No. 11-14554-EE

In the United States Court of Appeals for the Eleventh Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

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INTRODUCTION

Intervenors and the Secretary urge this Court to uphold Amendment Six based on an amalgam of rationales.[1] But ultimately their efforts fail because they cannot avoid the fact that the Supreme Court has confirmed that, under the Elections Clause, a state regulation of federal elections must be enacted through the State's legislative process—*i.e.,* "by the Legislature thereof." Amendment Six—which was undeniably enacted by a citizen initiative *outside* of the state legislative process—flunks that constitutional requirement. Nor can Appellees avoid that the obvious purpose of Amendment Six was to influence not just the process but the *outcome* of federal elections—to the advantage of some defined groups and the disadvantage of others. For either of these reasons, Amendment Six cannot stand. States are free to pass such measures to govern their *own* elections. But the Constitution forbids those measures when it comes to regulating *federal* elections.

ARGUMENT

Notwithstanding their fundamental disagreement over the constitutionality of Amendment Six, the parties do agree on several important points. They agree that Amendment Six is a regulation of federal elections. They agree that such regulations must be authorized by the Elections Clause, which authorizes measures

regulating federal elections only when they are enacted "by the Legislature" of a State. U.S. Const. art. I, § 4. They also agree that *Smiley v. Holm* and *Ohio ex rel. Davis v. Hildebrant* provide the proper interpretation of "by the Legislature thereof." And no party suggests that those words were meaningless to the Founders, as the district court essentially concluded. (RE 87:8-9.)

Despite this common ground, Appellees refuse to acknowledge the plain meaning of the Elections Clause, and they fundamentally misread the Supreme Court's construction of that Clause in *Smiley* and *Hildebrant*. While those decisions confirm that the Elections Clause commits authority to States to regulate federal elections only *through their state legislative processes*, Appellees read them as sanctioning *any* restrictions once embodied in a state constitution, whether or not enacted through or a part of the state legislative process. Thus, the primary question is whether "by the Legislature thereof," as interpreted by the Supreme Court, means by the State's *legislative* process—or by the State through *any* means. Because *Smiley* and *Hildebrant* compel the former construction, the only other question is whether Amendment Six was enacted through Florida's legislative process. It was not, because Florida's legislative authority is exclusively committed to the Florida Legislature. Fla. Const. art. III, § 1.

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[1] Intervenor-Defendants ("Intervenors") filed a consolidated brief ("Intv. Br."), and Secretary Browning ("Secretary") filed separately ("SOS Br.").

With respect to Appellants' independent second argument—that Amendment Six's results-oriented mandates are not proper regulations of the "manner" of federal elections—the parties likewise share common ground. They agree that the Elections Clause offers no authority to dictate electoral outcomes or to favor or disfavor candidates or classes of candidates. But they disagree about whether Amendment Six is a mere "procedural regulation" or one designed to alter election outcomes. On its face and in its declared purpose, Amendment Six is the latter. It is therefore invalid.

I. THE ELECTIONS CLAUSE AUTHORIZES STATE REGULATION OF FEDERAL ELECTIONS ONLY THROUGH THE STATE'S LEGISLATIVE PROCESS.

In arguing that the Elections Clause authorizes state regulation of federal elections through citizen-initiative constitutional amendments, the Secretary and Intervenors take different approaches. The Secretary does not dispute that Elections Clause authority must be exercised through the legislative process, but insists that Amendment Six merely changes that legislative process. (SOS Br. 6-8.) This overlooks the fact that Amendment Six, in its own right, directly and substantively regulates federal elections. Far from simply regulating a "process," Amendment Six makes policy decisions with respect to federal elections and thus completely removes policy choices from the legislative power. For example, no longer may the Legislature make policy choices regarding compactness; Amendment Six makes that choice. No longer may the Legislature disregard

political boundaries, however arbitrary those boundaries may be; Amendment Six makes that choice too. Amendment Six is therefore quite unlike a veto power, which modifies the legislative process generally without limiting policy choices. In any event, as a regulation of federal elections enacted outside Florida's legislative process, Amendment Six is invalid.[2]

Intervenors take an even bolder approach. In their view, the Elections Clause permits regulation of federal elections "through *any* means of lawmaking," even without the Legislature's involvement. (Intv. Br. 13.) Thus, they argue that "the procedural variances between one form of lawmaking and another merely present[] distinctions without a difference." (*Id.* at 26.) Intervenors also argue that, regardless, an initiative amendment to Florida's constitution *is* an exercise of legislative authority, notwithstanding clear, contrary language in the Florida Constitution vesting the "legislative power" in the "legislature." Fla. Const. art. III, § 1. Despite their dissimilar approaches, the Secretary and Intervenors both rely on flawed readings of *Smiley* and *Hildebrant*.

