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 FOR MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Constitutional Provisions: **Page(s)**

Statutes:

Statutes—Continued: **Page(s)**

Legislative Materials:

Other Authorities: **Page(s)**

Other Authorities—Continued: **Page(s)**

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current Members of Congress, from both major political parties, who share a strong interest in protecting and exercising Congress's authority under Article 1, Section 4 of the U.S. Constitution to "make or alter" regulations fixing the "Times, Places and Manner" of congressional elections. *Amici* have a direct and substantial interest in this case, because the Arizona Legislature, in challenging its own State's redistricting process, has raised broader questions about Congress's constitutional authority to regulate the manner of congressional elections nationwide, with potentially sweeping consequences.

Since 1842, Congress has exercised its authority under the Elections Clause to regulate the congressional districting process. In seeking to overturn the considered judgment of a majority of Arizona's voters, the Arizona Legislature in this case has advanced a cramped and ahistorical interpretation of the Elections Clause that would improperly constrain Congress's constitutional authority. *Amici* have an institutional interest in advising this Court about the proper interpretation of that Clause, Congress's long history of enactments under it, and the significance of those statutes for the questions presented. That history demonstrates that Congress has acted specifical-

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae* and their counsel made any monetary contribution to its preparation and submission. All parties have consented to this filing.

ly to afford States the autonomy to determine congressional districts through an independent commission, just as Arizona has done here.

In the view of *amici*, the Arizona law at issue in this case is fully consistent with the Elections Clause, core principles of constitutional federalism, and 2 U.S.C. § 2a(c). *Amici* further believe that such commissions have the potential, when used in appropriate circumstances, to mitigate the potential negative effects of malapportioned congressional districts. As incumbent legislators, *amici* participate in this case based on broad bipartisan concern about the potential ill effects of partisan gerrymandering, not only for elections, but also for the functioning of our national government.

In recent years, Members of Congress from both political parties have proposed or supported legislation to address concerns about congressional redistricting. Those bills have varied significantly in focus and approach, and the signatories of this brief do not necessarily endorse all (or any) of them. However, these bills collectively show Congress's important and ongoing role in ensuring that state redistricting results in fair and competitive elections. See, *e.g.*, Fairness and Independence in Redistricting Act, S. 2910, 113th Cong. (2014); John Tanner Fairness and Independence in Redistricting Act, H.R. 223, 113th Cong. (2013); Let the People Draw the Lines Act of 2013, H.R. 2978, 113th Cong. (2013); Redistricting Transparency Act of 2011, H.R. 419, 112th Cong. (2011); Fairness and Independence in Redistricting Act of 2009, H.R. 3025, 111th Cong. (2009); Fairness and Independence in Redistricting Act of

2007, H.R. 543, 110th Cong. (2007). *Amici* have a strong interest in ensuring that this Court's resolution of this case does not improperly constrain Congress's authority under the Elections Clause to enact these or any future reforms.

Amici are the following Members of the U.S. House of Representatives, in alphabetical order:

Julia Brownley (D-Cal.)

Ken Calvert (R-Cal.)

Steve Cohen (D-Tenn.)

Jim Cooper (D-Tenn.)

Rodney Davis (R-Ill.)

Keith Ellison (D-Minn.)

Alan Grayson (D-Fla.)

Raul Grijalva (D-Ariz.)

Richard Hanna (R-N.Y.)

Duncan D. Hunter (R-Cal.)

Derek Kilmer (D-Wash.)

Zoe Lofgren (D-Cal.)

Alan Lowenthal (D-Cal.)

Tom McClintock (R-Cal.)

Mark Meadows (R-N.C.)

Beto O'Rourke (D-Tex.)

David E. Price (D-N.C.)

Tom Reed (R-N.Y.)

Reid Ribble (R-Wis.)

Dana Rohrabacher (R-Cal.)

SUMMARY OF ARGUMENT

As Appellees persuasively argue, the decision of a majority of Arizona's voters to establish an independent commission for congressional districting is consistent with both the U.S. Constitution and 2 U.S.C. § 2a(c). This brief makes four arguments to supplement Appellees' brief.

First, Congress has explicit and broad authority under Article I, Section 4 of the Constitution to regulate the times, places, and manner of state congressional elections. Although the federal government is necessarily one of limited powers, the Constitution's text, Founding-era history, and ratification debates all demonstrate that the Framers deliberately vested Congress with broad supervisory control over state establishment of congressional districts. Congress's power under the Elections Clause serves as an essential check on potential overreach by state legislatures, which may at times elevate the "convenience" of a controlling faction over the "common interest" of a representative national government. 5 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 401 (1836) ("Elliot's Debates") (James Madison). Concerns about partisan gerrymandering by state governments predate the Constitution itself, and help explain why the Framers gave Congress broad authority to supervise state regulation of the times, places, and manner of congressional elections. This Court has long recognized Congress's authority in this sphere to be "'paramount.'" *Ariz.* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253-2254

(2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

Second, Congress has for more than 170 years exercised its authority under the Elections Clause in a way that clearly supports the Arizona law challenged here. Starting in 1842, Congress enacted a series of statutes regulating both procedural and substantive aspects of state congressional redistricting. Those statutes—the direct predecessors of language found in the U.S. Code today—affirm the authority of the People of the several states to adopt redistricting procedures through direct democracy measures such as ballot initiatives. Most notably, in a 1911 statute that is the predecessor of 2 U.S.C. § 2a(c), Congress replaced earlier references to redistricting by a State "legislature," with a broader reference to States adjusting districts "in the manner provided by the laws thereof." The text and history of that statute, as explicitly construed by this Court, contradict the Arizona Legislature's contention that the States are absolutely barred from redistricting in a manner other than by their legislatures. Under the 1911 statute, retained today in 2 U.S.C. § 2a(c), States may redistrict in any manner consistent with their own lawmaking processes—including by ballot initiative.

