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

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COLORADO GENERAL ASSEMBLY,

*Petitioner,*

v.

KEN SALAZAR, IN HIS OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF COLORADO,

*Respondent.*

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**On Petition for a Writ of Certiorari  
to the Supreme Court of Colorado**

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

1. Whether the Constitution's Elections Clause (Article I, Section 4, Clause 1), which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof," permits a State to disable the state legislature from prescribing congressional districts for an entire decade, and transfer that power to the state judiciary, unless the legislature enacts a redistricting plan within a severe, one-year time limit uniquely applicable to congressional redistricting statutes?

2. Whether the Colorado Supreme Court improperly exercised power delegated under the Elections Clause, and exceeded the inherent limits on its remedial power, by requiring that congressional elections be conducted for the remainder of the decade under a redistricting plan that disregards and conflicts with the redistricting policies and practices reflected in the legislature's 2003 redistricting statute?

**PARTIES TO THE PROCEEDING**

The parties to the proceeding below were:

The People of the State of Colorado, *ex rel.* Ken Salazar, in his official capacity as the Attorney General for the State of Colorado, as Petitioner;

Mark Udall, individually as a citizen of Colorado and in his capacity as the elected representative to the United States House of Representatives for the Second Congressional District of the State of Colorado, as Petitioner-in-Intervention;

The Board of County Commissioners of the County of Pitkin, Colorado, as Petitioner-in-Intervention;

Donetta Davidson, in her official capacity as the Secretary of State for the State of Colorado, as Respondent;

The Colorado General Assembly, the duly elected legislature for the State of Colorado, as Respondent-in-Intervention.

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## **OPINION BELOW**

The proceeding below was an original proceeding in the Supreme Court of Colorado. The majority and dissenting opinions of the Supreme Court of Colorado are reported at 79 P.3d 1221. The opinions are reprinted at pages 1a-62a of the appendix to this petition.

## **JURISDICTION**

The Supreme Court of Colorado issued its opinion on December 1, 2003, and issued its mandate on December 17, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The proceeding below was an original proceeding in the Supreme Court of Colorado. The federal questions sought to be reviewed were raised in the Colorado Secretary of State's Answer and Brief in Opposition to the Petition, dated June 16, 2003, and in the Colorado General Assembly's Brief in Opposition to the Petition, dated June 17, 2003. The federal questions were decided in the December 1, 2003 opinion of the Supreme Court of Colorado.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Elections Clause of the United States Constitution, U.S. Const. art. I, § 4, cl. 1, provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

## **STATEMENT**

Senate Bill 03-352, codified at Colo. Rev. Stat. § 2-1-101, was passed by both houses of the Colorado General Assembly, and signed by the Governor in May 2003, and reapportions the congressional districts for the State of Colorado for "the general election in 2004 and subsequent years until the congressional districts are again

reapportioned.” Colo. Rev. Stat. § 2-1-101(8). This law is the first and only congressional redistricting plan adopted by the Colorado legislature subsequent to the April 2001 reapportionment of Congress, in which Colorado’s share of Representatives increased from six to seven. Thus, there is and can be no claim in this case that Colorado’s legislative branch has redistricted more than once in a decade. Nor is there any claim in this case that § 2-1-101 violates federal law, or that its configuration of districts is contrary to any state law.

Section 2-1-101 supersedes a plan adopted by a single state trial court judge in January 2002 as a remedy for violation of the federal constitutional “one person, one vote” requirement caused by the pre-existing districting plan after the 2000 decennial census. Pet. App. 25a n.9 (citing *Avalos v. Davidson*, No. 01CV2897, 2002 WL 1895406 (Colo. Dist. Ct. Jan. 25, 2002), *aff’d sub nom. Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002)). A single state district court judge adopted a plan that the plaintiffs introduced on the last day of trial and ordered this 2002 plan into effect on January 25th of that year. *Avalos*, 2002 WL 1895406. The Supreme Court of Colorado affirmed on February 26, 2002, and issued its opinion on March 13, 2002. *Beauprez*, 42 P.3d at 645. The 2002 elections were conducted under the court-ordered plan. While acknowledging the necessity of a court-drawn plan pending legislative action, the General Assembly objected to the state court’s policy choices, which do damage to neutral redistricting criteria for the purpose of creating one so-called “competitive” district.

On May 14, 2003, five days after the Governor signed SB 03-352, the Colorado Attorney General filed an original action in the Supreme Court of Colorado against the Secretary of State, seeking an injunction against the implementation of § 2-1-101 and a writ of mandamus requiring continued use of the court-ordered plan. The Attorney General challenged the validity of § 2-1-101 solely under state law and on the sole ground that the legislature

allegedly lacked redistricting authority.<sup>1</sup> The Secretary of State opposed the petition, as did the Colorado General Assembly, which was permitted to intervene as a respondent by order dated July 3, 2003.

On December 1, 2003, the Supreme Court of Colorado issued its decision, with two justices dissenting. *Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003). On the merits, the Court held that the Colorado legislature has authority to redraw congressional districts only during an eleven-month period each decade: “Under our holding today, the General Assembly may only create a redistricting plan after the federal census (and the resulting congressional apportionment to the states) and before the ensuing general election. In this case, that would have been between April 1, 2001, when the U.S. Congress notified Colorado that it would gain an additional representative, and March 11, 2002, when the election process began.” Pet. App. 41a. Because the legislature had not acted within this narrow window, the Court held that “Senate Bill 03-352 is unconstitutional and void.” *Id.* The Court enjoined the implementation not only of § 2-1-101 but also of any other legislatively enacted redistricting plan in the 2004, 2006, 2008, and 2010 congressional elections. Instead, the Court ordered: “Until Congress apportions seats to Colorado after the next federal census, the Secretary of State is ordered to conduct congressional elections according to the plan approved in *Beauprez v. Avalos*.” *Id.*

The majority first addressed the question whether state law is limited by the federal Constitution’s Elections Clause, which requires that “[t]he Times, Places and Manner of

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<sup>1</sup> Individual voters also challenged § 2-1-101 in an action that was filed in Colorado district court and subsequently removed to federal district court. *Keller v. Davidson*, No. 03CV3452 (Colo. Dist. Ct. filed May 9, 2003); *Keller v. Davidson*, No. 03-Z-1482 (CBS) (D. Colo. filed Sept. 25, 2003). The federal court convened a three-judge panel and stayed its proceedings pending the outcome of the original proceeding in the Colorado Supreme Court.

holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof.” U.S. Const. art. I, § 4, cl. 1 (emphasis added). The majority held that there are no limits on the nature or severity of the restrictions that a state constitution may impose upon congressional redistricting by state legislatures: “Article I, Section 4, Clause 1 of the U.S. Constitution delegates congressional redistricting power to the states to carry out *as they see fit*, and not exclusively to the state legislatures.” Pet. App. 18a (emphasis added).