[2] As Intervenors note, Amendment Six was submitted for preclearance under Section 5 of the Voting Rights Act. (Intv. Br. 23 n.5.) If Amendment Six were a mere change in the general legislative process, preclearance would have been unnecessary. *Cf. Presley v. Etowah County Comm'n*, 502 U.S. 491, 506, 112 S. Ct. 820, 830 (1992).

A. Appellees Misread *Smiley* and *Hildebrant.*

Smiley and *Hildebrant* conclusively establish that the Elections Clause requires state regulation of federal elections to be effected through the state's legislative process. As the Supreme Court said, "the exercise of [Elections Clause] authority *must be in accordance with the method which the state has prescribed for legislative enactments*." *Smiley*, 285 U.S. at 367, 52 S. Ct. at 399 (emphasis added). That rule of course gives effect to the textual mandate of the Elections Clause requiring that measures regulating federal elections be enacted by "the Legislature thereof." In *Smiley*, therefore, the Court upheld the gubernatorial veto of the legislature's congressional redistricting because the veto was actually "part of the legislative process" under Minnesota's constitution—applicable to all legislative actions. *Id.* at 369, 52 S. Ct. at 400.

In *Hildebrant*, the Court similarly upheld an Ohio referendum vetoing the legislature's redistricting plan. 241 U.S. 565, 566, 36 S. Ct. 708, 709 (1916). Again, this was because Ohio's referendum power "to approve or disapprove by popular vote any law enacted by the general assembly" was "expressly declared" in the state constitution to be within the legislative power. *Id.* Like the gubernatorial veto, the referendum was valid because—as provided by the Ohio Constitution—it was "part of the legislative power." *Id.* at 568, 36 S. Ct. at 710. Moreover, in both cases, the provisions at issue were not election regulations but

mechanisms of the exercise of general legislative authority. Thus, regardless of how they were originally enacted, those provisions validly defined the "legislative process" generally applicable to *all* legislation, not just federal election measures.[3]

Appellees misread these decisions and insist that *any* state constitutional provision—however enacted and whatever its content—can restrict the Legislature and directly govern federal elections. But just because Amendment Six appears in the state constitution and purports to restrict the Legislature does not mean it was, itself, enacted through the legislative process. And *Smiley* and *Hildebrant* focused on the manner of enactment—specifically whether the election regulation was enacted "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367, 52 S. Ct. at 399. That is how the Court gave meaning to "by the Legislature thereof"—by requiring that election regulations be enacted through the state's legislative process.[4]

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[3] Furthermore, both provisions left the legislature will its full policy discretion. After either veto (one by the Governor, the other by referendum), the legislatures could have subsequently re-enacted the vetoed laws.

[4] Intervenors point to Congress's amendment of 2 U.S.C. § 2a(c) as congressional recognition that federal elections can be regulated by initiative. (Intv. Br. 25.) That misstates the purpose of the amendment, which "was to recognize the propriety of the referendum in establishing congressional districts *where the state had made it a part of the legislative process*." *Smiley*, 285 U.S. at 371, 52 S. Ct. 401 (emphasis added). Thus, the referendum veto in *Hildebrant* was not inconsistent with the Elections Clause. The initiative amendment process that led to Amendment Six was not part of Florida's legislative process. *See infra* at I(B).

Intervenors suggest that any "lawmaking" constitutes action "by the Legislature thereof." (*See* Intv. Br. 13.) But that argument ignores settled distinctions between laws enacted by a legislature, the executive, or, as here, by citizen initiative. More to the point, neither *Smiley* nor *Hildebrant* interpreted "by the Legislature thereof" so illogically; instead, they carefully analyzed and relied on each state's generally applicable *legislative process* as defined in the states' constitutions. *See Smiley*, 285 U.S. at 368, 52 S. Ct. at 400 (veto, "as a check in *the legislative process*, cannot be regarded as repugnant to the grant of *legislative authority*") (emphasis added); *id*. (veto "no more incongruous with the grant of *legislative authority to regulate congressional elections* than [is presidential veto applied to] Congress in making its regulations under the same provision") (emphasis added); *id.* at 369, 52 S. Ct. at 400 ("Legislatures [in redistricting] were exercising the lawmaking power and thus subject, where the state Constitution so provided, to the veto of the Governor *as a part of the legislative process*.") (emphasis added); *Hildebrant*, 241 U.S. at 566, 36 S. Ct. at 709 (Ohio's "legislative power was expressly declared to be vested not only in . . . the general assembly, but in the people"); *id.* at 568, 36 S. Ct. at 709 ("[T]he referendum constituted a part of the state Constitution and laws, *and was contained within the legislative power* . . . .") (emphasis added). If any state "lawmaking" suffices, the

Court's meticulous examination of each state's *legislative* process, as defined by the state constitutions, was superfluous.

