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 FOR AMICI CURIAE THOMAS MANN AND NORMAN ORNSTEIN IN SUPPORT OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

STATUTES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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STATEMENT OF INTEREST[1]

Amici curiae are political scientists who have studied, analyzed, and written extensively on issues related to redistricting, partisanship in American politics, and possible avenues of reform.

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[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs in this case.

Scholar at the Institute of Governmental Studies, University of California, Berkeley. He is the author of numerous scholarly articles and opinion pieces on various aspects of American politics, including election law and reform. His writings on redistricting include "Polarizing the House of Representatives: How Much Does Gerrymandering Matter?" in *Red and Blue Nation? Characteristics and Causes of America's Polarized Politics*, edited by Pietro S. Nivola and David W. Brady (2006). He co-edited *Party Lines: Competition, Partisanship and Congressional Redistricting* (2005) with Bruce Cain, to which he also contributed a chapter entitled "Redistricting Reform: What is Desirable? Possible?"

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research, where he has served as co-director of the AEI-Brookings Election Reform Project. He is a regular contributor to the *National Journal* and *The Atlantic*, as well as an election analyst for BBC News. He is also Project Director of the American Academy of Arts and Sciences initiative, "Institutions and the Common Good."

Together, *amici* have published two bestselling books on contemporary American politics: *The Broken Branch: How Congress is Failing America and How to Get it Back on Track* (2008), and *It's Even Worse Than it Looks: How the American Constitutional System Collided With the New Politics of Extremism* (2012). They have also co-authored numerous articles and opinion pieces on topics relating to American political reform, including campaign finance and congressional redistricting. And they have appeared as *amici* before this Court

in a number of recent cases involving election law issues, including two involving challenges to congressional redistricting.[2]

Amici have studied redistricting and its relationship to partisan politics in depth, and have contributed to the public debate on possible avenues of reform. They have a substantial interest in the States' continuing ability to act as laboratories of democracy in developing solutions—including independent redistricting commissions like Arizona's—to the pernicious effects of partisan gerrymandering. *Amici* therefore respectfully offer their views to aid the Court in this case.

SUMMARY OF ARGUMENT

This case presents the Court with a rare opportunity to assess whether the States may decide for themselves how best to realize the promise of representative democracy.

States enjoy considerable autonomy in deciding when and how to draw congressional districts, subject only to a few constitutional and statutory limitations. But when the district-drawing process is controlled by elected officials, the result too often is a process dominated by self-interest and partisan manipulation. The consequences are twofold: diminished electoral competition, which insulates Representatives from their constituents; and an increasingly polarized Congress that takes cues from the

[2] *See League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006) ("*LULAC*"), and *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004).

most extreme and politically active partisans, with little incentive to compromise.

Recognizing these pernicious effects and the conflict of interest inherent in legislative redistricting, many States have sought a better path through the use of redistricting commissions. In some, citizen or politician commissions offer non-binding advice on redistricting or step in when elected officials fail to agree on a plan. In others, including Arizona, voters have entrusted redistricting to independent, non-political commissions through ballot measures and constitutional amendments. These popular referenda deserve this Court's respect.

By insulating redistricting decisions from direct partisan influence, commissions like Arizona's offer a crucial first step toward breaking the cycle of partisanship and dysfunction perpetuated by legislative gerrymandering. The States' efforts to use such commissions to tackle one of America's most intractable political problems have great potential and are fully consistent with the States' traditional role as laboratories of democracy. This Court should not stand in their way.

ARGUMENT

I. GERRYMANDERING DISTORTS THE DEMOCRATIC PROCESS.

Every ten years, the completion of a new census ushers in a flurry of redistricting activity across the country. Using the results of the latest census, the President allocates to each State its proportional share of the 435 voting members of the House of

Representatives.[3] 2 U.S.C. § 2a(a); U.S. Const. art. I, § 2, cl. 3. By federal law, the States must assign each Representative to a unique district.[4] 2 U.S.C. § 2c. Under this Court's Equal Protection Clause jurisprudence, those districts must be as close as possible to equal in population. *See Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964). So, with each new recorded shift in population, the nation's electoral maps must be redrawn.

Aside from a few limitations, the States are relatively free to redistrict however, and however often, they like.[5] But when elected officials are given the

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[3] The number of Representatives was fixed by statute in 1911, ultimately resulting in a total of 435 voting members. Act of Aug. 8, 1911, ch. 5, Pub. Law 62-5, 37 Stat. 13 (1913). The number of Representatives temporarily increased to 437 when Alaska and Hawai'i were admitted as States, but the number was reset to 435 after the 1960 census. Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 345 (1958); Act of Mar. 18, 1959, Pub. L. 86-3, 73 Stat. 8 (1959).