Third, Arizona's use of an independent commission for congressional districting is consistent with core principles of federalism embodied in the Constitution and the Elections Clause itself, which seek to ensure a direct link between national representatives and the People. In replacing the Articles of Confederation with the Constitution, the Framers made fundamental structural choices intended to protect the relation-

ship between the national government and the People. The Elections Clause plays an important role in that structure, ensuring that national representatives are responsive to the People who elect them, not to the States in which they reside or particular factions of state government.

Fourth, use of an independent commission is an important, democracy-promoting development that can help reduce negative effects of severe partisan gerrymandering. Partisan manipulation of district boundaries tends to reduce competition in the districts where it occurs. When severe partisan gerrymandering creates effectively non-competitive districts, it undercuts citizens' ability to exercise a meaningful choice among candidates, diminishes robust political debate, and may lead voters to disengage from the electoral process. As Arizona voters recognized in amending their State's constitution to create the Commission, and as lawmakers and scholars have long observed, use of an independent commission can reduce these distorting influences and ensure that elections function as the Framers intended: as a meaningful choice between candidates for national office, where issues are fully and fairly debated from all sides.

ARGUMENT

As Appellees demonstrate, the Elections Clause of the U.S. Constitution does not prohibit Arizona's citizens from adopting an independent commission to establish their State's congressional districts. Arizona's law is also fully consistent with, and authorized by, 2 U.S.C. § 2a and its predecessor statutes, which since 1911 have contemplated states "redistrict[ing] in the

manner provided by the law thereof" rather than redistricting by the "legislature" alone, and since 1842 have reflected Congress's exercise of broad authority to regulate and modify state policy in this critical area.

I. The Constitution Confers Broad Authority On Congress To Regulate Elections To Ensure The Connection Between The People And The National Government

"Prior to the adoption of the Constitution, the States had joined together under the Articles of Confederation." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 803 (1995). Under that system, "'the States [had] retained most of their sovereignty, like independent nations bound together only by treaties.'" *Ibid.* (quoting *Wesberry* v. *Sanders*, 376 U.S. 1, 9 (1964)). At the Constitutional Convention, however, the Framers adopted a plan for a "new National Government," *Wesberry*, 376 U.S. at 10, that "reject[ed] the notion that the Nation was a collection of States, and instead creat[ed] a direct link between the National Government and the people of the United States." *Thornton*, 514 U.S. at 803; *FERC* v. *Mississippi*, 456 U.S. 742, 791 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part) ("The Constitution * * * permitt[ed] direct contact between the National Government and the individual citizen * * * ."). The Elections Clause of the Constitution plays an essential role in that transformative reframing of the relationship between the People and their national government.

The Elections Clause states 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. The Clause "has two functions. Upon the States it imposes the duty ('*shall* be prescribed') to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Arizona* v. *Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253 (2013). This "broad" grant of power to Congress was critical to the Framers' adoption of the Elections Clause, functioning among other things as "insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress" and thus "'at any moment annihilate it by neglecting to provide for the choice of persons to administer its affairs.'" *Ibid.* (quoting The Federalist No. 59, at 362-363 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis deleted)).

1. Constitutional Convention.

"[T]he Elections Clause was essentially uncontroversial at the 1787 Constitutional Convention in Philadelphia." Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021, 1031 (2005). Under the Articles of Confederation, "delegates" to the unicameral Congress were "annually appointed in such manner as the legislatures of each State shall direct." Articles of Confederation of 1781 art. V, para. 1. While the Articles established certain details about the time of meetings and term limits, the States retained prima-

ry authority over the selection of delegates, in recognition of their "sovereignty, freedom, and independence." *Id.* art. II.

"The Convention debates make clear" what is evident in the text of the Clause itself: "that the Framers' overriding concern was the potential for States' abuse of the power to set the 'Times, Places and Manner' of elections." *Thornton*, 514 U.S. at 808-809. Speaking in favor of Congress's supervisory role, Gouverneur Morris expressed fear that "the States might make false returns and then make no provisions for new elections." 2 *Records of the Federal Convention of 1787* at 241 (M. Farrand ed., 1911) ("Farrand").

After the Constitutional Convention achieved a quorum and adopted a series of resolutions to serve as the basis for the new Constitution, it appointed a "Committee of Detail" to prepare a draft constitution. The Committee's version of the Elections Clause was quite similar to the text ultimately adopted, contemplating an initial delegation of authority to the States, subject to congressional oversight.[2] There followed an unsuccessful effort to limit the Clause to the House of Representatives, an effort later vindicated in part by the addition of the words "except as to the Places of chusing Senators." See 2 Farrand at 613.

