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 UNTED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA CIVIL ACTION NO. 10-CV-23968-UNGARO

SECRETARY OF STATE'S BRIEF

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CERTIFICATE OF INTERESTED PARTIES

The undersigned certify that the certificate contained in Appellants' Initial Brief is complete. *See* Eleventh Circuit Rule 26.1-1.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is scheduled for January 10, 2012.

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STATEMENT OF THE ISSUE

The issue on appeal is whether Amendment 6 – article III, section 20 of the Florida Constitution – which defines the state legislature's authority to draw congressional districts, violates the Elections Clause of the United States Constitution where the Supreme Court has 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." Smiley v. Holm, 285 U.S. 355, 368, 52 S. Ct. 397, 399 (1932).

STATEMENT OF THE CASE

The Secretary cites the record as (R.x:y), with "x" being the docket entry below and "y" being the page or paragraph number. The record excerpts are cited as (RE x:y).

Like Appellants, the Secretary also refers to the challenged provision, article III, section 20 of the Florida Constitution, as "Amendment 6."

A. Course of Proceedings

The Secretary is satisfied with Appellants' statement of the course of proceedings below.

B. Facts

The Secretary restates the facts agreed to in the district court below. *See* (R.68, R.73.) Specifically, Amendment 6 was validly enacted and is now article III, section 20 of the Florida Constitution, which provides:

> Section 20. STANDARDS FOR ESTABLISHING CONGRESSIONAL DISTRICT BOUNDARIES
>
> In establishing Congressional district boundaries:
>
> (1) 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.

> (2) Unless compliance with the standards in this subsection conflicts with the standards in subsection (1) 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.
>
> (3) The order in which the standards within sub-sections (1) and (2) of this section are set forth shall not be read to establish any priority of one standard over the other within that subsection.

(R.68:¶¶ 5-7, R.73.)

C. Standard of Review

The standard of review is *de novo*. *See* Initial Brief at 6.

SUMMARY OF THE ARGUMENT

Although the Elections Clause delegates to state "Legislatures" the authority to draw congressional districts, the Supreme Court has determined that this delegation by no means frees state legislatures from the legislative restrictions and processes that state constitutions often impose. To the contrary, the Supreme Court has upheld state constitutional restraints on lawmaking and has determined that a state retains the ultimate authority to define the lawmaking process by which congressional districts are drawn. Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397 (1932); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 36 S. Ct. 708 (1916).

Notwithstanding this precedent, Appellants argue that the Elections Clause precludes the citizenry of this State from amending their State Constitution to revise and limit the legislative process for congressional redistricting. Appellants question the validity of a duly enacted constitutional amendment because it was enacted "wholly outside" the legislative process and "over the Legislature's opposition." Initial Brief at 35-36. In doing so, Appellants suggest that, contrary to ordinary principles of constitutional supremacy, the Florida Legislature is the final arbiter of its own authority with respect to congressional redistricting and that constitutional limitations on its congressional reapportionment process are invalid unless adopted by the Legislature itself. As explained below, the Supreme Court has expressly rejected Appellants' position by sanctioning state constitutional

provisions that limit the means by which state legislatures enact congressional redistricting legislation, thereby confirming the supremacy of state constitutions in the context of congressional reapportionment. And, importantly, the Supreme Court did not focus on whether state constitutional restrictions on the legislature's lawmaking power to adopt redistricting legislation were *themselves* enacted as part of the legislative process. *See* Smiley, 285 U.S. at 367-68, 52 S. Ct. at 399. Rather, the Supreme Court focused on whether the state constitutional restrictions, once enacted, were made part of the state legislative process and lawmaking power, as that process and power is defined by the state constitution. Id.

Appellants' second argument is that a State is not authorized to impose substantive requirements on redistricting. But this ignores that the requirements at issue here impose generally accepted standards recognized for congressional redistricting, several of which merely parrot existing federal constitutional and statutory requirements. Additionally, the Elections Clause authorizes regulations designed to ensure that elections are fair and honest. Nevertheless, the federal power granted by the Elections Clause has long been understood to occur subject to state constitutional limitations on the exercise of legislative power. Indeed, nothing in the Elections Clause frees the state legislature from the constraints in the state constitution that created it.

ARGUMENT

The district court correctly denied the Appellants' joint motion for summary judgment and granted the Secretary's because there was no evidence of a genuine issue of material fact and the Secretary was entitled to judgment as a matter of law. Article III, section 20 of the Florida Constitution, created by a valid constitutional amendment, limits the scope of lawmaking authority and redefines the legislative process by imposing standards for the Florida Legislature to follow in carrying out its duty to draw congressional districts. As explained below, the United States Supreme Court has permitted states, through constitutional amendment, to limit and modify the state legislature's authority to draw congressional districts.

The Elections Clause, contained in Article I, Section 4 of the United States Constitution, 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 the authority of Congress to, at any time, make or alter such laws. Although the Elections Clause delegates to state "Legislatures" the authority to draw congressional districts, the Supreme Court has determined that this delegation by no means frees state legislatures from the restrictions that state constitutions often impose. To the contrary, the Supreme Court has held that the Elections Clause grant of authority to the state "Legislature" is subject to the state constitution's definition of its legislative power and that a state retains authority to

define the lawmaking process by which the legislature determines the times, places and manner of conducting congressional elections. Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397 (1932); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 36 S. Ct. 708 (1916). Invalidating a state constitutional amendment that restricts the scope of the legislature's power to draw congressional districts would defy the Supreme Court's determination that the Election Clause powers are to be exercised by the legislative power of the state, whatever the state constitution defines that to be.

I. AMENDMENT 6 IS VALID BECAUSE THE ELECTIONS CLAUSE AUTHORIZES REGULATION OF FEDERAL ELECTIONS THROUGH THE STATE'S LEGISLATIVE PROCESS

The Florida Constitution defines the lawmaking power of the Florida Legislature and authorizes the people to reshape that power by constitutional amendment, such as Amendment 6. There is "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." Smiley, 285 U.S. at 368, 52 S. Ct. at 399. The Elections Clause authorizes Amendment 6 because Amendment 6 itself defines the state's legislative process for reapportioning congressional districts and was enacted in the manner that the Florida Constitution provides for all initiative proposals.

A. The Supreme Court has Given Meaning to the Authority Granted by the Elections Clause to the State's "Legislature"; Such Authority is Subject to the State Constitution's Limitations on the Exercise of Legislative Power

The Supreme Court has recognized that the Elections Clause allows a state to define the lawmaking process by which it prescribes the times, places and manner of holding congressional elections and that its delegation to state legislatures necessarily implies that those legislatures are subject to state constitutional limitations on the exercise of legislative power. As a duly enacted constitutional limitation on the exercise of legislative power, Amendment 6 – article III, section 20 – applies to the Florida Legislature's exercise of its Elections Clause duties.

