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

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

The Elections Clause, Article I, § 4 of the Constitution, states that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." This Court has held that this clause does not give "power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley v. Holm*, 285 U.S. 355, 368 (1932). Since voters amended the law in 2000, Arizona's Constitution has required an Independent Redistricting Commission to adopt the State's congressional redistricting plans rather than the Legislature.

The question presented is whether the three-judge district court correctly rejected Appellant's claim that Arizona's use of a commission to adopt congressional districts violates Article I, § 4 of the United States Constitution.

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JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253, except insofar as the Court lacks jurisdiction because this case presents a non-justiciable political question (*see* § III, *infra*).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

In addition to those set forth in Appellant's jurisdictional statement, the Commission refers to the following constitutional and statutory provisions.

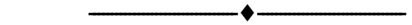
2 U.S.C. § 2a governs various aspects of reapportionment and the manner of electing members of the House of Representatives. Section 2a(c) states, "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in [one of five manners, depending on the circumstances]."

Article IV, Part 1, § 1(1) of the Arizona Constitution states:

> The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option,

> the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

Article IV, Part 1, § 1(15) of the Arizona Constitution states, "Nothing in this section shall be construed to deprive or limit the legislature of the right to order the submission to the people at the polls of any measure, item, section, or part of any measure."



MOTION TO DISMISS OR AFFIRM

ARGUMENT

As in many other states, the Arizona Legislature shares legislative power with the people, who since statehood have had the power to pass laws or amend the state constitution through ballot measures. Ariz. Const. art. IV, pt. 1, § 1(1). In 2000, Arizonans used that power to create a new constitutional body, the Independent Redistricting Commission, whose purpose is to "provide for the redistricting of congressional and state legislative districts." Ariz. Const. art. IV, pt. 2, § 1(3)-(23) ("Prop 106"). Until then, the Legislature had controlled redistricting legislation, subject to the governor's veto and the people's power of referendum and initiative.

Apparently dissatisfied with the Commission's congressional redistricting plan adopted in 2012, the Legislature brought this case on the theory that the voter-created Commission violates Article I's Elections Clause because it "divests the Legislature of its

authority" over redistricting legislation. (*See* Appellant's Jurisdictional Statement ("JS") at 33.) *See* U.S. Const. art. I, § 4.

This Court should dismiss this appeal for lack of a substantial federal question or summarily affirm the district court's dismissal of the Legislature's claim. The three-judge panel's order is a straightforward application of this Court's long-standing precedent. In two cases, this Court has already rejected the argument that the Elections Clause grants a state legislature some special institutional control over redistricting legislation. *Smiley v. Holm*, 285 U.S. 355 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

The Elections Clause gives states the authority to regulate federal elections by enacting legislation in the manner "in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 368. In Arizona, the state constitution "has provided that" redistricting legislation "shall be enacted" through the Commission. Like the voter referendum in *Hildebrant* and the gubernatorial veto in *Smiley*, the existence of the Commission "is a matter of state polity" that does not violate the Elections Clause. *Smiley*, 285 U.S. at 368. The Court need not take plenary review merely to consider another factual permutation of an issue it resolved long ago.

In the alternative, although the district court decided the merits, this Court should vacate the district court's judgment and remand with instructions

to dismiss for lack of subject matter jurisdiction. The case presents a non-justiciable political question because the Constitution dedicates this question to Congress, which has power to "make or alter" state regulations. And Congress decided a century ago that redistricting should be done pursuant to state law. *See* 2 U.S.C. § 2a(c).

I. The Legislature's Appeal Fails to Raise a Substantial Question Because the District Court's Judgment Is Fully Consistent with Existing Law.

The Legislature's arguments below and on appeal interpret the Elections Clause's use of the words "by the Legislature thereof" to mean that a state legislature, as a body, must have control – an "outcome-defining" role – over congressional redistricting, even if the state's constitution organizes legislative power differently. (*See*, *e.g.*, JS at 19.) But the Legislature's interpretation has long been rejected. Moreover, the Legislature argues for a constitutional rule at odds with the important federalism principle that redistricting is "primarily the duty and responsibility of the State." *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (internal quotation marks and citation omitted). There is no conflict among courts on the issue presented in this appeal, no good reason to change the settled view of the Elections Clause, and therefore no substantial question that warrants this Court's review.