Madison argued, for his part, that congressional supervision was necessary because "State Legisla-

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[2] "The Times and Places and the Manner of holding the Elections of the Members of each House shall be prescribed by the Legislature of each State; but their Provisions concerning them may, at any Time, be altered (or superseded) by the Legislature of the United States." 2 Farrand at 165.

tures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices." 2 Farrand at 240. In language no less relevant today, Madison feared that "inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter." *Id.* at 240-241. Congressional supervision was essential, Madison concluded, because "[i]t was impossible to foresee all the abuses that might be made [by the State legislature] of the discretionary power" to fix the "Times, Places and Manner of holding Elections." *Id.* at 240.

Thus, when Charles Pinckney and John Rutledge moved to delete language securing Congress's role from the Elections Clause, the motion was soundly defeated. 2 Farrand at 240-241. Several delegates opposed the Pinckney-Rutledge motion, including Gouverneur Morris (who objected that States, unconstrained by Congress, might engage in election fraud) and Massachusetts delegates Nathaniel Gorham and Rufus King (who argued that oversight power was essential to the survival of the national government). 5 Elliot's Debates at 401-402.

The motion to remove Congress's oversight role "seems largely to have been put to rest by Madison, who defended the wording of the Clause in a lengthy speech." Greene, 114 Yale L.J. at 1032. In Madison's words:

> The necessity of a general government supposes that the state legislatures will sometimes fail or re-

> fuse to consult the common interest at the expense of their local convenience or prejudices. * * * Whether the electors should vote by ballot, or *viva voce*, should assemble at this place or that place, should be divided into districts, or all meet at one place, should all vote for all the representatives, or all in a district vote for a number allotted to the district,—these, and many other points, would depend on the legislatures, and might materially affect the appointments. Whenever the state legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.

5 Elliot's Debates at 401. The Pinckney-Rutledge motion was subsequently defeated without any further recorded support. To the contrary, Delaware's George Read proposed language, ultimately adopted, expanding Congress's power by authorizing it both to alter and "*make*" election regulations. *Id.* at 402 (emphasis added). "As Hamilton later noted: 'Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.'" *Thornton*, 514 U.S. at 809 (quoting The Federalist No. 59, at 363).

2. Ratification debates.

"During the ratification debates" in the several states, Congress's authority under the Elections Clause engendered robust debate. See Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 23 (2010). Opponents highlighted the extent of au-

thority that the Clause would confer on Congress if adopted—as it ultimately was, without material amendment. See Vox Populi, Essay, Massachusettes Gazette, Oct. 29, 1878, in 4 *The Complete Anti-Federalist* § 4.4.2-6 (Herbert J. Storing ed., 1981) ("By this clause, the *time*, *place* and *manner* of choosing representatives is *wholly* at the disposal of Congress."). Those debates also ultimately confirm the understanding that the Elections Clause was predicated on a direct link between the People and their national representatives.

Federalist proponents of the Elections Clause raised a number of concerns about what state legislatures might do if left unchecked by Congress. They argued, for instance, that state legislatures might require electors to assemble in a remote location or at inconvenient times (to the disadvantage of those who could not travel), or might draw congressional districts in unfair ways. At the Massachusetts ratifying convention, for instance, Rufus King gave the example of "th[e] unequal mode of representation" reflected in South Carolina's legislative districts, which favored the city of Charleston to the disadvantage of rural areas. As a result, King feared, "[t]he representatives * * * from that state, will not be chosen *by the people*." 2 Elliot's Debates at 50-51. During the same debates, Francis Cabot "prize[d] the [Elections Clause] as highly as any in the Constitution," because of its role in protecting "the *democratic* branch of the national government, the branch chosen immediately for the people." *Id.* at 25-26. J.C. Jones of Massachusetts echoed the theme, explaining that "[t]he federal representatives will represent *the people*; they will be *the people*." *Id.* at 28-29.

Concerns about political manipulation of voting districts predated the Constitution, and featured in the Framers' drafting and ratification debates. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 274-275 (2004) (plurality opinion) (discussing "[p]olitical gerrymanders" in Colony of Pennsylvania and Province of North Carolina). The possibility of malapportionment of districts was explicitly discussed in debates, and delegates frequently expressed the expectation that the problem would be addressed by Congress. During the Massachusetts ratifying debates, for instance, Theophilus Parsons defended Congress's role as necessary to prevent States from "mak[ing] an unequal and partial division of the states into districts for the election of representatives." 2 Elliot's Debates at 27. Rufus King likewise emphasized the possibility that inequalities currently reflected in state legislative districts might be perpetuated in national representatives, such that "[t]he representatives * * * from that state, will not be chosen *by the people*, but will be the representatives of a faction of that state." *Id.* at 51.

Similarly, at the Virginia convention, James Madison viewed Congress's role under the Elections Clause as a safeguard against "the people of any state by any means be[ing] deprived of the right of suffrage," including by "unequa[l]" apportionment of legislative districts. 3 Elliot's Debates at 367; accord 4 Elliot's Debates at 303 (remarks by Charles Pinckney) (Congress's role under Elections Clause was necessary "lest, by the intrigues of a ruling faction in a state, the members of the House of Representatives should not really *represent the people* of the state" (emphasis added)). In short, Congress's power under the Elections Clause was understood as "a remedy for

all manner of state regulations thought by the national government to be unjust or inappropriate." Greene, 114 Yale L.J. at 1038 (conducting detailed study of ratification debates).

