legislative" responsibility to regulate federal elections to independent bodies of state and local election officials. And just as state legislatures retain the authority to override decisions by election officials they do not like via legislation, so do the people of Arizona retain the authority to override decisions by the Redistricting Commission via ballot initiatives.

created Arizona's Independent Redistricting Commission stands firmly in that tradition.

As states began to amend their constitutions after 1787, popular sovereignty became increasingly more vital to the state constitutional tradition. The Progressive Era marked the apex of the populism of the state constitutional tradition by institutionalizing the initiative and referendum. In 1898, South Dakota became the first state to adopt these direct democracy devices, with Utah and Oregon following suit in 1900 and 1902. John J. Dinan, *The American State Constitutional Tradition* 85 (2006). By the end of the twentieth century, roughly half of the states had adopted the statutory initiative and/or referendum.[11]

Notably, since the advent of ballot initiatives over a century ago, Americans have regularly and repeatedly used them to regulate the "times, places and manner" of congressional elections without formal involvement of institutional legislatures, and without drawing constitutional objections.

For example,[12] in 1904, Oregon passed a ballot initiative establishing a primary system for *all* elections (federal as well as state). *See* Oregon

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[11] A list of the current provisions can be found in Dinan, *supra*, at 94 n.151.

[12] Information about the ballot initiatives in this section can be found on the National Conference of State Legislature's Ballot Measure Database. *See Ballot Measures Database,* Nat'l Conf. of State Legis., http://www.ncsl.org/research/elections-and-campaigns/ballot-measures-database.aspx (last visited Jan. 22, 2015).

Primary Nominating Election, Measure 2 (1904).[13] This was two years after Oregon established the ballot initiative and six years after the first state adopted the ballot initiative (South Dakota). Oregon is not alone; other states like Arkansas and Washington have altered the way candidates, including congressional candidates, are nominated through ballot initiative. *See* Arkansas Primary Laws, Act 1 (1916); Washington Top Two Primaries, Initiative 872 (2004). Ballot initiatives have been used to affect various others aspects of the "times, places, and manner" of congressional elections. *See*, *e.g.*, Colorado Headless Ballot, Measure 14 (1912) (placing names of candidates on ballot without reference to their party affiliation); Washington Repeal of Poll Tax, Initiative 40 (1922) (repealing annual poll tax used in congressional elections); California Registration of Voters, Proposal 14 (1930) (providing for permanent voter registration, including for federal elections); Ohio Individual Voting for Candidates, Amendment 2 (1949) (arranged candidates on ballot by position they were running for, rather than by party); Arkansas Permit Use of Voting Machines (1962). There have also been dozens of unsuccessful ballot initiatives that would have affected congressional elections. *See*, *e.g.*, California Rules for Absentee Voting, Proposition 14,

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[13] Four years later, Oregon voters used a citizen ballot initiative to require the state legislature to elect the winner of a popular vote as Senator. Allen Hendershott Eaton, *The Oregon System: The Story of Direct Legislation in Oregon* 96 (1912). Although not under the Elections Clause, but under a parallel provision, this exercise of legislative power by the people is consistent with how the people of the states have exercised legislative power under the elections clause.

(1914) (asking voters to adopt an absentee ballot system); North Dakota Abolish Absent Ballot Initiative (1936) (asking voters to abolish absentee voting); Alaska Runoff Voting Initiative, Measure 1 (2002) (asking voters to adopt a preferential voting system where each voter would rank their top five candidates). The frequent use of ballot initiatives to affect the "times, places and manner" of congressional elections underscores the fact that the power initially invested in the states in the Elections Clause has always been understood to encompass direct legislative action by the electorate.

While Arizona was the first state to successfully pass a ballot initiative affecting congressional redistricting, others have since joined it. *See*, *e.g.*, California Congressional Redistricting, Proposition 20 (2010) (granting the California Citizens Redistricting Commission jurisdiction to redistrict federal congressional lines); Florida Congressional District Boundaries, Amendment 6 (2010) (providing the legislature with criteria that it must follow when redistricting). For decades before Arizona's initiative, voters in other states, likewise, tried and failed to address congressional redistricting through ballot initiative. *See*, *e.g.*, Oklahoma Congressional Redistricting, State Question 357 (1956) (asking voters to approve a congressional redistricting map); Ohio Redistricting Commission, Issue 2 (1981) (asking voters to approve a redistricting commission); California Creation of a Districting Commission, Proposition 14 (1982) (asking voters approve of redistricting through commission or judges). In all these instances, it was

understood that the voters—in their capacity as legislators—had the power to enact these measures.

