

FILED
FEB 17 2015
OFFICE OF THE CLERK

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**

REPLY BRIEF FOR APPELLANT

PETER A. GENTALA
PELE PEACOCK FISCHER
LESLI M. H. SORENSEN
OFFICE OF THE SPEAKER
ARIZONA HOUSE OF
REPRESENTATIVES
1700 W. Washington Street
Suite H
Phoenix, AZ 85007

GREGREY G. JERNIGAN
OFFICE OF THE PRESIDENT
ARIZONA STATE SENATE
1700 W. Washington Street
Suite S
Phoenix, AZ 85007

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
TAYLOR MEEHAN
RAYMOND P. TOLENTINO
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Appellant

(Additional Counsel Listed on Inside Cover)

February 17, 2015

JOSHUA W. CARDEN
MARSHALL R. HUNT
DAVIS MILES MCGUIRE GARDNER, PLLC
80 E. Rio Salado Parkway
Tempe, AZ 85281

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
REPLY BRIEF FOR APPELLANT.....	1
ARGUMENT.....	4
I. The Legislature Has Standing To Challenge The Complete Divestment Of Its Constitutionally-Conferred Redistricting Authority.....	4
A. The Legislature Has Alleged a Concrete and Particularized Injury	4
B. Appellees' Eleventh-Hour Alternative Arguments Are No Barrier to the Court's Review.....	7
II. Neither the Elections Clause Nor 2 U.S.C. §2a(c) Permits The Complete Divestment Of The Legislature's Authority To Adopt Congressional Districts	11
A. Appellees' Theory Is Completely Unmoored From and Irreconcilable With the Constitutional Text.....	11
B. Neither <i>Hildebrant</i> Nor <i>Smiley</i> Supports Appellees' Atextual Reading of the Elections Clause	14
C. 2 U.S.C. §2a(c) Does Not Authorize the Complete Displacement of the Legislature.....	16
D. Appellees' Policy Arguments Do Not Justify Ignoring the Constitution's Plain Terms	19
CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n, 121 P.3d 843 (Ariz. Ct. App. 2005)</i>	5
<i>Branch v. Smith, 538 U.S. 254 (2003)</i>	16
<i>Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000)</i>	8
<i>City of Hugo v. Nichols, 656 F.3d 1251 (10th Cir. 2011)</i>	7
<i>Coleman v. Miller, 307 U.S. 433 (1939)</i>	9
<i>Gomillion v. Lightfoot, 364 U.S. 339 (1960)</i>	9
<i>Hawke v. Smith, 253 U.S. 221 (1920)</i>	8, 11, 12, 13
<i>Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1, 469 U.S. 256 (1985)</i>	8, 9
<i>McPherson v. Blacker, 146 U.S. 1 (1892)</i>	8, 14, 21
<i>Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916)</i>	8
<i>Raines v. Byrd, 521 U.S. 811 (1997)</i>	6
<i>Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979)</i>	7
<i>Smiley v. Holm, 285 U.S. 355 (1932)</i>	<i>passim</i>

<i>Sporhase v. Nebraska, ex rel. Douglas</i> , 458 U.S. 941 (1982).....	5
<i>Trenton v. New Jersey</i> , 262 U.S. 182 (1923).....	8
<i>Truax v. Raich</i> , 239 U.S. 33 (1915).....	22
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995).....	14, 22
<i>Williams</i> <i>v. Mayor & City Council of Baltimore</i> , 289 U.S. 36 (1932).....	8
<i>Ysursa v. Pocatello Educ. Ass'n</i> , 555 U.S. 353 (2009).....	8
Constitutional Provisions	
U.S. Const. art. I, §2, cl. 1	21
U.S. Const. art. I, §4.....	<i>passim</i>
U.S. Const. art. II, §1, cl. 2.....	14
Wash. Const. art. II, §43	23
Statute	
2 U.S.C. §2a(c)	17
Other Authorities	
47 Cong. Rec. 674 (1911)	19
N.J. Commission, http://tinyurl.com/NJcommission	23
The Federalist No. 55 (Clinton Rossiter ed., 1961) (James Madison).....	20

BLANK PAGE

REPLY BRIEF FOR APPELLANT

The Elections Clause deliberately delegates the primary authority for prescribing regulations for congressional elections, including redistricting, to state legislatures. The Arizona law challenged here just as deliberately takes the redistricting authority away from the Legislature and relegates it to an unelected and unaccountable commission. The Legislature is clearly the correct party to challenge the redelegation of its constitutionally-delegated authority, and that redelegation just as clearly violates the Elections Clause.

