NO. 13-1314

In the
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

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

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Do the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts?

2. Does the Arizona Legislature have standing to bring this suit?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, appellees include Colleen Mathis, Linda J. McNulty, Cid R. Kallen, Scott D. Freeman, and Richard Stertz in their official capacities as members of the Arizona Independent Redistricting Commission, and Ken Bennett in his official capacity as Secretary of State of Arizona.

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OPINION BELOW

The district court's opinion is reported at 997 F. Supp. 2d 1047 and reproduced at Pet.App.2-23.

JURISDICTION

This is an appeal from the judgment of a three-judge district court convened under 28 U.S.C. §2284(a). The district court issued its decision on February 21, 2014. Appellant filed a timely jurisdictional statement on April 28, 2014. On October 2, 2014, this Court postponed further consideration of jurisdiction to a hearing on the merits. This Court has jurisdiction under 28 U.S.C. §1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Elections Clause of the United States Constitution 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 chusing Senators." U.S. Const. art. I, §4, cl. 1.

Section 2a of Title 2 of the United States Code is reproduced in the addendum to this brief.

Relevant provisions of the Arizona Constitution are also reproduced in the addendum to this brief.

STATEMENT OF THE CASE

The Elections Clause of the U.S. Constitution delegates the task of "prescrib[ing] … Regulations" concerning the times, places, and manner of congressional elections in each State to "the Legislature thereof." And for nearly ninety years, consistent with this explicit conferral of authority, the Arizona State Legislature adopted Arizona's congressional districts subject to the normal constraints on the ordinary legislative process, including the possibility of a gubernatorial veto. That all changed in 2000 when voters approved an amendment to the Arizona Constitution completely removing the redistricting power from the Legislature and putting it in the hands of the Arizona Independent Redistricting Commission (IRC). Five unelected individuals with ten-year terms now formulate, adopt, and certify Arizona's congressional districts wholly outside the ordinary legislative process. By design, the Legislature plays no role in prescribing congressional districts and cannot pass any law modifying or overriding the IRC's maps. In short, the Legislature has been completely divested of its redistricting power despite Article I's straightforward delegation of that power to "the Legislature" of each State.

Following completion of the most recent IRC-formulated districting maps, the Legislature voted to file suit, alleging that the wholesale removal of its redistricting authority and the use of IRC-drawn maps violates the Elections Clause. A divided three-judge district court rejected that challenge by construing the Constitution's express delegation to "the Legislature"

to permit States to delegate that power to another entity and to divest the Legislature entirely of the authority to prescribe congressional districts. The Legislature appealed to this Court, which postponed jurisdiction to a hearing on the merits of whether the Elections Clause and 2 U.S.C. §2a(c) permit Arizona's use of the IRC to adopt congressional districts. The Court also asked whether the Legislature has standing to bring this suit.

A. The Arizona Independent Redistricting Commission

From the first year of Arizona's statehood in 1912 until 2000, the Arizona State Legislature adopted Arizona's congressional districts, consistent with the practice in almost every other State. Pet.App.3. During that period, the Legislature drafted, debated, and passed redistricting measures as it would any other law. Redistricting measures were introduced as proposed legislation, then referred to a bipartisan joint committee on redistricting, which would review, debate, and recommend amendments. The proposed legislation, along with any recommended committee amendments, was then recommended to the body as a whole, which had the power to approve the recommendations of the joint committee or to make changes. The legislation was then read on three separate days on the floor and voted on by the body. After approval, it was sent to the Governor. The Governor could veto the legislation, but the Legislature could override the Governor's veto upon two-thirds vote by each chamber. Pet.App.3, 41; Ariz. Const. art. V, §7.

Like any other legislation, redistricting measures occasionally triggered these checks and balances. For example, in 1981 the Governor vetoed a legislative effort to redraw congressional district lines, and the Legislature overrode the Governor's veto. Pet.App.42; *Goddard v. Babbitt*, 536 F. Supp. 538, 541 (D. Ariz. 1982).

In 2000, a citizen group placed an initiative measure on the ballot designed to change all of this. J.A.17. In its application to the Secretary of State, the group explained that it sought to amend the Arizona state constitution to "create a new 'citizens' independent redistricting commission.'" *Id.* The amendment would "take[] the redistricting power away from the Arizona Legislature" and give it to the commission, which would "draw new legislative and congressional district boundaries after each U.S. Census." J.A.17-18. The Arizona Secretary of State designated the proposal Proposition 106. J.A.18. The official ballot explained that voting for Proposition 106 meant "removing redistricting authority from the Arizona Legislature." J.A.80. The measure passed with 56% of the votes cast. J.A.18.

The Arizona Independent Redistricting Commission (IRC) convenes at the beginning of every year ending in the number one (*e.g.*, 2001, 2011, etc.). Ariz. Const. art. IV, pt. 2, §1(3). It consists of five members chosen every ten years via a multi-step process. *Id.* First, the state Commission on Appellate Court Appointments establishes a pool of 25 candidates—ten from each of the two largest political parties in the State, and five not registered with either

of those parties. *Id.* §1(5).[1] Second, the highest-ranking officer and minority leader of each chamber of the Legislature each choose one member from that pool. *Id.* §1(6). Those four appointees then select, by majority vote, a fifth member from the pool to serve as chair. *Id.* §1(8). The fifth member cannot be registered with any party already represented on the commission, *id.*, and no more than two members of the commission may be members of the same political party, *id.* §1(3).[2] Members of the Legislature and any other holder of or candidate for public office (except school board) in the preceding three years are barred from serving on the IRC. *Id.* §1(3),(13).

Once appointed, IRC members can be removed only for gross misconduct, substantial neglect of duty, or inability to discharge the duties of the office, and only by the Governor with concurrence of two-thirds of the Senate. *Id.* §1(10). Each member's term runs until appointment of the next commission's first member—approximately ten years, ordinarily. *Id.* §1(23). The IRC's sole function is to undertake redistricting; it "shall establish congressional and legislative districts." *Id.* §1(14). The proposition directs the IRC

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[1] The Commission on Appellate Court Appointments consists of the chief justice of the Arizona Supreme Court, five appointed attorneys, and ten appointed non-attorney members. Ariz. Const. art. VI, §36. It is located within the Judicial Branch. *Id.* Before its IRC-related duties were added, the Commission's "single function" was reviewing and nominating candidates for appointment to the Arizona appellate courts. *Citizens Clean Elections Comm'n v. Myers*, 1 P.3d 706, 712 (Ariz. 2000).

[2] In practice, therefore, the selection criteria effectively guarantee that the IRC will be comprised of two Democrats, two Republicans, and one "independent" who serves as chair.

to create Arizona's congressional district map based on a list of factors that include compliance with the U.S. Constitution and Voting Rights Act; equal population; geographic compactness and contiguity; respect for "communities of interest"; use of geographic features and city and county boundaries; and the favoring of "competitive districts." *Id.* After a minimum 30-day public comment period on a draft map, the IRC "shall" establish "final district boundaries" and "shall" certify the final maps to the Secretary of State. *Id.* §1(16)-(17). Once the IRC completes redistricting, it "shall not meet" except to "revise districts if required by court decisions" or if the number of districts changes. *Id.* §1(23). The provisions governing the IRC's redistricting process are "self-executing," *id.* §1(17), meaning that they "operate … without the necessity of further legislative action," *Miller v. Wilson*, 129 P.2d 668, 670 (Ariz. 1942).

During the public comment period, either or both chambers of the Legislature may "make recommendations to" the IRC, and those recommendations "shall be considered" by the IRC. Ariz. Const. art. IV, pt. 2, §1(16). But the recommendations are not binding, and the IRC is under no obligation to do anything more than "consider[]" them. Members of the public may also make recommendations regarding the draft maps. *Id.* But as with the Legislature's recommendations, the IRC has no obligation to make any changes in response.

The Legislature has no other role in the redistricting process. Indeed, the Legislature may not

enact legislation modifying or overriding congressional districts adopted and certified by the IRC, and the Legislature may not enact any measure that eliminates or adversely affects the provisions establishing and authorizing the use of the IRC, or that diverts funds away from the IRC. *See id.* art. IV, pt. 1, §1(6)(B)-(D); *id.* §1(14). On the contrary, the Legislature must make "necessary appropriations" for the IRC's work. *Id.* art. IV, pt. 2, §1(18). Furthermore, unlike congressional districts previously adopted by the Legislature, IRC-created congressional districts may not be vetoed by the Governor, nor rejected by Arizona voters via popular referendum. *See id.* §1(16)-(17) (IRC alone establishes "final district boundaries" and certifies them directly to Secretary of State); *id.* art. IV, pt. 1, §1(1),(3)-(4) ("[r]eferendum power" extends only to measures "enacted by the legislature"). The IRC's maps are, of course, subject to judicial challenges and have engendered considerable litigation. *See, e.g.*, *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014), *appeal docketed*, No. 14-232 (U.S. Aug. 28, 2014); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676 (Ariz. 2009) (en banc); *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887 (D. Ariz. 2005); *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002).

B. Proceedings Below

On January 17, 2012, the IRC approved final congressional redistricting maps and certified them to the Secretary of State. The IRC's maps will thus be used in congressional elections until a new IRC convenes in 2021. Pet.App.4. Subsequently, each chamber of the Legislature voted to authorize the filing of suit in order to "defend [its] authority … related to redistricting" under the U.S. Constitution. J.A.26-27 (Senate authorization); J.A.46 (House authorization). On June 6, 2012, the Legislature filed suit in the United States District Court for the District of Arizona. Pet.App.4. The Legislature sought a declaration that the removal of its redistricting authority violates the Elections Clause, a declaration that the IRC's congressional maps are unconstitutional and void, and an injunction barring the adoption, implementation, or enforcement of any congressional maps created by the IRC, including the current maps. Pet.App.4; J.A.21-23. The Legislature did not advance any claim based on 2 U.S.C. §2a(c). Pursuant to 28 U.S.C. §2284(a), a three-judge court was convened to consider the Legislature's challenge.

