No. 13-1314

IN THE

Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, et al.,

Appellees.

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

BRIEF OF THE CAMPAIGN LEGAL CENTER, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, THE AMERICAN CIVIL LIBERTIES UNION, COMMON CAUSE, AND DEMOCRACY 21 AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*[1]

Amicus curiae The Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. The CLC has served as *amicus curiae* or counsel in voting rights and redistricting cases in this Court, including *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), *Bartlett v. Strickland*, 556 U.S. 1 (2009), and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), among others. The CLC has a demonstrated interest in voting rights and redistricting law.

Amicus curiae the League of Women Voters of the United States (the League) is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800 communities and in every state, with more than 150,000 members and supporters nationwide. The League

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

promotes an open governmental system that is representative, accountable, and responsive and that ensures opportunities for citizen participation in government decision-making. To further this goal, the League has been a leader in seeking reform of the redistricting process at the state, local, and federal levels for more than three decades.

Amicus curiae the American Civil Liberties Union Foundation (ACLU) is a nonprofit, nonpartisan organization with 500,000 members dedicated to the principles of liberty and equality enshrined in the Constitution and our nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court in numerous cases involving electoral democracy, including earlier cases addressing the issue of excessive partisan gerrymandering.

Amicus curiae Common Cause is a nonpartisan, nonprofit citizens' organization dedicated to ensuring open, accountable, and effective government. Common Cause works to strengthen public participation in the political process and to ensure that process serves the public interest. To that end, Common Cause has pursued redistricting reform for several decades in states including Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Maryland, Minnesota, Nebraska, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Washington, Wisconsin, Utah, and others. Specifically, Common Cause led the coalition that successfully pushed for the ballot initiative creating the Arizona Independent Redistricting Commission. Common Cause was also a

sponsor of two successful ballot initiatives to amend the Florida Constitution to prohibit partisan gerrymandering. Common Cause led efforts to reform California's redistricting process by drafting, serving as a proponent of, and defending Proposition 11, which created the Citizens Redistricting Commission, and Proposition 20, which expanded the Commission's responsibility to draw congressional districts.

Amicus curiae Democracy 21 is a nonprofit, nonpartisan policy organization that works to strengthen democracy. Democracy 21 has participated as counsel or *amicus curiae* in a number of cases before this Court involving the constitutionality of the campaign finance laws and other reform laws. The organization works to ensure the integrity of government decisions and to provide for fair and honest elections. It supports campaign finance and other political reforms, conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance and other political reform laws, and engages in efforts to help ensure that these laws are properly interpreted and enforced.

SUMMARY OF ARGUMENT

It has been just over fifty years since this Court first remarked that the goal of redistricting is to establish "fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964). Today, however, many state legislators appear to operate on the assumption that the goal of redistricting is to gain maximum partisan advantage for the political party that controls the redistricting

process. Partisan gerrymandering has reached unprecedented levels, subverting the federal electoral system envisioned by the Constitution. The harms of partisan gerrymandering have been well documented: the practice undermines the concept of majority rule, reduces the competitiveness of elections, and contributes to the political polarization that feeds gridlock.

Despite these harms, a practicable standard for adjudicating partisan gerrymandering claims has remained elusive, and the judiciary has thus far been unable to rein in this practice. As a result, other solutions are currently being explored by citizens seeking to enforce the guarantee in Article I, Section 2 of the Constitution that their Members of Congress actually be "chosen . . . by the People of the several States," U.S. Const. art. I, § 2, rather than predetermined through gerrymandering by state legislatures. Most prominently, voters in several states, including Arizona, have used the initiative process to require redistricting by independent commissions so as to avoid partisan influence and incumbency protection.

These independent redistricting commissions are a valuable result of direct democracy, which allows the people of an individual state to avail themselves of their inherent lawmaking power and bypass self-interested politicians in order to secure the fair elections to which they are constitutionally entitled. Citizen-driven structural reforms such as Arizona's independent redistricting commission are one of the few remaining alternatives for addressing partisan gerrymandering

given that courts have, to this point, been unable to fashion a judicially manageable standard to curb gerrymandering, and that congressional action is highly unlikely.

A reading of the Elections Clause that would preclude the "People of the several States" from reining in the unconstitutional practice of extreme partisan gerrymandering in elections for the House of Representatives would be fundamentally inconsistent with the Constitution's commitment to a system of government for "We the People of the United States." *Amici* therefore respectfully urge the Court to uphold the decision of the district court finding that the Elections Clause does not preclude redistricting by an independent commission created by the People of Arizona.