Tellingly, appellees concede traceability and redressability and barely dispute that the Legislature suffered an injury. Instead, they claim that the Legislature needed to engage in actions that were both futile and *ultra vires* under state law in order to challenge the state law as incompatible with the federal Constitution. There is no support for this bizarre exhaustion requirement, and no lack of a concrete context in which to consider the Legislature's challenge. Appellees have promulgated specific maps for congressional elections. The Legislature timely objected that the Constitution gives it that responsibility. Article III requires nothing more. Nor is there any bar to federal-court adjudication of suits between state-government components when a federal statute or constitutional provision delegates a particular federal responsibility to a specific state entity. In that situation, the state entity has standing to vindicate federal law, and the case presents a justiciable federal question.

On the merits, appellees insist that the Elections Clause’s specific delegation of authority to “the Legislature thereof” was really just a delegation to the lawmaking authority of the States. But nothing in text, history, or precedent supports that claim. Although the Framers may have used the word “legislature” more capaciously in discussing political theory, they meant exactly what they said in the Constitution when they delegated a particular federal function to state legislatures, rather than to some other part of state government. And while the Framers gave state legislatures a variety of different functions—some involving lawmaking subject to the normal constraints on lawmaking, others involving an electoral or ratifying function inconsistent with a gubernatorial veto—in every case the delegee was the representative body in the States, not some unelected and unaccountable entity. This Court’s cases confirm as much.

Appellees also invoke 2 U.S.C. §2a(c), but that nearly moribund statute has no application here. The provision’s only arguably relevant subsection—the one applicable to States that gained a seat in the last census—is plainly unconstitutional and does not remotely authorize or validate the redelegation of the Legislature’s constitutionally-conferred authority to an unelected commission. If Congress ever passes a statute authorizing such a redelegation, it would (1) look nothing like 2 U.S.C. §2a(c), and (2) be unconstitutional, as this Court has suggested.

Ultimately, appellees are reduced to policy arguments about the virtues of setting election rules via popular initiative and the loss of the last, great

hope for addressing partisan gerrymandering. But this case does not involve an election map enacted via initiative. Rather, it involves a State's effort to redelegate congressional redistricting from one group of state officials who—whatever their other shortcomings—are elected, accountable and handpicked for the task by the Framers, to another group of state officials who share none of those qualities. Plenty of options remain for addressing partisan gerrymandering, with the ultimate backstop being the ability to vote the gerrymanderers out. Appellees prefer to eliminate that check in favor of assurances of independence and non-partisanship, but nothing in their theory prevents the next State from re delegating congressional redistricting to an unaccountable, yet fiercely partisan, assemblage of political operatives. The Framers' answer to the potential manipulation of congressional election rules was to give primary authority to each State's representative legislature subject to revision by the Nation's representative legislature. Well-meaning reformers may have a better idea, but their resort lies in Article V.

ARGUMENT

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

A. The Legislature Has Alleged a Concrete and Particularized Injury.

Appellees do not dispute that appellant has satisfied Article III's traceability and redressability requirements; they claim only that appellant lacks a concrete and particularized injury. Appellees' Br. 19-22. But the concrete and particularized injury suffered by the Legislature is clear. The Elections Clause explicitly confers upon the Legislature the power to "prescribe[] ... Regulations" for congressional elections; the Legislature has just as explicitly been stripped of that power. Far from asserting a generalized grievance "that the State is not following the law," *id.* at 20, the Legislature challenges the usurpation of an explicit authority expressly delegated to it by the Constitution, and does so in the context of specific congressional maps promulgated by a commission exercising the very authority granted to the Legislature by the Constitution. There is nothing abstract about that claim.

Appellees' contrary assertion rests on two manifestly incorrect arguments. *First*, they offer what amounts to an exhaustion argument: the Legislature lacks standing unless it ignores Proposition 106 and the IRC, enacts its own congressional map, and demands that the Secretary of State certify its map. *See id.* at 20-21 & n.10. But there is no question that such action would be flatly illegal under Proposition

106. And there is no requirement that a plaintiff become a lawbreaker in the eyes of state law before she can challenge the state law as inconsistent with the federal Constitution. Such a rule would be particularly inappropriate for state legislators who take an oath to uphold both the state and federal constitutions. When the IRC took concrete actions to exercise power that the federal Constitution expressly delegates to the Legislature, the Legislature's injury was fully ripe. The Legislature did not need to take further actions that would be clearly *ultra vires* under Arizona law.¹

