UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 10-CV-23968-UNGARO

MARIO DIAZ-BALART and
CORRINE BROWN,

Plaintiffs,

and

THE FLORIDA HOUSE OF
REPRESENTATIVES,

Plaintiff-Intervenor,
v.

KURT S. BROWNING,
in his official capacity as Secretary of
State of Florida,

Defendant,

and

FLORIDA STATE CONFERENCE OF
NAACP BRANCHES, *et al*.,

Intervening Defendants.
_____/

DEFENDANT SECRETARY'S CROSS-MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Federal Rule of Civil Procedure 56, Defendant, Kurt S. Browning in his official capacity as Secretary of the State of Florida ("Secretary"), moves for entry of full and final summary judgment. The Secretary is entitled to summary judgment because there are no disputed material facts and judgment in his favor is appropriate as a matter of law. In support of this motion, the Secretary presents the following argument:

I. INTRODUCTION AND BACKGROUND.

Article I, Section 4 of the United States Constitution, also known as the Elections Clause, provides that the "Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," subject to the authority of Congress to, at any time, make or alter such laws. The Supreme Court has held that the Elections Clause grant of authority to the state legislature is subject to the state constitution's definition of its legislative power and that a state retains authority to define the lawmaking process by which the legislature determines the times, places and manner of conducting congressional elections. *Smiley v. Holm*, 285 U.S. 355 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). In so holding, the Supreme Court has plainly interpreted The Elections Clause to allow a state constitution to set parameters on the legislature's exercise of its authority to reapportion congressional districts.

This case involves an amendment to the Florida Constitution which limits the scope of lawmaking authority and redefines the legislative process with respect to congressional redistricting. The question presented in this case is whether the Elections Clause invalidates amendments to state constitutions that modify the legislative process by imposing standards for the legislature to follow in carrying out its duty to draw congressional districts. As explained below, the answer to this question must be no, as the Supreme Court has permitted states, through constitutional amendment, to limit and modify the state legislature's authority to draw congressional districts. Invalidating a state constitutional amendment that restricts the scope of the legislature's power to draw congressional districts would defy the Supreme Court's determination that Article I, Section 4 powers are to be exercised by the legislative power of the state, *whatever the state constitution defines that to be*.

A. The Lawmaking Power of the Florida Legislature is Wholly Derived From the Florida Constitution.

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

For instance, the Florida Constitution determines the nature and composition of the Florida Legislature; it imposes quorum requirements, qualifications of members, voting standards, and other rules necessary to enable the Legislature to exercise its lawmaking authority. Fla. Const. art. III, § 2 (members); *id*. § 3 (sessions); *id*. § 4 (quorum and procedures); *id*. § 7 (passage of bills); *id*. § 15 (qualifications). The Florida Legislature is a creature of the Constitution that creates it and, therefore, any exercise of legislative or lawmaking authority must correspond to the processes and limitations specified therein. *See State v. Bd. of Public Instruction for Dade Co.*, 126 Fla. 142, 151 (Fla. 1936) (holding that the Florida Legislature "looks to the [Florida] Constitution for the limitations on its power"). Simply put, the Florida Legislature has no power but for the Florida Constitution. It follows, therefore, that the Florida Legislature's power is only as broad as the Florida Constitution says that it is.

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

B. Amendment 6 Redefines the Scope of Legislative Authority to Reapportion Congressional Districts.

On November 2, 2010, the people of Florida, utilizing the authority reserved to them in the Florida Constitution, successfully amended the State Constitution to establish standards for the Legislature to follow in reapportioning congressional districts.[1] Upon its receipt of more than 60 percent of the votes cast, Amendment 6 became Article III, Section 20 of the Florida Constitution. That section in pertinent part presently provides:

> In establishing Congressional district boundaries:
>
> (1) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (2) Unless compliance with standards in this subsection conflicts with the standards in subsection (1) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

[1] Amendment 6 was proposed by initiative pursuant to Article XI, Section 3 of the Florida Constitution. The initiative was certified by the Secretary and placed on the 2010 general election ballot as "Amendment 6."

