

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ARIZONA STATE :

4 LEGISLATURE, :

5 Appellant :

6 v. : No. 13-1314.

7 ARIZONA INDEPENDENT :

8 REDISTRICTING COMMISSION, :

9 ET AL. :

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11 Washington, D.C.

12 Monday, March 2, 2015

13

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States

16 at 10:05 a.m.

17 APPEARANCES:

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19 Appellant.

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23 Appellees.

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25 Appellees.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 1313-14, the Arizona State
5 Legislature v. The Arizona Independent Redistricting
6 Commission.

7 Mr. Clement.

8 ORAL ARGUMENT OF PAUL D. CLEMENT

9 ON BEHALF OF APPELLANT

10 MR. CLEMENT: Mr. Chief Justice, and may it
11 please the Court:

12 Proposition 106 permanently divests the
13 State legislature of its authority to prescribe
14 congressional districts and relegates that authority
15 to an unelected and unaccountable commission. The
16 Elections Clause of the Constitution clearly vests that
17 authority not just in the States, but in the
18 legislatures thereof. Thus, this avowed effort to
19 redelegate that authority to an unelected and
20 unaccountable commission is plainly repugnant to the
21 Constitution's vesting of that authority in the
22 legislatures of the States.

23 JUSTICE GINSBURG: But it's all right for
24 the State redistricting. The commission is -- is --
25 there's no constitutional question with the -- Arizona

1 being able to use this commission for its State
2 representation.

3 MR. CLEMENT: Absolutely, Justice Ginsburg.
4 It only applies to the -- our argument only applies to
5 the congressional redistricting. And, of course, that
6 means that if these commissions are as effective as my
7 friends on the other side say, then we will have
8 nonpartisan districts that will elect the State house --
9 the State houses, the State representatives, and the
10 State senate, and then those nonpartisanly
11 gerrymandered, perfectly representative bodies will be
12 the ones to take care of congressional districting.
13 So --

14 JUSTICE SOTOMAYOR: Mr. Clement, I just want
15 to clarify your position. Are you suggesting that the
16 lack of legislative control is at issue only or are you
17 saying that we have to overturn Hildebrant and Smiley?

18 MR. CLEMENT: Oh, you certainly don't have
19 to overturn Hildebrant and Smiley. We actually think
20 that those decisions cut in our favor because what those
21 decisions stand for is, Smiley in particular -- I mean,
22 the Court was emphatic that the legislature was a term
23 of certain meaning at the Constitution, at the framing
24 of the Constitution, that it means then what it means
25 now, which is a representative body of the people.

1 JUSTICE SOTOMAYOR: That's sort of hard to
2 understand because we made it very clear in Smiley and
3 in Hildebrant that we're defining legislature in this
4 clause as meaning legislative process.

5 MR. CLEMENT: With -- with all due respect,
6 I disagree. This Court heard the argument in the briefs
7 in Smiley, and one side was saying just that. The --
8 one side was saying, oh, legislature just means the
9 legislative process in the State, whatever that is. The
10 other side said, no, it means the representative body of
11 the people.

12 And this Court said, well, actually we don't
13 have to decide that dispute, but we certainly agree that
14 it means the representative body of the people, just as
15 we said five years earlier in the Hawke case. So what
16 the Court said is, first, the delegee is clearly the
17 legislature, the representative body of the people.

18 But that brings you, then, to the second
19 question, which is what kind of authority is delegated
20 to the State legislatures. And the authority that's
21 granted under the Elections Clause is a lawmaking
22 authority, so that means that the State legislature has
23 to engage in lawmaking subject to the normal laws --

24 JUSTICE SOTOMAYOR: I -- but -- but this
25 makes no sense to me, because I think it's an either/or.

1 If the legislature has the power, how can the governor
2 veto it? How can a popular referendum veto it? Either
3 they have the power or they don't.

4 MR. CLEMENT: I disagree --

5 JUSTICE SOTOMAYOR: And if a State
6 constitution says that the people hold the power and
7 they can choose a commission or however else they want
8 to do it, isn't that the legislative process?

9 MR. CLEMENT: No, it's not. But, I mean, I
10 disagree with you, Justice Sotomayor, but that's not
11 particularly important.

12 I actually think the Court in Smiley
13 disagrees with that way of thinking about it. What they
14 say is that the delegee remains the same. Here, as in
15 Hawke, it is the State legislature, the representative
16 body. They say the function differs, so when the State
17 legislature is told that it can elect somebody or ratify
18 something, then there's no partial agency of anybody
19 else in that process. But when they're told to
20 prescribe rules, the Court says that's a delegation of
21 lawmaking authority, so of course you delegate -- of
22 course the State legislature does its lawmaking pursuant
23 to the ordinary rules. And if the ordinary rules
24 provide for a gubernatorial veto, if they say that it
25 has to spend 30 days in committee, then those rules

1 apply to the lawmaking under the Elections Clause, just
2 as they would to other lawmaking.

3 But it's a completely different matter to
4 say we're going to cut the State legislature out
5 entirely, and we are going to revisit the framers'
6 decision to delegate this important responsibility to
7 the State legislatures. And we're going to redelegate
8 it to an entirely different body and a body that has the
9 one feature we know that a representative body doesn't
10 have, which is this commission is completely unelected
11 and completely unaccountable to the people.

12 JUSTICE GINSBURG: Could Congress -- could
13 Congress do that? Could Congress substitute this
14 commission for the State's legislature?

15 MR. CLEMENT: I don't believe that Congress
16 could say that at the State level, we're going to
17 redelegate this authority from the State legislatures to
18 the State commissions or to independent commissions. If
19 Congress wants to do it itself on the Federal level and
20 set up some sort of Federal commission, I think that
21 would be a very different issue because obviously
22 Congress has power under the second subclause.

23 JUSTICE GINSBURG: But couldn't -- could
24 Congress bless what Arizona has done by saying that's a
25 matter in which Federal elections will be held?

1 MR. CLEMENT: I don't think they could
2 simply bless what Arizona has done because I think that
3 would amount to revisiting the judgment that the framers
4 made in the first subclause.

5 I think that they could -- if they wanted
6 to, Congress could say, we're going to actually take
7 those commission districts and we're going to make them
8 our own, and we're going to impose them. But that would
9 be different.

10 JUSTICE KENNEDY: So you're saying it has to
11 be a Federal commission or a State commission, but if
12 it's the latter, it can be only the legislature.

13 MR. CLEMENT: I -- I think that's right.
14 Though, of course, it could be an advisory commission.

15 What we object to is not just the idea that
16 there is a commission. What we object to is the
17 permanent wresting of authority from the State
18 legislature.

19 JUSTICE KENNEDY: Suppose you had a -- a law
20 that said that the reapportionment commission has -- must
21 submit its proposal to the legislature, and the
22 legislature has 30 days and can overturn it only by a
23 three-quarters vote.

24 MR. CLEMENT: I think, Justice Kennedy, that
25 would be a harder case. And I think that this Court,

1 however they decide this case, could decide that either
2 way.

3 Now, the question I think you would ask is:
4 Does that residual authority for the State legislature
5 there amount to the authority to prescribed districts?
6 And I think you could decide that either way. You could
7 say, well, they're not cut out completely. They have
8 the residual authority, and three-fourths is tough, but
9 maybe you can get it done. Or you could say -- and I
10 think this might be the better view in my view -- but
11 you could say, no, what you can do under Smiley and
12 Hildebrandt is apply the ordinary rules for legislation
13 to the State legislatures, but what you can't do is come
14 up with some separate rules that apply only to
15 congressional redistricting and make it much harder for
16 the State legislature to act.

17 JUSTICE KENNEDY: Your phrase "completely
18 cut out" probably answers the question, what about voter
19 ID laws, what about absentee ballots, and so forth that
20 are provisions enacted by referendum?

