

No. 13-1314

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IN THE  
**Supreme Court of the United States**

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ARIZONA STATE LEGISLATURE,  
*Appellant,*

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION,  
ET AL.,  
*Appellees.*

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**On Appeal from the United States District  
Court for the District of Arizona**

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**BRIEF OF NATHANIEL PERSILY, BRUCE E.  
CAIN, AND BERNARD GROFMAN AS *AMICI  
CURIAE* IN SUPPORT OF APPELLEES**

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## OTHER AUTHORITIES

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<i>Action on Redistricting Plans: 1991-99</i> , Redistricting Task Force for the Nat'l Conference of State Legislatures, <a href="http://www.senate.leg.state.mn.us/departments/scr/redist/Redsum/Action1990.htm">http://www.senate.leg.state.mn.us/departments/scr/redist/Redsum/Action1990.htm</a> . . . . .	9
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<i>Comparison of Statewide Initiative Processes, Initiative and Referendum Inst., <a href="http://www.iandrinstute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&amp;R%20Processes.pdf">http://www.iandrinstute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&amp;R%20Processes.pdf</a> .....</i>	16
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2015) available at <a href="http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551556">http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551556</a> .....	8, 13
Stephanopoulos, Nicholas O., <i>The Consequences of Consequentialist Criteria</i> , 3 UC Irvine L. Rev. 669 (2013).....	8
Tenn. Const. of 1796 art. III, § 3 .....	19
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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are political scientists who are experts on redistricting, direct democracy, and the regulation of the electoral process. *Amici* have served as nonpartisan experts or special masters for courts and redistricting commissions to assist in the development of state or federal redistricting plans.<sup>2</sup> Moreover, *amici*

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have filed with the Court a blanket consent authorizing such a brief.

<sup>2</sup> Nathaniel Persily is the James B. McClatchy Professor of Law at Stanford Law School with appointments in both Communication and Political Science, and recently served as the nonpartisan expert for the Presidential Commission on Election Administration; his CV is available at <http://www.persily.com/>. He served as a special master or court-appointed expert in the following cases: *Favors v. Cuomo*, 2012 WL 928223 (Mar. 19, E.D.N.Y. 2012); *In Re Petition of Reapportionment Commission, Ex. Rel.*, 36 A.3d 661 (Conn. 2012); *Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004); *In the Matter of Legislative Redistricting of the State*, 805 A.2d 292 (Md. 2002); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. 2002). Bernard Grofman is Professor of Political Science and Director of the Center for the Study of Democracy at the University of California, Irvine, and holds the Jack W. Peltason Bren Foundation Endowed Chair; his CV is available at <http://www.socsci.uci.edu/~bgrofman/>. He served as a court-appointed expert in *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. May 24, 2002); *Fplateau v. Anderson*,

have been among the foremost critics, on policy grounds, of both independent redistricting commissions and direct democracy.<sup>3</sup>

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537 F. Supp. 257 (S.D.N.Y. 1982). Bruce E. Cain is the Director of the Bill Lane Center for the American West and the Charles Louis Ducommun Professor in Humanities and Sciences, and Professor of Political Science at Stanford University; his biography is available at <http://west.stanford.edu/node/965>. He served as a Special Master in *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002), and as an expert witness on behalf of the Arizona Independent Redistricting Commission in recent litigation concerning its state legislative redistricting.

<sup>3</sup> See, e.g., Bruce E. Cain, *Democracy More or Less: America's Political Reform Quandary* (2014); Peter Miller & Bernard Grofman, Redistricting Commissions in the Western United States, 3 UC Irvine L. Rev. 637 (2013); Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808 (2012) (hereinafter Cain, *Redistricting Commissions*); Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. Cal. L. Rev. 1997 (2005); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent Protecting Gerrymanders*, 116 Harv. L. Rev. 649 (2002) (hereinafter Persily, *Foxes Guarding Henhouses*); Nathaniel 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 (1997); Joshua Fougere, Stephen Ansolabehere, & Nathaniel Persily, *Partisanship, Public Opinion, and Redistricting*, 9 Election L.J. 325 (2010); Bruce E. Cain, et al., *Redistricting and Electoral Competitiveness in State Legislative Districts*, (Midwest Political Sci. Ass'n, Apr. 13, 2007) available at <http://citation.all>