1. The definition of "Legislature" in the Constitution is function-based

The Elections Clause in Article I, Section 4 is one of many constitutional provisions granting federal authority to the state "Legislature." *See, e.g.*, U.S. Const. Art. I, § 8 (detailing the authority of the State "Legislature" to consent to the federal government's acquisition of land); id. Art. II, § 1 (instructing each State to appoint presidential electors, "in such Manner as the Legislature thereof may direct"); id. Art. V (providing that constitutional amendments are valid "when ratified by the Legislatures of three fourths of the several states"). But because "[t]he use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function," it is necessary to consider

"the function to be performed" in order to discern the breadth of authority conferred in a particular provision. Smiley, 285 U.S. at 365, 52 S. Ct. at 399. "As the [Elections Clause] authority is conferred for the purpose of making laws for the state, it follows . . . that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." Id. at 368, 52 S. Ct. at 399; *see also* id. at 366, 372, 52 S. Ct. at 399, 401. Here, the state constitution prescribes the method of congressional districting, pursuant to the authority conferred by the Elections Clause.

Appellants point to other constitutional provisions granting authority to State "Legislatures" that have been interpreted to authorize the legislative *body* to act without circumscription by the state constitution, but those provisions (and corresponding cases) are irrelevant here. *See* Initial Brief 27-29, 39-45. The Supreme Court has interpreted the Elections Clause differently. *See* Smiley, 285 U.S. at 366, 372, 52 S. Ct. at 399, 401. The Supreme Court in Smiley specifically contrasted the Elections Clause from *inter alia*, Article V, where the legislature acts as a "ratifying body," because "no legislative action [*i.e.*, lawmaking] is authorized or required" by Article V. Id. at 365-66, 52 S. Ct. at 399. In the Elections Clause, on the other hand, the Court found that the function contemplated was that of making laws. Id. 365-67, 52 S. Ct. at 399.

Given that the Supreme Court in Smiley has clearly distinguished between the authority granted by the Elections Clause and the authority granted by Article V of the U.S. Constitution, Appellants' reliance on Hawke v. Smith, 253 U.S. 221, 40 S. Ct. 495 (1920), Leser v. Garnett, 258 U.S. 130, 42 S. Ct. 217 (1922), and Trombetta v. Florida, 353 F. Supp. 575 (1973), is entirely misplaced. (*see* Initial Brief at 27). Indeed, in Hawke v. Smith, the Supreme Court found Hildebrant to be "inapposite" because the "legislative action" authorized by the Elections Clause "is entirely different from" the ratification authorized in Article V. Hawke, 253 U.S. at 230-31, 40 S. Ct. 498; *see also* id. at 229, 40 S. Ct. 498 (clarifying that ratification "is not an act of legislation" like that authorized in the Elections Clause and to suggest otherwise is "fallacious").

The Supreme Court's interpretations of Article II, Section 1 in Bush v. Palm Beach County Canvassing Board, 531 U.S. 70, 121 S. Ct. 471 (2000) and McPherson v. Blacker, 146 U.S. 1, 13 S. Ct. 3 (1892) are also irrelevant to this Court's Elections Clause analysis. First, the language of the delegation in the Elections Clause differs from the language of the delegation in Article II, Section 1, which provides that "[e]ach state shall appoint" presidential electors "in such manner as the Legislature thereof may direct." *Compare* U.S. Const. Art. I, § 4 (providing that the regulation of congressional elections "shall be prescribed in each State by the Legislature thereof"). Although both provisions refer to the state

"Legislature," "[t]he use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function." Smiley, 285 U.S. at 365, 52 S. Ct. 399. While the Elections Clause requires state legislatures to *regulate* congressional elections, Article II, Section 1 requires state legislatures to *appoint* presidential electors.[1] The Supreme Court in Smiley made clear that the constitutional delegation to state legislatures to regulate congressional elections under the Elections Clause "involves lawmaking in its essential features and most important aspect." Id. at 366, 52 S. Ct. at 399. The Supreme Court has never expressly held, however, that appointing presidential electors involves lawmaking in the traditional sense.

Moreover, the Supreme Court's refusal to defer to state courts with respect to the appointment of presidential electors and its preference for state courts in the context of congressional redistricting indicates a difference in the degree of authority granted to the states under Articles I and II. In Growe v. Emison, 507 U.S. 25, 113 S. Ct. 1075 (1993), the Supreme Court held that state courts have a significant role in congressional redistricting and that federal courts must defer consideration of disputes involving redistricting where the State, through its

[1] *See* Smiley v. Holm, 285 U.S. 355, 366, 52 S. Ct. 397 (1932) (referring to the second clause of Article I, Section 4, which provides that "the Congress may at any time by law make or alter such regulations" and holding that "[t]he phrase 'such regulations' plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections").

legislative *or* judicial branch, has begun to address the task itself. Citing to the Elections Clause in Article I, Section 4, the Court said "once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." Id. at 34, 113 S. Ct. 1081. The Court emphasized that both the state legislative and judicial branches are preferred over federal courts as agents of apportionment. Id. The Court's deference to state courts with respect to congressional reapportionment under the Elections Clause differs from the Court's treatment of state courts in the context of appointing presidential electors under Article II. *See* Palm Beach Co. Canvassing Bd., 531 U.S. at 76, 121 S. Ct. at 474 (affording the Florida Supreme Court little to no deference with respect to the appointment of presidential electors). Given this differential treatment, there is a difference in the scope of the delegation under the Elections Clause in Article I from that under Article II.

In any event, there are only two Supreme Court decisions addressing what the term "Legislature" *in the Elections Clause* means and what authority is conferred. *See* 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"). Both cases demonstrate that the use of the term "Legislature" in the Elections Clause means something different than what

the term means in other provisions relied upon by Appellants. But significantly, Smiley and Hildebrant demonstrate that the Elections Clause does not exempt state legislatures from the normal course of regulation by state constitutions. Smiley, 285 U.S. at 365, 52 S. Ct. 398. Where the Federal Constitution calls upon the state legislature to engage in lawmaking, a state constitution's supremacy as to legislative authority remains intact. Id. at 365-69, 52 S. Ct. at 398-400.