21 MR. CLEMENT: Right.

22 JUSTICE KENNEDY: You would say those are
23 okay because the legislature is not completely cut out?

24 MR. CLEMENT: I would say probably so.

25 JUSTICE KENNEDY: Or you --

1 MR. CLEMENT: I think it might depend on the
2 details a little bit.

3 JUSTICE KAGAN: Well, Mr. Clement, how about
4 that, because I thought that the legislature was
5 completely cut out as to most of those things. I mean,
6 you take the 2011 law in Mississippi adopting voter ID
7 requirements; 2007, Oregon, voting by mail; 1962,
8 Arkansas, use of voting machines. All of things --
9 these things were done by referendum or by initiative
10 with the legislative process completely cut out. So
11 would all of those be unconstitutional as well?

12 And we can go further. I mean, there are
13 zillions of these laws.

14 MR. CLEMENT: Yes. And -- and let me
15 address those laws, Justice Kagan, and also be
16 responsive to Justice Kennedy.

17 I think there is -- if you look at the
18 various laws that are put in the Appellees' appendix,
19 not one of those State constitutional provisions
20 purports to, on its face, redelegate authority away from
21 the State legislatures. And to the contrary, many of
22 them, roughly half -- I counted 27 -- actually delegate
23 authority to the State legislatures to implement them.
24 So if you want to look at the North Carolina provision
25 on page 27 --

1 JUSTICE KAGAN: Well, they're not
2 delegations or non-delegations. All they are is laws
3 that are passed not through the legislative process.

4 MR. CLEMENT: Exactly.

5 JUSTICE KAGAN: Not through the legislature.

6 MR. CLEMENT: Exactly. We don't think
7 that's the defect here.

8 JUSTICE KAGAN: No, but, I mean, my gosh. I
9 would think that if your primary argument is legislature
10 means legislature, that there has to be a legislative
11 control, in none of these laws is there legislative
12 control. There's no legislative participation at all.

13 MR. CLEMENT: See, Justice Kagan, we
14 distinguish two situations. We could be here saying,
15 you know, the problem with Proposition 106 is that
16 simply that it was done by initiative and not by the
17 legislature, but that's actually not our position. We
18 would have the same objections here if this were imposed
19 by gubernatorial edict.

20 And we know that the rule that should emerge
21 from this case is not that nobody but the legislature
22 can ever do anything with elections on a one-off basis,
23 and the way we know that is this Court has already said
24 that it's okay for a judicial body let's -- like a State
25 court, to do redistricting on a one-off basis.

1 JUSTICE KAGAN: Well, how do you -- how do
2 you make that consistent with the text that you are --
3 the textual argument that you are making? The textual
4 argument that you are making is legislature means
5 legislature. There's no two ways around that. But now
6 you're saying that there are these many, many, many laws
7 throughout the United States in which the rules are not
8 being made by a legislature. And that's perfectly okay
9 because the legislature isn't involved at all.

10 MR. CLEMENT: Two things, Justice Kagan.
11 See, our position is not the problem here is that
12 somebody else got into the legislature's lane and
13 purported to do something about elections. Our problem
14 is once they got in that lane, they decided to wrest the
15 legislature from that process entirely on a permanent
16 basis.

17 Now, as to a more specific answer to your
18 question, I would invoke this Court's case in *McPherson*
19 against *Blacker* which dealt with an analogous clause in
20 Article II that gives the State legislatures the
21 authority to prescribe the rules for presidential
22 electors. And what this Court said there -- it took
23 sort of a practical view of the matter, which is, look,
24 if -- if the State legislature sort of lets other parts
25 of the State do something, we're not going to jump in.

1 We can sort of think about those as delegation of
2 authorities. But the words in each -- "in the
3 legislatures thereof" means something in the
4 Constitution, and what they mean is it protects the
5 legislature from other parts of the State coming in and
6 permanently wresting that authority --

7 JUSTICE KAGAN: Well, I thought that the --
8 that generally in our separation of powers
9 jurisprudence, abdication is just as consequential as
10 aggrandizement.

11 In other words, it doesn't matter what the
12 legislature wants. The legislature could have said, oh,
13 that's fine, go do it, we don't care about it. If there
14 is a problem, the problem continues to exist
15 irrespective of whether the legislature protests or not.

16 MR. CLEMENT: Well, that's not the way the
17 Court approached this issue in McPherson. And I would
18 suggest that it's the same way to approach it here,
19 which is to say, I think the Court recognized in
20 McPherson -- I would certainly say it's the right view
21 -- that nothing would prevent a State legislature from
22 delegating its authority to one of these commissions.

23 That's not the problem. The problem is that
24 the law -- either by initiative or gubernatorial edict
25 would be the same -- from without comes in and says, no,

1 the framers thought it would be great for this to be in
2 the State legislature. We disagree. We're going to
3 give this power permanently --

4 JUSTICE KENNEDY: Suppose -- suppose the
5 legislature proposed the initiative or the referendum --
6 the referendum.

7 MR. CLEMENT: I don't think that would
8 ultimately make a difference in my own view, but I think
9 that would be a different case.

10 JUSTICE KENNEDY: Well, but that -- that --

11 MR. CLEMENT: And you could argue --

12 JUSTICE KENNEDY: That's a case in which the
13 legislature has, itself, made the decision.

14 MR. CLEMENT: Right. And so, I mean, that's
15 not the situation we're dealing with here. I do think
16 that you -- if -- what they did is propose a referendum
17 that then permanently wrested the authority, so they
18 couldn't get it back.

19 JUSTICE KENNEDY: Well, it's not completely
20 remote because the legislature in Arizona -- correct me
21 if I'm wrong -- can seek to overturn what the commission
22 does by putting its own referendum before the voters
23 saying, please, voters, change this proposal for -- or
24 change this districting plan and enact a different one.
25 I suppose the legislature can do that. It has a -- it

1 has the power to submit a referendum or an initiative
2 to -- I guess, a referendum to -- to the Arizona -- to
3 Arizona.

4 MR. CLEMENT: I --

5 JUSTICE KENNEDY: I think I'm right about
6 that.

7 MR. CLEMENT: I think they would have the
8 power to do an initiative. I don't think they would
9 have to do -- the power to do a referendum.

10 One of the ironies is that my friends on the
11 other side like to talk about the power of the people,
12 but the maps that the commission promulgates are not
13 subject to override by referendum the way the maps of
14 the legislature were before Proposition 106 passed.

15 So I think all the legislature could do is
16 what any citizen should do which is to propose an
17 alternative map by initiative process. But whatever
18 that is, that's not the primary power to prescribe
19 congressional districts or to make election regulations.
20 That puts the State legislature on the same plain as the
21 people, and we know --

22 JUSTICE SOTOMAYOR: So please tell me --

23 JUSTICE SCALIA: Do I understand you to say
24 that it would be okay if the legislature itself
25 established this commission?

1 MR. CLEMENT: I would -- I would take the
2 position that that is okay because that is a delegation
3 of authority. If you disagree with me, I mean, you
4 know, you may disagree with me, but I think my position
5 is consistent with what this Court said in the McPherson
6 case about the authority of the State legislatures to
7 prescribe rules for electorates. They can delegate that
8 to some commission and come up with it that way, but if
9 they want to take the authority back, as they did in
10 the -- in the Michigan piece of legislation at issue in
11 McPherson, you bet they can do that, and if the State
12 tries to stop them from taking it back, that's a
13 constitutional problem.

14 JUSTICE SOTOMAYOR: So --

15 JUSTICE KAGAN: So tell me, Mr. Clement,
16 there's -- the State sets up this independent commission
17 and the independent commission has a veto power on the
18 State's redistricting. In other words, the State can do
19 redistricting and then it submits it to the independent
20 commission, and the independent commission can say, No,
21 go back, do it again.