*Amici* submit this brief to bring to the Court's attention relevant social science research concerning redistricting commissions and direct democracy, not to endorse a particular institutional design for the redistricting process. Based on their experience and research, *amici* are in agreement on three key points. First, state-based experimentation in both the rules and institutions governing the congressional redistricting process is absolutely critical to address widespread and well-recognized pathologies of that process. Second, the regulation of elections, including federal elections, through direct democracy can provide a critical avenue for political reform in the face of recalcitrant, polarized, and often conflicted state legislatures. Finally, *amici* fear that aggressive judicial intervention on Elections Clause grounds would throw into constitutional doubt a range of important election practices that have been passed and will be passed again by way of direct democracy.

## SUMMARY OF THE ARGUMENT

Having searched in vain to arrive at a constitutional standard for partisan gerrymandering, this Court has left to the states the matter of restraining partisan excess in the redistricting process. Consequently, states have experimented with various institutions and rules to govern congressional redistricting. Because incumbents and dominant parties often have a conflict of interest when it comes to altering the process of redistricting that helped get them elected in the first place, the tools of direct democra-

cy have proven particularly useful for redistricting reform. An interpretation of the Elections Clause that would pull the plug on such experiments would prevent states from attempting to meet the challenge the Court has placed before them: namely, to develop rules and institutions for redistricting that are sensitive to local political contexts and reflect a variety of state-specific decisions about the appropriate considerations for the redistricting process.

That Appellant's argument would call into question a number of state redistricting laws and institutions is cause enough for concern, but the asserted constitutional principle would jeopardize a much wider array of election laws, some with a pedigree stretching back to the Progressive Era. If initiatives establishing redistricting commissions like Arizona's are unconstitutional because they wrest control over elections from the state legislature, it is difficult to see how the many other popularly enacted statutes and constitutional amendments regulating "the Times, Places, and Manner of holding Elections" are constitutional. Recent initiatives dealing with voter identification, primary reforms, election technology, and the like, would fail constitutional scrutiny with such an interpretation. So too might such an interpretation call into question age-old reforms, such as the direct primary, which were often instituted by popular initiative because legislatures controlled by party machines resisted popular participation in nomination processes.

The importance of direct democracy for electoral reform is not limited to the election statutes and constitutional provisions passed at the ballot box. The mere availability and threat of the initiative alters the bargaining that occurs within legislatures over

election legislation. The character of election-related legislation passed by state legislatures in initiative states, therefore, is often affected by the specter of initiatives should the legislature not act. The full impact of direct democracy in the states that allow it can be seen throughout their electoral codes.

The Court should reject Appellant's invitation to open up a potentially bountiful new area of election law litigation. The bounds of Appellant's argument cannot be easily contained, and could stretch even beyond redistricting and initiative-based election law to all manner of involvement in election law by courts acting under state constitutions, governors and local governments. Whether by rejecting Appellant's argument on the merits or by avoiding this constitutional question altogether through the many avenues available in this case, the Court should not strike down the Arizona Independent Redistricting Commission under the Elections Clause.

## ARGUMENT

### I. STATE EXPERIMENTATION IN THE RULES AND INSTITUTIONS GOVERNING CONGRESSIONAL REDISTRICTING IS CRITICAL TO ADDRESS WELL-KNOWN PATHOLOGIES OF GERRYMANDERING.

#### A. States have adopted a variety of methods to distance the redistricting process from control by parties, incumbents, and candidates.

This Court has had difficulty arriving at an administrable constitutional standard to govern partisan

gerrymandering claims. Nevertheless, despite the many opinions in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), all agreed that in the redistricting process, “excessive injection of politics” is unlawful. *Id.*, at 293 (Scalia, J.) (plurality opinion) (“So it is and so does our opinion assume.”). This understandable desire of the Court not to wade into this particular “political thicket” represents an invitation to the states to find their own standards and institutions to avoid what the Court has deemed unlawful. *Id.* at 292 (“The issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy.”)