Similar themes were reflected in responses to Anti-Federalist criticism that "Federal rulers" could "have interests separate from those of the people." Timothy Pickering, for instance, explained that representatives in Congress would not abuse their power under the Clause, because they were "the immediate Representatives of the people." 2 Charles W. Upham, *The Life of Timothy Pickering* 356 (1873) (letter to Charles Tillinghast of December 24, 1787) (emphasis omitted). In short, the Constitution's text, together with evidence from the Convention and ratification debates, show that the Elections Clause was intended to protect the direct connection between the People and their representatives to the national government, against the possibility of self-interested interference by the state legislature.

II. Congress Has Long Exercised Its Broad Constitutional Authority To Regulate State Redistricting Policies In A Manner That Supports Arizona's Redistricting Law

The Arizona Legislature contends that Congress has not allowed States the autonomy to adopt an independent commission for redistricting by means of a ballot initiative, and that it would be "plainly unconstitutional" for Congress to do so, in any event. Br. for Appellant 56. Thus framed, the Legislature's challenge is not limited to the facts of this case, but rather, if accepted, would call into question Congress's general constitutional authority to regulate

the times, places, and manner of congressional elections—with potential consequences for Congress's ability to supervise a wide range of existing and future state laws in this sphere. The Arizona Legislature's position must be rejected.

As the text and history of the Constitution make clear, and this Court has long recognized, the Elections Clause vests Congress with essentially plenary authority to regulate the States' conduct of congressional elections. The Clause states, without material qualification, that Congress "may at any time * * * make or alter" regulations "prescribed [by] each State" and governing the times, places, and manner of congressional elections. U.S. Const. art. I, § 4. "Through the Elections Clause, the Constitution delegated to the States the power to regulate the 'Times, Places and Manner of holding Elections for Senators and Representatives,' subject to a grant of authority to Congress to 'make or alter such Regulations.'" *Cook* v. *Gralike*, 531 U.S. 510, 522 (2001) (quoting U.S. Const. art. I, § 4, cl. 1); accord *Smiley* v. *Holm*, 285 U.S. 355, 366-367 (1932) ("[T]he Congress may supplement these state regulations or may substitute its own"); *Wesberry*, 376 U.S. at 29-30 (Harlan, J., dissenting) (the Elections Clause states "without qualification, that Congress may make or alter such [State] regulations. There is nothing to indicate any limitation whatsoever on this grant of plenary initial and supervisory power.").[3]

[3] Because "federal offices" such as seats in the House of Representatives "'aris[e] from the Constitution itself,'" "any state authority to regulate election to those offices could not precede their very creation by the Constitution, [and] such power 'had to

James Madison explained that authority must be vested in Congress because "[s]ome states might regulate the elections on the principles of equality, and others might regulate them otherwise. * * * Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government." 3 Elliot's Debates at 367.

As a plurality of this Court has concluded, "the Framers provided a remedy for * * * practices [such as malapportionment of districts] in the Constitution. Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished." *Vieth*, 541 U.S. at 275 (plurality opinion). Congress's power "over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, * * * the regulations effected supersede those of the State which are inconsistent therewith.'" *Inter Tribal Council*, 133 S. Ct. at 2253-2254 (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)).

A. Congress's Longstanding Exercise Of Its Elections Clause Authority Supports Arizona's Redistricting Law

The Arizona Legislature contends that 2 U.S.C. § 2a "has nothing to do" with the validity of Arizona's commission law, and that it would be "plainly unconstitutional" if Congress sought to authorize the States

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be delegated to, rather than reserved by, the States.'" *Cook*, 531 U.S. at 522 (quoting *Thornton*, 514 U.S. at 804, 805).

to conduct redistricting through that method, in any event. Br. for Appellant 54-55. That argument, however, rests on an incomplete and ultimately mistaken understanding of the Constitution's text and history, this Court's precedent, and the long series of congressional enactments regulating the time, place, and manner of congressional elections.

Congress first enacted districting legislation in 1842, as part of a statute that required States electing representatives on a statewide, "at-large" basis, to instead create single-member districts. See Act of June 25, 1842, § 2, 5 Stat. 491. The 1842 act also required that representatives in a multi-district State "shall be elected by districts composed of contiguous territory * * *, no one district electing more than one Representative." *Ibid.* Although an 1850 statute adjusting the size of the House of Representatives omitted provisions requiring elections by districts, see Act of May 23, 1850, § 25, 9 Stat. 428, 432-433, Congress soon re-enacted the requirements for one-member districts composed of contiguous territory, Act of July 14, 1862, 12 Stat. 572.

The apportionment act of 1872 exercised still broader authority over congressional districting, specifying the date "for the election of Representatives * * * to * * * Congress," and that vacancies would be filled (or failure to elect a Representative remedied) "at such time as is or may be provided by law for filling vacancies in the State or Territory in which the same may occur." Act of Feb. 2, 1872, §§ 3, 4, 17 Stat. 28, 29. The 1872 act also directed that districts contain "as nearly as practicable an equal number of inhabitants," and that, if a State was "given an in-

creased number of Representatives," its new Members "be elected by the State at large * * * unless the legislature of said State shall otherwise provide before the time fixed by law for the election." *Id.* § 2, 17 Stat. at 28.