In a divided decision, the court granted the IRC's motion to dismiss for failure to state a claim. The majority acknowledged at the outset that Proposition 106 "removed congressional redistricting authority from the Legislature" and "vested that authority in" the IRC. Pet.App.3. It ruled first that the Legislature has standing to bring suit because Proposition 106 "resulted in the Legislature losing its authority to draw congressional districts," and that "loss of redistricting power constitutes a concrete injury," not

just an "'abstract dilution of institutional legislative power.'" Pet.App.5-6 (quoting *Raines v. Byrd*, 521 U.S. 811, 826 (1997)).

On the merits, the majority held that Arizona's use of the IRC to adopt congressional districts does not violate the Elections Clause. Citing *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932), the majority asserted that this Court has "twice rejected the notion that when it comes to congressional redistricting the Elections Clause vests only in the legislature responsibilities relating to redistricting." Pet.App.10. Those cases, the majority believed, "demonstrate that the word 'Legislature' in the Elections Clause refers to the legislative process used in that state, determined by that state's own constitution and laws." Pet.App.15. Thus the "relevant inquiry is not whether Arizona has uniquely conferred its legislative power in representative bodies" but "whether the redistricting process it has designated results from the appropriate exercise of state law." Pet.App.17; *see also* Pet.App.18 (stating that the "relevant inquiry is not what role, *if any*, the state legislature plays in redistricting, but rather whether the state has appropriately exercised its authority in providing for that redistricting" (emphasis added)). The majority held that the Elections Clause "does not prohibit a state from vesting the power to conduct congressional districting elsewhere within its legislative powers." Pet.App.19. Because "[i]n Arizona the lawmaking power plainly includes the power to enact laws through initiative," it concluded, the Elections Clause permits the establishment and use of the IRC. *Id.*

Judge Rosenblatt dissented in part. Pet.App.20-23. He agreed that the Legislature has standing but, on the merits, disagreed that the complete divestment of the Legislature's redistricting authority is consistent with the Elections Clause. Pet.App.20. He observed that *Hildebrant* and *Smiley* involved "situations in which the state legislature participated in the redistricting decision-making process in some very significant and meaningful capacity." Pet.App.22. By contrast, Proposition 106's "acknowledged and undisputed purpose was to supplant [the Legislature's] constitutionally delegated authority to redistrict by establishing the IRC as Arizona's sole redistricting authority." *Id.* As a result, Judge Rosenblatt observed, the Legislature lacks "any outcome-defining effect on the congressional redistricting process." Pet.App.23. That result, he concluded, "is repugnant to the Elections Clause's grant of legislative authority." *Id.*

The Legislature appealed to this Court. In its motion to dismiss or affirm, the IRC abandoned its contention that the Legislature lacks standing to bring this case. *See* Reply Br. for Appellant 10 n.4, No. 13-1314 (U.S. July 14, 2014). On October 2, 2014, the Court postponed further consideration of the question of jurisdiction to a hearing of this case on the merits. 135 S. Ct. 46 (2014). The Court phrased the question presented on the merits as whether "the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts." *Id.* The Court also asked whether the Legislature has standing to bring this case. *Id.*

SUMMARY OF ARGUMENT

The Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) do not permit Arizona's use of the IRC to adopt congressional districts, and the Legislature has standing to bring this suit.

I. The Legislature readily meets the irreducible constitutional minimum of Article III standing. The Elections Clause explicitly vests the authority to "prescribe[] … Regulations" concerning the times, places, and manner of congressional elections in each State to "the Legislature thereof." Here, the Legislature has been completely deprived of that power, which is now in the hands of the IRC. The divestment of the Legislature's constitutionally-conferred redistricting authority clearly constitutes an actual, concrete, and particularized injury to the Legislature. The Legislature's injury is directly traceable to the IRC's usurpation of the Legislature's redistricting authority, and a favorable decision by this Court will plainly redress the Legislature's injury by restoring its constitutional authority.

States and other State-level entities routinely seek redress in federal court when deprived of rights or powers conferred or protected by the federal Constitution. There is no reason to treat a state legislature differently when it has been deprived of a power specifically conferred upon it by the federal Constitution. That is especially so when, as here, the unconstitutional usurpation is worked by an initiative, rather than through the ordinary legislative process. Whatever issues might be implicated by a scenario where a legislative party complains of a "self-

inflicted wound," here there is no possibility of repeal or resort to political remedies to redress the injury worked by Proposition 106 and the IRC-drawn maps. The Legislature's injury was not caused by the Legislature, and it cannot be remedied by the Legislature. Recourse in the federal courts is both permissible and appropriate.

II. The Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) do not permit Arizona's use of the IRC to adopt congressional districts. The Elections Clause expressly delegates the power to "prescribe[] … Regulations" concerning congressional districts to one specific entity: "the Legislature" of a State. The term "the Legislature" is clear and explicit and has an unambiguous meaning repeatedly recognized by the Framers and this Court: the representative lawmaking body of a State. In the Constitution, the Framers carefully assigned particular obligations to particular State-level entities, whether the "people," the "legislature," the "executive," or the "State" generally. That precise division of labor leaves no doubt that they intended that "the Legislature"—meaning the representative lawmaking body—be the entity that "prescribe[s] … Regulations" governing redistricting.

The Framers' delegation of State-level authority over congressional elections, including redistricting, to "the Legislature" is consistent with the Framers' relative confidence in republican democracy—*i.e.*, government through elected representatives—over other forms of government. It is consistent with their concern that giving States unbridled control of federal elections could eradicate the nascent federal

government. And it is consistent with the Framers' assurance that reserving a residual backstop role for Congress would not threaten the States, because both the entity primarily tasked with prescribing congressional election regulations and the Congress were both representative legislatures.

Given the plain text and history of the Elections Clause, Arizona's use of the IRC to adopt congressional districts cannot stand. By design, the Legislature has been completely divested of all authority to prescribe congressional districts; that power has been wholly transferred to the IRC, which is not and cannot claim to be the state legislature. The Legislature cannot modify or reject the IRC's districting maps; nor, for that matter, can the Governor or the people directly. The Legislature cannot pass any law repealing the creation and use of the IRC or interfering with its purpose. The complete exclusion of the representative lawmaking body in Arizona simply cannot be squared with the command of the Elections Clause that the times, places, and manner of congressional elections be "prescribed in each State by the Legislature thereof."

No decision of this Court, moreover, supports that unprecedented result. *Hildebrant* and *Smiley*, on which the district court heavily relied, are easily distinguishable. Both decisions expressly contemplate a continuing major role for the state legislature in prescribing congressional districts and did not address situations where, as here, the Legislature was completely cut out of the process. Even more significant, those cases simply rejected the rather bold assertion that the Elections Clause trumps a State's

ordinary legislative process, such that generally applicable constraints on a state legislature's lawmaking power (*e.g.*, a veto via gubernatorial action or referendum) are inapplicable to congressional redistricting. The Court's rejection of that sweeping proposition in no way suggests that States may cut out their legislatures altogether in an effort to take the politics out of redistricting. Unlike the laws at issue in *Hildebrant* and *Smiley*, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). It is an unabashed effort to divest the redistricting authority from the Legislature in clear contravention of the Elections Clause.

Finally, 2 U.S.C. §2a(c) does not somehow authorize Arizona's use of the IRC to adopt congressional districts. Indeed, 2 U.S.C. §2a(c) has no relevance here. On its face, the statute addresses only the default rules when the state redistricting process is deadlocked in the wake of a decennial census. Moreover, because much of 2 U.S.C. §2(a)(c) sets forth default rules that are wholly incompatible with one-person-one-vote principles, the Court has construed 2 U.S.C. §2a(c) so that it applies only in the narrowest of circumstances: when neither a state legislature, nor a state court, nor a federal court has developed a redistricting plan before a congressional election. There is absolutely no basis for arguing that this largely obsolete provision authorizes States to do anything in particular, let alone to vest the authority for prescribing election regulations in an entity other than the one specified in the Elections Clause. Any such construction would raise grave constitutional difficulties that this Court is duty bound to avoid engendering.

ARGUMENT

I. The Legislature Has Standing To Challenge The Complete Divestment Of Its Redistricting Authority.

A. The Legislature Satisfies the Three Requirements of Standing.

The requirements of Article III standing are by now well-established. The plaintiff must allege "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The Legislature readily satisfies all three prerequisites.[3]

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[3] The IRC did not challenge the Legislature's standing until some 18 months into the case, after it had filed several other dispositive motions, and it then abandoned its standing argument in its motion to dismiss or affirm before this Court. This Court has "an independent obligation to assure [itself] that jurisdiction is proper," *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008), but the fact that a standing challenge did not occur to the IRC until 18 months into the litigation and was then abandoned underscores that the Legislature straightforwardly satisfies the requirements for Article III standing. And to the extent the IRC would attempt to inject considerations of prudential standing into the case at this late juncture, the IRC's tardiness and abandonment would be fatal. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-87 & 1387 nn.3-4 (2014) (noting that prudential standing does not implicate subject-matter jurisdiction); *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417-18 (5th Cir. 2012) (holding that prudential standing argument was waived).

The Legislature has plainly suffered an injury in fact in the form of a direct usurpation of its constitutionally-conferred authority to adopt congressional districts. The Elections Clause explicitly vests redistricting authority in state legislatures: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*." U.S. Const. art. I, §4 (emphasis added). Since the Founding, state legislatures have undertaken this critical duty as part and parcel of their "authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Indeed, this Court has repeatedly recognized that the "primary responsibility" for redistricting "rests with the legislature itself." *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964); *see also White v. Weiser*, 412 U.S. 783, 794-95 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment."); pp. 51-53, *infra*.

But in Arizona, the Legislature has been entirely divested of all authority to perform this "most significant act[]." *League of United Latin Amer. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (plurality). Instead of the Legislature, the IRC "shall establish congressional and legislative districts." Ariz. Const. art. IV, pt. 2, §1(14). The complete deprivation of the Legislature's power to undertake that critical function conferred on it by the Elections Clause clearly constitutes an "'actual or imminent'" injury. *Driehaus*, 134 S. Ct. at 2341 (quoting *Lujan*, 504 U.S. at 560).