A. Controlling Supreme Court Law Is Clear: The Elections Clause Is a Delegation of Legislative Power to the States, Not a Directive as to How a State Ought to Organize Its Legislative Process.

The district court relied primarily on *Hildebrant* and *Smiley*. Taken together, as the district court put it, these cases establish that "the word 'Legislature' in the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws." (JS App. 15.)

In *Hildebrant*, the Court considered whether the Elections Clause permitted an Ohio voter referendum to void a redistricting plan the Ohio legislature had passed. 241 U.S. at 566-67. Ohio, like many states in the early twentieth century, had recently amended the state's constitution to vest "legislative power . . . not only in the senate and house of representatives of the state . . . but in the people." *Id*. at 566. The constitution reserved for the people a referendum power through which voters could approve or disapprove of any law the legislature passed, a power the voters used to disapprove of a congressional redistricting plan. *Id*. at 566-67. The Ohio constitution would have voided the legislation as a result of the referendum's approval but a mandamus action contended that the referendum vote could not be part of the state's legislative authority without violating the Elections Clause. *Id.* at 567.

The Court first explained that both state law and federal statute permitted the use of the referendum in redistricting. The referendum was "part of the state Constitution and laws, and was contained within the legislative power" of Ohio. *Id*. at 568. Furthermore, as further discussed below (§ III), Congress had amended its apportionment statute specifically to permit the use of ballot measures in congressional redistricting, so there could be no claim that the state referendum was prohibited through Congress's power to "make or alter" elections laws. *Id*. at 568-69 (discussing 1911 amendment to statute that changed language to require that redistricting should be done "in the manner provided by the laws" rather than by "the legislature" of each state). Thus, the only remaining argument was that state and federal law violated the Elections Clause itself by impermissibly "includ[ing] the referendum within state legislative power for the purpose of apportionment." *Id*. at 569.

The Court held that this argument "is plainly without substance." *Id*. It saw that the argument relied on two contentions, both of which failed. They were (1) that Congress could not constitutionally approve of "treating the referendum as a part of the legislative power for the purpose of apportionment, where so ordained by the state Constitution and laws;" or (2) the inclusion of the referendum in a state's legislative power is "obnoxious to a republican form of government as provided in" the republican guaranty clause. *Id*. at 569-70. In either case, the Constitution authorized Congress to decide the question. *Id*. (citing

Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912)).

As the district court recognized below, a necessary premise of *Hildebrant* is that the Elections Clause, by its terms, does not delegate power solely to the "legislature" as a body. Instead, the Elections Clause delegates authority to the "state's legislative power," subject to Congress's approval. (*See* JS App. 12-13.)

The Court confirmed this reading of the Elections Clause in *Smiley v. Holm*. There, after Minnesota's governor vetoed the legislature's congressional redistricting bill, the legislature nevertheless forwarded the bill to the secretary of state for use in the next election. 285 U.S. at 361. The secretary of state rejected claims that the bill was a "nullity" because of the veto, insisting that it was valid "by virtue of the authority conferred upon the Legislature by" the Elections Clause. *Id*. at 362-63.

As it did in *Hildebrant*, the Court rejected the idea that the Elections Clause vests a state legislature as a body with a "particular authority" that would "render[ ] inapplicable the conditions which attach to the making of state laws." *Smiley*, 285 U.S. at 365. Focusing the issue, the Court explained that the definition of the word "legislature" was not a mystery – it means "the representative body which made the laws of the people" – but that did not answer the constitutional question. *Id*. "The question

. . . is not with respect to the 'body' . . . but as to the function to be performed." *Id*.

After examining the clause and its purpose, the Court held that the Elections Clause conferred "authority . . . for the purpose of making laws for the state" and thus "the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id*. at 367. The Court found "no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id*. at 368. The Court also saw Congress's 1911 amendment, which rewrote the apportionment statute to require that redistricting be done "in the manner provided by the laws" of each state, as additional evidence of "the nature of the authority deemed to have been conferred by the constitutional provision." *Id*. at 372.

