No. 11-14554-EE

In the United States Court of Appeals for the Eleventh Circuit

CORRINE BROWN, MARIO DIAZ-BALART, AND
THE FLORIDA HOUSE OF REPRESENTATIVES,

Plaintiffs-Appellants,

v.

KURT S. BROWNING, IN HIS CAPACITY AS
SECRETARY OF STATE FOR THE STATE OF FLORIDA,
AMERICAN CIVIL LIBERTIES UNION OF FLORIDA,
FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *ET AL.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

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CERTIFICATE OF INTERESTED PARTIES

Brown v. Browning
Case No. 11-14554-EE

Pursuant to 11th Circuit Rule 26.1-1, Appellants Mario Diaz-Balart, Corrine Brown, and The Florida House of Representatives furnish a complete list of the following:

1. Akerman Senterfitt, attorneys for State Legislators
2. American Civil Liberties Union Foundation, Inc., attorneys for American Civil Liberties Union of Florida
3. American Civil Liberties Union Foundation of Florida, Inc., attorneys for American Civil Liberties Union of Florida
4. American Civil Liberties Union of Florida, Intervening Defendant
5. Jessica Ring Amunson, attorney for Florida State Conference for NAACP
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7. Corrine Brown, Plaintiff/Appellant
8. Kurt S. Browning, Secretary of State of the State of Florida, Defendant/Appellee
9. Charles G. Burr, attorney for Florida State Conference for NAACP
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11. Stephen M. Cody, attorney for Corrine Brown and Mario Diaz-Balart
12. Carolyn H. Collins, Intervening Defendant
13. Janet Cruz, Intervening Defendant State Legislator

14. Ashley E. Davis, attorney for Browning

15. Miguel De Grandy, attorney for The Florida House of Representatives

16. Democracia Ahora, Intervening Defendant

17. Michael B. DeSanctis, attorney for Florida State Conference of NAACP

18. Mario Diaz- Balart, Plaintiff/Appellant

19. Karen C. Dyer, attorney for State Legislators

20. Stephen Easdale, Intervening Defendant

21. Edwin Enciso, Intervening Defendant

22. The Florida House of Representatives, Intervenor-Plaintiff/Appellant

23. Florida State Conference of NAACP Branches, Intervening Defendant

24. Luis E. Garcia, Jr., Intervening Defendant State Legislator

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30. Joseph W. Hatchett, attorney for State Legislators

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33. Arthenia L. Joyner, Intervening Defendant State Legislator

34. Randall C. Marshall, attorney for ACLU of Florida

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36. George N. Meros, Jr., attorney for The Florida House of Representatives

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44. Howard Simon, Intervening Defendant

45. Stuart H. Singer, attorney for State Legislators

46. Paul M. Smith, attorney for Florida State Conference of NAACP

47. Patricia T. Spencer, Intervening Defendant

48. Benetta M. Standly, Intervening Defendant

49. Harry O. Thomas, attorney for Browning

50. Perry E. Thurston, Jr., Intervening Defendant State Legislator

CERTIFICATE OF INTERESTED PARTIES

Brown v. Browning
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51. Honorable Ursula Ungaro, District Judge

52. Susan Watson, Intervening Defendant

53. Allen Winsor, attorney for The Florida House of Representatives

STATEMENT REGARDING ORAL ARGUMENT

Appellants requested an expedited oral argument, which they believe will assist this Court. By order dated October 25, 2011, this Court directed the clerk to place the appeal on the next available argument calendar once briefing is completed.

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STATEMENT OF JURISDICTION

The issue presented here is whether a provision of Florida's Constitution is consistent with the United States Constitution. (RE 36-1.) The case therefore arises under federal law, and the district court had jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered a final judgment on September 9, 2011, disposing of all parties' claims. (RE 87.) Appellants filed a joint notice of appeal on September 29, 2011. (R.89.) This Court therefore has jurisdiction to review the district court's final decision, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether a state constitutional provision, recently added by a citizen initiative and contrary to the state's process for legislative enactments, may regulate the "manner" of congressional elections, notwithstanding Article I, section 4 of the United States Constitution, which provides that such regulations "shall be prescribed in each State by the *Legislature* thereof."

2. If so, whether such a regulation may include substantive, results-oriented criteria, which extend beyond any neutral, procedural, or mechanical regulation of federal elections.

STATEMENT OF THE CASE

Preliminary Statement

In this brief, Appellants will cite the record as (R.x:y), with "x" being the docket entry below and "y" being the page or paragraph number. Appellants will cite the record excerpts as (RE x:y).

As the parties and district court did below, Appellants will refer to Article III, Section 20 of the Florida Constitution—the provision challenged on appeal—as "Amendment Six," the designation under which it appeared on the election ballot. (R.68:¶ 5, R.73.)

Background and Procedural History

The sole issue on appeal is Amendment Six's validity under the United States Constitution. Amendment Six, which would directly regulate the manner of holding federal elections in Florida, was recently enacted through a citizen initiative wholly outside Florida's legislative process. Appellants Corrine Brown and Mario Diaz-Balart, members of the United States House of Representatives, initiated this action by filing a declaratory judgment action on November 3, 2010. (R.1.)[1] They sought a declaration that Amendment Six was invalid under the federal Elections Clause, which provides that regulation of federal elections "shall

[1] The district court incorrectly referred to Representative Diaz-Balart as a member of the Florida House of Representatives. (RE 87:2, 7.) He is, in fact, a

be prescribed in each State by the Legislature thereof," subject to congressional override. (R.1.)

Appellants Brown and Diaz-Balart subsequently amended their complaint to name Kurt S. Browning, in his official capacity as the Secretary of State for the State of Florida (the "Secretary"), as the sole state defendant. (RE 36-1; R.38.)

The district court permitted the intervention of Appellant Florida House of Representatives as an additional party plaintiff and several individuals and organizations as additional party defendants. (R.33, 54, 55.)[2]

The district court heard argument on cross-motions for summary judgment on September 9, 2011, (R.67, 71, 72, 74, 83), and granted final summary judgment in Appellees' favor the same day. (RE 87.) Appellants timely filed their notice of appeal. (R.89.)

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member of the United States House of Representatives, a fact not in dispute. (*See, e.g.,* R.74:1.)

[2] The intervening defendants are: The American Civil Liberties Union of Florida, Howard Simon, Benetta Standly, Susan Watson, Joyce Henry, the Florida State Conference of NAACP Branches, Leon Russell, Patricia Spencer, Carolyn Collins, Democracia Ahora, Edwin Enciso, Stephen Easdale, Arthenia Joyner, Janet Cruz, Luis Garcia, Joseph Gibbons, and Perry Thurston, Jr. (R.11, 19, 45, 54.)

Statement of the Facts

As the parties stipulated, this case involves only legal issues. (R.63:¶ 6.) The sole issue is whether Amendment Six is valid notwithstanding Article I, Section 4 of the United States Constitution.

FairDistrictsFlorida.org, Inc., a political committee, proposed Amendment Six and gathered sufficient signatures to place it on the ballot. (R.68:¶ 5, R.73.) Voters approved Amendment Six on November 2, 2010, (R.68:¶¶ 6, 7; R.73), and it took effect on January 4, 2011, *see* Fla. Const. art. XI, § 5(e) (establishing effective dates for constitutional amendments).

Amendment Six reads:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing congressional district boundaries:
>
> (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

> (c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

Fla. Const. art. III, § 20.

Before Amendment Six, the Florida Constitution never specifically regulated congressional redistricting plans, which instead were enacted through the ordinary legislative process. *See Adv. Op. to Att'y Gen. re Stds. For Establishing Legis. Dist. Bounds.,* 2 So. 3d 175, 183 (Fla. 2009) (plurality) ("As noted by FairDistrictsFlorida.org [the political committee sponsoring Amendment Six], the Florida Constitution currently contains no guidelines for congressional districting."); § 8.0002, Fla. Stat. (statute establishing current congressional districts).[3]

Standard of Review

This Court reviews summary judgment decisions *de novo*. *Rojas v. Florida*, 285 F.3d 1339, 1341 (11th Cir. 2002).

