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 APPELLEES

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QUESTIONS PRESENTED

In 2000, the citizens of Arizona passed Proposition 106, an initiative that amended the state constitution to transfer congressional redistricting authority in part from the Arizona State Legislature to an independent commission. Twelve years later, the Arizona State Legislature sued to invalidate the initiative. The questions presented are:

(1) Whether the Arizona State Legislature as a representative body has standing to bring this suit.

(2) Whether the Elections Clause of the United States Constitution and 2 U.S.C. § 2a(c) permit Arizona to authorize an independent commission to adopt congressional districts.
LIST OF ALL PARTIES

Appellant, as listed in the filings below, is the Arizona State Legislature.

This brief is filed on behalf of Appellees the Arizona Independent Redistricting Commission; Colleen Mathis, Linda J. McNulty, Jose M. Herrera, Scott D. Freeman, and Richard Stertz in their official capacities as members of the Commission; and Ken Bennett in his official capacity as Arizona Secretary of State.
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OPINION BELOW


STATEMENT OF JURISDICTION

The three-judge court entered judgment on February 21, 2014. Appellant filed a statement as to jurisdiction in this Court on April 28, 2014. On October 2, 2014, the Court postponed consideration of jurisdiction until a hearing on the merits. If the action was required to be heard by a three-judge district court under 28 U.S.C. § 2284(a), this Court has jurisdiction under 28 U.S.C. § 1253 to hear this direct appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Elections Clause to the United States Constitution provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.” U.S. Const. art. I, § 4.

2 U.S.C. § 2a(c) provides: “Until a State is redistricted in a manner provided by the law of the state thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner . . . .” 2 U.S.C. § 2a(c) is set out in full in Appendix A.

Article IV of Arizona’s State Constitution is set out in relevant part in Appendix B.
STATEMENT OF FACTS

A. Arizona’s Constitutional Framework and Proposition 106

Initiatives and referenda have been integral to Arizona’s legislative process since it joined the Union in 1912. At that time, support for populist lawmaker measures served as the “litmus test” for delegates to the Arizona Constitutional Convention. John D. Leshy, The Arizona State Constitution 8 (2013). The inclusion of initiatives and referenda in the constitution were of paramount importance at the Convention—each time the question of popular participation in the legislative process was raised, “the delegates opted for more democracy, not less.” Id. at 12, 16. The final document enshrined these principles, securing to the people of Arizona the capacity to “take the lawmaker power in their own hands.” Id. at 122. It is, in the words of George W.P. Hunt, President of the Constitutional Convention, “a people’s constitution.” Toni McClory, Understanding the Arizona Constitution 28 (2010).

The Arizona Constitution explicitly distributes the state’s “legislative authority” between the institutional legislature and the citizens. It reserves to the voters the “power to propose laws and amendments to the constitution . . . independently of the legislature.” Ariz. Const. art. IV, pt. 1, § 1. The voters have used that power often: in 103 years, they amended the constitution by initiative 146 times. Leshy, supra, at 23. Many amendments address election laws: voter-driven initiatives granted women the right to vote, Ariz. Const. art. VII, § 2, established the direct-primary system, id. § 10, and defined the process for instituting voter qualifications, id. art. VII.

Proposition 106 was a redistricting initiative proposed in 2000 aimed at “end[ing] the practice of gerrymandering” and producing “fair and competitive” congressional districts. JA 50. Prior to Proposition 106, the legislature introduced measures for congressional redistrict as proposed legislation, debated the measures in committee, and then submitted the legislation for
an up-or-down vote to the legislature as a whole. JA 16. If passed, the redistricting legislation was sent to the Governor for approval. If the Governor vetoed, the veto could be overridden by a two-thirds vote of the legislature. JA 16-17; Ariz. Const. art. V, § 7. That system caused persistent problems—under it, 45% of Arizona’s U.S. Senators and 69% of its U.S. Representatives have faced no competition from the other major party in over two decades, even though the state is closely divided between Republican and Democratic voters. McClory, supra, at 42-43.

Proposition 106 passed with 56% of the vote, amending Arizona’s constitution to create the Arizona Independent Redistricting Commission (“the Commission”). The Commission is charged with conducting state and congressional redistricting “in an honest, independent, and impartial fashion.” JA 52. Its members are selected in a “manner designed to assure diversity in political party affiliation and county of residence” from a pool of candidates nominated by the Commission on Appellate Court Appointments. Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n, 208 P.3d 676, 680 (Ariz. 2009). Four of the five Commissioners are chosen by members of the institutional state legislature. The Speaker of the Arizona House of Representatives appoints the first Commissioner, followed by appointments by the minority leader of the House, the President of the Arizona Senate, and the minority leader of the Senate. Ariz. Const. art. IV, pt. 2, § 1, cls. 5-6. The final Commissioner is selected from the same pool of candidates by a majority vote of the four appointed Commissioners. Id. cl. 8.

The five members of the Commission are tasked with the primary duty of establishing congressional and state legislative districts. They are guided in this responsibility by criteria laid out in the state constitution, including that the districts shall, to the extent practicable, “have equal population,” “be geographically compact and contiguous,” and “respect communities of interest.” Ariz. Const. art IV, pt. 2, § 1, cl. 14. In addition, the Commission is instructed that “to
the extent practicable, competitive districts should be favored where to do so would create no significant detriment to other goals.” *Id.* The meetings of the Commission are open to the public, and the Commission must publicize a “draft map” of the proposed districting for citizens’ comment. *Id.* During this comment period, Appellant may make recommendations to the Commission. The Commission is required to consider its feedback before publishing a finalized map. *Id.* cl. 16.

**B. Proceedings Below**

On January 17, 2012, the current Commission approved a final congressional map to be used in all congressional districts until a new Commission is selected in 2021. JA 20. On June 6, 2012, twelve years after Proposition 106 was adopted and one month before the primary elections began, the Arizona State Legislature filed suit against the Commission, its current members, and the Arizona Secretary of State. JA 20. Appellant sought to enjoin the use of the 2012 maps and to prevent use of any future maps created under Proposition 106. JA 22. Appellant claimed that the Elections Clause of the U.S. Constitution prohibited Arizona’s voters from removing the institutional legislature’s “constitutionally-delegated authority over prescribing the boundaries of congressional districts.” JA 22. As a result, Appellant alleged that Proposition 106 and the congressional district maps drawn by the Commission were null and void.

The district judge convened a three-judge panel under 28 U.S.C. § 2284, finding that Appellant was challenging the constitutionality of the apportionment of congressional districts. The court below dismissed Appellees’ motion to dismiss for lack of jurisdiction for lack of standing, but granted Appellee’s motion to dismiss for failure to state a claim. It held that this Court has “provided a clear and unambiguous answer” that the “term ‘Legislature’ in the Elections Clause refers not just to a state’s legislative body but more broadly to the entire lawmaking process of
the state.” Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 997 F. Supp. 2d 1047, 1056 (D. Ariz. 2014). It further found that the Commission was an acceptable exercise of such lawmaking authority. Even the Appellant, the court said, did not contest that the “people of Arizona used that legislative power to create” the Commission. Id. at 1051.

The majority found that under this Court’s precedent, the “Elections Clause does not give unique authority to state legislatures to conduct redistricting.” Ariz. State Legislature, 997 F. Supp. 2d at 1055. The Clause is concerned not with “what role, if any, the state legislature plays in redistricting,” but with whether or not the state has “appropriately exercised its [legislative] authority in providing for that redistricting.” Id. at 1056. The authority to make districting determinations, the majority found, “was vested in the operation of a state’s legislative power; not necessarily in the state legislature.” Id. at 1053. Adopting this Court’s functional reading of “Legislature” in its Elections Clause jurisprudence, the court below recognized that the legislative authority of the People “plainly includes the power to enact laws through initiative, and thus the Elections Clause permits the establishment and use of the [Commission].” Id. at 1056.

Judge Rosenblatt concurred in the denial of the motion to dismiss for lack of standing, but dissented from the majority’s grant of Appellees’ motion to dismiss for failure to state a claim. He argued that Proposition 106 prevented the state legislature from participating in redistricting in a meaningful capacity, and thus violated the Elections Clause. Ariz. State Legislature, 997 F. Supp. 2d at 1056-57 (Rosenblatt, J., dissenting in part).