In re-writing the Elections Clause to authorize redistricting “by the State” instead of “by the Legislature,” the majority purported to rely upon *Smiley v. Holm*, 285 U.S. 355 (1932), and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), which held that the legislature’s actions under the Elections Clause can be made subject to the same legislative processes, including gubernatorial veto and popular referendum, that apply to all legislative enactments in the State. Under the majority’s view, these cases announced a sweeping rule: “The United States Supreme Court has interpreted the word ‘legislature’ in Article I to broadly encompass *any means permitted by state law*, and not to refer exclusively to the state legislature.” Pet. App. 17a (emphasis added). In particular, the majority concluded: “Most importantly for our purposes, the word ‘legislature,’ as used in Article I of the federal Constitution, encompasses court orders.” Pet. App. 18a. In fact, the majority held that disabling the state legislature from prescribing congressional districts is valid, “regardless of the method by which the districts are created.” Pet. App. 16a.

Having held that *any* state constitutional limit on congressional redistricting would be valid under the Elections Clause, the majority proceeded somehow to discern its drastic time limitation on congressional redistricting from a provision of the Colorado constitution that states:

The general assembly shall divide the state into as many congressional districts as there are representatives in congress apportioned to this state by the congress of the United States for the election of one representative to congress from each district. *When a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly.*

Colo. Const. art. V, § 44 (emphasis added). According to the majority, the highlighted language means that “redistricting must take place after and only after a census,” because “when the constitution specifies a timeframe for redistricting, then, *by implication*, it forbids performing that task at other times.” Pet. App. 30a (emphasis added). As the dissent observed, however, the fact that redistricting must take place “after” reapportionment “does not in any way imply the imposition of a back-end limitation upon that duty.” Pet. App. 55a (Kourlis, J., dissenting). The majority cited other state constitutions that impose a time by which redistricting steps must occur, Pet. App. 35a, but these other provisions actually contain language imposing a time period.<sup>2</sup>

Even in States with a clear time period for redistricting, no court—until the decision below—has ever held that that state law barred the legislature from redistricting at least *once* in a decade. Thus, assuming the Colorado Constitution clearly provided that “the General Assembly shall establish new congressional districts before March 11, 2002,” the majority did not explain why this bars the legislature from redistricting *for the first time* even after that date. The majority relied upon *Legislature v. Deukmejian*, 669 P.2d 17 (Cal. 1983), but that case stands for the opposite conclusion. The California Supreme Court reaffirmed the State’s once-per-decade redistricting rule (which is based on the unambiguous constitutional requirement that redistricting

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<sup>2</sup> See Cal. Const. art. XXI, § 1; Utah Const. art. IX, § 1.

occur “[i]n the year following the year in which the national census is taken,” *id.* at 24), and it struck down a plan that was adopted (by initiative) *after* the legislature already had redistricted once in the decade. *Id.* at 22. Moreover, the congressional redistricting plan *upheld* by the court had been enacted by the legislature *after* the 1982 elections were held under a court-ordered plan. *Id.*

Indeed, in *In re Senate Resolution Relating to Constitutionality of Proposed Reapportionment Bill*, 21 P. 481 (Colo. 1889), the Colorado Supreme Court itself had decided precisely this question. The state constitution then provided that “at the session next following [an] enumeration,” the legislature “shall revise and adjust the apportionment for senators and representatives on the basis of such enumeration.” 21 P. at 481. Notwithstanding the fact that the legislature had failed (due to a gubernatorial veto) to redistrict during the first session after an enumeration as the constitution expressly required, the Colorado Supreme Court held that the constitution did *not* bar the legislature from redistricting after the deadline. *Id.* The dissent below cited a series of decisions by other state courts to the same effect.<sup>3</sup> By contrast, the only cases cited by the majority are those in which the constitutional time limits were clear *and* the legislature had *already* enacted a valid redistricting plan. Pet. App. 30a-31a, 36a.

Like its analysis of the federal law issue, therefore, the majority’s analysis of the state law issue ultimately depended upon a severe mischaracterization of judicial redistricting plans. According to the majority, a plan adopted pursuant to a state *or* federal court’s remedial authority must be given precisely the same status as a *permanent* plan enacted by the legislature—not only for the one election in which a court

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<sup>3</sup> Pet. App. 55a (citing *State v. Weatherill*, 147 N.W. 105 (Minn. 1914); *Harris v. Shanahan*, 387 P.2d 771, 795 (Kan. 1963); *Selzer v. Synhorst*, 113 N.W.2d 724, 733 (Iowa 1962); *Lamson v. Sec’y of the Commonwealth*, 168 N.E.2d 480, 483 (Mass. 1960)).

remedy is necessary but also for all future elections, even if the legislature has acted and a judicial remedy plainly is *not* required. Based on this fundamental confusion between interim judicial remedies and legislative plans, the Court mischaracterized the question whether the legislature could redistrict for the *first* time in 2003 as somehow implicating the distinct issue of whether the General Assembly had authority to redraw congressional districts “two, or even ten times in a single decade.” Pet. App. 40a; *see also* Pet. App. 33a.

The majority gave short shrift to this Court’s numerous precedents concerning the strong preference for legislative over judicial redistricting. Specifically, the Colorado court reasoned that disruption of districts created by a state or federal court “triggers the same policy concerns” as disruption of a prior legislative plan. Pet. App. 41a. The court accorded *no* weight to the fact that a court plan is imposed by a court with no policy-making authority acting in an emergency, remedial situation, whereas a legislative plan is developed by elected representatives through the lawmaking process and is subject to referendum if the people disagree.<sup>4</sup> Nor did the court accord any weight to the fact that this Court, after balancing the interest in stability against the strong preference for legislative plans, has held that courts may impose remedial plans only “pending later legislative action,” *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). The state court stated instead that *Wise* and other federal cases like it are not “persuasive or even relevant to our analysis.” Pet. App. 38a. The Colorado Supreme Court’s complete disregard of the differences between legislative and judicial redistricting was fundamental to its

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<sup>4</sup> The majority failed to acknowledge that the trial court had merely adopted the plan submitted by private plaintiffs, whose narrow agenda did not reflect a state-wide balancing of political considerations. Indeed, the trial court consciously created a new, “competitive” partisan district at the expense of politically neutral redistricting criteria, without broad citizen input or any meaningful political accountability.

erroneous holding that the Elections Clause’s specific delegation to the “Legislature” authorizes *courts* to draw congressional districts for an entire decade.