22 MR. CLEMENT: Well, if -- I mean, I guess it
23 depends a little bit on the details of how that works
24 and whether -- who's got the ultimate last say in the
25 matter.

1 JUSTICE KAGAN: They have the vote. That's
2 -- that's who has the veto, the independent commission.

3 MR. CLEMENT: And is it a veto that can be
4 overridden or is it just a permanent veto?

5 JUSTICE KAGAN: Does it matter?

6 MR. CLEMENT: I think it does or at least
7 arguably it does. At the end of the day, the way -- I
8 mean, let me say two things about that. One is, that
9 would give the legislature an awful lot more authority
10 than Arizona is allowed here, so it is a different case.
11 The principle that would allow you to decide that case
12 is to ask yourself the question of whether or not it
13 allows the State legislature to prescribe the
14 congressional districts. Now, you could --

15 JUSTICE KAGAN: Well, kind of it doesn't,
16 right, because there's a veto at the end of it.

17 MR. CLEMENT: Kind of it doesn't, kind of it
18 does, which is why it's a hard case that you can wait
19 for another day to decide.

20 JUSTICE KAGAN: All right. I'll take out
21 the "kind of." It doesn't. There's a veto at the end
22 of this.

23 MR. CLEMENT: If -- if -- if you think it
24 doesn't then you should decide that case in favor of the
25 State legislature. I just think --

1 JUSTICE KAGAN: But that's what -- so this
2 is what we're going to have to do for every time that
3 they set up some process in which there's some
4 independent commission involvement, what we're going to
5 have to ask is what exactly?

6 MR. CLEMENT: Whether or not it's consistent
7 with the Constitution and what the Constitution --

8 JUSTICE KAGAN: No. That's -- that's just
9 -- I mean tell me exactly how we're going to decide all
10 these cases in which an advisory commission plays some
11 role, but -- not -- not just some role, a very, very
12 serious role, but there's a little piece that's left to
13 the legislature.

14 MR. CLEMENT: I don't think it's going to be
15 that hard, Justice Kagan, and let's look at the
16 commissions that exist in the real world, okay? You
17 have some that are purely advisory. Now, nothing in our
18 theory suggests that they are constitutionally
19 problematic.

20 You have others that are what are called
21 backup commissions, which is they don't have a veto, but
22 if the legislature, because there's a stalemate and one
23 house is the democrats, one house is the republicans,
24 they just can't get it done, then a backup commission
25 comes in. I don't think that's problematic.

1 JUSTICE KAGAN: What if the commission says,
2 We're going to give you two maps, the legislature has to
3 pick one and only one?

4 MR. CLEMENT: I would think that that's
5 probably unconstitutional, but I don't think that -- I
6 mean, you know, obviously if --

7 JUSTICE SOTOMAYOR: But why is that
8 unconstitutional and an impasse in the legislature and
9 leaving it then to a third-party who is not the
10 legislature, why is that constitutional? That's what
11 you just said, that's constitutional.

12 MR. CLEMENT: It is, and the reason I say
13 that is because if the legislature has the primary
14 authority and they can't get it done, then we know, as a
15 matter of fact, that somebody else is going to provide
16 that rule. Now, if they don't provide -- if the
17 legislature gets stalemate, what happens in the real
18 world of course is you can't use the existing maps
19 because they violate one vote -- one-person, one-vote
20 principles and so the State courts come in.

21 Now, if a --

22 JUSTICE SOTOMAYOR: So that bypasses 2a(c)
23 altogether?

24 MR. CLEMENT: Well, sure, because everybody,
25 I think, wants to bypass 2a(c) because everybody knows

1 that at the end of that rainbow is an unconstitutional
2 Federal default rule that violates one-person, one-vote
3 principles.

4 JUSTICE SOTOMAYOR: Could I ask you this
5 simple question? I know you're going to say it's a
6 constitutional requirement, but if I read Hildebrant and
7 Smiley differently, and I think there's plenty of
8 language in there to suggest so, but if I read it
9 differently to say that what the Election Clause means
10 is the legislative process, isn't that just simple? We
11 never have to worry about how the States experiment,
12 what they do in their own self-governance. Why is that
13 a Federal interest?

14 MR. CLEMENT: Well, the Federal interest is
15 because the framers thought long and hard about this
16 issue and they decided --

17 JUSTICE SOTOMAYOR: No, they didn't,
18 actually. When you look at the -- the -- the
19 legislative history on this, the Federalists' papers,
20 not a whole lot on this particular clause.

21 MR. CLEMENT: Well, there actually is a
22 tremendous amount on this particular clause. If you're
23 making the point that there's less about the first
24 subclause than the second subclause, I suppose I would
25 grant you that, but part of the reason there was less

1 discussion of the first subclause is it seemed so
2 remarkably obvious to the framers that if this was going
3 to be done at the State level by anyone, of course it
4 would be done by the representative body of the people.

5 And it's not like they didn't know about
6 popular lawmaking. It's not like they didn't have the
7 conception of what a referendum would be or an
8 initiative would be, they simply said, We like
9 representative government, because that way they --

10 JUSTICE GINSBURG: I thought -- I thought --
11 Mr. Clement, I thought that the initiative and
12 referendum came in later, that at the time of the
13 founding, and the initiative and the referendum weren't
14 used by State legislatures.

15 MR. CLEMENT: They weren't in -- the
16 initiative and the referendum as we came to know them in
17 the early -- early 20th century, late 19th century were
18 not in used at frame- -- the time of the framing, but
19 direct democracy was. I mean, the framers themselves
20 said there ought to be conventions to approve the
21 Constitution, not -- they shouldn't be approved just by
22 votes of the State legislature.

23 The framers when they formulated Article V
24 and had alternative mechanisms that the Federal Congress
25 could choose to provide for ratification, they gave the

1 choice of State legislatures or the people in
2 convention.

3 So the Congress -- the framers understood
4 the difference between direct democracy and
5 representative democracy, and they made a conscious
6 choice. And indeed, it's really hard to argue that the
7 framers didn't know the difference between the people
8 and the State legislatures in the context of Federal
9 elections, because there they are creating a house
10 elected by the people and a senate appointed by the
11 State legislatures, and when they get to the voter
12 qualification clause they say, Well, the people are
13 going to vote for the Congress and how do we define the
14 people that get to vote for the Congress? They're the
15 same people that get to vote for the most numerous body
16 in the State house. So at various points the framers
17 obviously demonstrated --

18 JUSTICE KAGAN: But you see, Mr. Clement,
19 that suggests a very pure rule and -- and on occasion
20 you said something like this, a legislature means a
21 legislature, and that's what it means, and so a
22 legislature has to do all those things.

23 But you've made many, many exemptions to
24 that over the course of the last 20 minutes. You've
25 said that as to anything that's not redistricting, it

1 can be done by referendum or initiative without any
2 legislative process whatsoever. You've said that all
3 these kinds of different schemes about the interaction
4 between a legislature and advisory commission are all
5 going to be have to reviewed on a case-by-case basis to
6 determine whether the legislature has primary control.

7 And when you get through with all that, the
8 sort of purity of the originalist argument that a
9 legislature means a legislature, well, we are miles away
10 from that, aren't we?

11 MR. CLEMENT: I don't agree with that,
12 Justice Kagan. I think what I am doing is essentially
13 channeling this Court's decision in *Smiley*, which said,
14 of course the delegee is the State legislature.

15 Now, when this the State legislature gets to
16 do something, then the questions of whether the
17 constraints that are put on the State legislature
18 actually drawing these lines, those -- there may be some
19 hard questions about that, but there's no hard question
20 here. This isn't any of your hypotheticals. If the
21 Election Clause means anything, it means that you can't
22 completely cut out of the process the State legislature
23 entirely on a permanent basis.