States have taken up that invitation by establishing a multiplicity of institutions to deal with the redistricting process. Most still allow state legislatures to draw congressional districts through normal legislation. Many others, however, have attempted to achieve some measure of distance between elected legislators and the process for drawing their own constituencies and those of the congressional districts they often aspire to represent. *See generally* Cain, *Redistricting Commissions*.

Designing a redistricting process insulated from political pressure is no easy task. In most cases, those who draw the lines are either politicians themselves or individuals appointed (directly or indirectly) by elected politicians or party leaders. *See id.*; Persily, *Foxes Guarding Henhouses*. Nothing in the commission form of redistricting, necessarily, ensures independence: A legislative majority could simply appoint the majority of a commission or otherwise direct it to adopt a specific redistricting plan. That

said, some process other than the typical majority vote of legislators plus gubernatorial signature is necessary, even if not sufficient, to provide some measure of independence.

Recognizing the conflict of interest of state legislators and the poisonous polarization that redistricting inflicts upon the legislature as an institution, many states have identified redistricting as an area where the normal process of legislation should be altered. Seven states — Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington — vest initial redistricting authority in independent commissions. *See* Ariz. Const. art. IV, pt. 2, § 1; Cal. Const. art. XXI, § 2; Haw. Const. art. IV, §§ 2, 9; Idaho Const. art. III, § 2; Mont. Const. art. V, § 14(2); N.J. Const. art. II, § 2; Wash. Const. art. II, § 43. These commissions are generally structured to give equal weight to minority and majority political parties in the state. None require any approval by state legislatures for final district maps to become law.

Because redistricting commissions differ from each other in a number of respects, one must be careful in celebrating the commission form of redistricting as uniquely beneficial according to one or another variable. For example, many hope that commissions will make elections more competitive and facilitate the election of moderate legislators. The literature is mixed, at best, in its support of those arguments, in part because political segregation often prevents the creation of districts that are evenly balanced according to party. *See generally Solutions to Political Polarization in America* (Nathaniel Persily ed., 2015). However, because certain commissions, such as California's, are in their infancy, we may have better da-



ta by the end of the decade to assess these claims, assuming such commissions continue to exist.

Still, political scientists have arrived at some revealing conclusions as to the potential benefits of re-districting commissions. First, bipartisan and non-partisan commissions are less likely than legislatures under unified party control to produce plans with extreme partisan biases. *See* Cain et al., *Redistricting and Electoral Competitiveness* (comparing raw partisan bias averages for commission and non-commission states); Vladimir Kogan & Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 Cal. J. Pol. & Pol’y 1, 22-24 (2012) (finding sharp drop in bias after California adopted commission); Simon Jackman, *Measuring Electoral Bias: Australia, 1949-93*, 24 Brit. J. Pol. Sci. 319, 344-45 (1994) (finding sharp drops in bias after South Australia and Queensland adopted commissions); Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 UC Irvine L. Rev. 669, 710-11 (2013) (finding that commissions reduce efficiency gap in state legislative elections); Nicholas O. Stephanopoulos, *Arizona and Anti-Reform*, U. Chi. Legal F. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2551556](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2551556) (finding the same for congressional elections. This should come as no surprise; to the extent that commissions, on average, do not seek to manipulate the line-drawing process for partisan advantage (or do so less than a unified legislature drawing lines on its own), we should expect commission plans to be somewhat less biased.

Second, commission plans are more likely to be passed on time, in accordance with statutory dead-

lines. See Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 UC Irvine L. Rev. 637 (2013). This may sound like a small advantage, but getting redistricting done by a statutorily prescribed deadline allows potential candidates to identify their districts, begin ballot qualification, and commence their campaigns a sufficient time before an actual election. Commissions' relatively strict compliance with statutory deadlines is representative of their approach to legal requirements, in general. Because commissions are under less pressure to push the limits of the law to gain partisan advantage, their plans are less likely to violate constitutional and statutory provisions governing the redistricting process. See Cain, *Redistricting Commissions*, at 1812; Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical / Bipartisan Legislative Redistricting Commissions*, 13 Kan. J.L. & Pub. Pol'y 115, 132 (2004); *Action on Redistricting Plans: 1991-99*, Redistricting Task Force for the Nat'l Conference of State Legislatures, <http://www.senate.leg.state.mn.us/departments/scr/redist/Redsum/Action1990.htm>; *Action on Redistricting Plans: 2001-07*, Redistricting and Elections Comm. for the Nat'l Conference of State Legislatures, <http://www.senate.leg.state.mn.us/departments/scr/redist/redsum2000/action2000.htm>.

