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

REPLY BRIEF FOR APPELLANT

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APPELLANT'S REPLY BRIEF

Until the divided decision below, no court, much less this Court, had ever held that a state legislature may be completely divested of its authority to prescribe congressional redistricting. That unprecedented outcome simply cannot be squared with the clear command of the Elections Clause that the "Times, Places and Manner" of holding congressional elections "shall be prescribed in each State *by the Legislature thereof*." U.S. Const. art. I, § 4, cl. 1 (emphasis added).

The IRC's efforts to defend the majority's atextual and limitless construction of the Elections Clause are meritless. The IRC boldly contends that Proposition 106 does not accomplish what its proponents promised—namely, the complete removal of all redistricting authority from the Legislature. But Proposition 106 plainly removes the Legislature (and Governor, for good measure) from the redistricting process, and the two general state constitutional provisions the IRC cites do not preserve any meaningful residual role for the Legislature.

Nor have *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916), or *Smiley v. Holm*, 285 U.S. 355 (1932), resolved this question in the IRC's favor. Both decisions expressly contemplate a central role for the state legislature in redistricting, and neither stands for the far-reaching proposition that the word "Legislature" can be read out of the Elections Clause.

As the constitutional text, the historical record, and this Court's cases demonstrate, the Framers were well aware of the differences between the "Legislature" and other entities to whom they could

have assigned the role of "prescrib[ing]" regulation of federal elections. Their assignment of this delegated power specifically to the most accountable branch of state government—"the Legislature thereof"—cannot be disregarded.

Finally, the question presented is plainly justiciable. The IRC's argument that the question has been constitutionally committed to Congress misreads both constitutional and statutory text; moreover, contrary to the IRC's insinuations, this case is not and has never been about the Guarantee Clause. Rather, it is about the vitally significant issue of whether the Elections Clause means what it says. The decision below is plainly incorrect and should be reversed, but at a minimum this Court's plenary review is warranted to address this question of obvious national importance, which will continue to arise as States take ever-bolder steps to take "politics" and state legislatures out of the redistricting process.

I. Whether The Elections Clause Permits A Legislature To Be Completely Divested Of Any Authority To Prescribe Congressional Redistricting Lines Is A Substantial Question That Warrants Plenary Review.

A. Proposition 106 Completely Divests the Arizona Legislature of Redistricting Authority.

At the outset, the Court should reject the IRC's attempt to sidestep the substantial question presented by contending that Proposition 106 "does not fully 'remove' or 'divest' the Legislature's authority over redistricting." Br. 11. This contention is belied by the purpose, text, and effect of Proposition 106. The

initiative's authors expressly stated that it would "take[] the redistricting power away from the Arizona Legislature." App. 42-43. The official ballot provided that voting for the initiative meant "removing redistricting authority from the Arizona Legislature." 2000 Ballot Propositions, at 60, http://tinyurl.com/prop106ballot. The plain text of Proposition 106 accomplishes this stated goal by granting the IRC the power to redistrict immune from legislative override. Indeed, the IRC's very name proclaims its independence from the Legislature.

The IRC and its *amici* understood all of this in the proceedings below. In its motion to dismiss, the IRC argued that the Legislature seeks to "take back the power to draw congressional districts." Defs.' Mot. to Dismiss 2, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 02-1211 (D. Ariz. Aug. 10, 2012) (Dkt. 16). The initiative's authors, participating as *amici*, asserted that "Proposition 106 was intended to remove responsibility for redistricting from the Arizona Legislature." Br. of *Amici Curiae* 3, *Ariz. State Legislature*, *supra* (Dec. 19, 2013) (Dkt. 42). As the majority found, Proposition 106 accomplished that goal: it "removed congressional redistricting authority from the Legislature." App. 3.

The IRC's answer to all this is to advance an argument the majority understandably ignored: it contends that the Legislature "retains the power to pass a redistricting plan and refer it to the voters for approval." Br. 11. But the two constitutional provisions cited for that proposition do not support the IRC's claim. Article XXI, § 1 simply allows the Legislature to submit proposed constitutional

amendments to a vote of the people. This amendment process is no more evidence of the Legislature's power to establish redistricting lines than Congress' general authority to propose amendments to the United States Constitution is evidence of a congressional power to do things forbidden by the current constitutional text. *See* U.S. Const. amend. V.