SUMMARY OF ARGUMENT

Through a citizen initiative entirely divorced from the state's legislative process, Florida recently adopted a state constitutional amendment—Amendment Six—that would directly and substantially regulate federal elections by dictating

[3] At the same election, Florida's voters adopted "Amendment Five," which imposed identical standards for state legislative districts, Fla. Const. art. III, § 21,

requirements for congressional districts. Article I, Section 4 of the United States Constitution, known as the Elections Clause, provides that the "Times, Places and Manner" of holding congressional elections "shall be prescribed in each State *by the Legislature thereof*," which the Supreme Court has interpreted to mean "in accordance with the method which the state has prescribed for legislative enactments." Amendment Six is a federal election regulation but was *not* enacted in accordance with Florida's method for legislative enactments—indeed, it resulted from a process specifically designed to bypass the Legislature altogether.

The district court erred in dismissing the words "by the Legislature thereof," effectively writing them out of the constitution. The district court concluded that whether the Elections Clause assigned authority to "states" generally or "the Legislature thereof" was not what "really mattered to the Framers." But the Framers' words were carefully chosen, and they must be given meaning. Simply ignoring them runs contrary to all known rules of constitutional interpretation.

Because Amendment Six was enacted outside Florida's legislative process, it was not prescribed "by the Legislature thereof" and is not authorized by the Elections Clause.

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and added to substantial regulation of *state* redistricting already in the Florida Constitution, *see id*. § 16. Amendment Five is not challenged here.

Amendment Six is invalid for a second, independent reason. The Elections Clause permits only procedural regulations governing the mechanics of congressional elections—not substantive requirements designed to influence electoral outcomes. Amendment Six's purpose is to change electoral outcomes that the Amendment's sponsors disliked. This is not a permissible use of Elections-Clause authority.

For each of these reasons, this Court should reverse the decision below.

ARGUMENT

Article I, Section 4 of the United States Constitution—the Elections Clause—provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature* thereof," subject to Congress's supervisory authority. U.S. Const. art. I, § 4 (emphasis added). Nonetheless, Defendants insist that a state constitutional amendment—enacted by citizen initiative wholly outside and contrary to the manner prescribed for legislative enactments—can directly and substantively regulate federal elections, specifically congressional district boundaries.

The district court's judgment upholding Amendment Six is wrong for two independent reasons. First, Amendment Six's enactment by citizen initiative runs afoul of the plain constitutional text, which only empowers state *legislatures* to regulate federal elections. The Supreme Court has long understood this to mean Elections-Clause regulation "must be in accordance with the method which the state has prescribed *for legislative enactments*." *Smiley v. Holm*, 285 U.S. 355, 367, 52 S. Ct. 397, 399 (1932) (emphasis added); *accord Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569, 36 S. Ct. 708, 710 (1916). Amendment Six is invalid precisely because it was enacted wholly *outside* Florida's legislative process. The district court effectively read the words "by the Legislature" out of the Constitution. Its judgment must be reversed for that reason alone.

Second, even if the United States Constitution permitted regulation of federal elections *outside* the legislative process, it permits only "procedural regulations" governing "the mechanics of congressional elections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832, 894, 115 S. Ct. 1842, 1870, 1898 (1995); *Foster v. Love,* 522 U.S. 67, 69, 118 S. Ct. 464, 466 (1997). Amendment Six is invalid because it imposes *substantive* requirements with the express purpose of influencing electoral *outcomes*. The district court erred in holding otherwise, and on this *de novo* review, this Court must reverse.

I. AMENDMENT SIX IS INVALID BECAUSE THE UNITED STATES CONSTITUTION AUTHORIZES STATE REGULATION OF FEDERAL ELECTIONS ONLY THROUGH THE STATE'S LEGISLATIVE PROCESS.

It is well established that the Elections Clause's grant of authority to state legislatures is exclusive, and that states have no inherent authority to regulate federal elections. "Because any state authority to regulate election to [federal] offices could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522, 121 S. Ct. 1029, 1037 (2001) (citation and marks omitted); *see also U.S. Term Limits*, 514 U.S. at 805, 115 S. Ct. at 1856 ("[A]s the Framers recognized, electing representatives to the National Legislature was a new right, arising from the Constitution itself.").

It is equally well established that the Elections-Clause authority to regulate the manner of federal elections encompasses the establishment of congressional district boundaries. *See, e.g., Branch v. Smith*, 538 U.S. 254, 266, 123 S. Ct. 1429, 1438 (2003); *Smiley*, 285 U.S. at 366, 52 S. Ct. at 399; *Smith v. Clark*, 189 F. Supp. 2d 548, 550 (S.D. Miss. 2002) (three-judge court). Thus, like all regulation of federal elections, states' congressional redistricting is governed—and limited—by the Elections Clause. *See Cook*, 531 U.S. at 522-23, 121 S. Ct. at 1038 ("No other constitutional provision gives the States authority over congressional elections . . . ."); Joseph Story, 1 Commentaries on the Constitution of the United States § 627 (3d ed. 1858) ("[T]he states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution did not delegate to them . . . .").

Effective January 4, 2011, the Florida Constitution includes a new provision, Article III, Section 20—Amendment Six—which directly regulates federal elections by mandating substantive requirements for congressional districts. The amendment arose not through Florida's legislative process, but outside of that process: through a separate citizen-initiative process designed to bypass the Legislature altogether. The United States Supreme Court, however, has upheld the exercise of Elections-Clause authority only "as part of the legislative process." *Smiley,* 285 U.S. at 371, 52 S. Ct. at 401; *see also Hildebrant*, 241 U.S. at 569, 36

S. Ct. at 710. By validating this limitation, the Supreme Court has given meaning to the Framers' words "by the Legislature thereof." This Court must do the same.

A. The Federal Constitution's Words—"By the Legislature Thereof"—Must Be Given Meaning.

If states could enact federal election regulations without any involvement from—and indeed over the objection of—their state legislatures, then the phrase "by the Legislature thereof" would be left with no meaning or value, and the Constitution would be effectively amended to read:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State ~~by the Legislature thereof~~; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators.

In this case, the district court was dismissive of the phrase entirely, concluding that the Framers assigned it no worth. (RE 87:8.)

According to the district court, "[t]he Constitutional Convention clarifies what *really* mattered to the Framers when determining where to assign the power of regulating Congressional elections." (*Id.* (emphasis added).) What "really mattered," the district court concluded, was "whether Congress should have a supervisory role over the regulation [of] Congressional elections." (*Id.* at 9.) And in fact, the Framers did debate in detail Congress's role in regulating federal elections. *See, e.g.,* Federalist No. 59 (Hamilton). Ultimately, they adopted the Elections Clause, which gives authority to the state legislatures in the first instance,

subject to congressional oversight. But the Framers' debate on one issue (congressional supervision) cannot invalidate their choice of words on a second issue (whether authority is delegated to "states" or the "Legislature thereof"). The district court mistakenly concluded that the word "Legislature" simply did not matter to the Framers.[4]

As central support for its view, the district court pointed to a constitutional amendment proposed by Congressman Aedanus Burke in 1789. (RE 87:11.) Burke's amendment would have *supplemented* the Elections Clause and limited Congress's override authority to instances when "any State shall refuse or neglect, or be unable, by invasion or rebellion, to make such election." (*Id.*) The district court explained that the proposal's reference "simply to 'any State,'" was evidence that the word "Legislature" was unimportant to the Framers. (*Id.*) This evidence, the district court suggested, was "not a mere anomaly." (*Id.*)

In fact, it *was* an anomaly. Of the seven state ratifying conventions that proposed amendments to the Elections Clause, *five* referenced *state legislatures* expressly, and not "states" generally. Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 38-39 &

[4] The district court remarked that "[t]o supporters of the Elections Clause, the only argument worth having was over Congressional supervision." (RE 87:9-10.) The court also surmised that issues including whether "the state's electorate [would] have any role in the process . . . were *simply not issues at the time*." (*Id.* at 9 (emphasis added).)

nn.177-83 (2010). Burke's amendment, moreover, was an addition to—not a revision of—the Elections Clause, which would have retained the word "Legislature" already there. Finally, Burke's amendment was flatly rejected: James Madison denounced it as tending "to destroy the principles and the efficacy of the constitution," 1 Annals of Cong. 800 (1789) (Joseph Gales ed. 1834), and each of the six Congressmen who had been delegates to the Constitutional Convention (Burke had not been) voted against it, *id*. at 802.