Furthermore, if the Elections Clause authorized any state "lawmaking"—even when completely divorced from the legislative process—states could enact potentially limitless regulation of federal elections beyond the reach of the checks and protections inherent in the legislative process. Citizens could draw district lines themselves, through initiative amendments, as could Governors by executive order. Or citizens could nominally involve the Legislature by mandating that it enact a specific map, or one of a small number of maps. Interpreting "by the Legislature thereof" this way would deprive the phrase of any meaning. With or without those words, states could regulate elections in any manner, legislative or not. Yet the Framers specified that the regulation of federal elections may be undertaken by the States only through the *legislative* process. It is not the role of this Court to second-guess that choice. And the history of the Seventeenth Amendment underscores that the means of changing such a limit on the *way* states may act is (if needed) by constitutional amendment, not by ignoring the text of the Constitution and Supreme Court decisions interpreting it.

Last, the fact that the Legislature would have future involvement in redistricting—*subject to* Amendment Six—does not change the conclusion that Amendment Six is invalid under the Elections Clause. Amendment Six itself

operates as a regulation of federal elections, and regulations of federal elections must be *enacted* through the state legislative process. The fact that the Florida Legislature is required to apply substantive requirements enacted outside the state legislative process in drawing federal districts *compounds* the federal constitutional violation; it does not cure it.

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

Intervenors—but not the Secretary—next contend that Florida's constitutional-amendment initiative authority is, in fact, part of the state legislative process. (Intv. Br. 22-23.) Intervenors quote a concurring opinion in *John Doe No. 1 v. Reed*, -- U.S. --, 130 S. Ct. 2811, 2827 (2010), explaining that 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." (Intv. Br. 25.) We agree that the Constitution leaves this decision up to the States. But the critical point is that Florida—acting in *its* sovereign capacity—has decided *not* to allow direct citizen participation in the legislative process, even though other states (including Ohio) have. *Cf. Smiley*, 285 U.S. at 372, 52 S. Ct. at 401 ("[I]t was because of the authority of the state to determine what should constitute its legislative process that [Ohio's legislative referendum power] was sustained.").

As a starting point, Florida's constitution expressly states that "[t]he legislative power of the state shall be vested in a legislature of the State." Fla.

Const. art. III, § 1. Ohio's, by contrast, states that "[t]he legislative power of the state shall be vested in a General Assembly . . . *but the people reserve to themselves the power . . . to adopt or reject any law . . . passed by the General Assembly*." Ohio Const. art. II § 1 (emphasis added). Ohio citizens exercised their express legislative authority in *Hildebrant* to veto a redistricting measure,[5] but Florida citizens have no such legislative authority to exercise. Amendment Six instead originated through Florida's separate initiative process for amending the state constitution—permitted by a constitutional provision saying nothing of legislative authority. Fla. Const. art. XI, § 3.[6]

This distinction between citizen power to amend the constitution and citizen power to participate in the legislative process is not meaningless. Indeed, Florida

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[5] Ohio's citizen-veto is still in use. Just last month, Ohioans vetoed a state law regarding collective bargaining. Reginald Fields, *Ohio voters overwhelmingly reject Issue 2, dealing a blow to Gov. John Kasich*, The Plain Dealer, Nov. 8, 2011 (*available at* http://tinyurl.com/cw4k45j; last visited Nov. 30, 2011). Washington citizens recently used a similar process, trying to overturn a law enacted by their legislature. *See John Doe No. 1 v. Reed*, -- U.S. --, 130 S. Ct. 2811, 2816 (2010).