[4] Congress has, over time, enacted and repealed a range of regulations over congressional districting pursuant to its authority under the Elections Clause to "make or alter" regulations concerning the "times, places and manner of holding elections" for national office. *See Vieth*, 541 U.S. at 276-277 (plurality opinion); U.S. Const. art. I, § 4.

[5] Some States allow redistricting twice in a decade, or more. *See generally*, Justin Levitt and Michael P. McDonald, *Taking the "Re" out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 Geo. L.J. 1247 (2007). For example, the constitutions of South Carolina and Wyoming expressly permit congressional redistricting at any time. *See* S.C. Const. art. VII, § 13; Wyo. Const. art. III, § 49. In the 2000 redistricting cycle, both Texas and Colorado carried out mid-decade redistricting, although the Colorado legislature's effort was ultimately overturned by the state's Supreme Court. *See*

pen, self-dealing and partisanship enter into the process and, too often, dominate it. For over two hundred years, the worst excesses of these distortions have gone by a colorful name: the gerrymander.[6]

A. The Congressional Redistricting Process And The Modern Gerrymander.

1. The States' constitutional authority to apportion congressional seats is subject only to two substantive federal constraints and to a number of "traditional" criteria, which have been recognized by this Court, but are not required by federal law.

The first federal criterion is population equality. In a series of decisions in the 1960s, the Court explained the principle that congressional districts should be drawn to ensure "equal representation for equal numbers of people." *Wesberry*, 376 U.S. at 18. To allow unequal districts, the Court reasoned, would dilute the power of individual votes and violate the Equal Protection Clause's implicit guarantee of "one person, one vote." *Id.* at 18; *see Reynolds* v.

LULAC, 548 U.S. 399 (Texas); *People ex rel. Salazar* v. *Davidson*, 79 P.3d 1221 (Colo. 2003) (Colorado).

[6] "Gerrymander" is a portmanteau inspired by a Massachusetts legislative district shaped like a salamander. The district was drawn under the governorship of Elbridge Gerry in 1812 by Jeffersonian Republicans in the state legislature. A cartoon depicting the map with wings and fangs appeared in the March 26, 1812 issue of the *Boston Gazette* under the headline, "The Gerry-mander. A new species of *Monster*, which appeared in *South Essex District* in January last." *See* American Treasures of the Library of Congress, available at: http://goo.gl/kIhS3A (last visited Jan. 22, 2015).

Sims, 377 U.S. 533 (1964) (applying the principle to state legislatures); *Gray* v. *Sanders*, 372 U.S. 368 (1963) (statewide offices).

The second federal criterion, the Voting Rights Act, 52 U.S.C. § 10301, *et seq.*[7], builds on the first: it applies the Equal Protection Clause's guarantee to provide enhanced protection against the dilution of minority votes. Section 2 of the Act prohibits, among other things, any measure that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). The Act's practical effect on redistricting is a controversial and heavily litigated matter. *See, e.g.*, *LULAC*; *Bush* v. *Vera*, 517 U.S. 952 (1996); *Shaw* v. *Reno*, 509 U.S. 630 (1993). But it means at least that States may not draw districts in such a way that minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b); *see Abrams* v. *Johnson*, 521 U.S. 74, 90-91 (1997) (setting out the test for claims of vote dilution under section 2); *cf. LULAC*, 548 U.S. at 428 (section 2 guarantees "equality of opportunity, not * * * electoral success for minority-preferred candidates of whatever race").

The Court has also explicitly recognized several "traditional" redistricting criteria. These include "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests." *Miller* v. *Johnson*, 515 U.S. 900,

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[7] Former 42 U.S.C. § 1973 has been transferred to title 52 and renumbered section 10301.

916 (1995). Compactness depends broadly on a district's geometric shape. *See* Justin Levitt, *A Citizen's Guide to Redistricting* 51 (2010) ("*Citizen's Guide*"). Scholars have proposed dozens of ways of measuring compactness, focusing on metrics ranging from the straightness of a district's boundary lines to the degree to which it is spread out.[8] Nineteen States expressly consider compactness when drawing district lines. *See* Justin Levitt, *All About Redistricting*.[9]

Contiguity refers to the geographical interconnection of the district—i.e., whether a person could travel from any point in the district to any other point without crossing its boundary. *Citizen's Guide* at 50. Twenty-three States make contiguity a priority in redistricting, whether by statute or guideline. *See All About Redistricting, supra.*

Nineteen States prioritize respect for political boundaries, like municipal, taxing-district, and county lines. In application, this criterion varies in focus from neighborhoods, in California, to counties, in Alabama. *See id.*; *Citizen's Guide* at 54-55.

