IN THE
MORRIS TYLER MOOT COURT OF APPEALS
AT YALE

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

2. 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?
PARTIES TO THE PROCEEDING

Appellant, plaintiff below, is the Arizona State Legislature. Appellees, defendants below, are the Arizona Independent Redistricting Commission; its individual members Colleen Mathis, Linda C. McNulty, Cid Kallen (seat formerly held by José M. Herrera), Scott D. Freeman, and Richard Stertz, in their official capacities; and the Arizona Secretary of State, Michele Reagan, in her official capacity (office previously held by Ken Bennett).
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OPINION BELOW

The opinion of the district court is reported at 997 F. Supp. 2d 1047.

JURISDICTION

The three-judge district court issued its judgment on February 21, 2014. Appellant filed a timely Statement as to Jurisdiction on April 28, 2014. On October 2, 2014, this Court postponed further consideration on the question of jurisdiction to a hearing on the merits. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

The Elections Clause of the United States Constitution provides: “The Times, Places, and Manners 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 place of chusing Senators.” U.S. Const. art. 1, § 4, cl. 1.

STATUTORY PROVISION INVOLVED

2 U.S.C. § 2a(c) is reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

The Elections Clause of the United States Constitution vests the power to “prescribe[]” the “Times, Places, and Manner” of federal elections, including the power to draw congressional districts, in one state entity: the “Legislature.” U.S. Const. art. I, § 4, cl. 1. Accordingly, from the moment Arizona joined the Union in 1912, the Arizona State Legislature was the body authorized to redistrict, and was explicitly recognized as such in the Arizona Constitution. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 997 F. Supp. 2d 1047, 1048 (D. Ariz. 2014). The Arizona Legislature was then, and is now, directly elected by the people of Arizona.
The Legislature is currently comprised of a thirty-member Senate and a sixty-member House. J.A. 14.

Beginning in 1912, the directly elected Legislature enacted redistricting maps as they would enact any other legislation: through Arizona’s standard legislative process. J.A. 16. Members could introduce redistricting measures for debate in a joint committee. Id. The proposed redistricting legislation, along with any amendments, would then be recommended to the body as a whole, which had the power to either approve the recommendations of the joint committee or make changes. Id. Were the body to pass the measure, it was sent to the Governor for approval or veto. Ariz. Const. art. IV, pt. 2, § 12; id. art. V, § 7; J.A. 16-17. In short, redistricting was legislative business as usual.

That all changed in 2000, when the voters of Arizona passed Proposition 106, a citizen ballot initiative. Proposition 106 stripped the Legislature of its authority to draw Congressional districts. It vested that power in a newly created Independent Redistricting Commission (hereinafter “IRC” or “Commission”). Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n, 208 P.3d 676, 685 (Ariz. 2009) (“[W]hen the voters adopted Proposition 106, they . . . transferred the redistricting task from the legislature to the Commission.”). Proposition 106 also detailed how the IRC was to work moving forward. It laid out a process through which commissioners were to be selected, discussed below, and listed the factors the commissioners would be tasked with considering when drawing state legislative and congressional districts after the decennial census. J.A. 18-19.

Proposition 106, now ensconced in Article IV of the Arizona Constitution, dictates that the IRC will consist of five appointed volunteers who serve concurrent, ten-year terms. Ariz. Const. art. IV, pt. 2, §§ 1(3), (23). IRC members are not required to have any expertise in or even
familiarity with the redistricting process. Ariz. Const. art. IV, pt. 2, § 1(3). The only membership
requirement is that no more than two members of the Commission may be chosen from the same
political party. Ariz. Const. art IV, pt. 2, § 1(3). Four legislative leaders — the Speaker and
Minority Leader of the House, and the President and Minority Leader of the Senate — are
permitted some involvement in commissioner selection: they may each select one. But the
legislature as a whole is given no power to select commissioners. And even the legislative
leadership must choose their appointments from a pool of candidates not of their own choosing,
but put together by another unelected commission—the Commission on Appellate Court
Appointments (“Appellate Commission”). Ariz. Const. art IV, pt. 2, §§ 1(5)-(6). This Appellate
Commission exists to screen nominees for Arizona’s state appellate courts. Ariz. Const. art. VI, §
36. Proposition 106 actually allows even further delegation, as the Appellate Commission can
vest its power to select IRC candidates to yet another commission “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.” Ariz. Const. art IV, pt. 2, §
1(4). If a legislative leader fails to make an appointment in the prescribed seven-day time frame,
the Appellate Commission makes the appointment instead. Ariz. Const. art. IV, pt. 2, § 1(6). The
four IRC commissioners selected through this process select a fifth commissioner from a pool of
only five individuals chosen by the Appellate Commission (or its delegated commission), and if
they fail to agree on an appointment, the Appellate Commission chooses for them. Id. art. IV, pt.
2, § 1(7).

Redistricting was required after the 2000 census. Navajo Nation v. Ariz. Indep.
Redistricting Comm’n, 230 F. Supp. 2d 998, 1002 (D. Ariz. 2002). In June 2001, the IRC began
the process of redrawing Arizona’s legislative and Congressional maps, holding public hearings
and finally adopting a plan in October 2001. Id. The 2001 plan was challenged by numerous groups and individuals on multiple legal grounds. Id. at 1002-03; Ariz. Minority Coal. for Fair Redistricting, 208 P.3d at 681-84 (Ariz. 2009) (describing a variety of legal challenges to the 2001 plan). The Arizona Supreme Court signed off on a version of the Commission’s plan in 2009. Ariz. Minority Coal. for Fair Redistricting, 208 P.3d at 689.


On May 2, 2012, the State Senate voted to join the State House in filing a suit to “defend the authority of the Senate related to redistricting under the Constitutions of both the United States and the State of Arizona.” J.A. 27. The vote passed 21 to 9. Id. The same day, the House passed a motion confirming it would file suit. J.A. 46. On July 20, 2012, the Arizona Legislature sued the Arizona Independent Redistricting Commission; its individual members Colleen Mathis, Linda C. McNulty, José M. Herrera, Scott D. Freeman, and Richard Stertz in their official capacities; and the Arizona Secretary of State, Ken Bennett, in his official capacity. J.A. 13. The Legislature asks this Court to remand with instructions to enjoin Appellees from adopting, implementing, or enforcing any Congressional map created by the IRC, and declare Proposition 106, which wholly divests the Legislature of the power to prescribe Congressional redistricting legislation, unconstitutional.
SUMMARY OF ARGUMENT

The Arizona Legislature does have standing, and, on the merits, Arizona’s use of an IRC violates the Elections Clause. The Court should reverse the decision below.

I. The Arizona Legislature’s challenge presents a justiciable controversy. Like an individual seeking to vindicate a constitutional right guaranteed to individuals, the Arizona Legislature has Article III standing to seek to vindicate a right guaranteed by the Constitution to the “Legislature” by demonstrating injury, causation, and redressability. Put differently, this Court need not apply any special theory of legislator standing to the case at hand. When a constitutional right is infringed, the individuals, groups, and corporations to whom that right is guaranteed may sue to defend it. The Independent Redistricting Commission Amendment to the Arizona Constitution eliminates the Legislature’s authority, guaranteed by the Elections Clause, to prescribe Congressional districts; therefore, the Legislature seeks to have it invalidated. This establishes injury in fact, causation, and redressability.