ARGUMENT

I. Partisan Gerrymandering Poses A Threat To Our Democracy.

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), this Court made clear that it believes extreme partisan gerrymandering is a significant problem that amounts to disruption of our constitutional order. The problem has only worsened in the decade since *Vieth*. Indeed, "the problem of gerrymandering has never been worse in modern American history."[2] As the problem of

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[2] Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap* 5, (Univ. of Chi. Public Law and Legal Theory Working Paper No. 493, 2014),

gerrymandering worsens, its distortive effect on our electoral system grows. Severe partisan gerrymandering has been shown to undermine representative democracy, reduce the competitiveness of elections, and contribute to political polarization.

A. The Court In *Vieth v. Jubelirer* Unanimously Agreed That Extreme Partisan Gerrymandering Is Unconstitutional And Harmful.

Judicial involvement with partisan gerrymandering claims began nearly thirty years ago with the case of *Davis v. Bandemer*, 478 U.S. 109 (1986), in which this Court held that partisan gerrymandering presents a justiciable case or controversy. *Id.* at 143. Eighteen years later, the Court revisited the issue in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). While the Court in *Vieth* disagreed on the justiciability of partisan gerrymandering claims, the Court was unanimous in agreeing that "excessive partisanship in redistricting is unconstitutional."[3]

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457468 (82 U. Chi. L. Rev. (forthcoming 2015)).

[3] Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 782 (2005) ("To be sure, *Vieth* did advance the ball in one critical respect: For the first time, all nine Justices agreed that excessive partisanship in redistricting is unconstitutional."); *see Vieth*, 541 U.S. at 292 (plurality opinion) ("We do not disagree with [the] judgment" that "severe partisan gerrymanders [are incompatible] with democratic principles"); *id.* at 314-17 (Kennedy J., concurring) (concluding that partisan gerrymandering raises First Amendment concerns); *id.* at 317-18 (Stevens, J., dissenting)

The Court was likewise unanimous in agreeing that extreme partisan gerrymandering is harmful to American democracy. The four justices in the plurality acknowledged, for example, that excessive partisanship in redistricting offends the Constitution—and is therefore "*un*lawful"—and also that the "*excessive* injection of politics" into the redistricting process is fundamentally "[incompatible] with democratic principles." *Vieth,* 541 U.S. at 292-93. In his concurrence, Justice Kennedy noted that "[a]llegations of unconstitutional bias in apportionment are most serious claims," explaining that severe partisan gerrymanders impose burdens "on the representational rights of voters and parties." *Id.* at 311-13 (Kennedy, J., concurring). Justice Kennedy applauded the plurality for acknowledging that "partisan gerrymandering that disfavors one party" is impermissible. *Id.* at 316; *see also id.* (giving examples of both an "egregious" and a "more subtle" partisan gerrymander, and concluding that "each is culpable"). He further lamented that "[w]hether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes

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("The concept of equal justice under law requires the State to govern impartially[, and] partisan gerrymanders that are devoid of any rational justification . . . cannot be said to [be] impartial[]."); *id.* at 343 (Souter, J., dissenting) (explaining that "the guarantee of equal protection condemns [some forms of partisan gerrymandering] as a denial of substantial equality"); *id.* at 355 (Breyer, J., dissenting) ("The use of purely political considerations in drawing district boundaries is not a 'necessary evil' that . . . the Constitution inevitably must tolerate.").

to apportionment: 'We are in the business of rigging elections.'" *Id.* at 317 (citation omitted).

The various dissenters in *Vieth* similarly expressed concern with the harms of partisan gerrymandering. Justice Stevens' dissent observed that the "danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all." *Id.* at 331 (Stevens, J., dissenting). Justice Souter, joined by Justice Ginsburg, asserted that "the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine." *Id.* at 345 (Souter, J., dissenting). Similarly, Justice Breyer's dissent recognized that "purely political 'gerrymandering' . . . threaten[s] serious democratic harm" and "violates basic democratic norms." *Id.* at 355, 361 (Breyer, J., dissenting). Thus, the *Vieth* Court expressed deep concern about partisan excesses in redistricting, both as a matter of constitutional law and with respect to the vitality of American democracy.

B. Partisan Gerrymandering Thwarts Majority Rule, Makes Elections Less Competitive, And Heightens Political Polarization, Thereby Undermining Democratic Accountability.