Those actions would be futile to boot. There was no prospect that the Secretary of State would certify the Legislature's map in lieu of the Commission's. The Arizona courts have already made clear that once the IRC certifies its maps, "the secretary of state *must* use them in conducting the next election." *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 121 P.3d 843, 857 (Ariz. Ct. App. 2005) (per curiam) (emphasis added). And the Secretary of State is a party to this suit and has never raised this objection or suggested that legislative maps would be certified. This Court has made clear that a party need not engage in a futile act to establish standing. *See, e.g., Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 944 n.2 (1982) (where plaintiffs "would not have been granted a permit had they

¹ To the extent that appellees' objections sound more in exhaustion principles than in Article III's injury-in-fact requirement, they are prudential standing considerations that were forfeited when appellees dropped their standing objection. *See* Legislature Br. 15 n.3.

applied for one,” failure to apply did “not deprive them of standing to challenge the legality of” permitting regime).

To support this misguided argument, appellees invoke *Raines v. Byrd*, 521 U.S. 811, 823 (1997), and contend that the Legislature must point to “a specific legislative Act” that the Commission has overridden. Br. 20; *accord* U.S. Br. 21. But *Raines* is readily distinguishable on multiple grounds, Legislature Br. 21-22, as appellees never contest and partially concede, Appellees’ Br. 22 n.12. And to the extent *Raines* expresses a preference for adjudicating disputes in the context of concrete and specific actions, such concreteness and specificity are provided by the maps promulgated by the IRC. There was no need for the Legislature to enact its own competing maps that would be *ultra vires* under state law. In other words, although the Legislature had standing to challenge Proposition 106 upon its passage, its challenge to specific maps promulgated by the Commission under Proposition 106 ensures there is nothing premature or abstract about the Legislature’s challenge to the Commission’s exercise of authority the Constitution grants exclusively to the Legislature.

Second, appellees claim briefly (at 21) that even if complete removal of the Legislature’s redistricting authority would satisfy Article III, the Legislature “maintains significant control over redistricting.” That contention is doubly flawed. First, the Legislature detailed that the usurpation here is complete, *see* Legislature Br. 36-41, and appellees’ only response is an irrelevant empirical claim that the Arizona constitution is supposedly easier to amend

than the federal Constitution. But the ability to propose constitutional amendments, whatever their prospects of success, is not the authority to prescribe regulations for federal elections. Second, while the degree of deprivation might matter on the merits, it is irrelevant to standing. Even if the Legislature retained some peppercorn of authority to prescribe election regulations, that would not mean that the deprivation of the lion's share of its authority would not constitute injury-in-fact.

B. Appellees' Eleventh-Hour Alternative Arguments Are No Barrier to the Court's Review.

Perhaps because of the weakness of the standing objection that they previously abandoned, appellees lead off their jurisdictional section with a claim that state entities cannot bring a federal constitutional claim against another state entity. While appellees label this a standing argument, the United States more candidly argues (at 14) that this action "is not justiciable" and belongs in state court. That candor comes at a price, since justiciability arguments fall outside the scope of the question added by this Court. But whatever its proper label, the contention is meritless for two basic reasons.²

² In reality, appellees' argument is not jurisdictional at all, but merits-based, as lower courts have held. *See, e.g., Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979) (explaining that appellees' cases reflect "substantive interpretations of the constitutional provisions involved," not jurisdictional rules); *accord City of Hugo v. Nichols*, 656 F.3d 1251, 1255 n.4 (10th Cir. 2011). Thus, appellees forfeited this merits argument by not raising it below.

First, there is no sound reason why one state entity cannot bring a constitutional claim against another state entity to vindicate the federal Constitution's allocation of authority between those entities. As appellant has detailed, numerous federal constitutional provisions delegate federal authority to specific state government entities. See Legislature Br. 28. This Court has not hesitated to adjudicate claims based on those provisions, *see, e.g., Hawke v. Smith*, 253 U.S. 221 (1920); *Smiley v. Holm*, 285 U.S. 355 (1932); *McPherson v. Blacker*, 146 U.S. 1 (1892); *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70 (2000), and has done so even when they were brought in the name of the state against a state official, *see, e.g., Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916).

Appellees invoke precedents recognizing that inferior municipal bodies like cities, counties, and school boards generally cannot bring suit against a State. See *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 363 (2009); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1932); *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923). But that simply reflects the reality that the Constitution does not expressly confer any powers upon cities, counties, or school boards the way it does upon state legislatures, state executive authorities, and state courts. See Legislature Br. 28. Indeed, appellees concede that when a federal statute expressly grants rights to an inferior municipal body, those entities can file suit to vindicate their federal statutory rights against another state entity. See Appellees' Br. 18 n.9; *Lawrence Cnty. v. Lead-Deadwood Sch. Dist. No. 40-1*, 469 U.S. 256 (1985). In that situation, a State's

general power to structure its affairs among subordinate entities gives way to the command of federal law. *See, e.g., Lawrence Cnty.*, 469 U.S. at 270; *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (“When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.”).