Moreover, the Legislature's injury is "concrete and particularized." *Id.* The Elections Clause plainly grants the Legislature the authority to "prescribe[] … Regulations" for congressional elections, and Proposition 106 and the IRC-promulgated maps just as plainly take it away. This is far from the "undifferentiated, generalized grievance" of other plaintiffs who have waged unsuccessful challenges about the meaning of the Elections Clause. *See Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam) (ordering dismissal of Elections Clause challenge brought by four voters alleging "that the law … has not been followed"). Because the Constitution vests congressional redistricting authority in the Legislature itself, the Legislature seeks much more than a generic ruling that the Elections Clause "has not been followed." *Id.* The Legislature seeks the return of *its* constitutionally-conferred redistricting authority.

The Legislature likewise amply satisfies the Article III requirements of traceability and redressability. Indeed, the IRC has never suggested otherwise. The "causal connection" between the Legislature's loss of redistricting authority and the use of the IRC is unmistakable. *Lujan*, 504 U.S. at 560; *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997) (injury must be "'fairly traceable' to the actions of the defendant" (quoting *Lujan*, 504 U.S. at 560)). The IRC exists for one, and only one, purpose: to displace the Legislature in exercising redistricting authority in Arizona. The Legislature's inability to exercise authority granted to it under the Constitution is clearly traceable to the IRC's exercise of the authority

granted by Proposition 106 at the expense of the Legislature.

A decision of this Court holding that the IRC may not wholly displace the Legislature would also plainly redress the Legislature's injury. *Lujan*, 504 U.S. at 561. The Legislature seeks, among other relief, a declaration that the Elections Clause prohibits the IRC from adopting congressional districts and an injunction preventing the IRC from adopting, implementing, or enforcing its congressional maps. J.A.22-23. Should this Court rule in the Legislature's favor, it would restore the Legislature's redistricting authority. A favorable decision would confirm that the Legislature cannot be completely divested of its constitutional authority to "prescribe" congressional districts. The Legislature would indisputably "benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975). In short, under this Court's well-established jurisprudence, the Legislature has amply satisfied the "'irreducible constitutional minimum' of standing." *Bennett*, 520 U.S. at 162 (quoting *Lujan*, 504 U.S. at 560).

B. The Legislature's Status as a Legislature Provides No Basis for Deviating From This Court's Standing Jurisprudence.

Applying the traditional tripartite test under Article III, the Legislature's standing to vindicate its constitutionally-prescribed role is straightforward. To be sure, the Legislature seeks to vindicate its institutional interests, rather than to avoid some pocketbook injury. But that is hardly unusual and implicates no independent Article III difficulty. This Court routinely recognizes the ability of institutional

litigants to redress institutional injuries, including the loss of constitutionally-conferred rights or powers. For example, in *New York v. United States*, 505 U.S. 144 (1992), four States successfully claimed that the federal Low-Level Radioactive Waste Policy Act invaded their expressly reserved Tenth Amendment powers. *Id.* at 154. Before that, South Dakota sued to vindicate authority granted to it by the Twenty-First Amendment. *South Dakota v. Dole*, 483 U.S. 203 (1987); *see also FERC v. Mississippi*, 456 U.S. 742, 752 (1982) (challenge by Mississippi to vindicate Tenth Amendment authority); *Maryland v. Wirtz*, 392 U.S. 183, 187 (1968) (challenge by Maryland and 27 other States that Congress exceeded Commerce Clause power in passing Fair Labor Standards Act).

And the ability of institutional litigants to sue to vindicate institutional interests is hardly limited to States. For example, state agencies and school boards are routinely permitted to bring suit to redress institutional injuries, including the loss of constitutionally-granted rights or powers. *See, e.g.*, *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Bd. of Educ. of Ottawa Twp. High Sch. Dist. 140 v. Spellings*, 517 F.3d 922, 925 (7th Cir. 2008); *Ohio Student Loan Comm'n v. Cavazos*, 900 F.2d 894 (6th Cir. 1990). It would be more than passing strange to conclude that a local school board or state gravel commission can sue to vindicate its constitutional prerogatives, but a state legislature somehow lacks Article III standing.

There is certainly no principled reason to treat a state legislature differently from other institutional litigants when it suffers a usurpation of its

constitutional authority by external forces. Whatever distinct concerns might be implicated by a legislative challenge to a divestment of authority by a legislative act, this case does not involve any such "self-inflicted wound." Here, the Legislature had its constitutionally-delegated power usurped through the initiative process, and the Legislature challenges the IRC's exercise of redistricting authority that it cannot countermand through an exercise of its own legislative power. This is manifestly not a situation where the Legislature has an avenue of self-help available that distinguishes it from other litigants.[4] Unlike suits involving "mere intra-parliamentary controvers[ies]," *Coleman v. Miller*, 307 U.S. 433, 441 (1939), the Legislature cannot look to its own members to restore its constitutional authority over redistricting. *Cf. Raines v. Byrd*, 521 U.S. 811, 824 (1997) (noting that "a majority of Senators and Congressmen can vote to repeal the Act, or to exempt a given appropriations bill"). Nor is this a situation where a handful of legislators attempt to assert the institutional rights of the Legislature as a whole or seek to prevail in the courts after they failed to prevail in a legislative vote in their own chamber. Here, the Legislature as a whole seeks to remedy an injury to the Legislature as a whole that was inflicted not by any act of the Legislature but by external state action.

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[4] State law prohibits the Legislature from repealing successful initiatives. *See* Ariz. Const. art. IV, pt. 1, §1(6)(B). And the Legislature cannot amend any successful initiative "unless the amending legislation furthers the purposes of such measure." *Id.* §1(6)(C). Simply put, absent a constitutional amendment rescinding Proposition 106, the Legislature is forever barred from "prescrib[ing]" Arizona's congressional districts.

For these reasons, all three members of the district court correctly rejected the IRC's invocation of *Raines v. Byrd* to attack the Legislature's standing. *Raines* is readily distinguishable on multiple grounds. In *Raines*, six individual members of Congress, having failed to persuade enough of their fellow members to vote against the Line Item Veto Act, asked the Court to strike down that very same law as unconstitutional. The Court concluded that those members lacked standing. The Court noted that the individual members had not lost anything to which they individually were entitled, such as a seat or salary. *See id.* at 821. The only institutional injury the individual members had alleged was that the Act rendered their future votes "less 'effective' than before," and "the 'meaning' and 'integrity' of their vote" had changed. *Id.* at 825. But that injury was "wholly abstract and widely dispersed" among all members and, importantly, could have been redressed by Congress itself—by repealing the law that allegedly injured the legislators. *Id.* at 829. Finally, the Court "attach[ed] some importance" to the fact that the members were not authorized to represent their respective chambers, and both chambers actually opposed the suit. *Id.*; *see also United States v. Windsor*, 133 S. Ct. 2675, 2713 (2013) (Alito, J., dissenting) ("*Raines* dealt with individual Members of Congress and specifically pointed to the individual Members' lack of institutional endorsement as a sign of their standing problem.").

This suit is different from the failed *Raines* action in every relevant dimension. Unlike a suit by disgruntled individual legislators alleging what is really an injury to the institution, this is a suit by the

Legislature as a whole to redress a complete loss of redistricting authority, which is a concrete injury particular to the Legislature and suffered by the Legislature *qua* Legislature. And unlike the Line Item Veto Act at issue in *Raines*, the divestment of redistricting authority from the Legislature to the IRC is not a self-inflicted wound. It cannot be repealed by the Legislature, nor can the Legislature reject or modify any redistricting map formulated by the IRC. Finally, unlike in *Raines*, both chambers of the Legislature have authorized this suit. In sum, in contrast to *Raines*, this is a suit by the full Legislature to vindicate an injury suffered by the full Legislature, but where the Legislature has no ability to redress the problem itself.[5]

* * *

The question of standing in this appeal is straightforward: whether a state legislature has standing to recoup a power expressly granted to it by the United States Constitution. The clear answer is

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[5] The differences between this appeal and *Raines* are confirmed by the reasoning of *Raines* itself. The Court contrasted the suit with *Coleman v. Miller*, 307 U.S. 433 (1939), in which twenty state senators had voted for, and twenty against, a proposed constitutional amendment. 307 U.S. at 436. After the lieutenant governor cast his vote in favor of the amendment, the twenty "nay" senators filed suit challenging the lieutenant governor's right to cast the deciding vote. *Id.* The *Raines* Court explained that the *Coleman* legislators had standing to sue because, due to the challenged conduct, their votes were "completely nullified," which constituted a cognizable injury. 521 U.S. at 823-24. That reasoning *a fortiori* settles the Legislature's standing here: Arizona's use of the IRC to adopt redistricting maps and to displace the Legislature's redistricting has completely nullified the Legislature's ability to redistrict.

yes. The Legislature's "particularized stake in th[is] litigation," *Lance*, 549 U.S. at 442, guarantees that "the parties before the court have an actual, as opposed to professed, stake in the outcome." *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring). The meaning of the Elections Clause "will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.* And because the Legislature has a concrete stake in the outcome of the controversy, this Court is assured of the requisite "concrete adverseness which sharpens the presentation of issues" before it—namely, whether the Elections Clause permits the complete divestment of the Legislature's constitutionally-conferred redistricting power. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

II. Neither the Elections Clause Nor 2 U.S.C. §2a(c) Permits The Complete Divestment Of A State Legislature's Authority To Adopt Congressional Districts.

The Elections Clause of the United States Constitution answers the merits question presented in this case. The Clause 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 chusing Senators." U.S. Const. art. I, §4, cl. 1. The plain text of this provision clearly delegates the authority to "prescribe[] … Regulations" concerning the times, places, and manner of congressional elections, including the adoption of

congressional districts, to one entity alone: "the Legislature" of a State, which unambiguously refers to the Arizona Legislature and not the IRC. The Framers' assignment of that power to "the Legislature" reflects a considered decision to vest the initial power to regulate congressional elections in the state political body most reflective of their conception of ordered liberty: the representative lawmaking body of the people. Arizona's effort to completely oust the Legislature from the redistricting process and re-delegate that authority to the IRC is fundamentally antithetical to the Elections Clause. The Legislature no longer "prescribe[s] … Regulations" concerning congressional districts; that task has been wholly transferred to the IRC. Nothing in this Court's precedents or 2 U.S.C. §2a(c) is to the contrary. The district court's unprecedented determination that this reassignment of congressional redistricting authority is consistent with the Elections Clause cannot stand.