The Florida Legislature's exercise of lawmaking authority under the Elections Clause, as opposed to those provisions Appellants cited, must conform to state constitutional restraints on lawmaking. Subjecting the legislature to state constitutional "limitation[s]" on lawmaking is not "incongruous with the grant of legislative authority to regulate congressional elections" either. Smiley, 285 U.S. at 368, 52 S. Ct. at 399-400. Nothing in the Elections Clause "endow[s] 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. (emphasis added). The Supreme Court has found "no intimation" of a purpose to exclude restrictions "*imposed by state Constitutions* upon state Legislatures when exercising the lawmaking power." Id. at 369, 52 S. Ct. at 400 (emphasis added). State constitutional "conditions which attach to the making of state laws" "cannot be regarded as repugnant to the grant of legislative authority." Id.

Contrary to Appellants' assertion, the district court gave the term "Legislature" its proper weight and meaning. *Compare* Initial Brief at 12-16 *with* (RE.87:8-14.) Appellants and the district court agreed, however, that Smiley and Hildebrant provide "definitive" guidance on the "proper meaning" of the term. *See* Initial Brief at 16; (RE.87:15-17.) The district court correctly concluded that, as explained by the Supreme Court in Smiley, "[w]henever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view." (RE.87:13). In the Elections Clause, the term "Legislature" refers to the state's lawmaking function.

2. Smiley and Hildebrant provide that the exercise of Elections Clause authority by the legislature is subject to state-constitutional restraints.

In Smiley, the plaintiffs challenged the state executive's power to veto congressional redistricting legislation, relying on the Elections Clause delegation to the state legislature. The Minnesota Supreme Court held that the term "Legislature" meant the official legislative body itself and, therefore, was not synonymous with the lawmaking power of the state and did not include the Governor. State ex rel. Smiley v. Holm, 238 N.W. 494 (Minn. 1931). The United States Supreme Court reversed, expressly rejecting the Minnesota Supreme Court's narrow interpretation of the term "Legislature" in the Elections Clause.

As indicated above, the Supreme Court adopted a function-based framework for determining whether a state legislature is subject to state constitutional provisions when exercising its federally granted authority. Smiley, 285 U.S. at 365, 52 S. Ct. at 399 ("The question here is not with respect to the [legislative] 'body' . . . but as to the function to be performed."). According to the Court, the Elections Clause delegation to state legislatures requires state legislatures to perform a lawmaking function. Id. at 369, 52 S. Ct. at 399 (prescribing the "times, places and manner of holding elections . . . involves lawmaking in its essential features and most important aspects."). The Court contrasted the Elections Clause from Article I, Section 8, where the legislature acts as a "consenting body," and Article V, where the legislature acts as a "ratifying body," expressing assent or dissent to a proposed constitutional amendment. Id. at 366, 372, 52 S. Ct. at 399. In those cases, the Court determined "no legislative action [*i.e.*, lawmaking] is authorized or required." Id. at 372, 52 S. Ct. at 401.

Because, in its view, the Elections Clause directs legislatures to perform ordinary lawmaking duties, the Supreme Court concluded that the legislature's exercise of lawmaking authority must conform to state constitutional restraints on lawmaking. Smiley, 285 U.S. at 367, 52 S. Ct. at 399 ("As the [Elections Clause] authority is conferred for the purpose of making laws for the state, it follows . . . that the exercise of authority must be in accordance with the method which the

state has prescribed for legislative enactments"). The Court 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." Id. at 368, 52 S. Ct. at 399. Therefore, the Court determined that limitations or checks on legislative authority – even the authority to reapportion congressional districts – "is a matter of state polity" – *i.e.*, the state constitution.[2] Id. Because nothing in the Elections Clause revealed the framers' intent to shield state legislatures from lawmaking restrictions imposed by state constitutions, the Court held Minnesota's congressional redistricting legislation was subject to the constitutionally prescribed veto power of the Minnesota Governor. Id. at 368-69, 52 S. Ct. at 399-400 (describing the executive veto as a "restriction" and "limitation" on lawmaking power). The Court ultimately determined that subjecting the legislature to state constitutional "limitation[s]" on lawmaking is not "incongruous with the grant of legislative authority to regulate congressional elections." Id. at 368, 52 S. Ct. at 400.

Likewise, in Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 36 S. Ct. 708 (1916), the Supreme Court earlier considered whether a state, through constitutional amendment, could modify the state's legislative power with respect to congressional redistricting. Because the restriction (a popular referendum)

[2] State "polity" is defined as a state's "total governmental organization as based on its goals and policies." Black's Law Dictionary (9th ed. 2009).

"constituted *a part of the state Constitution*," it was applicable to the congressional redistricting process. Id. at 568, 36 S. Ct. at 709-10 (emphasis added). Indeed, the Supreme Court expressly *rejected* the plaintiff's argument that "the [State's] attempt to make the referendum a component part of the legislative authority empowered to deal with the elections of members of Congress was absolutely void." Id. at 567, 36 S. Ct. at 709. In doing so, the Court plainly recognized the authority of a state, through constitutional amendment, to modify and limit the state's legislative power with respect to congressional redistricting. As the Supreme Court later explained in Smiley, "it was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections, was sustained." Smiley v. Holm, 285 U.S. 355, 372, 52 S. Ct. 397, 401 (1932).

In these cases, the Supreme Court expressly rejected Appellants' underlying assertion that the Elections Clause nullifies ordinary principles of constitutional supremacy and invalidates constitutional restraints on the legislature's congressional reapportionment process that are not adopted by the state legislature itself. Both Smiley and Hildebrant involved state constitutional restrictions on the legislative process. The Court, in both cases, upheld the state constitutional provisions as applied to congressional reapportionment, determining that the state,

through its state constitution, retains the authority to determine the legislative process by which congressional districts are drawn.

3. Other authorities confirm the validity of state constitutional restraints on the legislature's power to reapportion congressional districts.

More recently, the Supreme Court has alluded to the "broad power" of the states to reapportion congressional districts. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 128 S. Ct. 1184 (2008). In Washington State Grange, the Supreme Court stated the following with respect to congressional redistricting:

> The States possess a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices. This power is not absolute, but is subject to the limitation that it may not be exercised in a way that violates specific provisions of the Constitution.

Id. at 451, 128 S. Ct. at 1191 (internal citations omitted). This language is significant because it equates a state's power to regulate congressional elections with its power to control state legislative elections. It is unmistakable that states have a broad power to reapportion state legislative districts and that legislatures are bound to comply with state constitutional provisions prescribing the mechanics of reapportionment. *See* Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362 (1964) (holding that courts should accommodate the relief ordered in state legislative

apportionment cases to the apportionment provisions of state constitutions insofar as it is possible). If, as indicated in Washington State Grange, state power to prescribe the times, places and manner of congressional elections "is matched by state control over the election process for state offices," it follows that states may, through provisions of their constitutions or otherwise, control the manner of congressional elections. Washington State Grange, 552 U.S. at 451, 128 S. Ct. at 1191.