SUMMARY OF ARGUMENT

I. Appellant cannot meet the Article III requirements for standing. The Constitution requires plaintiffs to allege an injury in fact, that their injury is fairly traceable to the actions of defendants, and that their injury is likely to be redressed by a favorable ruling. Appellant cannot
meet those requirements. Because generalized grievances are not sufficient to confer standing, Appellant’s injury is only cognizable as a claim that Proposition 106 removed its power to prescribe congressional redistricting. That, however, is an abstract institutional injury that does not constitute an injury-in-fact. Nor does it qualify as the type of “vote nullification” that the Court has held may satisfy the injury-in-fact requirement because Appellant did not vote on a particular act in a way that would affect its enactment. Even if this Court believes that the power to do congressional redistricting is equivalent to the type of “vot[ing]” that could count as an injury, Appellant cannot demonstrate that any “vote” was in fact nullified. Moreover, Appellant retains the power to recommend redistricting maps to the Commission, to propose new constitutional amendments, and to amend the existing initiative.

Aside from failing to meet the injury-in-fact requirement, Appellant cannot show that its injury was caused by the parties it sued. Neither the Commission nor the Secretary of State is the party responsible for Appellant’s alleged injury. That responsibility lies with Appellant’s own constituents, who are not defendants in this case. For this Court to hold that Appellant has standing to sue third parties who did not cause its abstract removal-of-power injury would come dangerously close to creating a doctrine of legislative standing far beyond the limits of Article III.

The lower court’s reliance on the merits determinations in Hildebrant and Smiley, cases construing the meaning of “Legislature” in the Elections Clause, to confer standing in this case, is misplaced. The plaintiffs there were not representative bodies alleging a dilution of their institutional power—they alleged concrete, particularized injuries. And those plaintiffs brought their cases in state court, against the defendants who actually caused the injuries alleged. Though Hildebrant and Smiley support Appellees’ argument on the merits, they provide no help for Appellant on standing.
The final blow to Appellant’s Article III standing is that it presents a question that is not justiciable. At bottom, Appellant asks the Court to pass on the constitutionality of Arizona’s internal ordering of its legislative power. Under longstanding precedent in this Court, such questions are not those that Article III allows federal courts to answer. The distribution of legislative authority within a state is a determination left to its own people, and any related concerns arising under the Constitution’s Guarantee Clause are a matter for Congress, not this Court, to decide.

II. The Elections Clause allows the citizens of Arizona to define their state process of congressional redistricting. The two-part structure of the Clause delegates initial elections authority to states’ legislative power, while reserving plenary and final oversight to the Congress. In vesting a degree of discretion in the states’ legislative branches, the Framers sought a channel of authority that was both responsive to the voters and able to efficiently administer federal elections. Neither the history nor the text of the Clause suggests that in delegating to the legislative processes of each state, the Framers intended to entrench their institutional legislatures.

The meaning of “Legislature” in the first part of the Clause is therefore not limited to representative bodies, but instead refers to the complete and varied lawmaking structures of each state. At the time of the Framing, the word “legislature” was defined broadly as the “power that makes the laws.” Even during Ratification states were far from uniform in how they ordered this lawmaking authority, and such diversity in legislative systems has only grown since. Today, twenty-four states provide for popular lawmaking through referenda and initiatives. Recognizing such mechanisms as part of the “Legislature” under the Elections Clause comports with the Framers’ intent that elections regulations be responsive to the citizens themselves.

Allowing for popular lawmaking such as Proposition 106 also aligns with this Court’s prior interpretations of the Elections Clause. Repeatedly, the Court has rejected Appellant’s
claim that “Legislature” must be read to necessarily refer to a state’s representative body. Arguments strikingly similar to those offered today were advanced in *Hildebrant*, when the Court upheld the power of the citizens of Ohio to reject a redistricting plan via the referendum. The Court again considered the issue in *Smiley*, in which it upheld the effect of the Minnesota Governor’s veto in nullifying a districting plan passed by the state assembly. Finding that the veto was part of the state’s general lawmaking structure, the Court held that the Elections Clause required only that elections regulations be passed in “accordance with the method which the state had prescribed for legislative enactments.” Such precedent confirms the power of Proposition 106 and the validity if the Commission, which was created pursuant to the legislative power expressly reserved to the voters under the Arizona Constitution.

The lawmaking authority of the people of Arizona is supported not only by constitutional text, history, and interpretation, but also by Congress’s exercise of its plenary oversight under the Elections Clause. The second part of the Clause grants Congress the power to “make or amend” any elections regulations. In 1911 it enacted the precursor to the current 2 U.S.C. § 2a(c), which states that congressional districts are to be determined in the “manner provided by the laws” of each state. The legislative history of the 1911 statute demonstrates that Congress departed from earlier language referring to the “legislature” of each state precisely in order to clarify that districting could take place via popular lawmaking processes such as the initiative. Appellant today argues that the Elections Clause cannot contemplate legislative authority as enacted through Proposition 106. Yet such a claim is refuted by Congress’s final authority under the Elections Clause and its corresponding decision to defer to state districting procedures.

This Court has never found a threshold of involvement by state representative bodies necessary to craft elections regulations under the Elections Clause. Rather, it has acknowledged
the need to preserve states’ discretion and flexibility in ordering their internal legislative processes. Appellant’s argument today would severely constrict the potential for such state innovation, and thus is contrary to core principles of federalism. Similarly, disallowing the Commission and related districting provisions would also conflict with values of popular sovereignty. Voters’ ability to create such independent processes is crucial to preventing entrenchment by incumbents and special interests. Without popular, state-based responses to gerrymandering, there remain few if any means for the people to preserve the accountability of their elected representatives.

ARGUMENT

I. The Arizona Legislature Does Not Have Standing

Article III permits federal courts to decide only “Cases” and “Controversies.” U.S. Const. art. III, § 2. “[W]hether the plaintiff has made out a ‘case or controversy’ between himself and the defendant” is “the threshold question in every federal case.” Warth v. Seldin, 422 U.S. 490, 498 (1975). The case-or-controversy requirement is “founded in concern about the proper—and properly limited—role of the courts in a democratic society,” and so sets “fundamental limits on federal judicial power in our system of government.” Allen v. Wright, 468 U.S. 737, 750 (1986); Warth, 422 U.S. at 498. One of those limits is the “essential,” “unchanging,” “irreducible constitutional minimum” of Article III standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Article III standing requires three things: that the plaintiff suffered an “injury-in-fact” (that is, “an invasion of a legally protected interest that is concrete and particularized,” “not conjectural or hypothetical”); that the injury is “fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court”; and that the injury is “likely . . . [to] be redressed by a favorable decision.” Lujan, 504 U.S. at 560 (internal quotation marks and alterations omitted).
Appellant cannot satisfy those “indispensable” requirements here. *Lujan*, 504 U.S. at 561. As a result, the Arizona State Legislature does not have standing to bring its claim, and the lower court’s order denying Appellees’ Motion To Dismiss for Lack of Jurisdiction for Lack of Standing should be reversed.

**A. Proposition 106’s Transfer of Redistricting Authority to the Commission Did Not Inflict a Concrete, Particularized Injury on the Arizona Legislature**

Appellant claims it is injured because the people of Arizona, in passing Proposition 106, “remove[d] entirely the constitutionally-delegated authority over prescribing the boundaries of congressional districts from the Arizona Legislature.” JA 22. Under this Court’s precedents, Appellant’s alleged removal-of-power injury is insufficient to confer standing.

1. **Raines Sharply Limits the Scope of Legislative Standing for Institutional Injuries Like the One Appellant Alleges Here**

   Appellant describes itself in its complaint as the “elected-representative portion of the legislative authority of the State of Arizona.” JA 14. On May 2, 2012, a month before the complaint was filed, the Arizona State Senate authorized its President to “represent the interests of the Senate . . . in any matter related to redistricting, including acting jointly with the Speaker of the House to act on behalf of the Legislature as a whole.” JA 27. The House authorized the Speaker to do the same on its behalf. *Id.* 46. Appellant cannot dispute that it brought this suit in its institutional capacity. Nor can Appellant dispute that it seeks to invalidate a popular initiative transferring power from Appellant to the Commission. JA 22. But this Court has never found a state legislature to have institutional standing to challenge a law passed by the legislature’s own constituents. The Court should not so expand its conception of Article III for the first time here.

   This Court articulated the outer bounds of legislative standing in *Raines v. Byrd*, 521 U.S. 811 (1997). In that case, six Members of Congress sued to challenge the constitutionality of the Line Item Veto Act. *Id.* at 814. The congressmen alleged a “type of institutional injury,” arguing
that, among other things, the Act “divest[ed them] of their constitutional role in the repeal of legislation.” Id. at 815, 821. The Court rejected that argument, holding that the congressmen’s alleged injury was merely an “abstract dilution of institutional legislative power” insufficient to confer standing. Id. at 826.

