No. 13-1314

IN THE
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,
v.
ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,
Appellees.

On Appeal From The United States District Court For The District Of Arizona

BRIEF OF FORMER CALIFORNIA GOVERNORS GEORGE DEUKMEJIAN, PETE WILSON, AND ARNOLD SCHWARZENEGGER; CHARLES T. MUNGER, JR.; BILL MUNDELL; AND CALIFORNIA CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

This case concerns the constitutionality of the people of Arizona's decision to delegate to the Arizona Independent Redistricting Commission the authority to draw the State's congressional districts. *See* Ariz. Const. art. IV, pt. 2, § 1. As in Arizona, the people of California recently amended their state constitution to establish an independent commission to draw congressional districts. *See* Cal. Const. art. XXI, § 1 (providing that a "Citizens Redistricting Commission" "shall adjust the boundary lines of the congressional . . . districts"); *id.* § 2 (describing the Commission, its duties, and its membership); *id.* § 3 (addressing defense of districting map and proceedings challenging the final map). California's Citizens Redistricting Commission is the product of two ballot initiatives: Proposition 11, a 2008 measure that created the Commission to draw state legislative districts, and Proposition 20, a 2010 measure that ex-

[1] Pursuant to this Court's Rule 37.3(a), *amici* state that appellant and appellees have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

tended the Commission's authority to congressional redistricting. *See* Proposition—Districts—Voters First Act, 2008 Cal. Leg. Serv. Prop. 11 (West) ("Proposition 11"); Constitutional Amendments—Voters First Act, 2010 Cal. Leg. Serv. Prop. 20 (West) ("Proposition 20"). Those measures sought to ensure that the boundaries of California's congressional and legislative districts fairly represent the people of California, rather than protect incumbent politicians or a particular political party. *See* Proposition 11 § 2 (findings and purpose); Proposition 20 § 2 (same). The post-2010 round of redistricting in California was the first in which the Commission conducted the redistricting process.

Amici curiae George Deukmejian, Pete Wilson, and Arnold Schwarzenegger are former Governors of California. Each played a central role in efforts to reform the redistricting process in the State—which, as discussed below, has long been plagued by abuses, partisan and otherwise. Each former Governor, during his tenure in office, pursued reform measures—predecessors to the ultimately successful efforts in 2008 and 2010—that were designed to remove redistricting authority from the California Legislature and delegate it to an independent commission. Each former Governor supported Propositions 11 and 20.

Amicus curiae Charles T. Munger, Jr., is a longtime supporter of independent redistricting commissions. He was a principal advocate for Proposition 11, and was the "Yes on 11" campaign's largest financial backer. He was also a principal advocate for Proposition 20: he was closely involved in drafting Proposition 20; he was its official "proponent" responsible for submitting the measure to the California Attorney General, *see* Cal. Elec. Code § 342; and he was its largest financial supporter.

Amicus curiae Bill Mundell is also a longtime advocate of redistricting reform. He served as Chairman of Californians for Fair Redistricting, which qualified Proposition 77, a 2005 California initiative to adopt an independent redistricting commission. In 2010, he was executive producer of the documentary *Gerrymandering*, which was released nationally and played an integral role in the campaign for Proposition 20.

Amicus curiae California Chamber of Commerce ("CalChamber") is a nonprofit business association with more than 13,000 members, both individual and corporate, representing virtually every economic interest in the State. CalChamber acts on behalf of the business community to improve the State's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues and by participating as *amicus curiae* in cases, like this one, that have a significant impact on California businesses. CalChamber was one of the principal supporters of Propositions 11 and 20.

SUMMARY OF ARGUMENT

I. Under the Elections Clause and federal statute, the people of a State may—as the people of Arizona and California have done—authorize an independent commission to draw congressional districts.

A. The text, structure, and history of the Elections Clause make clear that a state legislature, or the people of a State exercising legislative power through the initiative process, may delegate authority to regulate congressional elections to another body duly created under state law. The people of a State therefore may use the initiative process to delegate to an independent redistricting commission their au-

thority under the Elections Clause to draw congressional districts.

The Elections Clause provides that "[t]he 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, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. In the Founding Era, the word "Legislature" referred to legislative power or authority, not to a particular legislative body or process. *See*, *e.g.*, Samuel Johnson, A Dictionary of the English Language 1188 (1755) ("legislature" means "[t]he power that makes laws"). The term "Legislature" thus unambiguously permits congressional redistricting to be undertaken by whatever lawmaking body the people of a State decide to vest with that power, including, for example, the State's elected legislature sitting in session or the people legislating through ballot initiative. And nothing in the Clause's permissive language prohibits that legislative body—whether the assembled legislators or the people themselves—from delegating its redistricting authority to an independent commission established in accordance with applicable state law.

The structure and history of the Clause confirm that conclusion. The first part of the Clause provides broad authority to States "to provide a complete code for congressional elections," *Smiley v. Holm*, 285 U.S. 355, 366 (1932), without restricting the type of state legislative body that can promulgate that "code." The second part of the Clause likewise imposes no limit on how each State decides to structure and assign its legislative power over congressional elections, so long as Congress has not "ma[de] or alter[ed]" the State's regulations. Moreover, at the

time of the ratification, it was widely understood that the Elections Clause confers sweeping authority on States to regulate congressional elections and that, although Congress possesses ultimate authority over those elections, the Clause itself does not limit the regulations that a State can prescribe or the legislative means by which a State can issue those measures. The check on the States' power over congressional elections rests in Congress, not the Elections Clause.

