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, FLORIDA STATE CONFERENCE OF NAACP BRANCHES, ACLU OF FLORIDA, *ET AL.*,

Defendants-Appellees.

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

RESPONSE BRIEF OF DEFENDANT-INTERVENOR-APPELLEES

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CIRCUIT RULE 26.1-1 CERTIFICATE

Pursuant to Circuit Rule 26.1-1, the undersigned attorneys representing Defendant-Intervenor-Appellees American Civil Liberties Union of Florida, Carolyn H. Collins, Janet Cruz, Democracia Ahora, Stephen Easdale, Edwin Enciso, Florida State Conference of NAACP Branches, Luis E. Garcia, Jr., Joseph A. Gibbons, Joyce Hamilton Henry, Arthenia L. Joyner, Leon W. Russell, Howard Simon, Patricia T. Spencer, Benetta M. Standly, Perry E. Thurston, Jr., and Susan Watson hereby certify that the Certificate of Interested Persons submitted by Appellants in their Opening Brief is complete and correct.

STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for January 10, 2012. Defendant-Intervenor-Appellees believe that oral argument will assist the Court.

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STATEMENT OF ADOPTION OF BRIEFS OF OTHER PARTIES

This consolidated brief is hereby adopted by all Defendant-Intervenor-Appellee parties.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This case presents a federal question regarding whether a provision of Florida's state constitution is valid under the United States Constitution. The district court therefore had subject matter jurisdiction under 28 U.S.C. § 1331, and this Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court entered final judgment on September 9, 2011, and Appellants filed a timely notice of appeal on September 29, 2011.

STATEMENT OF THE ISSUES

1. Whether a state constitutional provision establishing standards for congressional redistricting that was overwhelmingly approved by 63% of Florida's voters on November 2, 2010, is contrary to Article I, Section 4 of the U.S. Constitution, which provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," where the voters adopted the constitutional provision in an act of constitutional lawmaking as part of the lawmaking process specifically provided for in the state constitution.

2. Whether a state constitutional provision that requires the legislature to adhere to neutral criteria rather than favoring certain candidates and political parties when conducting congressional redistricting "dictates electoral outcomes" and thus exceeds the state's powers in Article I, Section 4 to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives."

STATEMENT OF THE CASE

This case presents a single question: whether a duly enacted provision of Florida's state constitution violates the U.S. Constitution. Appellants herein seek to overturn a constitutional amendment adopted by 63% of Florida's voters that mandates standards that the legislature must follow in conducting congressional redistricting. In supporting the amendment, the voters were responding to evidence indicating that for decades under the leadership of both parties, legislators had repeatedly configured districts to favor themselves. (R.74:1). This practice had disempowered voters, who had been placed in districts where electoral outcomes were determined long before election day. *Id.* Appellants contend that the voters' amendment violates the Elections Clause, Article I, Section 4 of the U.S. Constitution both because it was not passed by the legislature acting through the ordinary legislative process and because it exceeds the state's powers to regulate the manner of holding congressional elections.

A. Constitutional Provisions At Issue

There are two constitutional provisions at issue in this case, one state and one federal. The first is Article III, Section 20 of the Florida constitution, which was adopted by the voters in a referendum on November 2, 2010 and went into effect on January 4, 2011. Article III, Section 20 provides:

> 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 1(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 1(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.

Almost 63% of Florida's voters approved the adoption of Article III, Section 20.

The second provision is the Elections Clause of the United States Constitution, Article I, Section 4, Clause 1. That provision states:

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

B. Background and Procedural History

Appellants Corrine Brown and Mario Diaz-Balart are incumbent members of the United States House of Representatives, representing Florida's Districts 3 and

21, respectively. Appellants Brown and Diaz-Balart initiated this litigation by filing a declaratory judgment action on November 3, 2010, within hours of the polls closing from the election at which the voters of Florida adopted Article III, Section 20. (R.1).[1] Appellants sought a declaratory judgment that Article III, Section 20 was invalid under the Elections Clause. *Id.* After several amended complaints, Appellants named Florida Secretary of State Kurt Browning as the sole Defendant in this case. (R.38). Appellant Florida House of Representatives moved to intervene as a plaintiff and the district court permitted that intervention.

Defendant-Intervenor-Appellees moved to intervene as defendants. Defendant-Intervenor-Appellees are organizations, state legislators, and citizens devoted to improving the functioning of democracy in the State of Florida. The Florida State Conference of NAACP Branches and Democracia Ahora are organizations representing the interests of racial minority voters statewide. (R.20:3-4). The American Civil Liberties Union of Florida ("ACLU") is a nonprofit, nonpartisan organization dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. (R.12:1-2). Senator Arthenia L. Joyner, Representative Janet Cruz, Representative

[1] Defendant-Intervenor-Appellees hereby adopt the conventions for citing to the record that Appellants proposed in their brief. *See* Appellants' Brief ("App. Br.") 3.

Luis R. Garcia, Jr., Representative Joseph A. Gibbons, and Representative Perry E. Thurston, Jr. (each a "State Legislator," and together the "State Legislators") are duly-elected members of the Florida Legislature as well as citizens and voters of Florida. (R.46:4).

All parties agreed that there were no disputed issues of fact and thus Plaintiffs and Plaintiff-Intervenors moved for summary judgment, (R.67), and Defendants and Defendant-Intervenors cross-moved for summary judgment, (R.72, 74). The district court heard oral argument on the summary judgment motions on September 9, 2011, and issued its opinion that same day. (R.87).

After a careful examination of the Framers' original understanding of the Elections Clause and thorough review of the case law, the district court determined that Article III, Section 20 is constitutional and granted final summary judgment for Defendant and Defendant-Intervenors. The district court noted that the Framers' primary focus when drafting the Elections Clause was the degree of control Congress would have over states' regulation of federal elections. (R.87:11). The district court thus found no support in the constitutional debates for Appellants' contention that state legislatures' control over congressional redistricting must remain unconstrained by state constitutions. *See id.*

The district court also examined the two controlling Supreme Court cases construing the term "Legislature" in the Elections Clause, *Smiley v. Holm*, 285

U.S. 355, 52 S. Ct. 397 (1932) and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 36 S. Ct. 708 (1916), and correctly concluded that the Supreme Court had broadly construed the term "Legislature" in the Elections Clause to encompass the entire act of "lawmaking" even where "lawmaking" was not accomplished solely by the state legislature. (R.87:11-14). Applying the construction of the term "Legislature" that the Supreme Court gave in *Smiley* and *Hildebrant*, the district court held that Article III, Section 20 was enacted as a product of Florida's legislative process, stating that "the state constitution authorizes the people to participate in the lawmaking process." (R.87:18).

Finally, the district court found no merit in Appellants' contention that Article III, Section 20 exceeds the state's power to regulate the manner of holding congressional elections. The court stated that there was "no indication" that the amendment would result in "dictating electoral outcomes or favoring or disfavoring Congressional candidates." (R.87:20). Further, the court found that the constitutional provision did "not appear to frustrate the electoral chances of particular candidates." (R.87:21). The district court thus granted final summary judgment to Defendants and Defendant-Intervenors. Appellants thereafter filed their notice of appeal.

