No. 13-1314

In the Supreme Court of the United States

ARIZONA STATE LEGISLATURE, APPELLANT,

v.

ARIZONA INDEPENDENT RESTRICTING COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF STATE AND LOCAL ELECTED OFFICIALS AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF AMICI CURIAE

Amici are a bipartisan group of current and former governors, attorneys general, justices, and other senior elected officials from state and local governments.[1] Amici have served in the governments of multiple States, including Arizona, Maryland, Montana, New Mexico, New York, Pennsylvania, Rhode Island, and Washington State. Over the course of their careers as public servants, amici have become familiar with the different roles played by state legislators, governors, courts, and independent commissions and, of most importance, citizens, in States' federal redistricting processes.

As amici have seen firsthand, so-called "*gerrymandering*" is a serious problem.[2] It has resulted in

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[1] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel contributed any money to fund its preparation or submission. The parties have entered blanket consents to the filing of amicus briefs, and copies of their letters of consent are on file with the Clerk's Office.

[2] Gerrymandering is the practice of drawing district boundaries to increase the likelihood of particular electoral outcomes. See Larry Alexander & Saikrishna B. Prakash, *Tempest in an Empty Teapot: Why the Constitution Does Not Regulate Gerrymandering*, 50 Wm. & Mary L. Rev. 1, 4 (2008). The term is a portmanteau of the last name of Elbridge Gerry, the eighth Governor of Massachusetts, and the shape of the electoral map he famously contorted for partisan gain, which included one district shaped like a salamander.

deeply polarized and gridlocked legislative bodies, uncompetitive elections, and heavy burdens on the judicial system, and has deprived citizens of the right to make meaningful choices. The Framers, however, provided a political solution to this political problem: federalism. When the voters of a state believe, as amici do, that gerrymandering and its effects threaten the public's right to a truly representative democracy, they may experiment with alternative methods for the drawing of legislative districts. Because amici are deeply committed to meaningful representative democracy as the foundation of this Nation's political system and fundamental values, they file this brief. Amici do not believe that the Framers adopted the Elections Clause of the Constitution to curtail the basic right of citizens to govern—a right that imbues the entirety of the Constitution and our political process.

SUMMARY OF ARGUMENT

The citizens of the State of Arizona have used their legislative powers to implement a potential solution to a serious problem: the state legislature's gerrymandering of federal election districts. As amici well know, throughout our Nation's history, States have developed many novel voter initiatives and referenda to enhance our democratic system by changing how Members of Congress are elected, including giving women the right to vote, developing the primary system, combating voter fraud, and expanding access to minority political parties. Initiatives can implement election reforms that have broad public support, but that legislatures may not want to pass.

The particular problem that Arizona's voters seek to remedy, gerrymandering, is one that many States

have tried to address. Many amici have proposed or supported anti-gerrymandering efforts, in their roles as governors, mayors, attorneys general or justices, and States have addressed gerrymandering in different ways. Some, like Arizona, use independent commissions to redistrict; others use commissions as a "backup" to redistrict if legislatures are unable to approve a plan. See National Conference of State Legislatures (NCSL) Br. 5-17. This variety of approaches—which appellant seeks to shut down—is consistent with our system of federalism in which States serve as laboratories of democracy.

States' power to regulate federal elections comes from the Elections Clause of the Constitution, which 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." U.S. Const. art. I, § 4. The Court consistently has interpreted the term "Legislature," as used in this clause, to refer to a State's entire lawmaking function, rather than to any specific government body. See *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565, 569 (1916); *Smiley* v. *Holm*, 285 U.S. 355, 364, 372-73 (1932); *Growe* v. *Emison*, 507 U.S. 25, 34 (1993). This interpretation is based upon the time-honored principle that there is no "one size fits all" requirement for state lawmaking; each State determines its own legislative process under our federal system. See *Alden* v. *Maine*, 527 U.S. 706, 752 (1999); *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991); *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608, 612 (1937). This interpretation also reinforces the Election Clause's purpose of allowing States to manage federal elections in order to ensure that citi-

zens can make meaningful decisions in the exercise of their franchise. A crabbed reading of the Election Clause that would limit States' authority to manage federal elections, by limiting voters' ability to establish election mechanisms, would undermine this principle and purpose.