[6] Notwithstanding Intervenors' inconsistent terminology, Florida's amendment process is an initiative process—not a "referendum." Fla. Const. art. XI, § 3 (reserving power to amend "by initiative"). "Generally speaking, in a referendum, voters approve or reject an Act already passed by the legislature. In an initiative, voters adopt or reject an entirely new law, either a statute or a constitutional amendment." *John Doe No. 1 v. Reed*, -- U.S. --, 130 S. Ct. 2811, 2837 n.1 (2010) (Thomas, J., dissenting). With Ohio's referendum in *Hildebrant*, voters rejected the legislative enactment; they did not initiate new enactments. Amendment Six was not offered to approve or reject any legislative enactment; it was proposed and adopted in a way that circumvented the state legislative process altogether.

has extensively considered the latter, and there were those who believed Florida, like Ohio, should grant its citizens direct legislative authority. In 2005, the Legislature debated and rejected an effort to open the legislative process to direct citizen participation. Representative Dan Gelber introduced an amendment that would have "reserved to the people" the power to not only amend the constitution, but also "to propose legislation." *See* Fla. H.R. Jour. 650-52 (Reg. Sess. 2005) (amendment 2 to Fla. CS for HJR 1723 (2005)). Representative Gelber's amendment would have allowed citizens direct participation in the legislative process, but left the Legislature with ultimate legislative responsibility, including power to repeal any citizen legislation. *Id.* The amendment failed, *id.*, and the state's legislative power remains vested exclusively in the Florida Legislature.

That debate was not new. A decade before Representative Gelber's unsuccessful amendment, the Florida Senate tasked the Committee on Governmental Reform and Oversight "to consider alternative methods for citizens to have a direct impact on government policies." Fla. S. Comm. on Govt'l Reform & Oversight, *A Review of the Citizen Initiative Method of Proposing Amendments to the Florida Constitution* 1 (March 1995) (available at State Library and Archives of Florida). The report detailed various proposals to vest legislative authority in the citizens, noting that some experts suggested making laws "enacted by the Legislature subject to voter approval" (like Ohio), and allowing "general

laws initiated by the people." *Id.* at 42-43. But others disagreed, including former Speaker of the Florida House Jon L. Mills, who did "not believe that an initiative process to enact legislation is a good concept." *Id.* at 43. Notwithstanding this spirited debate, Floridians have never taken action to amend their constitution to vest themselves with direct legislative authority.[7]

Next, even in states where citizens *do* have legislative authority, their legislative and constitutional-amendment powers are different. Arkansas's citizens, like Ohio's, reserved the right to participate directly in the legislative process and to propose constitutional amendments. In *U.S. Term Limits*, they exercised the latter:

> The people of [Arkansas] may propose either laws or constitutional amendments by initiative petition. The lawmaking power given to the people to propose and adopt laws by initiative petition was intended *to supplement existing legislative authority* in the General Assembly. That power, though, is not what is involved in the case before us. Here, we are concerned with an initiative petition to amend the Arkansas Constitution, *which is a separate matter altogether*.

[7] Appellees and the district court rely on Article I, section 1 of the Florida Constitution, which states that "[a]ll *political* power is inherent in the people." (emphasis added). But that says nothing of the state's *legislative* power, which is vested entirely in a legislature elected by the people. *Id.* art. III, § 1. In fact, the Florida Constitution recognized that all political power is inherent in the people a century before it permitted constitutional amendments by initiative. *See* Fla. Const. Dec. of Rights, § 2 (1868) ("All political power is inherent in the people."); (Intv. Br. 26) (citizens "had no ability to propose and effectuate constitutional lawmaking" until 1968).

U.S. Term Limits, Inc. v. Hill, 872 S.W.2d 349, 355 (Ark. 1994) (plurality) (emphasis added; citation omitted), *aff'd sub nom*., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S. Ct. 1842 (1995); s*ee also Maleng v. King County Corr. Guild,* 76 P.3d 727, 729 (Wash. 2003) ("Although [Washington's] initiative process is a means by which the people can exercise legislative authority to enact or prohibit laws, we concluded that directly amending the state constitution was not a legislative act and, consequently, not within the initiative power reserved to the voters.").

Finally, Intervenors suggest that by proposing the 1968 amendment conferring initiative amendment power, the Legislature somehow delegated its legislative power to the people. (Intv. Br. 26-29.) Not so. The Legislature's authority to propose amendments exists separately from its legislative authority, just as Congress's does. *See Collier v. Gray*, 157 So. 40, 44 (Fla. 1934) (Legislature's proposed constitutional amendments "are not the exercise of an ordinary legislative function, nor are they subject to the constitutional provisions regulating the introduction and passage of ordinary legislative enactments"); *cf. Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 n.* (1798) (Chase, J.) (contrasting "the ordinary cases of legislation" with "amendments to the Constitution"). Moreover, regardless of the fact that the Legislature *proposed* the initiative amendment, the *terms* of the amendment must govern. And as the recent

debate on whether to grant Floridians legislative authority underscores, the initiative amendment did *not* grant Floridians legislative authority.[8]

C. The Framers' Commitment of Election Regulation to the "Legislature Thereof" Was Not Intended to Allow Direct Regulation By Initiative.