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[8] Among the most recognized are the Polsby-Popper, Reock, and Convex Hull measures. *See* Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & P. Rev. 301 (1991); Ernest C. Reock, Jr., *A Note: Measuring Compactness as a Matter of Legislative Apportionment*, 5 Midwest J. Pol. Sci. 70 (1961); Richard G. Niemi, Bernard Grofman, Carl Carlucci, and Thomas Hofeller, *Measuring Compactness and the Role of the Compactness Standard in a Test for Partisan and Racial Gerrymandering* 52 J. Pol. 1155 (1990).

[9] *Available at:* http://goo.gl/VSmbSe (last visited Jan. 22, 2015).

Finally, fourteen States consider communities of shared interests in redistricting. *See All About Redistricting*. These can include "[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation." *Id.* (citing Kansas guidelines).

2. Within these broad constraints and guidelines, States are free to draw congressional district lines as they see fit. Unfortunately, this freedom leaves ample opportunity for what Justice Fortas called "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). Although purely partisan gerrymanders may present a justiciable question, *see Davis* v. *Bandemer*, 478 U.S. 109 (1986), this Court has not announced the standard that would apply to such a challenge. *See, e.g.*, *Vieth*, 541 U.S. at 292 (plurality opinion). Nor have the States, in large numbers, prohibited partisan gerrymandering: Only eight States expressly forbid line drawing that "unduly" favors a particular candidate or party. *See All About Redistricting*, *supra*.

Thirty-five States permit district mapmakers to consider electoral outcomes. *Id.*[10] When they do so, they use three techniques—"cracking," "packing," and "tacking"—to enhance the position of the party, candidate, or group whose electoral fortunes they

[10] This number excludes the eight States that prohibit partisan line-drawing and the seven States that have only one congressional district (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming).

wish to improve. *See Citizen's Guide* at 57. Cracking "involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts." *Vieth*, 541 U.S. at 286 n.7 (plurality opinion). Packing "refers to the practice of filling a district with a supermajority of a given group or party." *Id*. Packing might ensure a safe seat, but it can also concentrate groups that would otherwise have a majority in several districts into just one, thereby limiting their influence overall. *See Voinovich* v. *Quilter*, 507 U.S. 146, 153-154 (1993). Tacking is the practice of expanding the borders of an existing district to bring in members of a particular group from a neighboring district. *See Citizen's Guide* at 58; *Bradas* v. *Rapides Parish Police Jury*, 508 F.2d 1109, 1113 (5th Cir. 1975).

Together, cracking, packing, and tacking allow redistricting authorities to choose the voters who will elect the next Representative from a given district. By shoring up or diluting the influence of different groups, these techniques serve to protect or imperil incumbents by altering the makeup of the constituents they are elected to serve.

3. Gerrymandering has long been a source of concern. Justice Scalia has traced its roots to the early eighteenth century. *Vieth*, 541 U.S. at 274-275 (plurality opinion). But the long heritage of the problem does not make it less damaging or less urgently in need of reform. Indeed, by at least one measure, redistricting is more controversial than ever: The latest cycle, following the 2010 census, has already spawned some 214 lawsuits challenging the legality of congressional and state legislative district maps. *All About Redistricting*, *supra*, Litigation in

the 2010 Cycle.[11] And the post-2000 cycle that preceded it offered two vivid illustrations—one from each side of the political aisle—demonstrating just how entrenched partisan gerrymandering has become.

California. In 2001, thirty Democratic members of California's congressional delegation hired a redistricting consultant to design "safe" districts. One congresswoman told reporters: "Twenty thousand is nothing to keep your seat[.] I spend $2 million every election. If my colleagues are smart, they'll pay their $20,000 and [the consultant] will draw the district they can win in." Hanh Quach and Dena Bunis, *All Bow to Redistrict Architect*, O.C. Register (Aug. 26, 2001); James Sterngold, *New Map Helps Democrats Tighten Grip on California*, N.Y. Times (Sept. 1, 2001) (commenting that the State's map "all but guarantees a big Democratic majority in the delegation for perhaps the next decade"); *see Cano* v. *Davis*, 211 F. Supp. 2d 1208 (C.D. Cal. 2002) (dismissing a related equal protection challenge) *aff'd*, 537 U.S. 1100 (2003). The plan worked: in the 2004 elections, not one state legislative or congressional seat changed parties, and not one incumbent failed to be re-elected. John Wildermuth, *Some Suspect Governor's Plan to Redraw District Lines*, S.F. Chron. (Jan. 2, 2005). The Democratic majority remained intact.