More broadly, the historical record confirms that the Framers would not conceivably have intended the Clause to restrict the legislative means through which the States regulate congressional elections. Debates over the Guarantee Clause, U.S. Const. art. IV, § 4, make clear that, while the States would be guaranteed a baseline republican form of government, each State would be free to experiment with how to arrange that government. This approach was sensible given that, in the years leading up to the ratification, the States were experimenting with varied forms of republican government; the historical record reflects that the Framers intended to preserve the States' leeway to structure their own governments, subject only to broad constitutional constraints. In addition, the Framers were concerned that state legislators would at times serve their own interests at the people's expense. Given that concern, it would make little sense to construe the Elections Clause to deprive the people of their legislative authority under state law to remove the redistricting power from state legislators and delegate it to an independent commission.

B. Congress has eliminated any conceivable doubt on this issue. Exercising its power to "make or alter . . . Regulations" for congressional elections,

U.S. Const. art. I, § 4, cl. 1, Congress has established that "a State" may be "redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c). The history behind that provision confirms that it was worded expressly to permit States to adopt congressional districts under whatever legislative procedure state law provides—whether through independent commissions exercising delegated legislative authority, the votes of the State's elected legislative officials, or the people drawing electoral lines through the initiative process.

II. California's redistricting history confirms the wisdom of the approach that the Framers enshrined in the Elections Clause and that Congress confirmed in 2 U.S.C. § 2a(c). For decades, the California Legislature abused its power to adopt congressional districts, at times adopting highly partisan gerrymandered districts that sparked costly political battles and largely fruitless intervention by the courts, and at other times adopting bipartisan "sweetheart" gerrymanders designed to insulate incumbents of both major parties from electoral competition. The Framers recognized that adopting congressional districts was politically contentious, and they accordingly left the people of the States ample discretion to remedy any abuse by whatever legislative means state law provided. That flexible framework plainly—and wisely—permitted the people of California and Arizona, as the ultimate repositories of legislative power in those States, to use the initiative process to revoke their delegation of redistricting authority to the state legislature and instead delegate that power to an independent redistricting commission.

ARGUMENT

I. UNDER THE ELECTIONS CLAUSE AND FEDERAL STATUTE, THE PEOPLE OF A STATE MAY DELEGATE REDISTRICTING AUTHORITY TO AN INDEPENDENT COMMISSION.

The text, structure, and history of the Elections Clause make clear that a state legislature, or the people of a State exercising legislative powers through the initiative process, may delegate regulatory authority over congressional elections to another decision-making body duly created under state law. The people of a State can therefore use the initiative process to delegate redistricting authority to an independent redistricting commission. Moreover, to the extent that the Clause leaves any doubt on this issue, Congress has exercised its power under the Elections Clause to authorize the use of redistricting commissions to draw congressional districts.

A. The Elections Clause's Text, Structure, And History Make Clear That The People Of A State May Delegate Redistricting Authority To An Independent Commission.

1. ***Text.*** The Elections Clause provides: "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, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. The first part of the Clause unambiguously permits the body that exercises legislative power within each State—whether elected officials, the people themselves, or some combination of the two—to decide whether to retain the

redistricting power for itself or delegate it to some other decision-maker in accordance with state law.

In the Founding Era, the term "Legislature" referred broadly to legislative power or authority; it did not refer only to a particular legislative body or process. Samuel Johnson defined "legislature" simply as "[t]he power that makes laws." Samuel Johnson, A Dictionary of the English Language 1188 (1755); Samuel Johnson, A Dictionary of the English Language (1785) (same); Samuel Johnson, A Dictionary of the English Language (1802) (same). Thomas Sheridan's dictionary defined "legislature" exactly as Dr. Johnson did: "The power that makes laws." Thomas Sheridan, A Complete Dictionary of the English Language (4th ed. 1797). Noah Webster defined the term precisely that way as well. *See* Noah Webster, Compendious Dictionary of the English Language (1806). And Nathan Bailey similarly defined "legislature" as "the Authority of making laws, or Power which makes them." N. Bailey, An Universal Etymological Dictionary (20th ed. 1763). None of these authorities confined the term "legislature" to a particular body.

Under the ordinary meaning of "Legislature" at the time of the ratification, then, the Elections Clause permits regulations for congressional elections to "be prescribed in each State by" (U.S. Const. art. I, § 4, cl. 1) whatever body exercises "[t]he power that makes laws" (Johnson, *supra*, at 1188 (1755); Sheridan, *supra*; Webster, *supra*) or "the Authority of making laws" (Bailey, *supra*) in that State. The Clause thus permits the people of Arizona and California—who are the ultimate repositories of legislative authority in each State—to use the initiative process to make redistricting decisions. *See* Ariz. Const. art. IV, pt. 1, § 1(1) ("The legislative authority

of the state shall be vested in the legislature, . . . but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature . . . ."); Cal. Const. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.").

The Clause further permits the people to decide by ballot initiative to delegate their legislative authority over redistricting to an independent commission duly established under state law. Nothing in the language of the Elections Clause suggests that the people are barred from delegating that legislative power to a decision-maker of their choosing. Indeed, it is well-settled that the federal judiciary lacks the authority to superintend the decisions of state legislative bodies to delegate a portion of their authority to another decision-maker. Those matters of internal state governance are outside the purview of this Court. *Cf. Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cnty.*, 281 U.S. 74, 79-80 (1930) ("As to the guaranty to every state of a republican form of government (sec. 4, art. IV), it is well settled that the questions arising under it are political, not judicial, in character, and thus are for the consideration of the Congress and not the courts."); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912).[2]

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[2] At the federal level, it is likewise clear that Congress can delegate its legislative power to other governmental actors as long as it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to

2. ***Structure.*** The Elections Clause as a whole confirms that the Framers used the term "Legislature" in the Clause to denote legislative *power*—not a particular legislative *body*—and that, in keeping with the ordinary meaning of that term at the ratification, the Clause does not specify a particular legislative body in which a State must vest that power or restrict the right of that body to delegate its power to another decision-maker.