Intervenors next suggest that the Framers intended to allow direct regulation by initiative as a "check" on state legislative abuses. (Intv. Br. 33-37.) But the Framers addressed the concern of those abuses by expressly authorizing Congress to override state regulations—not by giving direct authority to the "people." *See* U.S. Const. art. I, § 4.

Intervenors' suggestion thus ignores the text of the Elections Clause, which specified that state regulation of federal elections was to be enacted by "the Legislature thereof." The Framers could certainly distinguish between a state's "People" and its "Legislature," having done so in the two sections immediately preceding the Elections Clause. *See* U.S. Const. art. I, §§ 2, 3 (Senators to be chosen by the "Legislatures"; Representatives "by the People"); *see also Hawke v. Smith*, 253 U.S. 221, 228, 40 S. Ct. 495, 497 (1920) ("When [the Framers] intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose."). Intervenors nevertheless

[8] The Secretary also argues that the Florida Constitution reserves to people the right to *amend* the legislative process. (SOS Br. 29-31.) But that is irrelevant

intimate that the Framers meant to allow direct citizen regulation of federal elections to restrain legislative abuses.[9]

On the contrary, and as explained in Appellants' initial brief, the Framers had ample reasons to assign election regulation to states' legislative processes. (Init. Br. 23-25.) The Framers demanded flexibility in election regulation, and Florida's legislative process—as compared to its constitutional amendment process—provides that flexibility, *see Adv. Op. to Att'y Gen.—Ltd. Marine Net Fishing*, 620 So. 2d 997, 1000 (Fla. 1993) (McDonald, J., concurring) ("Statutory law [unlike constitutional amendments] provides a set of legal rules that are specific, easily amended, and adaptable to the political, economic, and social changes of our society."). Indeed, absent the undeniable need for flexibility, the Framers could have directly regulated elections in the Constitution itself, an idea given no serious consideration: "It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will

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because Amendment Six is not a modification of the state's legislative process. It is a direct regulation of federal elections.

[9] Intervenors' suggestion lacks not only textual support, but also historical foundation. The Framers could not have intended to allow election regulation by citizen initiative because no such device existed at the time of the Constitution's drafting. The earliest use of a citizen initiative was more than a century later. Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the*

therefore not be denied, that a *discretionary power over elections ought to exist somewhere*." Federalist No. 59 (Hamilton) (emphasis added).[10] That "somewhere" is in the state and federal legislative processes, as the Elections Clause provides.[11]

In any event, this Court's role, of course, is not to second-guess the wisdom of the Framers, but to give effect to the text of the Constitution as interpreted by the Supreme Court in *Smiley* and *Hildebrant*.

Initiative, Referendum and Recall Developed in the American West, 2 Mich. L. & Pol'y Rev. 11, 16 tbl.1 (1997).

[10] In addition to flexibility, the Framers wanted legislation to flow from the measured deliberation and restraint inherent in the legislative process. Because "legislative authority necessarily predominates," that power must be tempered by dividing "the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit." *I.N.S. v. Chadha*, 462 U.S. 919, 950, 103 S. Ct. 2764, 2783 (1983) (quoting Federalist No. 51 (Madison)).

[11] That federal courts occasionally implement redistricting plans does not change this. Those courts act remedially to address constitutional violations not at issue here. *See White v. Weiser,* 412 U.S. 783, 794-95, 93 S.Ct. 2348, 2354 (1973) ("From the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.") (marks omitted).

D. Appellees Overstate the Potential Impact of This Court's Decision On Other States and Provisions.

Intervenors also contend that a decision recognizing Amendment Six's invalidity will have far-reaching impacts, necessarily invalidating every state constitutional provision impacting congressional redistricting. This is incorrect.