In addition, federal district courts have confirmed the principles announced long ago in Smiley and Hildebrant. For instance, in Carstens v. Lamm, 543 F. Supp. 68, 79 (D.Colo. 1982), a Colorado district court recognized that "[c]ongressional redistricting is a lawmaking function subject to the state's constitutional procedures." Similarly, in Smith v. Clark, 189 F. Supp. 2d 548, 553 (S.D. Miss. 2002), a Mississippi district court held that the "reference to 'Legislature' in Article I, Section 4 is to the lawmaking body and processes of the state." Analyzing Smiley and Hildebrant, the Smith court concluded that "congressional redistricting must be done within the perimeters of the legislative process" and that Article I, Section 4 "requires a state to adopt a congressional redistricting plan in a manner that comports with legislative authority *as defined by state law*." Id. at 554, 556 (emphasis added).

Finally, at least one federal district court has expressly acknowledged and complied with state constitutional reapportionment standards when crafting a court-ordered congressional reapportionment plan. In Preisler v. Secretary of State of Missouri, 341 F. Supp. 1158, 1161 (W.D. Mo. 1972), a federal district court acknowledged article III, section 45 of the Missouri Constitution, which required congressional districts to "be composed of contiguous territory as compact and as nearly equal in population as may be." In devising a judicial redistricting plan for the State, the federal court explicitly "respect[ed] and follow[ed] this state [constitutional] standard, as a matter of law and comity." Id. Together, these cases demonstrate the validity of state constitutional restraints on the legislative power to reapportion congressional districts.

The United States Congress has likewise recognized the supremacy of state constitutions in the context of congressional reapportionment. The United States House of Representatives, acting under its Article I authority "to be the Judge of the Elections, Returns, and Qualifications of its own Members," has decided, on at least two occasions, that provisions of a state constitution prevail where there is a conflict between the state constitution and an act of the state legislature regarding the times, places and manner of conducting congressional elections. *See* Farlee v. Runk, H.R. Rep. No. 29-2 (1845) (House Committee on Elections determining that, where there is a conflict between the state constitution and an act of the

legislature in regard to the place of voting for representatives in Congress, the provisions of the state constitution are binding); Shiel v. Thayer, H.R. Rep. No. 37-4 (1861) (House Committee on Elections determining that where the state constitution fixed the time for holding an election for representatives in Congress, and the legislature fixed another time, the time fixed by the constitution must govern because the constitutional provision had placed it beyond the power of the legislature to change the time of holding such elections). [3] These authorities[4] demonstrate the validity of state constitutional restraints on the legislative power to reapportion congressional districts.

B. Amendment 6 is Part of the Florida Constitution: It Defines the State's Legislative Process for Reapportioning Congressional Districts and Was Validly Enacted Pursuant to the Constitutional Amendment Process

In November 2010, the people of Florida exercised their inherent power to control the legislative processes of the State. By proposing and subsequently approving Amendment 6 to the Florida Constitution, the Florida electorate changed the legislative process for congressional redistricting. There is no question (and Appellants do not dispute) that Amendment 6 was proposed and approved in

[3] House Committee Reports reprinted in Chester H. Rowell, A Historical and Legal Digest of All the Contested Election Cases in the House of Representatives of the United States from the First to Fifty-Sixth Congress, at 124-25, 171-72 (1901).

[4] Several state supreme courts have also adopted a broad view of the Elections Clause delegation to state legislatures and, in doing so, have rejected the notion that the Elections Clause grant of power simultaneously suspends the constitution of the state vis-à-vis congressional reapportionment. *See* (R.72:14-15.)

accordance with the constitutionally prescribed process for amending the Florida Constitution. Proposed pursuant to article XI, section 3, and approved pursuant to article XI, section 5, Amendment 6 effectively modifies the process by which the Florida Legislature draws congressional districts.

Appellants argue that the district court erred by not looking to whether Amendment 6 *itself* was enacted "in accordance with the method which the state has prescribed for legislative enactments." Initial Brief at 39 (quoting Smiley). The district court, however, correctly found that "Smiley does not indicate that the ordinary legislative process must be the vehicle for attaching a condition to a state legislature's Elections Clause powers." (RE.87:16.); *see also* id. at 15-17 (examining Smiley to find that Plaintiff-Appellants misconstrued caselaw to conclude Amendment 6 is unconstitutional because it was not *also* enacted by the Legislature). Instead, the district court correctly found that "[i]n Smiley, the Court focused on whether the conditions which attach to the making of state laws" applied to congressional redistricting and were "'*imposed by state constitutions* upon state legislatures when exercising the lawmaking power'." (RE.87:16.) (quoting Smiley, 285 U.S. at 369 and adding emphasis). The district court therefore concluded that Amendment 6 is "precisely" what the Court in Smiley held the Election Clause authorized. Id.

The new provision created by Amendment 6 is contained in article III – the article establishing the state legislature and defining the legislative power of the State of Florida. The provision was adopted pursuant to the process by which all proposed constitutionally mandated legislative processes are adopted. *See* Fla. Const. art. XI, § 5 (providing that all proposed constitutional amendments "shall be submitted to the electors" for approval). Amendment 6 is, in effect, a constitutional mandate placing boundaries on the lawmaking power of the state legislature. The provision imposes standards for the Florida Legislature to follow in carrying out its federal duty to reapportion congressional districts. Section 20, together with every other provision in article III, defines Florida's legislative power.

Notwithstanding that Amendment 6 was duly enacted in accordance with the constitutional amendment process, Appellants contend that the amendment is void because it was enacted "wholly outside" the legislative process and "over the Legislature's opposition." Initial Brief at 35-36. By arguing that a duly enacted constitutional amendment is void because it was enacted through the constitutional amendment process as opposed to the legislative process, Appellants suggest that the Elections Clause delegation to state legislatures nullifies traditional principles of constitutional supremacy and permits a state legislature to operate independently of the state constitution that created it. Appellants effectively contend that the

Elections Clause delegation to state legislatures alters the internal structure of state government such that the Florida Legislature is the final arbiter of its own authority in the context of congressional reapportionment and that restrictions on the congressional reapportionment process are invalid unless adopted by the Legislature itself.