Texas. When Republicans gained control of the Texas legislature in 2003, they re-drew the State's congressional district map to give Republicans an

[11] *Available at*: http://goo.gl/scFlGr (last visited Jan. 22, 2015).

edge in the House of Representatives. After a dramatic showdown with Democratic legislators—who fled the State in an attempt to deprive Republicans of a quorum—the Republican plan passed. *LULAC*, 548 U.S. at 411-413 (opinion of Kennedy, J.). In the round of elections that followed, Republicans saw a six-seat gain in Texas' congressional delegation. *Id.* at 412-413. In a consolidated appeal, five Justices of this Court could not agree on a standard to evaluate claims that the Republican plan constituted an illegally partisan gerrymander. *Id.* at 423 (opinion of Kennedy, J.). But the Court did conclude that one of the newly drawn districts had "cracked" the Latino vote in order to protect an incumbent Republican, in violation of the Voting Rights Act. *Id.* at 442.

In light of blatant gerrymanders like these, it should come as no surprise that voters in both Arizona and California approved ballot measures since 2000, creating independent commissions intended to emancipate the redistricting process from partisan politicking.

B. Gerrymandering Both Reflects And Perpetuates Political Dysfunction.

Because redistricting is conducted by the legislature itself in most States, it reflects the partisan and political dynamics of those legislatures. And because redistricting has "the ability to shift the terrain on which all future political activity is negotiated," it also risks reinforcing those dynamics. Justin Levitt, *Weighing the Potential of Citizen Redistricting*, 44 Loy. L.A. L. Rev. 513, 518 (2011); *see* Thomas E. Mann, "Polarizing the House of Representatives" in *Red and Blue Nation?* 280 (Pietro S. Nivola and David W. Brady, eds. 2006) ("*Red and Blue Nation*").

The result over the past twenty years has been an overall decline in electoral competition, and a corresponding entrenchment of partisan behavior by Representatives: Elected to districts fixed to ensure their success, they have little incentive to seek compromise or to challenge the party line. *See* Thomas E. Mann and Norman J. Ornstein, *The Broken Branch* 230 (2008).

1. One of the clearest trends in congressional politics over the last several decades has been a decline in electoral competition. In the four elections leading up to the 2004 election cycle, congressional incumbents were reelected an unprecedented 97.9 percent of the time. Richard H. Pildes, *Why the Center Does Not Hold*, 99 Cal. L. Rev. 273, 309 (2011). The 2002 elections were less competitive than any over the preceding three decades. *Id.* at 309-310; *see* Samuel Issacharoff and Jonathan Nagler, *Protected From Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 Ohio St. L. J. 1121, 1123-24 (2007). This downward trend has become even more pronounced in recent years, but it is not a new phenomenon; the number of competitive congressional races has been in decline since at least the post-war period. Issacharoff and Nagler, *Protected from Politics* 1125; *see* Mann, "Polarizing the House of Representatives," at 268-269 (noting the trend since the turn of the twentieth century).

Gerrymandering has played a role in this decline of competition for congressional seats. Mann, "Polarizing the House of Representatives," at 274; *see* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Elec. L. J. 179, 184

(2003) (arguing that redistricting "largely explain[s]" incumbent successes in the 2002 election).

Here's how it works: Ordinarily, voters are supposed to choose their elected officials. But when a district is drawn to benefit a particular candidate, party, or group, redistricting effectively allows the elected officials to choose their own voters. Partisan manipulation of the redistricting process creates "safe seats," insulating Representatives from changes in voter preferences. This insulation, in turn, dampens congressional responsiveness: Representatives are less responsive to their constituency as a whole, and are more focused instead on the views of the most partisan, most politically active minority.

Gerrymandering thus turns on its head the Framers' notion that the House of Representatives should be "so constituted as to support in the members an habitual recollection of their dependence on the people." The Federalist No. 57 (Alexander Hamilton or James Madison); *see* The Federalist, No. 52 (Alexander Hamilton or James Madison). And it has rightly been condemned by this Court. *See Reynolds*, 377 U.S. at 565 (gerrymanders that permit minority control "deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result"); *Vieth*, 541 U.S. at 361 (Breyer, J., dissenting) ("The democratic harm" of such "unjustified entrenchment" of incumbents is "obvious.").

One recent study concluded that "the power of the gerrymander has been used to build up the electoral flood walls so that only a significant storm surge of popular opinion can have any discernible effect" on Congress. Issacharoff and Nagler, *Protected from*

Politics at 1131. In other words, having set the stage on which elections will be contested for a decade, the dominant political party may retain control over Congress, even as it loses majority popular support. *See* Hirsch, *The United States House of Unrepresentatives*, 2 Elec. L. J. at 202-204. This certainly is not what the Framers had in mind when they established a House characterized by its "immediate dependence" on the people. *See* The Federalist No. 52.