C. Statement of Facts

The parties have stipulated that the case involves only legal issues and there are no facts in dispute.

D. 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

In November 2010, Florida's voters went to the polls to enact reforms to the redistricting process. In an act of lawmaking entrusted to them by the Florida Constitution, nearly two-thirds of Florida's voters passed a constitutional amendment that will require their state legislature to adhere to certain standards in redistricting:

- prohibiting the legislature from drawing districts that would favor or disfavor certain candidates or political parties;
- forbidding the legislature from diminishing the ability of Florida's racial and language minorities to participate in the political process and elect the representatives of their choice; and
- requiring the legislature to adhere to traditional, neutral, districting criteria of compactness, contiguity, and respect for existing geographic and political boundaries.

Voters thus sought to put an end to the decades-long practice in which legislators drew districts to favor themselves and their political party. (R.74:1).

Appellants have brought this suit to declare the voters' act of lawmaking unconstitutional under the federal Elections Clause. In so doing, they seek to upend almost a century of Supreme Court precedent. They argue that the Elections Clause forbids voters from enacting reforms through a constitutionally authorized initiative without the direct approval of the state legislature acting in the ordinary "legislative process." No court has ever accepted the extreme argument Appellants make here, and with good reason. The Florida voters' act of constitutional

lawmaking is fully consistent with the interpretation given to the Elections Clause in the two Supreme Court cases that all parties, including Appellants, agree are controlling – *Smiley* and *Hildebrant*. Yet Appellants argue that these cases support their position that only the legislature itself may make policy regarding congressional elections, and therefore they may ignore a validly enacted provision of the Florida Constitution. *Smiley* and *Hildebrant* say just the opposite. A legislature cannot ignore its own constitution in drawing congressional districts.

Likewise unavailing is Appellants' argument that the redistricting reform enacted by the voters violates the Elections Clause because it is intended to "favor" certain candidates or "dictate electoral outcomes." On its face, the constitutional amendment adopted by the voters expressly prohibits the favoring of candidates or political parties, and the only electoral outcome the amendment is concerned with is that the outcome be the product of a fair process. That is entirely consistent with the Elections Clause. Appellants' argument that the voters' constitutional amendment is designed to defeat incumbents is unsupported by the plain text of the amendment, which simply imposes fair and neutral standards.

The district court's grant of summary judgment to Appellees and Defendant-Intervenor-Appellees should be affirmed, and Florida's voters should be permitted, for the first time, to participate in elections under a redistricting plan that is fair and neutral.

ARGUMENT

Appellants make two arguments. First, they contend that Article III, Section 20 of the Florida Constitution violates the federal Elections Clause's requirement that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," U.S. CONST. art. I, § 4, because it was enacted by a citizen initiative rather than by the state legislature in the course of the ordinary "legislative process." Second, they contend that Article III, Section 20, even if it is part of Florida's legislative process, is not an appropriate regulation of the time, place, or manner of federal elections under the Elections Clause. For the reasons set out below, neither argument has any merit, and the decision of the district court granting summary judgment for the Defendant and Defendant-Intervenors should be affirmed.

I. ARTICLE III, SECTION 20 IS FULLY CONSISTENT WITH THE ELECTIONS CLAUSE AS INTERPRETED BY THE SUPREME COURT IN *SMILEY* AND *HILDEBRANT*.

Appellants repeatedly contend that upholding the decision below would mean "read[ing] the words 'by the Legislature' out of the Constitution." App. Br. 9. Appellants urge this Court to recognize that "each word of our Constitution has meaning," *id*. at 14, and to strictly construe the term "by the Legislature thereof." According to Appellants, "the plain constitutional text … only allows state *legislatures* to regulate federal elections." App. Br. 9 (emphasis in original). But

Appellants' resort to literalism is too late. The Supreme Court has already definitively construed the term "by the Legislature thereof" in the Elections Clause and it has held that the term is not restricted to an enactment by the "Legislature" itself. In the two controlling cases, the Supreme Court has held that the Elections Clause allows states to regulate federal elections through *any* means of lawmaking provided for in the state constitution – including by initiative and referendum – and that state legislatures are subject to state constitutional constraints in congressional redistricting. Thus, the entirety of Appellants' argument that the words "by the Legislature thereof" must be given meaning, *see* App. Br. 12-16, is beside the point. The Supreme Court has given those words meaning, just not the meaning Appellants seek to advance.

A. *Smiley* and *Hildebrant* Provide The Definitive Interpretations Of The Elections Clause.

A brief discussion of the two controlling cases illustrates that the Supreme Court has expressly rejected Appellants' argument that the words "by the Legislature thereof" in the Elections Clause mean "*only* by the Legislature thereof." The first case was *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 36 S. Ct. 708 (1916), in which the Court faced the question of whether an Ohio constitutional provision, enacted by referendum of the people, which allowed the citizens of Ohio to vote to veto a congressional redistricting plan passed by the state legislature, was constitutional under the Elections Clause. 241 U.S. at 566-

67, 36 S. Ct. at 709.[2] The case came to the Supreme Court after the Ohio Supreme Court rejected an Elections Clause challenge to the voters' veto on several grounds, including a specific holding that *the people's* involvement in regulating the times, places, and manner of federal elections through a referendum veto was fully permitted by the Elections Clause. As the Ohio Supreme Court explained:

> While article 1, § 4, of the United States Constitution is controlling upon the states in so far as it grants the Legislature of the state authority to prescribe the times, places, and manner of holding elections, this is the quantum of the federal grant. The character of the Legislature, its composition and its potency as a legislative body are among the powers which are, by article 10 of said Constitution "expressly reserved to the states respectively, or to the people."

State ex rel. Davis v. Hildebrant, 114 N.E. 55, 57 (Ohio 1916). And "the people, by their state organic law, unhindered by federal check or requirement, may create

[2] That provision was newly enacted in an extensive constitutional revision that occurred through the Ohio Constitutional Convention of 1912. *State ex rel. Davis v. Hildebrant*, 114 N.E. 55, 56-7 (Ohio), *aff'd*, 241 U.S. 565, 36 S. Ct. 708 (1916). The Legislature's only connection to the provision was its decision, in 1909, to "submit[] a referendum on holding a constitutional convention to the voters." Barbara A. Terzian, *Symposium: Ohio's Constitution: An Historical Perspective*, 51 CLEV. ST. L. REV. 357, 381 (2004). "[T]he proposal passed handily in the referendum," *id.* at 383, and delegates to the convention were elected during subsequent municipal elections. *Id.* at 383-84. During the convention, delegates agreed to propose to Ohio voters the referendum veto provision that was at issue in *Hildebrant*. Constitution of the State of Ohio with Amendments Proposed by the Constitutional Convention of 1912, art. II, § 1c (1912). Voters ratified that provision thereafter. *Hildebrant*, 241 U.S. at 566, 36 S. Ct. at 709; *see also* Terzian, 51 CLEV. ST. L. REV. at 393.

any agency as its law-making body, or impose on such agency any checks or conditions under which a law may be enacted and become operative." *Id.* (emphasis added).