The Arizona Legislature raises no claims arising under or implicating the Guarantee Clause, which this Court has placed beyond the scope of judicial review. This suit does not attack citizen initiatives or direct democracy per se; it challenges the ability of a citizen initiative to wholly divest the legislature of the power delegated to it by the Constitution. There are no issues of state sovereignty implicated; the Elections Clause is the source of state authority to prescribe Congressional districts. Therefore, and because this Court has repeatedly been willing to consider the meaning of the Elections Clause, this case is not barred by the political question doctrine.

II. Arizona’s IRC Amendment violates the Elections Clause. The Elections Clause provides that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .” U.S. Const.
art. I, § 4, cl. 1. With respect to redistricting, the Elections Clause therefore establishes a clear rule: a State’s “Legislature” holds primary redistricting authority. The IRC Amendment broke that rule; in fact, it did so twice over. First, the Amendment’s enactment violated the Elections Clause, as the people of Arizona—not the Legislature—prescribed a redistricting regulation. Second, the Amendment’s substance violates the Elections Clause, as the IRC—not the Legislature—now holds plenary redistricting power. For both reasons, Arizona’s IRC Amendment cannot stand.

Both of Appellant's arguments hinge on a single commonsense claim: that “Legislature” in the Elections Clause refers exclusively to a State’s elected representative body. That claim finds ample support in the dictionary meaning of "Legislature," in the ways “Legislature” is used elsewhere in the Constitution, and in the manner in which the Framers used “Legislature” in their writings. For all those reasons, this Court should rule here exactly as it has ruled before, holding that “Legislature” refers exclusively and unambiguously to “the representative body which ma[kes] the laws of the people.” Smiley v. Holm, 285 U.S. 355, 365 (1932).

Neither this Court’s precedents nor 2 U.S.C. § 2a(c) require anything different. This Court has never said that a populace or an unelected commission become the “Legislature” when they exercise rulemaking power. Quite the opposite: this Court’s precedents make clear that while the Legislature must redistrict subject to the normal constraints the state lawmaking process imposes, it must still be the institutional Legislature that redistricts. Likewise, 2 U.S.C. § 2a(c) lends Appellees no aid. At most, § 2a(c) gives state courts the power to redistrict if the Legislature fails to, Branch v. Smith, 538 U.S. 254, 274 (2003); it says nothing about state populaces supplanting their Legislatures and exercising primary redistricting authority in their
steads. Since neither this Court’s precedent nor Congress have shielded the IRC Amendment from the Election Clause’s clear mandate, this Court should reverse the judgment below.

ARGUMENT

I. THE ARIZONA LEGISLATURE’S CHALLENGE TO THE CONSTITUTIONALITY OF PROPOSITION 106 PRESENTS A JUSTICIABLE CONTROVERSY

A. The Legislature Satisfies the Elements of Constitutional Standing: Injury, Causation, and Redressability

This case calls for a straightforward application of this Court’s Article III standing doctrine. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (listing injury in fact, causation, and redressability as the three requirements of constitutional standing). The Arizona Legislature, as an entity, suffered a concrete injury in fact caused by the nullification of its right to exercise its power to prescribe Congressional districts, which is conferred to it by the Constitution. U.S. Const. art. I, § 4, cl. 1. This injury is particularized, ongoing, and resolvable by this Court’s exercise of its foremost obligation to say what the Constitution means. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The Arizona Legislature asks this Court to restore a right guaranteed to it by the Constitution; it cannot vindicate this right without judicial intervention. This is therefore a prototypical Article III “case” or “controversy.” Whitmore v. Arkansas, 495 U.S. 149, 154-55 (1990) (“Article III, of course, gives the federal courts jurisdiction over only ‘cases and controversies,’ and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process.”).

1. The Legislature is injured in fact: it no longer has the power to conduct Congressional redistricting

The Legislature has demonstrated injury in fact. Proposition 106 and the Independent Redistricting Commission invade a legally protected interest that is concrete and particularized. Defenders of Wildlife, 504 U.S. at 560 (citing Allen v. Wright, 68 U.S. 737, 751 (1984)).

The Independent Redistricting Commission is composed entirely of individuals who are not members of the Legislature. Only four members of the Legislature have any say in choosing who serves on the Commission, and their influence is illusory. Four legislative leaders (the Speaker and Minority Leader of the House of Representatives and the President and Minority Leader of the State Senate) must choose their four appointments from a pool of only ten partisan-affiliated individuals, not of their own choosing, but created by yet another commission—the Commission on Appellate Court Appointments. Ariz. Const. art IV, pt. 2, §§ 1(5)-(6). In addition, no more than two members of the Commission may be chosen from the same political party. Ariz. Const. art IV, pt. 2, § 1(3). The Commission on Appellate Court Appointments is itself an appointed body that exists to screen nominees for Arizona’s state appellate courts. Ariz. Const. art. VI., §§ 36, 37. However, Proposition 106 allows the Commission on Appellate Court Appointments to delegate its power to select Independent Redistricting Commission candidates to yet a third commission, “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.” Ariz. Const. art IV, pt. 2, § 1(4).

This Russian-nesting-doll-esque divestment of power from the Legislature is a concrete and particularized injury in fact. *Defenders of Wildlife*, 504 U.S. at 560-61. The Legislature *qua* Legislature has no say in picking members of the Commission, or in guiding the development of the maps the Commission draws. Rather, the power is diverted to a series of unelected, virtually unaccountable individuals with only trifling involvement from House and Senate leaders. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 997 F. Supp. 2d 1047, 1058 (D. Ariz. 2014) (Rosenblatt, J., dissenting).

This is not the kind of “generalized grievance” that this Court has found insufficient to confer standing. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013). Nor is this injury speculative. *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (plaintiff did not allege a case or controversy in police misconduct suit based on possibility of future injury by an officer who might use a choke hold); *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1143 (2013) (plaintiffs alleging that they faced greater inconvenience and higher costs because of the need to conduct secure communications with overseas parties whom the U.S. government may have targeted for surveillance lacked standing). The injury is far more concrete than other alleged injuries for which this Court has conferred standing. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, Inc., 528 U.S. 167, 182 (2000) (describing sufficiently established injury in fact, based in part on testimony by an individual that “he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about [defendant company’s] discharges.”).
This injury is actual and ongoing. *Defenders of Wildlife*, 504 U.S. at 560. The Redistricting Amendment’s continued operation prevents the Legislature from exercising a power conferred to it by the federal Constitution. This Court need not reach to find this injury “actual or imminent.” *See Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990) (discussing how the Court’s determination in *United States v. SCRAP*, 412 U.S. 669 (1973), that environmentalist plaintiffs contesting an administrate agency’s approval of a surcharge on railroad freight rates had standing “surely went to the very outer limit of the law.”). The total infringement of a Constitutional right is a real and cognizable injury in fact. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008); *Nixon v. Condon*, 286 U.S. 73, 89 (1932).