This Court should reject Appellant’s argument for the same reason. This is not a situation where individual legislators were “singled out for especially unfavorable treatment,” Raines, 521 at 821, or “deprived of something to which they personally were entitled,” id. Nor is it a situation that raises the equivalent structural injury on an institutional scale—that is, the injury resulting from a federal court’s “drastic[]” reduction of the size of the upper house of Minnesota’s legislature from 67 seats to 35” during reapportionment. See Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 193, 200 (1972).

Instead, the sole injury Appellant alleges is an abstract one that relates not to the concrete makeup of its own institution, but to an abstract power it claims to possess—that Proposition 106 “divest[ed Appellant] of [its] constitutional role” in congressional redistricting, and that a “dilution of institutional legislative power” occurred as a result. Raines, 521 U.S. at 814, 821. Like in Raines, Appellant’s claimed injury is “wholly abstract and widely dispersed.” Id. at 829. And, owing to the lack of precedent,1 Appellant’s “attempt to litigate this dispute at this time and in

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1 That state legislatures and individual legislators have been involved in litigation involving initiatives in the past is of no moment. In those cases, the legislatures acted as defendants, frequently on appeal, to defend a state law. The standing inquiry is different in that situation, because this Court has held that state legislatures may “have standing to contest a decision holding a state statute unconstitutional” provided that “state law authorizes legislators to represent the State’s interests.” Arizonans for Official English v. Arizona, 520 U.S. 43, 65 (1997); see Karcher v. May, 484 U.S. 72, 82 (1987). So although Article III standing must be met by parties seeking to defend on appeal, id., when state law authorizes state legislatures to act in the state’s place, Article III standing is satisfied. Karcher, 484 U.S. at 82; cf. United States v. Windsor, 133 S. Ct.
this form is contrary to historical experience.” Id. As a result, on a straightforward reading of Raines, Appellant’s alleged injury is insufficient to confer standing. Id.; see Chenoweth v. Clinton, 181 F.3d 112, 115 (D.C. Cir. 1999).

Appellant can allege no other injury. Although Appellant seeks a judgment declaring that “Proposition 106 is unconstitutional to the extent it removes congressional-redistricting authority from the legislature,” the alleged unconstitutionality of Proposition 106 is not, by itself, a cognizable injury. That is because “[t]his Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.” Allen, 468 U.S. at 754 (internal quotation marks omitted). Because Article III requires Appellant to show that its injury is concrete and particularized, the “‘generalized interest of all citizens in constitutional governance’ . . . is an inadequate basis on which to grant petitioner standing to proceed.” Whitmore v. Arkansas, 495 U.S. 149, 160 (1990) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 207 (1974)). “In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a ‘case or controversy’ appropriate for judicial resolution.” Schlesinger v. Reservists Comm., 418 U.S. at 208, 226-27. For that reason, Appellant’s injury must rest on the alleged unconstitutional divestment of its redistricting authority rather than the allegedly unconstitutional legal regime that results. See JA 21. Raines forecloses the possibility that the “divest[ment] of [Appellant’s] constitutional role” can be considered an injury-in-fact for the

2675, 2688 (2013) (not reaching the question of whether Congress’s Bipartisan Legal Advisory Group had Article III standing to appeal by itself but allowing it to participate).

That is not the situation here. Appellant cannot gain Article III standing by claiming to represent the interests of the state of Arizona (indeed, a party claiming to represent the interests of Arizona would be defending the popular initiative, see Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)). Instead, Appellant must show injury-in-fact and causation to meet Article III’s strict requirements—a showing it cannot make.
purposes of standing. *Raines*, 521 U.S. at 814. As a result, Appellant cannot meet the requirements of Article III.

2. **Appellant’s Votes Have Not Been Nullified in the Way Coleman Requires**

The only other legislative standing case decided by this Court that Appellant can point to is *Coleman v. Miller*, 307 U.S. 433 (1932). *Raines*, 521 U.S. at 821 (“The one case in which we have upheld standing for legislators . . . claiming an institutional injury is *Coleman v. Miller*.”). According to the *Raines* Court, it is “obvious” that *Coleman* stands “at most” to allow legislators “suing as a bloc” “whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.” *Raines*, 521 U.S. at 823.

The vote-nullification injury in *Coleman* occurs, according to *Raines*, only in the context of a vote on a “specific legislative Act” where the votes would have been decisive. *Raines*, 521 U.S. at 823. That is far from the situation here. Appellants “have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless defeated.” *Id.* at 824. Instead, the people of Arizona chose in 1912 to allocate their legislative authority so that the institutional legislature is *not* the sole body responsible for lawmaking. The people, through the initiative power, can propose and enact laws “independent of” Appellant. Ariz. Const. art. I, pt. 1, § 1. The popular initiative is not a “nullification” of the institutional legislature’s authority under *Coleman* any more than the Supremacy Clause is a “nullification” of a state’s authority to pass laws conflicting with the Constitution. Instead, it is a system of power-sharing that the people of Arizona themselves have chosen.

In addition, as *Raines* itself acknowledged, *Coleman* may be inapplicable in cases like this one for another reason. Before appealing to the Supreme Court, the plaintiffs in *Coleman*
first petitioned for mandamus in the Supreme Court of Kansas. *Coleman*, 307 U.S. at 436. The Kansas court, unrestricted by Article III, treated the legislators’ “interest in the controversy . . . as a basis for entertaining and deciding the federal questions.” *Id.* at 446. The *Coleman* Court, in turn, considered the Kansas court’s treatment of the federal question “sufficient to give the [Supreme] Court jurisdiction to review that decision.” *Id.* According to the *Raines* Court, that may be enough to distinguish *Coleman* from cases where the alleged injury is vote nullification. 521 U.S. at 824 n.8. That distinction is in full force here—Appellant never attempted to vindicate its rights in Arizona’s state court. As a result, no state court previously took jurisdiction over Appellant’s claim to decide the federal question, so any “federalism concerns” that *Raines* notes were “eliminated” in *Coleman* are still very much alive here. *Id.*

3. **Even if *Coleman* Applies, Appellant’s Votes Were Not Nullified**

Even if this Court disagrees with *Raines* and finds that *Coleman* offers the correct test, Appellant still lacks standing because its “votes” are not “nullified.” Appellant is not powerless to change the division of legislative authority it believes to be unconstitutional. Under the Arizona Constitution, Appellant still retains the authority to amend and supersede Proposition 106 provided that it furthers the purpose of the measure and at least three-fourths of the legislature votes to do so. *See* Ariz. Const. art. IV, pt. 1, § 1, cls. 6, 14. Appellant also retains the authority to “order the submission to the people at the polls of any measure, item, section, or part of any measure,” including one to amend the current districting regime. *Id.* § 1 cl. 15. That Appellant could exercise this power to respond to Proposition 106 is not hypothetical. In the past century, over 80 percent of the nearly 150 amendments made to the state constitution have resulted from such “legislative referrals, rather than direct citizen initiatives.” John D. Leshy, *The Arizona State Constitution* 23 (2013). Moreover, Proposition 106 *itself* allows the legislature to make
recommendations to the Commission that the Commission must consider. Ariz. Const. art. I, pt. 2, § 1, cl.16. As a result, Appellant’s power is not “nullified” in the way that Coleman means—either in general or with respect to Proposition 106 in particular.

**B. Any Institutional Injury Was Not Caused by Appellees’ Conduct**

Appellant cannot meet the requirements of Article III for another reason—the injury-in-fact it alleges is not “‘fairly traceable’ to the actions of [Appellees].” *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (quoting *Lujan*, 504 U.S. at 555). The injury Appellant alleges is not a garden-variety claim that enforcement of a statute by a public official violated its constitutional rights. Instead, Appellant complains of an institutional injury due to its loss of “constitutionally-delegated authority over prescribing the boundaries of congressional districts.” JA 22. No matter to whom the authority had been given—indeed, if it had been given to *no one*—in Appellant’s view, the injury would still exist.

That missing link reveals why Appellant cannot meet the rigors of Article III. No Appellee—neither the Commission nor the Secretary of State—took an action that resulted in Appellant’s alleged injury. That injury, Appellant admits, was inflicted by Proposition 106, which was approved by popular vote pursuant to Arizona’s constitutional initiative process. JA 18. The injury is thus “the result of the independent action of some third party not before the court,” a situation that *Lujan* deemed insufficient to meet the traceability requirement. 504 U.S. at 560.