2. As competition over congressional seats has dropped to all-time lows, political polarization has soared to new heights. Over the last twenty years, the number of Americans with consistently liberal or conservative views has doubled, and the ideological overlap between the parties has diminished. Pew Research Ctr., *Political Polarization in the American Public* 6, 19-21 (June 2014). As the ideological poles have grown in size and grown further apart, the center—comprised of Americans with mixed political views—has shrunk, from approximately half of the population in 1994 and 2004 to 40 percent in 2014. *Id.* at 9. And the growing divide has also become more personal. Those with the most ideologically consistent views are now far more likely to express antipathy for supporters of the other party than at any other time in the last twenty years. *Id.* at 32-35.

Together, the decline in electoral competition and the growth of partisanship in the population at large contribute to increasingly partisan behavior in Congress. Districts that are dominated by supporters of a particular party, whether by virtue of gerrymandering or not, elect Representatives that reliably cast more partisan votes in the House. Mann, *Polar-*

izing the House of Representatives 275-276. These Representatives are naturally incentivized to respond primarily to the relatively small, politically-engaged extremes of their parties. *See Political Polarization in the American Public* 40-41; *cf.* Alan I. Abramowitz and Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. Pol. 542, 553-554 (2008) ("[I]t is mainly the least interested, least informed and least politically active members of the public who are clustered near the center of the ideological spectrum.").

Gerrymandering's intra-party dynamics only exacerbate this problem. Because Representatives must rely on their co-partisans in state legislatures to design favorable districts on their behalf, legislative redistricting reinforces partisan rigidity by making it more costly for legislators to break step with party orthodoxy. That dependence further saps the House of Representatives of its deliberative vigor, Mann and Ornstein, *It's Even Worse Than it Looks* 145, and undermines the legitimacy of the Congress and its work. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671, 684-685 (2013).

The result is that Representatives increasingly find themselves in the partisan equivalent of an echo chamber—districts drawn on party lines assure them of electoral success without the need for cross-party compromise, and the increasing zeal of their most active constituents—the only voters to whom they feel accountable—pushes them into a contest for partisan orthodoxy within their parties.

Although this trend cannot be explained purely by gerrymandering, redistricting reform can play an important part in containing it. This Court suggested as much twenty years ago in *Shaw* v. *Reno*, when

it observed in the context of race-based gerrymandering, that "reapportionment is one area in which appearances do matter." 509 U.S. at 647. When districts are drawn according to the perceived group characteristics of their inhabitants, it sends a message to elected officials that "their primary obligation is to represent only the members of th[e majority] group, rather than their constituency as a whole. This is altogether antithetical to our system of democracy." *Id.* at 648. It is no less antithetical to our democracy when the line-drawing in question is done for political, rather than racial, reasons. By reducing the role of partisan alignment in redistricting decisions, reform can begin to change Representatives' perceptions of their own roles and improve their responsiveness to the electorate as a whole.

II. INDEPENDENT COMMISSIONS LIKE ARIZONA'S REPRESENT A CRUCIAL AVENUE OF REFORM.

The basic problem with legislative control over redistricting is obvious: Legislators' personal and partisan interests are inherently in conflict with the ideals of electoral fairness and representative parity. That danger was not lost on James Madison, who cautioned that legislators empowered to regulate elections would have "a personal interest distinct from that of their Constituents" that would undermine the alignment of interests crucial to the functioning of representative democracy. Max Farrand, ed., 2 *Records of the Federal Convention of 1787*, at 249-250 (1911).

That conflict has proven to be so evident in practice that four Justices of the Court in *Davis* v. *Bandemer* were prepared to accept it as a given, observing that

"[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." 478 U.S. at 129 (White, J., joined by Brennan, Marshall, and Blackmun, JJ.).

It is therefore not surprising that calls for reform of the redistricting process have long focused on alternatives to the traditional model of leaving redistricting decisions entirely in the hands of state legislators. These alternatives vary in their degree of insulation from partisan pressures and in the extent of their control over the redistricting process, but they all share the goal of reducing partisan influence over redistricting.

Although no institution can alone address the most entrenched political dysfunction, these initiatives are promising experiments in democracy that offer invaluable examples to the nation as a whole. As Justice Brandeis noted: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." *See New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *cf. Lucas* v. *Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 752 (1964) (Stewart, J., dissenting) (citing Justice Brandeis's dissent in the context of a challenge to state legislative redistricting procedures).

A. States Have Employed A Range Of Mechanisms To Mitigate Partisan Influence In Legislative Redistricting.

Although state legislatures retain primary responsibility for redistricting in most States, at least

fourteen States have adopted some form of commission to play a role in congressional redistricting. Seven of those States have what are known as "assistive commissions," which aid the legislature in carrying out that responsibility.[12] *See generally* All About Redistricting, *supra*[13] These "assistive" commissions take two basic forms: advisory commissions, which provide non-binding guidance to the legislature; and back-up commissions, which step in and take over the process if the legislature fails to reach an agreement.