The Colorado Supreme Court issued its mandate on December 17, 2003. In May 2003, several plaintiffs had filed a complaint against the Secretary of State, the General Assembly, and the Governor in the Denver County District Court, No. 03CV3452, alleging that Colo. Rev. Stat. § 2-1-101 violated Colorado state law and federal law. On September 1, 2003, the General Assembly and Governor removed the case to the United States District Court for the District of Colorado, requested a three-judge panel pursuant to 28 U.S.C. § 2284, and filed a counterclaim for declaratory relief. *Keller v. Davidson*, No. 03CV1482 (D. Colo.). The *Keller* panel stayed its hand pending the outcome of the Colorado Supreme Court’s decision in *Salazar*.

After the Colorado Supreme Court issued its decision in *Salazar*, 79 P.3d 1221, on December 1, 2003, the General Assembly and the Governor promptly moved to amend their counterclaims to include a claim that the *Salazar* court’s interpretation of Colo. Const. art. V, § 44, and its striking down of § 2-1-101 in favor of making the 2002 court-drawn plan permanent, unconstitutionally interferes with the General Assembly’s exercise of its lawmaking power under the Elections Clause, U.S. Const. art. I, § 4. The General Assembly and the Governor therefore sought from the three-judge court a declaration that Colo. Const. art. V, § 44, as interpreted by the Colorado Supreme Court, is unconstitutional, as well as an injunction against enforcement of the court-drawn congressional reapportionment plan ordered in *Salazar*, 79 P.3d at 1243, in time for the 2004 elections to take place under § 2-1-101.<sup>5</sup>

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<sup>5</sup> On December 3, 2003, four private plaintiffs filed a separate suit against the Secretary of State in federal court, challenging the decision in *Salazar*. *Lance v. Davidson*, No. 03CV2453 (D. Colo.). Various parties

The three-judge district court panel in *Keller* heard arguments on December 18, 2003, and issued its opinion on January 23, 2004. It declined to decide the case on the merits but retained jurisdiction pending a reversal or modification by this Court of the *Salazar* court's rulings on the issues of federal law. *Keller v. Davidson*, No. 03CV1482 (D. Colo. Jan. 23, 2004). Although the panel found that it had subject-matter jurisdiction over the General Assembly's original counterclaims, it stated that the court's decision in *Salazar* had precluded its adjudication of these claims. Similarly, the three-judge court refused to grant the General Assembly's motion to amend the counterclaims, finding itself barred by the *Rooker-Feldman* doctrine because these claims were not made concurrently with the litigation in the state court. *Keller*, No. 03CV1482; *see also Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16 (1923).

#### REASONS FOR GRANTING THE WRIT

The Elections Clause of the federal Constitution—Article I, Section 4, Clause 1—mandates that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof” (emphasis added). The establishment of the “Times, Places and Manner” of federal elections includes the power and duty to establish congressional districts. *See, e.g., Branch v. Smith*, 123 S. Ct. 1429, 1438, 1445 (2003); *Smiley v. Holm*, 285 U.S. 355, 365 (1932); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 569 (1916). Nevertheless, the decision below upheld continued use of congressional districts prescribed by the “Courts” of Colorado, thus permitting the Colorado Supreme Court to directly and completely usurp the authority and duty that the Elections Clause specifically places upon the Colorado

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requested that *Lance* be heard by the three-judge panel in a consolidated proceeding with *Keller*.

Legislature. The Colorado Supreme Court based this remarkable transfer of authority to itself on the wholly unsupported and illogical conclusion that “the word ‘legislature,’ as used in Article I of the federal Constitution, encompasses court orders.” Pet. App. 18a.

Specifically, the Colorado Supreme Court interpreted the state constitution both to significantly circumscribe the legislature’s specifically delegated power to engage in congressional redistricting and to authorize the court to arrogate unto itself the legislative power to prescribe the times, places and manner of federal elections. This interpretation squarely conflicts with the federal Constitution in two ways.

First, the Elections Clause prohibits Colorado from singling out properly-enacted congressional redistricting statutes for a unique disability inapplicable to any other law and, in addition, certainly proscribes a state court from dictating the manner of federal elections in a way that squarely conflicts with the manner the legislature has prescribed for those elections to occur. To be sure, the legislature may “prescribe” congressional districts only through a law enacted through the normal lawmaking process, and thus the Elections Clause does not disable a State from requiring that legislative efforts to draw congressional districts comply with the normal lawmaking process. *Smiley*, 285 U.S. at 366-73. But, particularly since the federal Constitution commands that the state legislature “*shall* prescribe” congressional districts, a State may not erect a barrier uniquely and specifically designed to prevent the legislature from fulfilling that constitutionally required duty.

Second, and even more obviously, it violates the Elections Clause for a state entity without any *legislative* power to override the state legislature’s judgment on the best “manner” to conduct federal elections. Far from simply subjecting legislative enactments concerning congressional

redistricting to the normal lawmaking process, the regime erected by the court below creates a special lawmaking process for such statutes and transfers lawmaking power in this area from the legislature to the courts.

The Colorado Supreme Court's revision of the Elections Clause to substitute the word "Court" for "Legislature" fundamentally transfers the locus of authority over congressional redistricting (and other attributes of federal elections constitutionally committed to the "Legislature") and will thus have a profound effect on an issue of national importance in a context where the Court has routinely granted review absent a split among the lower federal courts. *See infra* at 28. The decision also directly implicates the proper relationship of courts and legislatures concerning redistricting policy and the related issue of what requirements or barriers the Constitution erects to "mid-decade redistricting" by a legislature following a court-drawn plan. The issue of a state legislature's plenary power over congressional redistricting was recently presented, but not resolved, in *Branch v. Smith* and has taken on special urgency in light of the growing political and legal controversy over legislative efforts to redistrict after a remedial judicial plan is in place.

**I. THE JUDGMENT OF THE COLORADO SUPREME COURT DIRECTLY CONFLICTS WITH THE ELECTIONS CLAUSE AND WITH THIS COURT'S PRECEDENTS.**

**A. The Elections Clause Delegates the Power to Prescribe Congressional Districts Exclusively to State Legislatures, Not Courts.**

As an initial matter, it is plain that the word "Legislature" in the Elections Clause means precisely what it says. As this Court has emphasized, the term "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for purposes of interpretation. A Legislature was then the

representative body which made the laws of the people.” *Smiley*, 285 U.S. at 365 (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The representative body that makes the laws of the people is obviously the legislative branch, not the judicial branch, of state government. Thus, the word “Legislature,” which appears repeatedly in the constitutional text, was not a careless choice of words that actually was meant to convey something other than its plain meaning. To the contrary, “[t]here can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states.” *Hawke*, 253 U.S. at 228. Indeed, where the Framers intended a different meaning, such as action not by the legislatures but by “the People of the several States,” U.S. Const. art. I, § 2, “they were no less accurate in the use of apt phraseology to carry out such a purpose.” *Hawke*, 253 U.S. at 228; *see also* U.S. Const. art. II, § 2 (power to appoint inferior officers may be vested in “the Courts of Law”); *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J., dissenting) (“[T]he text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state ‘Legislature[s].’”).

