No. 13-1314

In the Supreme Court of the United States

ARIZONA STATE LEGISLATURE

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

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

BRIEF OF COOLIDGE-REAGAN FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Coolidge-Reagan Foundation works to promote free and fair elections at all levels and staunchly advocates the enforcement of constitutional rights and other constraints on federal and state authority.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Elections Clause of the U.S. Constitution provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." U.S. Const. art. I. § 4, cl. 1. This provision grants state legislatures the authority to "provide a complete code" for federal elections, *Smiley v. Holm*, 285 U.S. 355, 366 (1932), including the power to draw congressional districts.

This case involves a double violation of the Elections Clause. Procedurally, the amendment to the Arizona Constitution that stripped the state legislature of its authority over redistricting and created the Arizona Independent Redistricting Commission ("IRC"), *see* ARIZ. CONST. art. IV, pt. 2, § 1 (the "IRC Amendment"), was enacted through a

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[1] Pursuant to S. Ct. R. 37.6, *amicus curiae* certifies that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus* or his counsel make a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

ballot initiative, rather than by the state legislature, J.A. 17-18.[2] An initiative may not be used to enact legal provisions governing the "Manner" of holding congressional elections, however, because the Elections Clause delegates such authority exclusively to the state legislature. This Court's holding to the contrary in *Ohio* ex rel. *Davis v. Hildebrant*, 241 U.S. 565, 569-70 (1916), should be overturned.

Substantively, the IRC Amendment purports to strip the Arizona legislature of a critical part of its authority under the Elections Clause to regulate the "Manner" in which congressional elections are held by drawing congressional districts. ARIZ. CONST. art. IV, pt. 2, § 1(3), (14), (16). The IRC Amendment is unconstitutional—entirely apart from concerns about the manner in which it was enacted—because it attempts to transfer authority over redistricting that the U.S. Constitution expressly and directly confers on the state legislature to a different, independent entity.

Underlying both of these arguments is the fundamental premise that the term "legislature," as used in the Elections Clause, refers exclusively to the multimember body of representatives within each state generally responsible for enacting its laws. An intratextual approach to the Elections Clause (as well as its Article II analogue, the Presidential Electors Clause, U.S. CONST. art. II, § 1, cl. 2) demonstrates that the term consistently bears this meaning on every other occasion on which it is

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[2] "J.A." refers to the Joint Appendix filed by the parties.

used throughout the rest of the Constitution. No persuasive reason exists for attributing it a different and highly unusual meaning in the context of federal elections. *See generally* Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause* (unpublished manuscript), *available at* http://ssrn.com/abstract=2515096 (forthcoming 109 NW. U. L. REV. ONLINE ___ (2014)).

This intratextual interpretation is bolstered by both the original understanding of the term "legislature," as well as the "independent state legislature" doctrine which this Court—as well as the U.S. House of Representatives, the U.S. Senate Committee on Privileges and Elections, and numerous state supreme courts—has embraced. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892); *cf. Leser v. Garnett*, 258 U.S. 130, 135 (1922); *Nat'l Prohibition Cases*, 253 U.S. 350, 386 (1920). The "independent state legislature" doctrine recognizes that, because state legislatures derive their power to regulate federal elections from the U.S. Constitution, state constitutions may not impose substantive restrictions on the scope of that authority. The IRC Amendment therefore is a nullity.

ARGUMENT

I. THE TERM "LEGISLATURE" SHOULD BE INTERPRETED INTRA-TEXTUALLY, AS REFERRING TO A STATE'S PRIMARY ELECTED LAWMAKING BODY

Intratextualism teaches that the meaning of a word or phrase that appears in a particular clause of the Constitution can be clarified by considering its meaning in other passages. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999). Intratextualism counsels readers to "plac[e] textually nonadjoining clauses" of the Constitution "side by side for careful analysis," to ensure that a term's meaning makes sense in the various contexts in which the Constitution deploys it. *Id*. The Constitution's use of "strongly parallel language" in different places "is a strong (presumptive) argument for parallel interpretation" of that language. *Id*. A major virtue of this approach is that "it takes seriously the document as a whole rather than as a jumbled grab bag of assorted clauses." *Id*. at 795.

This Court has applied intratextualism to clarify the meaning of several constitutional provisions. For example, Chief Justice John Marshall adopted such an approach in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 412 (1819), in construing the Commerce Clause. And Justice Joseph Story did so in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329, 330 (1816), concerning the Article III Vesting

Clause. More recently, in *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008), this Court interpreted the phrase "right of the people" as used in the Second Amendment to protect an individual right to bear arms in large part because the Constitution's three other uses of that phrase "unambiguously refer to individual rights."