The U.S. Supreme Court affirmed the lower court's decision, rejecting an Elections Clause argument nearly identical to the one Appellants assert here. The Court held that any claim that the referendum is outside the scope of the term "Legislature" in the Elections Clause "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government, and causes a state where such condition exists to be not republican in form, in violation of the guaranty of the Constitution." 241 U.S. at 569, 36 S. Ct. at 710 (citing U.S. CONST. art. IV, § 4). Having thus framed the question, the Court answered that such an argument with respect to the *Hildebrant* referendum was "plainly without substance." *Id.*[3]

The Court went on to hold that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative powers." *Id.*

[3] The Court reaffirmed that conclusion in *Hawke v. Smith*, 253 U.S. 221, 230-31, 40 S. Ct. 495, 498 (1920), describing *Hildebrant* as holding that a "referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional. Article 1, section 4, plainly gives authority to the state to legislate within the limitations therein named."

at 568, 36 S. Ct. at 709; *see id*. at 567, 36 S. Ct. at 709 ("the provisions as to referendum were a part of the legislative power of the state, made so by the Constitution"). In so holding, the Court relied on the fact that Congress also understood the Elections Clause to encompass the states' entire lawmaking processes, including the initiative and referendum. In 2 U.S.C. § 2a(c), its statute governing the redistricting process, Congress has provided that "[u]ntil a State is redistricted *in the manner provided by the law thereof* after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner . . . ." (emphasis added). The prior statute had been worded to require redistricting in a state "*[b]y the Legislature thereof* in the manner herein prescribed." *Hildebrant*, 114 N.E. at 58 (emphasis added). As the Court observed in *Hildebrant*, "the legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to the referendum which is now urged." 241 U.S. at 568-69, 36 S. Ct. at 710; *see also Hawke v. Smith*, 253 U.S. 221, 230, 40 S. Ct. 495, 498 (1920) (describing *Hildebrant* as holding that "Congress had itself recognized the referendum as part of the legislative authority" under the Elections Clause).

The next case to construe the Elections Clause was *Smiley v. Holm*, 285 U.S. 355, 52 S. Ct. 397 (1932). In *Smiley*, the Court reaffirmed and further explained *Hildebrant*. The provision at issue was a gubernatorial veto: the Minnesota Legislature passed a congressional redistricting plan but the governor, pursuant to his state constitutional authority, vetoed it. 285 U.S. at 361, 52 S. Ct. at 397. Nonetheless, the Minnesota Legislature placed its plan on file with the Secretary of State, and a suit was instituted to prevent elections from being held under the plan. *Id.* The suit argued that the governor's veto nullified the plan, *id.* at 362, 52 S. Ct. at 397-98, while the Secretary of State argued that the plan was valid "by virtue of the authority conferred upon the Legislature by article 1, s 4, of the Federal Constitution." *Id.* Persuaded by the Secretary's argument, the state trial court dismissed the suit, holding that the Elections Clause precluded the governor from interfering with the Legislature's redistricting power. *Id.* at 363, 52 S. Ct. at 398. The Minnesota Supreme Court affirmed. *See id.* at 364, 52 S. Ct. at 398 (summarizing the ruling below as holding "that the Legislature in redistricting the state was not acting strictly in the exercise of the lawmaking power, but merely as an agency, discharging a particular duty in the manner which the Federal Constitution required").

The U.S. Supreme Court reversed. Construing the term "Legislature" in the Elections Clause, the Court adopted the following interpretive principle: "The

question here is not with respect to the 'body' as thus described but as to the function to be performed…. Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view." *Id.* at 365-66, 52 S. Ct. at 399 (internal citations omitted). The Court concluded that, within the Elections Clause, "legislature" must be read expansively, to contemplate the state's entire "function . . . of making laws." *Id.* at 366, 52 S. Ct. at 399 (emphasis added).

Having so reasoned, the Court held that the states' Elections Clause power is also subject to state constitutional constraints, including a gubernatorial veto. "[T]he 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. Continuing, the Court stated that the Elections Clause does not "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; *see also id.* at 369, 52 S. Ct. at 400 ("[I]n providing for congressional elections, and for the districts in which they were to be held, . . . Legislatures [exercise] the lawmaking power and thus [are] subject, where the state Constitution so provide[s], to the veto of the Governor as a part of the legislative process"); *see also Carroll v. Becker*, 285 U.S. 380, 381-82, 52 S. Ct. 402, 402-03 (1932) (upholding a gubernatorial veto of a legislative congressional redistricting plan);

Koenig v. Flynn, 285 U.S. 375, 379, 52 S. Ct. 403, 403 (1932) (holding that a congressional plan not submitted to the governor for approval was ineffective as law and its rejection did not violate the Elections Clause).

Hildebrant and *Smiley* thus conclusively establish two propositions. First, the term "Legislature" in the Elections Clause refers not merely to a state's actual legislative body, but to the state's whole apparatus for making laws, including by initiative and referendum. *See Smiley*, 285 U.S. at 366-67, 52 S. Ct. at 399; *Hildebrant*, 241 U.S. at 568-69, 36 S. Ct. at 710; *see also Colorado General Assembly v. Salazar*, 541 U.S. 1093, 1095, 124 S. Ct. 2228, 2230 (2004) (Rehnquist, C.J., dissent from denial of cert.) ("the function referred to by Article I, § 4, was the lawmaking process, which is defined by state law"); *Smith v. Clark*, 189 F. Supp. 2d 548, 553 (S.D. Miss. 2002) (three-judge court) (decisions of the Supreme Court "have made clear that the reference to 'Legislature' in Article I, Section 4 is to the law-making body *and processes of* the state") (emphasis added), *aff'd*, 538 U.S. 254, 122 S. Ct. 2355 (2003). Indeed, in the most recent interpretation of these cases in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), the Colorado Supreme Court said that "[t]he United States Supreme Court has interpreted the word 'legislature' in Article I to broadly encompass any means permitted by state law, and not to refer exclusively to the state legislature. A state's lawmaking process may include citizen referenda and initiatives,

mandatory gubernatorial approval, and any other procedures defined by the state." *Id.* at 1232.

Second, in acting under the Elections Clause, state legislative bodies are fully subject to state constitutional constraints. *Smiley*, 285 U.S. at 366-67, 52 S. Ct. at 399; *see also Smith*, 189 F. Supp. 2d at 553; *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" (citing *Smiley*, 285 U.S. 355, 52 S. Ct. 397, and *Koenig*, 285 U.S. 375, 52 S. Ct. 403)). In short, these cases show that a citizen referendum like the one that created Article III, Section 20 is well within the scope and meaning of the word "Legislature" in the Elections Clause and may effectively limit what redistricting plans a legislature may pass.[4]

[4] Appellants rely on certain state law cases decided prior to the decisions in *Smiley* and *Hildebrant*, *see* App. Br. 22 n.5, but these cases are both irrelevant and inapposite. In *Opinion of the Justices of the Supreme Judicial Court on the Constitutionality of the Soldiers' Voting Bill*, 45 N.H. 595 (1864), the issue was whether a state law enacted by the legislature providing for absentee voting by members of the military in federal elections was trumped by a state constitutional provision requiring in-person voting. The state court concluded it was not, but no similar factual or legal issue is presented in the instant case. Here, there is no conflict between state constitutional and state statutory law. Not only is there no such conflict, but Article III, Section 20 was enacted as part of the lawmaking process within the meaning of the Elections Clause. Appellants also rely on *In re Plurality Elections*, 8 A. 881 (R.I. 1887), which held that a state law providing for plurality voting in federal, as well as state, elections, was not trumped by a state (Cont'd . . .)