First, this Court's decision would not wholesale abolish countless other states' practices. Each state-law provision demands separate analysis to determine whether it regulates federal elections, the method in which it was enacted, and whether it conflicts with the state's legislative authority. For example, state provisions imposing equal-population requirements (*see* Intv. Br. 37 n.7) make no difference, because the Supreme Court has interpreted Article I, Section 2 of the United States Constitution to mandate equal population anyway. *Wesberry v. Sanders*, 376 U.S. 1, 7-8, 84 S. Ct. 526, 530 (1964). Similarly, Connecticut's provision requiring that congressional districts "shall be consistent with federal constitutional standards" imposes no new limitation on the state legislature. *See* Conn. Const. art. III, § 5. To the extent other state provisions were challenged, courts would have to analyze the manner in which each was enacted, the subject it regulated, and whether it conflicted with the state's legislative authority. That fact-specific inquiry regarding other states' laws has no bearing on whether the Elections Clause authorizes Amendment Six.

Second, Amendment Six's invalidity would not necessarily nullify other provisions of Florida's constitution. Contrary to Intervenors' characterization, Appellants have never argued that "any provision even touching upon congressional elections must be enacted by the legislature." (Intv. Br. 32.) Florida's constitutional provisions requiring legislative quorums, multiple readings, and the gubernatorial veto all apply with equal force to congressional redistricting, just as they do to any other legislative enactment.[12] Indeed, such provisions—which regulate not elections, but the legislative process generally—are exactly the sort that the Supreme Court sanctioned in *Smiley* and *Hildebrant*. Florida's Elections Clause authority must be exercised "as in other cases of the exercise of the lawmaking power"—that is, "in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367, 373, 52 S. Ct. at 399, 401. Amendment Six, on the other hand, is a regulation targeted at federal elections. Because it was not enacted through the legislative process, it

[12] The Florida Constitution contains numerous provisions that do not regulate federal elections, but do regulate the legislative process generally, and therefore apply to the enactment of congressional redistricting bills. Provisions that require a quorum, Fla. Const. art. III, § 4(a); that session be conducted in public, *id*. art. III, § 4(b); that committee meetings be open, *id*. art. III, § 4(e); that laws be confined to a single subject, *id*. art. III, § 6; that bills be subject to three readings, *id*. art. III, § 7; that bills be signed by the presiding officers, *id*.; that bills be subject to veto, *id*. art. III, § 8(a); and that vetoed bills be returned for possible override, *id*. art. III, § 8(c); present no conflict with the Elections Clause. They do not regulate federal elections; they regulate the legislative process.

is unauthorized by the Elections Clause. That conclusion in no way undermines constitutional provisions generally governing Florida's legislative process.

Moreover, Intervenors' concern for Florida's felon-disenfranchisement constitutional provision is misplaced. (Intv. Br. 32-33.) Voter qualifications for federal elections are established not by the Elections Clause, but by Article I, Section 2, and the Seventeenth Amendment, which require voters for Congress to have the same qualifications as voters for the most numerous branch of the state legislature—qualifications necessarily established by states' constitutions. Regardless, this Court has already stated that the Fourteenth Amendment "expressly permits states to disenfranchise convicted felons." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1218 (11th Cir. 2005) (en banc).

The violation of the Elections Clause at issue here is stark given that Amendment Six was enacted wholly outside the state legislative process and, indeed, over legislative opposition. But in any event, the possibility that giving effect to the Constitution and Supreme Court precedent in this case will adversely impact hypothetical elections laws not before this Court provides no reason to ignore the Constitution and Supreme Court precedent. *See, e.g., I.N.S. v. Chadha*, 462 U.S. 919, 944-45, 103 S. Ct. 2764, 2781 (1983) (invalidating one-house congressional veto even though Congress had enacted hundreds of such laws over decades; rejecting as irrelevant the "proposition that the one-House veto is a useful

'political invention'"); *Reynolds v. Sims*, 377 U.S. 533, 569-570, 84 S. Ct. 1362, 1386 (1964) (ending unconstitutional, decades-long, widespread practice of disproportionately populating districts). Finally, to be clear, the only thing at issue here is the regulation of *federal* elections. The Elections Clause does not limit the manner by which a State may adopt limits on the time, place, and manner of its *own* elections.

* * *

"By the Legislature thereof" means something. These words cannot be sidestepped by diminishing their importance to the Framers, by expanding them limitlessly to include all "lawmaking," or by inserting the word "People" into the Elections Clause. As interpreted by the Supreme Court, "by the Legislature thereof" means that federal authority to regulate elections is conferred on states' legislative processes—not states generally. Florida's legislative process, as dictated by its constitution, requires the Legislature's involvement. Amendment Six was enacted without the Legislature's involvement and is therefore not authorized "by the Legislature thereof" or the Elections Clause.