2. **The injury is caused by Proposition 106, which provides for the creation, operation, and ongoing existence of the Independent Redistricting Commission, which exercises a power rightfully vested in the Legislature.**

The Legislature has established causation. The “line of causation between the illegal conduct and injury” is not “attenuated” here. *Allen v. Wright*, 468 U.S. 737, 752 (1984); *see also Warth v. Seldin*, 422 U.S. 490, 507 (1975) (requiring an “actionable causal relationship” between the asserted injury and the challenged provision of law or action of the defendant). Here the link is clear: the provision of the Arizona Constitution created by the passage of the IRC Amendment removed the power of the Legislature to draw Congressional districts. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 997 F. Supp. 2d at 1048. Appellant seeks to enjoin the operation of the Commission. It has properly named the Commission; its five members in their official capacities; and the Arizona Secretary of State, the chief elections official in Arizona, in her official capacity, as defendants. *Id.* at 1049 (“The parties dispute only the proper legal interpretation of the Elections Clause of the United States Constitution, in light of Supreme Court precedent.”); J.A. 13.
3. The injury is redressable.

The injury sustained by the Legislature will be remedied by an order reversing and remanding the matter to the District Court with instructions to invalidate Proposition 106; this clearly establishes redressability. *Whitmore*, 495 U.S. at 155; *Valley Forge Christian Coll. v. Am. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976). The Legislature’s rightful role in the redistricting process will be restored by an order invalidating Proposition 106, declaring the Independent Redistricting Commission to be an unconstitutional body, and thereby returning the power to prescribe district lines to the Legislature, as the Constitution requires.

B. The Standing Analysis Remains the Same When a Full Legislature Asserts Its Votes Have Been Completely Nullified

The standing analysis does not change when a full legislative body votes according to its internal procedures to authorize a lawsuit and asserts that its Elections Clause powers have been wholly dislodged. The Constitutional right at issue in this case is guaranteed not to individual legislators or individual voters, but to “the Legislature thereof.” U.S. Const. art. I, § 4, cl. 1. In this sense, the Legislature finds itself in an analogous situation to a non-profit corporation told it has no right to engage in political speech as guaranteed by the First Amendment, as in *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010), or a criminal defendant alleging that his right to confront the witnesses against him has been denied, as in *Crawford v. Washington*, 541 U.S. 36 (2004). The matter is functionally no different than a for-profit corporation alleging violations of its free exercise rights, as in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014) (not disputing the lower court’s determination that Hobby Lobby had standing to sue under the federal statute at issue, which is governed by the same standing rules as Article III. *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1292 (W.D. Okla. 2012)). The
scenario is likewise analogous to a criminal defendant raising a Tenth Amendment challenge to the federal statute under which she was convicted. *Bond v. United States*, 131 S. Ct. 2355, 2363-64 (2011). In *Bond*, this Court said that since “Bond seeks to vindicate her own constitutional interests,” she “can assert injury from governmental action taken in excess of the authority that federalism defines.” *Id.* Both houses of the Arizona Legislature authorized this lawsuit according to their internal measures, and hence are suing in their institutional capacity as one Legislature. J.A. 27, 46. No doctrine of special “legislative standing” need therefore apply. The injury is not one suffered by individual legislators; it necessarily affects the body as a whole.

This view—that a legislative entity suffering injury as a whole may seek to vindicate the right denied to it as a whole—is supported by *I.N.S. v. Chadha*, 462 U.S. 919 (1983). There, this Court determined that a “case” or “controversy” was properly presented by Congress’ intervention, as a distinct and complete legislative body, in the case. *Chadha*, 462 U.S. at 939 (“A case or controversy is presented by this case. First, from the time of Congress’ formal intervention . . . the concrete adverseness is beyond doubt. Congress is both a proper party . . . and a proper petitioner. . . .”). Congress could assert its institutional interest as whole. *Id.*

Nonetheless, should this Court find it appropriate to apply its line of cases relating to legislator standing, it is clear that *Coleman*, rather than *Raines*, governs. *Coleman v. Miller*, 307 U.S. 433 (1939) (holding that group of over half Kansas’s state senators had standing to challenge the nullification of their vote under Article V of the Constitution); *Raines v. Byrd*, 521

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1 *See Chadha*, 462 U.S. at 930 n.5 (“The Senate and House authorized intervention in this case . . . and, on February 3, 1981, filed motions to intervene and petitioned for rehearing. The Court of Appeals granted the motions to intervene.”).

2 *See also United States v. Am. Tel. & Tel. Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) (“It is clear that the House as a whole has standing to assert its investigatory power, and can designate a member to act on its behalf.”).
U.S. 811 (1997) (holding that six members of Congress challenging a statute passed by Congress as having unconstitutionally altered their legislative power did not have standing).

_Coleman_ involved a challenge by state legislators to Kansas’s ratification of a proposed federal constitutional amendment. 307 U.S. at 435. Twenty senators voted for the proposed amendment, but twenty voted against it. _Id._ at 436. The Lieutenant Governor, the presiding officer of the Senate, broke the tie in favor of the amendment, and the state House later approved it. _Id._ A majority of senators sued to enjoin the Secretary of State from authenticating the measure, alleging that it was not properly ratified by the “Legislature” under Article V of the Constitution. _Id._ This Court held that the legislators had standing, since their votes against ratification “[had] been overridden and virtually held for naught” and, had those votes been properly recognized, they “would have been sufficient to defeat ratification.” _Id._ at 438. Since the legal question “arose under Article V of the Constitution,” the senators established a “a plain, direct and adequate interest in maintaining the effectiveness of their votes.” _Id._ at 437-38. The scenario was not a “mere intra-parliamentary controversy” but a controversy “deriving its force solely from the provisions of the Federal Constitution.” _Id._ at 441. The Legislature could not have solved the problem for itself; the fix had to come from a judicial interpretation of the Constitution.

Here, the entire legislative body—not a small handful of individual members—filed suit to address an institutional injury suffered by the Legislature as a whole. This is in direct contrast to _Raines_ where this Court held that a small, disgruntled group of members of Congress did not have standing to sue to enjoin a law, duly passed by Congress and signed by the President, which delegated to the President some legislative veto authority. 521 U.S. at 829. _Raines_ made clear that legislator standing depends on the link between the party claiming harm, the harm alleged,
and the ability of the harm to be resolved internally to the legislative body. This distinguishes the case at hand. *Raines*, 521 U.S. at 824 (“In the vote on the Act, their votes were given full effect. They simply lost that vote.”). The Arizona Legislature’s challenge derives its force “solely from the provisions of the Federal Constitution,” *Coleman*, 307 U.S. at 441, on the basis that their right to prescribe Congressional districts has been nullified.

*Raines* assures that Elections Clause disputes that can be solved internally by state legislatures will be kept out of courtrooms when only a handful of legislators attempt to raise the challenge. When legislatures can “self-help,” there is no “case” or “controversy.” See *Raines*, 521 U.S. at 824. Additionally, when Congress has legislated under its power to prescribe the time, place, and manner of federal elections, state legislatures, acting in their institutional capacity, may only challenge federal regulations that infringe upon states’ power to establish voter qualifications. See *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2257 (2013) (describing how the Elections Clause empowers Congress to regulate *how* federal elections are held, but leaves to the states the power to set voter qualifications). These two checks further ensure that if this Court, consistent with prior precedent, agrees that the Legislature of Arizona has standing, such a decision will not and cannot lead to frivolous litigation, or otherwise expand the scope of the law.