The Court in *Raines*, though it did not reach the causation prong of the standing analysis, raised the specter of precisely the same Article III problem Appellant faces here. “In addition” to the lack of injury-in-fact, the Court noted, “it is far from clear that this injury is ‘fairly traceable’ to [Executive branch officials], as our precedents require, since the alleged cause of [legislators’] injury is not [Executive branch officials’] exercise of legislative power but the actions of their
own colleagues [in] passing the Act.” Raines, 521 U.S. at 830 n.11 (emphasis added) (citing Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d. Cir. 1973)).

This situation is on all fours with the one described in Raines. The source of Appellant’s alleged injury is not any ultra vires assumption of power by the Commission or the Secretary of State. The cause of Appellant’s alleged injury is instead the vote of its own constituents—indeed, perhaps members of the institutional legislature themselves—in approving Proposition 106. JA 18. Moreover, Proposition 106 requires no action by a state official in order to affect Appellant’s participation in congressional redistricting. That is, the alleged injury inflicted by Proposition 106 does not arise from its enforcement, but merely from its passage. See Raines, 521 U.S. at 830 n.11. The amended Arizona Constitution provides that the Commission “shall be established” “by February 28th of each year that ends in one” and that the Commission “shall establish congressional . . . districts.” Ariz. Const., art. IV, pt. 1, § 1 cls. 3, 14. The measure is “self-executing” and requires no implementing legislation. Id. cl. 17.

In short, the cause of Appellant’s alleged injury was not the parties Appellant sued. It was the people of Arizona, who “reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls” and who exercised that power in modifying Appellant’s role in the congressional redistricting process. Id. pt. 1, § 1 cl. 1; JA 22.2 This Court should not allow Appellant to dodge the effects of Arizona’s “people’s constitution” by attributing its alleged injury to different parties. McClory, supra, at 28.

2 That the Commission “shall have standing in legal actions regarding the redistricting plan” does not solve Appellant’s causation problem. Ariz. Const, art. IV, pt. 2, §1, cl. 20. First, Article III standing is a question of federal law, not state law. U.S. Const. art. III, § 2; Duchek v. Jacobi, 646 F.2d 415, 419 (9th Cir. 1981). Second, it is not the Commission’s “districting plan” that Appellant alleges caused its injury—it is not even the existence of the Commission itself. It is the removal of the authority from Appellant under Proposition 106.
C. That the Court Decided Smiley and Hildebrant on the Merits Is Irrelevant to the Standing Inquiry in this Case

At the end of its brief treatment of Article III standing, the court below concluded that “prior Supreme Court precedent strongly suggests that [Appellant] has suffered a cognizable injury.” *Ariz. State Legislature*, 997 F. Supp. 2d at 1050. To support this “strong[] suggest[ion],” The majority observed that the Court did not “refuse to address the merits [of the Elections Clause claim] for a lack of standing” in two cases that decided the meaning of the Clause—*Smiley v. Holm*, 285 U.S. 355 (1932), and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). But on closer inspection, that “strong[] suggest[ion]” falls apart. The standing (as opposed to merits) determinations in *Smiley* and *Hildebrant* are inapplicable here.

The standing question in *Smiley*, for one, is readily distinguishable from Appellant’s position in this case. The plaintiff in *Smiley*, a private citizen acting as a relator for the state, brought a mandamus action against the Minnesota Secretary of State, alleging that the Secretary had abridged the state constitution by refusing to give effect to the Governor’s veto of a redistricting plan. *Smiley*, 285 U.S. at 355-56. The harm alleged was not an abstract institutional injury to the legislature, nor was the alleged violation caused by a popular initiative passed by a party not before the Court. In addition, the relator in *Smiley* initially sought the writ of mandamus in *state court*—where the rules of Article III standing do not apply. *Id.; see Raines*, 521 U.S. at 824 n.8.

The standing question in *Hildebrant*, too, diverges from Appellant’s situation here in crucial respects. The plaintiff in *Hildebrant* was a relator acting on behalf of the state who, like Smiley, sought a writ of mandamus against the Ohio Secretary of State to implement a districting

The same is true of the Secretary of State, whom Appellant names as a defendant “solely in his official capacity in view of his election responsibilities,” which include “receiving certified legislative and congressional districts from the [Commission].” JA 15. The alleged unconstitutionality of the redistricting maps is not the injury Appellant claims. As a result, injury resulting from Proposition 106 is not “fairly traceable” to the Secretary of State.
plan overruled by referendum. As in Smiley, the plaintiff did not assert any institutional injury or deprivation of lawmaking power on behalf of the legislature. The claim was not one of authority denied, as Appellant claims today, but of concrete injury due to allegedly unconstitutional redistricting plans. Hildebrant, 241 U.S. at 565-66. And, like Smiley, the petitioner in Hildebrant sought a writ of mandamus in state court. Id.

These distinctions make a difference. The Court should not confuse Smiley and Hildebrant’s binding explication of the meaning of the Elections Clause with a general grant of legislative standing. Once again, Raines is instructive. Though in Raines the Court found it had no jurisdiction to decide the constitutionality of the Line Item Veto Act as it was presented by the congressmen, it later invalidated the Act when a plaintiff who could “allege[] a ‘personal stake’ in having an actual injury redressed rather than an ‘institutional injury’ that is ‘abstract and widely dispersed’” brought suit against the proper defendant. Clinton v. City of New York, 524 U.S. 417, 430 (1998) (quoting Raines, 521 U.S. at 829). For the lower court to equate the standing of the parties in this case with those in Smiley and Hildebrant merely because the case was decided on the merits ignores the “fundamental limits” of Article III entirely. Allen, 468 U.S. at 750.

D. The Question Is Not Justiciable Because Federal Courts Cannot Inquire into the Internal Ordering of State Legislative Power.

Even apart from its failure to show the injury-in-fact, causation, and redressability elements this Court requires, Appellant’s claim is not a “Case” or “Controversy” under Article III for another reason: questions, like this one, with “a textually demonstrable constitutional commitment of the issue to a coordinate political department” are not justiciable under Baker v. Carr, 369 U.S. 186 (1962). Appellant’s alleged injury rests on a claim that the government of Arizona has an unconstitutional distribution of legislative power between its institutional legislature and
its people—a determination this Court has held to be a nonjusticiable political question properly left to the judgment of Congress.

The Court held in Pacific States Telephone and Telegraph Co. v. Oregon that it is the “province of Congress,” not the duty of the courts, to determine “when a state has ceased to be republican in form.” 223 U.S. 113, 133 (1912). In that case, Oregon had amended its constitution to allow for the passage of laws by initiative and referendum, “independent of the legislative assembly.” Pac. States Tel., 223 U.S. at 134. In 1906, the people of the state passed an initiative to tax certain classes of corporations. When charged with paying taxes owed under the law, Pacific States Telephone argued that the statute was invalid because legislation by initiative violated the Constitution’s provision that “the United States shall guarantee to every state in th[e] union a republican form of government.” Pac. States Tel., 223 U.S. at 135; U.S. Const. art. IV, § 4.

The Court held that it lacked jurisdiction to hear the question. Because Pacific States Telephone challenged not “the tax as a tax, but . . . the state as a state[, its argument] is addressed to the framework and political character of the government by which the statute levying the tax was passed.” Pac. States Tel., 223 U.S. at 150-51. That question, according to the Court, was a matter for Congress to police, not the federal courts. Id.

This case presents many of the same questions of “the framework and political character of the government” that the Court refused to hear in Pacific States Telephone, and has continued to find not justiciable in the hundred years since. See, e.g., Vieth v. Jubelirer, 541 U.S. 267, 277 (2004); Ohio ex rel. Bryant v. Akron Metro. Park Dist. for Summit Cnty., 281 U.S. 74, 79-80 (1930); Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1917); Marshall v. Dye, 231 U.S. 250, 256 (1913). In particular, Appellant’s alleged injury is the “remov[al] of its “authority over prescribing the boundaries of congressional districts” caused by Proposition 106. JA 22.
That “removal” was effected by the provisions of Arizona’s constitution, which, like Oregon’s, provide for lawmaking by initiative. For Appellant to argue that Proposition 106 is “preempted, null and void” because it results from a particular form of legislative authority is a political question that Congress, not the Court, should address. JA 22. For similar reasons, as the court below acknowledged, “[t]o the extent . . . that the legislature makes arguments that the [Commission] cannot be a repository of legislative authority because it is not a representative body, such arguments arise under the Republican Guarantee Clause of the Constitution and, as such, are not justiciable.” *Ariz. State Legislature*, 997 F. Supp. 2d at 1050.