Intratextualism is an especially useful tool for determining the meaning of the term "Legislature" in the Elections Clause. The word is concrete and reasonably susceptible of only a limited number of definitions. Moreover, the term does not appear to lend itself to the type of compromise or mutually inconsistent understandings to which other, more general language might be subject. *Cf.* Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 731, 742 (2000). Additionally, the original, unamended Constitution uses "Legislature" on numerous different occasions, thereby avoiding the issue of whether subsequent constitutional amendments employ it in the same manner. *Cf. id.* at 731, 765. Indeed, in *Hawke v. Smith*, 253 U.S. 221, 227-28 (1920), this Court adopted an intratextual interpretation of the term "legislature" as it appears in Article V.

The Constitution's references to state "Legislatures" may be divided into four groups:

(i) those that discuss features of a "Legislature";

(ii) those that distinguish between a state "Legislature" and other state personnel or entities;

(iii) those that confer quasi-legislative or non-legislative powers upon a "Legislature"; and

(iv) those, such as the Elections Clause and Presidential Electors Clause that confer legislative authority over certain subjects upon the "Legislature".

See Michael T. Morley, *The Intratextual Independent "Legislature" and the Elections Clause* (unpublished manuscript), *available at* http://ssrn.com/abstract=2515096 (forthcoming 109 NW. U. L. REV. ONLINE ___ (2014)).

The text, context, original understanding, and consistent history of interpretation of the first three types of references to the term "Legislature" demonstrate that it is best understood as referring to a state's general lawmaking body of elected representatives, rather than a broader "legislative power" or other entities upon which a state's constitution may attempt to confer a portion of that legislative power. *Cf. Hildebrant*, 241 U.S. at 568–69. This consistent pattern of usage provides valuable information about the term's intended meaning, creating a strong—and ultimately insurmountable—presumption that the Elections Clause employs it in the same fashion.

A. The Constitution's Descriptions of Legislatures

The Constitution's usage of the term "Legislature" in certain provisions reveals certain characteristics about it. For example, Article VI's Oath Clause requires that "Members of the several State Legislatures . . . be bound by Oath or Affirmation, to support th[e] Constitution." U.S. CONST. art. VI, cl. 3.[3] This provision contemplates that a state legislature will have "[m]embers." *Id.* And its requirement that those "[m]embers" pledge to uphold the federal Constitution is best understood as referring to individuals who belong to a particular lawmaking institution within a state, rather than "[m]embers" of some overarching "legislative power" that conceivably encompasses the entire public eligible to vote on ballot initiatives.

Similarly, Article I's Qualifications Clause provides that a person may vote for the U.S. House of Representatives if he possesses "the Qualifications requisite for Electors of the most numerous Branch

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[3] The Fourteenth Amendment contains similar references; Section 2 imposes penalties on a State that denies the right to vote in federal or state elections, including elections for "members of the Legislature." U.S. CONST. amend. XIV, § 2. Section 3 prohibits a person who, while "a member of any State legislature . . . engaged in insurrection or rebellion" against the United States from serving as a federal official unless Congress removes the disability by a two-thirds vote. *Id.* amend. XIV, § 3.

of the State Legislature." *Id.* art. I, § 2, cl. 1.[4] This provision treats the "Legislature" as an entity that presumptively features multiple "[b]ranch[es]" and is comprised of elected representatives (i.e., members selected by "[e]lectors"). *Id.*

Article I's Senate Vacancies Clause (which has been superseded by the Seventeenth Amendment) likewise provides that, if a vacancy occurs in the U.S. Senate "during the Recess of the Legislature of any State," the state executive may make a temporary appointment "until the next Meeting of the Legislature." *Id.* art. I, § 3, cl. 2. Yet again, this provision contemplates the existence of an institutional legislature whose members periodically meet and which may be called into "[r]ecess." *Id.* Finally, the Domestic Violence Clause in Article IV provides that, "on Application of the [state] Legislature, or of the [state] Executive (when the Legislature cannot be convened)," the federal government shall protect a state against "domestic Violence." *Id.* art. IV, § 4. This further corroborates the constitutional image of a legislature as a multimember body that periodically "convene[s]" and adjourns. *Id.*

Thus, every clause that gives some insight into the nature of the "Legislature" uses the term to refer to a particular institution within each state that contains members, is presumptively comprised of multiple branches, periodically convenes and meets

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[4] The Seventeenth Amendment contains identical language concerning U.S. Senate elections. U.S. CONST. amend. XVII.

for limited periods of time, and then enters into recess.