As addressed above, the first part of the Elections Clause authorizes the "Legislature" of "each State" to "prescrib[e]" "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. The "substantive scope" of this part of the Clause "is broad." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013). "Times, Places and Manner" are, this Court has emphasized, "comprehensive words" that "embrace authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). The first part of the Clause does not impose any restrictions on the process or means by which a State's "Legislature"—its lawmaking power, *see supra* at 7-9—may promulgate that "code."

The second part of the Elections Clause reinforces that conclusion. That part authorizes Congress, "by Law," to "make" "Regulations" for elections or "alter" the "Regulations" prescribed by each State's

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[Footnote continued from previous page]

conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). It is inconceivable that the Framers would have placed greater restraints on the authority of the legislators and people of the sovereign States to delegate their legislative powers than on the authority of Congress to do so.

legislature, "except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. That language carves out for Congress ultimate authority over the way in which congressional elections are regulated, but it does not limit how each State's "Legislature" may exercise its power when Congress has not "ma[de] or alter[ed]" the State's regulations. As the Framers structured the Elections Clause, Congress could conceivably never act under the second part of the Clause at all: it *could* "make or alter" regulations over elections, but it need not do so. This structural feature underscores that the Clause necessarily grants state legislative bodies extensive leeway when regulating congressional elections—including, in the absence of congressional override, the unrestricted right to delegate that authority to another decisionmaker, such as an independent redistricting commission. This structure confirms, moreover, that if such commissions were problematic, the Framers understood that any remedy rested with Congress.

3. ***Debates over the Elections Clause.*** The historical record regarding the Elections Clause confirms that the Clause does not limit the legislative means by which congressional districts may be drawn, and that the Clause accordingly permits the people of a State to delegate that power to an independent commission. Four features of the historical record reinforce this conclusion.

First, at the time of the ratification, the Elections Clause was understood to address primarily the division of federal and state power to regulate congressional elections—not the legislative process by which each State could exercise the power granted to it. Alexander Hamilton explained that the Clause reflected the Framers' choice between lodging "power over elections" "wholly in the national legislature, or

wholly in the State legislatures, or primarily in the latter and ultimately in the former." The Federalist No. 59, at 360 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003) (1961). Hamilton did not suggest that the Clause embodied limitations on how States could exercise the power they were granted (aside from Congress's ultimate power over federal elections). Similarly, James Madison observed that, by including a congressional power to override state regulations, the Elections Clause was meant to prevent state legislatures from having an "uncontrouled right" over congressional elections. 2 The Records of the Federal Convention of 1787, at 240 (Max Farrand ed. 1911) ("Farrand"). Like Hamilton, Madison did not suggest that the Clause included other, unexpressed restrictions on state power—such as a restriction on the decision-makers to whom a state legislative body could delegate its authority to regulate the time, place, and manner of holding congressional elections. Given the concerns of the Anti-Federalists regarding potential encroachments on state power, any such federally imposed restrictions on the right of States to structure their own governments would have been met with the most vociferous opposition—but the historical record is devoid of any such evidence.

Second, the Elections Clause was widely understood to confer sweeping power on the States—even the power to regulate elections in ways that presented an obstacle to a well-functioning federal government or were otherwise improper. That broad understanding of state power is incompatible with the cramped view that the Clause bars the people of a State from delegating redistricting authority to an independent commission.

The ratification debates over the Elections Clause focused almost exclusively on the second part of the Clause, and in particular on whether Congress should have authority to preempt state election regulations. Anti-Federalists contended that such a power would enable Congress to swallow state authority and regulate elections in a way that benefited the powerful. Expressing these concerns, the Anti-Federalist Brutus argued that, "under [the Elections Clause], the foederal legislature may institute such rules respecting elections as to lead to the choice of one description of men." Brutus, Letter IV, N.Y. J., Nov. 29, 1787, *reprinted in* 14 The Documentary History of the Ratification of the Constitution 297, 301 (John P. Kaminski et al. eds. 1983) ("Documentary History").

The Constitution's supporters responded to such concerns by emphasizing that States could abuse the power conferred on them by the Elections Clause and that a congressional override was needed to address such abuse. They recognized that, while the people were likely to be attached to the new federal government, members of existing state governments stood to lose power under a strong central government and might seek to use their Elections Clause power to frustrate the success of that government. *See*, *e.g.*, 1 Farrand 132-33 (James Wilson: "The opposition [to the new national government] was to be expected . . . from the *Governments*, not from the Citizens of the State. . . . The State officers were to be the losers of power.").

For example, at the federal convention, opposing a motion to strike the second part of the Clause, James Madison explained that "[t]he necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common in-

terest at the expense of their local conveniency or prejudices." 2 Farrand 240. "[T]he Legislatures of the States," he argued, thus "ought not to have the uncontrouled right of regulating the times places & manner of holding elections." *Id.* Explaining the need for a congressional check on state legislative power, Madison emphasized that the first part of the Clause uses "words of great latitude." *Id.* A congressional check on the broad power granted by those words was needed, he continued, because "[i]t was impossible to foresee all the abuses that might be made of the discretionary power" given to the States:

> Whether the electors should vote by ballot or viv[a] voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures[,] and might materially affect the appointments. . . . What danger could there be in giving a controuling power to the Natl. Legislature?