Ultimately, both *Hildebrant* and *Smiley* held that the Elections Clause confers an authority to enact legislation concerning federal elections, not an edict as to how the state must go about enacting the legislation. In *Hildebrant*, the Court upheld the validity of the referendum "because of the authority of the state to determine what should constitute its legislative process." *Smiley*, 285 U.S. at 372. Likewise, the existence of a gubernatorial veto in *Smiley* was a "matter of state polity" that the Elections Clause "neither requires nor excludes." *Id*. at 368.

These cases thus stand for the principle the district court articulated and that this Court should summarily affirm: "the word 'Legislature' in the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws." (JS App. 15.)

B. Arizona's Redistricting Process Is Consistent with Current Law.

1. The Arizona Independent Redistricting Commission Is a Component of Arizona's Constitutional Legislative Process and Its Redistricting Plans Are a Product of the Legislative Power of the State.

Arizona's method for enacting congressional districts is fully consistent with *Hildebrant*, *Smiley*, and the settled understanding of the Elections Clause. The relevant inquiry is not (as the Legislature assumes) how much power over the process the Legislature has. Rather, the question is whether legislation falling under the ambit of the Elections Clause is enacted "in accordance with the method which the state has prescribed." *Smiley*, 285 U.S. at 367.

The Legislature incorrectly asserts that Prop 106 "operates ***outside*** Arizona's legislative process." (JS at 16.) The Arizona Supreme Court held that the "Commission acts as a legislative body," not merely an "administrative body." *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*,

208 P.3d 676, 683-84 (Ariz. 2009). The Commission's redistricting plans have "the hallmarks of traditional legislation" and Arizona courts treat the Commission's redistricting plans with "the same deference . . . afford[ed] to other legislation." *Id*. at 684 (internal quotation marks and citation omitted).

Furthermore, the Legislature has never been the sole repository of Arizona's legislative power. Since statehood, the Arizona Constitution has reserved for the "people" the power to "propose laws and amendments to the constitution" by initiative and referendum. Ariz. Const. art. IV, pt. 1, § 1(1); art. XXI § 1; art. XXII, § 14; *see also Cave Creek Unified Sch. Dist. v. Ducey*, 308 P.3d 1152, 1155 (Ariz. 2013) ("The legislature and electorate share lawmaking power under Arizona's system of government." (internal quotation marks and citation omitted)). With Prop 106, voters amended the Arizona Constitution to create the Commission, a constitutional body that is part of Article IV of the constitution, which governs the "Legislative Department."

Finally, as discussed below (§ III), the Legislature's argument reduces to a contention that the Commission is not sufficiently "legislative" to wield lawmaking power under the Elections Clause. That is precisely the kind of argument that *Hildebrant* held is a non-justiciable political question reserved for Congress. 241 U.S. at 569.

Like the referendum in *Hildebrant* and the veto in *Smiley*, the Independent Redistricting Commission

is a "part of the state Constitution and laws, and [is] contained within the legislative power" of Arizona. *Hildebrant*, 241 U.S. at 568. Arizona's use of the Commission as part of its lawmaking power is thus fully consistent with the Elections Clause.

2. Even Under the Legislature's Incorrect Interpretation, Arizona Does Not "Exclude" the Legislature.

The Legislature asks the Court to hold that Prop 106 violates the Elections Clause because Prop 106 "fully remove[s]" the Legislature's authority over redistricting. (JS at 33.) The Legislature overstates its case. Arizona does not fully "remove" or "divest" the Legislature's authority over redistricting. The Court need not take plenary review to consider this issue because the Legislature's claim fails even under its own flawed interpretation.

Prop 106 shifts power over redistricting legislation from the Legislature to the Commission. But the Legislature retains the power to pass a redistricting plan and refer it to the voters for approval. Ariz. Const. art. IV, pt. 1, § 1(15) ("Nothing in this section . . . deprive[s] or limit[s] the legislature of the right to order the submission to the people . . . of any measure, item, section, or part of any measure."); *id*. art. XXI, § 1 ("Any amendment . . . to this constitution may be proposed in either house of the legislature," and when approved by "a majority of the members . . . the

secretary of state shall submit such proposed amendment . . . to the vote of the people. . . .").