The *Vieth* Court's unanimous recognition of gerrymandering's subversion of fundamental democratic values rests upon a sound empirical basis. As the scholarly literature emphasizes, "the quintessential injury inflicted by gerrymandering" is

that gerrymandered district configurations often fail to reflect the actual partisan divide within the electorate, resulting in legislatures whose composition diverges from the will of a majority of voters.[4] This practice "undermine[s] citizen participation and republican self governance."[5]

Partisan gerrymandering's interference with majority rule is borne out in the statistics on partisan bias—a measurement of "the divergence in the share of seats that each party would win given the same share of the statewide vote."[6] Scholars have determined that when a party is in full control of a state's government, the redistricting plans it enacts "tend to award it about 6% more seats than if the opposing party had been

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[4] Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 Colum. L. Rev. 283, 286 (2014) (noting that "the most glaring problem with gerrymandering . . . is the partisan havoc that it may wreak"); *see also* G. Alan Tarr & Robert F. Williams, *Eighteenth Annual Issue on State Constitutional Law: Introduction*, 37 Rutgers L.J. 877, 878 (2006) ("Partisan gerrymandering ensures that the make-up of legislatures will fail to reflect fairly the partisan division within the electorate."); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103, 116 (2000) ("Partisan gerrymandering is designed to entrench a particular political faction against effective political challenge—sometimes even to give a political minority effective control. That is in obvious tension with the values of Republicanism.").

[5] Christopher J. Roederer, *The Noble Business of "Incumbantocracy:" A Response to the Sordid Business of Democracy*, 34 Ohio N.U. L. Rev. 373, 389 (2008).

[6] Stephanopoulos, *Elections and Alignment*, *supra* note 4, at 347.

responsible for redistricting."[7] And one recent analysis showed that "the typical 2012 congressional plan featured an absolute bias of about 11%," the highest score since 1966.[8]

Both parties have engaged in this undemocratic practice. A study by the Brennan Center for Justice showed that in 2012, in states where Republicans controlled the redistricting process, their candidates won roughly 53 percent of the vote but 72 percent of the seats.[9] In states where Democrats controlled the process, their candidates won about 56 percent of the vote and 71 percent of the seats.[10] For example, "Democratic Congressional candidates won nearly half the votes in Virginia but only 27 percent of its seats, and 48 percent of the vote in Ohio but only a quarter of its seats."[11] Meanwhile, "[i]n Illinois, where Democrats drew the maps, Republican Congressional candidates won 45 percent of the popular vote but only a third of

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[7] *Id.* at 349.

[8] *Id.* at 348.

[9] Sundeep Iyer, Brennan Ctr. For Justice, *Redistricting and Congressional Control Following the 2012 Election* (Nov. 28, 2012), http://www.brennancenter.org/analysis/redistricting-and-congressional-control-following-2012-election.

[10] *Id.*

[11] Griff Palmer & Michael Cooper, *How Maps Helped Republicans Keep an Edge in the House*, N.Y. Times, Dec. 14, 2012, http://www.nytimes.com/2012/12/15/us/politics/redistricting-helped-republicans-hold-onto-congress.html.

the House seats. And in Maryland, Republicans won 35 percent of the votes but just 13 percent of the seats."[12] Gerrymandering thus thwarts the will of voting majorities, "arrest[ing] the House's dynamic process" and "creat[ing] undemocratic slippage between the people and their government."[13] In this way, partisan gerrymandering is turning the House "into something sclerotic and skewed,"[14] rather than an institution responsive to and aligned with the actual preferences of the voters.[15]

Partisan gerrymandering likewise thwarts the will of the majority by reducing electoral competitiveness. Indeed, the entire strategy of gerrymandering is "to

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[12] *Id.*

[13] Richard H. Pildes, *The Constitution and Political Competition*, 30 Nova L. Rev. 253, 260-61 (2006).

[14] Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Election L.J. 179, 215 (2003).

[15] In 2014, Republicans won 52 percent of the popular vote, but captured 57 percent of the seats in the House. David Wasserman, FiveThirtyEight, *Why House Republicans Did Even Better Than They Expected* (Nov. 18, 2014, 11:50 AM), http://fivethirtyeight.com/features/why-house-republicans-did-even-better-than-they-expected/. In 2012, Republicans won 48 percent of the popular vote, but captured 55 percent of the seats in the House, making 2012 "one of a handful of elections in the last century where the party that won the popular vote for Congress did not win control of the House." Palmer & Cooper, *supra* note 11.

make virtually every district noncompetitive."[16] The decline in competitive districts results in significant part from the practice of "packing," in which self-interested politicians draw districts filled with sympathetic voters, creating safe districts dominated by voters loyal to one party's candidates. Often, incumbents excise competitors and divide up the constituencies of those competitors. To be sure, the rise in safe seats can also be attributed partly to the geographic distribution of the parties' supporters.[17] But it is one thing for elections to become less competitive due solely to natural geographic self-sorting, and entirely another for legislators to

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[16] Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 483 (2004) (noting that the "strategy [of gerrymandering] . . . aims to make virtually every district noncompetitive"); *see also* Stephanopoulos, *Elections and Alignment*, *supra* note 4, at 343-44 (noting that a "key harm" of gerrymandering "is the lack of competition that ensues when incumbents are placed in overly safe districts"); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 600 (2002) (defining gerrymandering as "[a] constriction of the competitive processes by which voters can express choice").