C. **The Legislature is the Only Party That Can Vindicate Its Rights Under the Elections Clause**

As discussed above, *supra* Part I.B, the injury at issue here is sustained by the Legislature itself as an entity; this is necessarily true because of the nature of the grant of power in the Elections Clause to the “Legislature.” U.S. Const. art. I, § 4, cl. 1. Other potential plaintiffs, chiefly individual voters in unlawfully apportioned Congressional districts, likely would not have standing to bring a similar claim under the Elections Clause. Article III standing “is not to be
placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests.” *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (citing *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (internal citations and quotation marks omitted). This Court affirmed that principle when it dismissed a case brought by four Colorado voters alleging similar claims arising under the Elections Clause—that an antecedent Colorado Supreme Court ruling unconstitutionally deprived the state legislature of its authority to draw congressional districts. *Lance v. Coffman*, 549 U.S. 437, 441-42 (2007). This Court said, “[t]his injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.” *Id*. It is true that voters generally have standing to challenge mal-apportioned Congressional districts, including plans passed by the Legislature and approved through voter initiative. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 715 (1964) (claims arising under the Equal Protection Clause). However, since the injury sustained by the Legislature in the current matter is sustained by the Legislature as an entity, citizen standing would be improper here. Citizens cannot vindicate a right conferred to the Legislature as a whole. *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (discussing how constitutional rights may not be asserted vicariously) (citing *McGowan v. Maryland*, 366 U.S. 420, 429-30 (1961)). Indeed, this Court has already said as much. *Coffman*, 549 U.S. at 441-42 (2007) (dismissing voters’ Elections Clause claim for lack of standing). Failing to adjudicate the Arizona Legislature’s claim that its power has been wholly divested by an unconstitutional voter initiative will render the Legislature powerless to vindicate the rights guaranteed to it by the Elections Clause.

**D. The Political Question Doctrine Does Not Apply**

Appellees cannot credibly assert that this case presents a non-justiciable political question. Two years ago, this Court adjudicated a controversy between a state—the state of
Arizona, at that—and the federal government about the meaning of the Elections Clause. *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013). This Court held that the Elections Clause allowed Congress to require states to “accept and use” a federal voter registration form—that this was a proper exercise of its power to “make or alter” regulations regarding the time, place, and manner of federal elections, and did not infringe upon Arizona’s right to set voter qualifications under U.S. Const. art. I, § 2, cl. 1. 133 S. Ct. at 2257. Given this willingness to explain the balance of power between the states and Congress in *Inter Tribal Council, Appellee*’s attempt to raise the political question doctrine must fail. *Id.* at 2251.

Furthermore, this Court has never shielded the Elections Clause from judicial review in prior cases, save, arguably, for *Colegrove v. Green*, 328 U.S. 549, 556 (1946), which was rendered obsolete by *Baker v. Carr*, 369 U.S. 186, 202 (1962). See *Ariz. v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2251 (2013) (Congress could preclude states from requiring additional proof of citizenship as part of its power to regulate the time, place, and manner of federal elections); *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972) (characterizing the question before the court not as a non-justiciable political question, but as a question regarding whether a state’s recount for a U.S. Senate election was a valid exercise of the state’s Elections Clause power or a forbidden infringement upon the U.S. Senate’s power under U.S. Const. art. I, § 5); *Oregon v. Mitchell*, 400 U.S. 112, 138 (1970) (no political questions were involved in deciding the constitutionality of Voting Rights Act amendments, a rule setting the minimum age to vote, and a rule abolishing durational residency requirements for voter registration); *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964) (Congressional apportionment challenges do not raise non-justiciable political questions); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 603 (2000) (Stevens, J., dissenting) (without raising the political question doctrine, discussing the possible
conflict between the Elections Clause’s delegation of power to “Legislature[s]” and California’s vesting of legislative power in voter-approved initiatives for the purposes of regulating federal elections). The issue raised by the Arizona Legislature is one this Court can answer by clarifying the power delegated to state legislatures; it does not require this Court to infringe upon that power.

Indeed, no version of this Court’s political question doctrine supports the claim that this case presents a non-justiciable political question. Rather, the Legislature asks this Court to do “what courts do;” that is, to clarify the meaning of a Constitutional right for a party whose interests depend on that interpretation. Zivotofsky ex rel. Zivotofsky v. Clinton, 132 S. Ct. 1421, 1430 (2012) (holding that the political question doctrine posed no bar to determining whether a provision of the Foreign Relations Act, which permitted citizens to have “Israel” listed as their place of birth on a consular report of birth abroad or passport, was an unconstitutional assertion of Congressional power over an Executive Branch prerogative). Given this urgent controversy, “[i]t is, emphatically the province and duty of the judicial department to say what the law is.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The political question doctrine can steer courts from cases that involve “a textually demonstrable constitutional commitment of the issue to a coordinate political department” beyond the reach of the judiciary, where “a lack of judicially discoverable and manageable standards” prevents resolution, where a court would necessarily decide a policy question “clearly

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for nonjudicial discretion,” or where other factors, described in Baker v. Carr, are present. Baker v. Carr, 369 U.S. 186, 217 (1962) (holding that questions of legislative apportionment involving Constitutional guarantees are justiciable).

The Elections Clause does not represent a “textually demonstrable commitment” of all authority to prescribe the time, place, and manner of federal elections to Congress alone, with no role for this Court to interpret the meaning of the predominant grant of power to the “Legislature” of “each State.” U.S. Const. art. I, § 4, cl. 1. This Court’s reasoning in Powell v. McCormack, 395 U.S. 486 (1969), makes this clear. There, the Court reasoned that Article I, § 5, directing the House of Representatives to serve as the judge of the qualifications of its own members, “is at most a ‘textually demonstrable commitment’ to Congress to judge only the qualifications expressly set forth in the Constitution.” 395 U.S. at 548. Therefore, this Court reasoned, the political question doctrine “does not bar federal courts from adjudicating petitioners’ claims” that he was unlawfully excluded for reasons beyond the scope of those express qualifications. Id.

Nixon v. United States clarifies what a commitment to a coordinate political branch actually looks like, elucidating why no such commitment is demonstrated by the Elections Clause. Nixon v. United States, 506 U.S. 224, 226 (1993) (holding that the Impeachment Trial Clause, U.S. Const. art. I, § 3, cl. 6, which provides that the “Senate shall have the sole Power to try all Impeachments,” was non-justiciable) (emphasis added). Congress does not have the “sole

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4 The six factors in Baker are: “... a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” 369 U.S. at 217.
power” under the Elections Clause, nor do state Legislatures; this Court must delineate the balance. This Court’s decision in *I.N.S. v. Chadha*, 462 U.S. 919 (1983), in contrast, further demonstrates why Appellees’ non-justiciability claim fails. In *Chadha*, Congress attempted to cast any “assault on [its] legislative authority” as a non-justiciable political question, but this Court rightly clarified that such logic would turn “virtually every challenge to the constitutionality of a statute” into a political question, and so this Court held that it could decide the matter by playing its traditional role as arbiter of the meaning of Constitutional provisions. *Chadha*, 462 U.S. at 941. Appellees’ similar, but unprecedented attempt to insulate the Elections Clause from judicial review must fail.