B. Constitutional Provisions That Distinguish Between Legislatures and Other State Personnel and Entities

Several other constitutional provisions expressly distinguish between legislatures (and their members) and other state officials and entities. For example, as discussed above, the Oath Clause requires "Members of the several State Legislatures, and all executive and judicial Officers . . . of the several States" to take an oath or affirmation to support the Constitution. U.S. CONST. art. VI, cl. 3.[5] Likewise, the Senate Vacancies Clause provides that, if a vacancy occurs while the "Legislature of any State" is in recess, "the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies." *Id.* art. I, § 3, cl. 2. And the Domestic Violence Clause requires the federal government to protect a state "against domestic Violence" upon "Application of the Legislature, or of the Executive (when the Legislature cannot be convened)." *Id.* art. IV, § 4. These provisions all distinguish between the state legislature and the state executive (or state executive officials). This juxtaposition of different branches suggests that, just as references to a state's "Executive" are best construed as referring to its

[5] Provisions of the Fourteenth Amendment discussed earlier reprise this list of State officials. *See supra* note 3.

governor, references to a state's "Legislature" are best construed as referring to its main lawmaking body comprised of elected representatives.

Even more telling is Article V, which specifies that a proposed constitutional amendment may be ratified either by "the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof," depending on the mode of ratification authorized by Congress. *Id*. art. V. This clause expressly distinguishes between legislatures and conventions specially elected by the people for the sole purpose of ratifying a constitutional amendment. *Id*. It demonstrates that, when the Framers wished to authorize action by the people independent of their institutional legislatures, they knew how to do so. Article V further bolsters the conclusion that the term "Legislature" refers to the particular institution within a state that exercises its general lawmaking authority, and does not extend to public referenda or initiatives.

C. References to Quasi-Legislative and Non-Legislative Powers

Numerous constitutional provisions confer authority on state legislatures other than the power to enact certain types of laws. The Constitution grants them the power to:

- choose U.S. Senators (since repealed by the Seventeenth Amendment), U.S. CONST. art. I, § 3, cl. 1;

- "fill" Senate vacancies, *id*. art. I, § 3, cl. 2; *cf*. *id*. amend. XVII, § 2;

- "call" for a convention for proposing amendments to the Constitution, *id*. art. V;

- "appl[y]" to the federal government for "protect[ion] . . . against domestic Violence," *id*. art. IV, § 4;

- "ratif[y]" proposed amendments to the Constitution, *id*. art V; and

- "[c]onsent" to the formation of new states within their borders or through "Junction" with other states, *id*. art. IV, § 3, cl. 1, or to the federal government's purchase of, and exercise of exclusive authority over, land within the state for the erection of military facilities, docks, and other "needful Buildings," *id*. art. I, § 8, cl. 17.

These provisions specifically and exclusively empower institutional legislatures, rather than other entities or the public at large, to perform certain acts. For example, as originally enacted, the Constitution directed state legislatures, rather than the electorate, to choose U.S. senators. *Id*. art. I, § 3, cl. 1. During the Constitutional Convention, James Dickenson moved that senators be elected by state legislature for two reasons:

> 1. because the sense of the States would be better collected through their Governments; than immediately from the people at large.
> 2. because he wished the Senate to consist of the most distinguished characters . . . and he thought such characters more likely to be selected by the State Legislatures, than in any other mode.

James Madison, *Notes on the Constitutional Convention* (June 7, 1787) (statement of John Dickinson), *in* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 150 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS]. He later added that empowering legislatures would help preserve the states as distinct entities and "produce that collision" between the federal and state governments "which should be wished for in order to check each other." 1 *id.* at 153 (statement of John Dickinson).

Throughout the ensuing debate, all delegates used the term "Legislature" consistently, referring to a particular, well-understood entity within each state.[6] Later in the convention, James Wilson reiterated:

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[6] For example, Roger Sherman urged that "elections by the people" are not as likely "to produce such fit men as elections by the State Legislatures." James Madison, *Notes on the Constitutional Convention* (June 7, 1787) (statement of Roger Sherman), *in* 1 FARRAND'S NOTES, *supra* at 154. Elbridge Gerry similarly contended that allowing the People to select Senators directly would give the "landed interest" an advantage and leave commercial interests with "no security." 1 *id.* at 152

> [O]ne branch of the Genl.—Govt. (the Senate or second branch) was to be appointed by the State Legislatures. The State Legislatures, therefore, by this participation in the Genl. Govt. would have an opportunity of defending their rights. . . . The States having in general a similar interest, in case of any proposition in the National Legislature to encroach on the State Legislatures, he conceived a general alarm [would] take place in the National Legislature itself, that it would communicate itself to the State Legislatures, and [would] finally spread among the people at large.