[17] *See* Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. Pol. Sci. 239, 240 (2013) (referencing "unintentional gerrymandering, whereby one party's voters are more geographically clustered than those of the opposing party due to residential patterns and human geography."); Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 Am. J. Pol. Sci. 666, 678 (2009) (pointing to "increased geographical sorting on political and social attitudes").

purposefully make elections less competitive for themselves.

Overall, competitiveness in House elections has been steadily declining since World War II.[18] One recent study found that partisan gerrymandering accounts for much of that decline, concluding that the 1980, 1990, and 2000 redistricting cycles accounted in the aggregate for 83% of the decline in competitive House seats since 1980.[19] This lack of competition contrasts greatly with non-gerrymandered Senate and gubernatorial races. For example, while fewer than 10% of House elections were competitive in 2002, nearly 50% of Senate and gubernatorial elections were competitive.[20] And this trend has continued; a recent study demonstrated that after the 2010 redistricting cycle, there were 15 fewer competitive districts than there were following the 2000 redistricting cycle.[21] Thus, "[o]ver the past decade, partisan gerrymandering has made competitive legislative elections a rarity."[22]

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[18] *See* Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. Pol. 75, 75-76 (2006).

[19] McCarty, *supra* note 17, at 673.

[20] Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 63-64 (2004).

[21] Fair Vote, Ctr. for Voting & Democracy, *Redistricting 2012: The Worst Congressional Map Ever?* (Oct. 2012).

[22] Alex J. Whitman, *Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 Emory L.J. 211, 212 (2009).

The increase in noncompetitive elections has had ramifications beyond simply the constriction of voter choice. First, the lack of competition contributes to the unrepresentative "hyperpolarized political parties" that have emerged in recent years.[23] Indeed, at least "a portion of the polarization we are observing in Congress is being artificially generated by the mapmakers responsible for drawing district boundaries at the state level."[24]

Second, the overwhelmingly safe seats created by partisan gerrymandering encourage ideological candidates who listen only to the voices of the party's base, especially when primary elections all but decide the ultimate winner.[25] Safe seats artificially entrench incumbents and can skew their positions, making them unresponsive to the political center because their electoral prospects do not depend on support from centrist voters or members of the opposing party.[26] In

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[23] Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 Yale L.J. 804, 818 (2014).

[24] Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 Am. Pol. Res. 878, 899 (2007) (finding evidence that "districts that have undergone significant change following redistricting have become more polarized, thus contributing to higher levels of polarization among legislators representing those districts").

[25] *See* Jeffrey Toobin, *The Great Election Grab*, New Yorker, at 63 (Dec. 8, 2003) (quoting Samuel Issacharoff).

[26] *See id.*

those ways, partisan gerrymandering can encourage extreme partisanship and discourage deliberative compromise with members of opposing political parties, producing policy gridlock that impedes the effective functioning of Congress.[27]

Third, the decline in competitive elections has also led to an increase in voter apathy and a concomitant decline in voter participation. A key part of the success of a democracy is the widespread belief in the fairness of elections. Competitive elections have been found to "have positive effects that endure for at least a year beyond the campaign season, reinforcing the idea that political competition plays a robust role in American representative democracy."[28] But this pattern of representatives choosing their voters rather than voters choosing their representatives reduces voters' faith in government, creating public disaffection that

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[27] *See* David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 Vill. L. Rev. 57, 57-58 (2006) (explaining that "partisanship may now pose serious problems for the effective functioning of basic American political institutions such as Congress"). However, not all scholars agree that partisan gerrymandering has increased political polarization. *See, e.g.*, Richard H. Pildes, *Why The Center Does Not Hold: The Causes Of Hyperpolarized Democracy In America*, 99 Calif. L. Rev. 273, 315 (2011) (concluding that, while "[t]here is no doubt polarization has increased dramatically since the 1970s, and that districted elections are less competitive," gerrymandering "does not seem to be a major cause").

[28] Heather K. Evans et al., *The Enduring Effects Of Competitive Elections*, 24 J. Elec. Pub. Op. & Parties 455, 455 (2014).