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

II. ARTICLE III, SECTION 20 IS A VALID LIMITATION ON THE LEGISLATURE'S EXERCISE OF ITS ELECTION CLAUSE DUTIES.

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

A. Because the Elections Clause Requires Legislatures to Make Law, the Authority Granted by the Elections Clause is Subject to the State Constitution's Limitations on the Exercise of Legislative Power.

Article I, Section 4 is one of many constitutional provisions granting federal authority to the state "legislature." *See, e.g.*, U.S. Const. art. I, § 8 (detailing the authority of the State "Legislature" to consent to the federal government's acquisition of land); *id*. art. II, § 1 (instructing each State to appoint presidential electors, "in such Manner as the Legislature thereof may direct"); *id*. art. V (providing that constitutional amendments are valid "when

ratified by the Legislatures of three fourths of the several states"). To discern the breadth of authority conferred in each particular provision, it is necessary to consider "the function to be performed." *Smiley v. Holm*, 285 U.S. 355, 365 (1932). Significantly, "[t]he use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function." *Id*. at 365. Therefore, "[w]herever the term 'legislature' is used in the Constitution, it is necessary to consider the nature of the particular action in view." *Id*. In some cases, the Federal Constitution "invests the Legislature with a particular authority and imposes upon it a corresponding duty" which renders ordinary state constitutional provisions inapplicable to the legislature's exercise of its federal authority. *Id*. Where, however, the Federal Constitution enlists the legislature to perform ordinary lawmaking activities, the legislature's exercise of federal power is subject to state constitutional "conditions which attach to the making of state laws." *Id*. at 365. In other words, where the Federal Constitution requires state legislatures to make law, the constitutional reference to "legislature" means the lawmaking power of the state. In these cases, the authority granted by the Federal Constitution to the state legislature is subject to the state constitution's definition of its legislative power. *Id*. at 367-69.

Therefore, to understand the delegation of authority in Article I, Section 4, it is necessary to consider "the nature of the particular action in view," and, in particular, "whether the function contemplated by Article I, [Section] 4, is that of making laws." *Id*. at 366. In *Smiley*, the Supreme Court squarely addressed both of these questions and analyzed whether a state legislature is subject to state constitutional restraints on authority when exercising its Elections Clause duties.

In *Smiley*, the plaintiffs challenged the state executive's power to veto congressional redistricting legislation, relying on the Elections Clause delegation to the state legislature. The

Minnesota Supreme Court held that the term "legislature" meant the official legislative body itself and, therefore, was not synonymous with the lawmaking power of the state and did not include the Governor. *State ex rel. Smiley v. Holm*, 238 N.W. 494 (Minn. 1931). The Supreme Court reversed, expressly rejecting the Minnesota Supreme Court's narrow interpretation of the term "legislature" in the Elections Clause.

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

Because, in its view, the Elections Clause directs legislatures to perform ordinary lawmaking duties, the Court concluded that the legislature's exercise of lawmaking authority must conform to state constitutional restraints on lawmaking. *Id*. at 368 ("As the [Elections Clause] authority is conferred for the purpose of making laws for the state, it follows . . . that the exercise of authority must be in accordance with the method which the state has prescribed for legislative enactments."). The Court found "no suggestion in the [Elections Clause] of an attempt to endow the Legislature of the state with power to enact laws in any manner other than

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

Likewise, in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), the Supreme Court earlier considered whether a state, through constitutional amendment, could modify the state's legislative power with respect to congressional redistricting. *Hildebrant* involved a citizen referendum invalidating a legislature's congressional redistricting plan. In *Hildebrant*, Ohio voters modified the State's legislative power *through constitutional amendment* and reserved to themselves a right of referendum to approve or disapprove by popular vote any law enacted by the State's General Assembly. *Id*. at 566. Thereafter, the Ohio General Assembly passed a congressional redistricting act that was disapproved by referendum. The plaintiffs brought suit in state court, arguing that use of the referendum violated the Elections Clause of the U.S. Constitution because it infringed on the General Assembly's authority to draw congressional districts. *Id*. The Ohio Supreme Court upheld the referendum procedure reasoning that the people could determine the character of their legislature and the manner by which the legislative

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

power was exercised. *State ex rel. Davis v. Hildebrant*, 114 N.E. 55, 57 (Ohio 1916). The court further reasoned that, by amending the Ohio Constitution, the people limited the State's legislative power by reserving to themselves the power to reject any reapportionment act by means of a popular referendum. *Id*. at 57-58.