That same principle applies, *a fortiori*, when it comes to vindicating the Constitution’s specific allocation of certain powers to state legislatures. It would make no sense to think that state bodies can sue other state entities to enforce federal statutes but not the Constitution. The relevant question in each case is whether the particular federal provision—constitutional or statutory—confers a protectable interest to the governmental body that is bringing the claim. *See Gomillion*, 364 U.S. at 343-45.³

Second, the broader problem with appellees’ jurisdictional argument is that it is indistinguishable

³ Appellees’ suggestion that there is no precedent for this Court exercising jurisdiction over federal constitutional claims brought by one state entity against another ignores the jurisdictional holding in *Coleman v. Miller*, 307 U.S. 433 (1939). In rejecting jurisdictional objections, this Court distinguished the very municipal-body precedents invoked by appellees, *see id.* at 441 n.6 (citing *Trenton* and *Williams*), and considered the suit brought by state legislators against the secretary of state. Although the Court ultimately found most of the issues to be textually committed to Congress, that conclusion turned on the constitutional claims asserted, not the parties asserting them. And *Hildebrant* and *Smiley* make clear that Elections Clause claims are justiciable.

from, and depends entirely on accepting, appellees' merits arguments. For example, appellees contend (at 16) that "the federal Constitution gives a state legislature no rights against the State itself." But that is precisely the merits question here—whether the Elections Clause's delegation of congressional redistricting authority to "the Legislature" trumps a state law permanently re delegating that authority elsewhere. Likewise, appellees claim (at 17) that "States do not derive their governmental powers from the federal government, but rather from the People." But that is not true of the power to prescribe regulations for congressional elections, which was assigned by the Constitution itself. And appellees contend (at 17) that federal courts "generally have no warrant to interfere with the distribution of powers within a state government," but that general rule does not apply when the federal Constitution expressly delegates a federal responsibility to one part of state government rather than another. In short, appellees' jurisdictional argument turns entirely on such highly disputable points of law going to the merits. While appellant firmly believes it should prevail on the merits, if this Court disagrees, there is no reason to do so as a jurisdictional, rather than merits, ruling.⁴

⁴ Appellees also contend in passing that the Legislature is challenging "the form of government the People of Arizona have chosen for themselves." Appellees' Br. 18. But the People of Arizona are absolutely entitled to "popular lawmaking," *id.* at 19—just not when the result of that lawmaking violates the Constitution.

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

A. Appellees' Theory Is Completely Unmoored From and Irreconcilable With the Constitutional Text.

Appellees studiously avoid any discussion of the Elections Clause's text until some forty pages into their brief. And even then, appellees completely disregard the definition that *this Court* has repeatedly given the term "the Legislature" in the specific context of the Elections Clause and every other constitutional provision in which it appears: "the representative body which ma[kes] the laws of the people." *Smiley*, 285 U.S. at 365 (quoting *Hawke*, 253 U.S. at 227). The term was "not one of uncertain meaning" at the Founding, and that certain meaning "still" applies today. *Id.* (quoting *Hawke*, 253 U.S. at 227) (quotations omitted). That settled meaning forecloses appellees' suggestions that "the Legislature" in the Elections Clause instead means "[t]he power that makes laws," Br. 40, "state-based lawmaking," *id.* at 23, "all the lawmaking power of the State," *id.* at 38, or various other reformulations (appellees cannot choose just one) of language that is explicit and unambiguous.

Appellees suggest (at 39) that the Framers "often used" the term "Legislature" "capaciously to refer to the entirety of lawmaking power within a polity"—but not when they were allocating particular federal responsibilities to specific entities within a state government. However broadly the Framers may have

used the term “legislature” when discussing political theory or “the Swiss Canton of Zug,” Appellees’ Br. 39 n.21, when they allocated responsibilities to the “Legislatures of the States” or “the Legislature thereof” in the Constitution, they clearly meant the representative body which makes the law in that State, just as surely as they meant the “Executive Authority” and “Judges” when they allocated responsibilities to them. *See* Legislature Br. 28.