"can discourage potential voters and reduce political participation."[29]

In these ways, extreme partisan gerrymandering threatens "the prime guarantor of democratic legitimacy": accountability to the electorate.[30] The House of Representatives was meant to be a "numerous and changeable body" whose membership would reflect the shifting popular will. *See* The Federalist No. 63, at 383 (James Madison) (Clinton Rossiter ed., 1961). Elected officials remain faithful to voter preferences and responsive to shifts in those preferences so long as they are held accountable by the voters at election time. But partisan gerrymandering "skews the incentive structures operating to ensure the accountability of elected representatives to shifts in the preferences of the electorate."[31] As a result, democratic legitimacy is compromised.

In sum, the democratic harms caused by partisan gerrymandering, as recognized by the *Vieth* Court and confirmed by the scholarly literature, undermine the functioning of American democracy.

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[29] Tarr & Williams, *supra* note 4, at 878.

[30] Issacharoff, *Political Cartels*, *supra* note 16, at 615.

[31] *Id.* at 605-06.

II. Without Judicial Recourse, Partisan Gerrymandering Can Be Prevented By Allowing The People To Exercise Their Lawmaking Power Over The Redistricting Process.

As discussed above, legislators have continuously and increasingly demonstrated their inability to resist the temptation of partisan gerrymandering. Absent a miraculous sea change in the exercise of political self-restraint on behalf of our nation's elected officials, then, the problem of partisan gerrymandering can best be ameliorated in one of two ways: through judicial intervention or by rebalancing the legislative role in redistricting. The first approach, which would require judicial enforcement of partisan gerrymandering claims, remains theoretical at this point due to the lack of judicially manageable standards. Therefore, the second approach, which has been adopted by the voters of Arizona, is one of the best remaining alternatives. To read the Elections Clause in a manner that would preclude the "People of the several States" from exercising their sovereign power to assert control over their choice of congressional representatives would flout the very structure of our constitutional system.

A. Until The Court Provides A Standard For Judicial Restraint Of Extreme Partisan Gerrymandering, Lower Courts Will Be Unable To Curb It.

The judicial branch is presently unable to provide a check on partisan gerrymandering due to this Court's difficulty in identifying a judicially manageable standard to adjudicate such claims. The Court's

inability to agree on such a standard in *Vieth* left lower courts with little guidance on how to adjudicate the claims that the Court declared justiciable. *See Vieth*, 541 U.S. at 307-08, 317 (Kennedy, J., concurring) (noting that the Court had "no basis on which to define clear, manageable, and politically neutral standards" and rejecting the dissenters' proposed standards). When the issue next arose in *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399 (2006), the Court did not revisit the conclusion that partisan gerrymandering claims are justiciable, *see id.* at 414 (opinion of the Court), but it again declined to promulgate a standard for deciding them, *see id.* at 420 (opinion of Kennedy, J.) (concluding that "the absence of any other workable test for judging partisan gerrymanders" compelled the rejection of the claim).[32]

The *Vieth* and *LULAC* decisions "place district courts in the untenable position of evaluating political gerrymandering claims without any definitive

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[32] Judicial enforcement has thus far been limited to the circumstance where gerrymandering is accomplished by systematically overpopulating districts dominated by one party and underpopulating districts dominated by the other, thereby violating the equipopulation requirement of the Equal Protection Clause. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1328-31, 1338, 1352 (N.D. Ga. 2004) (concluding that population deviations in a state legislative apportionment plan were not supported by "any legitimate, consistently-applied state interests," but rather were the result of regionalism and "an obviously purposeful attempt to unseat as many [Republican incumbents] as possible" and striking down the plan as violating the one-person, one-vote principle), *summarily aff'd*, 542 U.S. 947 (2004).

standards." *Radogno v. Ill. State Bd. of Elections* (*Radogno I*), No. 11-cv-04884, 2011 WL 5025251, at *4 (N.D. Ill. Oct. 21, 2011). The absence of clear standards to apply to these claims has made it extraordinarily difficult for lower courts to prevent states from pursuing excessive partisanship in redistricting. Indeed, in the decade that has passed since *Vieth*, lower courts have repeatedly been put in the position of asking: "How much [partisanship] is too much, and why?" *Radogno v. Ill. State Bd. of Elections* (*Radogno II*), No. 11-cv-4884, 2011 WL 5868225, at *2 (N.D. Ill. Nov. 22, 2011), *summarily aff'd*, 133 S. Ct. 103 (2012).