The Supreme Court affirmed the Ohio Supreme Court's decision, expressly rejecting the plaintiff's argument that "the [State's] attempt to make the referendum a component part of the legislative authority empowered to deal with the elections of members of Congress was absolutely void." *Hildebrant*, 241 U.S. at 567. Reasoning that "the referendum constituted a part of the state Constitution and laws," the Court held that the referendum provision was applicable to congressional redistricting. *Id*. at 568. In doing so, the Court plainly recognized the authority of a state, through constitutional amendment, to modify and limit the state's legislative power with respect to congressional redistricting.

More recently, the Supreme Court has alluded to "[t]he States" "broad power" to reapportion congressional districts. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008). In *Washington State Grange*, the Supreme Court stated the following with respect to congressional redistricting:

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

Id. at 451 (internal citations omitted). This language is significant because it equates a state's power to regulate congressional elections with its power to control state legislative elections. It is unmistakable that states have a broad power to reapportion state legislative districts and that legislatures are bound to comply with state constitutional provisions prescribing the mechanics

of reapportionment. *See Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that courts should accommodate the relief ordered in state legislative apportionment cases to the apportionment provisions of state constitutions insofar as it is possible).[3] If, as indicated in *Washington*, state power to prescribe the times, places and manner of congressional elections "is matched by state control over the election process for state offices," it follows that states may, through provisions of their constitutions or otherwise, control the manner of congressional elections.

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

Finally, at least one federal district court has expressly acknowledged and complied with state constitutional reapportionment standards when crafting a court-ordered congressional reapportionment plan. In *Preisler v. Secretary of State of Mo.*, 341 F.Supp. 1158 (W.D. Mo. 1972), a federal district court acknowledged Article III, Section 45 of the Missouri Constitution

[3] Article III, Section 21 of the Florida Constitution, also passed in the November 2010 general election, prescribes standards for the Legislature to follow in reapportioning state senatorial and representative districts. The standards contained in section 21 are identical to those at issue in this case. Plaintiffs do not challenge the constitutionality of Florida's constitutional provisions governing state legislative reapportionment. *See* Plaintiffs' and Plaintiff-Intervenor's Joint Motion for Summary Final Judgment and Incorporated Memorandum of Law, pp. 4-5.

which required congressional districts to "be composed of contiguous territory as compact and as nearly equal in population as may be." In devising a judicial redistricting plan for the State, the federal court explicitly "respect[ed] and follow[ed] this state [constitutional] standard, as a matter of law and comity." *Id.* at 1161. Together, these cases demonstrate the validity of state constitutional restraints on the legislative power to reapportion congressional districts.

B. Article III, Section 20 is a Valid Restraint on the Legislature's Lawmaking Authority.

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

The executive veto in *Smiley* and the popular referendum in *Hildebrant* were features of the state's legislative power. Both the veto and referendum were part of the state constitution and contained in the article establishing and defining the legislative power of the state. Minn. Const. art. 4, § 1 (1932) (establishing the Minnesota Legislature); *id.* art. 4, § 11 (requiring all legislative bills to receive gubernatorial approval before becoming law); Ohio Const. art. 2, § 1 (1913) (establishing the legislative power of the state and reserving, to the people, the power to reject any law by popular referendum). Both the veto and the referendum, as applied to redistricting legislation, restricted the scope of legislative authority by limiting the latitude afforded to the legislature to reapportion congressional districts. *See Smiley*, 285 U.S. at 369

(describing the executive veto as a "restriction" and "limitation" on the exercise of lawmaking authority). Clearly, by subjecting all congressional reapportionment plans to popular referendum or executive veto, the legislature's authority was significantly limited, yet the U.S. Supreme Court recognized the supremacy of the state constitution's articulation of its legislative power and deferred to these constitutional restrictions on lawmaking.