Id. at 240-41. Madison thus recognized that the Clause conferred sweeping "discretionary power" on the States—power that the States could use "abus[ively]" in ways that could not be "foresee[n]"—which necessitated a congressional backstop. *Id.* at 240. Such a capacious grant of power, though dangerous, was necessary because, as Madison explained at the Virginia ratifying convention, "[i]t was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution." 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 367 (Jonathan Elliot ed., 2d ed. 1891) ("Elliot").

Indeed, the Framers widely understood that the States would possess far-reaching power under the first part of the Elections Clause. The Clause's supporters regularly emphasized, like Madison, that the second part of the Clause was necessary because the States could exercise their broad authority improperly. Many supporters argued, for example, that the second part of the Clause was needed so that Congress could ensure its own existence: If Congress lacked authority to regulate federal elections, States could cripple the House of Representatives by refusing to provide for congressional elections. As Alexander Hamilton put it, giving States "exclusive power of regulating elections for the national government" could "accomplish the destruction of the Union." The Federalist No. 59, at 364. In defending the need for a congressional override, Hamilton accordingly emphasized that "every government ought to contain in itself the means of its own preservation." *Id.* at 360 (emphasis omitted); *see also Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. at 2253 (affirming this purpose). The Constitution's other supporters echoed him. *See*, *e.g.*, 3 Elliot 367 (James Madison, at Virginia ratifying convention: "Were [election regulations] exclusively under the control of state governments, the general government might easily be dissolved."); 2 Elliot 440 (James Wilson, at Pennsylvania ratifying convention: the Elections Clause was "necessary" to (among other things) give "the federal government" "self-preserving power").

Other defenses of Congress's "make or alter" authority similarly emphasized the need to address potential abuse by the States of their authority to regulate federal elections—a concern that arose precisely because the Clause conferred such sweeping power on the States. The Elections Clause's supporters

emphasized that Congress needed to be able to remedy such abuses, as when a State:

- drew congressional districts unfairly, *see*, *e.g.*, 2 Elliot 27 (Theophilus Parsons, at Massachusetts ratifying convention: a congressional override was needed if state legislatures were to "make an unequal and partial division" of congressional districts);
- provided that an election be held in a single location or in locations inconvenient for many, *see*, *e.g.*, 2 Elliot 441 (James Wilson at Pennsylvania ratifying convention) (noting that an election might be held in "Pittsburgh"));
- imposed *viva voce* voting, *see*, *e.g.*, 2 Documentary History 413 (Thomas McKean, at Pennsylvania ratifying convention: "If, for instance, the states should direct the suffrage of their citizens to be delivered *viva voce*, is it not necessary that the Congress should be authorized to change that mode, so injurious to the freedom of election, into the mode by ballot, so happily calculated to preserve the suffrages of the citizens from bias and influence?");
- adopted election rules that would enable state legislatures to control the House of Representatives, *see*, *e.g.*, 2 Elliot 441 (Francis Cabot at the Massachusetts ratifying convention: "if the state legislatures are suffered to regulate conclusively the elections of the democratic branch, they may, by such an interference, . . . at first diminish, and finally annihilate, that control of the general government, which the people ought always to have through their immediate representatives"); or

- otherwise acted arbitrarily, *see*, *e.g.*, 2 Elliot 27 (Theophilus Parsons, at Massachusetts ratifying convention: a congressional override was needed if, for example, a state legislature were to arbitrarily "disqualify one third of the electors").

The understanding underpinning all of these accounts is that the first part of the Elections Clause grants to state legislatures comprehensive authority to regulate elections—even in ways that are arguably unfair, arbitrary, or improper. Congress, the Clause's supporters made clear, needed to be able to remedy such misuses of the power granted to the States by the Clause. Given the breadth of that power—which encompassed the authority even to enact unjust and unreasonable election regulations—it is implausible that the Clause would simultaneously bar States from using independent redistricting commissions to adopt fair, representative congressional districts. In any event, if the use of such commissions were somehow problematic, the Framers understood that the remedy rested with Congress—through its "make or alter" power—not with the federal courts. *Cf. Hildebrant*, 241 U.S. at 569.

Third, while the Framers considered Congress's "make or alter" power to be an essential backstop, they understood the Elections Clause to leave the regulation of congressional elections substantially to the States in the first instance. More specifically, although they granted Congress plenary authority over congressional elections, the Framers believed that, as a prudential matter, Congress should invoke that authority to reject state regulations only in rare circumstances. At the Virginia ratifying convention, for example, James Madison maintained: "[I]f [elections] be regulated properly by the state legislatures,

the congressional control will very probably never be exercised." 3 Elliot 367. This was proper because "the state governments" are "best acquainted with the situation of the people." *Id.*

Supporters of the Elections Clause emphasized, moreover, that, despite possessing ultimate authority over congressional elections, Congress would likely override state regulations *only* in cases of necessity or abuse. At the Pennsylvania ratifying convention, Jasper Yeates argued that the power to preempt the States' election regulations would be invoked only "in a case of necessity, after the factious or listless disposition of a particular state has rendered an interference essential to the salvation of the general government." 2 Documentary History 437. Alexander Contee Hanson proclaimed it difficult to "imagine" "that congress will presume to use this power, without the occurrence of some one or more of" various extreme "cases": "the cases of invasion by a foreign power; of neglect, or obstinate refusal, in a state legislature; of the prevalence of a party, prescribing so as to suit a sinister purpose, or injure the general government." Aristides (Alexander Contee Hanson), Remarks on the Proposed Plan, Jan. 31, 1788, *reprinted in* 15 Documentary History 522, 526. At the North Carolina ratifying convention, future Supreme Court Justice James Iredell likewise explained: "An occasion may arise when the exercise of this ultimate power in Congress may be necessary," but such an occasion would be rare—"as, for instance, if a state should be involved in war, and its legislature could not assemble." 4 Elliot 53. The historical record does not suggest that the decision by a state legislature, or the people of a State, to delegate its authority under the Elections Clause to another decision-maker is one of the rare circumstances that

would warrant correction by Congress—let alone invalidation by a court.