The Court in *Hildebrant* made the point clearly: “To the extent [Appellant] urges that to include the referendum within state legislative power for the purpose of apportionment is” invalid, “it must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power . . . and causes a state where such condition exists to be not republican in form, in violation of the guaranty of the Constitution.” *Hildebrant*, 241 U.S. at 569. That, according to the Court, would “disregard the settled rule that the question of whether the republican guaranty of the Constitution has been disregarded presents no justiciable controversy.” *Id.* (citing *Pac. States Tel.*, 223 U.S. 118).\(^3\) For all those reasons, Appellant’s claim is not justiciable.

II. Arizona’s Redistricting Policy Is A Permissible Exercise Of State Authority Under The Elections Clause Of The U.S. Constitution

The text of the Elections Clause is both a delegation of power to the states and a grant of oversight to the Congress. It provides that: “The Times, Places and Manner of holding Elections
for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but
the Congress may at any time by Law make or alter such Regulations, except as to the Places of
chusing Senators.” U.S. Const. art. I, § 4. The first clause grants initial authority over state and
federal elections to the states. The second clause limits this allocation of power by subjecting it
to complete congressional control. With this two-part structure, the Framers ensured that elec-
tions regulations would reflect the needs of each states’ voters while remaining responsive to na-
tional norms and free from parochial capture.

A. The History and Text of the Elections Clause Encompasses Redistricting Pol-
ices Made Pursuant to State Legislative Power

The Framers’ primary concern in crafting the Elections Clause was to devolve control
over the electoral process to state-level lawmaking (in all its diversity) and to avoid entrench-
ment of state legislatures. Though some advocated for initial federal control, their position was
rejected in favor of vesting preliminary discretion at a level closer to the voters themselves. See,
e.g., Debate in New York Ratifying Convention (1788), in 2 Elliot’s Debates at 327 (1901)
(statement of John Jay) (“The will of the people certainly ought to be the law . . . with respect to
the time, place, and manner of holding elections.”); Federal Farmer, No. 12 (1788), reprinted in
2 The Founders’ Constitution, at 253, 254 (stating that electoral regulations “ought to be left to
the state legislatures, they coming far nearest to the people themselves”). The Framers regarded
states as best able to gauge the needs of their voters—and they had the pragmatic advantage of
already conducting state-level elections.

Misconstruing the Framers’ intent, Appellant argues that the term “Legislature” must be
confined to a singular and narrow reading, that it must mean for all purposes and in all states the
institutional representative body. Yet such a reading the Elections Clause would directly contra-
dict the Framers’ intent in delegating independent authority to each state. By entrusting elections
regulations to the state “Legislature,” the Framers did not seek to vest elections authority in a single, immutable institution or to compel its exercise through a predetermined process. Instead, the Elections Clause was drafted to preserve flexibility and discretion in state lawmaking, allowing states to be responsive to the needs of their voters.

Any argument by Appellant that “Legislature” refers only to the representative body of a given state thus ignores the original intent of the text. In contrast to the system for electing Senators prior to the Seventeenth Amendment—a process motivated by the “notion that state legislatures would serve as filters of popular passion and elect a better class of people to the Senate than would be produced by direct election”—the Framers had no elitist aims in delegating authority to the states under the Elections Clause. Vikram David Amar, Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment, 49 Vand. L. Rev. 1347, 1353 (1996). Instead, the Framers sought to balance popular accountability and administrative efficiency. With those concerns in mind, the Framers had little choice: at the time of the Framing, the institutional legislature “was the only body within a state capable of exercising” the power to regulate elections under the Elections Clause. See Brown v. Sec’y of State of Fla., 668 F.3d 1271, 1276 (11th Cir. 2012) (emphasis added). Because every state constitution prior to 1787 vested the power to regulate elections in the legislative branch, 2 Sources and Documents of United States Constitutions 143 (William F. Swindler ed., 1973), it was uniquely positioned to effectively implement elections regulations in the aftermath of Ratification. See Federalist No. 59, at 363 (Hamilton) (Clinton Rossiter ed., 1961) (noting that the local administration of elections in the first instance may be “both more convenient and more satisfactory”). With the expansion of states’ lawmakers structures to include mechanisms like the initiative, this pragmatic rationale now applies to a wider range of legislative authorities.
The Framers wrote the Elections Clause knowing that states already diverged with respect to their legislative structure, and that their systems of governance would continue to evolve. Most states such provided for bicameral institutions, but Pennsylvania, Georgia, and Vermont chose to have only a single representative house. David Brian Robertson, *The Constitution and America’s Destiny* 34 (2005). New York and Massachusetts allowed for executive vetoes of legislative acts, 3 Francis Thorpe, *American Charters, Constitutions and Organic Laws* 2642 (1894), and Rhode Island entered the Union without a written constitution in place, and was governed by its Royal Charter until the 1840s. William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 86 (1972). Despite (or, more likely, because of) this variation, “there is no intimation, either in debates in the Federal Convention or in contemporaneous exposition” of the Framers’ intent to prohibit “restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power.” *Smiley v. Holm*, 285 U.S. 355, 369 (1932); see also Brown, 668 F.3d at 1278 (holding that the Framers “expressed no intention to exclude” mechanisms such as the veto or referendum from the meaning of “legislature” in the Elections Clause). Given the variety and uncertainty of the states’ legislative structures at the time of ratification, the Framers intended “Legislature” to encompass a breadth of lawmaking processes.

This reading of “Legislature” also aligns with Founding-era definitions of the term. Multiple dictionaries define “legislature” not as a representative body, but as “the power that makes the laws.” See, e.g., John Ash, *The New and Complete Dictionary of the English Language* (1775); Samuel Johnson, *A Dictionary of the English Language* (1755); Noah Webster, *A Compendious Dictionary of the English Language* (1806) (“the power that makes laws”). Another defines the term as “the persons empowered to make, abolish, alter, or amend the laws of a kingdom or people.” Thomas Dyche & William Pardon, *A New General English Dictionary* (1760).
Plainly, the meaning of “Legislature” at the time it was written into the Constitution was not limited to the concept of an institutional body. The Framers crafted the text of the Elections Clause not to straight-jacket the state lawmaking process, but to defer to their diverse structures of authority. The term “Legislature” thus refers to the functional legislative power of each state, in all its varied forms.

B. This Court’s Precedents Confirm that the Elections Clause Permits States to Define and Distribute the Power of the “Legislature”

This Court, like the Framers, has long recognized that “Legislature” refers to a state’s lawmaking power, not just its representative body. Appellant’s cramped construction of the term would upend the Court’s determination that the Elections Clause addresses the functional, rather than institutional, legislative process of each state. Although Arizona’s initiative process allows for lawmaking independent of the state’s representative body, it remains within the scope of the “Legislature” as understood by this Court.

The Court established the meaning of “Legislature” in the Elections Clause when ruling on the 1916 challenge to Ohio’s referendum process. *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). In 1912, Ohio voters joined a growing number of states by amending their constitution to allow for a veto by popular referendum of acts passed by the state legislature. The amendment placed the legislative power of the state “not only in the senate and house of representatives . . . but in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly.” *Id.* at 566. In 1915, the people of Ohio used this power to reject a redistricting law passed by the state general assembly. The question before the Court was whether such control over the institutional legislature by the people could be tolerated under the Elections Clause.
The Court unanimously answered in the affirmative. *Id.* at 570. It held that there is no fixed and singular definition of the state legislature under the Elections Clause, specifically refuting the argument that “the referendum [w]as [not] part of the legislative authority of a state.” *Hildebrant*, 241 U.S. at 569. The text of the Constitution, the Court held, reserves to the states the prerogative to structure their legislative power, and the voters of Ohio had chosen the veto by referendum as a mechanism for popular lawmaking. The Court concluded that the Elections Clause allows the referendum to be treated as “the state legislative power for the purpose of creating congressional districts by law.” *Id.* at 568. Any other ruling would mean that “includ[ing] the referendum within state legislative power for the purposes of apportionment is repugnant to [the Constitution].” *Id.* at 570. The Court found that claim to be “without substance.” *Id.* at 568.