A. The Text of the Elections Clause Unambiguously Vests State Authority to Prescribe the Times, Places, and Manner of Congressional Elections in the State's Representative Lawmaking Body Alone.

Unlike the federal government, which may exercise only limited and enumerated powers, the States generally enjoy residual sovereignty and may exercise nearly plenary authority often referred to as police powers. But the States' residual sovereignty does not allow States to prescribe regulations for federal elections. Because the offices of United States Representative and Senator "aris[e] from the Constitution itself," the "powers over the election of

federal officers had to be delegated to, rather than reserved by, the States." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995).

The Elections Clause is thus an "express delegation[] of power to the States to act with respect to federal elections," *id.* at 805, including the adoption of congressional districts. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 5-6 (1964). "Through the Elections Clause, the Constitution delegated to the States the power to regulate the 'Times, Places and Manner of holding Elections for Senators and Representatives,' subject to a grant of authority to Congress to 'make or alter such Regulations.'" *Cook v. Gralike*, 531 U.S. 510, 522 (2001); *see also Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013) (explaining that Clause "invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices"); *Foster v. Love*, 522 U.S. 67, 69 (1997). States must ground their authority to prescribe regulations for federal elections in the Elections Clause or those laws are simply ultra vires. States lack inherent authority to regulate federal elections, and "[n]o other constitutional provision [beyond the Elections Clause] gives the States authority over congressional elections." *Cook*, 531 U.S. at 522-23.

The Framers did not simply delegate this authority to the "States" *qua* States. Rather, in "clear and explicit" language, *Puerto Rico v. Branstad*, 483 U.S. 219, 226-27 (1987) (quoting *Michigan v. Doran*, 439 U.S. 282, 286 (1978)), they placed this responsibility in one particular state entity: "the

Legislature thereof." U.S. Const. art. I, §4, cl. 1. The term "the Legislature" is "plain, and admits of no doubt in its interpretation." *Hawke v. Smith*, 253 U.S. 221, 227 (1920). It "was not a term of uncertain meaning when incorporated into the Constitution," and "[w]hat it meant when adopted it still means": "the representative body which made the laws of the people." *Id.*; *see also Smiley v. Holm*, 285 U.S. 355, 365 (1932).

The Framers' use of the term "the Legislature" is "explicit and unambiguous." *INS v. Chadha*, 462 U.S. 919, 945 (1983). It "produces no impression of doubt as to the meaning." *Lake Cnty. v. Rollins*, 130 U.S. 662, 670 (1889). What it means now is what it has always meant: "'the representative body which made the laws of the people.'" *Smiley*, 285 U.S. at 365 (quoting *Hawke*, 253 U.S. at 227). And in the context of the Elections Clause, it means that representative body "in each State"—*viz.*, the state legislature. Because the "text of [this] constitutional provision is not ambiguous," there is no basis or need for "search[ing] for its meaning beyond the instrument." *Lake Cnty.*, 130 U.S. at 670. As Justice Holmes aptly observed for the Court, "Courts cannot go very far against the literal meaning and plain intent of a constitutional text." *Forbes Pioneer Boat Line v. Board of Comm'rs of Everglades Drainage Dist.*, 258 U.S. 338, 340 (1922).

Moreover, there can be no doubt that the Framers "clearly understood and carefully used" the term "the Legislature" in the Elections Clause to mean "the representative body which made the laws of the people." *Hawke*, 253 U.S. at 227-28. The Framers well

understood the difference between States generally and "the Legislature[s] thereof." *Cf.*, *e.g.*, U.S. Const. art. I, §10 (enumerating various authorities that "No State" may exercise). The Framers equally understood the difference between those representative bodies and the people. *Cf.*, *e.g.*, *id.* amends. II & IV (protecting certain rights of "the people"). And the Framers knew the difference between "state legislatures" and the "executive and judicial" branches "of the several States." *Id.* art. VI, cl. 3. Those contemporary understandings and usages are critical. *See Utah v. Evans*, 536 U.S. 452, 475 (2002) (looking to "[c]ontemporaneous general usage" when construing term in Constitution).

The Framers reflected these well-understood distinctions in their writings and in the Constitution itself. For example, John Adams wrote, "[W]ho are the legislatures of these separate states? Are they the people? No. They are a selection of the *best men* among the people, made by the people themselves." Letter from John Adams to John Taylor (Apr. 15, 1814), *in* 6 *The Works of John Adams* 443, 472 (Charles Francis Adams ed., 1851) (emphasis in original). Alexander Hamilton described "the State legislatures" as "select bodies of men." The Federalist No. 27, at 170 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (hereinafter The Federalist). And he admonished that "there should be great care to distinguish the people of Virginia from their Legislature." Letter from Alexander Hamilton to Theodore Sedgwick (Feb. 2, 1799), *in* 10 *The Works of Alexander Hamilton* 340, 340-41 (Henry Cabot Lodge ed., 1904).

Even more significant, throughout the Constitution the Framers carefully employed particular terminology in describing and assigning rights, duties, and functions among various State-level individuals and entities. Thus, the "People of the several States" choose the members of the House of Representatives. U.S. Const. art. I, §2, cl. 1. The state "Legislature" regulates congressional elections, *id.* §4, cl. 1; consents to Congress' purchase of State land, *id.* §8, cl. 17; directs the manner of appointment of presidential electors, *id.* art. II, §1, cl. 2; consents to the joining of two States, *id.* art. IV, §3, cl. 1; applies for constitutional amendments, *id.* art. V; and ratifies constitutional amendments, *id.* The "Executive Authority" in the State issues writs of election to fill vacancies in the House, *id.* art. I, §2, cl. 4; appoints Senators if a vacancy occurs while the Legislature is in recess, *id.* §3, cl. 2; and demands extradition, *id.* art. IV, §2, cl. 2. "Judges in every State" are bound by the Supremacy Clause. *Id.* art. VI, cl. 2. And the Constitution equally reflects that the Framers knew how to refer to States *qua* States and to grant or deny powers to all authorities within a State. *See id.* art. I, §10, cl. 1-3.

This precise division of labor among the people and the various branches of state government—with other obligations left to the "State" generally—leaves no doubt that the Elections Clause's delegation of authority to "prescribe[] … Regulations" regarding congressional elections to "the Legislature," *id.* §4, is to that body alone and was not a general delegation to the States to prescribe regulations by whatever means they found convenient. Had the Framers wished to vest the authority to prescribe federal election

regulations in the people, or the Executive, or the "State" more generally, they clearly knew how to do so. *See Hawke*, 253 U.S. at 228 ("When [the Framers] intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose."). But they clearly and deliberately assigned this responsibility to "the Legislature."

The importance of honoring the Framers' deliberate choices about where to delegate important federal authority is self-evident. But the significance of such specific delegations is confirmed by the later ratification of the Seventeenth Amendment, which reassigned the selection of Senators of a State from "the Legislature thereof" to "the people thereof." *Compare* U.S. Const. art. I, §3, cl. 1, *with id.* amend. XVII. Unless the Seventeenth Amendment is to be regarded as an unnecessary gesture, the change worked by its provisions shows that it is not possible to treat a constitutional delegation of authority to "the Legislature" as synonymous with a delegation to the State to accomplish a constitutional objective by means of its own choosing. If the two were the same, a State wishing to provide for popular election of Senators before the Seventeenth Amendment would have *already* had the authority to do so. But a state law directly providing for popular election of Senators would have been manifestly unconstitutional before the Seventeenth Amendment. *See Hawke*, 253 U.S. at 228 ("The necessity of the [Seventeenth] amendment to accomplish the purpose of popular election is shown in the adoption of the amendment."). A present-day state law purporting to divest the Legislature of its

constitutional authority over congressional redistricting should fare no better.

Furthermore, the nature of the delegation by the Framers—one of specified authority over *federal* "Elections for Senators and Representatives"—accentuates why "the Legislature" must carry out its role as the component of state government authorized to prescribe the necessary regulations, including those for congressional redistricting. As explained, because congressional offices are distinctly federal and did not predate the Constitution, the power to regulate congressional elections was delegated to, not reserved by, the States. *U.S. Term Limits*, 514 U.S. at 804-05. Given that the Framers need not have granted the States any power at all over congressional elections, it is especially important that the limits on their grant of power be strictly observed.

Here, when the Framers specified that the times, places, and manner of congressional elections "shall be prescribed in each State by the Legislature thereof," they granted initial authority to the States but explicitly narrowed that grant of power by making it subject to a particular condition: that the Legislature exercise it. The Framers carried out the federal-state division of responsibility for regulating congressional elections by means of the phrase "shall be prescribed in each State," and then added the phrase "by the Legislature thereof" to identify the particular state body that must do the "prescrib[ing] in each State"—the State's representative lawmaking body. When a State exercises the broad grant of authority but ignores the limiting condition, it arrogates to itself more power than the Framers extended. And it

renders the constitutional text describing *who* does the "prescrib[ing] in each State"—the "Legislature thereof"—entirely superfluous.

Finally, the relationship between the two subclauses underscores the logic of the Framers' decision to delegate this authority to state legislatures in particular. The Elections Clause first delegates the initial authority to prescribe regulations about the times, places, and manner of congressional elections to the state legislatures. The Elections Clause then makes clear that the federal Congress has the ultimate authority to "by Law make or alter such regulations." The Framers viewed both the authority to prescribe regulations for congressional elections and the power to revise those regulations as inherently legislative tasks. It thus made sense for the Framers to give the initial authority to prescribe such regulations to the same kind of lawmaking body (*viz.*, the state legislature) as the lawmaking body with the ultimate authority to revise those regulations (*viz.*, the Congress).