Fourth, the historical record demonstrates that the Elections Clause was intended to protect the right of suffrage and to promote fair elections—the same objectives that animated the decisions of the people of Arizona and California to delegate redistricting authority under the Clause to an independent commission. At the Virginia ratifying convention, James Madison justified the congressional override as necessary "[s]hould the people of any state by any means be deprived of the right of suffrage." 3 Elliot 367. At the Massachusetts ratifying convention, Theophilus Parsons emphasized the need for a remedy if "a state legislature" were to "make an unequal and partial division of the states into districts for the election of representatives" (or do something else improper—such as "disqualify one third of the electors"). 2 Elliot 27. Parsons accordingly defended the second part of the Clause by explaining that it "provides a remedy" to "preserve and restore to the people their equal and sacred rights of election." *Id.* And at the Pennsylvania ratifying convention, Thomas McKean emphasized the need for Congress "to be enabled to make the necessary reform" if a State were to establish a "time and manner" of holding election that was "inconsistent with the principles of a pure and constitutional election." 2 Documentary History 413. It would be incongruous to construe the Elections Clause to prohibit the use of independent redistricting commissions established to serve the very goals that the Clause itself was meant to achieve.

4. ***Broader Historical Context.*** The broader Founding Era context confirms that the Framers did not intend the Elections Clause to restrict how the

people of a State could exercise the legislative power to regulate congressional elections or apportion governmental power within their own state governments to protect their interests more effectively.

For example, the debates concerning the Constitution's Guarantee Clause underscore the Framers' intention to leave the States with substantial leeway over the structure of their own governments. The Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union, a Republican Form of Government." U.S. Const. art. IV, § 4. In an initial draft, however, the Clause provided: "That a Republican Constitution & *its existing laws* ought to be guaranteid to each State by the U. States." 2 Farrand 47 (emphasis added). Delegates to the federal convention objected to that language on the ground that the structures of government in some States were undesirable and that the States should be able to modify them. *See id.* (Gouverneur Morris objecting to preserving Rhode Island's existing laws); *id.* at 48 (William Houston "was afraid of perpetuating the existing Constitutions of the States," and noted that the constitution of Georgia "was a very bad one" that "he hoped would be revised & amended"). In the face of such objections, the Clause was amended to read substantially as it does today. *See id.* at 48-49.

In keeping with this desire for flexibility, James Madison explained that, although a federal government "founded on republican principles" "ought clearly to possess authority to defend the system against aristocratic or monarchial innovations," "th[at] authority" should "exten[d] no further than to a *guaranty* of a republican form of government." The Federalist No. 43, at 271-72 (James Madison). Beyond that baseline, he believed that the States

should have significant leeway in how they structure their governments: "Whenever the States may choose to substitute other republican forms [for those they have now], they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance." *Id.* at 272. Given the structural freedom that the Framers afforded the States, it is implausible that they would have intended the Elections Clause to bar the people from experimenting with different legislative means of exercising the redistricting power.

That organizational flexibility is consistent with, and an outgrowth of, the States' widespread experimentation with different governmental structures in the years preceding the ratification. In the 1770s, most of the States adopted new constitutions.[3] These constitutions varied significantly, including in the manner in which they allocated the various powers of government. Pennsylvania's 1776 constitution, for example, adopted a unicameral legislature and a multi-member executive with no veto power. *See* Pa. Const. of 1776. Massachusetts adopted a model more akin to the federal constitution, including a bicameral legislature and a single governor with veto power. *See* Mass. Const. of 1780, *available at* http://press-pubs.uchicago.edu/founders/print_documents/v1ch1s6.html (last visited Jan. 21, 2015). New York subjected its legislature's proposed laws to a council of

[3] The text of most of these constitutions is available at http://avalon.law.yale.edu/subject_menus/18th.asp (last visited Jan. 21, 2015). Except as otherwise indicated, citations to those constitutions are to the versions reflected on that website.

revision, made up of the governor, chancellor, and judges, with the power to veto laws that violated the constitution. *See* N.Y. Const. of 1777. Other States adopted still other structures. In a time of such experimentation, if the Framers had intended the Elections Clause to restrict the people's right to organize their States' legislative authority as they saw fit, one would expect that intention to have been clearly expressed and widely debated. It was not.

Finally, by vesting in the people, rather than the state legislatures, the power to elect members of the House of Representatives, the Framers manifested their mistrust of state legislative bodies—a mistrust that is incompatible with construing the Elections Clause to empower elected state legislatures alone to exercise redistricting authority. At the federal convention, the Framers considered proposals that the House be elected by the state legislatures, rather than by the people directly. *See* 1 Farrand 48-50, 132-38, 358-60. In defending direct elections by the people, James Wilson argued that "[t]he [national] Legislature ought to be the most exact transcript of the whole Society," *id.* at 132, and that the people's interests would not be adequately served if the state legislatures were responsible for choosing representatives because "the Legislatures are actuated not merely by the sentiment of the people, but have an official sentiment opposed to that of the Genl[.] Govt. and perhaps to that of the people themselves," *id.* at 359. Rufus King similarly argued that "the [state] Legislatures wd. constantly choose men subservient to their own views as contrasted to the general interest." *Id.* Given the strongly articulated fears that state legislators would at times misuse their power—and the understanding that, with respect to state election regulations in particular, Congress would

override state legislatures only rarely, *see supra* at 17-19—the Framers would not conceivably have intended to preclude the people of a State from reforming their state government to protect their electoral rights, such as by creating independent redistricting commissions not controlled by self-interested state legislators.