In 1932, the Court again considered the authority of citizens to define their state legislative power. It confirmed the *Hildebrant* holding—“Legislature” in the Elections Clause must be read to allow for states to structure their own lawmaking processes. *Smiley v. Holm*, 285 U.S. 355 (1932). *Smiley* addressed whether the Governor of Minnesota could use the veto power granted to him under the state constitution to reject a districting plan passed by the state assembly. The veto power served a central role in the structure of Minnesota’s general lawmaking authority—every act passed by the institutional legislature was subject to it. Yet proponents of the general assembly’s districting plan argued that, when it came to election law, the veto could not be used to overturn decisions of the institutional legislature. They argued that the Elections Clause designated the “Legislature” as a “merely as an agency, discharging a particular duty” of elections regulations, and that the “[t]he Governor’s veto has no relation to such matters.” *Smiley*, 285 U.S. at 364. Regulations passed pursuant to the Elections Clause, they argued, could not

As in *Hildebrant*, this Court soundly rejected the premise that the Elections Clause is limited to a narrow, institutional channel of state lawmaking power. The Court held that “Legislature” must be interpreted through the lens of the “function to be performed” by the legislative apparatus of each state under the Elections Clause. *Smiley*, 285 U.S. at 399. “Wherever the term ‘legislature’ is used in the Constitution,” the Court held, “it is necessary to consider the nature of the particular action in view.” *Id.* at 366. Noting that in other parts of the Constitution “legislature” referred to a singular “electoral body,” “ratifying body,” or “consenting body,” the Court held that in the context of the Elections Clause, “the function contemplated . . . is that of making laws.” *Id.* Elections regulations, the Court stated, “involve[] lawmaking in its essential features and most important aspect.” *Id.* Finding no indication of contrary constitutional intent, the Court held that “the exercise of [this] authority must be in accordance with the method which the state had prescribed for legislative enactments.” *Id.* at 367. The Elections Clause does not “endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted.” *Id.* at 368. In Minnesota, as in Arizona, the voters laid out in their state constitutions a clear set of lawmaking procedures that distributed the legislative power to actors beyond elected representatives.

Later cases confirm this view of “Legislature.” In cases examining judicial oversight of state redistricting procedures, this Court has repeatedly held that the power to district can be vested in authorities other than the institutional legislature. In *Growe v. Emison*, discussing the role of the federal courts in redistricting, the Court wrote that “reapportionment is primarily the duty and responsibility of the State through its legislature or other body.” 507 U.S. 25, 34 (1993).
(emphasis added). In 2004, Chief Justice Rehnquist stated that a chief concern with judicial control over redistricting was that it does not involve “participation in the process by a body representing the people, or the people themselves in a referendum.” *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J., dissenting from denial of certiorari). Contrary to Appellant’s claims, this Court recognizes that the Elections Clause allows for state legislative authority to be structured through popular, rather than institutional, lawmaking procedures.

Precedent makes clear that “Legislature,” as used in the Elections Clause, confers no entitlement of authority on a given state body or actor. Appellant urges that the Court today adopt a singular reading of the term throughout the text of the Constitution. In doing so, they ignore principles of *stare decisis* and argue for a re-interpretation of well-settled law. While arguments based on the assumption of intratextual uniformity seem appealing at first, they do not map onto the various functions the Framers chose to delegate to “Legislatures” under the Constitution. See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 799 (1999) (recognizing that even in constitutional analysis, “the same words sometimes sensibly mean different things in different contexts”). As the Court held in *Smiley*, the term at times refers to the discrete actions of a representative body, and at others to the overall lawmaking structure of a given state. The meaning of

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4 Indeed, a fixed reading of “legislature” would arguably require that the Court overrule its holdings in *Hildebrant* and *Smiley*. But neither case warrants revisiting—they have not defied practical workability, and neither the law nor the facts of elections regulations have changed so to have “robbed the old rule of significant application or justification.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992). To the contrary, the Court’s doctrine under *Hildebrant* and *Smiley* has created strong reliance interests in states such as Arizona, California, Hawaii, Idaho, Iowa, New Jersey, and Washington, all of which use independent commissions to conduct congressional redistricting. *The Political Battle over Congressional Redistricting* (William J. Miller & Jeremy D. Walling, eds.) 207 (2013). The ongoing use of state districting processes beyond the institutional legislature confirms that the intervening years since *Smiley* counsel in favor not of its abandonment, but of its affirmation. *Cf. Jerman v. Carlisle, McNellie, Rint, Kramer & Ulrich LPA*, 559 U.S. 573, 583 (2010) (noting that “in the context of stare decisis, this Court has suggested precedents tend to gain, not lose, respect with age”).
“legislature” is construed in the former sense when no “legislative action is authorized or required” by the delegated power. *Hawke v. Smith*, 253 U.S. 221, 231 (1920). Those applications include the role of state legislatures in ratifying constitutional amendments, *id.* at 229 (“[R]atification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.”), electing state senators prior to the passage of the Seventeenth Amendment, *id.* at 227; U.S. Const. amend. XVII, and consenting to the creation of new states, *Hawke*, 253 U.S. at 228. When, however, the Constitution delegates authority that requires substantive lawmaking, as under the Elections Clause, “such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent.” *Id.* at 231. Ignoring real differences in the use of “Legislature” throughout the Constitution elevates formalism above the functional logic of this Court.

C. **State Legislative Power Under the Elections Clause Includes Popular Initiative Processes Such as Arizona’s and the Lawmaking Bodies They Create**

Although the Court has not directly addressed the role of voter initiatives in redistricting, its deference to the structure of state lawmaking authority does not depend on that authority’s particular instantiation. As a result, any claim by Appellant that the initiative process is meaningfully distinguishable from the veto or referendum is meritless. Appellant’s role in the initiative process may be limited, see *supra* at 14-15, but the Court has never held that the Elections Clause sets a threshold for representative-body participation in redistricting. To the contrary, the residual involvement of the institutional legislature was not a determinative factor in *Hildebrant* or *Smiley*.

In *Smiley*, the governor’s veto was subject to override by the institutional legislature. Minn. Const. art. III, § 23. But the fact that the representative body could, by a two-thirds vote in
each house, potentially participate in the lawmaking process after the veto does not change the analysis of state discretion over the structure of legislative authority. Rather, it confirms that this Court has treated state lawmaking power as multi-faceted and dialogic. In addition, the Court in *Hildebrant* upheld a form of legislative authority—the popular referendum—for which there was no institutional override authority provided under state law. As a result, it is not contrary to the meaning of “Legislature” under the Elections Clause for the final voice in the lawmaking process to be that of the People instead of the representative body. The Clause does not entitle Appellants to a privileged role in either the process or the outcomes of redistricting procedures.

The Court’s chief concern in its Elections Clause jurisprudence is whether a means of political reform is part of the functional lawmaking apparatus of a given state. Under *Smiley*, the Court asks whether a given mechanism is a “method which the state has prescribed for legislative enactments.” *Smiley*, 285 U.S. at 367. In twenty-four states, including Arizona, popular initiatives are a route for such lawmaking and political reform. M. Dane Waters, *Initiative and Referendum Almanac* 12 (2003); see, e.g., *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1232 (Colo. 2003) (“The United States Supreme Court has interpreted the word “legislature” in Article I to broadly encompass any means permitted by state law, and not to refer exclusively to the state legislature. A state’s lawmaking process may include citizen referenda and initiatives, mandatory gubernatorial approval, and any other procedures defined by the state.”) (emphasis added)).

A state’s capacity to “legislat[e] through its voters” via popular initiative is “an exercise by voters of their traditional right” indistinguishable from the referendum or the veto in its legitimacy as a form of legislative power. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 678 (1976). Indeed, the Court has approvingly referred to the legislative authority of state initiative processes—noting that “since 1900, the Utah Constitution has vested the legislative power
of the state not only in the state Senate and House of Representatives but in the people of the state of Utah . . . [It] grants voters the authority to initiate legislation to be voted up or down by a majority of voters in a general election.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986); *see also Brown*, 668 F.3d at 1279 (“Like the veto provisions at issue in *Hildebrant* and *Smiley*, Florida’s citizen initiative is every bit a part of the state’s lawmaking function.”); *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, No. 12-55726, 2015 WL 1499334, at *5 (9th Cir. Apr. 3, 2015) (“the initiative power that California . . . [has] reserved to electors is indisputably a legislative power”).

This lawmaking authority can be used by the voters of each state not only to pass statutes or amend constitutions, but also to create new legislative bodies. “In establishing legislative bodies,” this Court held, “the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.” *City of Eastlake*, 426 U.S. at 672. In Arizona, the voters used their lawmaking authority to pass Proposition 106 and establish the Commission. For the purposes of both state and federal law, the Commission thus serves as a legislative instrument. *Arizona Minority Coal. for Fair Redistricting*, 208 P.3d at 684 (holding “that the Commission acts as a legislative body,” bearing the “hallmarks of traditional legislature”).