This structure (unaltered in Prop 106) is functionally no more of an "exclusion" of the Legislature than what the Court approved of in *Hildebrant* and *Smiley*. In both cases, the legislature's preference was wholly rejected and nullified by way of referendum vote and veto. The Elections Clause did not save the legislature from having to obtain gubernatorial approval in *Smiley* or voter approval in *Hildebrant*. The situation here is hardly different. The Arizona Constitution allows the Legislature to create a redistricting plan and seek voter approval of it. This Court should not take plenary review of what is merely another permutation of *Hildebrant* and *Smiley*.

C. There Is No Conflict Among Lower Courts; All Agree That the Elections Clause Delegates a Power to Legislate in the Manner State Law Requires.

Summary affirmance is also proper because the district court's decision is consistent with other lower court decisions confronting this issue. In its Jurisdictional Statement, the Legislature cites cases that confirm the general principle set forth above: the delegation in the Elections Clause is to a legislative process, not a particular body. (JS at 8.) There is no conflict among federal courts on this point.

The most recent decision is *Brown v. Secretary of State of Florida*, 668 F.3d 1271 (11th Cir. 2012).

There, Florida voters approved a ballot initiative which limited the legislature's discretion over redistricting, requiring the legislature to consider certain questions as part of the process. Plaintiffs contended that the initiative violated the Elections Clause because it was not passed through the legislature itself which "would effectively read the 'Legislature' out of the Elections Clause." *Id*. at 1275. The Eleventh Circuit easily rejected the argument, explaining that *Smiley* and *Hildebrant* "provided a clear and unambiguous answer . . . twice explaining that the term 'Legislature' . . . refers not just to a state's legislative body but more broadly to the entire lawmaking process of the state." *Id*. at 1276-77.

Another related federal decision is *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003). There, the three-judge district court held that the Elections Clause would prohibit the implementation of a court-created redistricting plan. *Smith*, 189 F. Supp. 2d at 550. Like *Brown*, the court explained that *Smiley* and *Hildebrant* "have made clear that the reference to 'Legislature' in Article I, Section 4 is to the law-making body and processes of the state." *Id*. at 553. Thus, "congressional redistricting must be done within the perimeters of the legislative processes, whether the redistricting is done by the legislature itself or pursuant to the valid delegation of legislative power." *Id*. at 554. The court-created plan failed this standard because nothing in the state's constitution or statutes delegated any legislative authority to the

court to establish a congressional redistricting plan. *Id*. at 558; *see also Grills v. Branigin*, 284 F. Supp. 176, 180 (S.D. Ind. 1968) (explaining that Elections Clause does not authorize Election Board of Indiana "to create congressional districts" because "the Election Board does not possess the legislative power under the Indiana Constitution").

A survey of federal cases confirms that there is no need for this Court to take plenary review of this issue. Courts construing the Elections Clause uniformly interpret it to mean that state-made laws regulating the time, place, and manner of federal elections must be enacted pursuant to the legislative power as the state itself defines it.

D. The Legislature's Arguments That the District Court's Decision Is Inconsistent with Existing Law Amount to Nothing More Than a Disagreement with the Law, Not Substantial Questions Needing This Court's Attention.

The Legislature contends that the district court's decision conflicts with *Smiley* and *Hildebrant*. The Legislature's arguments concentrate on defining some constitutional line that the people of Arizona crossed when they voted to diminish the Legislature's power over congressional redistricting. But *Smiley* and *Hildebrant* already resolved what the line is: the lawmaking authority must be exercised consistent with the state's constitution and laws, and Congress's preemption power. The Legislature's anxiety about a

loss of power is unsurprising, but its arguments do not present substantial questions in need of plenary review.

1. The Legislature Badly Distorts *Smiley* and Ignores *Hildebrant*.

The Legislature's primary argument is that the district court's order "departs from the central holding of *Smiley*." (JS at 14-17.) According to the Legislature, the "central holding" is that the Elections Clause "does not prohibit limitations on a state legislature[ ]," such as a veto, but the legislature itself must be doing the lawmaking. (JS at 14.) The Legislature badly distorts *Smiley* in constructing this constitutional rule.