The district court's conclusion that, because it kindled no controversy, the word "Legislature" was not maturely considered or purposefully employed, is foreign to all known rules of constitutional interpretation. Courts have never presumed to distinguish between those portions of the Constitution that "really mattered to the Framers" and those that did not. Nor have courts ever discounted uncontroversial provisions *because* they were uncontroversial, refusing to give effect to those parts of the Constitution that were universally approved. Rather, courts have consistently recognized that each word of our Constitution has meaning. The district court flouted that cardinal principle here.

1. Every Word in the United States Constitution Has Meaning.

Even if the district court were correct that "[n]either side in the debate over the Elections Clause addressed where the power over Congressional elections was located within the state governments," (RE 87:9), the constitutional language

cannot be ignored. The Framers' use of "Legislature"—like their use of every other word in the Constitution—was not casual or accidental, and concluding otherwise would contradict centuries of judicial respect for the United States Constitution's every word. As the Supreme Court underscored more than 200 years ago, "[i]t cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). Indeed, courts have striven to make every one of the Framers' words meaningful:

> To disregard such a deliberate choice of words and their natural meaning would be a departure from the first principle of constitutional interpretation. In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.

Wright v. United States, 302 U.S. 583, 588, 58 S. Ct. 395, 397 (1938) (marks and citations omitted). The proper interpretation of our Constitution "requires that *real effect* should be given to *all the words* it uses." *Myers v. United States*, 272 U.S. 52, 151, 47 S. Ct. 21, 37 (1926) (emphasis added).

This requirement recognizes not only the magnitude of the federal Constitution, but also the eminence of those who created it. "[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824).

Notably, the passage of time has strengthened—not weakened—the need to give each word meaning:

> The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.

Wright, 302 U.S. at 588, 58 S. Ct. at 397 (citations omitted).

Here, the district court erred by assigning no value to the words of the Constitution, instead concluding that what "really mattered" was something else. (RE 87:8.) The Framers chose—and the people adopted—the words "by the Legislature thereof." The district court should have given those words their proper weight and meaning.

2. The Phrase "By the Legislature Thereof," as Used in the Elections Clause, Refers to the State Legislative Process.

Rather than ignoring "by the Legislature thereof," the United States Supreme Court interpreted it in a meaningful way. As the parties agree, the proper meaning of that phrase is found in *Smiley v. Holm* and *Ohio ex rel. Davis v. Hildebrant*—two decisions that are controlling and definitive. *See also Lance v. Coffman*, 549 U.S. 437, 442, 127 S. Ct. 1194, 1198 (2007) (referring to *Smiley* and *Hildebrant* as "[o]ur two decisions construing the term 'Legislature' in the Elections Clause").

Smiley v. Holm

In *Smiley v. Holm*, the Supreme Court considered whether a state's gubernatorial veto applied to a congressional redistricting plan the state legislature had enacted. 285 U.S. at 361-62, 52 S. Ct. at 397. After carefully analyzing the Elections Clause's language and context, the Court concluded that the authority it confers "is that of making laws" and that the term "Legislature" in the Elections Clause necessarily refers to the State's legislative process, as defined by the state constitution. *Id.* at 366, 52 S. Ct. at 399. "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, 52 S. Ct. at 399 (emphasis added).

In reaching this conclusion, the Court considered the language the Framers chose for the Elections Clause's second part, which provides that "the Congress may at any time *by law* make or alter such regulations," U.S. Const. art. I, § 4 (emphasis added); *see also Smiley*, 285 U.S. at 368, 52 S. Ct. at 399. Because Congress was to act "by law," the presidential veto applied, just as with other federal lawmaking. *Smiley*, 285 U.S. at 369, 52 S. Ct. at 400. And because state and federal regulation pursuant to the Elections Clause "involve action of the same inherent character," Minnesota's veto provision was likewise applicable. *Id.* at

367, 52 S. Ct. at 399. In short, because the presidential veto applied to congressional lawmaking, the Court found nothing in the Election Clause to "exclude a *similar* restriction imposed by state Constitutions upon state Legislatures when exercising the lawmaking power." *Id.* at 369, 52 S. Ct. at 400 (emphasis added).

The Minnesota Constitution's veto provision was indeed "similar" to its federal counterpart because each constituted an express part of the legislative process. In the federal system, "[t]he President acts legislatively under the Constitution [in vetoing bills], but he is not a constituent part of the Congress." *Edwards v. United States*, 286 U.S. 482, 490, 52 S. Ct. 627, 630 (1932); *accord La Abra Silver Min. Co. v. U.S.*, 175 U.S. 423, 453, 20 S. Ct. 168, 178 (1899) ("[T]he approval by the President of a bill passed by Congress is not strictly an executive function, but is legislative in its nature . . . ."). Similarly, as the Court emphasized in *Smiley*, Minnesota's gubernatorial veto is "part of the legislative process." *Smiley*, 285 U.S at 369, 52 S. Ct. at 400; *see also Bogan v. Scott-Harris*, 523 U.S. 44, 55, 118 S. Ct. 966, 973 (1998) (citing *Smiley* as holding "that a Governor's signing or vetoing of a bill constitutes part of the legislative process"); *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (three-judge court) ("Congressional redistricting is a law-making function subject to the state's constitutional

procedures . . . . Both the Governor and the [legislature] are integral and indispensable parts *of the legislative process*.") (emphasis added).

As the Supreme Court noted, Article IV of the Minnesota Constitution, which governs the Legislature, provides that before any bill "becomes a law," it must "be presented to the governor of the state" for approval. *Smiley*, 285 U.S. at 363, 52 S. Ct. at 398 (quoting Minn. Const.). If he returns it without approval, the bill may still become law, but only if passed by two-thirds of each house. *Id.* (citing Minn. Const.).

That the veto power is legislative in character is further highlighted by its organizational placement in the federal and state constitutions. The President's executive duties are outlined in Article II of the United States Constitution. U.S. Const. art. II, § 1. But his veto power is found in Article I, which governs the legislative branch. *Id.* art. I, § 7. Likewise, the Minnesota governor's veto authority appears in Article IV of the Minnesota Constitution, entitled "Legislative Department," but executive duties reside in a separate article, entitled "Executive Department." Minn. Const. art. IV, § 23; *id*. art. V.

Because a governor's veto has long been regarded as part of the legislative process, upholding the Minnesota governor's veto of a redistricting plan did not offend the Elections Clause's "by the Legislature thereof" limitation.

Hildebrant

Earlier, in *Ohio ex rel. Davis v. Hildebrant*, the Supreme Court upheld an Ohio referendum, which vetoed the legislature's redistricting plan. 241 U.S. at 566, 36 S. Ct. at 709. The Ohio Constitution allowed for not only a gubernatorial veto, but also a referendum "to approve or disapprove by popular vote any law enacted by the general assembly." *Id.* Through that referendum power, the electors rejected the legislature's redistricting plan. *Id.* Challengers filed suit, contending that a people's veto of a redistricting plan violated the Elections Clause. *Id.* at 566-67, 36 S. Ct. at 709. The Supreme Court rejected that argument, explaining that Ohio's referendum mechanism, like the gubernatorial veto power, "was treated as *part of* the legislative power." *Id.* at 568, 36 S. Ct. at 710 (emphasis added).