The initiative process thus falls squarely within the ambit of discretion left to each state to order their internal political procedures and legislative bodies. As this Court has held, “[u]nder our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create.” *City of Eastlake*, 426 U.S. at 672.

III. The Elections Clause Confers Broad Constitutional Authority To Congress To Defer To State Redistricting Policies Such As Arizona’s

Just as this Court has recognized the power of the citizens of each state to structure their lawmaking process, so too has Congress acknowledged such authority under the Elections
Clause. The Clause grants Congress “general supervisory power over the whole subject” of elections regulations. *Ex parte Siebold*, 100 U.S. at 387. Included within this oversight is Congress’s ability to “supplement state regulations or . . . [to] substitute its own.” *Smiley*, 285 U.S. at 366-67. In the case of districting, Congress has reflected the intentions of the Framers and echoed the jurisprudence of this Court. It has preserved to the states the ability to define the structure of state legislative power and the bodies through which that power can be exercised.

A. The Elections Clause Grants Congress Plenary Supervision of Elections

The second half of the Elections Clause grants to Congress sweeping oversight when it comes to how states structure and conduct elections. The history and text of the Clause demonstrates that the Framers intended this authority to provide a check on the accretion of power by institutional state legislatures.

In drafting the Elections Clause, the Framers reached a delicate balance between allowing states to efficiently manage elections and preserving federal control over the effects of localized regulations. As a result, the Clause provides for a delegation of centralized power, not a recognition of inherent state authority. *Cook v. Gralike*, 531 U.S. 510, 522 (2001) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S 779, 804 (1995)) (“Because any state authority to regulate election to [national] offices could not precede [the states’] very creation by the Constitution, such power ‘had to be delegated to, rather than reserved by, the States.’”). The Clause’s two-part structure allowed the Framers to grant autonomy to the states and supervisory power to the Congress, responding to the fear that “an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy.” *The Federalist No. 59*, at 363 (Hamilton) (Clinton Rossiter ed., 1961). The Framers’ “wariness over the potential for state abuse” led them to create a “safeguard” against the possibility of “state interference with federal elections.” *U.S. Term Limits*, 514 U.S. at 808-
09, 811. By vesting in Congress final authority over elections regulations, the Framers introduced a centralized check against state lawmakers.

Yet the Framers intended Congressional oversight to preserve not only the power of the Union, but also the power of the People in relation to their representative state bodies. As Theophilus Parsons, delegate to the Constitutional Convention and later Chief Justice of the Massachusetts Supreme Judicial Court explained, the second half of the Clause was necessary to protect against state institutional legislatures that, “under the influence of ambitious or popular characters, or in times of popular commotion, and when faction and party spirit run high . . . introduce such regulations as would render the rights of the people insecure and of little value.” 2 Elliotts Debates, supra, at 27. In supervising the state legislative process, Congress’s role in elections regulation served as “the Framers’ insurance” in ensuring that the voice of the people was heard over any potential corruption or stonewalling by their representative bodies. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2253 (2013).

B. In Passing 2 U.S.C. § 2a(c), Congress Exercised Its Authority To Uphold Districting Conducted According to Arizona State Law

In 1911, Congress passed the Apportionment Act, the precursor to 2 U.S.C. §2a(c), pursuant to its authority under the Elections Clause. The Act addressed the question of how to allocate representatives after a census showed population change, but before a state had conducted its own redistricting. In laying out the process, Congress directed that such procedures should be followed “until such State shall be redistricted in the manner provided by the laws thereof.” Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 14. This language marked a departure from the text of the 1901 Apportionment Act, which had provided that its procedures should be followed “until the legislature of such State in the manner herein prescribed, shall redistrict such State.” Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734.
The legislative history of the shift to the 1911 text “leaves no room for doubt that the prior words were stricken out and the new words inserted” for the “express purpose” of providing for redistricting via referendum and popular reform. *Hildebrant*, 241 U.S. at 568-69. Noting that the 1901 language could be construed to allow districting only by the institutional legislature, Senator Theodore Burton of Ohio stated that, “[w]hatever our views may be on the subject of the initiative or referendum, we cannot ignore the existence of statutes in diverse States of the Union under which they are the recognized methods of enacting laws.” 47 Cong. Rec. at 3436 (Aug. 1, 1911). The Constitution and the Congress, Senator Burton stated, did not intend for such legislative mechanisms to be superseded by “one inflexible way” for states to conduct redistricting. *Id.* at 3507 (Aug. 2, 1911). The new language, proponents argued, would make certain that any ambiguity in the interpretation of “legislature” under the prior Apportionment Acts was resolved in favor of state lawmaking processes. They acknowledged that “legislature” already could be construed to include initiatives and referenda, but favored the shift to the 1911 language in order to make clear that “each State [has] full authority to employ in the creation of congressional districts its own laws and regulations” *Id.* at 3437. Thus, the change to the 1901 text was not driven by an understanding of “legislature” as an institution, but was a clarification of the broad meaning intended by the term. “It behooves us,” Senator Burton said, “not to take any chances in a matter of this kind and not to leave any question to the uncertainties of phraseology.” *Id.* at 3508.

The Court’s precedent reinforces this legislative history. Only five years after the passage of the 1911 Act, the Court in *Hildebrant* joined Congress in concluding that authority to regulate elections was not limited to the institutional legislature. Both the constitutional analysis in *Hildebrant* and its discussion of the 1911 legislation found that Congress was right to allow for a diversity of state lawmaking processes. Discussing Senator Burton’s change to the 1901 language,
the Court stated that “it is clear that Congress, in 1911 . . . expressly modified the phraseology of the previous acts.” *Hildebrant*, 241 U.S. at 568. Congress had “insert[ed] a clause plainly intended to provide that . . . [the referendum] should be held and treated to be the state legislative power for the purpose of creating congressional districts” in those states in which it “was treated as part of the legislative power.” *Id.* The Court reiterated this analysis in *Smiley*, holding that “the significance of the clause ‘in the manner provided by the laws thereof’ . . . was to recognize the propriety of the referendum in establishing congressional districts.” *Smiley*, 285 U.S. at 371.

The 1911 statute is “almost word for word the same” as the current language in § 2a(c) and is thus the direct inheritor of the history and purpose of the earlier act. *Branch v. Smith*, 538 U.S. 254, 295 (2003) (O’Connor, J., concurring in part and dissenting in part). Congress’s intention in 1911 was to clarify states’ capacity to choose among a range of lawmaking procedures when creating congressional districts. In doing so, Congress clarified that “legislature” in the 1901 Act should be read to accommodate the evolution of state legislative structures underway at the time, including the use of initiative and referenda. Given the plenary power the Framers vested in Congress to establish the substance and strictures of state elections regulations, there is “no compelling reason not to read Elections Clause legislation simply to mean what it says.” *Inter Tribal Council of Ariz.*, 133 S. Ct. at 2257.

Just as Congress can “make” federal elections regulations wholesale, so too can it define the parameters of their state-level enactment. Congress’s interpretation of state legislative power should thus be liberally construed, allowing this Court to resolve any alleged ambiguity in the constitutional text in favor of express statutory intent. In enacting 2 U.S.C. § 2a(c), Congress sought to ensure districting laws passed by popular vote, such as Arizona’s Proposition 106, received due deference. Appellant attempts to detach this interpretation of legislative power from
its constitutional mooring. Yet the Constitution instructs that the “the authority of Congress over the subject” of elections regulations “is paramount.” *Ex parte Siebold*, 100 U.S. at 717. Congress has already acted to clarify the validity of each state’s districting laws, regardless of the legislative process through which they are passed. This Court assumes that Congress legislates against the backdrop of the Constitution, and despite Appellant’s argument to the contrary, the Elections Clause need not be read as in tension with 2 U.S.C. § 2a(c). Instead, the grant of final, preemptive power to Congress under the Elections Clause counsels in favor of adopting its recognition of state districting processes.

**IV. Principles Of Federalism And Popular Sovereignty Support Allowing Popular Redistricting Policies Such As Arizona’s**

Striking down Proposition 106 would run contrary to core constitutional principles. It would place the desires of entrenched representatives over the will of the source from which their power flows—the People themselves. In doing so, Appellants would have this Court ignore the intent of the Elections Clause to allow for state-level accountability and to uphold principles of popular sovereignty.