B. Vesting State Authority to Prescribe the Times, Places, and Manner of Congressional Elections in the State's Representative Lawmaking Body Alone Comports With the Historical Record.

The Framers' decision to vest State-level authority to prescribe the times, places, and manner of congressional elections in "the Legislature" alone is no accident. Rather, it is consistent with the Framers' admiration for representative democracy and skepticism for other forms of government, including direct democracy. And it makes particular sense given

the significance and nature of the federal power over congressional elections that the Framers were partially ceding in the Elections Clause.

The Framers lauded representative democracy and viewed it as an important improvement over direct democracy. For example, while granting that "the people are the only legitimate fountain of power," The Federalist No. 49, at 310, James Madison believed that "pure democracy" results in "spectacles of turbulence and contention" that "can admit of no cure for the mischiefs of faction," The Federalist No. 10, at 76. Indeed, Madison went so far as to contend that "[h]ad every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." The Federalist No. 55, at 340. By contrast, in Madison's view, a republic—which he defined as "a government in which the scheme of representation takes place"—"refine[s] and enlarge[s] the public views, by passing them through the medium of a chosen body of citizens," and it facilitates governance of a "greater number of citizens and extent of territory," thereby lessening the risk of "factious combinations." The Federalist No. 10, at 76-78.

Madison's views were hardly idiosyncratic. At the Constitutional Convention, Alexander Hamilton lauded the virtues of "republican government," remarking, "Real liberty is never found in despotism or the extremes of democracy." Speeches in the Federal Convention (June 18, 1787), *in* 1 *The Works of Alexander Hamilton* 381, 411 (Henry Cabot Lodge ed., 1904). John Adams deemed it a "fixed principle" that "all good government is and must be republican." Letter from John Adams to Samuel Adams (Oct. 18,

1790), *in* 6 *The Works of John Adams* at 414, 415. By contrast, he observed that "democracy never lasts long," for it "soon wastes, exhausts, and murders itself." Letter from John Adams to John Taylor (Apr. 15, 1814), *in* 6 *The Works of John Adams* at 443, 484. Chief Justice John Marshall observed that the difference "between a balanced republic and democracy … is like that between order and chaos." John Marshall, *The Life of George Washington* 467 (Robert Faulkner & Paul Carrese eds., 2000).

Given the Framers' devotion to representative democracy, it would be ahistorical to construe their choice of the term "the Legislature" in the Elections Clause as anything but a deliberate choice of that representative body. *See Reynolds v. Sims*, 377 U.S. 533, 564 (1964) (observing that "[s]tate legislatures are, historically, the fountainhead of representative government in this country"). That conclusion is bolstered by the particular concerns that gave rise to the balance reflected in the Clause. The Framers acknowledged that "a discretionary power over elections ought to exist somewhere," The Federalist No. 59, at 360 (Alexander Hamilton), and understood the value of giving those "best acquainted with the situation" where the elections would actually take place some partial agency in prescribing regulations, James Madison, *Debate in Virginia Ratifying Convention*, *in* 2 *The Founders' Constitution* 268 (Philip B. Kurland & Ralph Lerner eds., 1987). At the same time, the Framers were acutely concerned that simply delegating authority over federal elections to the States could result in the "annihilat[ion]" of the federal government. The Federalist No. 59, at 360-61. Leaving "exclusive power of regulating elections for

the national government, in the hands of the State legislatures," would "leave the existence of the Union entirely at their mercy." *Id.* at 361.

The Framers' solution to this conundrum was the same as their answer to many other constitutional difficulties—a system of separated powers and checks and balances. The Elections Clause gives primary authority over federal election regulations to state legislatures, but ultimate authority to the federal government. *See Inter Tribal Council of Ariz.*, 133 S. Ct. at 2253.

The Framers do not appear to have ever seriously considered giving the primary authority over congressional election regulations to any component of state government other than the state legislatures, nor does it appear that a general delegation to the State itself was ever contemplated. *See* The Federalist No. 59, at 360 ("[T]here were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter and ultimately in the former."). As noted, both subclauses underscore the Framers' view that prescribing regulations concerning the times, places, and manner of congressional elections was an exercise of legislative authority. Moreover, ratification debates concerning the Elections Clause clearly focused on the role and representative character of state legislatures, as opposed to state authority generically, by considering the role of state legislatures over election regulations in light of their pre-Seventeenth Amendment authority to appoint Senators. *See, e.g., id.* at 362

(concluding "that the national government would run a much greater risk" from an unchecked authority of "State legislatures over the elections of its House of Representatives than from their power of appointing the Members of its Senate"). In all events, given the Framers' concerns about putting States in a position to undermine the very "existence of the Union" by either refusing to prescribe congressional election regulations or prescribing imprudent ones, it strains credulity to think that they would have been comfortable putting that discretion in the hands of unelected bodies or the people directly.[6]

There were, of course, critics of the powers being concentrated in the new federal Congress who would have preferred that the state legislatures be given the authority over congressional elections without the possibility of a congressional override. Madison responded to those critics by emphasizing the similar republican virtues in the state legislatures and the federal Congress. He explained that there was no reason to fear a federal Congress that (before the Seventeenth Amendment) consisted of Senators "chosen by the States Legislatures" and "Representatives elected by the same people who elect the State Legislatures." In both cases, Madison reasoned, "if confidence is due to the latter, it must be due to the former." *Records of the Federal Convention*,

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[6] Of course, States may provide for their own direct-democracy measures, such as initiatives and referenda. But in determining whether the Framers intended for the term "the Legislature" in the Elections Clause to encompass something beyond a State's representative lawmaking body, the historical evidence answers this question in the negative.

in 2 *The Founders' Constitution* at 249. In short, allowing the state legislatures to be divested of their authority to prescribe regulations for congressional elections ignores not only the plain text of the Constitution, but also (not surprisingly) the clearly expressed views of the Framers.

C. Arizona's Use of the IRC to Adopt Congressional Districts Violates the Elections Clause Because It Completely Divests the Legislature's Authority to Prescribe Congressional Districts.

The plain text and history of the Elections Clause make clear that the Elections Clause does not permit Arizona's use of the IRC to adopt congressional districts. The IRC is not "the Legislature thereof," *i.e.*, the Arizona State Legislature, and yet it is plainly prescribing regulations for congressional elections. The differences between the Legislature and the IRC are legion. The IRC has no general lawmaking power; it exists solely to "establish congressional and legislative districts." Ariz. Const. art. IV, pt. 2, §1(14). Once it completes redistricting, it "shall not meet" except to "revise districts if required by court decisions" or the number of districts changes. *Id.* §1(23). IRC members are chosen not from the general populace but from a 25-person pool established by the state Commission on Appellate Court Appointments. *Id.* §1(5). They are not elected by the people; indeed, no member of the Legislature—or any holder of or candidate for *any* public office (except school board) in the preceding three years—can serve as an IRC member. *Id.* §1(3),(13). Their terms typically run for approximately ten years. *See id.* §1(23). Once

selected, they can be removed by the Governor, with two-thirds concurrence of the Senate, only for gross misconduct, substantial neglect of duty, or inability to discharge the duties of the office. *Id.* §1(10).[7]

The redistricting maps that the IRC creates are "final" and certified to the Secretary of State once complete. *Id.* §1(16)-(17). The maps are not subject to revision or rejection by the Legislature, the Governor, or the people. Indeed, the Legislature cannot enact any measure that eliminates or adversely affects the provisions establishing and authorizing the use of the IRC, or that diverts funds from the IRC. *See id.* art. IV, pt. 1, §1(1), (3)-(4), (6)(B)-(D). The IRC is as insulated from the ordinary political process as practicable. *See Arizona Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1273 (Ariz. 2012) (recognizing that "the constitutional provisions creating and governing the IRC … were designed to *remove* redistricting from the political process by extracting this authority from the legislature and governor"). Indeed, the IRC's very name proclaims its independence from the Legislature and any other source of influence.

And while the IRC is plainly not the Legislature and is structured to look and operate nothing like the

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[7] In practice, these standards pose an extraordinary barrier to removal of a member. In 2011, Arizona's Governor removed the IRC chair with two-thirds concurrence of the Senate, but the Arizona Supreme Court ordered the chair reinstated. *See Arizona Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1278 (Ariz. 2012). The court held that removal requires the "categorical and egregious" failure to perform a duty or "a willful act of omission that the commissioner knew or should have known was wrong or unlawful." *Id.* at 1276.

Legislature, the *actual* Legislature has been cut out of the redistricting process entirely, as the purpose, text, and effect of Proposition 106 make clear. The initiative's authors expressly stated that it would "take[] the redistricting power away from the Arizona Legislature." J.A.17-18. The official ballot provided that voting for the initiative meant "removing redistricting authority from the Arizona Legislature." J.A.80. In the district court, the IRC argued that the Legislature seeks to "take back the power to draw congressional districts." Defs.' Mot. to Dismiss 2, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 02-1211 (D. Ariz. Aug. 10, 2012) (Dkt. 16). The initiative's authors, participating as *amici*, asserted that "Proposition 106 was intended to remove responsibility for redistricting from the Arizona Legislature." Br. of Amici Curiae 3, *Ariz. State Legislature*, *supra* (Dec. 19, 2013) (Dkt. 42). The majority below found that this goal was achieved: the initiative "removed congressional redistricting authority from the Legislature." Pet.App.3.