The apportionment acts of 1882 (Act of Feb. 25, 1882, § 3, 22 Stat. 5, 6) and 1891 (Act of Feb. 7, 1891, §§ 3-4, 26 Stat. 735, 736) repeated the contiguity and equal-population requirements. And the 1891 Act again allowed at-large election "in case of an increase in the number of Representatives which may be given to any State," but only until "the legislature of such State in the manner herein prescribed shall redistrict such State." 1891 Act, § 4, 26 Stat. at 736. Apportionment legislation of 1901, in turn, directed that districts be "composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants," with "no one district electing more than one Representative." Act of Jan. 16, 1901, § 3, 31 Stat. 733, 734. Like earlier statutes, the 1901 act provided that any additional representatives accruing to a State be elected "at large," until "the legislature of such State in the manner herein prescribed, shall redistrict such State." *Id.* § 4, 31 Stat. at 734.

Ten years later, however, in response to the emergence of the initiative "[i]n the early twentieth century" as a more common means of exercising the state lawmaking power (Br. for Appellees 4-5),[4] Congress

[4] By the end of 1910, some twelve States or Territories had adopted initiative and referendum mechanisms; only two (South Dakota and Utah) had done so prior to the 1901 apportionment act. See Nathaniel A. Persily, *The Peculiar Geography of Direct*

clarified prior statutes by adopting language that has been carried forward to today, and is critical to the questions before this Court. While retaining the major substantive requirements from earlier statutes, Congress in 1911 amended language discussing *how* States would adjust districts. In place of prior references to action by "the legislature of such State," the 1911 statute contemplated the State being "redistricted in the manner *provided by the laws thereof*." Act of Aug. 8, 1911, §§ 3-4, 37 Stat. 13, 14 (emphasis added); see also *id.* § 5, 37 Stat. at 14 (candidates for at-large seats "shall be nominated in the same manner as candidates for governor, unless otherwise provided *by the laws of such State*" (emphasis added)).

As the Commission explains (see Br. for Appellees 28-30), this Court has repeatedly interpreted the 1911 amendment as deliberate congressional action acknowledging and affirming States' authority to choose methods of districting other than by the legislature itself. This Court recognized in *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 568 (1916):

> Congress in 1911 in enacting the controlling law * * * expressly modified the phraseology of the previous acts * * * by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the

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Democracy: Why the Initiative, Referendum and Recall Developed in the American West, 2 Mich. L. & Pol'y Rev. 11, 16 (1997); see also *State I & R*, Initiative & Referendum Institute, Univ. of S. Cal., http://www.iandrinstitute.org/statewide_i%26r.htm (last visited Jan. 21, 2015).

> state legislative power for the purpose of creating congressional districts by law.

The *Hildebrant* Court contrasted the 1891 statute discussed above, with the new 1911 language contemplating redistricting by a State "'in the manner provided by the laws thereof.'" *Ibid.* (quoting 37 Stat. at 14).

As this Court further observed in *Hildebrant*, "the legislative history of th[e] [1911] act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose * * * of excluding the possibility of making the contention" that redistricting was limited to the legislature itself. *Hildebrant* thus rejects the argument the Arizona Legislature now advances—that direct democracy methods "could not be a part" of a State's redistricting process. *Hildebrant*, 241 U.S. at 568-569, 567 (citing 47 Cong. Rec. 3436, 3437, 3507 (1911)).

The Commission's brief persuasively shows why the 1911 legislative record supports this Court's holding in *Hildebrant*. See Br. for Appellees 29-30. That record shows that Members understood amending the statute to refer to districting "by the law of such State" would ensure to "each State full authority to employ in the creation of congressional districts its own laws and regulations." 47 Cong. Rec. at 3437 (Sen. Burton). The 1911 statute, Members expected, would "simply [leave] the question [of redistricting] to the laws and methods of the States. If they include initiative, it is included." *Id.* at 3508.

Senator Burton of Ohio, a main proponent of the 1911 amendment, questioned why, "in the face of different methods and laws pertaining to the enactment

of legislation – some States acting by the legislature, others acting by the legislature but subject to a referendum," Congress should desire to "fix one inflexible way and require that every State shall be divided into congressional districts in that manner." 47 Cong. Rec. at 3507. "[W]hether we favor the referendum and initiative or not," Burton emphasized, "we cannot close our eyes to the fact that there has been a widespread agitation for their adoption and further that [the] agitation has not stopped with mere advocacy." *Id.* at 3507-3508. "[W]e cannot," Senator Burton explained, "cling either to obsolete phraseology or, in our dealing with the States, to adhere to obsolete methods – that is, to ignore their methods of enacting laws." *Ibid.*

Tellingly, some Members questioned whether the amendment was needed at all, suggesting that existing apportionment statutes (referring to redistricting by "the legislature") were *already* "sufficient to allow, whatever the law of the State may be, the people of the State to control the matter." 47 Cong. Rec. at 3507 (Sen. Shively). Proponents insisted, however, that "[i]n view of the very serious evils arising from gerrymanders," Congress should "not take any chances in [the] matter," *id.* at 3508 (Sen. Burton). The possibility existed that some might construe the existing statutes as a "condemnation of any legislation [for districting] by referendum or by initiative." *Id.* at 3436 (Sen. Burton). "[D]ue respect to the rights, to the established methods, and to the laws of the respective States requires us," Senator Burton argued, "to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." *Ibid.*