Finally, to the extent that Appellees argue that interpreting the Elections Clause to preclude the complete divestment of authority from the legislature infringes upon state sovereignty, they have no argument. States have no sovereignty here; their power to regulate federal elections is entirely delegated—and delegated to the “Legislature.” *See Growe v. Emison*, 507 U.S. at 34.

**E. The Arizona Legislature Makes No Claims Under the Guarantee Clause**

The Arizona Legislature does not challenge Arizona’s system of direct democracy, nor do any of its claims arise under the Guarantee Clause, which this Court has generally placed beyond the reach of judicial review. U.S. Const. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 151 (1912) (clause is non-justiciable); *but see Attorney Gen. of Michigan v. Lowrey*, 199 U.S. 233, 240 (1905) (discussing plaintiff’s claims under the Guarantee Clause without reference to the political question doctrine or non-justiciability).5

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5 For a case that does explicitly raise Guarantee Clause claims, see *Kerr v. Hickenlooper*, 744 F.3d 1156, 1176 (10th Cir. 2014), *petition for cert. filed*, (U.S. Oct. 17, 2014) (No. 14-460)
Clause countenances some involvement of direct democracy in Congressional apportionment and other regulations relating to the time, place, and manner of holding federal elections, as discussed below. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916). In contrast to *Hildebrant*, however, Appellant challenges the complete removal of apportionment authority from the Legislature to a five-member commission because that transfer of power nullifies the authority provided explicitly to the Legislature by the Elections Clause. For that reason—because Appellant asks this court to clarify the meaning of “Legislature” in the Elections Clause—Appellant needs not and does not raise any claims under the Guarantee Clause.

II. NEITHER THE ELECTIONS CLAUSE NOR 2 U.S.C. § 2A(C) PERMIT ARIZONA TO STRIP ITS LEGISLATURE OF ALL REDISTRICTING AUTHORITY.

A straightforward application of the Elections Clause decides this case in Appellant’s favor. The Elections Clause provides that “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof . . .” U.S. Const. art. I, § 4, cl. 1. This Court has long accepted that the power to “prescribe[]” the “Times, Places, and Manner” of congressional elections includes the power to draw district lines. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932); *see also Branch v. Smith*, 538 U.S. 254, 280 (2003). Thus, the Elections Clause vests redistricting authority in one—and only one—state entity: the Legislature. Since Legislature refers exclusively and unambiguously to “the representative body which ma[kes] the laws of the people,” *Smiley v. Holm*, 285 U.S. 355, 365 (1932), Arizona’s IRC Amendment violates the Elections Clause twice over. First, the Amendment’s enactment violated the Elections Clause, as the people of Arizona—not the Legislature—prescribed a redistricting regulation. Second, the Amendment’s substance violates ("[W]e reject the proposition that *Luther* and *Pacific States* brand all Guarantee Clause claims as per se non-justiciable.").
the Elections Clause, as the IRC—not the Legislature—now holds plenary redistricting power. For both reasons, Arizona’s IRC Amendment cannot stand.

Neither this Court’s precedents nor 2 U.S.C. § 2a(c) dictate a different outcome. This Court has never once held that a state populace somehow becomes the Legislature when it makes its own laws via ballot initiative. All the Court has said is that the Legislature — again, defined as “the representative body which ma[kes] the laws of the people,” Smiley, 285 U.S. at 365 — may not act as some kind of super-Legislature and unilaterally enact redistricting regulations as though the regulations were something other than garden-variety state laws. Id. at 367-368. See also Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565, 569 (1916). Thus, to argue from Hildebrant and Smiley that a populace can not only be a Legislature but a super-Legislature is to turn this Court’s precedents on their heads. Appellees’ reliance on 2 U.S.C. § 2a(c) is similarly misplaced. Section 2a(c) does not modify the constitutional default rule that the Legislature must have primary redistricting authority, see Growe v. Emison, 507 U.S. 25, 34 (1993). All § 2a(c) does is give state courts the power to redistrict if the Legislature fails to; it says nothing about state populaces exercising redistricting authority. Branch v. Smith, 538 U.S. 254, 274 (2003). Thus, neither this Court’s precedent nor Congress shield the IRC Amendment from the Election Clause’s clear mandate. Accordingly, this Court should reverse the judgment below.

A. The Elections Clause vests redistricting authority in the “Legislature,” which refers exclusively to an elected representative body.

The Elections Clause is the only source of State authority to draw congressional districts.6 Thus, if Arizona did not comply with the Elections Clause in enacting Proposition 106, the

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6 U.S. House and Senate positions were, after all, created by the Constitution itself. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 805 (1995). Thus, any power to regulate elections for those positions “had to be delegated to, rather than reserved by, the States.” Id. at 804. And the only “constitutional provision [that] gives the States authority over congressional elections [is] . . . the Elections Clause.” Cook v. Gralike, 531 U.S. 510, 522-23 (2001).
Amendment is void. Appellees recognize that. And because they do, they attempt some verbal alchemy, arguing that the Arizona populace somehow transformed into the Arizona Legislature when the people enacted the IRC Amendment. Appellees’ argument, however creative, must fail. “Legislature” in the Elections Clause does not refer to the populace or to single-issue decision-making bodies like the IRC. Rather, Legislature refers exclusively and unambiguously to “the representative body which ma[kes] the laws of the people,” Smiley, 285 U.S. at 365. Any argument to the contrary runs afoul of Legislature’s 1) dictionary meaning, 2) intratextual meaning, 3) historical meaning, and 4) meaning as set forth by this Court’s precedent. Below, each is discussed in turn.

1. Dictionary definitions reveal that Legislature refers to an elected representative body, not any entity that exercises legislative power.

In interpreting constitutional text, this Court reads words and phrases in light of “their normal and ordinary . . . meaning[s].” District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)). Ordinary meaning encompasses “idiomatic meaning,” this Court has said, “but it excludes . . . technical meaning[,]” id., or any other meaning that would not “be understood by the voters.” Sprague, 282 U.S. at 731. The best guide to the meaning of Legislature may therefore be the source that the average voter would look to discern it: the common dictionary.7 Heller, 554 U.S. at 581-584; Nixon v. United States, 506 U.S. 224, 229-30 (1993). Webster’s Collegiate Dictionary, Tenth Edition defines “Legislature” as “an organized body having the authority to make laws for a political unit.” Webster’s Collegiate Dictionary 665 (10th ed. 1999). Similarly, Random House Webster’s College Dictionary, Second Edition defines “Legislature” as “a deliberative body of persons,  

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7 Members of this Court have sometimes suggested that the meaning of constitutional terms morphs to reflect current usage. See, e.g., Furman v. Georgia, 408 U.S. 238, 420 (1972) (Powell, J., dissenting). Here, Appellant relies on modern dictionaries to illustrate current usage. Legislature’s historical meaning is discussed in detail below. See infra Part II.A.3.
usually elective, who are empowered to make, change, or repeal the laws of a country or state.”

*Random House Webster’s College Dictionary* 750 (2nd ed. 1997). Those representative definitions make clear that, in common parlance, “Legislature” does not refer to the populace acting via initiative; the people are not an “organized” “elective,” “body” who “deliberat[e]” together to “make laws.”

### 2. An intratextual reading of the Constitution confirms that “Legislature” refers exclusively to an elected representative body.