James Madison, *Notes on the Constitutional Convention* (June 21, 1787) (statement of James Wilson), *in* 1 *id.* at 355-56. Thus, in commenting on the selection of Senators, Wilson expressly distinguished among a "State" as a whole, state legislatures, and "the people at large." 1 *id.* at 355-56 (statement of James Wilson).

Likewise, in discussing the Senate Vacancies Clause, the Framers' debates unmistakably concerned institutional legislatures: they discussed the relative frequency with which various states' legislatures met and the power of certain legislatures to select the state's governor. James

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(statement of Elbridge Gerry). Conferring that power on state legislatures, in contrast, would "be most likely to provide some check in favor of the commercial interest [against] the landed; without which oppression will take place." *Id.*

Madison, *Notes on the Constitutional Convention* (Aug. 9, 1787) (statement of James Wilson), *in* 2 *id.* at 231. The same is true of Article V's delegation of authority to state legislatures to call for a new constitutional convention and to ratify amendments to the Constitution. U.S. CONST. art. V. As this Court noted in *Hawke v. Smith*, 253 U.S. 350, 386 (1920), Article V does not use "a term of uncertain meaning . . . . What it 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." The debates at the Constitutional Convention also confirm that the power to request federal assistance under the Domestic Violence Clause lies specifically in the institutional legislature. *See* James Madison, *Notes on the Constitutional Convention* (Aug. 17, 1787; Aug. 30, 1787), *in* 2 FARRAND'S RECORDS, *supra* at 316-17, 466-47.

D. References to Legislative Authority

The plain text of the Constitution, context of other constitutional provisions, and Framers' original understanding all confirm that the Constitution's numerous other instances of the term "Legislature" uniformly refer to the specific institution within each state, comprised of elected representatives, that exercises general lawmaking authority. Compelling evidence is therefore necessary to conclude that the term has a different, unique, and unusual meaning as used in the

Elections Clause (or its counterpart, the Presidential Electors Clause).

This Court previously held that the term "Legislature" should be accorded a different meaning in the Elections Clause because that provision—unlike most of the Constitution's other references to legislatures—confers a type of traditionally legislative authority on state legislatures: the ability to enact laws regulating federal elections. *Smiley v. Holm*, 285 U.S. 355, 367 (1932) (holding that the language of the Elections Clause "aptly points to the making of laws"); *Bush v. Gore*, 531 U.S. 98, 123 n.1 (2000) (Stevens, J., dissenting). The Court never explained, however, why this somewhat different context requires a unique definition of "Legislature" that differs from its use throughout the rest of the Constitution.

In *Ohio* ex rel. *Davis v. Hildebrant*, 241 U.S. 565, 569 (1916), this Court held that the Election Clause permitted Congress to enact a law authorizing states to draw or alter congressional districts through either state legislation or public referendum. It rejected as "plainly without substance" a challenge to a public referendum that nullified a redistricting plan enacted by the Ohio legislature. *Id*. Despite the Court's single passing reference to the Elections Clause, however, it assumed that any constitutional challenge to the use of public referenda to enact state laws governing federal elections must arise under the Guarantee Clause. *Id*. (discussing U.S. CONST. art. IV, § 4).

According to the *Hildebrant* Court, the Petitioners were arguing that public referenda "introduce a virus" that "annihilates representative government and causes a State . . . to be not republican in form." *Id.* It summarily rejected that argument on the grounds that Guarantee Clause claims are non-justiciable. *Id.* Thus, while *Hildebrant* mentioned the Elections Clause, it neither held nor purported to explain why the electorate or a public referendum qualifies as a "Legislature" under the Elections Clause. Rather, the *Hildebrant* Court failed to recognize that a distinct Elections Clause claim existed, and instead transmuted the plaintiff's claim under that provision into a non-justiciable Guarantee Clause argument.

In *Hawke v. Smith*, 253 U.S. 221, 227 (1920), this Court held that the term "Legislature" in the Article V Amendment Clause exclusively refers to "the representative body which ma[kes] the laws of the people." The *Hawke* Court distinguished *Hildebrant*, contending that *Hildebrant* held the Elections Clause "plainly gives authority to the State to legislate" concerning federal elections through public referenda. *Id.* at 231. Congress therefore could recognize a "referendum as part of the legislative authority of the State" for purposes of federal constitutional provisions dealing with the ability of states to enact certain kinds of laws. *Id.* at 230. "Such legislative action," *Hawke* reasoned, "is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In

such expression no legislative action is authorized or required." *Id.* at 231.