In Smiley and Hildebrant, however, the Supreme Court expressly rejected these assertions. The Court did not focus on whether state constitutional restrictions on the state legislature's lawmaking power to adopt redistricting legislation were *themselves* enacted as part of the legislative process. Smiley, 285 U.S. at 367-68, 52 S. Ct. at 399-400. Rather, the Supreme Court focused on whether the state constitutional restrictions, once enacted, were made part of the state legislative process and lawmaking power, as that process and power is defined by the state constitution. Id. Appellants therefore misstate the Supreme Court's holding in Smiley and Hildebrant when they claim that constitutional restrictions on legislative power must be "adopted through the legislative process." Initial Brief at 34; id. at 32 (claiming Amendment 6 can survive only if "it was enacted through Florida's legislative process").

The language "as part of the legislative process" on which Appellants rely was taken from Smiley at page 371, but is taken out of context. At that page of the opinion, the Court was addressing a federal statute, The Act of August 8, 1911, and

was explaining its earlier holding in Hildebrant that a referendum, enacted through constitutional amendment, was applicable to congressional redistricting legislation. Hildebrant, 241 U.S. 565, 36 S. Ct. 708.

In Smiley, the Supreme Court explained that Congress, in the Act of August 8, 1911, "definitely recognized" "that the [Elections Clause] contemplates the exercise of lawmaking power." 285 U.S. at 371, 52 S. Ct. 401. Section 4 of the Act of August 8, 1911, addressed congressional redistricting and stated in pertinent part:

> That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and other Representatives by districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act, ...

Smiley v. Holm, 285 U.S. 355, 362, n.1, 52 S. Ct. 397, 397 n.1 (1932) (emphasis added). At page 371 of Smiley, the Court was addressing the significance of the language "in the manner provided by the laws thereof" contained in the federal statute. Specifically, the Court stated:

> The significance of the clause "in the manner provided by the laws thereof" is manifest from its occasion and purpose. It was to recognize the propriety of the referendum in establishing congressional districts where the state had made it a part of the legislative process.

Id. at 371, 52 S. Ct. 401 (emphasis added). Appellants read this passage and interpret it to mean that Amendment 6 (article III, section 20 of the Florida Constitution) violates the Elections Clause because the state legislature had no role in its adoption and it was not enacted or "adopted through the legislative process." Initial Brief at 34; id. at 32. However, the Court in Smiley did not address the manner of adoption of the constitutional provision at issue, nor did it indicate that the constitutional provision had to be adopted as part of the legislative process or with the support of the legislature. What the Supreme Court said at page 371 of Smiley was that the constitutional provision at issue had to be made a part *of* the legislative process, not that it had to be made *via* the legislative process. Indeed, the Court 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," but "[w]hether the *Governor* of the state, through the veto power, shall have a part in the making of state laws, is a matter of state polity" which the Elections Clause "neither requires nor excludes." Smiley, 285 U.S. at 367-68, 52 S. Ct. 399-400 (emphasis added). Whether someone other than the Florida Legislature, such as the people of Florida here, through the initiative amendment power, may have a part in the congressional redistricting process, "is a matter of state polity" – it is up to the Florida Constitution. The Court in Smiley even clarified further that

provisions for restricting the making of state laws, "as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority" in the Elections Clause. Id.

Hildebrant does not change this analysis. The Supreme Court, in Hildebrant, never refers to the "legislative process" in considering the validity of the constitutional amendment at issue in that case. Instead, the Court addressed only whether the constitutional amendment "was treated as part of the legislative power" under the provisions of the Ohio State Constitution. Hildebrant, 241 U.S. 568, 36 S. Ct. at 709-10. Finding that it was, the Court held that the referendum should be "treated to be the state legislative power for the purpose of creating congressional districts by law."[5] Id.

By stating that the constitutional amendment "was *treated* as part of the legislative power," the Hildebrant Court was not stating that the constitutional amendment had to be *enacted* as part of legislative process. Hildebrant, 241 U.S.

[5] Although the Ohio Constitution contained a provision stating that the legislative power shall be vested in the people of the state, the Minnesota Constitution (at issue in Smiley) did not contain a provision expressly vesting the state's legislative power in the governor. Minn. Const., art. IV, §. 11. The absence of an express provision granting "legislative authority" in the governor did not prevent the Minnesota polity from permitting the governor to serve as a check in the legislative process. Similarly, that the Florida Constitution vests the legislative power in the state legislature does not prevent the Florida polity from establishing standards to serve as a check in the legislature's exercise of that power.

at 568, 36 S. Ct. at 709-10. Indeed, if Appellants' interpretation is correct, and a constitutional restriction on the legislature's redistricting authority must be enacted as part of the legislative process and with the support of the legislature in order to avoid violating the Elections Clause, then the Supreme Court in Hildebrant would have invalided the referendum provision in the case before it. In Hildebrant, the referendum provision was not adopted by an act of the legislature but instead was adopted as a constitutional amendment via the Ohio Constitutional Convention of 1912 and ratified by the voters thereafter. Id. at 566, 36 S. Ct. at 709. The Supreme Court upheld the constitutional restriction on the legislature's power to reapportion congressional districts notwithstanding that the restriction was enacted via constitutional amendment and, as Appellants contend, outside the legislative process.

Both Smiley and Hildebrant involved state constitutional restrictions on the legislative process that the Court upheld as applied to congressional reapportionment. The Court determined that the state, through its state constitution, retains the authority to determine the legislative process by which congressional districts are drawn.

1. The Florida Constitution defines the lawmaking power of the Florida Legislature and authorizes the people to reshape that power by constitutional amendment

"The basic principle of [Florida's] constitutional system is that 'All political power is inherent in the people'" and that "[t]his inherent power is exercised by the people under a Constitution adopted by them." Ayres v. Gray, 69 So. 2d 187, 193 (Fla. 1953); Fla. Const. art. I, § 1 ("All political power is inherent in the people."). The citizens of Florida, through their State Constitution, have vested the State's lawmaking power in the Florida Legislature and have prescribed precisely when and how the Legislature may exercise that power. Fla. Const. art. III, § 1 ("The legislative power of the state shall be vested in a legislature of the State Florida."); *see also* State ex rel. Cunningham v. Davis, 123 Fla. 41, 61-62 (Fla. 1936) ("The Legislature is but an instrumentality appointed by the Constitution of this state to exercise a part of its sovereign prerogatives, namely, the lawmaking power."). As the exclusive source of legislative power, the Florida Constitution serves as a blueprint for the exercise of legislative authority.