Accordingly, it is the state legislature—not any other part of the State—that has the delegated power to establish the rules governing federal elections. Thus, while a State normally can organize its internal powers as it deems fit, the Elections Clause is one of the “few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of the State’s government.” *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring). Equally important, regulation of federal elections is a delegated power, not an inherent power reserved to the states under the Tenth Amendment. The “federal offices at stake ‘aris[e] from the Constitution itself.’” *Cook v. Gralike*, 531

U.S. 510, 522 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995)). That being so, such power “had to be delegated to, rather than reserved by, the states.” *Id.* (quoting *Term Limits*, 514 U.S. at 804); *see also* 1 J. Story, *Commentaries on the Constitution of the United States* § 625 (3d ed. 1858) (“It is no original prerogative of state power to appoint a representative . . .”). Since “[n]o constitutional provision gives the states authority over congressional elections, and no such authority could be reserved under the Tenth Amendment . . . the states may regulate the incidents of such elections . . . only within the exclusive delegation of power under the Elections Clause.” *Cook*, 531 U.S. at 522; *see also Term Limits*, 514 U.S. at 805.

Thus, a state’s power to regulate congressional elections is exclusively derived from the Elections Clause’s delegation, and that power is granted exclusively to state legislatures. It necessarily follows, then, that the state legislature’s exclusively delegated power and duty to regulate federal elections cannot be usurped or circumscribed by other entities of the State.

This is well illustrated by *McPherson v. Blacker*, 146 U.S. 1 (1892), in which this Court stated that delegations of authority to the “Legislature” rather than to the “State” “operat[e] as a limitation upon the state in respect of any attempt to circumscribe the legislative power.” *Id.* at 25. The *McPherson* Court construed Article II, Section 1 of the federal Constitution, which, like Article I, Section 4, delegates authority to and imposes a duty upon state legislatures with respect to the elections of federal officers. *Id.* at 25; *see also Term Limits*, 514 U.S. at 804-05 (duty under Article I, Section 4 “parallels the duty under Article II that ‘Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.’”). The Court explained that, if the Constitution had simply delegated authority to each “State,” then the authority would have been wielded by the state legislature only “in the

absence of any provision in the state constitution in that regard.” 146 U.S. at 25. By granting authority to the “Legislature” rather than the “State,” on the other hand, the federal Constitution gives “plenary power” to the state legislatures. *Id.* at 35.<sup>6</sup> “This power is conferred upon the legislatures of the states by the Constitution of the United States, and cannot be taken from them or modified . . . any more than can their power to elect Senators of the United States.” *Id.* (quoting S. Rep. No. 43-395 (1874)).

The Court’s discussion in *McPherson* accords with the longstanding view of Congress that a state constitution cannot “tie the hands” of a legislature with respect to the authority delegated and the duty imposed by Article I, Section 4. *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866). “The people [of a State] authorize a [constitutional] convention to do that [tie the hands of the legislature] where they (the people) have power; but certainly the people of Michigan had no power to enlarge or restrict the language of the Constitution of the United States.” *Id.* at 48. A duly enacted statute, rather than the state constitution, is controlling under Article I, Section 4

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<sup>6</sup> Last Term, in *Branch*, 123 S. Ct. 1429, the Court recognized that, as a matter of interpretation, employment of the word “legislature” is fraught with significance. In construing a federal statute, the plurality concluded that there is a “stark contrast” between, on the one hand, references to congressional redistricting “in the manner provided by [State] law” (as the statute currently reads), and, on the other hand, references to redistricting “by the *legislature* of [a] State” (as under predecessor statutes). *Id.* at 1442. With respect to the same statutory history, the Court in *Hildebrant* similarly relied upon the difference between “laws” and “legislature.” 241 U.S. at 568-69. In *Hildebrant*, it was argued that the referendum could not validly be used to reject congressional redistricting plans enacted by state legislatures. Rejecting that argument, the Court stated that “the prior words [referencing the ‘legislature’] were stricken out and the new words [referencing the ‘laws’ of a State] inserted for the express purpose, in so far as Congress had the power to do it, of excluding the possibility of making the contention as to referendum which is now urged.” *Id.*

because, “[w]here there is a conflict of authority between the constitution and legislature of a State in regard to fixing place of elections, the power of the legislature is paramount.” *Id.* at 46. Specifically, the Michigan Constitution could not preclude the state legislature from passing a law that validated votes cast by soldiers serving away from home. Congress accordingly resolved the contested election by seating the candidate who required the out-of-state votes in order to prevail. *Id.*

This Court has never wavered in its recognition that states may not circumscribe the legislature’s authority and duties under the federal Constitution. In *Hawke v. Smith*, 253 U.S. 221 (1920), the Court held that no effect could be given to a state constitutional provision that circumscribed the state legislature’s power to ratify amendments under Article V of the federal Constitution. Specifically, the state constitution purported to subject ratifications by the legislature to popular referenda. *Id.* at 225. While the referendum may be considered an inherent part of a state legislature’s power to *legislate* under the Elections Clause, *see Hildebrant*, 241 U.S. 565, the Court held that the referendum is *not* an inherent part of a state legislature’s power to *ratify* under Article V. Where a limitation is not an inherent part of the legislature’s power, it necessarily circumscribes that power and, therefore, cannot be imposed by the state constitution in the face of an explicit delegation to the “Legislature” by the federal Constitution. *Hawke*, 253 U.S. at 227-31. More recently, in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000), the Court remanded for clarification because there were “expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Elections Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, ‘circumscribe the legislative power.’” *Id.* at 77 (citing *McPherson*, 146 U.S. at 25); *see also Grills v. Branigin*, 284 F. Supp. 176, 180 (S.D. Ind. 1968) (three-judge court) (“Article I, Section 4, Clause 1 of the United

States Constitution clearly does not authorize defendants, as members of the Election Board of Indiana, to create congressional districts.”); *aff’d sub nom. Branigin v. Duddleston*, 391 U.S. 364 (1968).

Under these principles, it is clear that the decision below impermissibly circumscribes the legislative power by imposing a unique barrier to congressional redistricting legislation—a severe time limit inapplicable to any other legislation. As a consequence of this newly minted rule, the trial court’s plan must be used for the 2004, 2006, 2008, and 2010 elections, making it now *impossible* under state law for the state legislature to fulfill its post-2000 census redistricting obligations. This was not an inadvertent effect of the special redistricting rule retroactively imposed by the Colorado Supreme Court, but reflected the purported “policy” of “maximizing stability” by disabling the legislature from redistricting, and thus requiring use of the court-ordered plan for the entire decade.