24 JUSTICE KENNEDY: Suppose that legislative
25 districting plan is challenged either on the one-person,

1 one-vote rule or under the Voting Rights Act, and it
2 goes to a State or Federal court, and it goes a year
3 before the election. Does the State court have an
4 obligation under the Constitution to simply pass on the
5 validity or invalidity of the plan and if it doesn't
6 pass, send it back to the legislature, or can it do its
7 own if an election is approaching?

8 MR. CLEMENT: As I read this Court's cases,
9 Justice Kennedy, what they say is that the -- the court
10 in that -- in that instance -- first of all, there
11 should be a preference for the State courts over the
12 Federal courts, and then the State court favors the
13 legislative process so what they do is, if there's time
14 for the legislature to go back and draw a new map, they
15 give the State --

16 JUSTICE KENNEDY: And you think that's
17 constitutionally required?

18 MR. CLEMENT: I do think ultimately it's
19 constitutionally required. It's certainly -- if it's
20 not constitutionally required, it's certainly prudent,
21 and the reason it's prudent flows from the recognition
22 of this Court time and time again that redistricting is
23 primarily --

24 JUSTICE KENNEDY: Well, we're talking
25 about -- we're talking about what's required, so if --

1 if we rule in your favor, we're going to have to tell
2 every court that's involved in a redistricting
3 litigation that it has to submit it to the legislature.
4 Even if the court made its own plan for one election, I
5 think it would have to submit it to the -- back to the
6 legislature for the next 8 years --

7 MR. CLEMENT: Well, I --

8 JUSTICE KENNEDY: -- under reapportionment
9 schemes.

10 MR. CLEMENT: Well, I think, for the most
11 part, that's what this Court has already said. I mean,
12 White v. Weiser says that in the initial challenge
13 phase, that if there's time, you let the legislature do
14 it.

15 Now, this Court has also said --

16 JUSTICE KENNEDY: Well, certainly -- you
17 mean a redistricting plan, if approved by a court, has
18 to have a fixed deadline? Of course the legislature
19 can, I assume, pass a conforming plan, but the court's
20 plan stays in place until it does. And it seems to me
21 that that's as much of a displacement as what you're
22 talking about here.

23 MR. CLEMENT: Well, Justice --

24 JUSTICE KENNEDY: Not as much, but it is a
25 displacement.

1 MR. CLEMENT: Yeah, it is a displacement.
2 It's not as much.

3 I -- I may have been confusing things. I'm
4 talking about -- there's two different circumstances,
5 right? One is when the redistricting plan is challenged
6 very early and there's still time for the legislature,
7 essentially, to take a second crack at a
8 constitutionally compliant plan.

9 And I read *White v. Weiser* to say that if
10 there is that kind of time, then you allow the State
11 legislature to do it, because it's their primary task.

12 Then the second question is, if there's not
13 time and then there is a judicial plan, and let's say
14 the first cycle of elections takes place under the
15 judicial plan. Now, I actually read this Court's cases
16 as generally suggesting, even then, there's nothing that
17 prevents the State legislature, certainly, from going in
18 and redistricting.

19 And this Court, in the *Perry* case, for
20 example, rejected the idea that it's like you got one
21 shot at this and then you're done for the whole
22 decennial census.

23 Now, there's at least one State, Colorado,
24 that's basically said that if you get into that
25 situation, then you got to live with the judicial plan

1 until the next census; but then the legislature still
2 kicks in and has the primary role.

3 Now, I'm inclined to think that what
4 Colorado has done is inconsistent with the Elections
5 Clause. But, however you decide that issue -- you can
6 decide it either way -- your position in accepting our
7 argument here does not foreordain the answer to that
8 question.

9 And that's why I'm -- I'm very happy to
10 address the hypotheticals, but I do think it's worth
11 remembering that this is about the most extreme case
12 that you're going to have. So if the Election Clause
13 means anything at all in terms of its delegation of this
14 responsibility to the State legislatures, maybe we can
15 talk about taking part of it away, but they can't take
16 the entire thing away on a permanent basis and give it
17 to a commission that's defining feature is that it's not
18 representative.

19 If I may reserve the balance of my time.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Feigin.

22 ORAL ARGUMENT OF ERIC J. FEIGIN

23 ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING APPELLEES

25 MR. FEIGIN: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 I'd like to make one main point on standing
3 before I turn to a couple points on the statutory
4 Section 2a(c) issue.

5 On standing, this is an extremely unusual
6 and unprecedented Federal lawsuit in which a State
7 legislature is asking a Federal court for assurance that
8 if it passed a certain kind of law, which it hasn't even
9 alleged that it's going to pass, the law would be
10 enforced by a defendant State official who hasn't even
11 denied that she would enforce it.

12 We don't normally conceive of legislatures
13 as having an interest, let alone an interest cognizable
14 under Article III, in the enforcement of laws they might
15 pass. And there's nothing in the Arizona Constitution
16 or the decision of the Arizona courts interpreting that
17 constitution --

18 JUSTICE SOTOMAYOR: Mr. Feigin, isn't this a
19 diminution of the power to legislate, not of a
20 particular plan or of a particular law and plan? This
21 is the removal of power from the legislature.

22 MR. FEIGIN: No, it isn't, Your Honor,
23 because I don't think there's anything that actually, as
24 a practical matter, prevents the legislature from
25 passing a bill that would redistrict the State, which

1 they believe, in good faith, that they can do under
2 their view of the Elections Clause.

3 The -- there are numerous cases, some of
4 which are cited in our brief at page 13, in which the
5 Arizona legislature has passed laws that conflict with a
6 popular initiative or conflict with the Arizona
7 Constitution; and the Arizona courts do treat them as
8 laws. And the consequence of their passage is -- and
9 their unconstitutionally or their conflict with the
10 initiative is simply that they are not enforceable and
11 their enforcement is enjoined.

12 CHIEF JUSTICE ROBERTS: So you want the
13 legislature to pass a law that's not enforceable --

14 MR. FEIGIN: Well --

15 CHIEF JUSTICE ROBERTS: -- and suggest they
16 don't have standing to challenge what the referendum has
17 done in this case until they go through that process?

18 MR. FEIGIN: Well, Your Honor, I do think,
19 just as in Lujan, the plaintiff had to allege that --

20 CHIEF JUSTICE ROBERTS: Which Lujan?

21 MR. FEIGIN: Lujan against Defenders of
22 Wildlife, the second one. The plaintiff had to allege
23 that they were going to buy a plane ticket to go see the
24 Nile crocodile. In order to complain about observation
25 of the Nile crocodile, the legislature here should

1 allege that it's going to do everything in its power to
2 bring this to a head.

3 But let me put to one side the --

4 CHIEF JUSTICE ROBERTS: Well, don't they
5 just have to, under that theory, just allege that they
6 plan to exercise what had, up to this point, been their
7 normal authority to engage in the redistricting?

8 MR. FEIGIN: Well, Your Honor --

9 CHIEF JUSTICE ROBERTS: I suspect the fact
10 that they're litigating it implies that they have some
11 interest in doing that.

12 MR. FEIGIN: Well, I think that could be
13 said of almost any litigation. And it may be difficult
14 for them to actually coalesce on some particular
15 redistricting plan, but I don't think that's a reason to
16 excuse them from the normal standing requirements.

17 But if I could just put their -- the absence
18 of an allegation that they pass a law to one side for a
19 second, let's assume they had passed their own
20 legislative redistricting plan, presented it to the
21 Secretary of State, and the Secretary of State had said,
22 No, I'm going with the commission's plan because that's
23 what State law requires me to do.