B. Congress Has Confirmed In 2 U.S.C. § 2a That States May Adopt Congressional Districts Through Independent Redistricting Commissions.

As discussed above, the second part of the Elections Clause provides that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Even if the first part of the Elections Clause did not permit the people of a State to establish an independent commission to draw congressional districts, Congress has exercised its authority under the second part of the Clause to authorize States to do so. Specifically, Congress has recognized that "a State" may be "redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c). On its face, that language plainly authorizes the people of a State to use the initiative process to delegate a portion of their legislative authority to an independent redistricting commission duly established under state law. Moreover, the history behind that language confirms that it grants each State wide discretion to design its procedures for redrawing congressional districts.

Before 1911, federal apportionment law required that congressional district lines be maintained in place "until the legislature of such State in the man-

ner herein prescribed shall redistrict such state." Act of Feb. 7, 1891, ch. 116 § 4, 26 Stat. 735, 736; *see also Hildebrant*, 241 U.S. at 568. That changed in 1911, when Congress adopted language providing instead "that the redistricting should be made by a State 'in the manner provided by the laws thereof.'" 241 U.S. at 568 (quoting Act of Aug. 8, 1911, ch. 5 § 4, 37 Stat. 13, 14). The Act's history makes clear that this broader language was adopted specifically to embrace the initiative and referendum power. *See id.* at 568-69.

When the Senate considered the legislation that would eventually become the 1911 Act, the bill retained language providing that redistricting could be accomplished by "the legislature of" each State. *See* 47 Cong. Rec. S3436 (Aug. 1, 1911) ("by the legislature thereof"). In the view of Senator Theodore Burton, that language was "a distinct and unequivocal condemnation of any legislation by referendum or by initiative" and a message to each State that, "[w]hatever your laws may be for the enactment of statutes, yet in the division of the State into congressional districts you must act by the legislature alone." *Id.* "A due respect to the rights, to the established methods, and to the laws of the respective States," Senator Burton urged, "requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Id.* Senator Burton emphasized, moreover, that it made especially little sense to confine redistricting decisions to the elected legislature. "If there is any case in the whole list of laws where you should apply your referendum," he explained, "it is to a districting bill": such laws provide "opportunity for monstrous injustice," which is pre-

cisely what the referendum process is designed to address. *Id.* at S3437.

Given those considerations, Senator Burton proposed "strik[ing] out the words 'by the legislature thereof in the manner herein prescribed,'" and replacing them with "the words 'in the manner provided by the laws thereof.'" 47 Cong. Rec. S3437. That change, he explained, "gives to each State full authority to employ in the creation of congressional districts its own laws and regulations." *Id.* The law passed with that amendment, and, five years later, this Court recognized that "the legislative history of" the 1911 Act "leaves no room for doubt" that the amendment was made "for the express purpose, in so far as Congress had power to do it, of excluding the possibility" that a State could not use the referendum process to adopt congressional districts. *Hildebrant*, 241 U.S. at 568-69.

In 2 U.S.C. § 2a(c), Congress re-incorporated the operative language from the 1911 Act that Senator Burton had proposed for the purpose of authorizing redistricting in accordance with the laws of each State: "Until 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 . . . ." 2 U.S.C. § 2a(c) (emphasis added). In light of this Court's construction of that language in *Hildebrant*, there is an overwhelming presumption that Congress intended, by re-enacting the same language, to authorize States to draw congressional districts through the processes authorized by the laws of each State—including the initiative and referendum process. *See*, *e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Thus, to the extent there is any ambiguity regarding Arizona's authority under the Elections Clause, Congress's recognition that "a State" may be "redistricted in the manner provided by the law thereof" is dispositive in this case. The people of Arizona, acting through the legislative authority they reserved to themselves, passed an initiative delegating the redistricting power to an independent commission. That use of the initiative process to delegate redistricting power to a body duly created under state law falls squarely within the authorization provided by Congress in 2 U.S.C. § 2a(c).

II. CALIFORNIA'S REDISTRICTING HISTORY UNDERSCORES THE WISDOM OF THE APPROACH ENSHRINED IN THE ELECTIONS CLAUSE AND CONFIRMED BY 2 U.S.C. § 2a.

Redistricting presents States with difficult, politically fraught problems—most notably, gerrymandering and similar efforts to empower some groups at others' expense. *See*, *e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion); *id.* at 326 (Stevens, J., dissenting). These problems are difficult to resolve either politically (because, with redistricting abuse, the legislative body is typically itself the source of the problem) or judicially (because manageable judicial standards are often elusive in the redistricting context). California's history with redistricting starkly illustrates the nature and extent of these problems. That history includes efforts to concentrate power in politically influential parts of the State and long-running campaigns by political majorities to promote and protect their electoral fortunes. As in Arizona, the people of California invoked the initiative process to ameliorate these problems by delegating redistricting authority to an independent commission. That effort—and the redis-

tricting abuses it was intended to remedy—confirms the wisdom of the Framers' decision in the Elections Clause and Congress's decision in 2 U.S.C. § 2a(c) to provide each State with the flexibility to craft its own redistricting procedures.[4]

A. The abuse of the redistricting process in California dates back to the State's admission to the Union in 1850. Attempts to restrain that abuse stretch back nearly as long.