Even if ordinary dictionaries left any doubt about Legislature’s meaning, here, the Court can “use the Constitution as its own dictionary.” Akhil R. Amar, *Intratexualism*, 112 Harv. L. Rev. 747, 789 (1999). Where a “contested word or phrase” appears repeatedly in the Constitution, *id.* at 748, the Court can often discern the term’s meaning by examining other passages where the term is used, *id.* at 791. Indeed, the Court has employed that intratextual interpretive approach in deciding some of its most seminal constitutional cases. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2586 (2012) (reading “regulate” in the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, in light of the Constitution’s other uses of the term); *District of Columbia v. Heller*, 554 U.S. 570, 579 (same for “right of the people” in the Second Amendment, U.S. Const. amend. II); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414-15 (1819) (same for “necessary” in the Necessary and Proper Clause, U.S. Const. art. I, § 8, cl. 18). The Court should take the same approach here, giving “Legislature” in the Elections Clause the same meaning the term bears everywhere else in the Constitution. *Cf. Powerex Corp. v. Reliant Energy Serv., Inc.*, 551 U.S. 224, 232 (2007) (“identical words . . . within the same statute should normally be given the same meaning”).

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8 Appellees read *Smiley* as mandating that “Legislature” be given different meanings at different points in the Constitution, with meaning determined by the “function to be performed.” 285 U.S. at 355. Appellees misunderstand *Smiley*. As argued below, *infra* Part II.A.5, *Smiley* holds
a. **Other constitutional provisions describe Legislatures in ways that are only consistent with elected representative bodies.**

The Constitution contains four provisions that detail features of “Legislatures.” All four make clear that “Legislature” refers specifically to an elected representative body, not to the populace “perform[ing] a legislative function,” *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n*, 208 P.3d at 687. First, take Article I’s Qualifications Clause. U.S. Const. art. I, § 2, cl. 1. The Qualifications Clause refers to the “Branch[es] of the State Legislature” and to the “Electors” who select the members of those “Branch[es].” *Id.* Elected representative bodies have “Branch[es]” filled with members voted in by “Electors.” State populaces — even ones vested with initiative authority — do not. Next, consider Article I’s Senate Vacancy Clause, which discusses both “the Recess of the [State] Legislature” and the “meeting[s] of the [State] Legislature.” *Id.* art. I, § 3, cl. 2. Or consider Article IV’s Guarantee Clause, which describes the State Legislature as “conven[ing]” periodically. *Id.* art IV, § 4. Elected representative bodies have sessions, of course: “meetings” which “conven[e]” then break for “Recess.” But the people never “meet[s],” “conven[e],” or “Recess”—at least not en masse.

Finally, there is Article VI’s Loyalty Clause, which requires that the “Members of the several State Legislatures” be “bound by Oath or Affirmation to support [the U.S.] Constitution.” While the populace certainly does have “Members,” not every one of them has sworn an “Oath . . . to support [the] Constitution,” nor must they do so before they are authorized to vote on an initiative measure. Unlike the average “Member[]” of the citizenry, however, each “Member[]” of a state representative body does swear allegiance to the Constitution upon taking office. In sum, the Constitution sets forth a batch of features inherent in “Legislatures.” Every one accurately describes elected representative bodies. Not one accurately describes state

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that Legislature has a constant meaning, but that the *constraints on* the Legislature change with the “function.”
populaces—even populaces vested with the authority to make their own laws via ballot initiative. Thus, if Legislature is indeed used consistently throughout the Constitution, then the four clauses discussed above are strong evidence that the people of Arizona cannot be the Legislature for Elections Clause purposes.

b. If “Legislature” includes the populace acting via initiative, then language in other constitutional provisions is rendered meaningless.

It is a cardinal rule of constitutional interpretation that “in expounding the Constitution . . . no word in it can be rejected as superfluous or unmeaning.” *Rhode Island v. Palmer*, 253 U.S. 350, 407 (1920) (Clarke, J., dissenting) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)). Applied here, that rule against superfluity counsels against Appellees’ interpretation of “Legislature.” For if “Legislature” did encompass the populace acting via initiative, then language in both Article V and the Seventeenth Amendment would be stripped of any real meaning.9

Take Article V first, which sets forth the procedure for amending the Constitution. U.S. Const. art. V. Article V provides that, once an amendment has been proposed, there are two permissible ways to ratify it: 1) approval by “the Legislatures of three fourths of the several States,” or 2) approval by “Conventions in three fourths thereof.” *Id.* Article V therefore draws an explicit distinction between a Legislature and a “Convention”—between a State’s standing representative body, on the one hand, and a body specially installed by the people, tasked only with conveying the popular will, on the other. *See* Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457, 502 (1994) (noting that ratification conventions were meant to better capture popular sentiment by “minimiz[ing] the

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9 Plus, the term “Legislature” in the *Elections Clause itself* would be devoid of meaning. If Legislature means any party vested with lawmaking authority, then the Elections Clause could easily cut off right after “shall be prescribed in each State.” U.S. Const. art. I, § 4, cl. 1.
‘agency gap’” between the people and their representatives). If Appellees are right about the meaning of “Legislature,” though, there would have been no need for the Constitution to afford that second, “agency gap”-minimizing option. For if the people could convey their own will directly by acting as the Legislature via initiative, then acting through “Convention” delegates would only ever be second best. Thus, for “Convention” to have any real meaning, the people cannot be permitted to act as the Legislature by ratifying amendments via ballot initiative. And indeed, in fidelity to the text, that is the exact conclusion this Court reached in *Hawke v. Smith*. 253 U.S. 221, 227 (1920) (squarely rejecting the argument that the people can serve as the Legislature for Article V purposes.)

The Seventeenth Amendment is even more damning for Appellees’ argument. Originally, the Constitution provided that the U.S. Senate would “be composed of two Senators from each state, [as] chosen by the Legislature thereof . . . .” U.S. Const. art. I, § 3, cl. 1. In 1912, the Seventeenth Amendment changed that, dictating that the “two Senators from each State” would thereafter be “elected by the people thereof.” *Id.* amend. XVII. If Appellees are right about the meaning of “Legislature,” that change was all smoke and no fire. For if the people were the Legislature any time they acted via initiative, then they already had the authority to elect their Senators; they needed only to pass an initiative mandating that Senatorial elections be held. In effect, then, Appellees’ reading of Legislature strips the Seventeenth Amendment—not just a word or phrase, but the full Amendment—of any real meaning. And, again, this Court’s

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10 Appellees may rightly contend that not all state constitutions permitted initiatives in 1912. Thus, Appellees will argue, at least for state populaces without initiative power, the Seventeenth Amendment did have real meaning. But that argument flies in the face of the historical record. No member of the Congress that proposed the Amendment ever billed it as a special aid to states without initiatives. Nor did any member of the state legislatures who ratified the Amendment. See generally, David Schleicher, *The Seventeenth Amendment and Federalism in an Age of National Political Parties*, 65 Hastings L.J. 1044 (2014).
precedent tells us that any interpretation that produces such a severe nullifying effect cannot be the right one. See Palmer, 253 U.S. at 407; Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”)

In sum, Appellees’ reading of Legislature violates the rule against superfluity. There would be no need for Article V ratifying “Conventions” if the people could act as the Legislature and voice their will directly. Nor would there be need to provide for the direct election of Senators if the people acting as the Legislature could institute Senatorial elections themselves. Thus, if “Legislature” means the same thing across the Constitution—and it should—then “Legislature” must mean an elected representative body, not a populace making its own laws via initiative.