The majority below did suggest that the Legislature has not been "entirely divested" of redistricting authority because it "retains the right to select the IRC commissioners, and the IRC is required to consider the Legislature's suggested modifications to the draft maps." Pet.App.19 n.4. The IRC did not defend this reasoning in its motion to dismiss or affirm before this Court, and with good reason. As Judge Rosenblatt correctly observed in dissent, these "minor procedural influences must be evaluated in light of the fact that" IRC members are chosen "from a list selected not by [the Legislature] but by the state's commission on appellate court appointments," and the

fact that "the IRC has the complete discretion not to implement any map changes suggested by" the Legislature. Pet.App.23. Indeed, every concerned citizen has the same opportunity to recommend congressional districts, and the IRC has complete discretion to discard recommendations from any external source. The usurpation is complete.[8]

Certainly, neither of the two features identified by the majority remotely preserves for the Legislature what the Elections Clause gives to the Legislature alone: the authority to "prescribe[] … Regulations" concerning the times, places, and manner of congressional elections. To "prescribe" is to "dictate, ordain, or direct; to establish authoritatively (as a rule or guideline)." *Black's Law Dictionary* 1302 (9th ed. 2009). Founding-era dictionaries provide substantially the same definition. *See, e.g.*, Noah Webster, *An American Dictionary of the English Language* (1828) ("To set or lay down authoritatively for direction; to give as a rule of conduct; as, to *prescribe* laws or rules."); Samuel Johnson, *A Dictionary of the English Language* (10th ed. 1792) ("To set down authoritatively; to order; to direct."); *see also Smiley*, 285 U.S. at 366 (stating that Elections Clause grants state legislatures authority "*to enact the numerous requirements* as to procedure and safeguards" (emphasis added)). The ability to provide

[8] Contrary to the majority's assertion, moreover, the "Legislature" does not select the IRC members. Instead, the majority and minority leaders from each chamber select four members from a pool preselected by the Commission on Appellate Court Appointments, and those four members select the critical fifth member to serve as chair.

nonbinding comments—*i.e.*, the ability to recommend—is hardly the power to prescribe, and the power to influence membership—*i.e.*, the ability to appoint—is even further removed from the power to prescribe the content of the regulations. As Judge Rosenblatt aptly put it, the Legislature has been divested of "any outcome-defining effect on the congressional redistricting process." Pet.App.23.

In the district court and again in its motion to dismiss or affirm, the IRC advanced an alternative argument why the Legislature has not been completely divested of authority to prescribe redistricting maps: the Legislature supposedly "retains the power to pass a redistricting plan and refer it to the voters for approval." All three judges below understandably ignored—and implicitly rejected—this erroneous claim. While such a residual, indirect role for the Legislature would still be inconsistent with the Elections Clause's delegation of "prescrib[ing]" authority to the Legislature, there is no such residual authority in Arizona. The two Arizona constitutional provisions that the IRC cited for this proposition—art. XXI, §1 and art. IV, pt. 1, §1(15)—do not support the premise. Article XXI, §1 simply allows the Legislature to submit proposed constitutional amendments to a vote of the people. No one would say that the federal Congress has the power to pass ex post facto laws, levy unenumerated direct taxes, or grant titles of nobility simply because it has the authority to propose amendments to the United States Constitution eliminating the express constitutional prohibitions on such laws. It is equally absurd to suggest that the Arizona Legislature's ability to propose constitutional amendments gives it the

authority to prescribe regulations for congressional elections in the wake of Proposition 106.

The IRC's argument concerning art. IV, pt. 1, §1(15) is even more of a reach. That provision was added to the Arizona Constitution as part of a set of changes aimed at *reducing* the Legislature's ability to alter voter-approved laws. The provision is merely a savings clause generally stating that "this section" (*i.e.*, section 1) does not otherwise limit the Legislature's ability to submit referendum measures to the people. But section 1 also specifically bars the Legislature from "adopt[ing] any measure that supersedes, in whole or in part," an initiative if it does not "further[] the purposes" of the initiative. *Id.* §1(14). That prohibition amply encompasses the hypothetical the IRC posits—a Legislature-drawn map submitted to the voters intended to supplant the map drawn by the IRC.

In short, the Legislature has been completely divested of its constitutionally-conferred power to adopt congressional districts. Arizona law does not simply "provide some general guidance to the legislature regarding the exercise of its redistricting power." *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1280 (11th Cir. 2012) (upholding initiative measure establishing standards legislature must follow when redistricting). Instead, it "eviscerate[s]" the Legislature's "constitutionally delegated power" and "exclude[s] the legislature from the redistricting process." *Id.* For good reason, then, the creation and use of the IRC has been fairly described as the "most radical[] … departure[] from the traditional legislative redistricting model." Bruce E. Cain, *Redistricting*

Commissions: A Better Political Buffer?, 121 Yale L.J. 1808, 1811-12 (2012). Whatever the policy merits of this novel approach to congressional redistricting, it is wholly at odds with the Elections Clause. The Framers deliberately vested State-level responsibility over congressional elections in the state legislature. Arizona is free to experiment with other modes of prescribing election regulations when it comes to its own elections. But when it comes to congressional elections, Arizona's only authority comes from the Elections Clause and must be consistent with its text. The complete ouster of the Legislature's authority to undertake congressional redistricting cannot be squared with that text and should be rejected.

D. No Decision of This Court Supports the Complete Divestment of a State Legislature's Authority to Prescribe Congressional Districts.

1. Until the divided decision below, no court, much less this Court, had ever held that a state legislature may be permanently displaced as the entity responsible for congressional redistricting. The district court majority reached that unprecedented outcome largely by relying on this Court's decisions in *Hildebrant* and *Smiley*. But those decisions do not support the IRC, much less the far-reaching proposition that a State can erect a specialized "independent" alternative process for congressional redistricting that permanently ousts "the Legislature" from the role assigned to it by the Elections Clause.

In *Hildebrant*, the Ohio legislature had passed, and the governor had signed, a law redistricting the State for the purpose of congressional elections. 241

U.S. at 566. Pursuant to the general Ohio process for making law, the redistricting law was subsequently rejected by popular referendum, in what amounts to a veto or override by referendum. *Id.* Suit was brought to void the referendum on the theory that "the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void." 241 U.S. at 567.

This Court affirmed the Ohio Supreme Court's dismissal of the suit. The Court characterized the constitutional question as whether "includ[ing] the referendum within state legislative power for the purpose of apportionment" violates the Constitution. *Id.* at 569. The Court held that any such claim rests upon the premise that a referendum "causes a state … to be not republican in form" in violation of the Guarantee Clause of the Constitution, U.S. Const. art. IV, §4, and, according to the Court, challenges under the Guarantee Clause are nonjusticiable. 241 U.S. at 569-70. The Court also observed that incorporating the possibility of an override-by-referendum into the general legislative process does not run afoul of the Elections Clause or a precursor to 2 U.S.C. §2a(c). *See id.* at 568 (stating that including referendum as "part of the legislative power" does not violate statute); *id.* at 569 (acknowledging argument that "includ[ing] the referendum within state legislative power … is repugnant to" the Elections Clause, and deeming argument "plainly without substance").

In *Smiley*, the Minnesota state legislature passed a law adopting new congressional districts, which the governor then vetoed. Despite the veto, the legislature

nevertheless registered the new map with the secretary of state. 285 U.S. at 361. Suit was brought to void the map given the governor's veto. *Id.* at 362. The Minnesota Supreme Court rejected that suit, holding that in prescribing redistricting measures pursuant to the Elections Clause, a state legislature is "not acting strictly in the exercise of the lawmaking power, but merely as an agency, discharging a particular duty in the manner which the Federal Constitution required." *Id.* at 364. Thus, the state court concluded, "the Governor's veto has no relation to such matters." *Id.* (quotation marks omitted).

This Court reversed, finding "no suggestion" in the Elections Clause "of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 367-68. Thus, if the general lawmaking process in Minnesota included a gubernatorial veto, that "check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority" in the Elections Clause. *Id.* at 368.

For several reasons, *Hildebrant* and *Smiley* do not aid the IRC. First, both decisions clearly contemplate a continuing role—indeed, a continuing, preeminent role—for the state legislature in prescribing congressional districts. In *Hildebrant*, the challenged referendum was "a *component part* of the legislative authority empowered to deal with" congressional redistricting, 241 U.S. at 567 (emphasis added)—not, as here, a complete displacement of that authority. Indeed, the result of the referendum at issue was simply to return the congressional districts to those

enacted two years earlier by the Ohio legislature. *See State ex rel. Davis v. Hildebrant*, 114 N.E. 55, 59 (Ohio 1916). After the referendum, the legislature retained the power to draw congressional district lines, subject, like any other legislative act, only to a gubernatorial veto or override-by-referendum. Likewise, in *Smiley*, the redistricting measure at issue had been enacted by the Minnesota state legislature. The governor's veto simply sent the matter back to the legislature to start the process anew.

Here, by contrast, the Arizona State Legislature has been completely stripped of its authority to prescribe redistricting maps. It is completely and permanently cut out of the redistricting process—as is the Governor, for good measure. The IRC does not merely have the power to reject Legislature-approved redistricting maps and return the task to the Legislature. Rather, it has absolute power to create, finalize, and certify redistricting maps. Nothing in *Hildebrant* and *Smiley* remotely supports this complete and permanent re-delegation of authority to prescribe regulations from the entity selected by the Framers—*viz.*, the state legislatures—to a different entity.

Second, there is a fundamental difference between the claims brought in *Hildebrant* and *Smiley* and the claim brought here. Those cases sought a special exception from the ordinary legislative process for laws dealing with congressional elections. The argument was that even if other laws are subject to gubernatorial veto or override-by-referendum, regulations prescribed under the Elections Clause are different because the Constitution delegated that

authority to the state legislatures alone, to the exclusion of the Governor or the referendum process. This Court quite understandably rejected that plea for a special exemption from the general legislative process, since the request rested on the proposition that state legislatures are doing something other than legislating when they prescribe regulations for congressional elections.

But rejecting the suggestion that state legislatures are freed from the general constraints of the legislative process, like the gubernatorial veto, does not remotely suggest that States can erect a special process for prescribing electoral regulations and cut the state legislature out of that process. The IRC is not some general constraint on the ordinary legislative process, but a specialized agency expressly designed to exercise the redistricting power, and that power alone, to the exclusion of the state legislature. Unlike anything at issue in *Hildebrant* and *Smiley*, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). It is one thing to reject a special exemption that treats congressional election regulations as something other than legislation and quite another matter to bless a specialized regime that removes electoral regulations from the ordinary legislative process in which the legislature plays the central role.