As in *Smiley*, the Supreme Court in *Hildebrant* carefully analyzed the state constitution. The Court emphasized that the Ohio Constitution "expressly declared" that the legislative power was "vested not only in the senate and house of representatives of the state, constituting the general assembly, but in *the people,* in whom a right was reserved by way of referendum to approve or disapprove by popular vote *any law* enacted by the general assembly." *Id.* at 566, 36 S. Ct. 709 (emphasis added). In other words, as the Court later explained in *Smiley,* the State

made "the referendum in establishing congressional districts . . . *a part of the legislative process*." 285 U.S. at 371, 52 S. Ct. at 401 (emphasis added).

The people's referendum veto in *Hildebrant* was therefore not unlike the governor's veto in *Smiley*. Both were specifically and expressly authorized by their state constitutions *as part of the legislative process*. In Ohio, the "people exercise the veto power through the referendum" over all "laws passed by the General Assembly," *State ex rel. Turner v. U.S. Fid. & Guar. Co. of Baltimore, Md.*, 117 N.E. 232, 258 (Ohio 1917); *accord City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 673, 96 S. Ct. 2358, 2362 (1976) (describing Ohio's referendum process as "amounting to a veto power, over enactments of representative bodies"). The Ohio governor has his own, separate veto power. Ohio Const. art. II, § 16. The people's and the governor's vetoes are expressly provided for in their constitutions as parts of the legislative process, so the exercise of either veto is "in accordance with the method which the state has prescribed for legislative enactments" and consistent with the Elections Clause. *Smiley*, 285 U.S. at 367, 52 S. Ct. at 399; *see also id.* at 372-73, 52 S. Ct. at 401 (Elections Clause does not preclude a state from subjecting congressional redistricting plans to "the veto power . . . *as in other cases of the exercise of the lawmaking power*.") (emphasis added).

Smiley and *Hildebrant* make clear that a state's Elections-Clause authority must be exercised through its legislative process.[5] Indeed, the Secretary acknowledged as much below. (R.81:5) ("The Secretary has continually maintained that a state's Elections Clause powers are to be exercised by the legislative power of the state—whatever the state constitution defines that to be.").[6]

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[5] Decisions preceding *Smiley* and *Hildebrant* further demonstrate that "by the Legislature thereof" must have meaning. *See, e.g., Opinion of the Justices of the Supreme Judicial Court on the Constitutionality of the Soldiers' Voting Bill,* 45 N.H. 595, 605-07 (1864) (upholding legislative act permitting absent soldiers to vote, notwithstanding contrary state constitutional provision, because legislatures exercise their Elections Clause authority "untrammeled by the provision of the State constitution"); *see also In re Plurality Elections,* 8 A. 881, 882 (R.I. 1887) ("[T]he state constitution is manifestly in conflict with [the Elections Clause] if it be construed to . . . impose a restraint upon the power of prescribing the manner of holding such elections which is given to the legislature by the constitution of the United States without restraint . . . .").

[6] Other authorities demonstrate this principle. Following the 2000 census, a state court drew Mississippi's congressional districts, adopting a plan proposed by litigants. *Smith v. Clark*, 189 F. Supp. 2d 503, 505-06 (S.D. Miss. 2002) (three-judge court). The federal district court enjoined the state court's plan based on the Federal Voting Rights Act. *Smith v. Clark*, 189 F. Supp. 2d 529 (S.D. Miss. 2002). In the alternative, the district court also held that the court-drawn plan violated the Elections Clause because "the state authority that produces the redistricting plan must, in order to comply with [the Elections Clause], find the source of its power to redistrict in some act of the legislature." *Smith v. Clark*, 189 F. Supp. 2d 548, 550 (S.D. Miss. 2002). Analyzing *Smiley* and *Hildebrant*, the court concluded "that congressional redistricting must be done by a state in the same manner that other legislative enactments are implemented." *Id.* at 553; *see also Grills v. Branigin*, 284 F. Supp. 176, 180 (S.D. Ind. 1968) ("[The Elections Clause] clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts."), *aff'd*, 391 U.S. 364, 88 S. Ct. 1666 (1968). The Supreme Court affirmed the *Smith* decision on the original, VRA basis and did not

3. ***The Framers' Assignment of Federal Authority to State Legislative Processes Was Purposeful.***

Even without the definitive guidance *Smiley* and *Hildebrant* provide regarding the meaning of "by the Legislature thereof," it is clear that the constitutional grant of Election-Clause authority to state legislative processes—and not to "states" generally—was purposeful. After compromising on a bicameral legislature, the Framers vigorously debated how federal elections should be regulated. Some contended the states should control entirely; others believed the federal government should. *See* Federalist No. 59 (Hamilton) ("[T]here were only three ways in which this power could have been reasonably modified and disposed:

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pass on the court's alternative holding. *See Branch v. Smith*, 538 U.S. 254, 261, 265-66, 123 S. Ct. 1429, 1435, 1437 (2003).

Not long thereafter, the Supreme Court passed on another opportunity to consider the issue. In *Salazar v. Davidson*, the Colorado state court concluded the Elections Clause "broadly encompass[es] any means permitted by state law," including court orders. 79 P.3d 1221, 1232 (Colo. 2003). It did so without any mention of—much less a rejection of—*Smith v. Clark.* The Supreme Court declined review in *Salazar,* but Chief Justice Rehnquist and Justices Scalia and Thomas dissented from the denial of *certiorari*:

> Generally the separation of powers among branches of a State's government raises no federal constitutional questions, subject to the requirement that the government be republican in character. But the words "shall be prescribed in each State by the *Legislature* thereof" operate as a limitation on the State. And to be consistent with Article I, § 4, there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts.

Colo. Gen. Assembly v. Salazar, 541 U.S. 1093, 1095, 124 S. Ct. 2228, 2230 (2004) (Rehnquist, C.J., dissenting).

that it must either have been lodged wholly in the national legislature, or wholly in the state legislatures, or primarily in the latter and ultimately in the former."). The resulting compromise assigned the authority to state legislatures in the first instance, but subject to congressional supervision. U.S. Const. art. I, § 4.

By allowing state legislatures to regulate in the first instance—instead of giving the authority exclusively to Congress—the compromise delivered necessary flexibility to the states. *See* Federalist No. 59 (Hamilton) (noting that the compromise placed "regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory"). The benefits Hamilton described derived from the legislatures' superior knowledge regarding local conditions and issues. "It was found necessary to leave the regulation of [federal elections], in the first place, to the state governments, as being best acquainted with the situation of the people . . . ." The Records of the Federal Convention of 1787 (Farrand) Vol. III at 312.

The Framers thus assigned the task to state legislatures, which could flexibly respond to local conditions. *Id*. But if the regulation of federal elections—including congressional redistricting—were substantially circumscribed by initiative amendments, this flexibility would disappear. The regulation could be modified or undone only by subsequent constitutional amendments and would

preclude legislative response to ever-changing conditions. Regulation by ordinary legislation, which the Framers intended, is always subject to review or reconsideration by future legislatures. *See Neu v. Miami Herald Pub. Co.,* 462 So. 2d 821, 824 (Fla. 1985) (legislatures may not bind future legislatures); *see also Adv. Op. to Att'y Gen.—Ltd. Marine Net Fishing*, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring) (unlike constitutional amendments, "[s]tatutory law . . . provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society").

Their purpose aside, though, the Framers "must be understood to . . . have intended what they have said." *Gibbons*, 22 U.S. at 188. And what they said was that the regulation of federal elections is not accomplished by "states," but "by the Legislature thereof." If that distinction "meant little to them," as the district court supposed, (RE 87:10), the Framers would not have included the words "by the Legislature thereof."

Finally, if the regulation of federal elections was to be by "states" generally, *Smiley* and *Hildebrant* would not have included careful analysis of whether the vetoes were exercised *as part of the legislative process.* The Court instead would have simply announced that the Elections Clause gave authority to states generally, avoiding a useless discussion of those states' specific legislative processes.