In Senator Burton's view, "[i]f there is any case in the whole list of laws where you should apply your referendum, it is to a districting bill. * * * [The amendment would] give[] to each State full authority to employ in the creation of congressional districts its own laws and regulations. What objection can be made to a provision of that kind? Pass this amendment, and you will transmit to each State the message 'Proceed and district your State in accordance with your laws.'" 47 Cong. Rec. at 3437 (Sen. Burton). Other Members of Congress understood the change the same way. See *id.* at 3508 (Sen. Works). The amendment passed.[5]

In a striking coincidence, Congress was debating the 1911 apportionment act at the same time it was considering whether to admit Arizona to the Union. See 47 Cong. Rec. at 3510 (Sen. Root) (discussing admission of Arizona on the same day as Burton amendment). Notably, the Arizona Territory employed the initiative process even before it sought admission, and Congress explicitly debated the merits of that system in considering Arizona's application. See Br. for Appellees 49-50 n.27 (citing 47 Cong. Rec. 4229 (1911) (Mr. Davenport)). That Congress enacted legislation allowing States to redistrict "in the manner provided by the laws thereof," 37 Stat. at

[5] Even those opposed the 1911 legislation (on other grounds) recognized that potential malapportionment of congressional districts required "some way * * * to secure fairness in the division of the State into congressional districts." A solution "worthy of serious consideration by the Senate," the minority Members suggested, was "a general clause submitting apportionment acts to a referendum vote of the electorate of the State." S. Rep. No. 62-94, pt. 2, at 4-5 (1911) (minority views).

14, while simultaneously debating whether to admit a State whose lawmaking process was well understood to include initiatives, creates a strong inference that the Arizona law in this case falls comfortably within the 1911 Congress's expectation of how States would conduct redistricting.

1929 reapportionment legislation did not displace or repeal the 1911 act in any material part. See Act of June 18, 1929, § 22, 46 Stat. 21, 27. The 1911 statute was effectively "carried into the United States Code." *Smiley*, 285 U.S. at 373, and a 1941 statute used the current wording ("shall be elected from the districts then prescribed by the law of such State"). The 1911 act is the direct predecessor to 2 U.S.C. § 2a(c), as codified today. See *Branch* v. *Smith*, 538 U.S. 254, 274 (2003) (opinion of Scalia, J.); accord *id.* at 295 (O'Connor, J., concurring in part and dissenting in part) ("the 1911 statute * * * is almost word for word the same as the current [2 U.S.C. § 2a(c)]").

B. Congress Can Constitutionally Authorize State Popular Reform Of Redistricting

As the Commission explains (Br. for Appellees 27-33), the Arizona Legislature is incorrect to argue that "nothing" in 2 U.S.C. § 2a(c) bears on the questions presented, and that it would be "plainly unconstitutional" for Congress to attempt to authorize States to adopt an independent redistricting commission via ballot initiative. Br. for Appellant 56.

By its plain terms, 2 U.S.C. § 2a(c) contemplates that "the Representatives to which [a] State is entitled * * * shall be elected from the districts then prescribed by the law of such State." The statute refers repeatedly to districting undertaken "by the law of

[the] State," following a national apportionment, whether a State retains the same number of representatives, or the size of its delegation increases or decreases.

This Court is not writing on a blank slate in construing § 2a(c) or considering its constitutionality. In upholding the use of a referendum in Ohio (coincidentally, Senator Burton's home state) to approve or disapprove districts adopted by that State's General Assembly, *Hildebrant* relied extensively on the 1911 predecessor to § 2a(c), which it understood to "treat[] the referendum as part of the legislative power for the purpose of apportionment, where so ordained by the state Constitutions and laws." 241 U.S. at 569. The 1911 act was itself constitutional as applied in this manner, this Court concluded, as it reflected Congress's exercise of what "the Constitution expressly gave [it] the right to do." *Ibid.*

So too in *Smiley*, 285 U.S. 355, which upheld a Minnesota law requiring presentment of all legislation (including redistricting bills) to the Governor for signature or veto, and a two-thirds majority of both houses to overcome a veto. *Smiley* viewed the Elections Clause's reference to the "times, places and manner of holding elections" as "comprehensive," conferring on Congress "authority to provide a complete code for congressional elections." *Id.* at 366. *Smiley* squarely upheld the constitutionality of a state requiring presentation of redistricting legislation to the governor, instead of entrusting it entirely to the "Legislature thereof." And in reaffirming *Hildebrant*, the *Smiley* Court reiterated that Congress's purpose in referring to "the laws thereof" in the 1911 apportion-

ment statute was "manifest from its occasion and purpose"—i.e., "to recognize the propriety of the referendum in establishing congressional districts where the state had made it a part of the legislative process." *Id.* at 371.