The IRC's argument concerning art. IV, pt. 1, § 1(15) is even more of a reach. That general provision was added to the Arizona Constitution in 1998 by an initiative aimed at *reducing* the Legislature's ability to change voter-approved laws, and it merely provides that "this section" (*i.e.*, § 1) does not limit the Legislature's ability to submit referendum measures to the people. Proposition 106 *postdates* this savings clause, is located *outside* the relevant article IV, pt. 1, § 1, and specifically states that the IRC "shall ... establish *final* boundaries," Ariz. Const. art. IV, pt. 2, § 1(16) (emphasis added). Arizona law thus does not give the Legislature the power to "create a redistricting plan and seek voter approval of it," Br. 12, and the IRC cites no Arizona decision even suggesting to the contrary.

Notably, while the IRC presses theories even the majority rejected, the IRC declines to defend the majority's claim that Proposition 106 "has not entirely divested the legislature of any redistricting power" because the Legislature "retains the right to select the IRC commissioners" and "the IRC is required to consider the Legislature's suggested modifications" to its redistricting lines. App. 19 n.4. That reasoning is plainly wrong, *see* App. 22-23 (Rosenblatt, J.,

dissenting); J.S. 17-19, and the IRC understandably abstains from defending it.

In short, Proposition 106 accomplished exactly what its proponents promised: it took the Legislature out of redistricting. Whatever its policy merits, it is fairly described as the "most radical[] ... departure[] from the traditional legislative redistricting model." Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1811-12 (2012). Whether that radical effort to "de-politicize" redistricting can be reconciled with the Constitution's deliberate decision to vest such responsibilities in the most politically-accountable branch of state government is thus squarely presented and substantial.

B. This Court Has Never Held That Completely Divesting a Legislature's Authority To Prescribe Congressional Redistricting Lines Is Consistent With the Elections Clause, and No Precedent Supports That Far-Reaching Result.

The IRC's need to deny Proposition 106's plain purpose and effect stems from the reality that no case, other than the divided decision below, holds that the complete removal of a legislature's authority over redistricting can be squared with the Elections Clause.

The IRC relies heavily on *Hildebrandt* and *Smiley*. But those decisions do not support the IRC, let alone render the term "Legislature" in the Elections Clause a nullity. Indeed, both decisions take as their foundation what the IRC rejects: the constitutional role of state legislatures.

Hildebrandt is problematic for the IRC both doctrinally and factually. Doctrinally, *Hildebrandt* focuses on the Guarantee Clause, not the Elections Clause. And, factually, the referendum was "a *component part* of the legislative authority empowered to deal with" congressional redistricting, 241 U.S. at 567 (emphasis added)—not, as here, a complete displacement of that authority. As explained, the Ohio Legislature continued to play an active role in redistricting after the referendum was enacted. *See* J.S. 11.

Smiley is doubly unhelpful to the IRC. First, *Smiley* rejects the argument—essential to the IRC's claim—that the Elections Clause's reference to "by the Legislature thereof" is just an awkward way of referring to any procedure adopted by the State. *See* 285 U.S. at 365 (agreeing with lower court that "Legislature" means "the representative body which made the laws of the people" and not "the state or ... the lawmaking power of the state" (quotation marks omitted)); J.S. 12-13.

Second, *Smiley* stands for the modest proposition that the Election Clause's reference to "the Legislature" does not immunize the legislature from the normal constraints on the legislative process, such as the gubernatorial veto. *Smiley* does not remotely support the proposition that any limitation on the Legislature, including its complete ouster from redistricting, is valid so long as it is accomplished via a lawmaking process authorized by state law. Here, Proposition 106 establishes a redistricting process that is in complete derogation of the normal lawmaking process because it eliminates both a

meaningful legislative role and any prospect of a gubernatorial veto. *Smiley* does not authorize such a radical innovation. To the contrary, *Smiley* rejects the only proposition that could save Proposition 106—namely, that "by the Legislature thereof" actually means "by the State."[1]

Notably, the IRC makes no effort to defend the majority's repeated reliance upon *Growe v. Emison*, 507 U.S. 25 (1993), to reject the contention that a state legislature may not be completely divested of its redistricting power. The IRC cites *Growe* only for the bland proposition that it "reflects a strong desire that states maintain control over how redistricting is accomplished." Br. 23. But the majority invoked *Growe* for entirely different reasons, *see* App. 15-16, 18, that are both central to its holding and manifestly incorrect. *See* J.S. 20-21. *Growe* sheds no light on whether the Elections Clause places some outer limit on efforts to oust state legislatures from congressional redistricting.