24 I still don't think that they would have
25 standing here because, again, legislatures don't have an

1 interest in the enforcement of the laws that they pass,
2 as a general matter.

3 JUSTICE SOTOMAYOR: They have an interest in
4 the constitutional powers they have.

5 MR. FEIGIN: Well, Your Honor, let me give
6 you an example that I think is fairly analogous to this
7 case and really crystallizes the point.

8 Let's suppose that Congress passed a law
9 that preempted State regulation in some area, and let's
10 further suppose there were colorable constitutional
11 challenge to that law.

12 Now, I don't think anyone would believe that
13 the State legislature, acting in its own name, would be
14 the proper party to bring that constitutional challenge
15 on the theory that its police powers have been infringed
16 by the preemptive Federal statute. And although this
17 case arises under the Elections Clause, the Elections
18 Clause, it -- it doesn't give the State any more
19 lawmaking power than it would ordinarily have if it --

20 JUSTICE GINSBURG: Are you saying that --

21 MR. FEIGIN: -- were given an interest in
22 law enforcement.

23 JUSTICE GINSBURG: -- there's no -- nobody
24 would have standing, because it seems the legislature,
25 if anyone, has standing, and they are, as an

1 institution, affected.

2 MR. FEIGIN: I think there may be people who
3 are much more directly affected, such as people who
4 might be put into one district versus another. If
5 someone were to bring a Voting Rights Act challenge and
6 have -- end up with an injury to bring that claim, they
7 could --

8 JUSTICE GINSBURG: Well, they have to --

9 JUSTICE KENNEDY: Is it part of our
10 jurisprudence that if it's likely that another person is
11 more directly affected, that that goes into the balance
12 and we say, Well, the legislature doesn't have standing
13 because there are other people out there that are more
14 directly affected? Do we say this in our cases?

15 MR. FEIGIN: No, Your Honor. And I -- I
16 think, in fact, you say quite the opposite, which is
17 that even if it would mean no one would have standing to
18 sue, that's not a reason to find standing. And we think
19 the legislature simply doesn't have standing to sue here
20 regardless of whether anyone else does.

21 But if the Court were to reach the merits, I
22 want to make a couple of points on the statutory
23 Section 2a(c) issue; and the first is I think the
24 statutory issue is -- in this case is relatively easy
25 because the Court decided all the relevant issues in

1 Ohio against Hildebrant in construing the nearly
2 word-for-word identical language of the 1911 Act.

3 CHIEF JUSTICE ROBERTS: But I don't
4 understand how 2a(c) even applies. It's meant to apply
5 when the State has not, under its law, redistricted.

6 Here, there's no doubt the State has
7 redistricted under its law. The question is whether the
8 law is valid.

9 MR. FEIGIN: Well, sir, Your Honor, I'd like
10 to turn back to Hildebrant in a second; but just to take
11 your question on, I think the operation of the prefatory
12 clause here is best understood in context.

13 A neighboring Federal statute, 2 U.S.C. 2c
14 requires that, as a matter of Federal statutory law,
15 states be divided into districts for the purpose of
16 electing congressional representatives. That makes it a
17 question of Federal statutory law, how that districting
18 requirement is met and whether it is met.

19 And that's the question that Section 2a(c)
20 answers. Section 2a(c) says one of these default
21 procedures that we prescribed is going to apply until a
22 State is redistricted in the manner provided by the law
23 thereof.

24 I think the necessary and logical corollary
25 for that is that once the State is redistricted in the

1 manner divided by the law thereof, those are the
2 districts that are going to be used. It's hard to
3 believe Congress would have expected anything different
4 and, in fact, given that they are legislating in light
5 of Hildebrant, that is exactly what they would have
6 expected.

7 Hildebrant, in construing the nearly
8 identical language of the 1911 Act, said, first of all,
9 that the statutory language had the express purpose to
10 provide the direct democracy features --

11 JUSTICE ALITO: Well, I had the same thought
12 as the Chief Justice. It would be one thing if Congress
13 passed a law that said a State may apportion
14 congressional districts in any manner consistent with
15 the law of this State. But that's not what this --
16 that's not what this statute says.

17 Now, this statute may have been enacted on
18 the assumption that that would be constitutional but
19 it -- it is not the exercise of congressional authority
20 implementing that. It's just an assumption in which a
21 statute that's otherwise completely irrelevant to this
22 case may have been enacted.

23 MR. FEIGIN: Well, Your Honor, I do think
24 it's quite important that Congress was legislating
25 against the backdrop of Hildebrant. Hildebrant,

1 interpreting the same statutory language, effectively
2 the same in the 1911 Act, found that it had the express
3 purpose to provide the direct democracy procedures could
4 be used in redistricting. The Congress was exercising
5 its power to make -- effectuate that result insofar as
6 it had the power to do it.

7 JUSTICE SOTOMAYOR: Mr. Feigin --

8 MR. FEIGIN: And then went on to say that
9 Congress did have the power to do it.

10 JUSTICE SOTOMAYOR: I guess the bottom-line
11 question is: Let's assume 2a(c) said something totally
12 different, which is we removed redistricting from the
13 legislature, and we require every State to pass it by --
14 redistricting by referendum.

15 That would -- are you -- is your position
16 that Congress has the power to override the
17 Constitution?

18 MR. FEIGIN: Well, Your Honor, I don't think
19 that would exactly be overriding the Constitution. If
20 there were such a law, we might defend it, but I don't
21 think we need to go that far in this case for two
22 important reasons.

23 First, Congress here isn't trying to force
24 upon the States some process that the State doesn't
25 want. Congress is simply trying to recognize that the

1 Federal statutory requirement of districting is
2 satisfied when a State redistricts in the manner that
3 it's decided to redistrict under its own procedures. I
4 would think that the power of Congress should be at its
5 apex when both Congress and the State want to do the
6 same thing.

7 The second thing I would say is that in this
8 circumstance --

9 JUSTICE SCALIA: No, no, no, not -- not if
10 the same thing violates the Constitution. I mean, just
11 because Congress agrees with a State that they can do
12 it, does that make it constitutional?

13 MR. FEIGIN: Well, Your --

14 JUSTICE SCALIA: The objection here is a
15 constitutional objection.

16 MR. FEIGIN: Well, Your Honor, I do think
17 this is within the authority of Congress. And let me
18 come at it a slightly different way, which is, my friend
19 just said that if the State legislature wanted to, the
20 State legislature could have given this power to the
21 commission. Now, under the second subclause of the
22 Elections Clause, Congress can do anything that a State
23 legislature can do, which means Congress could also give
24 this power to the commission.

25 The only difference between my friend's

1 scenario and mine is that in my friend's scenario, the
2 State legislature would retain the authority to override
3 what the commission had done, but that's always the
4 consequence of congressional legislation versus State
5 legislation. When Congress passes a law of the sort
6 that was allowed to pass under the second subclause of
7 the Elections Clause, it's not something that a State
8 legislature can override and it's simply a consequence
9 of Congress's superseding authority and congruent
10 authority under the second subclause of the Elections
11 Clause. I also think that the constitutional -- --

12 JUSTICE SCALIA: Can the second clause be
13 used to revise the first clause? That's what we're
14 talking about here. The second clause can certainly --
15 Congress can do something on its own, but can Congress
16 use the second clause to revise what the first clause
17 says?

18 MR. FEIGIN: Well, I guess, Your Honor, one
19 thing I would want to emphasize is that I do think the
20 Court settled this issue in Hildebrant when it said that
21 the predecessor to Section 2a(c) was simply doing
22 something that the Constitution expressly gave the right
23 to do. And I don't think the right way to think about
24 this is to think about Congress using the second
25 subclause to rewrite the first subclause. Congress here

1 is using the second subclause to do something that a
2 State legislature could otherwise have done as my friend
3 acknowledges.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Waxman.