The Legislature draws this "central holding" primarily from a single passage in *Smiley*: "What [Legislature] meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." *Smiley*, 285 U.S. at 365 (internal quotation marks and citation omitted). But the Legislature ignores the surrounding sentences to pluck this sentence out for special, unwarranted meaning. The Court explained that the meaning of the word Legislature "is beside the point" because "[t]he question here is not with respect to the 'body' as thus described but as to the function to be performed." *Id*.

Smiley's actual holding is quite different than the Legislature suggests. If the "function" delegated is

lawmaking on topics within the Elections Clause, then the Elections Clause does not alter the state's lawmaking process itself. Or, as the Court put it in *Smiley*: "As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id*. at 367.

Furthermore, in hyper-focusing on a single passage in *Smiley*, the Legislature entirely ignores *Hildebrant*. But *Hildebrant* is significant. In *Hildebrant*, the Court was asked to declare that the Elections Clause prohibited the state of Ohio from shifting legislative power over redistricting from the legislature to the people, who could wholly void the legislature's preference through a referendum. The Court refused, finding that the argument was "plainly without substance." 241 U.S. at 569.

The Legislature says essentially nothing about *Hildebrant* but the case is fatal to the Legislature's claim.

2. The Argument That the Legislature Has No "Meaningful Role" in Redistricting Is Irrelevant.

Having misread *Smiley* to permit no more than "checks" on the Legislature's control over redistricting and other topics within the scope of the Elections Clause, the Legislature next argues that Prop 106

violates this rule because the Legislature "has no meaningful role" in redistricting or because Prop 106 impermissibly "divested" the Legislature of authority over redistricting. (JS at 17.)

This argument fails to present a substantial question for the same reasons previously explained. The Legislature's contention that it must have some minimum level of "influence" (JS at 18) or "meaningful role" simply ignores that the Court in *Smiley* found "no suggestion in the federal constitution provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided." 285 U.S. at 367-68.

Prop 106 sets forth the "manner" of redistricting that "the Constitution of the state has provided." The Legislature measures Prop 106 against a constitutional standard that does not exist. Especially given that no courts have so misread *Smiley* or *Hildebrant*, the Legislature's arguments do not raise any substantial question for plenary review.

II. The Legislature's Arguments Regarding the Text and History of the Elections Clause Fail to Raise a Substantial Question for Review.

The Legislature also argues that, regardless of controlling precedent, the Elections Clause's text, "context and history" show that states cannot shift their legislative power over redistricting away from

the Legislature. (JS at 23-33.) These arguments fail to raise a substantial question for review.

A. The Legislature's "Context" Argument Was Already Considered and Rejected in *Smiley*.

The Legislature contends that the use of the word "Legislature" must have been a deliberate limitation on state authority because the Constitution "frequently acknowledge[s] and refer[s] to 'the states'" but "[l]ess frequently . . . specifically references local agencies of government." (JS at 24.) This is not a new argument and it does not add to the Legislature's case for plenary review.

In *Smiley*, the Court held that the fact that the "Legislature" was delegated a specific authority in other constitutional provisions (e.g., to ratify constitutional amendments) did not change the nature of the power delegated under the Elections Clause. 285 U.S. at 365-66. The determinative question was the "function" being delegated, and the Elections Clause delegated the lawmaking power on certain subjects. *Id*. at 366. The mere use of the word "Legislature" does not mean that the Elections Clause "invests the Legislature with a particular authority" that would "render[ ] inapplicable the conditions which attach to the making of state laws." *Id*. at 365.

The Legislature's citation to *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), and

McPherson v. Blacker, 146 U.S. 1 (1892), is not relevant to this analysis.

Both cases concern the state's authority to appoint presidential electors under Article II, not the Article I Elections Clause. *See* U.S. Const. art. II, § 1, cl. 2. For example, the Legislature refers to a passage in *Bush v. Palm Beach County*, in which the Court implies that Florida's legislative enactments regarding presidential electors should not be subject to the strictures of Florida's constitution. 531 U.S. at 77 (faulting state court for assuming that state legislation regarding electors must be consistent with the state constitution). *Bush* does not reference the Elections Clause or *Smiley*. Whatever may be said of other constitutional provisions, the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 368.