Appellees contend (at 40) that this Court has “rejected” the proposition that the term “must always refer to the State’s elected body of representatives.” That assertion is deeply flawed. While this Court has made clear that context may dictate the *function* performed by the state legislatures, which in turn may inform the constraints under which “the State’s elected body of representatives” operate, it has never suggested that context changes the *meaning* of the term state legislature or permits the redelegation of power expressly conferred on state legislatures to another entity. Thus, when state legislatures serve as electors or ratifiers, they act free from any veto constraint. *See, e.g., Hawke*, 253 U.S. at 229-30. In contrast, when state legislatures are granted a lawmaking function, they act subject to the normal constraints on that legislative function, including the gubernatorial veto or override-by-referendum. *See, e.g., Smiley*, 285 U.S. at 365. But in no context has this Court found that a delegation to state legislatures was a delegation to some different entity, let alone that a State could override the Constitution by permanently redelegating that authority elsewhere. Moreover, this Court has already determined in

Smiley that the legislature means the representative body of the State in the *specific* context at issue here.

The Seventeenth Amendment's reallocation of the power to choose Senators—which appellees must view as an unnecessary exercise—demonstrates the point. Before that amendment, a state legislature's function in choosing Senators was “electoral,” Appellees' Br. 41, and others within the State—most obviously, the People—were capable of performing electoral functions. But that did not mean that anyone besides the state legislature—including the People—could have discharged the legislature's constitutionally-assigned electoral function absent a constitutional amendment, as *Hawke* confirms. See 253 U.S. at 228 (stating that “the purpose of making the office of Senator elective by the people” could not “be accomplished by a referendum vote”). Likewise, in the Elections Clause context, the state legislature's function is “lawmaking,” and others within the State may be able to perform lawmaking functions, but that does not mean that the Legislature's constitutionally-conferred Elections Clause authority can be re delegated to some other entity with lawmaking capabilities absent another constitutional amendment.

Appellees' effort to equate state legislatures with any process of lawmaking permitted by the State suffers from other serious deficiencies. First, it violates the admonition against rendering language deliberately included by the Framers superfluous. Appellees would transform the phrase “shall be prescribed in each State by the Legislature thereof” into “shall be prescribed in each State by [the power

that makes laws in that State].” If “the Legislature thereof” means simply any method for lawmaking allowed by the State, the Framers could just as easily have ended the clause at “in each State.” But the reference to “Legislature thereof” was not superfluous. As this Court made clear in an analogous context, that reference “operat[es] as a limitation upon the state in respect of any attempt to circumscribe the legislative power.” *McPherson*, 146 U.S. at 25 (discussing art. II, §1, cl. 2); *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) (noting parallel duties imposed on state legislatures by art. I, §4, cl. 1 and art. II, §1, cl. 2).

Equally damning, appellees’ approach has no limiting principle. *See* Legislature Br. 48-49. Appellees’ response to that rather fundamental flaw is tucked away in a footnote, where they argue that the IRC acts as a legislative body not simply because redistricting is a legislative task, but also because the IRC commissioners “exercise discretion and make policy decisions,” and their enactments “carry the force of law and have prospective implications.” Appellees’ Br. 41 n.25 (quotations omitted). But any person or entity given the job of redistricting—whether the governor, the state supreme court, or an unelected redistricting czar—will exercise discretion and make policy decisions with the force of law.

B. Neither *Hildebrant* Nor *Smiley* Supports Appellees’ Atextual Reading of the Elections Clause.

Given the massive problems that would result from appellees’ construction of the constitutional text, it is unsurprising that no precedent of this Court

supports their view. Appellees nevertheless insist (at 33) that in *Hildebrant* and *Smiley*, this Court held that “the Elections Clause does not bar state entities other than a representative body from prescribing the manner of congressional elections,” even to the complete exclusion of that representative body (*i.e.*, the state legislature). Appellees grossly overread both decisions. Each decision did no more than hold that because redistricting is a lawmaking function, state legislatures act pursuant to the normal constraints on *their* lawmaking powers, such as the gubernatorial veto in *Smiley* and override-by-referendum in *Hildebrant*. Here, it is *appellees* that seek to free redistricting from the normal constraints on the Legislature’s lawmaking functions, such as the legislators’ need to face the voters, by permanently re delegating congressional redistricting to an unaccountable and unelected commission. The idea that *Smiley* and *Hildebrant* support that deviation from the normal lawmaking process gets matters backwards.

Appellees stress (at 34-35) that in *Hildebrant*, the Court rejected the proposition that including a popular check on the state legislature is “repugnant to” the Elections Clause. But appellant makes no comparable claim. The problem with Proposition 106 is not a procedural concern that it originated as an initiative, but the substantive reality that it divests the Legislature of an authority expressly granted to it by the Constitution. And the problem with the IRC’s maps is not that they are an indirect product of an initiative, but that they are regulations of congressional elections prescribed by a body that is not the state legislature.