C. Congress did not limit the scope of initiative powers when it approved state constitutions

Congress, likewise, did not stand by idly as initiative powers were established broad enough to give the people a say in the rules for federal elections. Indeed, Congress actively encouraged or acquiesced in these developments. Between 1791 and 1959, Congress carefully considered and actively debated the addition of thirty-seven states. Likewise, after the Civil War, Congress consciously weighed the readmission of the eleven former Confederate states. Congress did not assent lightly. Rather, it frequently imposed restrictions on new states. Eric Biber, *The Price of Admission: Causes, Effects, and Patters of Conditions Imposed on States Entering the Union*, 46 Am. J. Legal Hist. 119, 120 (2004).

Congress never required state constitutions to avoid direct democracy. In fact, Congress approved constitutions that incorporated far reaching aspects of popular sovereignty.[14] In the early twentieth

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[14] Missouri and Nebraska, states admitted within the context of heated debates on the republican nature of slavery and civil rights, had a right of revolution and a mandatory referendum on the incurrence of $50,000 of state debt, respectively. *Id.* at 141–43; Mo. Const. of 1820, art. XIII, § 2; Neb. Const. of 1866, art. II, § 32. The Louisiana Constitution, likewise, envisioned popular votes on whether to hold a new constitution convention. La. Const. of 1812, art. VII, § 1. The Utah constitution required mandatory referendums on property tax increases and the incurrence of public debt over specified levels, and public votes on proposed amendments as well as the adoption of the

century, as states began to amend their Constitutions to provide legislative power to the people through initiatives, referendums, or both, territories seeking admission to the Union did the same. *See*, *e.g.*, *State-by-State List of Initiative and Referendum Provisions*, Initiative & Referendum Inst., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Jan. 22, 2015). Indeed, Oklahoma, Arizona, and New Mexico all enshrined the people's legislative power in the new state constitutions approved by Congress.

Oklahoma was the first state to include initiative and referendum provisions in its Constitution at the time it was admitted to the Union. John David Rausch, *Initiative and Referendum*, Okla. Historical Soc'y, http://www.okhistory.org/publications/enc/entry.php?entry=IN025 (last visited Jan. 22, 2015). Article V, Section 1 created a legislature comprised of a Senate and House of Representatives, but the same section reserved for the people "the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls independent of the Legislature, and [the] power at their own option to approve or reject at the polls any act of the Legislature." Okla. Const. art. V, § 1.

Arizona's Constitution spoke as plainly as Oklahoma's in preserving legislative power for the people was as direct as Oklahoma's, setting forth the principle that:

Constitution itself. Utah Const. of 1895, art. XII, § 7,; *id.* art. XIV, § 3; *id.* art. XXIII, § 1; *id.* schedule § 11.

> [Legislative power] shall be vested in the legislature . . . 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(1). New Mexico's original Constitution vested power in the Senate and House of Representatives, but reserved for the people "the power to disapprove, suspend and annul any law enacted by the legislature," with certain exceptions. N.M. Const. art. IV, § 1.

Half a century after Congress and the President approved the Constitutions of Oklahoma, New Mexico, and Arizona, Alaska's Constitution also reserved legislative power for its citizens. In Article XI, the Alaska Constitution provides that "[t]he people may propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum."[15] Alaska Const. art. XI, § 1.

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[15] Congress approved Alaska's Constitution that included initiative and referendum provisions in 1958, two decades after Arkansas citizens had used the initiative power to create a redistricting commission for state legislative races. *See* Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & POL. 331, 346 (2007).

Notably, the congressional debates of 1911, concerning potential statehood for Arizona and New Mexico, focused heavily on direct democracy provisions included in the territories' proposed constitutions. Much of the controversy centered around Arizona's inclusion of a provision that would allow popular recall of judges,[16] but the initiative and referendum provisions were hotly debated as well. Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. Pol. 578, 598-601 (1949).

Despite the fact that the proposed initiative power clearly would allow the people of the new states to enact electoral rules by initiative, there was no objection on that basis from Congress.

On the heels of each debate, Congress determined the territories should be admitted to the Union with the direct democracy provisions intact. Over one hundred years ago, this included Arizona. The state later used its initiative power, accepted as lawful from the state's admission to the Union, to create its Independent Redistricting Commission.

Congress' acquiescence in these direct democracy provisions at the very least mark the

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[16] President Taft vetoed the first resolution that would have admitted Arizona and New Mexico into the Union because of Arizona's judicial recall provision. Arizonans removed the provision, Taft signed the second statehood bill in 1912, and the citizens of Arizona promptly inserted a new recall provision in the fall of 1912. *See*, *e.g.*, Jana Bommersbach, *Arizona's Statehood Story*, Ariz. Republic, Nov. 27, 2010, *available at* http://archive.azcentral.com/arizonarepublic/viewpoints/articles/20101127arizona-statehood-boomersbach.html.

widely shared constitutional understanding over two centuries. Moreover, they can be seen as a meaningful decision not to preempt state practices under the Elections Clause.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the Court affirm the decision below.

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