Furthermore, despite the Legislature's description, *McPherson v. Blacker* does not "[strike] down a state constitutional provision limiting the ability of the Michigan Legislature to appoint presidential electors." (JS at 24-25.) No such claim or argument appears in the case. In *McPherson*, the Court upheld a Michigan law requiring the appointment of presidential electors by way of a vote "in each of [Michigan's] twelve congressional districts" rather than a statewide at-large election. 146 U.S. at 24-25; *see also id.* at 42 ("[T]he act of the legislature of Michigan

. . . is not void as in contravention of the constitution of the United States. . . .").

Having mischaracterized the case, the Legislature then poaches a phrase from *McPherson* indicating that a delegation of power to "the Legislature" is a "limitation upon the state in respect of any attempt to circumscribe the legislative power." (JS at 25 (quoting *McPherson*, 146 U.S. at 25).) The Legislature does not explain how this out-of-context dicta supports its theory that the Elections Clause prohibits Arizona from reorganizing its legislative power. What is clear is that *McPherson* simply does not deal with the issues presented here.

The Legislature has not advanced any argument that the Court did not already dispose of in *Smiley*. Accordingly, the Legislature's argument does not raise a substantial question for review.

B. The Legislature's Interpretation of the Elections Clause Is Implausible.

The Legislature's interpretation is implausible and harmful to state sovereignty.

First, the Legislature argues that the Elections Clause requires the Legislature's lawmaking authority to trump the lawmaking authority of the voters who approved Prop 106, never mind what Arizona's constitution says. This argument ignores that the initiative and referendum process did not exist in the states in the late 18th Century. Arizona's division of legislative

power between an elected legislature and the people directly was part of a movement gaining speed at the turn of the 20th Century. *See*, *e.g.*, Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11, 16 (1997) (showing chronology of adoption of initiative and referendum beginning in 1898); *see also* 47 Cong. Rec. 3436 (1911) (statement by Senator Burton that by 1911 the initiative and referendum were already in "existence . . . in divers[e] States of the Union" as "recognized methods of enacting laws").

The idea that the Framers intended for the words "Legislature thereof" in the Elections Clause to exclude a method of legislating that did not exist in the states at the time but is now commonplace makes little sense. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) (stating that "[w]e do not interpret constitutional rights" to exclude alternative forms just because they "were not in existence at the time of the founding").

Second, the Legislature's position conflicts with federalism principles that were critically important during the ratification of the Elections Clause and continue to feature prominently in this Court's redistricting and Elections Clause decisions.

"The Elections Clause has two functions. Upon the States it imposes the duty . . . 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 Ariz., Inc., 133 S. Ct. 2247, 2253 (2013). The Legislature would have this Court write into the clause an invasive limitation on how states may pass laws regarding elections. The text and historical evidence do not support such an intrusive view of the Elections Clause. If anything, the Legislature's reading of the clause is implausible in light of the historical record.

The clause "proved to be one of the most controversial provisions in the new Constitution." Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 23 (2010). But the "[d]ebate about the Elections Clause . . . focused almost exclusively on the Clause's second part, which allows Congress to" override state law. *Brown*, 668 F.3d at 1275. Anti-federalists feared that Congress would exploit the preemption power to override local concerns. Natelson, *supra*, at 25-32 (summarizing controversy and fears of expansive congressional power over elections). Ultimately, however, the Constitution included the clause because of "a very real concern in the founding era" that "a State would refuse to provide for the election of representatives of the Federal Congress." *Inter Tribal Council*, 133 S. Ct. at 2253; *see also* Natelson, *supra*, at 35 (The "decisive argument" was that the "Clause was needed to enable Congress to preserve its own existence.").

Given the intense controversy over the grant of federal preemption power, it is illogical to construe

the Elections Clause to limit a state's power to organize its legislative power as its people see fit.

Summary affirmance is appropriate because existing law already makes this point clear. In addition to *Smiley* and *Hildebrant*, this Court's modern redistricting cases reflect this same concern for the importance of local control over redistricting. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) ("[W]e renew our adherence to the principles" of deferring to state authority over redistricting, "which derive from the recognition that the Constitution leaves with the States the primary responsibility for apportionment of their federal congressional and state legislative districts.").[1] And the Court has repeatedly affirmed that "[d]rawing lines for congressional districts is . . . primarily the duty and responsibility of the State." *Shelby Cnty.*, 133 S. Ct. at 2623 (internal quotation marks and citation omitted).