B. Appellants' Arguments Cannot Be Squared With *Smiley* and *Hildebrant*.

Though Appellants purport to rely on *Smiley* and *Hildebrant*, calling them the "controlling and definitive" decisions, App. Br. 16, their arguments cannot be squared with the two propositions established by those cases. As to the first proposition that the term "Legislature" refers to the entirety of the state's lawmaking process, including citizen initiatives and referenda, Appellants doggedly insist that even if the "legislative process" does not mean exclusively the "Legislature," it still must include the legislature at some point in the chain. App. Br. 34-39. And as to the second proposition that state legislatures are bound by state constitutional constraints when conducting redistricting, Appellants blatantly ignore the holdings of *Smiley* and *Hildebrant* to argue that "federally conferred authority cannot be circumscribed by state constitutions." App. Br. 26-32. Neither argument has merit.

(. . . cont'd)
constitutional provision apparently providing for elections by majority vote. But again, no such issue is presented in this case; there is no conflict between state constitutional and statutory law; and Article III, Section 20 was enacted as part of the lawmaking process within the meaning of the Elections Clause.

1. Constitutional Lawmaking Is Part Of The Lawmaking Process And Was A Power Given To The People By The Legislature.

Appellants insist (no less than nine times) that Article III, Section 20 is invalid because it was enacted "outside the legislative process." *See* App. Br. 3, 7, 9, 10, 11, 35, 43, 49. It is only by applying the most limited possible interpretation of the "legislative process" that Appellants could arrive at that conclusion. Such an interpretation is inconsistent with *Smiley* and *Hildebrant*, as the district court properly recognized. In Florida, the legislative process includes constitutional lawmaking by the people through the initiative process. Appellants' contention that "Florida's Constitution does not vest any 'legislative power...in the people,'" App. Br. 36 (citing *Hildebrant*), ignores the express language of the Florida Constitution and is patently without merit.

a. The People Are Given The Power To Make Laws By The Florida Constitution.

The Florida Constitution, Article I, Section 1, provides: "All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." FLA. CONST. art I, sec. 1; *see State ex rel. Ayres v. Gray*, 69 So. 2d 187, 193 (Fla. 1953) (citing Section 1 as "[t]he basic principle of our constitutional system"). Undoubtedly, "[t]he power to amend the constitution is implicit in [that provision]." *Advisory Op. to Att'y Gen. Ltd. Marine Net Fishing*, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J.,

concurring) (citing Talbot D'Alemberte, COMMENTARY, 25A Fla. Stat. Ann. 16 (1991)). The Florida Constitution also provides: "The power to propose the revision or amendment of any portion or portions of this constitution is reserved to the people." FLA. CONST. art XI, sec. 3. This power "may be invoked by filing with the custodian of state records a petition containing a copy of the proposed revision or amendment" signed by a specified number of voters. *Id.* As Appellants concede, Article III, Section 20 followed these constitutional procedures and "took effect on January 4, 2011." App. Br. 5.[5]

The Florida Supreme Court has recognized that "[t]he Legislature is but an instrumentality appointed by the Constitution of this state to exercise a part of its sovereign prerogatives, namely the lawmaking power." *State ex rel. Cunningham v. Davis*, 166 So. 289, 297 (Fla. 1936). In Florida, "[a]n amendment to the Constitution, duly adopted, is the last expression of the will and intent of the law-making power." *State v. Div. of Bond Fin. of Dep't of Gen. Servs.*, 278 So. 2d 614, 617 (Fla. 1973). The provisions of the Florida Constitution, even those adopted as a result of an initiative, are "the supreme law of Florida." *Lane v. Chiles*, 698 So. 2d 260, 263 (Fla. 1997).

[5] The Florida House and Senate submitted Article III, Section 20, to the Department of Justice for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and preclearance was granted. *See* Letter from T. Christian Herren, Jr., Chief, Dept. of Justice Voting Section, to Andy Baros, *et al.*, May 31, 2011.

The very cases relied upon by Appellants refute their claim that Article III, Section 20 is not part of the Florida law making process. *Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053 (Fla. 2010), cited at App. Br. 36, provides that Florida's initiative process was adopted "to provide the people of Florida a narrow but direct voice in amending their fundamental organic law." *Id.* at 1063. *Browning* further provides that "[w]hen a constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way." *Id.* at 1064 (quoting *Thomas v. State ex rel. Cobb*, 58 So. 2d 173, 178 (Fla. 1952)). *Browning* thus confirms that Article III, Section 20 was enacted pursuant to the Florida lawmaking process. Similarly, *In re Advisory Opinion To Attorney General Ex Rel. Limiting Cruel & Inhumane Confinement Of Pigs During Pregnancy*, 815 So. 2d 597, 601 (Fla. 2002) (Pariente, J., concurring), cited at App. Br. 36, suggests in a concurrence that some issues would be more appropriately included in state statutes rather than in the constitution, but nowhere does the opinion question that initiatives are part of the state lawmaking process.

Indeed, the United States Supreme Court has repeatedly recognized that the power of the initiative and the referendum are the power of the people to make laws. *See, e.g., Arizona Free Ent. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813-15 (2011) (referring to the product of a citizen initiative as "law"); *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 186, 119 S. Ct. 636, 639

(1999) (noting that Colorado allows its citizens to make law directly through initiatives); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 493 n.1, 105 S. Ct. 2794, 2796 n.1 (1985) (referring to adopted initiative measure as "law"); *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2827 (2010) ("It is … up to the people of each State, acting in their sovereign capacity, to decide whether and how to permit *legislation* by popular action.") (Sotomayor, Stevens and Ginsburg, JJ. concurring) (emphasis added). As is apparent, Article III, Section 20 was enacted and implemented as part of the lawmaking process in Florida.

Congress has also understood the Elections Clause to encompass lawmaking by the people through initiative and referendum. Indeed, it amended the federal congressional redistricting statute, 2 U.S.C. § 2a(c), "for the express purpose" of recognizing that the referendum is a part of a state's lawmaking process when conducting redistricting under the Elections Clause. *Hildebrant*, 241 U.S. at 567-68, 36 S. Ct. at 709-10; *see also Hawke*, 253 U.S. at 230, 40 S. Ct. at 498 (describing *Hildebrandt* as holding that "Congress had itself recognized the referendum as part of the legislative authority" under the Elections Clause).