The IRC contends (at 12) that "[t]here is no conflict among federal courts" on the question presented. But in exercising its appellate—as opposed

[1] The IRC notes (at 9-10) that the Arizona Supreme Court has held that the "'Commission acts as a legislative body.'" *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 684 (Ariz. 2009). But that court so held because "redistricting is ... a legislative task," *id.*, underscoring the limitlessness of the IRC's position: any entity that undertakes redistricting satisfies the Elections Clause, because it undertakes redistricting. The Elections Clause prevents this tautology by vesting federal redistricting authority in "the Legislature," not "a legislative body." And the IRC does not, and cannot, claim that it is the Legislature.

to certiorari—jurisdiction, this Court routinely undertakes plenary review absent a conflict. *See, e.g.*, *Ala. Democratic Conf. v. Alabama*, 134 S. Ct. 2697 (2014); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014).

In all events, the IRC's claim depends on its flawed argument that Proposition 106 does not accomplish its avowed purpose of taking the Legislature out of redistricting. The IRC principally invokes *Brown v. Secretary of State of Florida*, 668 F.3d 1271 (11th Cir. 2012), which rejected an Elections Clause challenge to an initiative that set "standards for the legislature to use in the congressional redistricting process." *Id.* at 1273. But *Brown* emphasized that the initiative there "simply informs the process *by which the legislature* is to go about its task of redistricting." *Id.* at 1279 (emphasis added). It is one thing for an initiative to put some constraints on the legislature's ability to redistrict, and quite another to eliminate the legislative redistricting power altogether. Indeed, *Brown* signaled that a different outcome would have emerged had the initiative "so limit[ed] the state legislature's discretion as to eviscerate its constitutionally delegated power and effectively exclude the legislature from the redistricting process." *Id.* at 1280. *Brown* thus underscores that other courts apply a measured test to incursions on the legislature's redistricting responsibilities, which is incompatible with the approach of the majority below.[2]

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[2] Neither of the other decisions the IRC cites remotely addresses this question. Indeed, *Smith v. Clark*, 189 F. Supp. 2d

The IRC's efforts to dismiss the Framers' careful deliberations as largely irrelevant only underscore the need for this Court's plenary review. The answer to the constitutional question presented here ultimately lies in the constitutional text and "what Charles Pinckney [and the other Framers] would say about this case," Br. 25, and the IRC has no persuasive answer to either. The IRC's effort to dismiss the Framing-era evidence as irrelevant because the Framers could not anticipate the popular initiative process, *id.* at 20-21, is a diversion. The ultimate constitutional question here does not depend on the fact that Proposition 106 was enacted by referendum. Any state effort to oust the legislature from the congressional-redistricting process raises serious questions under the Elections Clause whether it is accomplished via referendum, other means of constitutional amendment, executive fiat, or even bicameralism and presentment.

The IRC fares no better in emphasizing (at 21-23) that the Elections Clause emerged in part based on concerns that Congress would exercise too much power vis-à-vis the States. Those concerns did not manifest themselves in a text granting exclusive authority to States to regulate federal elections as they see fit. Rather, a specific compromise emerged granting particular authority to the most politically-accountable branch of state governments. The Framers clearly did not contemplate a process

548 (S.D. Miss. 2002), was an "alternative holding" that this Court vacated, *see Branch v. Smith*, 538 U.S. 254, 265-66 (2003). Thus the IRC cites not just *dicta* but vacated *dicta*.

whereby the regulation of federal elections would be taken from "the Legislature" and granted to an entity insulated from the normal political process.[3]

At bottom, the IRC's position depends on reading "Legislature" out of the constitutional text entirely, and there is no historical evidence to support that rewrite. Instead, the IRC picks away at the Legislature's evidence and proclaims that it "sheds little light" on the question presented. Br. 27. But what the historical evidence overwhelmingly demonstrates is that the Framers knew how to distinguish between state legislatures and other entities. Consequently, their decision to employ the specific term "Legislature" in the Elections Clause cannot simply be disregarded, as the IRC and the majority below would have it.