With no clear standards from this Court by which to measure partisan gerrymandering claims, lower courts have been unable to stop the practice, even as they recognize that it is wrong. Instead, courts across the country have, with some reluctance, consistently rejected such claims.[33] Given this landscape, citizens

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[33] *See, e.g.*, *Benisek v. Mack*, 11 F. Supp. 3d 516, 525 (D. Md. 2014) (rejecting partisan gerrymandering claim because "the standard Plaintiffs propose is, in substance, markedly similar to tests that have already been rejected by the courts"), *summarily aff'd*, 584 F. App'x 140 (4th Cir. 2014) (per curiam); *Perez v. Perry*, 26 F. Supp. 3d 612, 623 (W.D. Tex. 2014) (rejecting partisan gerrymandering claim after the plaintiffs "contend[ed] that no standard [was] necessary . . . because Defendants have admitted to partisan gerrymandering" in addition to proposing tests rejected in *Vieth*); *Ala. Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1296 (M.D. Ala. 2013) (questioning how the court "could 'allow a claim to go forward that no one understands,'" and for which plaintiffs "'don't even know what evidence [they can] marshal to either support it or reject it'" (citation omitted); *Baldus v. Members of the Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d

have understandably looked beyond the courts and toward other solutions in order to ameliorate the harm caused by unconstitutional partisan gerrymandering.

840, 853-54 (E.D. Wis. 2012) (rejecting partisan gerrymandering claim because of the plaintiff's "failure to offer a workable standard"); *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 904 (D. Md. 2011) (concluding that "[a]bsent a clear standard to apply," it had no choice but to reject the plaintiffs' claim), *summarily aff'd*, 133 S. Ct. 29 (2012); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 567, 579 (N.D. Ill. 2011) (rejecting partisan gerrymandering claim because plaintiff proposed a standard "not so dissimilar from the effects test rejected in *Vieth*"); *Radogno II*, 2011 WL 5868225, at *2 (rejecting partisan gerrymandering claim because such claims "are currently 'unsolvable' based on the absence of any workable standard for addressing them"); *League of Women Voters v. Quinn*, No. 11-cv-5569, 2011 WL 5143044, at *1-4 (N.D. Ill. Oct. 28, 2011) (rejecting a partisan gerrymandering claim based on a First Amendment standard), *summarily aff'd*, 132 S. Ct. 2430 (2012); *Radogno I*, 2011 WL 5025251, at *6 (rejecting partisan gerrymandering claim because plaintiffs did not state "a workable standard of fairness by which to assess that claim"); *Perez v. Texas*, No. 11-CA-0360, 2011 WL 9160142, at *11 (W.D. Tex. Sept. 2, 2011) (rejecting a partisan gerrymandering claim because the plaintiffs did not "identif[y] a reliable standard by which to measure the redistricting plan's alleged burden on their representational rights"); *Henderson v. Perry*, 399 F. Supp. 2d 756, 770 (E.D. Tex. 2005) (rejecting partisan gerrymandering claim because "the plaintiffs' contentions . . . are conspicuous for want of any measure of substantive fairness"); *Pearson v. Koster*, 359 S.W.3d 35, 42 (Mo. 2012) (rejecting a partisan gerrymandering claim "[i]n light of the Supreme Court's inability to state a clear standard"); *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 390 (W. Va. 2012) (rejecting a partisan gerrymandering claim because of the lack of "any authoritative standard by which to definitively judge such matters").

B. Partisan Gerrymandering Can Be Curtailed By Allowing Citizens To Exercise Their Sovereign Power Over The Redistricting Process.

When the citizens of Arizona acted to end partisan gerrymandering in their state, they acted in a manner fully consistent with our constitutional structure, which derives its authority from "We the People." U.S. Const. pmbl.; *see also* The Declaration of Independence para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed[.]").[34] The original constitutional text included numerous structural elements to give effect to the popular will,[35] and of the seventeen amendments adopted after the Bill of Rights, twelve deal with the democratic process and the government's ongoing accountability to the People.[36] As this Court has

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[34] John Hart Ely, *Democracy and Distrust* 87 (1980) (noting that at its core, the Constitution expresses "overwhelming[] concern[] . . . with ensuring broad participation in the processes and distributions of government").

[35] *See, e.g.*, U.S. Const. art. IV, § 4 (guaranteeing states a republican form of government); art. I, § 2, cl. 3 (providing for decennial enumeration and establishing minimum population of House districts); *id.* art. 1, § 2, cl. 4 (requiring House vacancies to be filled by elections, not appointments).