3. The Framers’ writings reveal that they used “Legislature” to refer exclusively to an elected representative body.

Appellees’ reading of Legislature is not just atextual; it is also ahistorical. If one thing shines through clearly in the Framers’ writings, it is their collective distrust of direct democracy. James Madison described democracies as “spectacles of turbulence and contention . . . [that] have in general been as short in their lives as they have been violent in their deaths.” The Federalist No. 10, at 76 (James Madison) (Clinton Rossiter ed., 1961). Alexander Hamilton concurred, observing that “[t]he ancient democracies in which the people themselves deliberated never possessed one good feature of government. Their very character was tyranny; their figure deformity.” Speech in the New York Ratifying Convention on Representation, in Alexander Hamilton: Writings 489 (Joanne B. Freeman ed., 2001). So in crafting America’s Constitution, the Framers opted for a different model: a republican model. And the centerpiece of their republican vision was a “scheme of representation” as exemplified by “the chosen body of
citizens” who served as the legislature. The Federalist No. 10, at 76. It would therefore be exceedingly odd if Legislature — the word the Framers used for the institution that distinguished their government from a direct democracy — simultaneously referred to the very practice of direct democracy.

But the Court need not extrapolate to discern what Legislature meant to the Framers; their writings refute Appellees’ argument directly. In his correspondence, John Adams made clear that America’s legislatures were in no way “democratical.” Letter from John Adams to John Taylor (Apr. 15, 1814) in *6 The Works of John Adams* 443, 472 (Charles C. Little & James Brown eds., 1851). “Are they the people?” Adams asked, referring to state legislatures. “No. They are a selection of the *best men* among the people . . . .” *Id.* (emphasis in original). In correspondence of his own, Alexander Hamilton said much the same, noting that “there should be great care to distinguish the people of [a State] from their Legislature . . . .” Letter from Alexander Hamilton to Theo Sedgwick (Feb. 2, 1799) in *Words of the Founding Fathers* 183, 183 (Steve Coffman ed., 2012). To equate the Legislature with the people therefore runs afoul of the Framers’ clear expressions that the two ought to remain distinct.

The history behind the Elections Clause provides further confirmation that the Clause uses Legislature to refer only to an elected representative body. At the Framing, the Elections Clause sparked fierce and prolonged debate. Somebody needed to have “a discretionary power over [U.S. House] elections,” the Framers agreed. The Federalist No. 59, at 360 (James Madison) (Clinton Rossiter ed., 1961). But they divided bitterly over whom should hold that power. Some argued the power should “be[] lodged wholly in the national legislature.” *Id.* Others contended it should reside “wholly in the State legislatures.” *Id.* A third group—the ultimate victors—advocated that the power be split, vested “primarily in the latter, and ultimately
in the former.” *Id.* Notably, the Framers thought those were the “*only* three ways in which th[e] power could have been reasonably modified and disposed,” *id.* (emphasis added); they apparently never even contemplated vesting the power in the House electorate — i.e. the “People of the several States.” U.S. Const. art. I, § 2, cl. 1. The Framers’ failure to even consider that option underscores their strong aversion to direct democratic rule-making. In light of that aversion, “Legislature” should not be read to encompass the populace doing its own lawmaking.

4. **This Court has already said that “Legislature” refers exclusively to an elected representative body.**

All the arguments above—the dictionary definitions, the claims about intratextual meaning, the citations to the Framers’ writings—are arguments this Court has entertained before. Indeed, the Court considered them all at once in *Hawke v. Smith.* 253 U.S. at 227-28 (discussing plain meaning, intratextual meaning, and original meaning of Legislature). And on the basis of that evidence, the *Hawke* Court drew an unequivocal conclusion. Legislature was “not a term of uncertain meaning” at the Founding, the Court said. *Id.* at 227. “What it meant when adopted it still means [today].” *Id.* “A Legislature [is] the representative body which ma[kes] the laws of the people.” *Id.* And that is *all* Legislature means: the term does not encompass — nor has it ever encompassed — “direct action by the people.” *Id.* at 228.

Admittedly, *Hawke* interpreted Article V, not the Elections Clause. But the Court has since adopted *Hawke’s* definition in an Elections Clause case. *Smiley,* 285 U.S. at 365 (quoting *Hawke:* Legislature means “the representative body which ma[kes] the laws of the people”). And while Appellees try unsuccessfully to resist the full force of *Smiley,* see infra Part.II.A.4.a, the *Smiley* opinion “says what it says,” *Tome v. United States,* 513 U.S. 150, 168 (1995) (Scalia, J., concurring in the judgment). *Smiley* therefore assists Appellant, not the IRC. So does the other

a. **Neither *Hildebrant* nor *Smiley* holds that “Legislature” means anything other than an elected representative body.**

   As noted immediately above, *Smiley* defines “Legislature” as “the representative body which ma[kes] the laws of the people.” 285 U.S. at 365 (quoting *Hawke*, 253 U.S. at 227). True, the *Smiley* Court did also say that where “the term ‘Legislature’ is used in the Constitution, it is necessary to consider the nature of the particular action in view.” *Id.* at 366. But the Court said that not because “the function to be performed,” *id.* at 365, dictates the meaning of “Legislature.” Rather, the Court said that because “function” dictates the constraints the Legislature must operate under. Put more simply, “function” tells us what the Legislature can do, not what the Legislature is.

   And the facts of *Smiley* make that clear. In *Smiley*, the Minnesota legislature had passed a redistricting plan and submitted it to the Governor for signature. *Id.* at 361. The Governor vetoed the plan, but the Secretary of State enforced it anyway, asserting that the gubernatorial veto violated the Elections Clause. *Id.* at 362. The Court rejected the Secretary of State’s argument. But the Court’s reason for doing so cannot have been that the Governor somehow became the Legislature, making his veto a permissible legislative act. Were that the reasoning, the *Smiley* Court would have been flouting separation of powers principles in the worst way. Thus, *Smiley* cannot support the argument that some other entity can be the Legislature—in *Smiley*, the Minnesota Governor certainly could not have been.

   It makes much more sense to read *Smiley* as being a case about legislative capacity—as saying that other entities can constrain the Legislature, if state law so provides. That, Appellant submits, is what the *Smiley* Court meant when it said that “the Legislature . . . [must] enact laws
in [the] manner . . . which the Constitution of the state has provided.” *Id.* at 368 (emphasis added). The Legislature, the “representative body which ma[kes] the laws of the people,” *id.* at 365, must still be the one doing the “enact[ing].” But it must do so subject to the constraints “state [law] has provided,” checks from the other branches included. By that reading, all *Smiley* does is set forth a rule against Elections Clause super-Legislatures: Legislatures which can unilaterally enact redistricting regulations. Given that *Smiley* was decided after *Hawke*—in which the Court said that Legislatures ratifying constitutional amendments *do function* as super-Legislatures, *Hawke*, 253 U.S. at 229-30—it makes sense that the *Smiley* Court would have felt the need to draw the distinction.