Article III, Section 20 of the Florida Constitution is not fundamentally different than the constitutional provisions given deference by the Supreme Court. Like the constitutional provisions in *Smiley* and *Hildebrant*, Article III, Section 20 is contained in the article establishing and defining the State's legislative power. Article III, in its entirety, establishes the legislative power of the State, and section 20 is one of many provisions which, together, define the scope of the Legislature's lawmaking authority. The provision places boundaries on the lawmaking process by prescribing standards for the Legislature to follow in carrying out its duty to reapportion congressional districts. Just as the constitutional provisions in *Smiley* and *Hildebrant*, Article III, Section 20 operates as a constitutional restriction on the legislative authority of the State.

Article III, Section 20 is actually less restrictive on the Legislature's autonomy than either the gubernatorial veto or popular referendum provisions sanctioned in *Smiley* and *Hildebrant*. It is less of a usurpation of legislative authority to impose standards for the legislature to follow in reapportioning congressional districts than it is to completely invalidate a reapportionment plan crafted and approved by the state legislature. Specifying constitutional standards for the legislature to follow in reapportioning congressional districts is an equally valid method for a state to define and limit the legislature's lawmaking power.

That Article III, Section 20 was enacted through constitutional amendment has no effect on the primacy of the standards specified therein. Like the standards adopted here, the popular referendum in *Hildebrant* was put in place by constitutional amendment. *See Hildebrant*, 241 U.S. at 566 (stating that people reserved to themselves a right of referendum "[b]y an amendment to the Constitution of Ohio"). Like the people of Florida, the Ohio citizenry retained the power to modify the legislative power of the state and did so by way of constitutional amendment. The Supreme Court upheld the state constitutional amendment notwithstanding its effect on the legislature's exercise of its Elections Clause duties. In doing so, the Supreme Court determined that the Elections Clause does not invalidate state constitutional amendments that modify and even restrict the legislature's authority to reapportion congressional districts.

As noted by the Supreme Court in *Smiley*, at least two states provided for constitutional limitations on legislative authority at the time of the adoption of the Federal Constitution. 285 U.S. at 368. "That the state Legislature might be subject to such limitation[s], either then *or thereafter imposed as the several states might think wise*," (i.e., by constitutional amendment) is not "incongruous with the grant of legislative authority to regulate congressional elections." *Id*. (emphasis added). Nothing in the Elections Clause precludes a state from providing that legislative action in congressional redistricting shall comport with standards established by the state constitution. The definition of legislative power and the incorporation of standards to guide and limit the exercise of that power "is a matter of state polity." *Id*. at 368. "Article I, [Section] 4 of the Federal Constitution neither requires nor excludes" the incorporation of such standards. *Id*. "And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of the legislative authority." *Id*.

C. Other Authorities Recognize the Supremacy of State Constitutions and Further Support the Validity of Article III, Section 20 as a Limitation on the Lawmaking Power of the State.

Although the Supreme Court's holding in *Smiley* and *Hildebrant* establish the validity of constitutional provisions such as Article III, Section 20, other authorities further demonstrate the point. In line with Supreme Court precedent, several state supreme courts have adopted a broad view of the Elections Clause delegation to state legislatures and, in doing so, have rejected the notion that the Elections Clause grant of power simultaneously suspends the constitution of the state vis-à-vis congressional reapportionment.

In *State ex rel. Schrader v. Polley*, 127 N.W. 848 (S.D. 1910), the South Dakota Supreme Court considered whether the legislature's redistricting act was subject to referendum, as required by the state constitution. The South Dakota Supreme Court determined the term "legislature" in Article I, Section 4 refers to "the lawmaking body or power of the state, as established by the state Constitution, and which includes the whole constitutional lawmaking machinery of the state." *Id*. at 850. It therefore concluded that congressional redistricting legislation must "be passed according to the constitutional provisions of [the] state." *Id*. at 851.