Hawke's premise—that *Hildebrant* purported to interpret the Elections Clause—is an overstatement. As discussed above, *Hildebrant* misinterpreted or avoided the Elections Clause issue by transmuting it into a Guarantee Clause claim. In any event, *Hawke* never explained why the term "Legislature" should be given different meanings under the Elections Clause and Article V (or the other constitutional provisions *Hawke* surveyed). The Court pointed out that enacting statutes under the Elections Clause to regulate federal elections is a traditional legislative activity, while ratifying constitutional amendments under Article V is a quasi- or non-legislative act. *Id.* It never explains, however, why this change of context requires or justifies attributing a different and unusual meaning to the term "Legislature." In light of the Constitution's consistent use of that term throughout the rest of the document, there is a strong presumption that the Elections Clause uses it in the same manner—a presumption that neither *Hildebrant* nor *Hawke* overcomes.

The Court gestured toward these issues in *Smiley v. Holm*, 285 U.S. 355, 365-66 (1932), in which it held that the Elections Clause permits a state's governor to veto a law, enacted by the state's institutional legislature, regulating federal elections. *Smiley* reiterated the point made in *Hawke* that, unlike most other federal constitutional provisions referring to "legislatures," the Elections Clause grants them lawmaking authority. *Id.* at 367.

Smiley went on to hold, "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.* Smiley never held that the term "Legislature" should mean something other than a state's institutional, representative lawmaking body. Rather, it concluded only that when such an entity exercises authority under the Elections Clause, it must do so subject to the standard lawmaking process set forth in the state constitution, including a gubernatorial veto. *Id.* at 372-73.

Thus, the holdings of both *Hawke* and *Smiley* are consistent with an intratextual reading of the term "Legislature" as used in the Elections Clause, and *Hildebrant* does not actually address the issue. This Court never identified any evidence that the Framers intended to use the term differently in in the Elections Clause (or its counterpart, the Presidential Electors Clause) than throughout the rest of the Constitution. Nor did it provide a persuasive explanation as to why the word should mean something different when referring to the exercise of a traditionally legislative power rather than a quasi- or non-legislative power.

The *Federalist Papers* specifically confirm that the term "Legislature" bears the same meaning in the Elections Clause as it does in Article I, § 3, which permitted state legislatures to select U.S. senators. After recognizing that state legislatures might

attempt to undermine the national government by refusing to name senators, Federalist No. 59 declares that the federal government would "run a much greater risk" from legislatures' power under the Elections Clause to regulate House elections than from their power to appoint Senators. THE FEDERALIST NO. 59, at 302-03 (Alexander Hamilton) (Ian Shapiro ed., 2009). It goes on to discuss various reasons why state legislatures would be more likely to refrain from holding congressional elections than from appointing senators. *Id.* at 303-04. The Elections Clause alleviates this risk by permitting Congress to impose its own rules for congressional elections if states fail to act. *Id.* at 302.

The early *Commentaries* of both St. George Tucker and Chancellor Kent likewise discuss "Legislatures" under Article I, § 3 and under the Elections Clause—often in the same sentence—without suggesting any potential difference in the term's meaning. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, note D, pt. 2, at 143–44 (Philadelphia, William Young Birch, and Abraham Small 1803); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, pt. 2, lecture XI, at 210–12 (New York, O. Halsted 1826). Kent also distinguished between having the legislature select presidential electors and allowing the "people at large" do so, confirming that a power vested in a "legislature" may not be exercised directly by the

electorate as a whole (as through an initiative or referendum). KENT, *supra* pt. 2, lecture XIII, at 232.

The best reading of the word "Legislature" as it appears throughout the Constitution, including in the Elections Clause and Presidential Electors Clause, therefore, is that it refers solely and exclusively to a state's general lawmaking body comprised of elected representatives and cannot extend to other entities such as independent redistricting commissions.

II. AN ORIGINALIST INTERPRETATION OF THE TERM "LEGISLATURE" CONFIRMS THAT IT REFERS SOLELY TO A STATE'S PRIMARY ELECTED LAWMAKING BODY

An intratextual interpretation of the term "Legislature" is consistent with a clause-bound approach that focuses on how that term would have been generally understood in the Founding Era. Any such textual analysis must focus on dictionaries from that period. *See, e.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561 (2014); *Heller*, 554 U.S. at 584. Matthew Hale's 1713 *The History of the Common Law of England* defines the British "Legislature" as comprised of three parts: the King of the Realm and the two Houses of Parliament. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 2 (London, J. Nutt 1713). Citing Hale's work, Samuel Johnson's mid-1700s dictionary defines "legislature" as "the power that makes laws." 2 SAMUEL JOHNSON,

A DICTIONARY OF THE ENGLISH LANGUAGE 32 (London, W. Strahan 1755). Several other dictionaries from the Founding period utilized Johnson's definition verbatim. *E.g.*, CALEB ALEXANDER, THE COLUMBIAN DICTIONARY OF THE ENGLISH LANGUAGE 285 (Boston, Isaiah Thomas & Ebenezer T. Andrews 1800); THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 360 (London, Charles Dilly, 2d ed. 1789).