4. Federally Conferred Authority Cannot Be Circumscribed by State Constitutions.

Defendants insisted below that because the Florida Constitution established the Florida Legislature, the former had unconstrained control of the latter. The problem with that argument is that the Florida Constitution cannot control what its sovereign does not possess. This case is unconnected to "ordinary principles of [state] constitutional supremacy," (R.71:2), because all state authority to regulate federal elections flows from the federal Constitution, and states may regulate "only within the exclusive delegation of power under the Elections Clause," *Cook v. Gralike*, 531 U.S. 510, 523, 121 S. Ct. 1029, 1038 (2001). Thus, in this very narrow context, it matters not that the Florida Constitution is the "supreme law of the state" or that "[t]he Florida Legislature is a creature of the Constitution that creates it." (R.74:2, 12; R.72:3; *see also* RE 87:18.) What matters, for purposes of the Elections Clause, is whether the law was enacted by the "Legislature thereof," as interpreted by the Supreme Court.

The Elections Clause is not the only provision assigning duties to state legislatures. The Constitution granted state legislatures authority to ratify constitutional amendments, to choose Senators (before the Seventeenth Amendment), and to designate the method of selecting presidential electors. U.S.

Const. art. I, § 3; art. II, § 1; art. V.[7] With respect to each of these, the Supreme Court has recognized that state legislatures' authority extends beyond any specific state constitutional limitation.

In *Hawke v. Smith*, the Supreme Court considered a state constitutional provision purporting to reserve an initiative right of citizens to direct their state legislature's ratification of federal amendments. 253 U.S. 221, 225, 40 S. Ct. 495, 496 (1920). The Supreme Court held that notwithstanding a state's general sovereignty to control its own affairs, "[t]he act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented." *Id.* at 230, 40 S. Ct. at 498. That federal authority "transcends any limitations sought to be imposed by the people of a state." *Leser v. Garnett*, 258 U.S. 130, 137, 42 S. Ct. 217, 218 (1922); *see also Trombetta v. State of Florida*, 353 F. Supp. 575, 577 (M.D. Fla. 1973) (invalidating similar Florida constitutional provision). The Framers thus entrusted the important responsibility of considering constitutional amendments not to "states" generally, but to the Legislatures thereof.

[7] In other provisions, the Constitution authorized "states" generally. *See, e.g.*, U.S. Const. art. I, § 8 (reserving "to the States" appointment of certain officers); *id.* art. I, § 10 (detailing actions "[n]o state shall" take absent federal approval); *id.* amend. X (reserving non-delegated powers "to the States respectively, or to the people"). In other provisions, the Constitution grants authority directly to the people. *See, e.g.,* U.S. Const. art. I, § 2 (Representatives to be elected "by the People of the several States").

In addition, the Framers tasked state legislatures with choosing United States Senators. The Framers entrusted the election of House members to "the People of the several States" but deliberately provided that Senators would be "chosen by the Legislature" of each state. U.S. Const. art. I, §§ 2, 3. Indeed, the differing methods of selecting members prove that the Framers found a meaningful difference between direct action by a State's people and indirect action through the state legislature.

In 1913, the Seventeenth Amendment modified the Constitution to provide that Senators, too, would be "elected by the people." *See* U.S. Const. amend. XVII. Yet the Framers' original plan demonstrates their acute understanding of the difference between assigning authority to states' *people* and to states' *legislatures*. And just as voters could not—by initiative or otherwise—direct their legislatures to ratify amendments, they could not direct their legislatures to elect particular Senators. *Hawke*, 253 U.S. at 228, 40 S. Ct. at 497 ("It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote."); *see also U.S. Term Limits,* 514 U.S. at 804 n.16, 115 S. Ct. 1842 at 1855 n.16 ("The power of state legislatures to elect Senators comes from an express delegation of power from the Constitution . . . ."). Indeed, if a state could have required its legislature to elect the Senators preferred by the people, the Seventeenth Amendment would have

been unnecessary. But "[t]he necessity of the amendment to accomplish the purpose of popular election is shown in the adoption of the amendment." *Hawke*, 253 U.S. at 228, 40 S. Ct. at 497.

The state legislatures' authority to ratify amendments or elect senators differs from their authority to regulate federal elections, because only the latter is exercised as through traditional legislative function. *See Smiley*, 285 U.S. at 365, 52 S. Ct. at 399 ("The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function."). But the legislatures' authority to direct the manner of appointing presidential electors directly "parallels" the duty under the Elections Clause. *U.S. Term Limits*, 514 U.S. at 804-05, 115 S. Ct. at 1855. Therefore, the Supreme Court's consideration of Article II, Section 1, is particularly instructive.

The Constitution provides that "Each State shall appoint, *in such Manner as the Legislature thereof may direct*, a Number of [presidential] Electors." U.S. Const. art. II, § 1 (emphasis added). This provision and the duty it imposes were scrutinized during the contested 2000 election. In *Bush v. Palm Beach County Canvassing Board*, the United States Supreme Court unanimously vacated a Florida Supreme Court decision invalidating a state canvassing law. 531 U.S. 70, 78, 121 S. Ct. 471, 475 (2000) (per curiam). The United States Supreme Court expressed concern that the Florida court relied on the state constitution to

undermine the Legislature's Article II, Section 1, federal authority. *Id*. at 77, 121 S. Ct. at 475. "There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with [Article II, Section 1], 'circumscribe the legislative power.'" *Id.*

In rejecting the Florida Supreme Court's decision, the United States Supreme Court looked to *McPherson v. Blacker*, which described the state legislature's Article II, Section 1 authority: "The appointment of these electors is . . . placed absolutely and wholly with the legislatures of the several states . . . ." 146 U.S. 1, 34-35, 13 S. Ct. 3, 10 (1892) (*quoting* S. Rep. No. 43-395, at 9 (1874)). In *McPherson*, the Court rejected the notion that the *people*—as opposed to their legislatures—could exercise this authority. "The clause under consideration does not read that the people or the citizens shall appoint . . . ." *Id.* at 25, 13 S. Ct. at 7. Had the Constitution merely delegated authority to "States," the state legislatures' decisions would have stood only "in the absence of any provision in the state constitution in that regard." *Id.* But instead, the Constitution provided that each State shall act "in such Manner as *the Legislature thereof* may direct." *Id.* (emphasis added). Thus, like the Elections Clause, the presidential-elector

provision granted authority to state legislatures, and that authority could not be bypassed or circumscribed by a state constitutional provision.[8]

Bush v. Palm Beach County Canvassing Board is therefore in harmony with *Smiley* and *Hildebrant*. The decisions analyze parallel constitutional provisions regulating the election of federal officers—Article II, Section 1, and the Elections Clause—and they demonstrate that a federal assignment of authority to state legislatures cannot be circumscribed by state constitutions. "[O]nly the legislative

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[8] *Bush v. Gore* later provided the Court an opportunity to resolve finally the 2000 presidential election dispute. Although the majority decided the case on other grounds, Chief Justice Rehnquist's concurrence, joined by two other Justices, seized on *McPherson*'s principles. The Chief Justice reasoned that the Florida Supreme Court could not change the Legislature's electoral plan, and no Justice cast doubt on this analysis. 531 U.S. 98, 113-14, 121 S. Ct. 525, 534 (2000) (Rehnquist, C.J., concurring); *see also Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1011 (S.D. Ohio 2008) ("The four dissenting justices [in *Bush v. Gore*] did not appear to disagree that the Florida legislature had exclusive power under Article II."); *id*. at 1012 ("The seven justices who joined in opinions addressing the authority of the state legislatures under Articles II all recognized the exclusive role given therein.").

Earlier in 2000, the United States Supreme Court invalidated California's blanket primary system. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586, 120 S. Ct. 2402, 2414 (2000). The challenged state provision was adopted through a citizen initiative, but the Court ruled on First Amendment grounds without addressing any Elections-Clause issue. But Justice Stevens wrote separately and expressed concern that the Elections Clause prohibited election regulation by initiative. "The text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state 'Legislature[s].'" *Id.* at 602, 120 S. Ct. at 2423 (Stevens, J., dissenting). Justice Stevens reserved judgment on the issue because it

branch has the authority, *under Articles I and II* of the United States Constitution, to prescribe the manner of electing candidates for federal office." *Libertarian Party of Ohio v. Brunner*, 567 F. Supp. 2d 1006, 1011 (S.D. Ohio 2008) (citing *Palm Beach County*) (emphasis added).