1850-1941. In the first century of statehood, northern California counties sought to prevent their legislative power from eroding as southern California's population surged. The result was a series of agreements each decade that locked in existing power structures to the extent possible. In 1926, the people of California approved a proposal that created a "federal"-style state senate based upon area rather than population, which enabled counties suffering population losses to maintain their influence in one house of the legislature. This eventually led to severely unequal senate districts: by 1960, Los Angeles County's population exceeded six million yet the county had only one state senator, while a northern California district with a population of less than 15,000 (spread across three counties) also had one senator. *See* T. Anthony Quinn, *California*, *in* Reapportionment Politics: The History of Redistricting in the 50 States 53, 53 (Leroy Hardy et al. eds., The Rose Institute of State and Local Government 1981) ("Quinn"). Voters responded to such vast and growing disparities by qualifying four initiatives—in

[4] It is a well-established principle of California law that the legislature in Sacramento and the people are co-equal "legislative bodies." *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 981 P.2d 990, 1002 (Cal. 1999).

1928, 1948, 1960, and 1962—that sought to return to a population-based reapportionment system. *See id.* Each measure failed. *See id.*

1951. The population imbalances generated by the "federal" senate were ultimately resolved by this Court's "one person, one vote" ruling in *Reynolds v. Sims*, 377 U.S. 533 (1964). *See* Quinn 55. By then, however, a new era of partisan gerrymandering had taken hold in California. An influx of Democratic voters in the 1940s made the Republicans' longstanding hold on the state legislature increasingly tenuous. *See id.* at 54. Republicans responded by drawing districts to lock in their partisan advantage. *See id.* That gerrymander lacked the technical sophistication of contemporary redistricting efforts, however, and it ultimately failed: Republicans drew too many marginally Republican seats at which Democrats could take aim, and in 1958 the Democrats took control of both houses of the legislature in a landslide. *See id.*

1961. The Democratic majority took revenge in the 1961 redistricting, eliminating weak Republican seats statewide. *See* Quinn 54-55. In 1964, the opportunity arose to do even more damage to Republicans when this Court's decision in *Reynolds* invalidated the "federal" approach to state senate apportionment. Democrats took the opportunity to gerrymander new state senate districts as they had done with congressional and assembly seats several years earlier. *See id.* at 55.

1971. The 1971 redistricting pitted a Democratic legislature against Republican Governor Ronald Reagan. *See* Quinn 55. A series of acrimonious negotiations produced a stalemate. *See id.* Democrats repeatedly forced gerrymanders through the legisla-

ture, only to have them vetoed. *See id.* As the 1972 elections approached, the California Supreme Court intervened, mandating that the preexisting assembly and senate districts be used for the election. *See id.* at 56. Because California had gained five congressional seats in reapportionment, however, the court imposed a redistricting plan for the election that had been vetoed by the Governor. *See Legislature v. Reinecke*, 492 P.2d 385, 390-91 (Cal. 1972). The court implored the legislature and Governor to reach an accord. *See id.* at 386-87. But agreement proved impossible. *See* Quinn 56. Governor Reagan and the legislature continued their standoff, and in 1973 the state supreme court again intervened. *See id.* This time, it appointed three retired judges as special masters, who created a new plan that the court substantially imposed in the fall of 1973. *See Legislature v. Reinecke*, 516 P.2d 6, 9 (Cal. 1973). In devising that plan, the masters sought to create competitive districts rather than "safe seats." *Id.* at 38 (appendix containing special masters' report and recommendations) (internal quotation marks omitted). Although the plan initially appeared to favor Democrats, the court-imposed districts proved more competitive than prior plans.

1981. After the 1980 Census, Democratic majorities controlled the legislature. *See Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988). In 1981, voting along party lines, the legislature adopted a new plan for congressional districts. *Id*. That plan, authored by Congressman Phillip Burton, was "considered one of the most notoriously partisan gerrymanders in recent years." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 573

(1993); *see also* John H. Fund, *Beware the Gerrymander, My Son*, Nat'l Rev., Apr. 7, 1989, at 34 ("Fund"). Congressman Burton drew contorted districts designed to reward his party and his friends. Notoriously, he drew a congressional district for his brother, John, that "included parts of four counties" and was connected in parts "only by water" or "by railroad yards." John Jacobs, A Rage for Justice: The Passion and Politics of Phillip Burton 435 (1995).

California voters qualified a referendum to rescind the so-called "Burtonmander," but the Democratic state assembly challenged the referendum in California's courts. *See Badham*, 694 F. Supp. at 666. The state supreme court upheld the referendum, but ordered that the Burton plan be used for the 1982 elections. *See Assembly v. Deukmejian*, 639 P.2d 939 (Cal. 1982); Fund 35. As a result, although voters "overwhelmingly rejected" the Burton plan at the June 1982 referendum election, Democrats made significant gains in the legislature and in Congress that November. *Legislature v. Deukmejian*, 669 P.2d 17, 35-36 (Cal. 1983) (Richardson, J., dissenting); *see also Badham*, 694 F. Supp. at 666; Fund 34.

Despite the voters' disapproval of the Burtonmander, at an extraordinary session that winter the legislature adopted a new plan—dubbed "Son of Burton"—making only minor changes to the rejected gerrymander and locking in the Democratic gains; it was signed by outgoing Governor Brown just hours before the new Republican Governor, *amicus* George Deukmejian, was sworn into office. Fund 35; *Badham*, 694 F. Supp. at 666. The legislature designated the new plan "urgency" legislation, precluding further use of the referendum power. *Deukmejian*, 669 P.2d at 36 (Richardson, J., dissenting).