Thus, according to the Supreme Court’s interpretation, Colorado has established a policy under which the federal and state judiciary can trump the state legislature in prescribing the times, places and manner of congressional elections. If the federal or state courts act first to enact redistricting plans, those plans remain permanently in place and immune from interference by the legislature. Indeed, the only “advantage” that the state legislature has relative to the federal or state judiciary is that it gets the “first bite at the apple” to engage in that redistricting. Any temporary inability or unwillingness to perform its mandatory duty under the Elections Clause automatically transfers the redistricting power to entities with no legislative or delegated power to engage in this task. Such direct interference with, and usurpation of, the exclusive legislative prerogative to redistrict for federal elections is a palpable violation of Article I, Section 4. Moreover, since the Elections Clause not only “invests the Legislature with a particular authority” but also “imposes upon it a corresponding *duty*,” *Smiley*, 285

U.S. at 365 (emphasis added),<sup>7</sup> the decision below “stands as an obstacle to the accomplishment . . . of the full purposes and objectives” of that Clause. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

**B. *Smiley v. Holm* Does Not Authorize Circumscribing the Legislature’s Congressional Redistricting Authority or Transferring It to the State Judiciary.**

The Colorado Supreme Court, however, ruled that the Elections Clause authorizes congressional redistricting to be done by “any means permitted by state law.” Pet. App. 17a. This conclusion obviously writes the term “Legislature” out of the Elections Clause.

Contrary to the view of the Colorado Supreme Court, *Smiley v. Holm*, 285 U.S. 355, in no way endorses this radical revision of the Constitution’s text. Rather, *Smiley* stands for the far more modest rule that the legislature may constitutionally be required to “prescribe” congressional districts through the normal lawmaking process that is required to make the legislature’s will binding in all other circumstances. In other words, the legislative power is not unduly *circumscribed* by a rule that the legislature’s effort to govern voters and candidates in federal elections will become effective only in circumstances where other laws seeking to govern citizens’ behavior become effective. This is because the legislature is *inherently* prevented from issuing binding directives on third parties unless it does so through a law. The Constitution therefore contemplates that the normal rule constraining a legislature’s ability to govern

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<sup>7</sup> *Accord Branch*, 123 S. Ct. at 1445 (redistricting is part of “the state legislature’s obligation to prescribe the ‘Times, Places and Manner’ of holding congressional elections”); *Term Limits*, 514 U.S. at 804-05 (“[T]he context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States . . . .”); *cf. id.* at 862 (Thomas, J., dissenting).

third parties—compliance with the lawmaking process—will also apply with respect to congressional redistricting statutes.

In contrast, in carrying out certain other tasks assigned by the Constitution, such as ratifying constitutional amendments or consenting to the acquisition of federal lands, a state legislature need not enact a law. *See Hawke*, 253 U.S. at 227-30; *Smiley*, 285 U.S. at 365-66 (citing Article I, §§ 3 & 8). Thus, no other state entities involved in the normal lawmaking process—such as the governor or the people acting through popular referenda—can play a part in the legislature’s performance of these duties. *Hawke*, 253 U.S. at 227-30. “Wherever the term ‘legislature’ is used in the Constitution,” therefore, “it is necessary to consider the nature of the particular action in view” to determine whether the lawmaking process is required, thus authorizing the participation of the other entities involved in that process. *Smiley*, 285 U.S. at 366.

*Smiley* simply held that, since a state legislature’s exercise of authority over the times, places and manner of congressional elections requires the state legislature to enact laws, the legislature must abide by the normal requirements of the lawmaking process. *Smiley*, 285 U.S. at 366-73; *see also Smith v. Clark*, 189 F. Supp. 2d 548, 553 (S.D. Miss. 2002) (three-judge court), *aff’d on other grounds sub nom. Branch*, 123 S. Ct. 1429; *Branigin*, 284 F. Supp. at 180. Unlike the ratification of an amendment or consent to acquisition of federal land, the creation and enforcement of a federal elections code requires legislation. *Smiley*, 285 U.S. at 366. As *Smiley* noted, prescribing rules for elections inherently entails the establishment of “a complete code” with “numerous requirements” that, to be effective, must be accompanied by “definition of offenses” and “appropriate sanctions.” *Id.*

“As the authority is conferred for the purpose of making laws for the state, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be

in accordance with the method which the state has prescribed for legislative enactments.” *Id.* at 367. For example, where a state legislature’s authority to legislate in general is subject to gubernatorial veto, “there is nothing in article I, § 4, which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power.” *Id.* at 372-73; *accord Hildebrandt*, 241 U.S. at 567 (referendum applied to congressional redistricting legislation enacted by state legislature because “provisions as to referendum were a part of the legislative power of the state”).<sup>8</sup>

The Colorado Supreme Court, therefore, impermissibly transformed the straightforward rule that a state legislature’s prescription for congressional elections is ineffective unless

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<sup>8</sup> The referendum provision at issue in *Hildebrandt* only allowed voters to approve or disapprove a law already enacted by the state legislature. 241 U.S. at 566. By comparison, Colorado’s Constitution includes a similar referendum provision, as well as an initiative provision giving the people the power “to propose laws and amendments to the constitution and to *enact* or reject the same at the polls independent of the general assembly.” Colo. Const. art. V, § 1(1) (emphasis added). However, the issue of whether initiatives may dictate congressional districts need not be resolved in this case because there has been no post-2000 voter initiative in Colorado to establish congressional districts. Similarly, in *Cook v. Gralike*, this Court declined to “delve into th[e] inquiry” of whether a regulation of congressional elections is authorized under Article I, Section 4 when adopted by popular initiative because the *substance* of the initiative was invalid in that case. 531 U.S. at 526 n.20. The Court also did not decide the issue in *Jones* because the California proposition violated the First Amendment. *See Jones*, 530 U.S. at 602 (Stevens, J., dissenting). Such initiatives are potentially distinguishable from the state constitutional provision interpreted here because they are *generally* applicable to *all* legislation, not just congressional redistricting, and constitute an exercise of legislative power by an entity, unlike the judiciary, that possesses such power under the state constitution. *See infra* at 21-23. Indeed, the Colorado Supreme Court’s assumption unto itself of the legislative power to permanently redistrict renders its court-ordered plan superior to not only subsequent *legislative* enactments, but also popularly sponsored initiatives on redistricting by the citizenry—thus ensuring that all participants in the democratic process are subordinate to judicial fiat.

it follows regular lawmaking procedure into a rule that entities *other than* the legislature may prescribe congressional districts or usurp the legislature's power to do so. This conclusion fundamentally confuses the issue of *who* may redistrict and the distinct issue of *how* they may do it. The fact that the Colorado Constitution can require the legislature to follow a lawmaking process that includes presentment to the Governor does not, of course, mean that the Colorado Constitution can anoint the Governor to draw congressional districts for the State. It would make no more sense to suggest that the President, because he can veto a bill passed by Congress under the Elections Clause, is empowered to establish the regulations himself.