Finally, while it may be difficult to prove empirically, redistricting commissions, by their nature, relieve legislatures of the polarizing task of drawing district lines. Commissions may not produce plans that produce less polarized delegations, but they do avoid burdening the legislature with the kinds of redistricting decisions that can cause lasting enmity among

elected representatives and between parties. The process of line drawing can be the most contentious enterprise in which legislatures engage. *See, e.g.*, Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541 (1994) (“In total, legislative redistricting is one of the most conflictual forms of regular politics in the United States short of violence.”); *Id.* (“Indeed, because the costs of the political fight frequently outweigh the benefits of government service during redistricting, incumbents disproportionately choose to retire during this time.”); *see also* Steve Bickerstaff, *Lines in the Sand: Congressional Redistricting in Texas and the Downfall of Tom Delay* (2010) (describing the effects of recent redistricting on the Texas legislature). When legislators use the line-drawing process to protect some incumbents but not others or to maximize partisan advantage, the bad feeling engendered by this once-a-decade process can last well into the future by poisoning relations among legislators. Not only are independent commissions somewhat insulated from the partisan pressures of legislatures, but, in turn, they also insulate legislatures from the inevitable partisan rancor caused by decennial redistricting.

**B. A contorted interpretation of the Elections Clause would call into question many, if not all, redistricting commissions currently tasked with drawing congressional lines.**

The interpretation of the Elections Clause urged by Appellant in this case would threaten most, if not all,

of the commissions charged with drawing congressional lines. Appellant stated its far-reaching argument succinctly in their reply brief at the petition stage: “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.”<sup>4</sup> In short, the problem with Arizona’s commission, as Appellant sees it, is that the elected legislature does not have control over the redistricting process.

The critical constitutional test for a state’s redistricting system, if one is to believe Appellant’s argument, must be whether the legislature could pass a redistricting plan that will supersede the plan of the commission. That is, if two institutions draft two different plans, does the legislature’s plan take precedence under state law? Following Appellant’s reasoning, only then is the “Legislature,” rather than the commission, “prescrib[ing]” the “Places and Manner of holding elections.” The redistricting commissions in Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington would all fail this test. In those states, which comprise roughly 20 percent of congressional seats (88 in total), the legislature does not control the redistricting process to the extent required by Appellant’s interpretation of the Elections Clause.<sup>5</sup>

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<sup>4</sup> Reply Br. of Appellant for Motion to Dismiss or Affirm at 9 (July 14, 2014).

<sup>5</sup> To be precise, those states together contain 89 congressional districts. Because Montana currently has only

Indeed, it is not at all clear why the so-called back-up commissions in Indiana and Connecticut, *see* NCSL Br. at 9, would even pass this test. The fact that commissions in those states act only if the legislature fails to draw its own plan does not mean that those commission plans are “prescribed in each State by the Legislature” if one is to believe Appellant’s argument. Under the proposed definition, only the elected Legislature — not commissions, executives, courts or other institutions — can act in any way to diminish legislative control of the redistricting process.

The fact that legislative leaders pick most or all of the commissioners (as they do in every commission state except California) does not make their commissions agents of their legislatures, as Appellant would consider them. Legislators in Arizona, after all, pick all but one of the commissioners there, albeit from a restricted pool determined by the Arizona state commission on appellate court appointments. Ariz. Const. art. IV, pt. 2, § 1(5). Aside from the restricted pool, Arizona looks like the other commission states, in that the majority and minority leaders of the two state houses choose most or all of the commissioners. *See* NCSL Br. at 10-14. In Arizona, the fifth commissioner is then chosen by the four selected by the legislative leaders. In other states, such as Idaho and New Jersey, party leaders outside of the legislature also play a role by selecting some of the commissioners. *See* Idaho Const. art. III, § 2(2); N.J. Const. art. II, § 2, ¶ 1(b)(5).