For instance, the Florida Constitution determines the nature and composition of the Florida Legislature; it imposes quorum requirements, qualifications of members, voting standards, and other rules necessary to enable the Legislature to exercise its lawmaking authority. Fla. Const. art. III, § 2 (members); id. § 3 (sessions); id. § 4 (quorum and procedures); id. § 15 (qualifications). Moreover,

by prescribing when and how the Florida Legislature exercises its lawmaking power, the Florida Constitution establishes the process for legislative enactments. *See, e.g.*, Fla. Const. art. III, § 6 (requiring laws to "embrace but one subject matter"); id. § 7 (prescribing procedure for the passage of bills); id. § 8 (subjecting legislative bills to executive veto); id. § 10 (precluding "special laws" pertaining to various subjects). Thus, the Florida Legislature looks to the Florida Constitution for the limitations on its authority and the legislative processes with which it must comply. State v. Bd. of Public Instruction for Dade Co., 126 Fla. 142, 151 (Fla. 1936) (holding that "[t]he [Florida] Legislature . . . looks to the [Florida] Constitution for limitations on its power").

Accordingly, the Florida Constitution, rather than the Florida Legislature, is the final arbiter of legislative authority. Indeed, it is well established that the lawmaking power of the Florida Legislature is supreme *except as limited by the Florida Constitution*. State ex rel. Cunningham v. Davis, 123 Fla. 41, 61 (Fla. 1936) ("The test of legislative power is constitutional restriction; what the people have not said in their organic law their representatives shall not do, they may do."). As an "instrumentality" of the State of Florida, the Florida Legislature must comport with the restrictions imposed by the Florida Constitution. Id. at 62. Indeed, "[t]hat the state Legislature might be subject to such [] limitation[s], either then or thereafter imposed as the several states might think wise," (*i.e.*, by

constitutional amendment) is not "incongruous with the grant of legislative authority to regulate congressional elections." Smiley, 285 U.S. at 368 (noting that at least two states provided for constitutional limitations on legislative authority at the time of the adoption of the Federal Constitution).

Appellants argue that the district court erred because of its "misunderstanding of Amendment 6's nature" as not "merely altering the legislative *process*," but *substantively* limiting the Legislature's authority. Initial Brief at 39; *see also* id. at 39-43. The district court concluded that this was a distinction without a difference because "Smiley nowhere indicated that a state could not attach substantive conditions to the legislature's redistricting power" and *only* required that the conditions be in accordance with the method prescribed by the state constitution. (RE.87:17.)

The people of Florida have reserved to themselves "[t]he power to propose the revision or amendment of any portion or portions of [the State] Constitution." Fla. Const. art. XI, § 3. As such, Florida citizens retain the power to alter and reshape the legislative power of the state and the processes by which legislative enactments become law. It is the people's adoption of the Constitution in the first instance that establishes the legislative authority, power and processes, and the people retain the power, through constitutional amendment, to subsequently limit and modify the legislative authority, power and processes as they see fit.

Accordingly, the district court correctly concluded that Florida's Constitution authorizes the people to participate in lawmaking because the Florida Constitution is the arbiter of the Legislature's authority and permits new conditions to be imposed via article XI, section 3. (RE.87:18.)

2. Amendment 6 is not fundamentally different than the constitutional provisions given deference by the Supreme Court in Smiley and Hildebrant

Smiley and Hildebrant establish that the Elections Clause does not displace the state constitution's ordinary authority over its legislature, as the Supreme Court, in both cases, subjected a legislature's exercise of its Elections Clause duties to state constitutional limitations on legislative authority. *See* Salazar v. Davidson, 79 P.3d 1221, 1232-35 (Col. 2003) (*en banc*) (relying on Smiley and Hildebrant and concluding that the state constitution operates as an "additional limitation" on congressional redistricting).[6] Indeed, Smiley and Hildebrant stand

[6] The Supreme Court denied certiorari review in Salazar Colo. Gen. Assembly v. Salazar, 541 U.S. 1093, 124 S. Ct. 2228 (2004). Although three Justices dissented from the denial of certiorari, their concern was that the Colorado Supreme Court *completely* excluded the state legislature from the reapportionment process in favor of the courts. Id. at 1095 (Rehnquist, C.J., dissenting) (stating that "there must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts"). However, even the dissenting Justices recognized a State's authority to define its legislative power and expressed no dissatisfaction with the Colorado constitutional provision limiting the legislative process with respect to congressional redistricting. Id.

for the proposition that the authority granted to the legislature by the Elections Clause is subject to the state constitution's definition of the legislative power.

The executive veto in Smiley and the popular referendum in Hildebrant were features of the state's legislative power. Both the veto and referendum were part of the state constitution and contained in the article establishing and defining the legislative power of the state. Minn. Const. art. IV, § 1 (1932) (establishing the Minnesota Legislature); id. art. IV, § 11 (requiring all legislative bills to receive gubernatorial approval before becoming law); Ohio Const. art. II, § 1 (1913) (establishing the legislative power of the state and reserving, to the people, the power to reject any law by popular referendum). Both the veto and the referendum, as applied to redistricting legislation, restricted the scope of legislative authority by limiting the latitude afforded to the legislature to reapportion congressional districts. *See* Smiley, 285 U.S. at 369, 52 S. Ct. at 400 (describing the executive veto as a "restriction" and "limitation" on the exercise of lawmaking authority). Clearly, by subjecting all congressional reapportionment plans to popular referendum or executive veto, the legislature's authority was significantly limited, yet the U.S. Supreme Court recognized the supremacy of the state constitution's articulation of its legislative power and deferred to these constitutional restrictions on lawmaking.

Like the constitutional provisions in Smiley and Hildebrant, Amendment 6, article III, section 20, is contained in the article establishing and defining the State's legislative power. Article III, in its entirety, establishes the legislative power of the State, and section 20 is one of many provisions which, together, define the scope of the Florida Legislature's lawmaking authority. The provision places boundaries on the lawmaking process by prescribing standards for the Florida Legislature to follow in carrying out its duty to reapportion congressional districts. Just as the constitutional provisions in Smiley and Hildebrant, Amendment 6 operates as a constitutional restriction on the legislative authority of the State.

Amendment 6 is actually less restrictive on the Florida Legislature's autonomy than either the gubernatorial veto or popular referendum provisions sanctioned in Smiley and Hildebrant. It is less of a usurpation of legislative authority to impose standards for the legislature to follow in reapportioning congressional districts than it is to completely invalidate a reapportionment plan crafted and approved by the state legislature. Specifying constitutional standards for the legislature to follow in reapportioning congressional districts is an equally valid method for a state to define and limit the legislature's lawmaking power.