But even assuming that *Smiley* stands for the broader proposition that a State may delegate legislative power over redistricting to entities the state constitution has vested with *legislative* authority, this does not support the reasoning or result of the decision below. It is clear and undisputed that the Colorado judiciary—which adopted the redistricting plan to be used for the rest of the decade—has not been delegated any *legislative* power.<sup>9</sup> Accordingly, in formulating the

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<sup>9</sup> Colo. Const. art. V, § 1 (reserving power of referendum and initiative and delegating remaining legislative power to General Assembly, not courts); *id.* art. III (stating that “no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted”); *People v. Zapotocky*, 869 P.2d 1234, 1244 (Colo. 1994) (“Courts cannot, under the pretense of deciding a case, assume power vested in either the legislative or executive branch of the government.”); *People v. Herrera*, 516 P.2d 626, 628 (Colo. 1973) (“The judiciary can no more exercise a power constitutionally conferred upon the legislature than can the executive.”); *Speer v. People*, 122 P. 768, 771-72 (Colo. 1912) (“The [legislature], by the Constitution, is invested with the power of legislation, in the exercise of which it is supreme; and no other branch of the state government can usurp this authority, or directly prevent the exercise of this power.”); *see also Springer v. Gov’t of Phil. Islands*, 277 U.S. 189, 201 (1928) (“It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly

2002 congressional redistricting plan, the Colorado courts initially did not purport to *make* state redistricting policy, but—like a federal court—merely “consider[ed] non-constitutional criteria that have been articulated by the state as important state policy.” *Beauprez*, 42 P.3d at 651 (citing *Carstens v. Lamm*, 543 F. Supp. 68, 82-83 (D. Colo. 1982)).

The Colorado Supreme Court concluded otherwise based on the truism that courts may, as a remedy, order redistricting plans if the legislature has not fulfilled its duty to create districts of sufficiently equal population under *Wesberry v. Sanders*, 376 U.S. 1 (1964). However, this wholly confuses the judicial authority to invalidate legislative redistricting plans that violate the substantive provisions of the Constitution, and to require a constitutionally sufficient substitute, with the quintessentially legislative power to establish redistricting policy in the first instance. A state court that enjoins implementation of malapportioned districts created during the prior decade, and enters a constitutionally prescribed remedy, is obviously acting pursuant to the judicial power to remedy constitutional violations, since state courts have concurrent jurisdiction with federal courts to prevent such violations of Article I, Section 2. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). In doing so, courts are not exercising any delegated legislative power under the Elections Clause. Under the reasoning of the decision below, the fact that federal courts routinely order redistricting plans in the face of legislative inaction means that those federal courts have some legislative power to dictate the times, places and manner of federal elections. Even outside the Elections Clause context, this Court has repeatedly emphasized that such judicial aggrandizement fundamentally distorts the proper relationship between the judicial and legislative

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provided or incidental to the powers conferred, . . . the judiciary cannot exercise executive or legislative power”).

branches.<sup>10</sup> For this reason, judicially ordered remedies are necessarily temporary and exist only so long as the legislature does not fulfill its duty to redistrict.<sup>11</sup>

Accordingly, the Colorado court had no power, remedial or legislative, to order its redistricting plan into place *permanently*, and to disregard the subsequent legislative enactment when the legislature in 2003 fulfilled its twin constitutional duties to “prescribe” congressional districts under the Elections Clause and create equally populated districts under Article I, Section 2.<sup>12</sup>

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<sup>10</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 586 (1964) (stating that “reapportionment is primarily a matter for legislative consideration and determination,” with judicial relief “appropriate only when a legislature fails to reapportion . . . after having had an adequate opportunity to do so”); *White v. Weiser*, 412 U.S. 783, 795 (1973) (stating that state legislatures have “primary jurisdiction” over reapportionment and that court “should not pre-empt the legislative task nor intrude upon state policy any more than necessary”) (internal citations and quotation marks omitted).

<sup>11</sup> See, e.g., *Lawyer v. Dep’t of Justice*, 521 U.S. 567, 578 n.5 (1997) (“[A federal court’s acceptance of] settlement and subsequent judgment do not, of course, prevent the state legislature from redistricting yet again.”); *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (observing the parties’ argument “that because the District Court’s plan is only an interim plan and is subject to replacement by the legislature in 1983, the injury to appellants, if any, will not be irreparable”); *Wise*, 437 U.S. at 540 (“Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the ‘unwelcome obligation’ of the federal court to devise and impose a reapportionment plan *pending later legislative action.*”) (internal citations omitted) (emphasis added)); *Conner v. Finch*, 431 U.S. 407 (1977) (implicitly assuming that the state legislature could replace a “permanent” plan imposed by a district court); *White v. Regester*, 422 U.S. 935, 935 (1975) (noting that Texas’s legislative plan “does not become effective until the 1976 elections”); *Session v. Perry*, No. 2:03-CV-354, \_\_\_ F. Supp. 2d \_\_\_, 2004 WL 42591, at \*4 (E.D. Tex. Jan. 6, 2004) (three-judge court); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 670-71 (D.S.C. 2002) (three-judge court); *Johnson v. Mortham*, 915 F. Supp. 1529, 1544 (N.D. Fla. 1995) (three-judge court).

<sup>12</sup> If the Elections Clause allows a state constitution to override regulations prescribed by the “Legislature,” it is at least necessary for the

### **C. Court-Drawn Congressional Redistricting Plans Must Adhere to Redistricting Policies Expressed in Legislative Enactments.**

For the reasons stated above, even assuming the Colorado Constitution could render the legislature’s redistricting statute ineffective as binding state law, this provides no justification for the Colorado Supreme Court’s separate decision to impose the trial court’s plan for the rest of the decade, without any regard to the legislative policies reflected in the enacted redistricting plan. Even without reference to the Elections Clause’s straightforward requirements, this Court has repeatedly held that state legislative redistricting policies, even if they have not been

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state constitution’s text to do so clearly and unequivocally. In analogous circumstances, this Court has held that a congressional provision altering traditional balances of power must be “unmistakably clear,” particularly with regard to “state decisions that go to the heart of representative government.” *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (internal citations and quotation marks omitted); *accord Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989). If permissible at all, any shift of “traditional state authority” from the legislature to the courts must be stated in the state constitution in “a clear voice,” so that the legislature can be “cognizant of the consequences” of inaction. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16-17 (1981). When the Colorado courts specifically considered the “consequences” of legislative inaction in January-March 2002, they gave no inkling that the General Assembly’s failure to enact a plan before March 11 effectively ceded redistricting power for the entire decade to the Colorado courts. *Avalos*, 2002 WL 1895406; *Beauprez*, 42 P.3d 642. And certainly no such rule is evident on the face of the Colorado Constitution, which simply requires the General Assembly to redistrict “[w]hen a new apportionment shall be made by congress.” Colo. Const. art. V, §44. This neither requires the General Assembly to act before March 11, 2002, nor suggests that the General Assembly cannot redistrict after that date if it fails to do so earlier. Even where state constitutions contain a clear time period for legislative action, *all* state courts—including the Colorado Supreme Court—had previously held that a legislature’s failure to redistrict during the prescribed period does *not* deprive it of an ability to redistrict thereafter. *See supra* 4-5; *see also Lawyer*, 521 U.S. at 577 n.4 (stating that since Florida Constitution “provides only that the state legislature is bound to redistrict within a certain time after each decennial census,” it does not suggest that legislative enactment during this time period are the “exclusive means by which redistricting can take place.”)

validly enacted under state law, must still be followed to the extent possible by courts entering redistricting plans.