7 ORAL ARGUMENT BY SETH P. WAXMAN

8 ON BEHALF OF APPELLEES

9 MR. WAXMAN: Mr. Chief Justice, and may it
10 please the Court:

11 The gravamen of Appellant's suit that the
12 people "usurped" a power of a legislative body that they
13 created both raises a claim that the framers would have
14 been astonished to consider that Federal district courts
15 have jurisdiction to adjudicate and more fundamentally,
16 is simply misconceived. Arizona defines its legislature
17 in its Constitution to include both the people and two
18 representative bodies. And Appellant's argument hinges
19 on the premise that in drafting the Elections Clause,
20 the framers intended to ignore a State's definition of
21 its own legislature.

22 It is deeply inconsistent with --

23 JUSTICE SCALIA: Whatever the State calls a
24 legislature suffices under the -- under the Federal
25 Constitution; is that right?

1 MR. WAXMAN: The Federal --

2 JUSTICE SCALIA: I mean, suppose the State
3 says the courts are -- are the legislature. Will that
4 suffice under the Federal Constitution?

5 MR. WAXMAN: The Federal -- Justice Scalia,
6 the Federal Constitution by using the word "legislature"
7 in connection with its -- the uniform accepted
8 definition of that term in the founding generation. And
9 we've cited both Noah Webster and Samuel Johnson's
10 dictionaries. But all of them are in accord it was
11 understood that "legislature" meant the body that makes
12 the laws.

13 JUSTICE SCALIA: Give me -- give me one
14 provision of the Constitution that uses the term
15 "legislature" that clearly was not meant to apply to the
16 body that -- of representatives of the people that --
17 that makes the laws.

18 MR. WAXMAN: There is no provision --

19 JUSTICE SCALIA: All I want is one provision
20 of the Constitution that -- that clearly has your
21 meaning. And I looked through -- through them all. I
22 can't find a single one.

23 MR. WAXMAN: Well, the one that most clearly
24 has our meaning, which accords with understanding, is
25 the one in -- that this Court has said in Hildebrandt and

1 in Smiley and --

2 JUSTICE SCALIA: Oh, it's this one. This is
3 the only one.

4 MR. WAXMAN: This may or may not be the only
5 one. It may very well be --

6 JUSTICE KENNEDY: Well, if it's -- it's
7 not -- it's not --

8 JUSTICE SCALIA: For -- until 1913, for
9 close to a hundred years, many States wanted to have
10 direct election of the senators and they had all sorts
11 of proposals, they had primaries and not one State, not
12 one State displaced the legislature. It took the
13 Seventeenth Amendment to do that.

14 MR. WAXMAN: That's correct. And as --

15 JUSTICE KENNEDY: It seems to me that
16 that -- that that history works very much against you
17 because the -- the term "legislature" is not in the
18 Constitution. Now it's been taken out by the
19 Seventeenth Amendment. The senators shall be chosen by
20 the legislature. And there was no suggestion that this
21 could be displaced.

22 MR. WAXMAN: So, Your Honor -- Justice
23 Kennedy, there is no question, as this Court has
24 explained repeatedly first in *Smith v. Hawk*, which
25 distinguished *Hildebrand* and the legislative power that

1 is addressed in Article Section 1 from the election of
2 senators in Article I, Section 3. And again, in Smiley
3 that made clear that the meaning -- as this Court
4 reiterated just last week in Yates -- that the meaning
5 of a term in an enactment may differ depending on the
6 function that the term is serving.

7 JUSTICE KENNEDY: Wait. Now -- now you're
8 going to the statute. But just under the Constitution,
9 you're -- you're saying that legislature in the first
10 article of Section 3, the now repealed section that
11 talks about it --

12 MR. WAXMAN: Correct.

13 JUSTICE KENNEDY: -- choosing senators means
14 something different than what it means in the following
15 section in the same article.

16 MR. WAXMAN: That's correct. And as this
17 Court explained in Smith v. Hawk, which was -- which was
18 decided, which was an Article V question of the meaning
19 of the word "legislature" for purposes of ratification.
20 In Smith v. Hawk, this Court said that in the Article I,
21 Section 3 election of senators by the legislature and in
22 Article V, the ratification power, what was at issue was
23 a power that is the power to elect and the power to
24 ratify that specifically comported with the elected
25 representative body, and it used those as examples the

1 Court said where often, Justice Kennedy, often the term
2 legislature in the Constitution has that meaning.

3 But it then -- Smith then goes on and
4 distinguishes Hildebrant on precisely the grounds that
5 we are urging, that what was at issue in Hildebrant
6 under the Elections Clause is not a particular body, a
7 brick and mortar legislature necessarily, it is the
8 legislative power of the State. In fact --

9 JUSTICE ALITO: Well, I understand
10 Hildebrant is very -- is very helpful to you. But to
11 get back to Justice Scalia's question. Is there any
12 other provision where legislature means anything other
13 than the conventional meaning? How about applying for a
14 constitutional convention? Calling on the President to
15 send in troops to suppress domestic violence. Creating
16 a new State out of part of -- of the State of Arizona,
17 for example. Those -- all those provisions use the term
18 "legislature." Does it mean anything other than the --
19 than the conventional meaning of "legislature"?

20 MR. WAXMAN: I don't -- I don't know the
21 answer to that question. My --

22 JUSTICE ALITO: It might. Do you think it
23 might?

24 MR. WAXMAN: Well, this Court has never said
25 that it doesn't. It's never said that it does. It has

1 focused a lot of attention on three particular uses of
2 the word "legislature" in the Constitution. The Article
3 V ratification power, the former Article I, Section 3
4 power to elect senators in the legislative body. And
5 the Article I, Section 4 power to make the laws in the
6 provision that's at issue here. And I think it's
7 particularly important. I want to get to the language
8 of Smiley, which my friend embraces, but I think --

9 JUSTICE BREYER: I'd like you to because as
10 I read those two cases, they don't help you very much.
11 I mean, Hildebrant is talking about a particular statute
12 that was passed in 1911 and it helps the government with
13 its statutory argument because a different statute uses
14 similar words, but we don't know if it was with the same
15 intent.

16 Smiley talks about a sitting legislature and
17 asks whether its exercise of map-drawing power is a
18 legislative exercise or, say, more like an impeachment
19 exercise. It doesn't talk about what's at issue here,
20 where you have people outside that building making the
21 judicial -- making a legislative decision.

22 So I didn't see those two cases as helping
23 you that much, though please argue to the contrary. But
24 I think the great open question here is: What happens
25 when legislative power, over time, expands from a group

1 of people sitting in the State's capitol to those people
2 plus a referendum? And there, I don't find much help in
3 the cases one way or the other.

4 MR. WAXMAN: Well, Justice Breyer, I think
5 that both -- that Hildebrant, Smiley, Hawke, and also
6 this Court's -- the -- a case that this Court decided a
7 few months after Smiley, and that was block quoted in
8 the Court's opinion last week in Yates, the Atlantic
9 Cleaners & Dyers case, all strongly support the reading
10 of the word -- the meaning of the word "legislature"
11 that we advocate, and that was, in fact, the consensus
12 definition of "legislature." And I agree with you that
13 I'm --

14 JUSTICE SCALIA: The consensus definition,
15 although you cannot give us a single instance in the
16 Constitution in which it is clearly used, in which the
17 consensus definition was clearly used? I don't think it
18 was a consensus definition at all. You've plucked that
19 out of -- out of a couple of dictionaries.

20 MR. WAXMAN: Justice --

21 JUSTICE SCALIA: It was referring to --

22 JUSTICE BREYER: Well, the dictionaries, I
23 take it, are your support. They say how the word is
24 used. And no one defines the dictionary definition of
25 "legislature" as "the power" -- we don't use that word

1 "power" in this sense much anymore -- but "the power
2 that legislates." The power that legislates in Arizona
3 is the people in the capitol plus the referendums and
4 the initiatives.