Appellants' list of procedural differences between the enactment of constitutional amendments and the enactment of statutes is unavailing. *See* App. Br. 36-38. The relevant inquiry remains whether the state constitution, through its initiative provision, contemplates a "lawmaking" role for the people of Florida, and

the answer is undoubtedly yes. That Florida citizens' participation in direct democracy takes a different route than a typical statutory enactment does not change the fact that by passing Article III, Section 20, the people of Florida made constitutional *law*. Appellants' attempt to highlight the procedural variances between one form of lawmaking and another merely presents distinctions without a difference. The power to amend the constitution is the power to make laws, and the power to make laws is the "the function referred to by Article I, § 4." *Salazar*, 541 U.S. at 1095, 124 S. Ct. at 2230 (2004) (Rehnquist, C.J., dissent from denial of cert.).

b. The Legislature Delegated Its Lawmaking Power To The People.

Appellants' claim that Florida's initiative process exists "wholly outside" the legislative process is wrong not only as a matter of law, but also as a matter of fact. Even indulging Appellants' claim that the "legislative process" must include the legislature itself, history demonstrates that the initiative provision at issue came into the Florida constitution as a result of the legislature's action and thus the people were not acting "wholly outside" the legislative process in amending their constitution, but were instead exercising a power the legislature permitted them to have.

Until 1968, the people of Florida had no ability to propose and effectuate constitutional lawmaking. But in 1965 the legislature itself initiated a process to

revise the Florida Constitution, charging a Constitutional Revision Commission with the task of recommending amendments to the constitution. *See* Talbot D'Alemberte, THE FLORIDA STATE CONSTITUTION 14 (2011). Along with a slate of other amendments, the Commission recommended that an initiative power be added to the Constitution. *See, e.g.*, *Advisory Op. to Att'y Gen. Ltd. Marine Net Fishing*, 620 So. 2d at 1000 (McDonald, J., concurring); *In re Advisory Op. to Att'y Gen. ex rel. Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy*, 815 So. 2d at 600 (Pariente, J., concurring). The legislature approved the initiative amendment, placing it on the ballot, and Florida's citizens subsequently voted for the incorporation of the initiative power into the Florida Constitution. *See* Journal of the House of Representatives, July 3, 1968, at 89, 99; *see also Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170, 172 (Fla. 1983) (noting citizens' adoption of 1968 constitution).

Thus, when enacting Article III, Section 20, Florida voters simply exercised a power approved by the legislature itself.[6] In this respect, Appellants' contention

[6] The Florida Legislature reaffirmed its delegation of the initiative power in 1972, when it proposed to the people an amendment to limit the initiative power to single subjects. *See, e.g.*, FLA. CONST. ANN. art. XI, § 3. And additionally, the legislature retains significant control over the initiative process: numerous procedures for filing initiative petitions are set by statutes enacted by the Legislature. *See* P.K. Jameson & Marsha Hosack, *Citizens Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*,

(Cont'd . . .)

that Article III, Section 20 was enacted "wholly outside," App. Br. 9, 35, and "entirely divorced from," App. Br. 6, the legislative process is simply false as a matter of fact.

Indeed, the initiative power in Florida has a much closer connection to what Appellants narrowly define as the "legislative process," than the referendum at issue in *Hildebrant*. The Florida congressional redistricting provision was adopted using the initiative power engendered by the Florida legislature and given directly to the people of Florida. *See* Letter from C. Smith, Holland & Knight (Oct. 21, 1980) (reprinting *Statement of Chesterfield Smith to Florida Legislature*, January 1967) ("The single most important thing that this historic Legislature can do – is to give the people forevermore the power to amend and revise their Constitution in the future…."). In contrast, the *Hildebrant* referendum veto was one of a package of constitutional amendments proposed by a constitutional convention, not the state legislature itself. Indeed, the Ohio state legislature neither ratified nor voted on the constitutional amendment that created the people's veto at issue in *Hildebrant*. The Ohio state legislature's only involvement was in proposing a referendum vote on whether to have a constitutional convention. In effect, Appellants ask this court

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(. . . cont'd)
23 FLA. ST. U. L. REV. 417, 426-27 (1995) ("Various Florida statutes set forth the process for filing initiative petitions.") (citing Fla. Stat. §§ 15.21, 16.061, 99.097, 100.371, 101.161, 106.03 (1995)).

to insulate the Florida legislature from its 1968 decision to give the people of Florida a hand in lawmaking. Nothing in the Elections Clause requires this result.

In short, Appellants' view of the "legislative process" cannot be squared with either logic or law. The legislature authorized the creation of the new standards through the initiative process, and the legislature will draw the congressional district lines. Appellants' argument that Article III, Section 20 was enacted outside the Florida lawmaking process and therefore violates the Elections Clause was properly rejected by the district court.

2. Legislatures Are Bound By Their State Constitutions When Conducting Redistricting.

The second teaching of *Smiley* and *Hildebrant* is that legislatures are bound by their state constitutions when exercising their Elections Clause powers. Indeed, these cases unquestionably establish that the Elections Clause does not "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. Yet Appellants blatantly ignore *Smiley* and *Hildebrant* in arguing the "federally conferred authority cannot be circumscribed by state constitutions." App. Br. 26. In support of their argument, Appellants point to three other constitutional provisions assigning duties to state legislatures: that of ratifying constitutional amendments, appointing Senators, and establishing the method for selecting presidential electors. *See id.* Appellants contend that these "parallel

constitutional provisions" and the caselaw interpreting them establish that the legislature is unconstrained by state law with respect to anything bearing on congressional elections. App. Br. 31.

Glaringly omitted from Appellants' discussion of these other constitutional provisions and the cases interpreting them is any reference to the fact that *Smiley* already considered and rejected the suggestion that the term "Legislature" has the same meaning everywhere it is used in the Constitution. As the Supreme Court stated in *Smiley*:

> The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The Legislature may act as an electoral body, as in the choice of United States Senators under article 1, s 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under article 5. It may act as a consenting body, as in relation to the acquisition of lands by the United States under article 1, s 8, par. 17. Wherever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view.

Id. at 365-66, 52 S. Ct. at 399 (internal citations omitted).

The Court concluded that, within the Elections Clause, the term "legislature" encompassed the state's entire "function . . . of making laws." *Id.* at 366, 52 S. Ct. at 399 (emphasis added). The Court thus expressly distinguished the use of the term "Legislature" in the Elections Clause from its use in other constitutional provisions. And it held that as to the Elections Clause, the Legislature was fully bound by whatever limits the state's constitution provides. *See id.* at 368, 52 S. Ct.

at 400. The district court quoted and relied on this same language in holding that the legislature is bound by Article III, Section 20. (R.87:13). Appellants' discussion of the term "Legislature" as it appears in other constitutional provisions and the cases interpreting them is thus entirely irrelevant. *See* App. Br. 26-32; *see also supra* p. 25 (discussing Congressional recognition that redistricting need not be done solely by the "Legislature" under the Elections Clause).