In *Wise v. Lipscomb*, 437 U.S. 535 (1978), the Court held that a legislature’s plan, rather than a court-drawn plan, must be used *even if* the state constitution or city charter does not authorize redistricting by the legislature, so long as the plan is adopted through “a legislative Act of reapportionment performed in accordance with the political processes of the community in question.” *Id.* at 545. In *Wise*, the invalid at-large system was established by charter, which the city council had no power to amend. *Id.* at 544. Nevertheless, because the City Council reapportioned itself by “exercis[ing] its legislative powers as Dallas’ governing body,” *id.*, the Court required that the plan be accepted. In an opinion for two Justices announcing the Court’s judgment, Justice White contrasted the case with *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), in which the police jury and school boards carried out “the mere act of submitting a plan” and “did not purport to reapportion themselves” by legislative enactment. 437 U.S. at 545. As Justice Powell stated in a concurring opinion for four other Justices, the “rule of deference to local legislative judgments remains in force even if . . . our examination of state law suggests that the local body lacks authority to reapportion itself.” *Id.* at 548.<sup>13</sup> Justice Powell cited *Burns v. Richardson*, 384 U.S. 73 (1966), in which the Court accepted that the legislature did not have “authority under state law to adopt an interim apportionment plan,” *id.* at 78 n.5, but the Hawaii legislature nevertheless had enacted

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<sup>13</sup> With respect to the interim nature of court-drawn plans, the Colorado court incorrectly stated that the statement in *Wise* did not have the support of a majority and is contrary to *Connor v. Coleman*, 425 U.S. 675 (1976). In fact, a total of six Justices in *Wise* agreed with the portion of the opinion stating that a court can “devise and impose a plan *pending later legislative action*,” 437 U.S. at 540 (emphasis added), and the Court in *Connor* cited this passage to confirm that “[i]f upheld, [a] statutory plan would supersede any court-ordered one.” *Connor v. Coleman*, 440 U.S. 612 (1979).

such a plan, *id.* at 81, and the Court held that the “*only* question” in those circumstances is whether the plan “falls short of federal constitutional standards.” *Id.* at 85-86 (emphasis added).

Indeed, a court must implement all non-defective portions of a legislative plan even if the plan as a whole is null and void under *federal* law. In *White v. Weiser*, 412 U.S. 783, 795 (1973), although the district court had properly found that the Legislature’s plan violated equal population requirements of the federal Constitution, it erred by adopting a remedial plan that did not “most clearly approximat[e] the reapportionment plan of the state legislature, while satisfying constitutional requirements.” *Id.* at 796. In *Upham v. Seamon*, 456 U.S. 37, 43 (1982), the Court summarily reversed the lower court for violating the principles set forth in *Weiser*. *Id.* at 41. There, the Texas legislature passed a congressional redistricting plan and the Justice Department objected under Section 5 of the Voting Rights Act to two congressional districts in south Texas. *See id.* at 40-41. The court devised an interim plan that not only cured the Section 5 violation in south Texas, but also redrew districts in Dallas County. *Id.* The court reasoned that, after the Section 5 objection, the enacted plan was a “nullity” and that the court, unlike a legislature, could not consider the “innumerable political factors” that could influence the legislative plan. *Id.* at 39.<sup>14</sup> This Court reversed, reaffirming that “the district court’s modifications of the state plan are limited to those *necessary* to cure any constitutional or statutory defect.” *Id.* at 43 (emphasis added). Thus, the Court held in *Upham* that “in the absence of a finding that [particular districts] offended either the Constitution or the Voting Rights Act,

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<sup>14</sup> In that regard, it is noteworthy that the Section 5 objection “went to the entire plan” and that the Attorney General had subsequently “refused the State’s request that the objection be severed and addressed to only a portion of [the enacted legislative plan].” 456 U.S. at 38 n.1.

the District Court was not free . . . to disregard the political program of the Texas State Legislature.” *Id.*

*Upham* is especially significant because, unlike a redistricting statute that becomes law and is subsequently held invalid, a “new reapportionment plan enacted by a State . . . will not be considered ‘effective as law,’ until it has been submitted and has received clearance under § 5.” *Wise*, 437 U.S. at 542 (internal citation omitted). Accordingly, “a State is not ‘redistricted’ until the apportionment plan has been cleared under § 5 of the Voting Rights Act.” *Branch*, 123 S. Ct. at 1461 (O’Connor, J., dissenting). *Upham* shows that an unprecleared plan nevertheless must be implemented to the extent it does not violate the substantive standards of federal law. *A fortiori*, the Colorado Supreme Court erred when it supplanted the plan enacted by the Colorado legislature, regardless of the redistricting law’s validity under the state constitution.

Particularly in the congressional redistricting context, these principles fully apply to state courts because, as noted, state courts, like federal courts, have not been delegated any legislative policymaking authority to prescribe the manner of federal elections, but only the concurrent remedial authority to enforce one-person-one-vote requirements. (And, as noted, the Colorado Constitution does not provide the state judiciary with any legislative authority, and certainly not legislative authority *superior* to the legislature’s.) Indeed, when *entering* the congressional redistricting plan in 2002, the court below itself recognized that the requirement of deference to legislatively enacted plans applies to state courts. *Beauprez*, 42 P.3d at 652 (quoting *Upham*, 456 U.S. at 41); *see also Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002); *Terrazas v. Ramirez*, 829 S.W.2d 712, 720 (Tex. 1991); *Hellar v. Cenarrusa*, 682 P.2d 524, 529 (Idaho 1984).