The Legislature nevertheless contends that federalism principles are not relevant because the legislative power in the Elections Clause is "delegated"

[1] The Legislature devotes an entire section (§ I.C) to disputing the district court's citation to *Growe v. Emison*, which held that the federal district court should have deferred to state courts before engaging in its own redistricting. (JS at 20-21.) The Legislature contends that the case should be disregarded as merely a "remedial-adjudication precedent." The Legislature's argument misses the point. *Grow* is relevant here because its holding reflects a strong desire that states maintain control over how redistricting is accomplished.

and not "inherent." (JS at 21-22.) This argument ignores entirely the historical context described above. The Legislature offers no explanation for why the Court should interpret the Elections Clause to limit state sovereignty to a greater degree than is already accomplished through the federal preemption power.

Indeed, in support of the argument, the Legislature cites *Inter Tribal Council* for the proposition that "federalism principles . . . are limited in the Elections Clause context." (JS at 21-22.) What the case says, however, is that the limitation on state power comes from the federal preemption power: "the States' role in regulating elections – while weighty and worthy of respect – has always existed subject to the express qualification that it terminates according to federal law." *Inter Tribal Council of Ariz.*, 133 S. Ct. at 2257 (internal quotation marks and citation omitted).

There is simply no support in *Inter Tribal Council* for the Legislature's position that the Elections Clause should be read to infringe on state decision-making any more than Congress deems appropriate.

C. The Legislature's Historical Arguments Are Meritless.

Although the historical record is full of detail regarding Congress's preemption power, the "Framers said precious little about the first part of the Clause, and they said nothing that would help resolve the

issue now before us: what it means to repose a state's Elections Clause power in 'the Legislature thereof.'" *Brown*, 668 F.3d at 1276. The Legislature asserts, however, that the "Founding-Era" historical record shows that the Elections Clause deliberately intended to grant legislative power to the legislature itself and exclude other forms of state legislative action. Despite the lengthy historical dissertation in its brief, the Legislature has not discovered anything that undermines the district court's order.

The Legislature first discusses the development of the Elections Clause language during the Constitutional Convention. (JS at 28-31.) Specifically, the Legislature argues that the Elections Clause derives from Charles Pinckney's proposal that "the 1st branch be elected by the people in such mode as the Legislatures should direct." (JS at 29 (internal quotation marks and citation omitted).) The Legislature further argues that Pinckney had been opposed to direct election of House members, preferring that they (like Senators) be chosen by state legislatures. (JS at 28.) From this, the Legislature argues that the Elections Clause is a compromise meant to divide authority between the people and the state legislature.

Regardless of what Charles Pinckney would say about this case, the Legislature is misreading the purpose of the Election Clause's delegation to the states. The Elections Clause "compromise" was to give

states, rather than Congress, the primary role in legislating the mode of elections to ensure that the federal government did not totally control the elections of Representatives, and to give Congress the power to preempt those state policies. *See*, *e.g.*, THE FEDERALIST NO. 59 (Alexander Hamilton) (describing that Framers had the choice to lodge "power over elections . . . wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former"); *see also* James Madison, *Debates in the Federal Convention of 1787* 371-72 (Prometheus ed. 2007) (explaining rationale of including congressional preemption power to prevent state legislatures from having an "uncontrouled right" over elections).

Indeed, the Legislature states that the "perhaps more important[ ]" reason for including the delegation of legislative power was to "make 'State Govts. a part of the General System' . . . to protect the interests of less populous states." (JS at 30 (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 360, 365 (M. Farrand ed. 1911)).) If anything, this "more important" purpose undermines the Legislature's position, which would require the federal court to override Arizona's constitution. The convention records do not support the Legislature's position.

The Legislature next cites The Federalist Nos. 44 and 45. Again, the Legislature cribs language from a debate concerning the allocation of power between

states and the federal government, not a debate about the organization of internal state power. From No. 44, the Legislature finds it significant that Madison writes that "the election of the President and Senate will depend in all cases, on the legislatures of the several states. And the election of the House of Representatives will equally depend on the same authority in the first instance." (JS at 32 (quoting THE FEDERALIST NO. 44).) Similarly, the Legislature quotes a passage from No. 45 which assumes that state legislatures would be influencing federal elections. (JS at 32.)