Advisory commissions operate in five States. In Maine, Ohio, and Rhode Island,[14] panels comprising both legislators and members of the general public recommend redistricting plans to the legislature. *See* Me. Rev. Stat. tit 21-A, § 1206; Ohio Rev. Code § 103.51; 2011 R.I. Laws ch. 106, § 1. More robust advisory commissions assist the legislatures in Iowa and New York. Iowa maintains two advisory bodies, one comprised of ordinary citizens selected by legislative leaders, and one made up of civil servants. *See* Iowa Code §§ 42.5-42.6. The latter drafts redistricting plans according to statutory criteria, turning to the former for input where the criteria leave room for

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[12] This brief addresses only congressional redistricting; States do not necessarily use the same institutions to handle state legislative redistricting.

[13] *Available at*: http://goo.gl/Haf9kY (last visited Jan. 22, 2015).

[14] The statute establishing Rhode Island's commission requires the commission to report its findings by January 15, 2012. *See* 2011 R.I. Laws ch. 106, § 4. Unless the commission is reauthorized by the State's legislature, that language suggests that its work may be limited to the 2010 redistricting cycle.

discretion. These commissions' proposals must be accepted or rejected by the state legislature as-is, unless the legislature is unable to approve two successive proposals, in which case legislators may make modifications to achieve agreement. Voters in New York recently established by ballot initiative a citizen commission with similar responsibilities—the commission must hold public hearings and draw district maps, subject to the same take-it or leave-it rule used in Iowa. *See* New York State Board of Elections, 2014 General Election Proposal Number One, An Amendment.[15]

Back-up commissions operate in two other States, Connecticut and Indiana, to supplement legislative efforts. In Connecticut, if the legislature is unable to agree on new district lines within a year after the decennial census, the governor is directed to establish an eight-member commission of legislators with authority to enact its own plan. Conn. Const. art. III, § 6. Likewise, in Indiana, a five-member legislative commission takes over responsibility for drawing district lines any time the full legislature is incapable of doing so. Ind. Stat. § 3-3-2-2. In both cases, once the commission is activated, it has the final word on redistricting, without any further involvement by the state legislature. *Id.*; Conn. Const. art. III, § 6.

Other States continue to experiment with new reforms. During the 2010 redistricting cycle, for example, then-Governor Bob McDonnell of Virginia used his executive authority to establish a temporary

[15] *Available at*: http://goo.gl/lEuvJQ (last visited Jan. 22, 2015).

commission to make non-binding recommendations to the state legislature. Va. Exec. Order No. 31 (Jan. 10, 2011).

Advisory and backup commissions each seek to address the political distortions of redistricting in their own way. Advisory commissions create a valuable layer of institutional separation between the people who actually draft district maps and the legislators who must eventually approve them: Although the legislatures in Ohio, Rhode Island, and Virginia are free to modify their commissions' proposed plans, they do not work from a blank slate, and it becomes politically more difficult for them to justify departing from the proposed plan. And while backup commissions do not ordinarily affect redistricting, they exist precisely so that partisan deadlock will not be allowed to derail the process.

Of course, these "assistive" commissions do not eliminate the inherent conflict of interest responsible for gerrymandering because they do not supplant the role elected officials play in redistricting. Thus, they do not displace the mechanisms that allow "insiders [to] capture and manipulate the very processes from which they draw their legitimacy." Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. at 684-685. That is why, as discussed in detail below, seven other States, including Arizona, entrust congressional redistricting entirely to independent commissions.[16]

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[16] The other six are California, Cal. Const. art XXI, § 2; Hawaii, Haw. Const. art IV, § 9; Idaho, Idaho Const. art III, § 2; Montana, Mont. Const. art V, § 14; New Jersey, N.J. Const. art. IV, § III; and Washington, Wash. Const. art. III, § 43.

B. Independent Commissions Like Arizona's Are Among The Most Promising Means To Address The Legislative Conflict Of Interest Responsible For Corrosive Gerrymanders.

Independent commissions represent the next logical step in these important reforms: They place redistricting decisions outside of the partisan political process, mitigating the conflict of interest inherent in legislative redistricting. In so doing, they begin to roll back the destructive dynamics of reduced electoral competition and increased insulation of Representatives.