James Barclay's dictionary provides a definition of "legislature" similar to Johnson's but, akin to Hale, discusses it as being comprised of the House of Lords and the House of Commons. JAMES BARCLAY, A COMPLETE AND UNIVERSAL ENGLISH DICTIONARY ON A NEW PLAN XLI-XXII, 657 (London, Richardson & Urquhart 1774).

Entities such as the Arizona Independent Redistricting Commission would not qualify as "legislatures" under the prevailing definition from the Founding Era for at least three reasons. First, those definitions' use of the definite article "the" implies the existence of a single legislature within each sovereign entity. They appear to preclude the recognition of multiple entities within a state as state "legislatures." Second, the definition refers to the exercise of a general lawmaking power. An entity specifically empowered to enact only certain kinds of laws or perform only certain narrow types of functions (i.e., drawing congressional districts) would not qualify as a "legislature." Third, drawing congressional districts arguably does not even qualify as "mak[ing] laws."

Perhaps more importantly, every state constitution from the Founding Era that used the term "legislature" defined it as a distinct multimember entity comprised of representatives with the general authority to enact laws,[7] and most

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[7] DEL. CONST. of 1776, art. 2 ("The legislature shall be formed of two distinct branches; they shall meet once or oftener in every year, and shall be called, 'The general assembly of Delaware.'"); GA. CONST. of 1777, art. II ("The legislature of this State shall be composed of the representatives of the people . . . and the representatives shall be elected yearly . . . ."); MD. CONST. of 1776, art. I ("THAT the Legislature consist of two distinct branches, a Senate and House of Delegates, which shall be styled, The General Assembly of Maryland."); MASS. CONST. pt. II, ch. I, § 2, art. II; pt. II, ch. I, § 3, art. I ("The Senate shall be the first branch of the legislature . . . . There [also] shall be, in the legislature of this commonwealth, a representation of the people, annually elected . . . ."); N.Y. CONST. of 1777, art. II ("[T]he supreme legislative power within this State shall be vested in two separate and distinct bodies of men . . . who together shall form the legislature . . . ."); VA. CONST. of 1776, para. 2 ("The legislative shall be formed of two distinct branches, who, together, shall be a complete Legislature."); see also N.H. CONST. of 1776, ¶ 4 (discussing "both branches of the legislature"); N.J. CONST. of 1776, art. VI (establishing the Council as "a free and independent branch of the Legislature of this Colony"); N.C. CONST. of 1776, declaration XVIII ("[T]he people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the Legislature, for redress of grievances."); PA. CONST. of 1776, art. XVI ("[T]he people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances . . . ."); S.C. CONST. of 1778, art. IX (providing that the "journal shall be laid before the legislature when required by either house"). The organic documents of Connecticut and

other references to "legislatures" throughout those documents are consistent with that understanding. If the Elections Clause (or Presidential Electors Clause) used the term "Legislature" in a broader capacity, it would apparently be the only provision in any organic documents from the Founding Era to do so—not a single precedent in any state constitution supports a more expansive interpretation.

The *Federalist Papers* and Justice Story's *Commentaries* on the Constitution reinforce this interpretation. Federalist No. 59 and Section 814 of Story's *Commentaries*, which focus specifically on the Elections Clause, contend that there "were only three ways" in which the power to regulate federal elections could have been allotted: "it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former." THE FEDERALIST NO. 59, at 301 (Alexander Hamilton) (Ian Shapiro ed., 2009); *accord* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 814, at 281 (Boston, Hilliard, Gray & Co. 1833). They explain that the Elections Clause embodies the final alternative. These passages' contrast of the "national legislature," which refers exclusively to Congress, with "state legislatures" strongly suggests that the latter refers to a state's analogue to Congress: its institutional legislature, comprised of elected representatives that exercises general lawmaking authority.

Rhode Island did not refer to a "legislature." CT. CHARTER of 1662; R.I. & PROVIDENCE PLANTATIONS CHARTER of 1663.