More recently, *Branch* v. *Smith* concluded that the phrase "established by law" was not limited to action by the legislature of a State. 538 U.S. at 271 (opinion of the Court). Although the facts of *Branch* raised the issue of whether state *courts* had authority to engage in redistricting, nothing in the Court's opinion was limited to courts. *Ibid.* (looking to "common meaning" of phrase "by law," and finding it not limited to State legislature); accord *id.* at 300 & n.1 (O'Connor, J., concurring in part and dissenting in part) ("To the extent that courts are part of the 'manner provided by the law [of a State],' courts may redistrict."). The Arizona Constitution expressly "reserve[s]" to "*the people*" the "legislative authority" and "power to * * * enact * * * laws and amendments at the polls." Ariz. Const. art. 4, pt. 1, § 1 (emphasis added).[6]

As demonstrated in section II.A *supra*, Congress has since at least 1842 exercised its authority under

[6] Appellant cites (at 57), without explanation, two cases invalidating other federal statutes on completely different constitutional grounds. They are irrelevant here. *Clinton* v. *City of New York*, 524 U.S. 417, 421 (1998), simply held that the "cancellation procedures" in the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), violated the Presentment Clause of the Constitution. *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), held that the Religious Freedom Restoration Act of 1993 exceeded Congress's power under the Fourteenth Amendment. No opinion in either case mentioned the Elections Clause.

the Elections Clause to regulate states' conduct of congressional redistricting. Since 1911, Congress has done so in a manner that explicitly contemplates election of congressional representatives from districts "prescribed by the law of [each] State." 2 U.S.C. § 2a(c). This longstanding historical practice is a strong indication that Congress acted within the scope of its constitutional authority, and at a minimum provides the perspective of numerous early Congresses on the meaning of the Elections Clause. Cf. *Smiley*, 285 U.S. at 369 ("[L]ong and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning.").

Members of Congress have long understood the Elections Clause to encompass States' use of an independent commission for districting. Senator Burton, the main proponent of the 1911 amendment contemplating state redistricting "by the laws thereof," opened the floor debate on that bill by discussing his own prior bill proposing a "new plan for dividing States into districts." That plan was not unlike the Arizona law here: i.e., "the governor of each State should appoint a nonpartisan board of four, two members from each party, which should proceed to divide the State into districts according to certain well-defined rules * * * ." 47 Cong. Rec. 3507 (1911) (Sen. Burton).

The Legislature's principal contention (*e.g.*, Br. for Appellant 36) is that Arizona's use of the commission violates the Elections Clause because it "completely divests the Legislature's authority to prescribe congressional districts." But Congress plainly has au-

thority to displace state regulations, by "mak[ing]" its own congressional districts for a State, creating a federal commission to do so, or even requiring States to employ such a method. Records from the Constitutional Convention and ratification debates show that adoption of the Clause rested in significant part on concerns (e.g., disproportionate allocation of state legislative districts) that are redressed by state reliance on direct-democracy methods such as the referendum and ballot initiative in the redistricting process. Appellant does not explain why, if Congress has authority to directly impose such a requirement, it would be "plainly unconstitutional" (Br. 55) for Congress, ex ante, to allow States to choose such an approach.

The Legislature focuses heavily on *Branch*'s discussion of whether other portions of 2 U.S.C. § 2a(c) are rendered unconstitutional by this Court's subsequent decisions on grounds not relevant here. As the Commission explains, however, the Legislature's reliance on *Branch* is misplaced. That case dealt with different questions not presented here—*e.g.*, whether § 2a(c)(5)'s requirement of elections "at large" pending redistricting was superseded by 2 U.S.C. § 2c's requirement of one-member districts.[7] And while *Branch* had no occasion to restate *Hildebrant*'s core holding (i.e., that the 1911 statute contemplates States using direct democracy methods in redistricting), *Branch* said nothing at all to displace or under-

[7] A majority of Justices in *Branch* concluded that § 2a(c) had *not* been implicitly repealed by § 2c. See *Branch*, 538 U.S. at 273 (plurality opinion); accord *id.* at 282 (Kennedy, J., concurring); *id.* at 292-293 (O'Connor and Thomas, JJ., concurring in part and dissenting in part); cf. Br. for Appellant 54 (suggesting only that "plurality" of court had rejected repeal by implication).

cut *Hildebrant*'s result or rationale, which strongly support the Arizona law at issue here.

III. Popular Reform Of State Districting Processes Is Fully Consistent With Core Federalism Principles

In the Arizona Legislature's view, the Elections Clause "[v]ests State [a]uthority * * * in the State's [r]epresentative [l]awmaking [b]ody [a]lone" because of "the Framers' admiration for representative democracy and skepticism for other forms of government, including direct democracy." Br. for Appellant 24, 31. On that basis, the Legislature invites this Court to hold that Arizona's citizens transgressed the Elections Clause when they created the Commission via a ballot initiative.

These arguments, however, rest on an incomplete and ultimately mistaken account of the Constitution's text, structure, and ratification history. Full consideration confirms that popular regulation of congressional elections to guard against potential manipulation of congressional district boundaries by incumbent state legislators is fully consistent with the Constitution's core purpose of ensuring a direct link between the People and their representatives to the national government.

Although the Framers certainly endorsed notions of representative democracy in the structure of the federal government (see Br. for Appellant 31-36), treatment of the Elections Clause in the Constitutional Convention and ratification debates makes clear that the Framers vested Congress with plenary control over the times, places, and manner of elections, in significant part to safeguard the relationship

between the People and their representatives to the national government. See *supra* Section I.