Appellant nevertheless urges the Court to reverse its longstanding interpretation, and instead read the Elections Clause as granting the power to regulate federal elections to state legislatures "alone." Appellant Br. 39. This reading cannot be squared with basic principles of federalism, or with the history and purpose of the Elections Clause. If adopted, appellant's rule would impede the development of state-tailored solutions to gerrymandering, hinder any innovative federal election regulation that does not begin and end with State legislatures, and thwart the right of voters to participate meaningfully in the political process.

ARGUMENT

ARIZONA'S USE OF ITS LEGISLATIVE POWERS IS CONSISTENT WITH BASIC PRINCIPLES OF FEDERALISM

When the voters of the State of Arizona amended their State Constitution to create the Independent Redistricting Commission, they did so to address an entrenched and debilitating political problem that amici understand all too well: the gerrymandering of congressional districts. The actions of Arizona's voters are consistent with the federalist structure of our government and the purpose of the Elections Clause. The Elections Clause should be read to vest responsibility for managing federal elections in States without limiting the methodology for accomplishing this objec-

tive. To adopt an alternative interpretation—that singles out federal elections as the one area where States cannot order their own legislative powers—would frustrate the efforts of States, citizens, and the amici to solve elections-related problems, including gerrymandering.

A. The Elections Clause Empowers Each State To Establish Its Own Processes For Holding Congressional Elections

1. States are laboratories of democratic policies and legislative processes

The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009); see *Gregory*, 501 U.S. at 458; *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). Deference to state lawmaking "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States in competition for a mobile citizenry.'" *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) (quoting *Gregory*, 501 U.S. at 458).

States are not only laboratories of policies, but also of legislative structures. "How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy*, 300 U.S. at 612. The

people structured and restructured their States' lawmaking apparatuses during the Framers' lifetimes. During the founding decade, "the thirteen independent states . . . debated, framed, adopted, rejected, modified, and continued to debate at least twenty state constitutions," Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541, 543 (1989), which structured state legislative schemes in different ways. States "became the laboratories for . . . trying the institutions in the various forms that presently appeared in the constitutions of the United States and other countries." Jackson Tyler Main, *The American States in the Revolutionary Era*, in R. Hoffman & P. Albert, *Sovereign States in an Age of Uncertainty* 1, 23 (1981). Against this backdrop, it would be unwarranted to conclude that the Constitution was intended to vest any particular state structure with the exclusive authority to regulate elections.

Today, state legislatures still structure and manage their lawmaking in different ways. But all States reserve some form of legislative power for their voters.[3] Initiatives and referenda enhance States' ability to act as laboratories of democracy by allowing citizens to address problems that legislators might not

[3] Twenty-four states have an initiative process, fifty states have legislative referenda (i.e., a process where the legislature submits a question via the ballot), and twenty-four states have popular referenda. See National Conference of State Legislatures, *Initiative, Referendum and Recall*, http://www.ncsl.org/ research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx (last visited Jan. 22, 2015).

act on. As James Madison put it, "the genius of Republican liberty [demands] not only that all power should be derived from the people; but, that those entrusted with it should be kept in dependence on the people . . . ." Federalist No. 37 (Madison).

Appellant may well agree with the proposition that States generally should determine their own legislative structure and act as laboratories for policies and ideas. See, *e.g.*, Appellant Jurisdictional Stmt. 21-22. In contravention of those principles, however, appellant argues that the Framers intended to prevent States from using their disparate legislative processes to enact laws for federal elections. Instead, appellant theorizes, the Framers drafted the Elections Clause specifically to require States to use their legislatures "alone" to prescribe federal election regulations. Appellant Br. 39. Thus, the States would be barred from using citizen initiatives—that otherwise would be a normal part of their lawmaking function—in the management of federal elections alone. This reading of the Elections Clause is inconsistent with the long-standing endorsement of States' legislative self-determination[4] and the purpose of the Elections Clause.

[4] See, *e.g.*, *Ice*, 555 U.S. at 171. It also is inconsistent with the Framers' view of state experimentation, see, *e.g.*, Federalist No. 61 (Hamilton) ("entrust[ing]" elections matters "to legislative discretion" of the States is preferable to fixing them in the Constitution because States "might, upon experiment," alter their processes).