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one district, its commission did not draw districts this cycle, but it has in the past and may again in the future.

Although each commission has its differences in member selection, redistricting criteria, and voting rules, their defining feature is that they do not, in fact, recreate the elected legislature in a smaller form. The participation of both parties in the selection of an equal number of commissioners ensures partisan balance even under conditions of one-party legislative dominance, which currently exist in all commission states, except Washington.<sup>6</sup> If non-commission states are any guide, the plans that emerge from these commissions are almost certainly different than those that would emerge from one-party states in which minority party interests can be ignored altogether and the “Legislature” as an institution acts without restraint. See Stephanopolous, *Arizona and Anti-Reform*, at 13-17. Regardless, if one takes Appellant at its word, nominees of legislative leaders are not “the Legislature” in a constitutional sense. Indeed, the whole purpose of these institutions is to create some distance between the commissioners and the elected legislature as it traditionally operates.

One might argue that legislatures, nevertheless, voluntarily delegate their redistricting power to commissions they create, and that therefore legislatures act through these commissions. For California and Arizona, of course, the commissions were created by popular initiative, and Hawaii’s commission is a creature of its state constitution, which was passed by a convention, not the legislature. Commissions in

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<sup>6</sup> See *Statevote 2014: Election Results*, Nat’l Conference of State Legislatures (Nov. 19, 2014), available at <http://www.ncsl.org/research/elections-and-campaigns/statevote-2014-post-election-analysis635508614.aspx>.

New Jersey, Idaho, and Washington were originally created by legislatively-referred constitutional amendments approved by the people in referenda. In each of those states, the legislature may have consented to the commission decades ago when it placed an amendment on state ballots, but is now barred from changing the law. In other words, when the commissions craft plans in those states, “the Legislature” does not, in Appellant’s sense, “prescribe” “the Manner” of congressional elections.

Indeed, Appellant’s “Lone Ranger” conception of the “Legislature” calls into question not only commissions, but other redistricting constraints provided through popular initiatives, constitutional provisions, or statutes. Florida’s popularly enacted constitutional amendment, for example, provides that “No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.” Fla. Const. art. III, § 20. Appellant hopes to distinguish such constraints as “general guidance to the legislature,” as opposed to complete “eviscerat[ion]” of the legislature’s redistricting authority through a commission. Appellant’s br. at 41 (quoting *Brown v. Sec’y of State of Fla.*, 668 F.3d 1271, 1280 (11th Cir. 2012)). But the key question remains whether this popularly enacted provision of state law would operate in the event the legislature, acting under its Elections Clause authority, ignores the provision and enacts its own redistricting plan. Under such circumstances, Appellant’s strained interpretation necessarily would instruct a court to uphold the legislature’s plan. To do otherwise would suggest that another institution, either the people through the initiative or a state court that

would craft a remedial plan, has the power to “prescribe” a redistricting plan.

## II. THE TOOLS OF DIRECT DEMOCRACY HAVE PROVEN PARTICULARLY EFFECTIVE AS A MEANS OF ENACTING ELECTION-RELATED REFORMS.

The Elections Clause is not limited, of course, to laws and institutions concerning redistricting. In fact, although this Court has assumed redistricting is included within the Clause, *see Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *Smiley v. Holm*, 285 U.S. 355 (1932), that conclusion requires some departure from the literal meaning of the phrase “Places and Manner of *holding* elections.”<sup>7</sup> If one were to approach the Clause as narrowly as Appellant urges, it would not cover redistricting at all. The redrawing of districts does not affect how, where, or whether elections are *held*, but only which candidates run from which districts. In any event, if the Clause captures congressional redistricting, which might be seen as at the periphery of Elections Clause authority, it certainly includes multiple other types of election laws that one might consider at the heart of “Times, Places and Manner of holding elections.” All such laws that were passed by initiative are called into question by Appellant’s interpretation in this case.