5 MR. WAXMAN: I -- I will address the cases,
6 Justice Breyer, let me -- if I may just first --

7 JUSTICE BREYER: Yeah.

8 MR. WAXMAN: -- respond to Justice Scalia's
9 assertion.

10 One thing is for sure: If there were any
11 other Constitution -- if there were any other dictionary
12 that had a different principal meaning, we would have
13 seen it in the briefing in this case. But you only have
14 to look at the framers' own use of the term. If I may:
15 Charles Pinckney, for example -- these are collected at
16 pages 39 and 40 of our brief -- Charles Pinckney, for
17 example, who was -- who wanted to do away with the
18 second part of the clause that gave Congress any power
19 because he thought it was an impairment on the State's
20 rights, said, quote, that "America is a republic where
21 the people at large, either collectively or by
22 representation, form the legislature."

23 Madison made clear in discussing the
24 Constitution that when he referred to, quote, "the
25 legislatures of the States," he meant the existing

1 authorities in the States that comprised the legislative
2 branch of government. James Wilson repeatedly
3 interspersed legislature, States, and the people acting
4 by democracy.

5 JUSTICE SCALIA: Okay. Let's say -- let's
6 say that "legislature" means the body we normally can
7 think of as the legislature; however, at the time, there
8 was no such thing as the referendum or the initiative.
9 So when the dictionaries referred to "the power" -- "the
10 power that makes laws," it was always the legislature.
11 It was never the people at large, because there was no
12 such thing as -- as the referendum. Now that there is
13 such a thing as a referendum, what about saying, "Okay;
14 'legislature' means what everybody knows a legislature
15 is, plus the full citizenry, which is a level higher of
16 democracy"? But what we have here is not a level higher
17 of democracy. It's -- it's giving this power to an
18 unelected body of five people that, you know, that --
19 could -- could that body -- as it's -- as it's
20 constituted here, two of them are elected, or selected,
21 by the majority party, two selected by the minority
22 party. What if -- what if Arizona decided all four
23 would be selected by the majority party?

24 MR. WAXMAN: Well, any -- Justice --

25 JUSTICE SCALIA: Would that be okay?

1 MR. WAXMAN: Justice Scalia, any delegation
2 question -- the issue in this case is: What does the
3 word "legislature" mean? My friend concedes that
4 whatever the legislature is, it can delegate its
5 authority. So the delegation questions -- I mean, I'll
6 endorse whatever, I believe, my friend would say.
7 Because the Arizona legislature has delegated all manner
8 of time, place, and manner regulations to a single
9 person, both the Secretary of State and executive
10 officer, and the -- the -- the individual counties that
11 set the precinct places, the -- the places where you can
12 vote, where you can register, et cetera. So delegation,
13 I don't think is in this case.

14 The question is: What is the legislature?
15 And if your question is: Well, you know, now we know
16 that there's something called an initiative -- of
17 course, that -- we knew this, you know, 120 years ago
18 when the first States first adopt -- started reserving
19 in their constitutions legislative power to the people
20 by initiative. But just to -- to echo something that
21 Justice Kagan adverted to in the earlier argument, there
22 are any -- we're talking here about a construction of
23 the word "legislature" as to all time, place, or manner
24 regulations. If --

25 CHIEF JUSTICE ROBERTS: Doesn't your -- why

1 doesn't your interpretation make the words "by the
2 legislature thereof" entirely superfluous? In other
3 words, why didn't they just say that the rules would be
4 prescribed by each State?

5 MR. WAXMAN: Because --

6 CHIEF JUSTICE ROBERTS: Because any way --

7 MR. WAXMAN: -- as --

8 CHIEF JUSTICE ROBERTS: I'm sorry.

9 MR. WAXMAN: Because as the Court explained
10 in Smiley, what the framers wanted was it to be done by
11 a legislation. That is, it wanted a, quote, "complete
12 code" of holding congressional elections to be enacted.

13 CHIEF JUSTICE ROBERTS: Well, but I would
14 have thought -- I understood your argument to be that as
15 long as it's an exercise of legislative power, that it's
16 satisfied. And if you have, for example, a governor
17 doing it, it presumably would be pursuant to a
18 delegation, either from the people or from the
19 legislature. But either way, nothing happens until
20 there's an exercise of lawmaking power by the State. So
21 it should have been sufficient for the drafters of the
22 Constitution to simply say it should be prescribed by
23 each State, whether they do it by referendum, whether
24 they do it by initiative, whether they do it by what is
25 commonly understood to be the legislature, whether they

1 do it by committee, whatever. It's up to the State.
2 And then saying "by the legislature" seems, as I said,
3 totally superfluous.

4 MR. WAXMAN: It is up to the power in each
5 State that makes the laws. And as to Justice Scalia's
6 hypothetical about, you know, could they -- could they
7 just delegate it to the chair or the State Democratic
8 party, or just let one party choose, as Justice
9 Kennedy's separate opinion in *Vieth* and, I think,
10 *Cook v. Gralike* points out, there might be other
11 constitutional problems with that, arising either from
12 the First Amendment or the Fourteenth Amendment. But
13 the -- I think that -- I believe that -- and Mr. Clement
14 would agree on rebuttal, that if the legislature --
15 whatever "the legislature" means, if the legislature
16 decided, look, we are going to delegate this
17 responsibility to the governor, that would be a
18 constitutional delegation because it would have been a
19 decision made by the lawmaking body of the State.

20 If I could just make one point and then
21 address Justice Breyer's question about *Smiley*,
22 *Hildebrant*, and *Hawke*.

23 It would be deeply, deeply inconsistent with
24 the enterprise in Philadelphia to harbor, then to
25 effectuate, the notion that our framers intended to set

1 aside both a cornerstone principle of Federalism and
2 their aim to bind the people as closely as possible to
3 the national House of Representatives. Yes, it is true
4 that all of the Sturm und Drang over this clause related
5 to the second part, giving Congress authority, and that
6 is because no one questioned the fundamental principles
7 that the sovereign States could choose to allocate their
8 legislative power as they wanted. If there had been any
9 suggestion, the anti-Federalists would have been
10 screaming bloody murder that the States could not do so.

11 Now, Smiley specifically said that, at,
12 quote -- and I'm quoting from page 367 -- "As the
13 authority is conferred for the purpose of making laws
14 for the State, it follows, in the absence of an
15 indication of a contrary intent, that the exercise of
16 the authority must be in accordance with the method the
17 State has chosen, has prescribed for legislative
18 enactments." If we find --

19 JUSTICE GINSBURG: But as Mr. Clement points
20 out, the legislature, in both Smiley and Hildebrant,
21 remain the prime mover. And what he has objected to is
22 taking the legislature out of the picture entirely.

23 MR. WAXMAN: Yes, Justice Ginsburg. I -- we
24 concede that in neither case was the initiative power at
25 issue. But that distinction was never made by the

1 Court, either in Hildebrant or Smiley. And, in fact,
2 Smiley says, "We find no suggestion in the Federal
3 constitutional provision of an attempt to endow the
4 legislature of a State with power to enact laws in any
5 manner other than which -- in which the constitution of
6 the State" --

7 JUSTICE BREYER: But it's not -- it's
8 not that -- I'm not -- I'm just quibbling in a sense
9 about the case. But the question in the case is not
10 about -- they say, "the body." I mean, what's "the
11 body"? Everybody agreed it was the legislature. But
12 when the legislature acts in this instance, is it acting
13 as an electoral body? Is it acting as a ratifying body?
14 Is it acting as a consenting body, as with the
15 acquisition of LAMS, or is it acting as a legislating
16 body?