C. 2 U.S.C. §2a(c) Does Not Authorize the Complete Displacement of the Legislature.

Appellees argue that the Court need not reach the straightforward text of the Elections Clause because 2 U.S.C. §2a(c) “permit[s] redistricting by initiative.” Appellees’ Br. 27. Appellees have never before claimed that §2a(c) resolves this case on the merits, and with good reason. While appellees’ “statutory” argument is long on discussion of the legislative history of the since-repealed 1911 Act, it all but omits any discussion of §2a(c)’s text. But that text makes clear that §2a(c) has no application here. The nearly moribund law sets forth default rules for elections when a State fails to redistrict after a decennial census, providing a different default rule depending on whether a State gained, lost, or maintained its number of representatives. Since Arizona gained a ninth seat as a result of the 2010 census, the only even arguably relevant provision of §2a(c) is subsection (2), which sets a default election map of the previous eight districts plus an at-large, state-wide district. As *Branch v. Smith*, 538 U.S. 254 (2003) explains, that default option would plainly be unconstitutional under one-person-one-vote principles. See Legislature Br. 54-56. In short, the only arguably applicable provision of §2a(c) is inarguably unconstitutional. That should suffice to dispense with appellees’ so-called statutory argument.⁵

⁵ The United States tries to avoid this anomaly by focusing on §2a(c)’s prefatory clause, which it describes (at 28) as “a comprehensive procedure for redistricting.” That is a bold claim

For §2a(c) to be relevant at all, it would need to do far more than provide a default rule for the failure to redistrict; it would need to affirmatively authorize states to redistrict through commissions that were fully independent of the state legislature. But if Congress were to pass such a statute, it would raise constitutional questions of the first order. Whatever power Congress has under the second subclause of the Elections Clause, it does not include the authority to override the first subclause. *See* Legislature Br. 56-57. Indeed, this Court said as much in *Smiley*. 285 U.S. at 372 (“Congress ha[s] no power to alter [the Elections Clause].”).⁶ And the Framers made the same basic point in responding to anti-federalist fears that the second clause could be used to extend legislative terms beyond their constitutionally-prescribed length. *See* Legislature Br. 56-57. Appellees’ only response (at 32) is that “a law extending the terms ‘would be a palpable violation of the Constitution.’” Indeed. And a law authorizing States to deprive state legislatures of their constitutionally-conferred role in prescribing regulations for congressional elections and redelegate that authority elsewhere would be an equally palpable

for a sixteen-word subjunctive fragment; but the prefatory clause is comprehensive only in the sense that it introduces the default rule for every post-census situation, whether the number of seats stays the same, *see* 2 U.S.C. §2a(c)(1), increases, *id.* §2a(c)(2), or decreases, *id.* §2a(c)(3)-(5). When, as here, the number increases, the prefatory clause and §2a(c)(2) together do nothing more or less than prescribe a default rule that is plainly unconstitutional.

⁶ Appellees dismiss this as *dicta* (at 29 n.14), but the *very next paragraph* of the decision states that the Court’s holding “clearly follows” from the principles just stated. 285 U.S. at 372-73.

violation of the Constitution. In all events, such a law, if it ever passed, would look nothing like §2a(c), and this Court interprets statutes to avoid constitutional problems, not to create them.⁷

In the end, appellees' §2a(c) argument is not really a traditional statutory argument so much as an excuse to highlight a few snippets from the legislative history of the since-repealed 1911 Act. That endeavor will certainly embolden critics of legislative history. Whatever the merits of using the legislative history of the provision directly at issue, or perhaps even the legislative history of a predecessor statute, to invoke the legislative history of a since-repealed statute where its successor statute is not even directly implicated is surely a bridge too far.

In all events, at most appellees' legislative history suggests that the 1911 Congress understood redistricting to be a lawmaking function, *see Smiley*, 285 U.S. at 372-73, and was comfortable with the

⁷ The United States conspicuously does not embrace appellees' constitutional arguments concerning §2a(c). It argues instead (at 32) that the statute "simply validates, for purposes of federal law, the districts adopted under state law." But §2a(c)'s plain text does no such thing; it merely provides a (plainly unconstitutional) default rule for a failure to redistrict. If §2a(c) really were an all-purpose federal-law validator of districts adopted by any state law no matter how otherwise repugnant to the Constitution, then the constitutional issue most certainly could not be avoided. Of course, this constitutionally dubious role for §2a(c) is not only not apparent from its text, but it entirely escaped the notice of nine Justices in *Branch*, all of whom were searching for some continuing role for the provision to avoid finding an implied repeal.