That Amendment 6 was enacted through constitutional amendment has no effect on the primacy of the standards specified therein. By arguing that the duly

enacted constitutional amendment is void because it was enacted "outside the legislative process," Appellants improperly elevate the ordinary legislative process over the constitutional amendment process. Initial Brief at 35; *see also* id. at 34-39. Indeed, Appellants' attempt to distinguish the legislative process from the constitutional amendment process overlooks the Florida Constitution's supremacy over the Florida Legislature and ignores the fact the Florida Constitution *controls* the legislative process. Appellants' argument assumes one can divorce the legislative process from the Florida Constitution and that one can separate what the Florida legislative process is from what the Florida Constitution says it is. This cannot be done, however, as Florida's ordinary legislative processes are no more and no less than what the Florida Constitution provides.

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. *Compare* Fla. Const. art. III (prescribing the process for legislative enactments) *with* id. art. XI. (prescribing the process for amending the Constitution). That does not mean, however, that the standards contained in Amendment 6 (article III, section 20) are not "part of the legislative process" or "legislative power" as those phrases are used in Smiley and Hildebrant. Just as the

constitutional provisions at issue in Smiley and Hildebrant, Amendment 6 was made part of the legislative power and process through its adoption as a part of the state constitution. Ultimately, the legislative process is whatever the Florida Constitution says that it is and the Florida Constitution says that the process may be amended in the manner Amendment 6 was created. Accordingly, Amendment 6 itself establishes the legislative process and was enacted pursuant to the constitutionally permissible method for prescribing the legislative process. *See* Fla. Const. art. XI, § 5.

Appellants' suggestion that Amendment 6 is invalid because it was opposed by the Florida Legislature is similarly flawed. That the Florida Legislature opposed the Amendment is irrelevant, as the Florida Constitution authorizes the people to revise and reshape the power they have delegated to the Florida Legislature with or without the Legislature's approval. *See* Fla. Const. art. I, § 1; id. art. XI, §§ 3, 5. Pursuant to the basic principles of Florida's constitutional system, the Florida Legislature is not the final arbiter of its own authority, as the Florida Constitution plainly operates as the ultimate limitation on legislative authority. *See* Cunningham, 123 Fla. 41, 61.

This case is no different from Hildebrant, where the citizens of Ohio amended the state constitution to modify the process for legislative enactments. Hildebrant, 241 U.S. at 566, 36 S. Ct. at 709. In Hildebrant, the popular

referendum was adopted as a constitutional amendment and not as a legislative enactment, yet it still applied to congressional redistricting legislation. *See* Hildebrant, 241 U.S. at 566, 36 S. Ct. at 709 (stating that people reserved to themselves a right of referendum "[b]y an amendment to the Constitution of Ohio"). Like the people of Florida, the Ohio citizenry retained the power to modify the legislative power of the state and did so by way of constitutional amendment. The Supreme Court upheld the state constitutional amendment notwithstanding its effect on the legislature's exercise of its Elections Clause duties. In doing so, the Supreme Court determined that the Elections Clause does not invalidate state constitutional amendments that modify and even restrict the legislature's authority to reapportion congressional districts. In light of Hildebrant, Appellants' insistence on a legislative enactment instead of a constitutional amendment is unwarranted, and the Court should reject Appellants' contention that modifications to the congressional reapportionment process are invalid unless adopted by the Legislature itself.[7]

[7] Similar to the effect of the popular referendum and executive veto provisions on the legislatures' authority in Smiley and Hildebrant, the Florida Legislature retains the ultimate responsibility to draw congressional districts as it sees fit, subject to satisfying constitutionally specified standards. Notably, Amendment 6 differs from several state constitutions which more severely restrict the legislature's role in the congressional redistricting process. *See, e.g.*, Cal. Const. art. XXI, § 2 (establishing the "citizens redistricting commission" that is "independent from legislative influence" to draw congressional districts); Idaho Const. art. III, § 2

Appellants further attempt to distinguish this case from Hildebrant by arguing that "Florida's Constitution does not vest any 'legislative power . . . in the people'" and that the "initiative right of Floridians is limited to amending the constitution and does not extend to the legislative process." Initial Brief at 36. These arguments ignore the fact that the people of Florida expressly reserved to themselves the power to define the scope of legislative authority and modify the legislative processes of the state by amending the constitution in precisely the manner that Amendment 6 was enacted. *See* Fla. Const. art. 1 § 1; id. art. XI, § 3; id. § 5. Ultimately, Appellants fail to offer any support for their proposition that the Elections Clause authorizes a legislature, formed by a state constitution, to act unconstrained by the provisions of that constitution defining the extent of its power. Smiley and Hildebrant do not support such a proposition. To the contrary, both cases demonstrate that state legislatures are not immune from the normal course of regulation by state constitutions. The initiative right of Floridians to amend the constitution includes amending those portions of the constitution that define the legislative process.

The concept of constitutional supremacy was not a remarkable or unfamiliar concept at the time the Federal Constitution was adopted. Indeed, as James Madison explained at the Constitutional Convention, "it would be a novel and

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(directing the secretary of state to form a reapportionment commission to draw congressional districts).

dangerous doctrine that a Legislature could change the Constitution under which it held its existence." 2 The Records of the Federal Convention of 1787, at 92-93 (Max Farrand ed., 1966) (quoting James Madison at the Constitutional Convention). Accordingly, the Framers understood the Elections Clause to be a simple delegation to states of power to regulate congressional elections pursuant to their legislative process, whatever that might be. *See* Smiley, 285 U.S. at 368, 52 S. Ct. at 400 ("That the state Legislature might be subject to [constitutional] limitation[s] . . . *as the several states might think wise*," is not "incongruous with the grant of legislative authority to regulate congressional elections."). (emphasis added).

Nothing in the Elections Clause precludes a state from providing that legislative action in congressional redistricting shall comport with standards established by the state constitution. The definition of legislative power and the incorporation of standards to guide and limit the exercise of that power "is a matter of state polity." Smiley, 285 U.S. at 368, 52 S. Ct. at 399. The Elections Clause in "Article I, [Section] 4 of the Federal Constitution neither requires nor excludes" the incorporation of such standards. Id., 52 S. Ct. at 400. "And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of the legislative authority." Id.