California voters reacted again, qualifying an initiative that would have repealed the "Son of Burton" plan and replaced it with a new plan thought to embody "good government" principles. *See* Fund 35; *Deukmejian*, 669 P.2d at 36 (Richardson, J., dissenting). In another legal challenge by the Democratic legislature, however, the California Supreme Court prohibited a vote on the initiative, holding that under the California Constitution a valid redistricting could be enacted, whether by the legislature or by initiative, only once per decade, and "Son of Burton" was that plan. *Deukmejian*, 669 P.2d at 22-31. The following year, Republicans received an absolute majority (50.1%) of the congressional vote statewide, but only 40% of the State's congressional seats, giving rise to one of the first partisan gerrymandering cases. *Badham*, 694 F. Supp. at 670. A similar disparity prevailed throughout the decade. *See* Fund 34.

Led by *amici* Governors George Deukmejian and Pete Wilson, Republicans also attempted reform at the ballot box. Proposition 14 (1982) called for a ten-member redistricting commission composed of legislators and citizens. Proposition 39 (1984) would have created a redistricting commission. Both measures failed, as did other similar reform measures pursued in 1990.

1991. The 1991 redistricting followed the model of the 1971 process. A Democratic legislature squared off against Governor Wilson, who vetoed the legislature's efforts—again placing the matter in the California Supreme Court's hands. *Wilson v. Eu*, 816 P.2d 1306 (Cal. 1991). Again, the Court appointed special masters, who "excluded such political factors as the potential effects on incumbents or the major political parties" from the line-drawing process. *Wilson v. Eu*, 823 P.2d 545, 549 (Cal. 1992). Again, the

result was a more fair, balanced, and competitive set of seats. But the battles over redistricting did not subside.

2001. In 2001, rather than enacting a partisan gerrymander, the two parties in the legislature conspired to adopt a bipartisan or "sweetheart" gerrymander. That map "has been widely perceived as specifically designed to protect incumbent legislators of both major political parties and as serving that purpose well over the decade in which the redistricting map was in effect." *Vandermost v. Bowen*, 269 P.3d 446, 479 (Cal. 2012). Under that redistricting map, only one incumbent lost in 459 legislative and congressional general elections. *See id.* (quoting study).

In response, *amicus* Governor Arnold Schwarzenegger again pursued reform. Proposition 77 (2005) would have removed control of redistricting from the legislature and placed it in a panel of special masters, each retired judges. That measure was also defeated.

2008-2010. The people of California finally passed reform measures in 2008 and 2010. Through Proposition 11, in 2008 the people of California amended the state constitution to create the Citizens Redistricting Commission. In 2010, the people passed Proposition 20, which extended the Commission's authority to congressional redistricting. *See* Cal. Const. art. XXI, §§ 1-3. The voters ensured that the Commission remains democratically accountable by providing that the Commission's plans are subject to the referendum power. Cal. Const. art. XXI, § 2(i). This is a greater degree of accountability than previously existed because the referendum cannot be by-

passed by designating the maps "urgency" legislation. *See supra* at 30.

The redistricting that followed the 2010 census was the first in which the Commission adopted congressional districts.

B. The Framers foresaw that the regulation of congressional elections could produce the partisan battles, abusive practices, and legislative misconduct that have plagued California's redistricting history. James Madison recognized, for example, "that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices." 2 Farrand 240. Others observed that state legislatures could "make an unequal and partial division" of congressional districts, 2 Elliot 27 (Theophilus Parsons at Massachusetts ratifying convention), or adopt other measures "injurious to the freedom of election," 2 Documentary History 413 (Thomas McKean at Pennsylvania ratifying convention).

Although the Framers authorized Congress to override such abuse in the second part of the Elections Clause, they also enabled the people of each State, through the broad "discretionary power" provided in the first part of the Clause, 2 Farrand 240 (Madison), to provide a remedy—permitting them to remove redistricting authority from the elected legislature altogether and establish a process that would better serve the people's interests. *See supra* Part I.A. The people of California and Arizona have exercised that constitutional prerogative by delegating the redistricting power to independent commissions duly constituted under the laws of each State. *See* Cal. Const. art. XXI, §§ 1-3; Ariz. Const. art. IV, pt. 2.

California's history confirms the Framers' wisdom in entrusting each State with broad authority to regulate elections, including the task of devising procedures for drawing congressional districts. For decades, the California Legislature proved itself unwilling to draw congressional districts in a fair, representative manner—opting instead for districts that either entrenched the party that happened to dominate the legislature at that time or all incumbents regardless of party. Despite negotiations, judicial intervention, stopgap measures, and attempts at reform, nothing succeeded in stemming the legislature's abuse of the redistricting power. Given the severity of the problem that the people of California faced, the Framers wisely left them—and the people of each State—the discretion to delegate the redistricting power to an independent commission free of partisan motives and the distorting influence of incumbency.

CONCLUSION

The text, structure, and history of the Elections Clause make clear that the Clause permits the people of a State to delegate redistricting authority to an independent redistricting commission—a power that Congress confirmed when it enacted 2 U.S.C. § 2a(c). The district court's decision upholding the constitutionality of the Arizona Independent Redistricting Commission enables the people of the State to exercise the power granted to them by the Elections Clause and by Congress, and reserved to them by the Arizona Constitution. That decision should be affirmed.

Respectfully submitted.

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