possibility of override-by-referendum as a constraint on that lawmaking function.⁸ But that gets appellees no further than *Hildebrant*. And as already emphasized, it is one thing to confirm that state legislatures are subject to the normal constraints on lawmaking when they redistrict, and quite another for a State to redelegate that authority to an unelected and unaccountable entity different from that selected by the Framers. Nothing in the legislative history of the 1911 Act endorses the latter.⁹

D. Appellees' Policy Arguments Do Not Justify Ignoring the Constitution's Plain Terms.

Unable to ground their argument in the text of the Elections Clause, the relevant precedents, or §2a(c), appellees instead rely heavily on dubious theories about the Clause's purpose (at 23-27, 44-46), and equally dubious policy arguments predicting ruin should the Court reverse the entirely unprecedented decision below (at 1-3, 46-55). Appellees' efforts are no match for the Framers' own words in the Constitution and ratifying debates.

⁸ See, e.g., 47 Cong. Rec. 674 (1911) (contending that prior statutory language meant "the people ... have the final determination of all legislation except the creation of congressional districts") (statement of Rep. Crumpacker).

⁹ Indeed, the 1911 Senate *rejected* an amendment that would have allowed districts to be drawn "by the legislature thereof, or by the people thereof." See 47 Cong. Rec. 3556. That rejected text, while closer to appellees' mischaracterization of the enacted text, is still a far cry from language that would sanction the legislature's permanent ouster from the process in favor of a commission independent from the legislature.

Appellees' grand unifying theory is that the Elections Clause "vests the initial duty to regulate congressional elections in state-based lawmaking, as close to the People as possible, but also authorizes Congress to intervene to prevent state election regulations from being manipulated by state officials." Br. 23. In appellees' view, if only the Framers knew about lawmaking via initiative, they would have placed the power over redistricting directly in the People. This theory has several problems, not the least of which is that the Framers were well aware of direct democracy and had a healthy skepticism about it. Appellees' attempt (at 47-48) to isolate this skepticism as concerned only about direct democracy at the national level rewrites the historical record. To cite just the most colorful example, Madison talked about the city-state of Athens, not any expansive national polity, when he opined that direct democracy would produce a mob even "[h]ad every Athenian citizen been a Socrates." *The Federalist* No. 55, at 340 (Clinton Rossiter ed., 1961). The Framers were well-acquainted with direct democracy, including its possible use by States, and still made a clear decision to delegate the primary responsibility for congressional election regulations to state legislatures. In doing so, the Framers expressly referenced the legislatures' representative character and defended the Elections Clause as giving parallel lawmaking responsibility to two representative legislatures, at the state and federal levels. See *Legislature* Br. 35-36 (discussing Madison's response to Elections Clause critics).

An equally fundamental problem with appellees' theory that the Framers wanted the redistricting

power to rest directly in the People is that, despite appellees' sweeping rhetoric, that is not what Arizona law prescribes. Proposition 106 did not usher in some brave new world of map drawing by the assembled voters; it permanently transferred the redistricting authority from one group of state officials (elected, accountable, and chosen by both the People and the Framers) to a different group of state officials (unelected, unaccountable to the voters, and chosen by neither the People nor the Framers). Nothing in the Framing-era debates or the purposes of the Elections Clause remotely supports that transfer.¹⁰

Appellees contend that the Framers reserved a role for Congress to prevent “manipulat[ion]” by “self-interested state officials,” such as “state legislatures [that] might try to manipulate the federal elections

¹⁰ Because this case is about permanent redelegation to an *unelected* commission, appellees' (and amici's) sky-is-falling claims about the threat to popular lawmaking concerning congressional elections are misplaced. They are also wildly overstated. Appellees' lead example (at 51), Arizona's extension of the franchise to women via initiative, implicates the Electors Qualification provision in art. I, §2, cl. 1, not the Elections Clause. The former does not delegate power to state legislatures; it merely uses the qualifications (however established) for voting for the state legislature's most numerous branch as the qualifications for voting in congressional elections in that State. *Hildebrand* preserves popular lawmaking via referendum. And the constitutionality of particular initiatives depends on their details. But whatever the fate of one-off efforts to dictate congressional election rules via initiative, the permanent divestiture and redelegation of the state legislature's constitutionally-conferred authority clearly crosses the constitutional line. *Cf. McPherson*, 146 U.S. at 35 (indicating that authority over presidential electors cannot be permanently wrested from state legislature).

system.” Br. 23, 32. There are two problems with that argument. First, there is no reason to think that the Framers would be *more* comfortable with “self-interested state officials” who were unelected and unaccountable to the voters. Second, appellees’ argument about the Framers’ concerns only makes sense if “the Legislature” in fact means “the state legislature,” not the “state lawmaking process.”