The district court fundamentally misunderstood the authority the federal constitution granted state legislatures, and it was wrong to rely on the fact that "[t]he Legislature is but an instrumentality appointed by the Constitution of this state to exercise a part of its sovereign prerogatives." (RE 87:18 quoting *State ex. Rel. Cunningham v. Davis*, 123 Fla. 41 (Fla. 1936).) State regulation of federal elections constitutes an exercise of federal authority, not state "sovereign prerogatives." That regulation is thus governed by the federal constitution, which commits the authority to the state legislative process. *Smiley*, 285 U.S. at 371; *Hildebrant*, 241 U.S. at 569, 36 S. Ct. at 710.

B. Amendment Six is a Regulation of Federal Elections But Was Not Enacted Through Florida's Legislative Process.

Because all federal election regulation must be authorized by the Elections Clause, and because Elections-Clause authority must be exercised "as part of the legislative process," *id.*, Amendment Six can survive only if (i) it is not a regulation of federal elections, or (ii) it was enacted through Florida's legislative

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was not raised by the parties. He noted, however, "that the importance of the point merits further attention." *Id.* at 603, 120 S. Ct. at 2423 (Stevens, J., dissenting).

process. As the Secretary acknowledged, Amendment Six *is* a regulation of federal elections, (R.71:15; R.81:4), and *was not* enacted through the legislative process (R.72:2). It is therefore invalid.

1. Amendment Six is a Regulation of Federal Elections.

On its face, Amendment Six governs the "Standards for Establishing Congressional District Boundaries." The Secretary acknowledged below that Amendment Six is a regulation of federal elections, (R.71:15; R.81:4), and indeed it has long been understood that redistricting "standards" are themselves election regulations. For example, under its Elections-Clause authority to "make or alter such Regulations," Congress has regularly made "such Regulations" by imposing standards for congressional districts. Congress currently requires single-member districts. *See* 2 U.S.C. § 2c ("no district to elect more than one Representative"). Earlier, Congress mandated other standards. The Apportionment Act of 1842, 5 Stat. 491, imposed a requirement for single-member, contiguous districts. The Apportionment Act of 1862, 12 Stat. 572, additionally mandated districts with nearly equal populations, and the Apportionment Act of 1901 imposed a "compactness" standard, 31 Stat. 733.

Although these "standards" left the actual line-drawing to state legislatures, they unmistakably regulated the "manner" of federal elections, pursuant to the Elections Clause. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399,

415, 126 S. Ct. 2594, 2608 (2006) ("Congress, as the text of the [Elections Clause] also provides, may set further requirements, and with respect to districting it has generally required single-member districts.") (Kennedy, J.).

In *Vieth v. Jubelirer*, the Court explored Congress's history of redistricting standards, which, the Justices noted, were imposed under "[t]he power bestowed on Congress to regulate elections" under the Elections Clause. 541 U.S. 267, 276, 124 S. Ct. 1769, 1775 (2004) (plurality). Indeed, as the Secretary acknowledged below, Congress's Apportionment Acts demonstrate that redistricting "standards" regulate "the manner of federal elections." (R.71 at 17 n.11.) The standards Amendment Six would impose—like the standards Congress has imposed—regulate the manner of federal elections. To prescribe that representatives will be elected from compact and contiguous districts that use political and geographical boundaries is to prescribe the manner in which federal elections will be conducted. Therefore, Amendment Six is valid only if the Elections Clause authorizes it.

2. Amendment Six Was Not Enacted Through Florida's Legislative Process.

Smiley and *Hildebrant* establish that the Framers' use of "Legislature" must be given effect and that, accordingly, the Elections Clause authorizes only those measures that are adopted through the legislative process. *See, e.g., Smith*, 189 F. Supp. 2d at 553 ("*Smiley* indicates that congressional redistricting must be done by a state in the *same manner that other legislative enactments are implemented*.")

(emphasis added). The Secretary does not dispute this: "The Secretary has continually maintained that a state's Elections Clause powers are to be exercised by the legislative power of the state—whatever the state constitution defines that to be." (R.81:5.) Yet Amendment Six, which would regulate congressional elections, was enacted contrary to—and wholly outside—Florida's legislative process.

The Florida Constitution defines the State's legislative power clearly and unmistakably in Article III: "The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district." Fla. Const. art. III, § 1. Bills passed by the Legislature are subject to gubernatorial veto, which is contained in the legislative power, and which the Legislature can override. *Id.* art. III, § 8.

The citizen-initiative amendment power, on the other hand, is quite different. It resides in Article XI of the Florida Constitution, which governs all constitutional amendments. "The power to propose the revision or amendment of any portion or portions of this constitution by initiative is reserved to the people . . . ." *Id.* art. XI, § 3. Once a sponsor obtains sufficient petition signatures, its proposed amendment is submitted to a vote. *Id.* art. XI, § 5.[9] Through this procedure—and over the

[9] The Florida Constitution also permits amendments by other means, including proposal by the Legislature or periodic commissions. *Id.* art. XI, §§ 1, 2, 4, 6.

Legislature's opposition—the political committee sponsoring Amendment Six advanced the amendment. (RE 87:3-4.)[10]

Unlike the Ohio Constitution at issue in *Hildebrant,* Florida's Constitution does not vest any "legislative power . . . in the people," much less reserve a right of the people "by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly." *Hildebrant*, 241 U.S. at 566, 36 S. Ct. at 709. The initiative right of Floridians is limited to amending the constitution and does not extend to the legislative process. Indeed, far from allowing participation in the legislative process, Florida's initiative process "was adopted to bypass legislative . . . control." *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1063 (Fla. 2010) (plurality). "[S]ome of Florida's most crucial legal principles have evolved as a result of the initiative process. *However, the legislative power of the state is vested in the Legislature . . . .*" *In re Advisory Op. to Atty. Gen. ex rel. Limiting Cruel & Inhum. Conf. of Pigs*, 815 So. 2d 597, 601 (Fla. 2002) (Pariente, J., concurring) (quoting *Advisory Op. to the Atty. Gen.—Ltd. Marine Net Fishing*, 620 So. 2d 997, 1000 (Fla. 1993)) (emphasis added).

The processes associated with legislative and initiative-amendment powers differ as well. The legislative process involves substantial debate, compromise,

[10] Florida's Legislature opposed Amendment Six and its inclusion on the ballot. *See, e.g., Roberts v. Brown*, 43 So. 3d 673, 676 (Fla. 2010); *Adv. Op. to Att'y Gen. re Stds. for Estab. Legis. Dist. Bounds.*, 2 So. 3d 175, 181 (Fla. 2009).

transparency, and citizen involvement. "[A]ny proposed law must proceed through legislative debate and public hearing. Such a process allows change in the content of any law before its adoption." *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984); *accord Campbell v. Buckley,* 203 F.3d 738, 748 (10th Cir. 2000) ("Before a vote on a bill, it is subject to committee consideration, amendment, and debate according to the rules of the general assembly. The legislative process and the initiative process are so fundamentally different . . . ."). The initiative-amendment process contrasts sharply because "[n]o official record of legislative history or debate [is] available." *Fine*, 448 So. 2d at 989. Indeed, electors vote on initiatives relying on a limited ballot title and summary (limited to fifteen and seventy-five words, respectively). § 101.161, Fla. Stat. The Florida Supreme Court has therefore acknowledged that the title and summary "need not explain every ramification of a proposed amendment, only the chief purpose." *Advisory Op. to the Attorney Gen. re Extending Existing Sales Tax*, 953 So. 2d 471, 482 (Fla. 2007) (marks omitted). In addition, the legislative process affords a gubernatorial veto. Fla. Const. art. III, § 8. The initiative process offers none. *See id.* art. XI.