To accept Appellants' contention that "a federal assignment of authority to state legislatures" to regulate the time, place, and manner of holding federal elections "cannot be circumscribed by state constitutions," App. Br. 31, would be to hold that any and all state constitutional limits on the legislature's power with respect to redistricting are null and void. Thus, under Appellants' view, the state legislature is not bound by the constitution's equal protection clause in Article I, Section 2, when conducting redistricting and may ignore that clause's directive to treat all persons equally. Likewise, the legislature would operate free of the ethics provisions found in Article II, Section 8. And the legislature could apparently ignore all of the procedural regulations for the legislative process that are found in Article III. *See* FLA. CONST. art. III, § 3; quorum requirements, *id.* § 4(a); public-meeting and journal requirements, *id.* § 4(b)-(c); a single-subject rule, *id.* § 6; multiple reading and related requirements relevant to passage, *id.* § 7; and gubernatorial veto provisions, *id.* § 8. But as the Florida Supreme Court has held,

"[t]he Constitution of this state is not a grant of power to the Legislature, but a limitation upon legislative power." *Chiles v. Phelps*, 714 So. 2d 453, 458 (Fla. 1998); *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006).

Appellants' claims that the voters of Florida cannot place constitutional limits on the legislature's ability to draw districts for political advantage are beyond the pale. As the Court put it in *Smiley*, the Elections Clause does not grant legislators the "power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." 285 U.S. at 368, 52 S. Ct. at 399. The legislature is thus bound by Article III, Section 20.

That Article III, Section 20 is a provision specifically regarding congressional elections does not change the analysis. If Appellants are correct that any provision even touching upon congressional elections must be enacted by the legislature, then several other parts of the Florida Constitution are likewise imperiled as applied to federal elections. For example, Article VI, Section 4(a) of the Florida Constitution prevents felons from voting for any office, including federal office. This provision regulates the manner of holding elections as it determines who may vote. Yet it was adopted by the voters through an initiative process. If Appellants are right about the Elections Clause, this provision must not control federal elections. So too, all of the amendments to Article VI of the Florida Constitution regulating "Suffrage and Elections" that were proposed by the Florida

Constitutional Revision Commission and then put to the people for a vote are also invalid under the Appellants' view of the Elections Clause since these were enacted "outside of the legislative process" as Appellants define that process. For example, the Court would have to strike down Article VI, Section 1's provision on ballot access for minor party candidates and Section 5(b)'s revisions to the primary system. Neither was passed through Appellants' "legislative process," but both will unquestionably affect the manner of holding federal elections.

C. The Framers Desired A System In Which Congressional Representatives Would Be Directly Accountable To The People.

As the district court recognized, the interpretation given to the Elections Clause in *Smiley* and *Hildebrant* is fully consistent with the vision of the Framers. Appellants repeatedly criticize the district court's reliance on originalism and the court's reference to "what really mattered to the Framers," *see, e.g.*, App. Br. 7, 12, 14, 16, but the district court was correct to look to the Framers' intent because it sheds light on the meaning and purpose of the Elections Clause. In fact, what the Framers feared with respect to state legislatures abusing their power over congressional elections is exactly what has come to pass. That is why 63% of the Florida electorate voted to reform the way in which the state legislature conducts congressional redistricting. (R.74:1).

At the nation's founding, the Framers believed it was critical to limit the state legislatures' involvement in the appointment of congressional representatives

so as to keep those representatives directly accountable to the people. The Framers feared that "the Legislatures [would] constantly choose men subservient to their own views as contrasted to the general interest." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 354, 359 (Max Farrand ed., rev. ed. 1966) (notes of James Madison describing the statement of Rufus King). Alexander Hamilton strongly felt that, when it came to congressional elections, "State influence . . . could not be too watchfully guarded ag[ain]st." *Id.* at 358-59. Hence, the Framers limited the states' involvement in congressional elections to the power to set the "Times, Places and Manner" of holding them. Yet great fear persisted that states would abuse even this carefully circumscribed power. As Madison presciently expressed it:

> [T]he Legislatures of the States ought not to have the uncontrouled [sic] right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. . . . Whenever the State Legislatures had a favorite measure to carry, *they would take care so to mould their regulations as to favor the candidates they wished to succeed*.

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 230, 240-41 (emphasis added).

Madison's apprehensions were shared by the ratifiers of the Constitution. In Massachusetts, John Cabot declared that "if the state legislatures are suffered to regulate conclusively the elections of the democratic branch, . . . they may at first

diminish, and finally annihilate, that control of the general government, which the people ought always to have through their immediate representatives." Debate in Massachusetts Ratifying Convention (Jan. 16-17, 21, 1788), *in* 2 THE FOUNDERS' CONSTITUTION 254, 255 (Philip B. Kurland & Ralph Lerner eds., 1987). Theophilus Parsons feared that "a state legislature, ...when faction and party spirit run high, would introduce such regulations as would render the rights of the people insecure and of little value." *Id*. at 256. Rufus King, a Framer also present at the ratification debates in Massachusetts, warned that state legislatures might use their power such that "[t]he representatives . . . from that state[] will not be chosen by the people, but will be the representatives of a faction of that state." *Id*. at 260 (emphasis omitted).

In short, the Framers feared exactly what has happened in Florida and elsewhere: that state legislatures would abuse their Elections Clause power to ensure that their favored candidates and "factions" would succeed. Meanwhile, the ability of the people to elect their chosen representatives to Congress would be lost. As the district court correctly concluded, that is why the Framers chose to check the power of state legislatures by providing for congressional override authority. (R.87:9-11). But congressional oversight is not the only check on state legislatures. As *Smiley* and *Hildebrant* make clear, state legislatures are likewise subject to limits on their lawmaking power as set forth in their state constitutions.

Here, the state constitution gives lawmaking power to the people and the people used that power to enact reforms that legislators were very unlikely to make. In this way, the citizens attempted to regain the control over their representatives that the Framers wanted them to have.

Indeed, it is not just in Florida, but nationwide, that citizens have sought to take back the power that the Framers intended to elect their representatives in a free and fair manner without state legislative gerrymandering. To protect the voters' interests, seven states have taken the responsibility for congressional redistricting completely away from their legislatures and placed it in the hands of independent commissions. *See* ARIZ. CONST. art. IV, pt. 2, § 1; CAL. CONST. art. XXI; HAW. CONST. art. IV, § 9; IDAHO CONST. art. III, § 2(2); N.J. CONST. art. II, § 2; MONT. CONST. art. V, § 14; WASH. CONST. art. II, § 43. Additionally, in Connecticut, a commission is responsible for congressional redistricting if the legislature fails to do so by a given deadline. *See* CONN. CONST. art. XVI. The use of commissions for congressional redistricting is widely accepted as a way to mitigate the partisan temptations legislators face during that process. *See Vieth v. Jubelirer*, 541 U.S. 267, 362, 124 S. Ct. 1769, 1826 (2004) (Breyer, J., dissenting) (describing commissions as a solution for a "civically-minded electorate" that has grown "tir[ed] of the political boundary-drawing rivalry" during redistricting). If Appellants' claim is accepted, these valuable innovations that citizens have enacted

to return to the Framers' vision of how federal elections should work will necessarily be struck down.[7]

D. The District Court Did Not "Misunderstand" The Nature of Article III, Section 20.

As should be evident from the foregoing, the district court did not "misunderstand" the nature of Article III, Section 20. *See* App. Br. 39. Nor did the district court "effectively read the words 'by the Legislature' out of the