[36] The Fourteenth Amendment establishes national citizenship, requires states to provide equal protection of the laws (including voting districts of equal population), and makes states' representation in Congress dependent on their granting suffrage to newly freed slaves. The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments

explained, quoting Alexander Hamilton, "[t]he true principle of a republic is, that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (quoting 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876)). Indeed, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440-41 (2014) (plurality opinion).

It would thus be perverse to interpret the term "Legislature" in the Elections Clause so as to exclude lawmaking by the People, particularly where such lawmaking is intended to secure the constitutional right guaranteed in Article I, Section 2 of the Constitution that Members of Congress actually be "chosen . . . by the People of the several States." U.S. Const. art. I, § 2. The People of Arizona have exercised their direct sovereign authority, granted to them by their own state constitution, to end the practice of partisan gerrymandering in their state for the election of members of the House of Representatives. In so doing, the People of Arizona have specifically sought to

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implement equal universal suffrage by barring voting discrimination on the basis of race, sex, wealth, or youth; providing for direct popular election of Senators; and permitting residents of the District of Columbia to participate in presidential elections. The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth amendments provide for separate elections of the President and Vice-President, limit a lame duck President's term, impose a two-term limit on the Presidency, and provide for orderly succession in times of Presidential disability. The Twenty-Seventh amendment regulates Congressional self-interest by forbidding Members from raising their own pay.

restore the Framers' vision of the House as a fluid and "changeable body"[37] by making the specter of frequent House turnover an actual possibility. The House is, of course, the governing body that was envisioned by the Framers to be most accountable to the People.[38]

The term "Legislature" in the Elections Clause should not be read so narrowly that it would forbid the use of one of a state's most basic methods of lawmaking:

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[37] *The Federalist* No. 63, at 383 (James Madison) (noting that with its potential to fully turn over every two years, the House was meant to be a "numerous and changeable body" whose membership would reflect shifting popular will). In fact, Madison sought to persuade doubters that two years was not *too long* a period for the people to wait to replace their representatives in the House. *See The Federalist* No. 52, at 327 (James Madison) ("[I]t is particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectively secured."); *The Federalist* No. 53, at 330 (James Madison) ("I shall here, perhaps, be reminded of a current observation, 'that where annual elections end, tyranny begins.'"). The Framers thought that Representatives must face the prospect of defeat frequently, lest they forget the source of their authority. *See The Federalist* No. 57, at 352 (James Madison) ("[T]he House . . . is so constituted as to support in the members an habitual recollection of their dependence on the people.").

[38] Of the various governing bodies established by the original Constitution, the House of Representatives was intended to remain most closely answerable to the People. *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 Nw. U. L. Rev. 500, 515-16 (1997) (noting that the House was "the Eighteenth Century equivalent of government by poll").

lawmaking by vote of the People to remedy fundamental structural problems with the democratic system. In engaging in sovereign lawmaking, the People of Arizona have come up with a fundamentally democratic solution to the anti-democratic nature of partisan gerrymandering, which allows self-interested state legislators to skew unfairly the outcome of elections and debases the democratic process itself by "burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

Ordinary citizens have a key role to play in addressing the serious challenge partisan gerrymandering poses to our democratic processes. The Constitution envisions that "[s]erious complex legal change is often made in the context of a national conversation involving . . . legislators, judges, and many ordinary citizens whose lives [are affected]."[39] Partisan gerrymandering warrants, if not demands, such a broad-based conversation because of its capacity to distort our democratic ideals. Some state legislators have attempted various methods of partially addressing the problem, *see Vieth*, 541 U.S. at 277 n.4 (plurality opinion) (noting that "[t]he States, of course, have taken their own steps to prevent abusive districting practices" by "adopt[ing] standards for redistricting, and measures designed to insulate the

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[39] Stephen Breyer, *Active Liberty* 70-71 (2005).

process from politics"),[40] and Justices of this Court have been engaged with this conversation for decades, *see infra* Part I.

The Elections Clause should not be used as a sword to cut ordinary citizens out of this crucial and ongoing conversation, in which citizens engage in lawmaking so as to cure structural deficiencies in our system of government. *Cf. Schuette v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623, 1650 (2014) (Breyer, J., concurring) (explaining that "the 'Constitution creates a democratic political system through which the people themselves must together find answers' to disagreements of this kind" (citation omitted)); *NLRB v. Canning*, 134 S. Ct. 2550, 2577 (2014) (noting that the "constitutional structure" "foresees resolution not only through judicial interpretation and compromise among the branches but also by the ballot box").[41]

Indeed, "[t]he essence of democracy is that the right to make law rests in the people and flows to the government, not the other way around." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2675 (2013) (Kennedy, J., dissenting). Thus, when addressing structural reform of governmental institutions of the

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[40] *See also* Brief for *Amicus Curiae* National Conference of State Legislatures in Support of Appellant at 3-13.