Consistent with this textual and historical evidence, this Court's cases have long recognized "the 'fundamental principle of our representative democracy,' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" *Thornton*, 514 U.S. at 783 (quoting *Powell* v. *McCormack*, 395 U.S. 486, 547 (1969)). To that end, this Court has understood the Framers as having deliberately "creat[ed] a direct link between the National Government and the people of the United States." *Id.* at 803; *id.* at 822 (emphasizing "the direct link that the Framers found so critical between the National Government and the people of the United States"). In short, "[n]othing in the Constitution or The Federalist Papers * * * supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." *Id.* at 842.

"From the start," this Court has emphasized,

> the Framers recognized that the "great and radical vice" of the Articles of Confederation was "the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist." The Federalist No. 15, at 108 (Hamilton). Thus the Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the

> people, and chosen directly, not by States, but by the people.

Thornton, 514 U.S. at 821.

This Court has noted with approval Madison's argument against mechanisms that "'would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone.'" *Thornton*, 514 U.S. at 808 (quoting The Federalist No. 52, at 326). The Elections Clause thus reflects "[t]he principle * * * that Senators and Representatives in the National Government are responsible to the people who elect them, not to the States in which they reside." *Gralike*, 531 U.S. at 528 (Kennedy, J., concurring). "[F]reedom is most secure if the people themselves, not the States as intermediaries, hold their federal legislators to account for the conduct of their office." *Ibid.* This Court has not hesitated to strike down measures that threatened to "blur[]" the "direct line of accountability between the National Legislature and the people who elect it." *Ibid.*

IV. The Independent Redistricting Commission Is A Positive And Democracy-Promoting State Innovation

As this Court has long recognized, "[a]s long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Ensuring that Congress is "directly representative of the people," *ibid.*, despite ongoing national and state-level

population shifts, requires not only decennial reapportionment of congressional seats *among* States, but also adjustment of congressional districts within States.

As scholars have long recognized, however, partisan manipulation of district boundaries can reduce competition in the districts where it occurs. See Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 Am. Pol. Sci. Rev. 540, 540 (1973) (concluding that "recent reapportionments in the United States have had dramatic and unexpected effects on the translation of votes into [legislative] seats"); Michael Lyons & Peter F. Galderisi, *Incumbency, Reapportionment and U.S. House Redistricting*, 48 Pol. Res. Q. 857, 857 (1995) (concluding that incumbents may "benefit from party controlled redistricting").

When partisan gerrymandering creates effectively uncompetitive districts, it undercuts voters' ability to exercise a meaningful choice among candidates, diminishes robust political debate, and may lead to disengagement from the electoral process. The Center for Voting and Democracy, for instance, reports that in the 2010 election cycle, some 64 percent of House seats involved a margin of victory of at least 20 percent. In some districts with particularly strong incumbents or majority parties, there may be no opposing candidate at all; as many as 27 House seats were reported as uncontested in the 2010 elections.[8] Dis-

[8] See U.S. Profile, *Dubious Democracy 1982-2010*, Ctr. for Voting & Democracy, http://www.fairvote.org/research-and-analysis/congressional-elections/dubious-democracy/dubious-

tricts without healthy competition between two or more candidates may limit voters' ability to make meaningful choices between candidates or issues.

As Arizona voters recognized in amending their constitution, an independent redistricting commission can reduce these distorting influences and ensure that elections function as the Framers intended: a meaningful choice between candidates for national office, where issues are fully and fairly debated from all sides. Scholars have suggested, for instance, that vesting districting responsibility in an independent and "technocratic" commission can defuse or minimize concerns that the process is partisan or subject to political interference. See Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 Election L.J. 184, 194 (2007). Such a commission may also bring important expertise and experience to bear on a process that increasingly involves complex and conflicting considerations, including population shifts, district compactness, racial and ethnic considerations, partisan composition, county and municipal boundaries, and preservation of communities of shared interest. See James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 Rutgers L.J. 881, 894-897 (2006).

The decision by an increasing number of States to employ independent commissions for congressional districting may promise a more fair and transparent electoral process, and may increase competition and

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accountability in congressional elections.[9] A wide range of observers and interest groups have endorsed the advantages of such an approach. *E.g.*, Am. Bar Ass'n House of Delegates, Report No. 102A (Feb. 11, 2008) (urging all States "to assign the redistricting process for congressional and legislative districts to an independent commission").

To resolve this case, of course, the Court need not grapple with these disputed and often difficult questions about the optimal method for States to establish and adjust congressional districts. Indeed, given the diverse histories and circumstances of the several States, and the possibility of "considerable disagreement * * * about how best to accomplish th[e] goal" of fair and competitive congressional elections, this case illustrates the Framers' genius in allowing "States [to] perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States* v. *Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citing *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1, 49-50 (1973)). It is sufficient to conclude, as the text and history of the Elections Clause and 2 U.S.C. § 2a(c) clearly require, that there is no basis for this Court to disturb the choice made by Arizona's citizens to establish congressional districts in that State through an independent commission.

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[9] In addition to Arizona, six other States currently place primary authority for drawing congressional districts in a nonpartisan or independent group. See Cal. Const. art. XXI, §§ 1-3; Haw. Const. art. IV; Idaho Const. art. III, § 2; Mont. Const. art. V, § 14(2) (because Montana has only one congressional seat, this mechanism is not currently in use); N.J. Const. art. 2, § 2; Wash. Const. art. II, § 43.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted.

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