[7] Carrying Appellants' contention to its logical conclusion, it would have the effect of striking down *every* state constitutional provision placing limitations on the legislature's authority to draw congressional lines, or at a minimum, those constitutional provisions that were created by initiative. Many state constitutions codify traditional redistricting principles – the very same standards imposed in Article III, Section 20 – in the context of congressional redistricting. *See, e.g.*, ARIZ. CONST. art. IV, pt. 2, § 1, (14)(B)-(F) (requiring equal population, compactness, contiguity, respect for communities of interest, geographic and political boundaries, and requiring competitive districts where practicable); CONN. CONST. art. III, § 5 (requiring that congressional districts be established in accordance with federal constitutional standards); IOWA CONST. art. III, § 37 (requiring that congressional districts be contiguous and political boundaries be respected); MO. CONST. art. III, § 45 (requiring contiguity, equal population, and compactness); VA. CONST. art. II, § 6 (requiring contiguity, compactness, and equal population); WASH. CONST. art. II, § 43 (requiring equal population contiguity, compactness, respect for natural and political boundaries, and prohibiting discrimination based on political party or other group); W. VA. CONST. art. I, § 4 (requiring contiguity, compactness, and equal population); WYO. CONST. art. III, § 49 (requiring contiguity, compactness, and respect for political boundaries). State courts have been applying these provisions to congressional redistricting for decades, if not longer. *See, e.g.*, *Brown v. Saunders*, 166 S.E. 105 (Va. 1932) (equal-population requirement); *Erfer v. Pennsylvania*, 794 A.2d 325, 331 (Pa. 2002) (state constitutional equal protection and free and equal elections clauses); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231-32, 1240 (Colo. 2003) (state constitutional limit of one redistricting every 10 years). All are imperiled by Appellants' view of the Elections Clause.

Constitution." App. Br. 9. Instead, the district court carefully traced the history of the Elections Clause from the time of its adoption through its interpretation by the Supreme Court in *Smiley* and *Hildebrant*. As to the origins of the Elections Clause, the court correctly concluded that the "original battle lines over the Elections Clause were drawn over the division of power between the federal and state governments, not over the division of power within the state governments." (R.87:11).[8] And as to the interpretation of the Elections Clause in *Smiley* and *Hildebrant,* the district court correctly concluded that Article III, Section 20 was "consistent" with these decisions and it gave the term "Legislature" the exact same meaning that the Supreme Court gave it in *Smiley* and *Hildebrant*. (R. 87:17).

Appellants nonetheless fault the district court for "miss[ing] the difference between an amendment merely altering the legislative process … and an

[8] In an effort to undermine the district court's discussion of the constitutional debates, Appellants deride the court's citation of a single proposed amendment to the Elections Clause that referenced "states" rather than "state legislatures." Appellants contend that "[o]f the seven state ratifying conventions that proposed amendments to the Elections Clause, *five* referenced *state legislatures* expressly, and not 'states' generally." App. Br. 13. That may well be, but it does nothing to undermine the district court's conclusion that the history shows the Framers were unconcerned with "the division of power within the state governments." (R.87:11). Appellants' claim that the district court held the distinction between "states" and "Legislature" "meant little" to the Framers of the constitution is also a misstatement of the court's holding. App. Br. 25. What the district court actually said was, "the precise contours of the power belonging to the state legislatures meant little to them." (R.87:11).

amendment that actually regulates federal elections." App. Br. 39. But it is Appellants who miss the difference. Here, as in *Smiley* and *Hildebrant*, the legislature is acting as an ordinary legislative body in redistricting. The legislature retains the authority to draw congressional districts and create districting plans that will regulate the manner of holding the next congressional elections. Thus, it is the legislature that will enact the redistricting plans that will ultimately regulate the "Manner of holding elections for … Representatives." U.S. CONST. art I, § 4. That there will be some limits on the legislature's power in doing so is fully consistent with *Smiley* and *Hildebrant*. Thus, as the district court recognized, "the question under *Smiley* is not whether a state has restricted its legislature's redistricting power retrospectively through a veto as in *Smiley* and *Hildebrant* or prospectively through the adoption of a constitutional provision limiting the legislature's discretion. *Smiley* holds that conditions of whatever type on a legislature's redistricting power are valid if 'in accordance with the method that the State has prescribed for legislative enactments.'" (R.87:18-19). And it further recognized that in Florida, this "method" includes citizen initiatives, in which "the state constitution authorizes the people to participate in the lawmaking process." *Id*. at 18. That conclusion is unassailable and fully consistent with Supreme Court precedent. *See also, e.g., Chapman v. Meier*, 420 U.S. 1, 27, 95 S. Ct. 751, 766

(1975) ("reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*") (emphasis added).

II. ARTICLE III, SECTION 20 IS A VALID EXERCISE OF THE POWER TO REGULATE THE TIME, PLACE, AND MANNER OF CONGRESSIONAL ELECTIONS.

Appellants next contend that even if Article III, Section 20 had been enacted in accordance with Appellants' contorted view of the "legislative process" (*i.e.*, even if the state legislature had enacted it), the provision would nonetheless be unconstitutional under the Elections Clause as it exceeds the State's power to regulate the time, place, or manner of federal elections. In Appellants' view, Article III, Section 20 violates the Elections Clause because it imposes "mandatory, substantive criteria for drawing congressional districts that effectively 'favor or disfavor' candidates, 'dictate electoral outcomes,' or otherwise skew the electoral process." App. Br. 44. (quotation marks omitted). This argument hardly passes the straight-face test.

Article III, Section 20 explicitly instructs the legislature that in establishing congressional district boundaries it may *not* draw any plan or individual district "with the intent to favor or disfavor a political party or an incumbent." FLA. CONST. art. III, § 20. It is precisely because state legislatures were using their Elections Clause power to "dictate electoral outcomes" that the voters of Florida

enacted Article III, Section 20. (R.74:1). The provision is not about dictating electoral outcomes, it is about preventing the legislature from continuing to do so.

A. The Cases Relied Upon By Appellants Actually Support Appellees.

Appellants rely on two cases in support of their argument: *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842 (1995), and *Cook v. Gralike*, 531 U.S. 510, 121 S. Ct. 1029 (2001). Both cases actually support Appellees' position. In *Term Limits*, the people of Arkansas passed a constitutional amendment that prohibited the name of a candidate for Congress from appearing on the general election ballot if that candidate had already served three terms in the House of Representatives or two terms in the Senate. The Supreme Court held that this violated the Qualifications Clause in Article I of the Constitution.[9] As the Court stated: "Allowing individual States to adopt their own qualifications for congressional service would be inconsistent with the Framers' vision of a uniform National Legislature representing the people of the United States." 514 U.S. at 783, 115 S. Ct. at 1845. But the Court further noted that the states are entitled under the Elections Clause "to adopt 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'"

[9]Article I, Section 2, clause 3 and Section 3, clause 3 set qualifications for members of the House and Senate, based on age, years of citizenship, and residence.