More recently, the Supreme Court of Pennsylvania reached a similar conclusion in *Erfer v. Commonwealth*, 794 A.2d 325 (Penn. 2002), where Pennsylvania voters alleged the legislature's congressional redistricting plan violated the free and equal elections clause of the Pennsylvania Constitution. The Pennsylvania Legislature argued that none of the protections afforded by the Pennsylvania Constitution could be extended to congressional elections because the Federal Constitution gives state legislatures the power to draw congressional reapportionment plans. The Pennsylvania Supreme Court rejected "the radical conclusion that [the Pennsylvania] Constitution is nullified in challenges to congressional reapportionment

plans" and refused to "circumscribe the operation of the organic legal document of [the State]." *Id*. at 137.

Likewise, the Colorado Supreme Court upheld and enforced provisions of the Colorado Constitution specifying the time in which congressional redistricting must occur and precluding congressional redistricting outside of the constitutionally mandated time period. *Salazar v. Davidson*, 79 P.3d 1221 (Col. 2003) (*en banc*). The Colorado Supreme Court refused to implement the Colorado Legislature's redistricting plan because it was enacted outside of the time period prescribed by the Colorado Constitution. *Id*. at 1231-32, 1235. Deferring to the supremacy of the Colorado Constitution, the court opted instead for a court-drawn redistricting plan because it was drawn within the constitutionally prescribed window. *Id*. Recognizing that the Supreme Court in *Smiley* and *Hildebrant*, "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," the court held that "[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 (emphasis added).[4]

In addition to several state supreme courts, the United States Congress has likewise recognized the supremacy of state constitutions in the context of congressional reapportionment. The United States House of Representatives, acting under its authority "to be the Judge of the

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

Elections, Returns, and Qualifications of its own Members," has decided, on at least two occasions, that provisions of a state constitution prevail where there is a conflict between the state constitution and an act of the state legislature regarding the times, places and manner of conducting congressional elections. *See Farlee v. Runk*, H.R. Rep. No. 29-2 (1845) (House Committee on Elections determining that, where there is a conflict between the state constitution and an act of the legislature in regard to the place of voting for representatives in Congress, the provisions of the state constitution are binding); *Shiel v. Thayer*, H.R. Rep. No. 37-4 (1861) (House Committee on Elections determining that where the state constitution fixed the time for holding an election for representatives in Congress, and the legislature fixed another time, the time fixed by the constitution must govern because the constitutional provision had placed it beyond the power of the legislature to change the time of holding such elections).[5]

Given the holding in *Smiley* and *Hildebrant*, it is not surprising that at least a quarter of all states have adopted constitutional provisions expressly restricting the state legislature's power to reapportion congressional districts.[6] In fact, a survey of state constitutions reveals that the

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

[6] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1 (establishing "an independent redistricting commission" to reapportion congressional districts and requiring districts to be geographically compact, contiguous, respect communities of interest, and use visible geographic features); Cal. Const. art. XXI, § 2 (establishing the "citizens redistricting commission" that is "independent from legislative influence" to draw congressional districts and requiring districts to be contiguous and compact); Colo. Const. art. V, § 47 (requiring congressional districts to be contiguous and compact); Conn. Const. art. III, § 6 (commanding legislature to "appoint a reapportionment committee" to advise the legislature on matters of reapportionment); Haw. Const. art. IV, § 2 (establishing a reapportionment commission for the purpose of drawing congressional districts); Idaho Const. art. III, § 2 (directing secretary of state to form reapportionment commission to draw congressional districts); Minn. Const. art. IV, § 3 (requiring congressional districts to be "convenient contiguous territory"); Mo. Const. art. III, § 45 (requiring congressional districts to be compact and composed of contiguous territory); Mt. Const. art. V, § 14 (establishing

State of Florida is merely joining the ranks of many states in its decision to prescribe constitutional standards for its Legislature to follow in crafting congressional reapportionment plans. These constitutional provisions demonstrate the widely accepted and long-standing determination in *Smiley* that the federal power granted by the Elections Clause to state legislatures presupposes that each state legislature is acting in subordination to and in conformity with the organic law to which it owes its existence.