2. The Elections Clause purposefully vests States with the authority to regulate federal elections

The Elections Clause accomplishes a straightforward objective: it vests States with authority for regulating "[t]he Times, Places and Manner" of congressional elections. U.S. Const. art. I, § 4. One of the reasons that the Framers gave this authority to the States was to alleviate fears that, if the power were left to the federal government alone, incumbent members of Congress could manipulate election laws to secure their reelections. See, *e.g.*, Cornelius (Dec. 18, 1787) in 4 *The Complete Anti-Federalist* 10.10 (Herbert J. Storing, ed., 1981) (*Anti-Federalist*). ("Should . . . the major part of the Members of Congress . . . be elected in, and near the seaport towns; there would, in that case, naturally arise strong inducements for fixing the places for holding elections in such towns, or within their vicinity."); Letters from The Federal Farmer, no. 3 (Oct. 10, 1787) in 2 *Anti-Federalist* 8.25 ("The branches of the legislature . . . ought to be so fixed *by the people*, that the legislature cannot alter itself by modifying the elections of its own members.") (emphasis added).

Had the Framers truly intended to dictate how States' citizens must exercise their lawmaking powers in the area of federal elections, one would think this departure from federalist principles would have been much-debated. But the Framers' debates do not reflect significant concern with how States would exercise their power to regulate federal elections, or prescribe any specific state body that would exercise this power. See *Brown* v. *Sec'y of State of Fla.*, 668 F.3d 1271, 1275 (11th Cir. 2012) ("Debate about the Elections Clause prior to the ratification of the U.S. Con-

stitution focused almost exclusively on the Clause's second part, which allows Congress to supervise or alter the states' exercise of their Elections Clause power."). In fact, the Framers referred to "the States" and the "State Legislatures" interchangeably in their discussions of the Elections Clause.[5] The use of the term "Legislature" in the Elections Clause thus should not be read to restrict the right of States' citizens to exercise lawmaking authority over congres-

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[5] Compare 2 *The Records of the Federal Convention of 1787* 239 (Max Farrand ed., rev. ed. 1937) (*Records*) (statement of Pinkney & Rutlidge) (in discussing the need for residual federal authority over elections, stating, "The States they contended could & must be relied on in such cases."); Letters from The Federal Farmer, no. 12 (Jan. 12, 1788) in 2 *Anti-Federalist* 8.161-65 ("[T]he states shall make regulations [regarding elections], and congress may make such regulations as the clause stands[.]"); *Debate in Virginia Ratifying Convention, June 14, 1788,* in 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 366-67 (Jonathan Elliot ed., 2d ed. 1888) (statement of James Madison) ("And, considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be submitted to the former, and the general regulations to the latter."); Charles Upham, 2 *The Life of Timothy Pickering* 356-57 (1873) (letter from Timothy Pickering to Charles Tillinghast (Dec. 24, 1787)) ("If we give a loose to our imaginations, we may suppose that the State governments *may* abuse their power, and regulate these elections in such manner as would be highly inconvenient to the people, and injurious to the common interests of the States.") (emphasis in original); *Letters from The Federal Farmer, no. 3* in 2 *Anti-Federalist* 8.25 ("Were it omitted, the regulations of elections would be solely in the respective states[.]") with 2 *Records* 239 (statement of James Madison) ("This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections.").

sional elections. The Framers did not intend to dictate how federal elections must be run or to prevent the voters of each State from organizing their legislative affairs as they see fit. The concern was, rather, that federal election power be vested in the body that "com[es] far nearest to the people themselves[.]" Letters from the Federal Farmer, no. 12 (Jan. 12, 1788) in 2 *Anti-Federalist*.

3. Appellant's proposed reading is at odds with the Court's cases, principles of federalism, and States' established practices

This Court has not read the Elections Clause as specifically or exclusively delegating federal redistricting responsibility to a specific state body. Rather, the Court has interpreted the Elections Clause broadly, to permit each State to regulate federal elections through its own legislative process. In *Hildebrant*, the Court permitted a voter referendum to veto a state legislature's redistricting plan. See 241 U.S. at 569. In *Smiley*, the Court affirmed the governor's power to veto legislative redistricting plans. See 285 U.S. at 364, 372-73. And in *Growe*, the Court recognized that state courts had the power to prescribe redistricting plans, reiterating the principle that States can use "[their] legislature or other body," in federal redistricting. 507 U.S. at 34.[6]

Despite these cases, appellant urges this Court to rule, for the first time, that the Elections Clause requires States to use their legislatures "alone" to prescribe federal election regulations. Appellant Br. 39.