Arizona's commission, established in 2000 by ballot initiative, *see* JA17-18, is among the most promising of these alternative institutions, but it hardly stands alone. One or more States have established such a commission in each of the last four decennial redistricting cycles. *See* Arizona (2000); California (2008); Hawaii (1978)[17]; Idaho (1994); Montana (1984)[18]; New Jersey (1995); Washington (1984). And the idea is not new; as early as 1893, one commentator sug-

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[17] Although Hawai'i first established an independent commission in 1968, the commission dealt only with state legislative redistricting until 1978, when the State's new constitution expanded the commission's duties to include congressional redistricting. *See* Craig Kugisaki, *Article III: Reapportionment in Hawaii*, Hawaii Constitutional Convention Studies 79-83 (1978); Haw. Const. art. IV, § 9.

[18] Although Montana's constitution provides for an independent commission to draw both state legislative and congressional districts, the State is currently apportioned just one Representative, so it has only one congressional district.

gested that if "each State [chose] by popular vote a commission whose duty it should be to divide the States into congressional districts * * * * [I]t is hardly conceivable that it could produce worse gerrymandering than the present method." John Haynes, *The Merging of National and State Politics*, 2 Yale L.J. 151, 156 (1893).

1. Arizona's Independent Redistricting Commission ("AIRC") shares a number of key features in common with its counterparts, each aimed at reducing the risk of partisan gerrymandering. These include restrictions on who may serve as a commissioner, including limitations on the formal role of elected officials in the commission's work, as well as substantive guidelines on how districts should be drawn. Three of the state commissions, including the AIRC, also incorporate legislative input in the redistricting process.

a. Independent-commission States generally restrict the role that elected officials or putative candidates may play in the redistricting process. Arizona, California, Idaho, Montana, and Washington expressly bar elected officials from sitting on their commissions.[19] Nor can commissioners jump immediately to elected office (and run in the districts they created) once their work is complete; commissioners are generally barred from holding office for some period of time.[20] Even where partisan officials select

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[19] Ariz. Const. art. IV, pt. 2, § 1; Cal. Const. art. XXI, § 2(c)(6); Idaho Const. art. III, §§ 2(2), (6); Mont. Const. art. V, § 14(2); Wash. Const. art. III, § 43(3) and RCW 44.05.030(3).

[20] *See* Ariz. Const. art. IV, pt. 2, § 1(13) (three years); Cal. Const. art. XXI, § 2(c)(6) (ten years for elective office; five years

some or most of the commissioners—as they do in six States, including Arizona—the chair of the commission is chosen separately by the other members.[21]

b. In addition to these structural features, most independent-commission States, including Arizona, also provide substantive guidelines for the redistricting process; indeed, Arizona constrains its commission's discretion to an even greater degree than do its counterparts. The Arizona state constitution directs commissioners to begin by drawing a "grid-like pattern" of districts of equal population, without considering any party registration or voting history data. Ariz. Const. art IV, pt. 2, §§ 1(14), (15). Once the initial grid is complete, the commission may adjust it to comply with federal law, and to accommodate the "traditional" redistricting criteria, including maintaining compactness and contiguity, and preserving communities of interest. *Id.* at § 1(14). The commission is also directed to respect "visible geographic features" and political boundaries, and to favor competitive districts. *Id.* Voting and registration data are permitted to play a role in these adjustments, but the residences of incumbents or candidates may not. *Id.* at § 1(15). Although other independent-commission States impose some degree of substantive guidance, only Arizona imposes a

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for appointive office); Haw. Const. art IV, § 2 (two election cycles); Ida. Const. art. III § 2(6) *and* Idaho Stat. § 72-1502 (five years).

[21] Ariz. Const. art. IV, pt. 2, § 1(8); Haw. Const., art V, § 2; Mont. Const. art. V, § 14(2) *and* Mont. Code § 5-1-102(1); N.J. Const. art. II, § II(1); Wash. Const. art. III, § 43(2).

constitutional requirement to start from a neutral grid.[22]

c. With these structural and substantive constraints in place, most independent-commission States leave redistricting to the commissioners alone. But Arizona is one of three independent-commission States that expressly contemplate a role for the legislature in the commission process. In that respect, the AIRC is far from being the "radical departure" from the traditional redistricting model that Appellant claims. App. Br. 41. Nor does the AIRC "wholly deprive the state legislature of any meaningful role," as *amicus* National Conference of State Legislatures claims, NCSL *Amicus* Br. 14. On the contrary: Not only do legislators participate in the selection of Commission members, but Arizona, like Montana, specifically provides the legislature an opportunity to "comment" on the Commission's proposed plan. *See* Ariz. Const. art IV, pt. 2, § 1(16); Mont. Const. art. V, § 14(2). Washington, the third commission State that contemplates the legislature's involvement in the redistricting process, allows legislators to amend a redistricting plan enacted by the commission by a two-thirds vote within thirty days of the legislative session immediately following the conclusion of the commission's work. Wash. Const. art. III, § 43(7).