William Rawle's *A View of the Constitution* likewise states that the Elections Clause permits Congress to "make or alter" regulations governing federal elections, "except as to the place of choosing senators," in order to "guard against a refractory disposition, should it ever arise in the legislatures of the states," concerning the issue. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 42 (Philadelphia, H.C. Carey & I. Lea 1825). He explains that the Elections Clause's exception concerning the place of choosing senators "was proper, as congress ought not to have the power of convening the state legislature at any other than its usual place of meeting." *Id*. Thus, Rawle also treated the entity empowered to select Senators as the same one delegated sole constitutional authority to regulate federal elections (subject only to congressional override). These sources all confirm that the original understanding of the term "legislature" referred to a state's primary elected lawmaking body. There is little support for *Hildebrant*'s notion that the term was understood more broadly as encompassing the totality of a state's lawmaking authority.

III. THE "INDEPENDENT STATE LEGISLATURE" DOCTRINE FURTHER CONFIRMS THAT THE TERM "LEGISLATURE" EXCLUSIVELY MEANS A STATE'S PRIMARY ELECTED LAWMAKING BODY.

Finally, the "independent state legislature" doctrine, which has been embraced by this Court, state courts, and both houses of Congress, further confirms the accuracy of an intratextual interpretation of "Legislature." *See generally* Michael T. Morley, *Rethinking the Right to Vote Under State Constitutions*, 67 VAND. L. REV. EN BANC 189, 198-204 (2014) (discussing the doctrine in detail). This doctrine arises from the premise that a state legislature's authority to regulate federal elections comes directly from the U.S. Constitution. *Cook v. Gralike*, 531 U.S. 510, 523 (2001) ("[T]he States may regulate the incidents of [federal] elections . . . only within the exclusive delegation of power under the Elections Clause."). Consequently, a state constitution may neither impose substantive limits on the scope of a legislature's authority to regulate the time, place, or manner of federal elections, nor strip the legislature of its prerogative to do so. Arizona's Independent Redistricting Commission flatly violates the "independent state legislature" doctrine because the state constitutional amendment that created it purports to strip the legislature, as a matter of state constitutional law, of authority it derives directly from the U.S. Constitution.

In 1892, this Court recognized the "independent state legislature" doctrine in *dicta* in *McPherson v. Blacker*, 146 U.S. 1 (1892). It stated that the Presidential Electors Clause "operate[s] as a limitation upon the State in respect of any attempt to circumscribe the legislative power" concerning presidential elections, including through "any provision in the state constitution in that regard." *Id.* at 25. This reasoning applies with equal force to congressional elections and the Elections Clause.

This Court went even further in *Leser v. Garnett*, 258 U.S. 130, 135 (1922), in which it held that the doctrine also applies to state legislatures' role in ratifying constitutional amendments under Article V. It ruled that a legislature's "function . . . in ratifying a proposed amendment to the Federal Constitution . . . is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State." *Id.* at 137; *see also Nat'l Prohibition Cases*, 253 U.S. at 386 ("The referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution of the United States, in the ratification or rejection of amendments to it."). Under the independent state legislature doctrine, a legislature's exercise of its authority under the U.S. Constitution to ratify certain federal constitutional amendments is valid, even though state constitutional provisions purported to prohibit the legislature from doing so. *Leser*, 258 U.S. at 136-37.

Several state courts have relied on the "independent state legislature" doctrine as an essential component of holdings concerning the Elections Clause and Presidential Electors Clause. For example, the Supreme Court of Rhode Island held in *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887), that the state constitution may not "impose a restraint upon the power of prescribing the manner of holding [federal] elections which is given to the legislature by the constitution of the United States without restraint." The court enforced a state law providing that a candidate had to receive only a plurality of votes in order to win a federal election, despite a state constitutional provision specifying that all candidates had to receive an absolute majority to prevail. *Id*.

Likewise, the Nebraska Supreme Court held that it was "unnecessary . . . to consider whether or not there is a conflict between the method of appointment of presidential electors directed by the Legislature" and a particular provision of the state constitution. *State* ex rel. *Beeson v. Marsh*, 34 N.W.2d 279, 286–87 (Neb. 1948). It explained that a state constitution may not "'circumscribe the legislative power' granted by the Constitution of the United States" to the legislature to regulate the selection of presidential electors. *Id*. (quoting *McPherson v. Blacker*, 146 U.S. 1, 25 (1892)). Other courts have reached the same conclusion. *See, e.g.*, In re *Opinion of Justices*, 45 N.H. 595, 601 (1864) (holding that, because a State legislature's "authority . . . to prescribe the time, place and

manner of holding elections for representatives in Congress" is derived from the Elections Clause, "[t]he constitution and laws of this State are entirely foreign to the question"); *see also Commonwealth* ex rel. *Dummit v. O'Connell*, 181 S.W.2d 691, 695 (Ky. Ct. App. 1944). Modern courts also occasionally apply the "independent state legislature" doctrine. *See, e.g.*, *PG Publ'g Co. v. Aichele*, 902 F. Supp. 2d 724, 747–48 (W.D. Pa. 2012) (noting that the Pennsylvania legislature's authority to regulate the manner in which congressional and presidential elections are conducted stems from the U.S. Constitution and "is not circumscribed by the Pennsylvania Constitution").