Appellees’ paeans to federalism and popular sovereignty (at 46-49) are easily answered. Of course a state government is free to “chart its own course based on the will of its People.” Br. 46. Just not when the result violates the Constitution. *See, e.g., Thornton*, 514 U.S. at 783 (holding Arkansas term-limits initiative unconstitutional); *Truax v. Raich*, 239 U.S. 33, 37 (1915). And the power of States is hardly at its zenith when it comes to the uniquely federal subject of congressional elections. *See, e.g., Thornton*, 514 U.S. at 841-42 (Kennedy, J., concurring).

Appellees’ rather breathless suggestion that the IRC is the last bastion against partisan gerrymandering is fundamentally misguided both legally and practically. Legally, the absence of judicially-manageable standards to police partisan gerrymandering should not lead this Court to ignore perfectly manageable standards derived from the plain text of the Elections Clause. And practically, there are ample means of trying to rein in partisan gerrymandering that comply with the Constitution. States are free to adopt redistricting principles that narrow the scope for partisan gerrymandering. And they are free to adopt advisory commissions that put political pressure on the state legislature to adopt

their maps, as some States have done. Congress can use its authority under the Elections Clause to address the problem in the context of congressional elections. And the ultimate check on partisan gerrymandering is the ability to vote the bums out.¹¹

But appellees would eliminate that ultimate check by permanently re delegating congressional redistricting authority to unelected and unaccountable officials who cannot be voted out. There is no evidence that Arizona's particular five-member commission has cracked the code and solved the problem of partisan gerrymandering, and some evidence to the contrary. *See* Legislature Br. 58. But, more troubling, there is nothing in appellees' legal theory to prevent the delegation of redistricting authority to an unelected commission dominated by political operatives of a single party. Appellant's opening brief emphasized this disturbing prospect, *id.* at 50, and appellees' failure to respond is telling. There is no response. Once States are free to redelegate the authority the Framers granted to the state legislatures, there is no basis for ensuring that

¹¹ Contrary to appellees' suggestion (at 43, 55), Arizona is an outlier in ousting the state legislature from the process entirely. In Washington, for example, "the legislature may amend the redistricting plan" adopted by its commission. Wash. Const. art. II, §43. In New Jersey, state legislators may and do serve on its commission. *See* <http://tinyurl.com/NJcommission> (listing Assemblywoman Caroline Casagrande and Senator Nilsa Cruz-Perez). Montana has only one congressional district and would be unaffected by a Court ruling (and Idaho and Hawaii have only two). *Only* in Arizona must commission members be selected from a predetermined list that the legislature has no role in formulating.

the new delegees will be independent, non-partisan, or anything else.

As the Framers well understood, while alternatives may sound good in theory, it is hard to beat representative democracy in practice. That is why the Framers gave the primary authority to prescribe regulations for congressional elections to the state legislatures and not some unelected and unaccountable commission. Ultimately, appellees' position is not that this power should be given to the People, but that redistricting is too fraught with difficulties to be entrusted to the normal lawmaking process, and should be given to just such an unelected commission.

This Court has already rejected two efforts to exempt redistricting from the constraints faced by state legislatures in their ordinary lawmaking process. Facing the voters every few years is perhaps the most important of those constraints. Appellees would free redistricting from that constraint and redelegate the authority from an elected and accountable body hand-picked by the Framers to a different group that possesses none of those virtues. As the Court concluded about a different reform-minded initiative in *Thornton*, the option open for appellees' proposal lies in Article V, not in ignoring the plain terms of Article I.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

PETER A. GENTALA
PELE PEACOCK FISCHER
LESLI M. H. SORENSEN
OFFICE OF THE SPEAKER
ARIZONA HOUSE OF
REPRESENTATIVES
1700 W. Washington St.
Suite H
Phoenix, AZ 85007

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
TAYLOR MEEHAN
RAYMOND P. TOLENTINO
BANCROFT PLLC
1919 M St. NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

GREGREY G. JERNIGAN
OFFICE OF THE PRESIDENT
ARIZONA STATE SENATE
1700 W. Washington St.
Suite S
Phoenix, AZ 85007

JOSHUA W. CARDEN
MARSHALL R. HUNT
DAVIS MILES MCGUIRE
GARDNER, PLLC
80 E. Rio Salado Pkwy.
Tempe, AZ 85281

Counsel for Appellant

February 17, 2015

BLANK PAGE