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[6] If appellant's proposed rule were adopted, *Hildebrant*, *Smiley*, and *Growe* all would need to be seriously re-examined, and either limited or reversed.

This is inconsistent with the Court's repeated holding to the contrary, that "a State is entitled to order the processes of its own governance." *Alden*, 527 U.S. at 752; see also *Bond*, 131 S. Ct. at 2364; *Gregory*, 501 U.S. at 460. Most States constrain the abilities of their legislatures to prescribe redistricting plans in some manner, be it by gubernatorial veto, voter referendum, or judicial review of legislative deadlocks. A rule that state legislatures "alone" must prescribe federal election regulations cannot be squared with States' current practices or their rights to structure their own governments.

Appellant neither acknowledges nor addresses the many ways in which a requirement that legislatures "alone" prescribe federal election regulations is ill-defined and illogical. On the one hand, one might interpret appellant's rule as allowing state legislatures to delegate their authority to commissions. But then the principle appellant proposes is merely formalistic; Arizona's legislature can do what its voters cannot, and this lawsuit merely is a political power play dressed up as a federal constitutional challenge, brought by legislators who seek to disempower their own citizens. On the other hand, if legislatures' authority cannot be transferred, it is unclear why state legislatures are restricted in a single area—voting regulations—in a way that Congress itself—which can delegate authority over many issues to committees, agencies or other authorities, see *Touby* v. *United States*, 500 U.S. 160, 165-66 (1991)—is not. Appellant offers no convincing rationale to justify why the Constitution would treat state legislatures so differently in this area, and there is no satisfactory argument that the Framers intended such a consequence.

Appellant also ignores that its proposed rule could require intrusive judicial intervention into state election laws. Appellant maintains that the Constitution requires that state legislatures alone have the power to "prescribe" federal election regulations. Appellant Br. 39. But States currently arrange their redistricting in different ways, which, in turn, intrude on legislative powers differently. See Sec. B(3). It is not clear which of these intrusions would cross the line into "prescribing" voting regulations under appellant's reading.[7] Appellant's proposed rule thus would require courts to conduct a searching review of legislative processes to determine when a given measure impermissibly usurps a legislature's power. In doing so, courts will be forced to break with the traditional judicial deference accorded to each State's lawmaking function and to substitute their own judgments for the judgments of a State's citizens about the appropriate role of state legislators.

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[7] For example, of the seven States that use independent commissions, appellant's amicus NCSL argues that five are constitutional under appellant's rule, because legislators may appoint "whomever they want" as commissioners. NCSL Br. 17. This is in contrast to Arizona's scheme, where legislators still select commissioners, but from a pre-determined list of candidates. Ariz. Const. art. IV, pt. 2, § 1(3)-(8). But there is no obvious way in which a list is necessarily more "outcome determinative" of specific congressional boundaries, as appellant's rule requires. And even under the five schemes NCSL deems constitutional, candidate choices can be restricted in other ways, by, for example, "excluding past or current elected officials for a period of time." NCSL Br. 17 n.83. Appellant articulates no clear rule for why these restrictions allow legislators an outcome determinative role, but Arizona's restrictions do not.

B. Arizona Voters Have Exercised Their Authority Under The Elections Clause To Address What Could Otherwise Be the Intractable Problem Of Gerrymandering

Although gerrymandering is only one of many electoral issues that States have sought to address using voter initiatives and referenda, it is a serious problem that threatens the integrity of the democratic process. Appellant's proposed reading of the Elections Clause would imperil States' efforts to confront that problem. It also would threaten a host of other important electoral reforms in a variety of States that voters have enacted through initiatives to respond to state-specific concerns. In many of amici's States, voters have used their franchise to propose or enact regulations that change voting in various ways. The Election Clause's grant of authority to States should not be read in a manner that thwarts the will of States' own citizens as expressed through the democratic process.