II. Amendment 6 is Valid Because It Imposes Generally Accepted Standards Recognized for Congressional Redistricting

Appellants further question the validity of Amendment 6 by contending that the constitutional provision "purports to impose substantive requirements that exceed a State's authority to regulate the times, places, and manner of federal elections." Initial Brief at 43. Contrary to Appellants' argument, Amendment 6 imposes generally accepted standards recognized for congressional redistricting and is an appropriate regulation of the manner of federal elections. At least a quarter of all states have adopted constitutional provisions expressly restricting the state legislature's power to reapportion congressional districts.[8] By adopting

[8] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1 (establishing "an independent redistricting commission" to reapportion congressional districts and requiring districts to be geographically compact, contiguous, respect communities of interest, and use visible geographic features); Cal. Const. art. XXI, § 2 (establishing the "citizens redistricting commission" that is "independent from legislative influence" to draw congressional districts and requiring districts to be contiguous and compact); Colo. Const. art. V, § 47 (requiring congressional districts to be contiguous and compact); Conn. Const. art. III, § 6 (commanding legislature to "appoint a reapportionment committee" to advise the legislature on matters of reapportionment); Haw. Const. art. IV, § 2 (establishing a reapportionment commission for the purpose of drawing congressional districts); Idaho Const. art. III, § 2 (directing secretary of state to form reapportionment commission to draw congressional districts); Minn. Const. art. IV, § 3 (requiring congressional districts to be "convenient contiguous territory"); Mo. Const. art. III, § 45 (requiring congressional districts to be compact and composed of contiguous territory); Mt. Const. art. V, § 14 (establishing "commission of five citizens, none of whom may be public officials" to prepare a plan for reapportioning congressional districts); Ne. Const. art. III, § 5 (requiring legislature to redistrict after federal decennial census and to follow county lines when practicable); Utah Const. art. IX, § 1 (prescribing when the legislature may draw congressional districts); Wyo. Const.

Amendment 6, Florida has joined their ranks, but with much less intrusive standards.

"The Elections Clause gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 834, 115 S. Ct. 1842, 1869-70 (1995) (citing Smiley, 285 U.S. at 366, 52 S. Ct. at 399). Amendment 6 imposes six standards for the Legislature to follow in drawing congressional districts lines. Specifically, Amendment 6 requires districts: (i) to be drawn without the intent to favor or disfavor a political party or an incumbent; (ii) to be drawn without the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process; (iii) to consist of contiguous territory; (iv) to be as nearly equal in population as is practicable; (v) to be compact; and (vi) where feasible, to utilize existing political and geographical boundaries. *See* Fla. Const. art. III, § 20. These standards are "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself" and, therefore, do not exceed the State's Elections

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art. III, § 49 (requiring congressional districts to be contiguous and compact); W. Va. Const. art. I, § 4 (requiring districts to be contiguous and compact); Va. Const. art. II, § 6 (requiring congressional districts to be contiguous and compact).

Clause authority. U.S. Term Limits, 514 U.S. at 834,115 S. Ct. at 1870 (citing Anderson v. Celebrezze, 460 U.S. 780, 788, n.9, 103 S. Ct. 1564, 1570, n.9 (1983)). Moreover, the Florida Legislature was already required to comply with many of these standards even before the passage of Amendment 6.

Several standards established in article III, section 20 merely parrot existing federal constitutional and statutory requirements. *See, e.g.*, Wesberry v. Sanders, 376 U.S. 1, 18, 84 S. Ct. 526, 535 (1964) (announcing "one person, one vote" principle); Gaffney v. Cummings, 412 U.S. 735, 751, 93 S. Ct. 2321, 2330 (1973) (holding that redistricting plans may be "invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population'"); 42 U.S.C. § 1973a (providing that no voting practice or procedure "shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color").

Moreover, the remaining standards imposed by Amendment 6, namely, that districts be compact, consist of contiguous territory and, where feasible, utilize existing political and geographical boundaries, are generally accepted standards for congressional redistricting "originally designed to represent a restraint on partisan gerrymandering." Carstens v. Lamm, 543 F. Supp. 68, 83-87 (D.Colo. 1982). In fact, when reviewing or drawing congressional reapportionment plans, federal

courts regularly evaluate or draw the plans based on these exact criteria. *See, e.g.*, id. at 82 (evaluating congressional redistricting plan on the basis of compactness, contiguity and preservation of county and municipal boundaries); David v. Cahill, 342 F. Supp. 463 (D. N.J. 1972) (stating that the criteria appropriate in reapportioning congressional districts include, among others, contiguity, compactness and preservation of whole municipalities where possible). The customary use of these standards indicates the pragmatic character of Florida's legislative requirements.

Appellants' reliance on U.S. Term Limits, 514 U.S. 779, and Cook v. Gralike, 531 U.S. 510, 121 S. Ct. 1029 (2001), is misplaced. U.S. Term Limits involved a ballot access restriction that effectively imposed term limits on U.S Representatives and Senators, while Cook involved a state constitutional provision requiring federal ballots to include a disclaimer noting the candidate's refusal to support term limits. The provisions at issue in both cases were plainly designed to favor candidates who support term limits and to disfavor those who did not. Amendment 6 is designed to do the exact opposite, as it expressly restricts the Legislature's ability to draw districts with the intent to favor or disfavor a particular party or candidate. There is no support for Appellants' claim that Amendment 6 "seeks to impact the electoral outcomes." *See* Initial Brief at 46; *see also* (R.67:19.) Indeed, the district court recognized that "[o]n its face," the

amendment prohibits the legislature from impacting electoral outcomes and deals with providing an equal opportunity to *participate* in the process (RE 87:20.)

In any event, the Supreme Court has "approved of state regulations designed to ensure that elections are fair and honest and that some sort of order, rather than chaos, accompanies the democratic process." U.S. Term Limits, 514 U.S. at 834-35, 115 S. Ct. at 1870 (citations omitted). There is no indication that the standards imposed by Amendment 6 are *anything but* designed to ensure fair and honest elections. Accordingly, Amendment 6 is an appropriate regulation of the manner of federal elections. Nonetheless, the decisions by Congress, state supreme courts and the variety of state constitutional limitations on congressional reapportionment demonstrate that the federal power granted by the Elections Clause has long been understood to occur subject to state constitutional limitations on the exercise of legislative power. Indeed, nothing in the Elections Clause frees the state legislature from the constraints in the state constitution that created it.

CONCLUSION

The district court properly denied Appellants' joint motion for summary judgment and granted the Secretary's motion. The Florida Legislature is obligated to comport with the limitations on its lawmaking authority as prescribed in the Florida Constitution that were enacted in accordance with the Florida Constitution. Because the Elections Clause imposes a lawmaking duty on the state legislature, the United States Supreme Court has determined that the authority granted by the Elections Clause is subject to state constitutional limitations on the exercise of legislative power, regardless of whether those limitations are preexisting or subsequently enacted through constitutional amendment. As a duly enacted provision of the Florida Constitution, article III, section 20 is a valid limitation on the Legislature's exercise of its federal Elections Clause power. The Court should affirm the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7). The brief contains 11,661 words in total. The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on November 16, 2011, this brief and the required number of copies was sent to the clerk via FedEx Priority Overnight and also uploaded to the Court's website. I further certify that on the same day, a copy was also served upon the following via email:

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