Indeed, if anything, *Hildebrant* and *Smiley* affirmatively undermine the IRC's argument. By reaffirming that the Framers intended state legislatures to prescribe regulations for congressional elections through the normal legislative process, those cases undermine the premise of the IRC, which is that

redistricting is something that should be exempted from the ordinary legislative process and given to a specialized, independent commission. Of course, Arizona is free to make a contrary judgment for its own elections. But when it comes to congressional elections, the Constitution and this Court's cases make clear that the state legislature, subject to generally applicable constraints in the ordinary legislative process, is the body that is to prescribe electoral regulations.

2. To conclude otherwise—to hold that "the Legislature" in the Elections Clause means "the legislative process," in the sense of any "appropriate exercise of state law," Pet.App.17—is problematic on many levels. First, it requires a departure from the plain and natural meaning of the term "the Legislature." "'[T]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *District of Columba v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). The "enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824); *see also, e.g.*, *NFIB v. Sebelius*, 132 S. Ct. 2566, 2586 (2012). As this Court has acknowledged—and the Framers themselves understood, *see* pp. 26-27, *supra*—the "natural" meaning of the term "the Legislature" is "the representative body which ma[kes] the law of the people." *Smiley*, 285 U.S. at 365; *Hawke*, 253 U.S. at 227. States may make laws through other means, be

it by popular initiative, agency promulgation, executive fiat, or common law judicial reasoning, but that hardly makes any "appropriate exercise of state law," or even the "legislative process," coterminous with "the Legislature."

Second, a contrary determination results in a circular, limitless, and ultimately meaningless conception of the term "the Legislature" and the Elections Clause as a whole. Indeed, this case demonstrates the point. The IRC has argued that its adoption of congressional districts is consistent with the Elections Clause because the Arizona Supreme Court has held that the IRC "'acts as a legislative body.'" Mot. to Dismiss or Affirm 9-10 (June 30, 2014) (quoting *Ariz. Minority Coal. For Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 684 (Ariz. 2009)). But the Arizona Supreme Court held that the IRC "acts a legislative body" because, in its view, "'redistricting is … a legislative task.'" 208 P.3d at 684 (quoting *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978)).

The Framers surely agreed with the latter proposition, which is why they delegated the initial authority to prescribe regulations for congressional elections to state legislatures subject to alteration by the federal legislature. In other words, it is precisely because congressional redistricting is "a legislative task" that the Constitution assigns that task to legislatures. Thus, the argument that this legislative power can be delegated to any entity under the sun because any recipient will be engaged in a legislative task is to get matters exactly backwards. It is also entirely circular and limitless. Under the IRC's

reasoning, it is "the Legislature" for purposes of redistricting under the Elections Clause because it is "a legislative body," and it is "a legislative body" because it engages in redistricting. Voila. The reasoning is limitless: *any* entity that undertakes redistricting—whether the people, judges, the governor, or even a single, unelected redistricting "czar"—satisfies the Elections Clause, because it undertakes redistricting.[9] And the logic is hardly limited to redistricting, as any prescription of the regulations concerning the times, places, and manner of congressional elections is just as surely a legislative task. The Elections Clause prevents this dangerous tautology by vesting congressional redistricting authority in "the Legislature," not "a legislative body" so defined by the very task it is undertaking.

The IRC's position conflicts with not just the constitutional language chosen by the Framers but also the very notion of representative government that they lauded. Assigning the task of redistricting to "the Legislature" ensures that all citizens, through their elected representatives, have a voice in the inherently political task of redistricting. *See Gaffney v. Cummings*, 412 U.S. 735, 749, 753 (1973) (observing that redistricting is "primarily a political and legislative process," and "[p]olitics and political considerations are inseparable from districting and apportionment"). But the IRC is chosen by party leaders of the two majority parties and consists, in

[9] Indeed, because in practice the IRC is comprised of two Democrats, two Republicans, and one independent who serves as chair, the chair in effect serves as the redistricting "czar" when ideological differences inevitably divide the other members.

practice, of two Democrats, two Republicans, and one "independent." At the time of the Framing, the state legislatures were largely nonpartisan; within a few years, they were divided among Federalists, Democratic-Republicans, and later Whigs; today, they might include a few Greens and Libertarians; and no one can confidently predict what is next. The only guarantee is that the state legislatures will reflect whatever lies next through the very principles of representative democracy the Framers held dear. The IRC, by contrast, appears to lock in the majority parties and create a powerful role for one, but only one, "independent." *Cf. Williams v. Rhodes*, 393 U.S. 23, 32 (1968) (enjoining state electoral law "favor[ing] two particular parties—the Republicans and the Democrats" over "[n]ew parties"). And even that is just the composition of this particular commission. There is no reason in logic that a narrow majority of a State's voters could not enact an initiative permanently placing redistricting power in the hands of an unelected commission comprised entirely of members of one political party. Once it is accepted that "the Legislature" means anything that passes muster under state law, rather than the elected representatives of all the people in the State, the sky is the limit.

Third, the IRC's view of itself as "the Legislature" under the Elections Clause—essential to its argument—leads to both textual and conceptual incongruities. Because the IRC cannot deny that the Arizona Legislature is itself a legislature, the most that the IRC can argue on its own behalf is that it is "*a* Legislature," not the sole one. But, as a textual argument, that theory is notably incomplete given

that the Elections Clause confers authority on "*the* Legislature" of a State, not just "*a* Legislature." *See Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004) (emphasizing the "use of the definite article"). By contrast, the Legislature's argument fits squarely with the relevant language because it regards the Arizona Legislature as the only Legislature in Arizona. Furthermore, the very notion that States are imbued with multiple legislatures at a single time is fanciful even now, and certainly would have been seen as such by the Framers. Thus, while it seems plain that the IRC is not "a Legislature" at all, it seems plainer still that it is not "the Legislature" in Arizona.

3. The district court also cited this Court's decisions in *Growe v. Emison*, 507 U.S. 25 (1993), and *Scott v. Germano*, 381 U.S. 407 (1965) (per curiam), which it viewed as "reaffirm[ing] that a state can place the redistricting function in state bodies other than the legislature." Pet.App.10; *see also* Pet.App.15-16. In its motion to dismiss or affirm, the IRC did not defend this reasoning, and rightly so, for the majority grossly misread those decisions.

Growe and *Scott* are part of a line of decisions by this Court holding that courts, including state courts, may step in to *remedy* unlawful districting maps drawn by a state legislature or, as a last resort, draw *temporary*, lawful districting maps if a state legislature fails to do so in a timely fashion. That is a far cry from approving a permanent re-delegation of the legislative task of redistricting to the state courts, and these cases do not remotely stand for that proposition. Quite the opposite: they firmly establishes that "primary responsibility" for

redistricting "rests with the legislature itself." *Tawes*, 377 U.S. at 676; *see also White v. Weiser*, 412 U.S. 783, 795 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment."). Judicial relief is "appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds*, 377 U.S. at 586; *see also Tawes*, 377 U.S. at 676 (allowing Maryland courts to "take further affirmative action only if the legislature fails to enact a constitutionally valid state legislative apportionment scheme in a timely fashion after being afforded a further opportunity by the courts to do so"); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977) (observing that "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework"); *White*, 412 U.S. at 794-95.

Growe and *Scott* comprise an even more specific subset of these decisions. They hold that judicial relief by a *federal* court is appropriate only once the state legislature *and* state courts fail to execute these duties. *See Growe*, 507 U.S. at 34; *Scott*, 381 U.S. at 409; *see also Branch v. Smith*, 538 U.S. 254, 261-62 (2003); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *cf. McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("[R]edistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." (citation and quotation marks omitted)).

The majority focused on this Court's statement in *Growe* that reapportionment is "'primarily the duty

and responsibility of the State through its legislature *or other body*, rather than of a federal court.'" Pet.App.16 (quoting 507 U.S. at 34) (emphasis by majority). But properly understood in the context of this Court's remedial-districting cases, the Court's reference to "other body" simply refers to state courts, which may step in when the legislature fails to carry out its duty in a timely fashion. *See also Branch*, 538 U.S. at 272 (referring to "state courts acting pursuant to state legislative authorization in the event of legislative default"). This Court's precedents provide no basis for interpreting that statement to permit any entity other than a court to draw congressional maps—much less that the state legislature may be completely and permanently divested of its redistricting authority. Indeed, those precedents recognize the difficulties of judicial map drawing and emphasize that the state legislature has the "primary responsibility" to conduct redistricting.

E. 2 U.S.C. §2a(c) Does Not Permit the Complete Divestment of a State Legislature's Authority to Prescribe Congressional Districts.

In its order postponing jurisdiction, this Court rephrased the question presented as whether "the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts." As explained, the Elections Clause does not permit Arizona's use of a commission to adopt congressional districts. Nothing in 2 U.S.C. §2a(c) changes the analysis, for numerous reasons.

To begin with, the Legislature brought its claim under the Elections Clause and did not invoke §2a(c). The Legislature has challenged the IRC maps as inconsistent with and unauthorized by the Elections Clause. Thus, §2a(c) is relevant only if it could be read to authorize a permanent ouster of the state legislature from the congressional redistricting process under circumstances that would otherwise violate the Elections Clause. The statute does not remotely purport to authorize any such thing and could not do so consistent with the Constitution. To the contrary, the provision was enacted for a limited purpose, and its role has been narrowed dramatically by this Court.

Consistent with the Framers' concerns that States could frustrate federal objectives by deadlocking in a way that left congressional elections without needed regulations, Congress passed what is now 2 U.S.C. §2a(c) as a gap-filling statute to provide default rules if the state legislatures could not produce a timely redistricting map in the wake of a decennial census. That narrow purpose has nothing to do with the case at hand. Moreover, four-fifths of the default options provided in §2a(c) have been rendered unconstitutional by subsequently-articulated one-person, one-vote principles. So little is left of §2a(c) by these constitutional developments and later statutes that in *Branch v. Smith* this Court divided over whether the provision had been impliedly repealed. Three Justices held that 2 U.S.C. §2a(c) had been repealed. *See* 538 U.S. at 292 (Stevens, J., concurring in the judgment). A plurality of the Court declined to so hold, but only by giving the statute a saving

construction rendering the circumstances in which it applies vanishingly small.