When compared to other state constitutional provisions, particularly those creating independent congressional redistricting commissions, Florida's constitutional standards are mild indeed. Moreover, and perhaps more significant, the Florida Legislature is *already* required to comply with many of the newly prescribed constitutional standards notwithstanding the passage of Amendment 6. Several standards established in Article III, Section 20 merely parrot existing federal constitutional and statutory requirements. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (announcing "one person, one vote" principle); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (holding that redistricting plans may be "invidiously discriminatory because they are employed to minimize or cancel out the voting strength of racial or political elements of the voting population"); 42 U.S.C. § 1973(a) (providing that no voting practice or procedure "shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"). Accordingly, the constitutional standard announced in Article III, Section 20 of the Florida Constitution,

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"commission of five citizens, none of whom may be public officials" to prepare a plan for reapportioning congressional districts); Ne. Const. art. III, § 5 (requiring legislature to redistrict after federal decennial census and to follow county lines when practicable); Utah Const. art. IX, § 1 (prescribing when the legislature may draw congressional districts); Wyo. Const. art. III, § 49 (requiring congressional districts to be contiguous and compact); W. Va. Const. art. I, § 4 (requiring districts to be contiguous and compact); Va. Const. art. II, § 6 (requiring congressional districts to be contiguous and compact).

namely, that no apportionment plan be drawn with the intent or result of denying or abridging the equal opportunity of racial minorities to participate in the political process, is hardly a novel concept and is already required by Federal law. *See id.* Similarly, Article III, Section 20's requirement that districts be "as nearly equal in population as is practicable" is redundant to say the least, as it tracks almost word for word, the "one person, one vote" principle announced over forty years ago in *Wesberry v. Sanders*, 376 U.S. at 8 (holding that Article I, Section 2 of the Federal Constitution requires congressional districts to achieve population equality "as nearly as is practicable"). Thus, at least two of the legislative boundaries prescribed in Article III, Section 20 are duplicative of long-standing federal requirements.

Moreover, the remaining standards imposed by Article III, Section 20, namely, that districts be compact, consist of contiguous territory and, where feasible, utilize existing political and geographical boundaries, are universally accepted standards for congressional redistricting "originally designed to represent a restraint on partisan gerrymandering." *Carstens et al. v. Lamm*, 543 F.Supp. 68, 83-87 (D.Colo. 1982). In fact, when reviewing or drawing congressional reapportionment plans, federal courts regularly evaluate or draw the plans based on these exact criteria. *See, e.g., id.* at 82 (evaluating congressional redistricting plan on the basis of compactness, contiguity and preservation of county and municipal boundaries); *David v. Cahill*, 342 F.Supp. 463 (D.C. N.J. 1972) (stating that the criteria appropriate in reapportioning congressional districts include, among others, contiguity, compactness and preservation of whole municipalities where possible). The customary use of these standards indicates the pragmatic character of Florida's legislative requirements.

Nonetheless, the decisions by Congress, state supreme courts and the variety of state constitutional limitations on congressional reapportionment demonstrate that the federal power

granted by Article I, Section 4 of the U.S. Constitution has long been understood to occur subject to state constitutional limitations on the exercise of legislative power. Indeed, nothing in Article I, Section 4 of the Federal Constitution frees the state legislature from the constraints in the state constitution that created it.

III. CONCLUSION.

The Florida Legislature is obligated to comport with the limitations on its lawmaking authority as prescribed in the Florida Constitution. Because the Elections Clause imposes a lawmaking duty on the state legislature, the U.S. Supreme Court has determined that the authority granted by the Elections Clause is subject to state constitutional limitations on the exercise of legislative power, regardless of whether those limitations are preexisting or subsequently enacted through constitutional amendment. As a duly enacted provision of the Florida Constitution, Article III, Section 20 is a valid limitation on the Legislature's exercise of its federal Elections Clause power.

Dated: May 25, 2011

Respectfully submitted,

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I HEREBY CERTIFY that a copy of the foregoing was electronically served through the Court's CM/ECF system, unless otherwise noted, this 25th day of May, 2011, to the following:

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