Because Arizona and other states that employ direct democracy prevent state legislatures from overturning popular initiatives, many election laws that have been passed by that method would violate Ap-

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<sup>7</sup> *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 997 F. Supp. 2d 1047, 1052 n.2 (D. Ariz. 2014).



pellant's interpretation of the Elections Clause. See Ariz. Const. art. IV, pt. 1, § 1(6); Cal. Const. art. II, § 10(c).<sup>8</sup> Try as one might to limit this constitutional theory to independent redistricting commissions or to redistricting, in general, the principle cannot be so easily cabined. If Arizona's redistricting commission is unconstitutional because the legislature did not draw the districts or delegate authority to the commission to do so, so too are the many election law initiatives that were not passed by the legislature and might contradict laws the legislature might pass on its own.

The list of laws that might fall into such a category is quite long. The following are just a sample of the variety of popularly enacted state statutes and constitutional provisions implicated by Appellant's interpretation of the Elections Clause:

- **Voter identification laws.** Miss. Const. art. XII, § 249-A; Ariz. Rev. Stat. Ann. § 16-579.
- **Implementation of voting machines rather than paper ballots.** Ark. Const. amend. 50, § 2.
- **Bans on ballots that provide for automatic party-list voting.** Ohio Const. art. V, § 2(a).

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<sup>8</sup> See also *Comparison of Statewide Initiative Processes 1*, Initiative and Referendum Inst., <http://www.iandr.institute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/A%20Comparison%20of%20Statewide%20I&R%20Processes.pdf>.

- **Deadlines for voter registration.** Or. Const. art. II, § 2.
- **Residency requirements.** Ohio Const. art. V, § 1.
- **Regulation of primary elections.** Wash. Rev. Code Ann. § 29A.36.170, *as amended by* 2013 Wash. Legis. Serv. Ch. 143 (H.B. 1474). Wash. Initiative 872 (2004).<sup>9</sup>
- **Mail balloting.** Or. Rev. Stat. Ann. § 254.465, *as amended by* 2007 Or. Laws Ch. 154 (S.B. 74).<sup>10</sup>
- **Procedures for filling vacant U.S. Senate seats.** Alaska Stat. Ann. § 15.40.<sup>11</sup>

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<sup>9</sup> Indeed, the direct primary itself was often the subject of early initiatives during the Progressive Era. In Maine, for example, the first successful initiative was the direct primary approved by the voters in 1911. *See* Persily & Anderson, *Regulating Democracy*, at 1023-24. Although most legislatures in this period adopted the direct primary as well, the only three states that did not have the direct primary by 1915 — Connecticut, New Mexico, and Rhode Island — were also states that did not provide for an initiative process.

<sup>10</sup> The original provision for mail balloting in Oregon was passed by initiative. It was later amended by a similar, and more expansive legislative provision.

<sup>11</sup> Because the provision applies only to Senate elections, it implicates the Seventeenth Amendment, rather than the Elections Clause. However, that provision contains a provision that parallels the Elections Clause and would be implicated by Appellant’s interpretation. *See* U.S. Const. amend. XVII § 2 (“[T]he legislature of any

The list of endangered state election laws would not end there, however. Almost all state constitutions themselves were passed by convention and ratified by voters at the ballot box — without direct involvement or approval by “the Legislature,” as Appellant defines it. Such constitutions often contain original provisions that regulate core aspects of the electoral process, including voter registration,<sup>12</sup> absentee voting,<sup>13</sup> criteria for vote counting and challenges,<sup>14</sup> and victory thresholds,<sup>15</sup> to name just a few. If those provisions conflict with laws passed by the Legislature, then they would be legally void under Appel-

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State may empower the executive thereof to make temporary appointments . . . ).

<sup>12</sup> Many states have constitutional provisions requiring voter registration, or requiring the legislature to provide for registration. *See, e.g.* Miss. Const. art. XII, § 249; N.C. Const. art. VI, § 3; Va. Const. art. II, § 2; W. Va. Const. art. IV, § 12; Wash. Const. art. VI, § 7.

<sup>13</sup> A number of states require absentee voting. *See, e.g.*, Haw. Const. art. II, § 4; La. Const. art XI, § 2; N.D. Const. art. II, § 1; Penn. Const. art. VII, § 14.