1. States historically have used initiatives and referenda to address a variety of concerns

States have used voter initiatives to pioneer some of the most important voting improvements and reforms in American democracy. Arizona's first voter initiative granted women the right to vote after state delegates failed to adopt a constitutional amendment to the same effect. See Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 Vand. L. Rev. 657, 663-64 (1996). Voter initiatives also established some of the first primary elections, see Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct*

Legislation in Election Law Reform, 78 S. Cal. L. Rev. 997, 1024-25 (2005), in an attempt to destroy "'the corrupt alliance' between wealthy special interests and the political machine," *Lightfoot* v. *Eu*, 964 F.2d 865, 872 (9th Cir. 1992) (internal citation omitted).

More recently, voters have used the initiative process to change how primaries are conducted, sometimes against the wishes of those in power. For example, several amici served in Washington State, where a voter initiative established a "top-two" primary system that amicus Rob McKenna successfully defended against a constitutional challenge by the major political parties. See *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 444, 447-48 (2008). Voters also have passed initiatives that expanded access to the ballot by smaller political parties,[8] permitted all voting to be accomplished by mail,[9] banned "straight-ticket" voting,[10] or required voters to provide identification at the polls.[11]

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[8] See, *e.g.*, Mass. Gen. Laws Ann. ch. 50 § 1 (West 2014); Peter J. Howe, *Question 4: remaking the political landscape*, Boston Globe, Nov. 25, 1990, at A27.

[9] See Or. Rev. Stat. Ann. § 254.465 (West 2014); see also Lois Romano, *Growing Use Of Mail Voting Puts Its Stamp On Campaigns*, Wash. Post, Nov. 29, 1998, at A1.

[10] Ohio Const. art. V, § 2a (West 2014).

[11] See Miss. Const. art. 12, § 249-A (West 2014); Ariz. Rev. Stat. Ann. § 16 579(A) (West 2014); see also *Purcell* v. *Gonzalez*, 549 U.S. 1, 2 (2006).

2. States have taken important strides to combat gerrymandering

Arizona is one of many States that views gerrymandering as inconsistent with the meaningful right of franchise. Gerrymandering disrupts "the core principle of republican government"—namely, "that the voters should choose their representatives, not the other way around." Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 781 (2005). Gerrymandering also reduces the accountability and responsiveness of elected officials to the citizens of their State, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 615-16 (2002), and increases partisanship in the House of Representatives, see Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 Wm. & Mary L. Rev. 415, 427-28 (2004).

Gerrymandering of federal seats undermines our democracy irrespective of whether it is done on a partisan basis, by a State's elected officials seeking to maximize their party's seats in the House of Representatives, see Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness As A Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 301-02 (1991), or on a bipartisan basis to keep federal incumbents in power regardless of political affiliation.[12] See Bruce E. Cain et al.,

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[12] For example, after the 2000 census, leaders of both parties in the California legislature agreed to draw a redistricting map that would protect each party's congressional incumbents; in the 2002 congressional election, every incumbent won by landslide margins. See Nicholas M. Goedert, *Redistricting, Risk, and Representation: How Five State Gerrymanders Weathered The Tides of The 2000s*, 13 Election L.J. 406, 409 (2014).

From Equality to Fairness: The Path of Political Reform since Baker v. Carr, in Party Lines Competition, Partisanship, and Congressional Redistricting 23 (Thomas E. Mann & Bruce E. Cain eds., 2005).

Although state legislators may appear to have little incentive to gerrymander federal districts, they reap the "benefits of having very senior legislators who can 'bring home the bacon.'" *An Interstate Process Perspective on Political Gerrymandering*, 119 Harv. L. Rev. 1576, 1589 (2006). In fact, "congressional redistricting is influenced heavily by the efforts of the state's in-party congresspersons to lobby their state counterparts." Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 Cornell J. L. & Pub. Pol'y 443, 444, 463 (2005). Many state legislators have plans to run for Congress, and "redistricting offers the opportunity to draw his or her own future Congressional district." Jocelyn Benson, *How Serpentine Districts Became Law: Michigan Redistricting in 2011*, 13 J. L. Society 7, 10-11 (2011).