17 MR. WAXMAN: It is acting --

18 JUSTICE BREYER: That's correct, and that's
19 the answer they give. This is a form of legislation.
20 Here, the question is about the body, and --

21 MR. WAXMAN: That's right. The question is,
22 is -- are the people, by initiative, a legislative body?

23 JUSTICE BREYER: Yes, that's the question.

24 MR. WAXMAN: Are they the legislature as
25 they themselves have chosen? And in Smiley, again,

1 discussing Hildebrant, this is what the Court said. And
2 it was because of the authority of the State to
3 determine what should constitute its legislative process
4 that the validity of the requirement of the State
5 constitution in its application to congressional
6 elections was sustained. And again --

7 JUSTICE SCALIA: "Legislative process" there
8 means the process in the legislature.

9 MR. WAXMAN: It --

10 JUSTICE SCALIA: What it takes for the
11 legislature to enact a law.

12 MR. WAXMAN: That was --

13 JUSTICE SCALIA: Once -- once you assume
14 "legislative" refers to legislature, your whole argument
15 for Smiley just disappears.

16 MR. WAXMAN: The -- the State of Arizona,
17 like the States of a near majority of -- the
18 constitutions of the States of a near majority have
19 defined the legislative power to include the people by
20 initiative. And again, you know, in -- in Atlantic
21 Cleaners & Dyers, which was decided a month after Smiley
22 and which this Court quoted last week in Yates, it said
23 that it is not unusual for the same word to be used with
24 different meanings, "and thus" -- and I'm quoting --
25 "and thus, for example, the meaning of the word

1 'legislature,' used several times in the Federal
2 Constitution, differs according to the connection in
3 which it is employed, depending upon the character of
4 the function which that body in each instance is called
5 upon to exercise citing Smiley."

6 CHIEF JUSTICE ROBERTS: You've -- you've
7 said "the Court in Yates." It was a plurality? Was it,
8 or am I -- am I --

9 MR. WAXMAN: I -- Yates doesn't itself --
10 just to be clear, Yates doesn't talk about this. It was
11 the decision in Yates. I thought --

12 CHIEF JUSTICE ROBERTS: No, I know, but --

13 MR. WAXMAN: My point only is that the
14 Supreme -- this Supreme Court, in the months following
15 Smiley, again interpreted Smiley in the -- I was not
16 quoting from Yates. I'm quoting from -- from Atlantic
17 Cleaners & Dyers, itself citing Smiley.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 Mr. Clement, you have five minutes left.

21 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

22 ON BEHALF OF APPELLANT

23 MR. CLEMENT: Thank you, Mr. Chief Justice,
24 and may it please the Court:

25 Let me start with the definition of

1 "legislature." Obviously, we can point to our favorite
2 quotes from the framers. They're at 27 and 34 and 35 of
3 the blue brief. The critical thing, though, is not what
4 the framers meant by the legislature when they were
5 talking broadly about political theory or the Swiss
6 canton of Zug. What matters is when they were talking
7 about assigning particular authorities in the
8 Constitution to particular components of the State
9 government. And in that context, as a number of you
10 have pointed out, there is no doubt, every time they
11 assigned an authority to the State legislature, they
12 were assigning the authority to the representative body
13 of the people.

14 Now, that takes us to the Smiley case. And
15 if the definition of "legislature" in the Smiley case is
16 what this case turns on, then with all due respect to my
17 friends on the other side, we win. Because Smiley
18 specifically talked, as Justice Breyer alluded to, the
19 body question, and then it defined "the body." And what
20 it said is, quote -- I'm quoting from Smiley, not Yates
21 or anything else; I'm quoting from Smiley -- "The term
22 was not one of uncertain meaning when incorporated into
23 the Constitution. What it meant when adopted, it still
24 means for purposes of interpretation. A legislature was
25 then the representative body which made the laws of the

1 people."

2 JUSTICE BREYER: That's true. But I see --
3 Smiley doesn't help him, I don't think, but I think it
4 helps you still less, because that was the question in
5 the case. Everybody assumed, nobody denied, that it's
6 those people in the -- the bricks over there that are
7 making this law. But the question is: Are they
8 legislating when they're doing it? So they were --
9 nobody denied they were the legislative power. Here, we
10 have a different question.

11 MR. CLEMENT: With respect to --

12 JUSTICE BREYER: And that is: Is this the
13 legislative power when you can proceed by referendum?
14 And the reason I say Smiley might help is simply because
15 it says be a little bit flexible about that.

16 MR. CLEMENT: I think it says a little bit
17 flexible about the lawmaking authority of the State
18 legislature. So don't think you've been given some new
19 key that allows you to make laws without the process of
20 the governor being involved at all. I do think Smiley
21 is very helpful because not only does it answer the body
22 question, but the parties disputed this and the -- and
23 the other side in Smiley said, oh, we win this case
24 because legislature means the lawmaking authority. And
25 the other side said, no, it means the body. And this

1 Court said, you're right, it means the body, but
2 critically, it's a lawmaking function. Therefore, it's
3 subject to the gubernatorial veto. I think they would
4 have been flabbergasted to find out that the
5 legislature, which they just defined as the
6 representative body of the people, could be cut out
7 entirely.

8 Let me give you --

9 JUSTICE KAGAN: But I would think, Mr.
10 Clement, that the overriding principle of Smiley and
11 Hildebrant and Hawke is that when it comes to this
12 particular provision, and this particular provision as
13 compared to the Seventeenth Amendment, which is the
14 comparison and the contrast that Hawke sets up, when it
15 comes to this particular provision, we need to show a
16 lot of respect to the State's own decisions about how
17 legislative power ought to be exercised. And that seems
18 to me the overriding principle of the three cases.

19 MR. CLEMENT: I think what you have to show
20 is respect for the way that the State says the State
21 legislature can go about lawmaking. But it is
22 completely different to say it's okay to cut the State
23 legislature out of the process entirely.

24 Let me avert very briefly to the 1911 Act,
25 which, of course, is since repealed. I think the

1 questions show that the actual statute that's now on the
2 books has nothing to do with this case. But the irony
3 of my friends on the other side relying on the
4 legislation -- the legislative history of the 1911 Act
5 is, the whole point of the legislative history in 1911
6 is people in 1911 could read. The statute on the books
7 then said you're going to have the Federal default rule
8 kick in until the State legislature redistricts. They
9 realized in 1911 that the State legislature meant the
10 State legislature, so they better change that law if
11 they wanted to allow the referendum process.

12 So the 1911 legislative history -- not that
13 I think you should particularly spend a lot of time with
14 it, but it actually cuts against them on the
15 constitutional issue. It shows that there is a
16 fundamental difference between the legislature and the
17 people. And as the Chief Justice pointed out, if there
18 weren't, then the framers could have stopped the
19 Election Clause at -- in each State. They wouldn't have
20 had to say, "by the legislatures thereof."

21 Now, the other side --

22 JUSTICE KAGAN: But, of course, you can turn
23 that around and say what that provision shows is really
24 exactly what I just said, is that Congress was also on
25 board with this idea that the Court had, that when you

1 look at that clause, the Elections Clause, that a lot of
2 respect, a lot of deference, has to be given to the
3 State's own definition.

4 MR. CLEMENT: And if I may respond, Justice
5 Kagan. I'm happy with giving deference to what the
6 State legislature does. And if that's constrained in
7 the State by the rule that you have a gubernatorial
8 veto, override by referendum, something has to sit in
9 committee for 30 days, then the restrictions on the
10 State legislature are fine, but it has to be the State
11 legislature.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you, counsel.
14 The case is submitted.

15 (Whereupon, at 11:06 a.m., the case in the
16 above-entitled matter was submitted.)

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