The plurality explained that four out of the five procedures set forth in the statute "have become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional." *Branch*, 538 U.S. at 273 (plurality). It then held that the remaining "flotsam" of 2 U.S.C. §2a(c)—a clause prescribing at-large representation in multi-district States where the number of Representatives has decreased and the number of districts exceeds the number of Representatives, *see id.* §2a(c)(5)—"is inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict pursuant to §2c." *Branch*, 538 U.S. at 275 (plurality). Thus, the plurality explained, 2 U.S.C §2a(c) is "a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one." *Id.* This limiting construction makes clear that 2 U.S.C. §2a(c) has no relevance here, and certainly does not provide a basis for permitting Arizona to oust the State Legislature from the congressional redistricting process.[10]

The IRC has suggested that §2a(c) is relevant here because, by changing the statutory text from "the legislature" in early versions of §2a(c) to "the law thereof" in a predecessor to the current §2a(c), Congress "decided that redistricting may be

[10] Since 2003, when *Branch* was decided, the circumstances where 2 U.S.C. §2a(c) is applicable have not come to pass.

accomplished however state law dictates, including via ballot measures." Mot. to Dismiss or Affirm 28. But the *Branch* plurality saw no such overhaul. Although it acknowledged the change in language, the plurality appropriately construed this modification as encompassing *judicial* redistricting in remedial circumstances—*i.e.*, where the state legislature has failed to timely enact a constitutional redistricting plan. *See* 538 U.S. at 274. That interpretation is consistent with the Court's longstanding recognition that state legislatures have primary responsibility for redistricting, with state and then federal courts filling in on an interim, remedial basis. *See* pp. 51-53, *supra*.

In short, nothing in 2 U.S.C. §2a(c), especially after *Branch*, has any relevance here. That obscure provision, narrowed by subsequent developments to the brink of irrelevance, does not remotely evince any intent by Congress to authorize States to oust from the congressional redistricting process the very state legislatures to which the Constitution delegates the primary power to prescribe regulations for congressional elections. If Congress ever passed a statute purporting to do so, it would be plainly unconstitutional. The second subclause of the Elections Clause gives Congress the power to override "such regulations" as the state legislatures prescribe and to make its own regulations of those elections. It does not remotely authorize Congress to rewrite the Constitution by authorizing the delegation of the primary authority to prescribe regulations of congressional elections to an entity other than that specified by the Framers in the Constitution. The Framers dismissed as absurd and clearly unconstitutional a comparable Anti-Federalist claim

that the second subclause could be used to extend the terms of Representatives and Senators beyond those specified in the Constitution. *See, e.g., Debate in North Carolina Ratifying Convention*, *in* 2 *The Founders' Constitution* at 270-77. And this Court has rejected less aggressive efforts by Congress to rewrite the Constitution. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 421 (1998); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). But there is no need to attribute such an unconstitutional motive to Congress based on the remarkably thin reed of 2 U.S.C. §2a(c). *See, e.g.*, *Branch*, 538 U.S. at 272 (opinion of Court) ("Only when it is utterly unavoidable should we interpret a statute to require an unconstitutional result—and that is far from the situation here."). There will be time enough to address that constitutional question if Congress ever expressly attempts to use its power under the second subclause of the Elections Clause to eviscerate the first subclause. It is sufficient for present purposes to recognize that §2a(c) is not such a law.

* * *

Amidst accounts of bitter redistricting battles within state legislatures, complaints of ideologically stacked and uncompetitively drawn districts, and concerns about diminished confidence in elected officials, there are doubtless those who believe that Arizona's use of the IRC to adopt congressional districts is a welcome "'political invention.'" *INS v. Chadha*, 462 U.S. 919, 945 (1983). To be sure, the "long range political wisdom of this 'invention' is arguable." *Id.* Such commissions "are rarely as independent as claimed," and "may be more dangerous

than legislatures because [they] can mask partisan motives that are easily visible" in legislatures. *Developments in the Law—Voting and Democracy*, 119 Harv. L. Rev. 1165, 1169 (2006). A recent, thorough analysis of such commissions concluded that they "have not eliminated political controversy and partisan suspicions." Cain, *supra*, at 1812. Arizona's use of the IRC is no exception. *See* p. 7, *supra* (citing litigation against IRC-drawn maps); Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 Ariz. St. L.J. 575, 578 (2003) (noting that "[t]he expectation for the [IRC] was that it would be free from partisanship, and thus Arizona would have fairer districts that allowed for competitive elections and that kept communities of interest together," but "the process turned out to be very disappointing for many supporters").

All of this is unsurprising to anyone familiar with this Court's precedents. The Court has repeatedly explained that redistricting is "primarily a political and legislative process," and "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 749, 753 (1973); *see also Perry v. Perez*, 132 S. Ct. 934, 941 (2012) ("[R]edistricting ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment."); *White*, 412 U.S. at 795-96 ("Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task."); *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality) ("The Constitution clearly contemplates districting by political entities, *see* Article I, §4, and

unsurprisingly that turns out to be root-and-branch a matter of politics."). Redistricting "inevitably has and is intended to have substantial political consequences" that will engender heated debate and passionate response regardless of who carries it out. *Gaffney*, 412 U.S. at 753.

But in all events, "policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution." *Chadha*, 462 U.S. at 945; *see also U.S. Term Limits*, 514 U.S. at 837; *City of New York*, 524 U.S. at 449 (Kennedy, J., concurring) ("Failure of political will does not justify unconstitutional remedies."). And the Framers had their own decided views about where to place the politically charged authority to "prescribe" regulations concerning the "Times, Places and Manner" of congressional elections, and they enshrined those views in the Elections Clause. Their views reflected their confidence in the republican form of government and concerns about reposing legislative authority in unelected and potentially unrepresentative bodies. The Framers were not so confident in their views that they failed to provide for a mechanism to amend the Constitution. But when the Framers have spoken as clearly to an issue as they did in delegating the primary authority for prescribing regulations for congressional elections to "the Legislature thereof," then the proper resort for those who take issue with the Framers' considered views lies in Article V, not in ignoring the plain terms of Article I, section 4.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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December 2, 2014

STATUTORY APPENDIX

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2 U.S.C. §2a

Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

Ariz. Const. art. IV, pt. 2, §1

§1. Senate; house of representatives; members; special session upon petition of members; congressional and legislative boundaries; citizen commissions

Section 1. (1) The senate shall be composed of one member elected from each of the thirty legislative districts established pursuant to this section.

The house of representatives shall be composed of two members elected from each of the thirty legislative districts established pursuant to this section.

(2) Upon the presentation to the governor of a petition bearing the signatures of not less than two-thirds of the members of each house, requesting a special session of the legislature and designating the date of convening, the governor shall promptly call a special session to assemble on the date specified. At a special session so called the subjects which may be considered by the legislature shall not be limited.

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in

an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

(4) The commission on appellate court appointments shall nominate candidates for appointment to the independent redistricting commission, except that, if a politically balanced commission exists whose members are nominated by the commission on appellate court appointments and whose regular duties relate to the elective process, the commission on appellate court appointments may delegate to such existing commission (hereinafter called the commission on appellate court appointments' designee) the duty of nominating members for the independent redistricting commission, and all other duties assigned to the commission on appellate court appointments in this section.

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest

political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. Each such official shall have a seven-day period in which to make an appointment. Any official who fails to make an appointment within the specified time period will forfeit the appointment privilege. In the event that there are two or more minority parties within the house or the senate, the leader of the largest minority party by statewide party registration shall make the appointment.

(7) Any vacancy in the above four independent redistricting commission positions remaining as of March 1 of a year ending in one shall be filled from the pool of nominees by the commission on appellate court appointments or its designee. The appointing body shall strive for political balance and fairness.

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be

registered with any party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or its designee, striving for political balance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair.

(9) The five commissioners shall then select by majority vote one of their members to serve as vice-chair.

(10) After having been served written notice and provided with an opportunity for a response, a member of the independent redistricting commission may be removed by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

(11) If a commissioner or chair does not complete the term of office for any reason, the commission on appellate court appointments or its designee shall nominate a pool of three candidates within the first thirty days after the vacancy occurs. The nominees shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment, and the appointment other than the chair shall be made by the current holder of the office designated to make the original appointment. The appointment of a new chair shall be made by the remaining commissioners. If the appointment of a replacement commissioner or chair is not made within fourteen days following the presentation of the nominees, the commission on appellate court

appointments or its designee shall make the appointment, striving for political balance and fairness. The newly appointed commissioner shall serve out the remainder of the original term.

(12) Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting commission shall conduct business in meetings open to the public, with 48 or more hours public notice provided.

(13) A commissioner, during the commissioner's term of office and for three years thereafter, shall be ineligible for Arizona public office or for registration as a paid lobbyist.

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

A. Districts shall comply with the United States Constitution and the United States voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;

F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

(16) The independent redistricting commission shall advertise a draft map of congressional districts and a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. Either or both bodies of the legislature may act within this period to make recommendations to the independent redistricting commission by memorial or by minority report, which recommendations shall be considered by the independent redistricting commission. The independent redistricting commission shall then establish final district boundaries.

(17) The provisions regarding this section are self-executing. The independent redistricting commission shall certify to the secretary of state the establishment of congressional and legislative districts.

(18) Upon approval of this amendment, the department of administration or its successor shall make adequate office space available for the independent redistricting commission. The treasurer of the state shall make $6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote.

(19) The independent redistricting commission, with fiscal oversight from the department of administration or its successor, shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(20) The independent redistricting commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the independent redistricting commission. The independent redistricting commission shall have sole authority to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan.

(21) Members of the independent redistricting commission are eligible for reimbursement of expenses pursuant to law, and a member's residence is deemed to be the member's post of duty for purposes of reimbursement of expenses.

(22) Employees of the department of administration or its successor shall not influence or attempt to influence the district-mapping decisions of the independent redistricting commission.

(23) Each commissioner's duties established by this section expire upon the appointment of the first member of the next redistricting commission. The independent redistricting commission shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.