In addition to catering to partisan interests, gerrymandering imposes significant burdens on the judicial system. In 2000, there were challenges to redistricting in 21 of the 43 States with more than one congressional district. See James B. Cottrill, Terri J. Peretti, *Gerrymandering from the Bench? The Electoral Consequences of Judicial Redistricting*, 12 Election L.J. 261, 261 (2013). In the 2010 redistricting cycle, there were nearly 100 federal redistricting challenges filed, and only three States with no judicial redistricting challenge. See *Litigation in the 2010 Cycle*, All About Redistricting, Loyola Law School, http://redistricting.lls.edu/cases.php (last visited Jan. 23, 2015). Ultimately, it is taxpayers who bear the burden of these challenges. See, *e.g.*, Peggy Fikae &

David S. Rauf, *Taxpayers' tab for redistricting battle nears $4 million*, Houston Chronicle, Aug. 10, 2014, at B1; Mary Ellen Klas & Michael Van Sickler, *Florida legislators approve new redistricting map but new challenge is expected*, The Miami Herald, Aug. 11, 2014. When infighting over gerrymandered districts renders legislatures unable to pass a redistricting plan, courts are forced to oversee the process of redistricting, or even draw district boundaries themselves—a task for which they are ill-suited. See, *e.g.*, *Perry* v. *Perez*, 132 S. Ct. 934, 941 (2012).

3. Appellant's proposed rule would threaten States' efforts to address not only gerrymandering but also a host of other electoral issues

As appellant's own amicus highlights, States have adopted many different approaches to redistricting and combating gerrymandering. See NCSL Br. 5-17. Six States other than Arizona have independent commissions that draw federal election districts.[13] Two States use commissions as backups to redistrict if their legislatures fail to pass plans.[14] And four States use commissions to advise their legislatures during the redistricting process. See NCSL Br. 5. Amici have a firsthand understanding of the importance of these commissions. Many amici served in Arizona's government, and witnessed the voters' support for the Independent Redistricting Commission, and amicus

[13] See Cal. Const. art. XXI, § 2; Haw. Const. art. IV, § 2; Idaho Const. art. III, § 2; Mont. Const. art. V, § 14; N.J. Const. art. II, § 2, ¶ 1; Wash. Const. art. II, § 43.

[14] Conn. Const. art. III, § 6(b); Ind. Code § 3-3-2-2 (2014).

Jim Regnier presided over Montana's independent redistricting commission for years.

The diversity of States' approaches is a natural outgrowth of our federal system: States are addressing the problem of gerrymandering differently, for reasons specific to each State and its voters. Appellant threatens this diversity. Reading the Elections Clause as requiring that state legislatures "alone" prescribe federal election regulations would call into question the constitutionality of many of these redistricting approaches. Both independent and backup commissions exercise some amount of redistricting authority that otherwise would be exercised by state legislatures; that is their very purpose. Indeed, providing some level of redistricting authority to entities other than the legislature itself is often the only way to break the partisan logjam. See Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 Harv. L. & Pol'y Rev. 109 (2014).

More fundamentally, any federal election regulation passed by voter initiative depends, at least in part, on bypassing State legislatures. Through state initiatives, the people have pioneered voting reforms and changes in response to various problems, see Sec. B(1), just as they now seek to do with gerrymandering. Amici understand and deeply value the voices of their fellow citizens, and the importance of the initiative power. In Washington State, where several amici served in elected office, voters established their "top two" voting system by initiative, to combat the power of the major political parties. In other States, voter initiatives have improved ballot access for minority parties, addressed voter fraud, or banned straight

ticket voting.[15] All these measures now are threatened.

Some State solutions to election problems like gerrymandering may prove effective, others less so. But States' ability to experiment has proven invaluable to our democracy and should not be set aside by a crabbed reading of the Elections Clause that would limit voter franchise. Appellant's proposed interpretation of the Elections Clause would eliminate a rich and time-honored source of ideas and solutions to make our democracy effective and respected.

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[15] See, *e.g.*, Miss. Const. art. 12, § 249-A (West 2014) (voter identification); Wash. Rev. Code. Ann. § 29A.52.112 (West 2014) (top-two primary); Ariz. Rev. Stat. Ann. § 16 579(A) (West 2014) (voter identification); Or. Rev. Stat. Ann. § 254.465 (West 2014) (vote-by-mail); Mass. Gen. Laws Ann. ch. 50 § 1 (West 2014) (improved ballot access for minority parties and independent candidates); Ohio Const. art. V, § 2a (West 2014) (ban on straight-ticket voting).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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JANUARY 2015

LIST OF AMICI CURIAE

Michael R. Bloomberg served as the Mayor of New York City, from 2002 through 2013. During his tenure as Mayor, Mr. Bloomberg observed the anti-competitive effects of partisan gerrymandering and was a vocal proponent of redistricting reforms. He has actively endorsed concrete redistricting efforts, notably by collaborating with Governor Schwarzenegger in California and by campaigning in favor of amendments to the state Constitution in Florida.