The Legislature assumes too much from these excerpts. Both are part of arguments intended to justify the greater powers the new constitution provided to the federal government. In The Federalist No. 44, Madison defends why several constitutional provisions were necessary to make the federal government function, including the oath requirement. In The Federalist No. 45, titled "The Alleged Danger from the Powers of the Union to the State Governments Considered," Madison is allaying fears of too much federal power with an argument that states retain substantial influence over federal elections.

The Legislature's collection of records helps explain why the Elections Clause balances state and federal power over the operation of elections in the way it does. It sheds little light, however, on the question at issue: does the Elections Clause also act as a limitation on state authority to organize state legislative power in the manner its people desire? This Court and Congress have said it does not. Therefore,

the Court should dismiss this appeal or summarily affirm the three-judge panel's decision.

III. In the Alternative, the Court Should Vacate the Judgment Below Because Whether the Elections Clause Permits Prop 106 Is a Non-Justiciable Political Question That Congress Has Already Answered.

A controversy is a non-justiciable political question when "there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993) and *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The Legislature's claim presents a political question in two ways.

First, the Elections Clause itself contains a clear and unambiguous "commitment of the issue" to Congress: the states may make elections regulations "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. Whatever the Elections Clause may require of states in the absence of congressional action is irrelevant if Congress "make[s]" or "alter[s]" such laws.

This is such a case. Congress has already decided that redistricting may be accomplished however state law dictates, including via ballot measures. 2 U.S.C.

§ 2a sets out a process for the reapportionment of House Representatives. Section 2a(c) spells out what happens if there is an election after a reapportionment but before the state has had a chance to enact a redistricting plan. It states, "[u]ntil a State is redistricted ***in the manner provided by the law thereof*** after any apportionment," elections for Representatives shall occur as set forth in the statute. 2 U.S.C. § 2a(c) (emphasis added).

Congress added the highlighted language specifically to clarify that states may organize the legislative power over redistricting how they see fit, including the use of initiative and referendum. *See Hildebrant*, 241 U.S. at 568-69 (there was "no room for doubt that" Congress amended the statute "for the express purpose, in so far as Congress had power to do it, of excluding" the argument that a referendum could not be used in redistricting).

Before 1911, the reapportionment statute stated that a preexisting districting plan would be in effect "until the legislature of such state" completed redistricting of the new apportionment. *See id*. at 568 (discussing pre-1911 version of statute). In 1911, Congress deleted this language and added the language that is still in the statute today, "in the manner provided by the law thereof." *See id.* (describing amendment to predecessor statute of 2 U.S.C. § 2a(c)).

As the Senator who proposed the amendment explained, "A due respect to the rights, to the established

methods, and to the laws of the respective States requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." 47 Cong. Rec. 3436 (1911).

There is no dispute that Prop 106 is the "manner provided by the law" of Arizona. 2 U.S.C. § 2a(c). Congress has therefore rejected the Legislature's position, and the Constitution expressly gives it authority to do so.

Second, the Legislature's claim is not justiciable for the same reasons the constitutional claim in *Hildebrant* was rejected. Like there, the Legislature's argument is that "including [Prop 106] within state legislative power . . . is repugnant to" the Elections Clause. 241 U.S. at 569. And, as in *Hildebrant*, the claim "must rest upon the assumption that to include [Prop 106] in the scope of the legislative power is to introduce a virus which destroys that power," thereby violating the guaranty clause. The Legislature makes this assumption when it contends that Prop 106 is unlawful because the Legislature does not have "meaningful" influence over the Commission, and that the Commission is "fully insulated" and "outside Arizona's legislative process." (JS at 16-19.) These concerns are no different from the concerns with the referendum process raised in *Hildebrant*. They "present[ ] no justiciable controversy, but involve[ ] the exercise by Congress of the authority vested in it by the Constitution." *Hildebrant*, 241 U.S. at 569 (citing

Pac. States Tel. & Tel. Co., 223 U.S. 118 (challenge to initiative process held non-justiciable)).

CONCLUSION

The appeal should be dismissed for want of a substantial federal question. In the alternative, the judgment should be summarily affirmed or vacated with instructions to dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

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