<sup>14</sup> *See, e.g.*, Ala. Const. art. VIII, § 185 (laying out procedures for challenging validity of votes); Ark. Const. art. III, § 11 (requiring ballots unlawfully not counted initially to be counted after election); La. Const. art. XI, § 2 (requiring all ballots to be counted publically).

<sup>15</sup> Three states mandate a plurality of votes as the standard for victory in all elections, excluding runoffs. Ariz. Const. art. VII, § 7; Mont. Const. art. IV, § 5; Or. Const. art. II, § 16.

lant's interpretation for the same reasons the Arizona Redistricting Commission would be.<sup>16</sup>

It would be a mistake, however, to consider the importance of direct democracy for electoral reform as limited to the catalog of statutes and constitutional amendments successfully passed through popular initiative. The threat of an initiative hangs over the

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<sup>16</sup> Indeed, even the requirement that votes be taken by “ballot” or “secret ballot,” as opposed to *viva voce*, can be found in forty-four existing state constitutions and many of the original ones. See Appellees’ br. at Appendix A (assembling state constitutional provisions). For James Madison, the decision “whether the electors should vote by ballot or *viva voce*” was quintessentially one covered by the Elections Clause. See 2 *Records of the Federal Convention* 240 (M. Farrand ed., 1937). See also 4 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 71 (J. Elliot 2d ed., 1863) (quoting delegate of the North Carolina ratifying convention as defining “manner” in the Elections Clause as “only enabl[ing] [states] to determine *how* these electors shall elect — whether by ballot, or by vote, or by another way.”). Yet even some of the earliest state constitutions, such as the 1776 and 1790 Pennsylvania Constitutions, the 1796 Tennessee Constitution, and the 1812 Louisiana Constitution contained such provisions protecting a secret ballot, thereby placing the manner of voting out of the elected Legislature’s reach. Pa. Const. of 1776 ch. II, § 32 (“All elections, whether by the people or general assembly, shall be by ballot”); Pa. Const. of 1790 art. III, § 2 (“All elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*.”); Tenn. Const. of 1796 art. III, § 3 (“All elections shall be by ballot”); La. Const. of 1812, art. VI, § 13 (“In all elections by the people, and also by the Senate and House of Representatives jointly or separately, the vote shall be given by ballot.”).

legislature whenever it considers (or fails to consider) election-related legislation. As such, every regulation of federal elections in an initiative state is influenced directly or indirectly by the availability of direct democracy. See Caroline Tolbert, *Changing Rules for State Legislatures: Direct Democracy and Governance Policies*, in *Citizens as Legislators: Direct Democracy in the United States* 171 (Shaun Bowler et al., eds., 1998); see also Persily and Anderson, at 1006-07; Elizabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 *Am. J. Pol. Sci.* 99 (1996). An interpretation of the Elections Clause that would restrict the use of direct democracy for purposes of election reform, therefore, would not only diminish the ability of citizens in initiative states to take charge of their democracy directly, but it would also change the behavior and negotiations of legislators who will no longer fear having their legislation overturned or modified by the voters themselves.

## CONCLUSION

The jury is still out on the best way to reform the redistricting process in the United States. No consensus exists on how best to deal with a problem that seems to be getting more complex, sophisticated, and intractable each census cycle, as technology for mapmaking and political data-mining advances. Different states are experimenting with institutional alternatives that vary the people, principles, and processes governing redistricting. With time, this experimentation may lead to the discovery of better ways to ensure independence of the people drawing congressional districts or the development of more

effective legal constraints to prevent state legislatures from engaging in well-known abuses of the re-districting process.

What is manifestly not needed at this stage in the investigation of policy alternatives is to cut off experimentation with an unprecedented constitutional rule that greatly limits available options. To do so would consign states to the dysfunctionality of a system where politicians choose their voters rather than voters choosing their politicians. Worse still, the interpretation of the Elections Clause triggering that premature abandonment of ongoing experiments would have consequences well outside the field of re-districting. Indeed, such a move would open an entirely new field of election litigation and call into question a range of state democracy reforms stretching back a century or more.

The judgment of the U.S. District Court for the District of Arizona should be affirmed.

Respectfully submitted,

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