Finally, that the two powers are distinct is highlighted by the fact that Ohio has both. Indeed, the "people's-veto" referendum power in *Hildebrant* is designated in the Ohio constitution as "the second aforestated power reserved by the people." Ohio Const. art. II, § 1c. The "first aforestated power reserved by the

people is designated the initiative," under which electors may propose amendments to the state constitution. *Id.* § 1a. Florida's constitution reserves to its people a power like Ohio's "first aforestated power," but not its second.

At bottom, as the Secretary correctly stated in briefing below:

> Amendment 6 was not enacted through the ordinary legislative process. Constitutional amendments are never enacted through the ordinary legislative process, as there are fundamental differences between ordinary legislation and constitutional provisions, and there are, by constitutional design, distinct procedures for amending the Florida Constitution and enacting Florida Statutes.

(R.77:2.)

The Secretary has acknowledged that: (i) Amendment Six is a regulation of federal elections; (ii) States' exercise of Elections-Clause authority must be through the legislative process; and (iii) Amendment Six was *not* enacted through Florida's legislative process. (R.71:15, 17 n.11; R.77:2; R.81:4, 5.) Each of these concessions is correct, and together they demonstrate Amendment Six's invalidity.

The district court did not expressly disagree with any of these concessions, but it nonetheless upheld Amendment Six. Its decision not only conflicts with *Smiley* and *Hildebrant*, but also removes all meaning from "by the *Legislature* thereof," neutering the Framers' words. Moreover, the decision betrays the district court's fundamental misunderstanding about the proper inquiry. The district court confused the separate issues of: (i) whether Amendment Six was enacted *pursuant*

to the legislative process, and (ii) what Amendment Six *would do in the legislative process*, if properly enacted.

C. The District Court Misunderstood the Nature of Amendment Six.

The district court's error flowed not only from its disregard of "by the Legislature thereof" and *Smiley*'s and *Hildebrant*'s critical teachings, but also from its misunderstanding of Amendment Six's nature. Although Amendment Six constitutes a direct and substantive regulation of federal elections, the district court looked not to whether it was enacted "in accordance with the method which the state has prescribed for legislative enactments," *Smiley*, 285 U.S. at 367, 52 S. Ct. at 399, but to whether (after adoption) Amendment Six would *impact* the legislative process. "From the petition phase onward, amendment VI was contemplated as a constitutional restriction upon the Florida legislature." (RE 87:16-17; *accord id*. at 19 ("[I]t attaches a series of conditions, adopted in accordance with the state constitution, to eventual legislative action on redistricting.").)

The district court thus missed the difference between an amendment merely altering the legislative *process* (such as adopting a veto power over all legislative enactments), and an amendment that actually regulates federal elections (such as Amendment Six). Defendants invited this confusion, arguing that Amendment Six was akin to Ohio's constitutional amendment authorizing a people's veto over

legislative actions. (*See*, *e.g.*, R.78:7.) But the adoption of the constitutional veto provisions in Ohio and Minnesota was unlike the adoption of Amendment Six. Those provisions governed the legislative *process* and applied to all legislation, not just congressional redistricting.

Furthermore, veto authority does not narrow the states' legislative authority. The vetoes in *Smiley* and *Hildebrant* did not subject the legislative apportionment to new substantive rules. Rather, they simply prevented the congressional districts from taking effect, essentially wiping the slate clean and requiring the *legislatures* to draw new district lines. *See Smiley*, 285 U.S. at 363, 52 S. Ct. at 398; *Hildebrant,* 241 U.S. at 566, 36 S. Ct. at 709 (laws rejected by people's veto "should have no effect"). They did not restrict future legislative choices, and they did not remove the flexibility that the legislative process affords. They certainly did not substantively target and regulate federal elections—or anything else. Indeed, they had nothing to do with federal elections, except to the extent they governed the legislative *process* for *all* state legislation, which happens to include federal election regulation.[11]

[11] The district court appeared to recognize the distinction, explaining that the veto provisions in *Smiley* and *Hildebrant* "had nothing to do with redistricting. It only happened that they were used against redistricting laws in the instances that produced the two Supreme Court cases." (RE 87:17.) Yet the Court incorrectly concluded that *Smiley* and *Hildebrant* authorized Amendment Six.

That Ohio's "people's veto" provision or Minnesota's gubernatorial veto were adopted through citizen initiatives, therefore, is of no moment. Neither amendment was a regulation of federal elections, so the Elections Clause was not implicated. Indeed, the existence of the veto provision was not challenged in *Smiley* or *Hildebrant*—only the exercise of the veto as applied to federal election regulation.[12] The Ohio and Minnesota provisions merely altered those states' legislative processes by adding a people's and gubernatorial veto, respectively, as process restrictions on general legislative power. Florida's constitution is similarly replete with general process restrictions, including a gubernatorial veto (which was approved by voters). *See* Fla. Const. art. III, § 8. No party has contended that Florida's veto provision—which governs Florida's legislative process generally—is inapplicable to congressional redistricting. Nor has any party argued the inapplicability of other process restrictions in the Florida Constitution. Quorum requirements and mandatory multiple readings, for example, are part of the legislative process, applicable to federal election regulation and other legislation alike. *See id*. art. III, §§ 4, 7. If the citizens amended their constitution to alter these *processes*, the Elections Clause likely would provide no obstacle. But when

[12] In *Smiley* and *Hildebrant*, the election regulation at issue was an actual redistricting plan that had been vetoed. Here, the election regulation at issue is Amendment Six itself—no actual redistricting plan has been enacted.

states wish to regulate federal elections, they must do so through the state's legislative process.

Amendment Six does not change the legislative process. There is nothing procedural about a requirement that congressional districts be compact and contiguous, that boundaries follow existing political and geographical lines, or that districts "result" in the protection of racial and language minorities. *See* Amendment Six. Thus, when Congress mandated that each congressional district have a single member, *see* 2 U.S.C. § 2c, it was not altering the "legislative process" for all state legislatures; it was demanding a particular result and regulating federal elections, pursuant to its Elections Clause authority, *see Vieth*, 541 U.S. at 276 (plurality) (Elections Clause authorizes congressional redistricting mandates).

Rather than analyzing whether Amendment Six was enacted as part of the legislative process (as required by the Elections Clause), the district court examined only whether (once adopted) it would impact the legislative process. This defective, circular logic would permit potentially limitless regulation of federal elections beyond the legislative process and the checks and protections inherent in that process. It would allow states to add constitutional "process" restrictions demanding their Legislatures enact any number of federal election regulations. It would allow states to impose a "process" under which the

Legislature must adopt districts as directed by the executive or other outside officials. *Cf. Libertarian Party of Ohio*, 567 F. Supp. 2d at 1011 (executive officials have no Elections Clause authority). Such a result contradicts the Framers' intent, the Elections Clause's plain language, and the Supreme Court precedent in *Smiley* and *Hildebrant*.

A State's regulation of federal elections "must be in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367, 52 S. Ct. at 399 (emphasis added); *accord Hildebrant*, 241 U.S. at 568, 36 S. Ct. at 710. Because Amendment Six was enacted otherwise, it is invalid.

II. AMENDMENT SIX IS ALSO INVALID BECAUSE IT IS NOT AN APPROPRIATE REGULATION OF THE TIME, PLACE, OR MANNER OF FEDERAL ELECTIONS.

Amendment Six suffers from an additional and independent defect. Even putting aside that it was enacted outside of the legislative process, it purports to impose substantive requirements that exceed a State's authority to regulate the times, places, and manner of federal elections. As the Supreme Court has emphasized, this grant of authority (even when properly exercised through the legislative process) extends only to "procedural regulations" and is "not as a source of power to dictate electoral outcomes." *U.S. Term Limits*, 514 U.S. at 833-34, 115 S. Ct. at 1869; *Smiley,* 285 U.S. at 366, 52 S. Ct. at 399 (Elections Clause authorizes "procedure and safeguards"); *Foster v. Love,* 522 U.S. 67, 69, 118 S. Ct.

464, 465 (1997) (Elections Clause authorizes rules governing "the mechanics of congressional elections").