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

Even putting aside its manner of enactment, Amendment Six is invalid because it purports to impose substantive requirements exceeding state authority to regulate the times, places, and manner of federal elections. Amendment Six is no

mere "procedural regulation"; it is a results-oriented provision designed to alter electoral outcomes. It is thus a type of regulation the Elections Clause does not authorize, even when enacted by a state legislature. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34, 115 S. Ct. 1842, 1869 (1995); *Smiley,* 285 U.S. at 366, 52 S. Ct. at 399 (Elections Clause authorizes "procedure and safeguards").

A. Amendment Six Operates To Change Electoral Outcomes.

After insisting that Amendment Six was necessary to remedy the Legislature's practice of ensuring that its "favored candidates and 'factions' would succeed" (Intv. Br. 35), Intervenors implausibly contend that Amendment Six is not results oriented. The Secretary takes a more measured approach, arguing simply that Amendment Six's imposition of "generally accepted standards" is an appropriate Elections Clause regulation. (SOS Br. 40.) Intervenors' argument proves the point; the Secretary's misses it.

Intervenors argue that without Amendment Six, election results are dictated by the Legislature, but with Amendment Six, they are not. (Intv. Br. 41 ("The provision is not about dictating electoral outcomes, it is about preventing the legislature from continuing to do so.").) Appellants strongly dispute Intervenors' characterization of past redistricting practices, which lacks any record support. But accepting it for the sake of argument, it demonstrates Amendment Six's results-oriented nature. If absent Amendment Six, electoral outcomes were one way

(dictated by the Legislature), and *with* Amendment Six, electoral outcomes will be another way (*not* dictated by the Legislature), then Amendment Six inevitably will operate to change electoral outcomes.[13]

Appellees also argue that Amendment Six does not "disfavor" incumbents because it expressly prohibits districts "drawn with the intent to . . . disfavor an incumbent." The Supreme Court has recognized that (Amendment Six aside) incumbents *can* be favored. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440-41, 126 S. Ct. 2594, 2622 (2006) ("incumbency protection can be a legitimate factor in districting"—for example, to "to keep the constituency intact so the officeholder is accountable for promises made or broken"); *see also Vieth v. Jubelirer,* 541 U.S. 267, 300, 124 S.Ct. 1769, 1789 (2004) (plurality) (noting "the time-honored criterion of incumbent protection"). A prohibition on doing so works, therefore, to incumbents' disfavor. In fact, Intervenors argue that "incumbent legislatures [] are greatly benefitted by the status quo prior to [Amendment Six]." (Intv. Br. 44.) They cannot explain, though, how incumbents are not accordingly *disadvantaged* by prohibiting the use of this traditional redistricting criteria.

[13] Logically, if previous results were "dictated," then victorious candidates necessarily were not those voters were otherwise inclined to elect. Removing the "dictate" thus changes the result.

Nor is it any defense to argue, as Intervenors do, that notwithstanding Amendment Six, the voters will ultimately choose their representatives. (Intv. Br. 44.) Of course they will. But the same was true in *Cook v. Gralike*, where the regulation required labeling congressional candidates as supporting or opposing term limits. The Court did not strike the "regulation" because voters would not ultimately determine the outcome—indeed, "the precise damage the labels may exact on candidates [was] disputed between the parties." 531 U.S. 510, 525, 121 S. Ct. 1029, 1039 (2001). The point was that "the intended effect" was to make it more difficult for certain candidates to be elected. *Id.* In that case, the measure was to promote those adhering to a term-limits pledge; here Amendment Six's purpose is to address the view that too many incumbents are reelected.

The Secretary's contention—that Amendment Six imposes "generally accepted standards recognized for congressional redistricting"—is therefore beside the point. (SOS Br. 40.) The issue is not whether the Legislature's adherence to certain principles is "generally accepted"—it is whether an election regulation imposing substantive redistricting requirements "encompasses matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Cook*, 531 U.S. at 523-24, 121 S. Ct. at 1038 (quoting *Smiley*). The Elections Clause offers no authority "to

dictate electoral outcomes [or] to favor or disfavor a class or candidates." *U.S. Term Limits*, 514 U.S. at 833-34, 115 S. Ct. at 1869. Amendment Six's design is to change electoral outcomes—specifically to reduce the number of reelected incumbents and therefore disfavor a particular class of candidates. "Such 'regulation' of congressional elections simply is not authorized by the Elections Clause." *Cook*, 531 U.S. at 526, 121 S. Ct. at 1040.