Id. at 834, 115 S. Ct. at 1870 (citation omitted). And the Court emphasized that under the Elections Clause, states were permitted to further their "interest[s] in having orderly, fair, and honest elections." *Id*.

In *Gralike*, the people of Missouri adopted a constitutional amendment that would have required, among other things, that the words "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" be printed on ballots next to the names of congressional Members failing to take certain legislative acts in support of term limits. 531 U.S. at 514, 121 S. Ct. at 1033. The Court held that the amendment, "far from regulating the procedural mechanisms of elections, . . . attempts to 'dictate electoral outcomes.' . . . Such 'regulation' of congressional elections simply is not authorized by the Elections Clause." *Id.* at 525-26, 121 S. Ct. at 1039-40 (citing *Term Limits*, 514 U.S. at 833-34, 115 S. Ct. at 1869-70). But the Court acknowledged, citing *Smiley*, 285 U.S. at 366, 52 S. Ct. at 399, that the term "manner," as used in the Elections Cause, "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 ("the Elections Clause grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections" (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 107 S. Ct. 544, 550 (1986))).

Appellants' reliance on these cases is ironic. Contrary to the unlawful provisions at issue in these cases, Article III, Section 20 expressly prohibits the favoring or disfavoring of incumbents and parties. It imposes neutral and traditional principles such as compactness, contiguity, and respect for political and geographic boundaries that have been recognized for decades. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 647, 113 S. Ct. 2816, 2827 (1993) (describing "compactness, contiguity, and respect for political subdivisions" as "traditional districting principles" and "objective factors that may serve to defeat a claim that a district has been gerrymandered"). In short, Article III, Section 20 was designed to prevent exactly what these cases warned against: legislation, here in the form of gerrymandered redistricting maps that "dictate electoral outcomes." *Cook*, 531 U.S. at 526, 121 S. Ct. at 1040 (quotation marks omitted).[10] Thus, the district court correctly concluded that "unlike the provisions at issue in *U.S. Term Limits* and *Cook*, those in [Article III, Section 20] do not appear to frustrate the electoral chances of particular candidates," and therefore "plaintiffs' and plaintiff

[10] *Foster v. Love*, 522 U.S. 67, 69, 72, 118 S. Ct. 464, 466, 468 (1997), also cited by Appellants, held only that Louisiana's selection of congressional candidates "before the federal election day" violated 2 U.S.C. §§ 1 & 7, which sets the date for congressional elections on the first Tuesday after the first Monday in November in an even-numbered year. Nothing in *Foster* suggests that Article III, Section 20 violates the Elections Clause.

intervenor's argument that amendment VI constitutes an improper 'manner' regulation also fails." (R.87:21).

B. Article III, Section 20 Is Not Outcome-Determinative.

As a variant on their "favoritism" argument, Appellants also contend that Article III, Section 20 is invalid because it is concerned with "electoral outcomes." *See, e.g.,* App. Br. 46, 47. They even go so far as to suggest that the State Legislators who intervened in the action below in support of Article III, Section 20 did so to protect an interest in "win[ning] elections by the use of a redistricting scheme favoring their candidacies at the expense of others." *Id.* at 46. In fact, it is Appellants – incumbent legislatures who are greatly benefitted by the status quo prior to Article III, Section 20 – who truly have an interest in "win[ning] elections by the use of a redistricting scheme favoring their candidacies at the expense of others." That Article III, Section 20 may possibly result in the election of fewer incumbents, since it expressly forbids the legislature from following its typical practice of designing districts specifically to favor incumbents, does not mean that Article III, Section 20 is outcome-determinative. Instead, it is the voters who will determine whether or not any incumbent is re-elected, and for the first time voters will be able to do so without having incumbents rig the process. That is why the incumbent Members of Congress are fighting so hard to overturn these amendments.

Perhaps most egregious is Appellants' reliance on Article III, Section 20's mandate 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," in support of their argument that this is an Election Clause violation. *See* App. Br. 47-48. Appellants contend that this language shows that the constitutional amendment is "results-oriented" and not a "mechanical or procedural regulation." *Id*. at 47. In fact, as Appellants recognize, the language of Article III, Section 20 mirrors the language of Section 2 and Section 5 of the Voting Rights Act, *see* 42 U.S.C. §§ 1973, 1973c. Section 2 provides in relevant part that a violation can be shown if minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Section 5 provides in relevant part that a voting change is objectionable if it "has the purpose of or will have the effect of diminishing the ability of any citizen of the United States on account of race or color [or membership in a language minority] … to elect their preferred candidates of choice or abridges the right to vote." 42 U.S.C. § 1973(c). The absurd argument that incorporating these provisions of federal law into Article III, Section 20 and that drawing congressional districts consistent with federal law would violate the Elections Clause is totally without merit.

That Appellants would even suggest that the federal Voting Rights Act is unconstitutional under the federal Elections Clause is truly incredible. Both Sections 2 and 5 have been routinely applied by states in congressional redistricting and no court has ever held or suggested the statutes violated the Elections Clause. *See Bush v. Vera*, 517 U.S. 952, 991, 116 S. Ct. 1941, 1969 (1996) (in congressional redistricting "it would be irresponsible for a State to disregard the § 2 results test") (O'Connor, J., concurring); *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475, 2490 (1995) (in congressional redistricting a state "is free to recognize communities that have a particular racial makeup"). In addition, the "Supremacy Clause obliges the State to comply with all constitutional exercises of Congress' power." *Bush*, 517 U.S. at 991-92, 116 S. Ct. at 1969. There could be no conceivable violation of the Elections Clause for Florida to apply the racial fairness standards of the Voting Rights Act in congressional redistricting.

Plainly, Article III, Section 20, like Sections 2 and 5 of the Voting Rights Act, does not dictate the election of "certain representatives" by "certain groups," *see* App. Br. 48, but only provides minorities the equal right with other voters to elect representatives of their choice, whoever they might be. As the Court in *Cook* acknowledged, citing *Smiley*, 285 U.S. at 366, 52 S. Ct. at 399, the term "manner," as used in the Elections Cause, "encompasses matters like ... 'supervision of

voting, protection of voters, prevention of fraud and corrupt practices…'" *Cook*, 531 U.S. at 523-24, 121 S. Ct. at 1038. And as the Court held in *Term Limits*, states are entitled under the Election Clause "to adopt 'generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.'" 514 U.S. at 834, 115 S. Ct. at 1870 (citation omitted). Article III, Section 20 is an evenhanded restriction designed to protect the integrity and reliability of the electoral process and is plainly permissible under the Election Clause. It protects the equal rights of minority voters, but it does not dictate the outcome of elections nor does it disadvantage a particular class of candidates.

CONCLUSION

For the foregoing reasons, as well as those set forth in our briefs in the district court below, Defendant-Intervenor-Appellees respectfully request that the judgment of the district court be affirmed.

Respectfully submitted this 17th day of November, 2011,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with the Federal Rule of Appellate Procedure 32(a)(7). This brief is submitted in 14-point Times New Roman font, and it contains 10,910 words, according to the word processing software on which it was created.

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This is to certify that on November 17, 2011, two copies of this brief were served by overnight delivery 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 and was filed with the Court.

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