Last Term in *Branch v. Smith*, this Court confirmed that the deference to legislative plans for congressional districts,

required by *Weiser* and similar cases, applies equally to state and federal courts. The Court held that the single-member congressional district mandate of 2 U.S.C. § 2c “applies equally to courts remedying a state legislature’s failure to redistrict constitutionally.” 123 S. Ct. at 1441. And “when a court, *state or federal*, redistricts pursuant to § 2c, it necessarily does so ‘in the manner provided by [state] law.’ It *must follow* the ‘policies and preferences of the State, as expressed in statutory and constitutional provisions *or in the reapportionment plans proposed by the state legislature,*’ except, of course, when ‘adherence to state policy . . . detract[s] from the requirements of the Federal Constitution.’” *Id.* at 1442 (quoting *Weiser*, 412 U.S. at 795) (emphasis added). Thus, Congress, in exercising its Elections Clause authority under § 2c, has also required that state courts adhere to state legislative policy.

Under these precedents, the court below had no justification for imposing its own plan for the 2004, 2006, 2008, and 2010 elections, rather than the plan enacted by the Colorado Legislature, regardless of whether the state constitution can and does render the legislature’s plan invalid as a state law.

## **II. THE POWER OF STATE LEGISLATURES UNDER THE ELECTIONS CLAUSE IS AN EXTREMELY IMPORTANT ISSUE.**

The primary question of federal law in this case—the meaning of the word “Legislature” in the Elections Clause—is of utmost national importance. The election of Representatives and Senators is the cornerstone of republican government, and, accordingly, the Framers recognized that control over the “Time, Place and Manner” of those elections is an immensely important power. Moreover, construction of the word “Legislature” in the Elections Clause necessarily affects the construction of the same term in the analogous provision for presidential elections. Accordingly, this case raises fundamental questions regarding the locus of power

over *all* federal elections. This Court routinely reviews decisions going to issues of power over federal elections, even if there is no split among the lower federal courts on the issue. *See, e.g., Term Limits*, 514 U.S. 779; *Cook v. Gralike*, 531 U.S. 510; *Foster v. Love*, 522 U.S. 67 (1997); *see also Jones*, 530 U.S. at 601 (Stevens, J., dissenting) (stating, with respect to interpretation of word “Legislature” in Elections Clause, that “the importance of the point merits further attention”). The particular importance of *redistricting* controversies, moreover, is established by the fact that lower court resolution of constitutional redistricting issues is one of the very rare classes of cases subject to *direct* appeal to this Court. 28 U.S.C. §§ 1253 & 2284. This reflects both the national importance of such controversies and Congress’s desire to have this Court ensure that uniform rules govern such cases. *See Perez v. Ledesma*, 401 U.S. 82, 128 n.18 (1971); S. Rep. No. 94-204, at 9 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988, 1996.

More specifically, the decision below raises an issue directly analogous to the question left unresolved last Term in *Branch v. Smith*: whether there is any source of authority for state court involvement in congressional redistricting apart from the authority to remedy violations of federal law. In *Branch*, the three-judge district court held that the Elections Clause deprives the Mississippi chancery courts of authority to fashion a congressional redistricting plan, even absent legislative action after a census to create equally populated districts. *Smith*, 189 F. Supp. 2d 548 (three-judge court).<sup>15</sup> This Court did not reach the issue in *Branch* only

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<sup>15</sup> Since the lower court in *Branch* found that state courts were precluded from imposing plans even in the face of legislative *inaction*, however, it endorsed an interpretation of the Elections Clause’s preclusive effect that is potentially broader than that presented here. In this case, there is no claim that the Colorado courts were without authority to impose a remedial plan for the 2002 elections, in order to avoid malapportioned districts, *before* the legislature enacted a valid redistricting statute. Rather, the Colorado Supreme Court erred by

because a narrower ground supported the district court's injunction against the state court's remedial plan; *i.e.*, that Section 5 of the Voting Rights Act precluded the state court's plan from taking effect. 123 S. Ct. at 1437.

The guidance that was not forthcoming in *Branch* concerning the plenary power of state legislatures to craft congressional redistricting plans is now more urgently needed because of recent controversies concerning a state legislature's ability to redistrict after a court-ordered plan is in place. In *Jackson v. Perry*, a stay application was recently filed, arguing that the federal Constitution *requires* that a court-drawn remedial plan supplant the legislature's later enacted legislative plan for the remainder of the decade. Significantly, this Court denied the motion to stay, allowing the legislature's plan to remain in place. No. 3A581 (S. Ct. Jan. 16, 2004). The instant case, in contrast, involves the question whether federal law *permits* a court-drawn remedial plan to supplant a later-enacted legislative plan for the remainder of the decade.<sup>16</sup>

These cases have engendered national attention and spirited public debate on the issue of "mid-decade redistricting." *See, e.g.*, Editorial, *Once is Enough*, *The Washington Post*, Dec. 3, 2003, at A28. Moreover, according to the *Jackson* application, mid-decade redistricting is fast becoming "the norm," as "Illinois and Oklahoma are already plotting to emulate the Texas Republicans' strategy of altering congressional lines used in a prior election." *See Jackson v. Perry*, No. 3A581, Application for a Stay or Injunction Pending Appeal at 18 (S. Ct. Jan. 9, 2004). The Court should provide precise guidance on this continuing redistricting controversy.

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holding that the court plan *trumps* the legislature's plan for the remainder of the decade.

<sup>16</sup> Section 2-1-101 is the *only* redistricting plan prescribed by the Colorado legislature. This case therefore does not present the issue of whether a state legislature may redistrict *multiple* times in a decade.

Finally, this case presents the recurring issue of the proper relationship of courts and the legislature in establishing redistricting policies,<sup>17</sup> in the unusual context where “the distribution of powers among the branches of a State’s government raises [a] question[ ] of federal constitutional law.” *Bush v. Gore*, 531 U.S. at 112 (Rehnquist, C.J., concurring). Five justices of the Colorado court have decreed that there can be *no* legislative enactments on congressional districting until the year 2012. Instead, the people of Colorado will elect their Representatives to Congress under a court-drawn plan that reflects innumerable policy choices that were advocated by a handful of private plaintiffs, adopted by a single district judge, and reviewed by the Colorado Supreme Court under a lenient abuse of discretion standard. The court’s decision thus assures that the people of Colorado are utterly powerless to overturn a lone judge’s policy preferences for the next eight years, even if that were to become the single highest priority of the polity. And the only proffered basis for this starkly countermajoritarian result is the newfound “prohibition” against legislative enactment of a redistricting plan after March 11, 2002, based on constitutional language that says no such thing. Where it concerns the elections of Representatives to Congress, and where the sole source of authority over those elections is the federal Constitution, a state court’s usurpation of power from the people and their representatives is an important federal issue warranting corrective action by this Court.

### CONCLUSION

The petition for a writ of certiorari should be granted.

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<sup>17</sup> See *Grove v. Emison*, 507 U.S. 25 (1993); see also *Branch*, 123 S. Ct. 1429; *Upham*, 456 U.S. 37; *Wise*, 437 U.S. 535; *Weiser*, 412 U.S. 783.

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