The U.S. House of Representatives adopted the "independent state legislature" doctrine in resolving an election challenge in *Baldwin v. Trowbridge*, D.W. BARTLETT, DIGEST OF ELECTION CASES, H.R. MISC. DOC. NO. 41-152, at 46–47 (1870). The House upheld the validity of votes cast in a congressional election pursuant to a state law that authorized voting by military members who were absent from their districts on Election Day, despite a state constitutional provision requiring that all votes be cast in person. 2 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, § 856 (1907); *see also* In re *Holmes*, 1 *id*. at § 525 ("The constitution of a State may not control its legislature in fixing under the U.S. Constitution, the time of election for Congressmen.").

The U.S. Senate Committee on Privileges and Elections reached a similar conclusion in a report on the Electoral College. S. REP. NO. 43-395, at 9 (1874). It concluded that a state legislature's power under the Presidential Electors Clause to regulate presidential elections cannot be:

> taken from [state legislatures] or modified by their State constitutions any more than can their power to elect Senators of the United States. Whatever provisions may be made by statute, or by the State constitution, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated.

Id.

Numerous commentators have embraced the "independent state legislatures" doctrine. *See, e.g.*, Richard D. Friedman, *Trying to Make Peace with* Bush v. Gore, 29 FLA. ST. U. L. REV. 811, 835 (2001) ("Suppose, then, that the state constitution forbade felons to vote. If the legislature, operating under the authority granted it by Article II rather than by the state constitution, decided that this limitation should not apply in voting for presidential electors, the legislative choice should prevail."); James C. Kirby, Jr., *Limitations on the Power of State Legislatures over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 504 (1962) ("[S]tate legislatures are limited by constitutional provisions

for veto, referendum, and initiative in prescribing the manner of choosing presidential electors, but . . . state constitutional provisions concerning suffrage qualifications and the manner of choosing electors do not limit the substantive terms of legislation."); Walter Clark, *The Electoral College and Presidential Suffrage*, 65 U. PA. L. REV. 737, 741 (1917) ("[T]he exercise of such power [to regulate presidential elections] is given to the state legislature subject to no restriction from the state constitution."). *But see* Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731, 783–84 (2001) (arguing that the Founders did not construe the Presidential Electors Clause as authorizing state legislatures to act independently of state constitutions).

The "independent state legislature" doctrine's longstanding history and acceptance by this Court and state supreme courts, as well as both houses of Congress, confirm the validity of an intratextual interpretation of the Elections Clause. The "Legislature" is the state's general lawmaking body, and its powers under the Elections Clause may not be reduced or withdrawn by a state constitution. *See* Morley, *The Intratextual Independent "Legislature"*, *supra* at 21-23; *see also* Morley, *Rethinking the Right to Vote*, 67 VAND. L. REV. EN BANC at 198-204.

IV. THIS COURT SHOULD OVERTURN *OHIO* EX REL. *DAVIS v. HILDEBRANT.*

This Court could overturn the lower court's judgment, without revisiting any precedents, on the narrow grounds that the Elections Clause prohibits a State from completely excluding its legislature from the congressional redistricting process. Such a ruling, however, would both minimize the true meaning of the Elections Clause and overlook the other key constitutional defect with the IRC Amendment: the fact that it was enacted through an initiative process rather than by the legislature.

This Court has recognized that the Elections Clause confers upon state legislatures the power to "provide a complete code" for federal elections, including but not limited to laws concerning "notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U.S. at 366. If this Court is persuaded that the term "legislature" refers exclusively to a state's general elected lawmaking body, *see supra* Parts I-III, then a state may not permit authority that the Constitution delegates specifically to that institutional legislature to be exercised independently of it, such as through an initiative or referendum process. This Court therefore should reject the propositions for which *Hildebrant* has come to be cited: that the term

"legislature" refers broadly to the totality of a state's "legislative power," regardless of how the state constitution chooses to allocate it, and that the Elections Clause therefore allows measures relating to congressional redistricting to be enacted through public referendum. *Hildebrant*, 241 U.S. at 569.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the U.S. District Court for the District of Arizona.

Respectfully submitted,

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