C. The Question Presented Is Justiciable and Important.

The IRC's final effort to avoid plenary review—its contention that the question presented is a nonjusticiable political question—is plainly wrong.[4] In an argument ignored (and thus implicitly rejected)

[3] The IRC suggests (at 18-20) that the Framers' choice of the word "Legislature" is irrelevant because the "Legislature" can serve different constitutional functions depending on the "nature of the particular action in view," *Smiley*, 285 U.S. at 366. But the critical point is that whatever function the Constitution ascribes to the Legislature in a particular context, the Framers specified that in each instance—including the Elections Clause—it is *the Legislature* that undertakes that function, not some other entity the Framers could have selected or authorized the States to select.

[4] The IRC has abandoned the standing and laches arguments it unsuccessfully advanced below.

by every member of the panel below, the IRC contends (at 28-30) that "the Elections Clause itself contains a clear and unambiguous 'commitment of the issue' to Congress" by granting Congress the residual power to override state election laws, which Congress has exercised in enacting 2 U.S.C. § 2a(c). Br. 28. This argument is deeply flawed. First, it clashes with this Court's recognition in *Smiley* that "Congress [has] no power to alter article 1, § 4" and that the federal statute is merely a "legislative recognition of the nature of the authority ... conferred by the constitutional provision." 285 U.S. at 372. Second, Congress' power to override state legislation addressing federal elections is no substitute for judicial review. The Supremacy Clause generally grants Congress a power to displace state law, but that in no way diminishes the courts' ability to examine non-displaced state law for conformity with the Constitution. The Election Clause works no differently, as evidenced by decisions like *Smiley* and *Brown* addressing Elections Clause challenges even though 2 U.S.C. § 2a(c) was already on the books. *See Smiley*, 285 U.S. at 362 n.1. And third, nothing in that statutory provision purports to immunize from judicial review any redistricting accomplished in accordance with state law. This Court routinely reviews redistricting accomplished in accordance with state law for conformity with the Equal Protection Clause. There is no reason for a different rule when state law conflicts with the Elections Clause.

The IRC also contends that the Legislature's claim is nonjusticiable because it "'rest[s] upon the assumption that'" Proposition 106 violates the Guarantee Clause. Br. 30 (quoting *Hildebrandt*, 241

U.S. at 569). But that is just wishful thinking. The Legislature has never advanced a Guarantee Clause challenge. *See* App. 46-48. To the contrary, the Legislature straightforwardly challenges the purposeful and complete divestment of its redistricting authority notwithstanding the Elections Clause's plain command that such regulation is to be "prescribed" by "the Legislature."

That question, moreover, is one of great national importance. States around the Nation are experimenting with ever-bolder measures concerning congressional redistricting. *See generally* Cain, *supra*, at 1813-21. Arizona's Proposition 106 is a radical measure perceived by some as representing "the cutting edge of redistricting reform," *id.* at 1830—with the state legislature quite literally cut out of the process completely. But whatever the policy merits of these efforts to de-politicize the redistricting process, the Framers clearly had a different view. Their conscious decision to grant this power to the most politically-accountable branch of state government is at odds with efforts to take legislators out of the redistricting process. This case involves an effort to oust the Legislature entirely, and thus presents an ideal vehicle for this Court's review. If the Constitution's reference to "by the Legislature thereof" really means no more than "by the State," then this Court can say as much. But if the Elections Clause really means what it says, and whatever deference is given to the States does not extend to the complete ouster of the Legislature, then this Court should say so and reverse the decision below. In either case, this Court's plenary review is needed.

CONCLUSION

This Court should note probable jurisdiction and set the case for full briefing and oral argument.

Respectfully submitted,

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