Lincoln Chafee served as a United States Senator from 1999 through 2007 and as the Governor of Rhode Island from 2011 through 2015. During his tenure as Governor, Mr. Chafee witnessed the establishment of a Reapportionment Commission in Rhode Island for the purpose of redistricting and several court challenges concerning redistricting.

Terry Goddard served as Arizona Attorney General from 2003 through 2011, after serving as Mayor of Phoenix from 1983 through 1990. He has been a vocal proponent of the right of the people of Arizona to take redistricting out of the partisan political arena, and has denounced past partisan attempts to undermine the Arizona Independent Redistricting Commission (IRC).

Christine Gregoire served as the Attorney General of the State of Washington from 1993 through 2005 and, thereafter, as Governor of the State from 2005 through 2013. In both these positions, she witnessed firsthand the gridlock and delays created by partisan redistricting. While she served as Governor, the voters of the State of Washington used popular

initiatives on many occasions, so she is familiar with the importance of that power.

Gary King served as Attorney General of New Mexico from 2006 through 2015. As such, he witnessed New Mexico's 2011 redistricting process and the ensuing legal challenges.

Rob McKenna served as Attorney General of Washington from 2005 through 2013. During his time in office, he successfully defended Washington's top-two primary system, which was adopted by voter initiative. See *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442 (2008). He is therefore familiar with how States can utilize direct democracy to experiment with different manners of holding elections. He is familiar with the problems caused by gerrymandering.

Janet Napolitano served as the Governor of Arizona from 2003 through 2009, Attorney General of Arizona from 1999-2003, and as Secretary of Homeland Security from 2009 through 2013. The IRC was created during her tenure as Attorney General. As a former Governor of Arizona, she is familiar with the voter initiative process that created the IRC, the IRC's functioning, as well as the ongoing debates and court challenges in Arizona relating to redistricting.

Martin O'Malley served as the Governor of Maryland from 2007 through 2015, after having served as the Mayor of Baltimore from 1999 to 2007. In 2011, he signed legislation redrawing Maryland's state and federal district boundaries. Court challenges to the redistricting plan were rejected, and in a 2012 referendum, 64% of Maryland voters approved the redrawn districts.

Sam Reed served as Secretary of State for the State of Washington from 2000 through 2013. He supported the voter initiative that established Washington's "Top-Two" primary system, and defended it alongside amicus Rob McKenna. He is therefore deeply concerned with preserving the States' rights to experiment, through direct democracy, with different manners of holding elections. As a former Secretary of State, he was also in charge of supervising elections, and thus has a strong interest in redistricting issues.

Edward G. Rendell served as the Governor of Pennsylvania from 2003 through 2011. During his tenure, he called for an amendment to the state constitution that would create a bipartisan citizen's redistricting commission, similar to the IRC.

Jim Regnier served as a Montana Supreme Court Justice from 1997 through 2005 and Presiding Officer of the Montana Districting and Apportionment Commission from 2009 through 2013. Similarly to the IRC, the Commission is an independent body that adopts a binding redistricting plan for the State. During his tenure, the Commission held fourteen public hearings to solicit the opinions of the population of Montana and achieved a bipartisan compromise on redistricting among the commissioners (i.e., the Majority and Minority Leaders of the State's House and Senate).

Dennis Vacco served as New York State Attorney General from 1995 through 1998. He is familiar with the political arena and, as a former prosecutor and current practicing lawyer who interfaces regularly with the government, is knowledgeable about the dis-

torting effects that gerrymandering can have on government.

Grant Woods served as Attorney General of Arizona from 1991 through 1999. He lent public support to Proposition 106 (the voter initiative creating the IRC), explaining that having elected officials redraw electoral districts creates a fundamental conflict of interest.

Kim Wyman currently serves as the Secretary of State for the State of Washington, having assumed office in 2013. As such, her tasks include supervising state and local elections, certifying the results of state primaries and general elections, and filing and verifying initiatives and referendums. Preserving the integrity of elections in Washington State is one of her missions. Consequently, she has a strong interest in redistricting and its attendant issues.