**A. The Elections Clause and Principles of Federalism Support Allowing State Discretion in Developing Redistricting Policies and Processes**

In delegating initial authority to state lawmaking processes, the Framers sought to preserve localized input into elections regulations. They recognized the disparate needs of various electorates and drafted the Clause to allow for a level of decentralized control over elections regulations, *see supra* at 21-22. Congress’s choice of language in the 1911 Appropriations Act confirms that discretionary intent. *Supra* at 32-33. As a proponent of the 1911 clarification noted, “[d]ue respect to the rights, to the established methods, and to the laws of the respective states requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution.” 47 Cong. Rec. at 3436. Removing the ability of the people to
create legislative bodies such as Arizona’s Commission is no “respect” at all. Appellant’s reading of the Clause would hamper the ability of state lawmakers, including the people themselves, to respond to the particular districting challenges and electoral concerns of their states.

Interference with the ordering of state legislative authority is contrary to core principles of federalism and to this Court’s precedents. As with the rest of the Constitution, the Elections Clause does not provide “a pretext for alterations in the State governments, without the concurrence of the States themselves.” The Federalist No. 43, at 275 (Madison) (Clinton Rossiter ed., 1961). Instead, our federalism counsels the Court to “recognize a State’s interest in establishing its own form of government . . . [and] the State’s broad power to define its political community.” Sugarman v. Dougall, 413 U.S. 634, 642-43 (1973) (internal citation omitted). As the Court held in Smiley, the structure of internal legislative authority is a “matter of state polity” because it is the privilege of the people of each state to “to determine what should constitute its legislative process.” Smiley, 285 U.S. at 368, 372. Federal elections law “does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions.” Bush v. Gore, 531 U.S. 98, 123 (2000) (Stevens, J., dissenting).

The passage of Proposition 106 represents a model of state-level response to a state-wide problem. The voters of Arizona created the Commission to reform a state districting system of “contorted boundaries” forming “bulletproof districts for incumbents.” JA 65. This Court has repeatedly recognized the need to allow for such responsive innovation in election procedures. In crafting elections regulations, lawmakers in each state are faced with the need to “prevent the clogging of [the state’s] election machinery, avoid voter confusion, and assure that the winner is the choice of a majority.” Storer v. Brown, 415 U.S. 724, 732-33 (1974) (internal citations omitted). They “ha[ve] an interest, if not a duty, to protect the integrity of [their] political processes.”
"Id. The attempts to address such concerns are the result of “long experience,” id., and it is only with time and experimentation that states have “evolved comprehensive, and in many respects complex, election codes” that reflect the needs of their electorate. Id. at 730. Appellant’s argument today would constrain states’ legislative discretion and experimentation, limiting their responsive capacity to measures passed with excessive involvement of the representative body.

Popular processes such as referenda and initiatives have been the source for state laws governing crucial questions of election law. In many states, it is the people rather than the institutional legislature who have determined issues such as voter registration and identification, see 30-Day Voter Eligibility, Ohio (1977); Voter ID Initiative, Mississippi (2011), political party systems, see Political Parties and Nominations Initiative, Massachusetts (1990), and primary procedures, see Secret Primary Ballot Initiative, North Dakota (1962); Establishing a Top Two Primary Initiative, Washington (2004). If Appellant got its way, any regulations enacted without the institutional legislature’s consideration would be unconstitutional, undermining the capacity of citizens to exercise their popular lawmaking power.

B. Core Principles of Democratic Accountability Counsel in Favor of Recognizing the Legislative Authority of Arizona’s Voters and the Commission

It is a “fundamental axiom of republican governments” such as ours that they require “a dependence on, and a responsibility to the people, on the part of the representative, which shall constantly exert an influence upon his acts and opinions.” Joseph Story, Commentaries on the Constitution § 300 (1833). The responsiveness of national representatives to their constituents is largely dependent on the existence of meaningful electoral accountability. Prior to the passage of Proposition 106, the contestability of federal elections in Arizona was largely determined by the whims of the institutional state legislature. Through canny redistricting and gerrymandering, Appellant was able to insert itself into the electoral process—impermissibly straining the link be-
tween the citizens and their national legislators. In our system of popular sovereignty, “[n]either the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it.” Cook, 531 U.S. at 528. The voters of Arizona sought to combat precisely this problem when they created the Commission.

The people of Arizona feared that their institutional legislature would continue to insulate its incumbents from the electoral process, rendering them immune from the democratic pressures of re-election. JA 63-74. In order to maintain fair and competitive congressional districts, they turned to the lawmaking mechanisms of popular reform. The legislative power of the initiative is needed for just such checks on the representative body, as “the basic premise of the initiative process . . . is that the right to make law rests in the people and flows to the government, not the other way around.” Hollingsworth, 133 S. Ct. at 2675 (Kennedy, J., dissenting). As the Ninth Circuit, sitting en banc, wrote just this month, “the initiative system is, at its core, a mechanism to ensure that the people . . . maintain control of their government.” Chula Vista Citizens for Jobs & Fair Competition, 2015 WL 1499334, at *8.

Although this Court has largely declined to intervene in the politicization of the districting process, see, e.g., Vieth, 541 U.S. 267, the people of each state possess the power to check partisan gerrymandering. Cf. Colegrove v. Green, 328 U.S. 549, 556 (1946) (“The Constitution has left the performance of many duties in our governmental scheme to depend . . . ultimately, on the vigilance of the people in exercising their political rights.”). Indeed, popular lawmaking efforts such as Arizona’s are one of the only means of preventing capture and corruption of the state legislatures. See Reynolds v. Sims, 377 U.S. 533, 553 (1964) (finding that “no effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature
appears to have been available” because “no initiative procedure exists under Alabama law”). From the time they arose as popular forms of legislative power at the turn of the 20th century, “[i]nitatives and referenda were touted as a means of overcoming the capture of legislatures . . . and of circumventing the power of ward-based political machines.” Samuel Issacharoff et al., *The Law of Democracy: Legal Structure of the Political Process* 937 (4th ed. 2012). Even at the Founding, the Framers recognized the peril of state institutional legislatures “mak[ing] an unequal and partial division of the states into districts for the election of representatives.” 2 *Elliots Debates* at 27. The people must be allowed to police their representative bodies through their own lawmaking power to prevent such subversions of democratic accountability.

It is a “fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them.” *U.S. Term Limits*, 514 U.S. at 795 (internal citations omitted). Yet in today’s highly polarized political system, even this core belief is threatened by districting policies that favor entrenched lawmakers and special interests. The people of Arizona created the Commission to vest their legislative authority in a body they trusted to preserve their electoral power. In doing so, they did not unconstitutionally deprive Appellant of any affirmative entitlement under the Elections Clause. To the contrary: the citizens of Arizona are the initial source of the state’s legislative power and the final arbiters of its allocation. They acted in their capacity as lawmakers to combat partisan gridlock and ensure democratic accountability—achieving through direct reform what their representatives would not.

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5 This threat of inequality remains very much alive today, and not only with respect to political entrenchment. Minority disenfranchisement through “second-generation” barriers to voting like “racial gerrymandering” and at-large rather than district-by-district voting in areas of concentrated minority populations raise significant concerns. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2635 (2013) (Ginsburg, J., dissenting). Using popular initiatives to change the way redistricting is done is a crucial tool for combating the institutional interests that perpetuate injustice.
CONCLUSION

The judgment of the three-judge court should be affirmed.

Respectfully submitted.

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APRIL 2015
2 U.S.C. § 2a: Reapportionment of Representatives

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner:

(1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected;

(2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State;

(3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State;

(4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or

(5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.
APPENDIX B

Arizona State Constitution, Article IV, Legislative Department

PART 1: INITIATIVE AND REFERENDUM

Section 1. Legislative authority; initiative and referendum

(1) Senate; house of representatives; reservation of power to people. The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature.

(2) Initiative power. The first of these reserved powers is the initiative. Under this power ten per centum of the qualified electors shall have the right to propose any measure, and fifteen per centum shall have the right to propose any amendment to the constitution.

PART 2: THE LEGISLATURE

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

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

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

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct commit-
teeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

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

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

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

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

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or its designee, striving for political balance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair.
(9) The five commissioners shall then select by majority vote one of their members to serve as vice-chair.

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

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

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

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

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

A. Districts shall comply with the United States Constitution and the United States voting rights act;
B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;
C. Districts shall be geographically compact and contiguous to the extent practicable;
D. District boundaries shall respect communities of interest to the extent practicable;
E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;
F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.
(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

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

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

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

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

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

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

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

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