In the four other States with commissions, the legislature's role is informal or nonexistent. *See, e.g.*, Bruce E. Cain, *Redistricting Commissions: A Better*

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[22] *See* Cal. Const. art. XXI, § 2(d); Haw. Stat. § 25-2(b); Idaho Stat. § 72-1506; Wash. Const. art III, § 43(5).

Political Buffer?, 121 Yale L.J. 1808, 1838 (2012) (describing the practice of New Jersey's commission, which invites partisan delegations to present competing proposals).[23]

Taken together, these structural features balance the need to avoid legislative conflicts of interest with the recognition that every redistricting decision represents important tradeoffs.

2. The AIRC avoids the political distortions of the traditional legislative model of redistricting in at least two crucial respects. First, because the AIRC is the product of a ballot initiative, its composition and the guidelines it must follow directly reflect the will and values of the State's voters, rather than the result of political bargaining among self-interested officeholders. Second, the AIRC's structural independence from partisan influence insulates it from the conflict of interest primarily responsible for gerrymandering.

As a result, the Commission has been able to produce relatively neutral district maps without overtly favoring either incumbents or parties. *See* David Lublin and Michael P. McDonald, *Is It Time to Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 Election L.J. 144, 152

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[23] Indeed, although the NCSL acknowledges that the commissions in place in Hawaii, Idaho, Montana, New Jersey, and Washington preserve "a substantive role" for the legislature in redistricting, the only distinction the NCSL can point to between those commissions and the AIRC, is that in Arizona, unlike these other five States, the members of the commission are appointed "from a predetermined list." NCSL Br. at 10; *see also id*. at 4-5.

(2006) (assessing state legislative districts, which are also drawn by the AIRC). And the Commission has enjoyed some success in increasing the level of competition in congressional elections. *See* Thomas E. Mann, "Redistricting Reform: What is Desirable? Possible?" in Thomas E. Mann and Bruce E. Cain, eds. *Party Lines: Competition, Partisanship and Congressional Redistricting* 107 (2005). *But see* Lublin and McDonald, *Is It Time to Draw the Line?*, 5 Election L.J. at 157 (suggesting, in the context of state legislative elections, that the AIRC's maps may actually have made districts less competitive because the Commission's mandate required it to prioritize other factors).

The AIRC also appears to have made progress on another measure of electoral fairness: Compared to its sister States, Arizona now enjoys a closer fit between the proportion of voters who support majority party candidates and the proportion of seats those candidates actually win. *See* Nicholas Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 J.L. & Pol. 331, 340 (2007). That means that the Commission's maps have not, overall, worked to the advantage of either party, and more accurately reflect the political views of the people as a whole.

These outcomes suggest that independent redistricting can ameliorate at least some of the negative effects of gerrymandering. And they comport with the findings of a recent study of election results from 1972 to 2012, employing a new way of measuring electoral efficiency, which concludes that independent commissions reduce discrepancies in "wasted" votes between the parties. *See* Nicholas Stephanop-

oulos, *Arizona and Anti-Reform*, U.Chi. Legal F. (forthcoming 2015) (manuscript at 14-15).[24] The study deems votes "wasted" if they are cast for a losing candidate or if they are excess votes for a winning candidate, over and above the number of the votes needed to win. It concludes that the discrepancy in wasted votes is low when an independent commission is responsible for redistricting, but high when districts are "cracked," "packed," or "tacked" by a state legislature. This is important: It means that independent commissions are having some success in disrupting the partisan playbook.

This is not to say that independent commissions are a panacea. The effect of the AIRC on congressional partisanship is hard to discern. *See* David G. Oedel, Allen K. Lynch, Sean E. Mulholland, Neil T. Edwards, *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 Vill. L. Rev. 57, 83 (2009) (concluding that "the average level of partisanship appears lower but statistically indistinguishable after redistricting" in Arizona). And there is a lively debate in the scholarly literature about the extent to which political independence of the kind the AIRC appears to enjoy is desirable or even possible. *See, e.g.*, Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 Wash. U.L. Rev. 667 (2006); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649 (2002); Samuel Issacharoff,

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[24] *Available at:* http://goo.gl/NLihV2 (last visited Jan. 22, 2015).

Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593 (2002).

But these debates do not diminish the important contribution institutions like the AIRC make, not only to the quality of representation available to Arizonans, but to the process of reform across the Nation. By learning from the example and experience of the independent commissions in Arizona, California, Hawaii, Idaho, New Jersey, and Washington, States will be able to develop new and better institutions to realize the Framers' vision of a House with "an immediate dependence on, and an intimate sympathy with, the people." The Federalist, No. 52.

CONCLUSION

Because the AIRC, and redistricting commissions like it, represent valuable efforts aimed at mitigating the corrosive effects of partisan gerrymandering, the judgment of the District of Arizona should be affirmed.

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