During the Framers' debates, James Madison emphasized the Elections Clause's focus on procedural regulations by explaining that it governed: "'[w]hether the electors should vote by ballot or vivâ voce, should assemble at this place or that place; should be divided into districts or all meet at one place, sh[oul]d all vote for all the representatives; or all in a district vote for a number allotted to the district.'" *U.S. Term Limits*, 514 U.S. at 833, 115 S. Ct. at 1869 (quoting 2 Farrand 240). "Similarly, during the ratification debates, proponents of the Constitution noted: '[T]he power over the manner only enables them to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way.'" *Id.* (quoting 4 Elliot's Debates 71 (Steele statement at N.C. ratifying convention) (emphasis in original)).

Because the regulation of the "manner" of federal elections may reach only procedural and mechanical rules, the Elections Clause does not permit mandatory, substantive criteria for drawing congressional district lines that effectively "favor or disfavor" candidates, "dictate electoral outcomes," or otherwise skew the electoral process. *See id*. at 833-34, 115 S. Ct. at 1869. Therefore, in *Cook v. Gralike*, the Supreme Court invalidated a provision of the Missouri Constitution requiring federal ballots to include disclaimers regarding the candidates' position

on term limits. 531 U.S. 510, 514, 121 S. Ct. 1029, 1033 (2000). Missouri defended the provision as a valid regulation of the "time, place, and manner" of federal elections, just as Appellees do here. *Id.* at 515, 121 S. Ct. at 1034. Although the Elections Clause plainly reaches balloting regulations, *Smiley*, 285 U.S. at 366, 52 S. Ct. at 1034, the Court invalidated the regulation because it was not related to the "manner" of elections. "[I]n our commonsense view that term encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Cook*, 531 U.S. at 523-24, 121 S. Ct. at 1038 (quoting *Smiley*, 285 U.S. at 366, 52 S. Ct. at 397). "[F]ar from regulating the procedural mechanisms of elections," the regulation was designed to favor certain candidates and to handicap certain others. *Id.* at 525-26, 121 S. Ct. at 1039. It therefore attempted to impact electoral outcomes, and "[s]uch 'regulation' of congressional elections simply is not authorized by the Elections Clause." *Id.* at 526, 121 S. Ct. at 1040.[13]

[13] Because the amendment challenged in *Cook* was passed by citizen initiative, the parties disputed whether the Elections Clause could even authorize it. *Id.* at 513, 526 n.20, 121 S. Ct. at 1033, 1040 n.20. The Court found the amendment clearly unauthorized by the Elections Clause irrespective of its origin, so it did not analyze whether a state could exercise Elections-Clause authority by initiative. *Id.* at 526 n.20, 121 S. Ct. at 1040 n.20.

Similarly, Amendment Six is no mere procedural or mechanical regulation governing congressional elections. Like the amendment in *Cook*, Amendment Six seeks to impact the electoral outcomes. Indeed, the state legislators who intervened here admit they are "prospective Congressional candidates," and that "[t]he resolution of this action will directly affect [their] ability to protect their interests." (R.46:4.) Their interest to be protected, presumably, is their ability to win elections by the use of a redistricting scheme favoring their candidacies at the expense of others'. Indeed, the announced purpose of Amendment Six was to lead to the electoral rejection of incumbents. The political organization sponsoring the amendment candidly lamented on its website "that over the last decade only a small fraction of legislative incumbents have been defeated." *See* FairDistrictsNow, available at http://fairdistrictsnow.org/mission/ (last visited October 24, 2011). And intervening defendants insist that the Amendment was a response "to evidence indicating that for decades under the leadership of both parties, legislators had repeatedly configured districts to favor themselves," which led to "districts where electoral outcomes were determined long before election day." (R.74:1.) Amendment Six, therefore, seeks to address dissatisfaction with "electoral outcomes." Like the proponents of term limits in Arkansas and Missouri, Amendment Six's proponents want fewer reelected incumbents. This goal may not be pursued through Elections-Clause regulation.

Moreover, Amendment Six mandates that "districts shall not be drawn with the intent *or result* of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their *ability to elect representatives of their choice*." Fla. Const. art. III, § 20 (emphasis added). This requirement constitutes laudable policy, and the Congressperson Plaintiffs and the Florida Legislature have strong histories of promoting and protecting the rights of minorities and minority groups. But the requirement also demonstrates that Amendment Six is results-oriented and not a mechanical or procedural regulation. Indeed, its language is similar to language appearing in the Federal Voting Rights Act ("VRA"), *see* 42 U.S.C. §§ 1973, 1973c, and under federal law, electoral *outcomes* are a factor in determining VRA compliance, *see, e.g., Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1268 (11th Cir. 2004) (protected group must "demonstrate that a challenged structure or practice impedes its ability to determine the outcome of elections"); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1322-24 (S.D. Fla. 2002) (three-judge district court) (VRA challenge evaluating likelihood that minority-preferred candidates will prevail in elections).[14]

[14] Congress enacted the VRA (which addresses state and federal elections) not pursuant to its Elections Clause authority, but pursuant to the Fifteenth Amendment, which gives Congress express and exclusive authority to enforce the voting rights of minorities. *See Lopez v. Monterey County*, 525 U.S. 266, 282, 119 S. Ct. 693, 703 (1999); *City of Rome v. United States*, 446 U.S. 156, 173, 100 S. Ct. 1548, 1559 (1980).

Additionally, as the political committee sponsoring Amendment Six told the Florida Supreme Court in defending its ballot summary, "[t]he phrase presented by the summary and the amendment has the same essential meaning, and the application of the terms would lead to identical results, *i.e*. to allow political participation of minorities *and allow them to elect their chosen representatives*." *Adv. Op. to the Att'y Gen. re Stds. for Estab. Cong. Dist. Bounds.*, No. SC08-1149, Ans. Br. of Sponsor FairDistrictsFlorida.org, at 24-25 (2008), 2008 WL 3491010 (emphasis added). An amendment with a specific purpose of allowing certain groups to elect certain representatives is not a procedural or mechanical regulation. *See U.S. Term Limits*, 514 U.S. at 835, 115 S. Ct. at 1870 (rejecting notion that "disadvantaging a particular class of candidates" is permissible use of Elections-Clause authority). Regardless of Amendment Six's intentions of protecting minorities, it is inconsistent with the Elections Clause.

In upholding Amendment Six, the district court noted the "'great latitude' that state legislatures have under the Elections Clause." (RE 87:21 (quoting 2 Farrand 240).) "To be sure, the Elections Clause grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook*, 531 U.S. at 523, 121 S. Ct. at 1038 (quoting *Tashjian v. Republican Party of Conn*., 479 U.S. 208, 217, 107 S. Ct. 544 (1986)). But this broad power and

latitude did not encompass the results-oriented constitutional amendment in *Cook*, and it does not encompass Amendment Six's results-oriented regulation.

Because Amendment Six is not a procedural, mechanical regulation of federal elections, it is not authorized by the Elections Clause. Thus, even if it were enacted through the state's legislative process, it nonetheless would be invalid.

CONCLUSION

All state regulation of federal elections must be authorized by the Elections Clause, which provides that such regulations "shall be prescribed in each State by the Legislature thereof." The Supreme Court has interpreted this to mean that state regulation of federal elections is committed to the states' legislative processes. Amendment Six is a regulation of federal elections but was adopted contrary to—and wholly outside—Florida's legislative process. Therefore, Amendment Six is unauthorized by the Elections Clause.

Secondly, because it is designed to influence electoral outcomes, and because it operates well beyond the procedural and mechanical regulations the Elections Clause authorizes, Amendment Six is not an appropriate regulation of the "manner of holding elections." For this independent reason, Amendment Six is invalid.

This Court should reverse the district court and remand for entry of judgment in Appellants' favor, declaring Amendment Six invalid.

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7). This brief is submitted in 14-point Times New Roman font, and it contains 11,219 words, according to the word processing software on which it was created.

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Allen Winsor

CERTIFICATE OF SERVICE

This is to certify that on October 27, 2011, a copy of this brief was served by United States Mail, postage prepaid, on the individuals listed below. This further certifies that this same day, an electronic copy of the brief was transmitted to the email addresses listed below:

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