[41] *See also* Ely, *Democracy and Distrust*, *supra* note 32, at 76 ("[I]t is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open.").

sort at issue here, lawmaking by the People serves as a helpful reminder to legislatures that they are dutiful agents of the People, and to the People themselves of their ultimate responsibility to ensure that government is properly functioning on their behalf.

The exercise in popular sovereignty by the voters of Arizona also fully complies with federal statutory law. Congress has expressly directed that a state's redistricting process be carried out "in the manner provided by the law thereof." 2 U.S.C. § 2a(c). In placing authority for redistricting with the lawmaking processes of each state rather than with the state legislature exclusively, Congress exercised its power under the Elections Clause to direct the manner in which the election of federal representatives should take place, as was envisioned by the Clause.[42] And "there is no compelling reason not to read Elections Clause legislation simply to mean what it says." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013); *see id.* at 2253 (holding that congressional authority under the Elections Clause

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[42] Indeed, in 2 U.S.C. § 2a(c), Congress lays out the manner in which the election of federal representatives should occur in each State—at large, by districts, or by a combination thereof—and in so doing, directs that representatives should be elected in a manner "prescribed by the law of such State." 2 U.S.C. § 2a(c)(1)-(5). This is appropriate because the Elections Clause grants Congress "a general supervisory power over the whole subject" of federal elections. *Ex parte Siebold*, 100 U.S. 371, 387 (1879). By recognizing that the laws of a state are not the same as the legislature of the state, Congress has empowered the people of the state of Arizona to address excessive partisan gerrymandering.

should be broadly interpreted). The Arizona Constitution empowers the "people" to "propose laws and amendments to the constitution" by initiative and referendum. Ariz. Const. art. IV, part 1, § 1. And that is precisely what they did in this case.

Where, as here, the voters of Arizona have engaged in lawmaking as authorized under their state constitution in order to reform the redistricting process, "direct democracy is playing precisely the role that it should: . . . check[ing] dysfunctional government."[43] It is hard to identify a more appropriate "exercise of the[] [people's] democratic power" than that of "us[ing] the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters," *Schuette*, 134 S. Ct. at 1636, especially as it pertains to their concerns about the electoral process.

Finally, the exercise of direct democracy reflected in the creation of Arizona's independent commission is an important contribution to a "national dialogue," *Schuette*, 134 S. Ct. at 1630-31, between the people of the various states, operating as laboratories of democracy, regarding how best to structure the redistricting process and end partisan gerrymandering. *See United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from

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[43] Note, *Judicial Approaches to Direct Democracy*, 118 Harv. L. Rev. 2748, 2764-65 (2005).

clear.").[44] State legislators should not be allowed to close the laboratory doors to the very people who elected them, and this Court should not interpret the Elections Clause in a way that furthers the undemocratic practice of extreme partisan gerrymandering and ends this important conversation.

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[44] *See also* Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 Yale L.J. 1808, 1812 (2012) (describing the Arizona and California commissions as "the natural experiments we can learn the most from because they collectively embody elements of almost every redistricting reform idea ever proposed"). Citizens of other states have also contributed to the conversation. For example, Florida voters passed a constitutional amendment that prohibited the Florida legislature from favoring or disfavoring a political party or incumbent when drawing congressional maps. *See Brown v. Sec'y of Fla.*, 668 F.3d 1271, 1272-73 (11th Cir. 2012) (upholding the amendment and reasoning that "the Florida voters' act of lawmaking according to the state's expressly enumerated lawmaking process is fully consistent with the commands of the federal Constitution's Elections Clause"). Other states have employed redistricting commissions that vary in their independence from the legislature. For example, Idaho and Washington have each tasked politically balanced independent commissions with final authority to draw congressional districts, while Hawaii and New Jersey use commissions to draw congressional districts but allow politicians to serve on those commissions. Other states use backup commissions to draw congressional maps if legislators are unable to agree on a redistricting plan by a certain date, and still others utilize advisory commissions to assist legislators with the redistricting process. *See* Justin Levitt, *Who Draws The Lines?*, All About Redistricting, Loyola Law School, http://redistricting.lls.edu/who.php (last visited Jan. 11, 2015).

CONCLUSION

For the foregoing reasons, the judgment of the District Court for the District of Arizona should be affirmed.

Respectfully submitted,

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