To the extent *Hildebrant* has any bearing on this case,11 it simply anticipates the *Smiley* rule that Legislatures may not act as super-Legislatures. In *Hildebrant*, the Ohio legislature passed a redistricting plan, and the Governor signed it into law. But the people of Ohio repealed the plan, exercising their right under the Ohio Constitution to “disapprove by popular vote any law enacted by the general assembly.” *Hildebrant*, 241 U.S. at 566. The Court ruled that the popular veto did not offend the Constitution. *Id.* at 569. But it never said that the people of Ohio were—or had been acting—as the Legislature. It simply said that the actual Legislature could not ignore the popular referendum constraint which state law imposed. As such, neither *Hildebrant* nor *Smiley* should convince this Court that a state populace can *be* the Legislature for Elections Clause purposes.

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11 And it really may have no bearing. *Hildebrant* was decided on Guarantee Clause grounds, because the Court misunderstood the challengers to be arguing that “includ[ing] the referendum in the scope of the legislative power is to introduce a virus . . . which in effect annihilates representative government.” 241 U.S. at 569. Appellant makes no such argument here, and *Hildebrant* holding is therefore inapposite.
b. The *Hildebrant-Smiley* rule against super-Legislatures assists Appellant, not the IRC.

If Appellant is right about *Hildebrant* and *Smiley* imposing a “no super-Legislatures” rule, then the cases plainly do not aid the IRC. Here, the Arizona Legislature did not disregard a gubernatorial or popular veto. Here, the Arizona Legislature was stripped of any and all redistricting authority. *Hildebrant* does not condone that result; after the popular veto, redistricting authority remained vested in the Ohio Legislature. Nor does *Smiley* condone that result; after the gubernatorial veto, the Minnesota Legislature was free to draw another map. On the other hand, after Proposition 106, “[t]he Legislature” can no longer “enact laws in [the] manner . . . which [Arizona] law has provided.” *Smiley*, 285 U.S. at 368 (emphasis added). Indeed, the Legislature can no longer enact redistricting laws at all. The Redistricting Amendment therefore violates the Elections Clause.

But it gets worse for the IRC. Because even if the IRC were the Legislature, the IRC itself would be violating the “no super-Legislatures” rule. The maps the IRC draws are “final.” Ariz. Const. art. IV, pt. 2, § 1(16). That means the IRC’s maps not subject to pre-enactment veto by the Governor, the Legislature, or even the people. *Id.* Thus, since *Hildebrant* and *Smiley* say that redistricting laws must be passed through the normal political process—complete with all the checks that that normal process imposes—the IRC Amendment actually violates the *Hildebrant* and *Smiley* in addition to the Elections Clause. Accordingly, the Amendment cannot stand.

B. Neither the Arizona populace nor the IRC is an elected representative body. The IRC Amendment therefore violates the Elections Clause.

All the arguments above lead to the commonsense conclusion that Legislature means what *Smiley* says it means: “the representative body which ma[kes] the laws of the people.” 285 U.S. at 365. And to accept that definition is to decide this case in Appellant’s favor, for neither
the Arizona populace nor the IRC constitute an elected representative body. Obviously, the people do not fit the bill: initiative voters are not elected, nor do they speak for anyone but themselves. See Emily Calhoun, *Initiative Petition Reforms and the First Amendment*, 66 U. Colo. L. Rev. 129, 136 (1995) (“Unlike representatives, initiative voters . . . are neither formally nor informally constrained by the responsibilities of a trustee.”). And the IRC fares equally poorly when put to *Smiley’s* definitional test. The IRC is not vested with the general power to “ma[ke] the laws of the people”; it simply draws district maps, Ariz. Const. art. IV, pt. 2, § 1(14), then waits around to see if it needs to “revise [the] districts,” *id.* § 1(23). Nor are IRC members popularly elected; they are appointed through a two-step process involving a judicial nominating commission, *id.* §1(5), and legislative leadership, *id.* § 1(6), but never the people themselves.

Appellees see these shortcomings as virtues, arguing that the IRC’s limited agenda and political insulation produce better redistricting results. Maybe so, maybe not: the Arizona IRC has a checkered record at best. See Rhonda L. Barnes, Comment, *Redistricting in Arizona Under the Proposition 106 Provisions: Retrogression, Representation and Regret*, 35 Ariz. St. L.J. 575, 578 (arguing that the IRC has disappointed “expectation[s] . . . that it would be free from partisanship, and thus [that] Arizona would have fairer districts”). But even if Appellees were right, their policy arguments would be beside the point. Because the IRC’s limited rulemaking power and near complete insulation from politics — whatever their virtues — are the exact features that prove the IRC is not the Legislature. Since its not, and since the populace that created it is not the Legislature either, Arizona’s IRC Amendment violates the Elections Clause.

**C. 2 U.S.C. § 2a(c) does not permit non-Legislatures to exercise primary redistricting authority.**

This Court has asked the parties to address whether 2 U.S.C. § 2a(c) requires a different result than the one the Elections Clause would otherwise demand. For three reasons, the answer
is no. First, 2 U.S.C. § 2a(c) does not center on whom in a state gets to draw district lines. Just the opposite: § 2a(c) lays out a set of default rules that apply only if all state actors with redistricting authority fail to exercise it. It therefore strains credulity to suggest that Congress would use § 2a(c) to facilitate revolutionary changes in intra-state redistricting balances of power. Congress, this Court has said, “does not . . . hide elephants in mouseholes.” *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). Eight words in a prefatory clause in an off-topic provision is a pretty small hole indeed.

Second, as interpreted by this Court in *Branch v. Smith*, § 2a(c) is nearly “dead letter.” 538 U.S. 254, 273 (2003). As noted above, the provision sets forth five default rules for redistricting—backstop rules that apply only when a state fails to redistrict after a decennial census. And not every rule applies in every case: § 2a(c)(1) applies where the number of representatives remains constant, (2) where the number increases, and (3)-(5) where the number decreases. In *Branch*, this Court held that rules (1)-(4) were invalid, rendered “plainly unconstitutional” by “postenactment decisions of this Court.” *Id.* That is problematic for Appellees because Arizona picked up a representative in 2010. U.S. Census Bureau, Congressional Apportionment: 2010 Census Briefs 2 tbl.1 (2011). Thus, the only part of the statute that might apply in this case, § 2a(c)(2), is a nullity. Voided federal statutory law, cannot trump the clear text of the Elections Clause.

Third, in *Branch*, this Court directly interpreted the statutory phrase that Appellees so eagerly latch onto: “the manner provided by the law thereof.” That language, the Court said, authorizes “judicial redistricting.” *Branch*, 538 U.S. at 274. But the Court said nothing about popular redistricting. And the reason the Court did not mention it is clear: because Congress could not have authorized it without violating the Constitution. Whatever power Congress has
under the Elections Clause’s second sub-clause, it does not have the power to abrogate sub-clause one. Smiley, (“It is manifest that the Congress had no power to alter [U.S. Const. art. I, § 4].”). And that is exactly what Congress would have done if it authorized states to vest primary redistricting authority in an entity other than the Legislature. For that reason—and for the two others discussed above—2 U.S.C. § 2a(c) does not require an outcome different than the one the Elections Clause demands. As such, the IRC Amendment should be invalidated.

CONCLUSION

For all the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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April 13, 2015
2 U.S.C. § 2a(c)

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

(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.