B. Amendment Six's Minority Provisions Further Demonstrate Its Focus on Results.

Reducing incumbent reelection is not the only way Amendment Six is results oriented. It also mandates that "districts shall not be drawn with the intent *or result* of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their *ability to elect representatives of their choice*." Fla. Const. art. III, § 20 (emphasis added). As indicated in Appellants' Initial Brief, this constitutes laudable policy, and the Congressperson Plaintiffs and the Florida Legislature have long been dedicated to promoting and protecting the rights of minorities. But however well intended, Amendment Six's mandate requiring a certain "result" demonstrates that Amendment Six is no mere mechanical or procedural regulation.

The parties agree that Amendment Six's minority-protection language borrows in part from Sections 2 and 5 of the federal Voting Rights Act ("VRA"). (Intv. Br. 45.) Compliance with the VRA depends on, among other things, likely

electoral results. *See, e.g., Georgia v. Ashcroft*, 539 U.S. 461, 480, 123 S. Ct. 2498, 2511 (2003) (discussing retrogression analysis under Section 5: "to maximize the electoral success of a minority group, a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely . . . that minority voters will be able to elect candidates of their choice") (citation omitted); *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1268 (11th Cir. 2004) (protected group must "demonstrate that a challenged structure or practice impedes its ability to determine the outcome of elections").

But just because Congress may enact outcome-determinative laws regulating federal elections does not mean states can. Congress's authority to enact the VRA arose from the Fifteenth Amendment, which authorizes Congress exclusively to enact appropriate measures to enforce the minority voting rights. *See Lopez v. Monterey County*, 525 U.S. 266, 282, 119 S. Ct. 693, 703 (1999); (*see also* Init. Br. 47 n.14.) (Indeed, the VRA applies to federal *and* state elections, so it could not have been the product of Elections Clause authority, which authorizes regulation of only federal elections. *See* U. S. Const. art. I, § 4.) Moreover, it is undisputed that the Fifteenth Amendment gives no authority to states. U.S. const. amend. XV ("The Congress shall have power to enforce this article by appropriate

legislation."); *cf. Ex parte Virginia,* 100 U.S. 339, 345 (1879) (explaining that Civil War Amendments were "limitations of the power of the States and enlargements of the power of Congress"). Therefore, Amendment Six is valid only if the *Elections Clause* authorizes the outcome-determinative regulation like that in the VRA. Appellees offer no authority suggesting it does.[14]

Instead, Appellees contend that Amendment Six changes nothing with respect to minority protections; they claim it merely incorporates the VRA into Florida law and therefore cannot violate the Elections Clause. (Intv. Br. 45; SOS Br. 42 (provisions "merely parrot existing federal constitutional and statutory law").) But Amendment Six would do substantially more than incorporate the VRA—it would expand it significantly. Section 5 of the VRA applies only in five Florida counties, 41 Fed. Reg. 34,329 (1976); 40 Fed. Reg. 43,746 (1975), but Amendment Six would effectively expand it to all sixty-seven. Indeed, that was a key benefit some Intervenors touted before Amendment Six passed. As *amici curiae* in a state-court procedural challenge, the Florida State Conference of NAACP Branches and Democracia Ahora (Intervenors here) touted that:

[14] Intervenors incorrectly suggest that Appellants question Congress's authority to enact the VRA. (Intv. Br. 46.) The Congressperson Appellants led the fight to renew and extend Section 5 of the VRA when it was set to expire in 2006. *Cf.* The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, 120 Stat. 577. No party challenges the VRA's constitutionality here.

> [Amendment Six] provide[s] *even greater* protections for minority voters than does Section 5 of the Voting Rights Act. Whereas, the protection afforded to minority voters under Section 5 apply in only five enumerated counties in Florida, [Amendment Six] will apply *statewide*.

Brief for Amici NAACP & Democracia Ahora at 5, *Roberts v. Brown*, 43 So. 3d 673 (Fla. 2010) (No. SC10-1362) (emphasis added) (available at http://tinyurl.com/amicusbr). As a result, Amendment Six does far more than simply "incorporate[]" the VRA into the state constitution. (Intv. Br. 45.) Through its exclusive Fifteenth Amendment authority, Congress perhaps could have expanded Section 5 statewide, but the State of Florida, which has no Fifteenth Amendment authority, cannot do so.

To be sure, the Florida Legislature, subject to constitutional constraints, can act to protect minority voting rights, just as it has done for decades. But a results-oriented regulation of federal elections, like Amendment Six, is not a proper exercise of Elections Clause authority.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7). This brief is submitted in 14-point Times New Roman font, and it contains 6,443 words, according to the word-processing software on which it was created.

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CERTIFICATE OF SERVICE

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