No. 13-1314

IN THE
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,

Appellant,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,

Appellees.

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

BRIEF OF SCHOLARS AND HISTORIANS OF CONGRESSIONAL REDISTRICTING AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

ROBERT A. ATKINS
ANDREW J. EHRLICH
MICHAEL L. NADLER
Of Counsel
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

JUSTIN LEVITT
Counsel of Record
LOYOLA LAW SCHOOL*
919 Albany St.
Los Angeles, CA 90015
(213) 736-7417
justin.levitt@lls.edu

* Institutional affiliation for purpose of identification only

Counsel for Amici Curiae

January 23, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	5
I. SECTION 2A ALLOWS EACH STATE TO DECIDE FOR ITSELF HOW CONGRESSIONAL LINES ARE DRAWN, FULFILLING THE CONSTITUTION'S FEDERALIST DESIGN	5
A. The Principle of Constitutional Avoidance Strongly Suggests That This Case Should Be Resolved on Statutory Grounds	5
B. The Clear Text of § 2a Allows States to Decide for Themselves How Congressional District Lines Are Drawn	8
C. The Legislative History of § 2a Shows that Congress Intended to Allow States to Decide for Themselves How Congressional District Lines Would Be Drawn	10
D. Section 2a Is a Valid Statute that Fulfills the Federalist Constitutional Design	17
II. THE STRAIGHTFORWARD CONSTRUCTION OF THE VALID STATUTE AVOIDS DIFFICULT CONSTITUTIONAL QUESTIONS	23

TABLE OF CONTENTS—Continued

Page

A. No Party Seeks a Literal Construction of the Constitutional Text 23

B. Reaching Beyond the Clear Statute to Interpret the Constitutional Text Presents Many Difficult Constitutional Questions 25

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES Page(s)

Alexander v. Taylor,
51 P.3d 1204 (Okla. 2002) 10

Arizona v. Inter Tribal Council of Ariz., Inc.,
133 S. Ct. 2247 (2013) 17

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n,
135 S. Ct. 46 (2014) 7

Ashwander v. Tenn. Valley Auth.,
297 U.S. 288 (1936) 6

Bond v. United States,
134 S. Ct. 2077 (2014) 6, 18

Branch v. Smith,
538 U.S. 254 (2003) .....*passim*

Buckley v. Valeo,
424 U.S. 1 (1976) 19, 20

Corley v. United States,
556 U.S. 303 (2009) 23

Dandridge v. Williams,
397 U.S. 471 (1970) 7

Egolf v. Duran,
No. D-101-CV-2011-02942,
(N.M. 1st Jud. Dist. Ct.
Santa Fe Cnty. Dec. 29, 2011) 10

Escambia Cnty. v. McMillan,
466 U.S. 48 (1984) 6

Growe v. Emison,
507 U.S. 25 (1993) 10

TABLE OF AUTHORITIES—Continued

Page(s)

Guy v. Miller,
No. 11 OC 00042 1B, (Nev. 1st Jud. Dist. Ct. Carson City Oct. 27, 2011) 10

Hall v. Moreno,
270 P.3d 961 (Colo. 2012)..... 10

Hawke v. Smith,
253 U.S. 221 (1920) 24

Hibbs v. Winn,
542 U.S. 88 (2004) 23

Hippert v. Ritchie,
813 N.W.2d 391 (Minn. 2012) 10

In re 2003 Apportionment of State Senate & U.S. Congressional Dists.,
827 A.2d 844 (Me. 2003)..... 10

Koenig v. Flynn,
179 N.E. 705 (N.Y. 1932)..... 25

Mobile v. Bolden,
446 U.S. 55 (1980) 11

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 17

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 6

Ohio ex rel. *Davis v. Hildebrant*,
241 U.S. 565 (1916) .....*passim*

Perrin v. Kitzhaber,
83 P.3d 368 (Or. Ct. App. 2004) 10

Reynolds v. Sims,
377 U.S. 533 (1964) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Smiley v. Holm,
285 U.S. 355 (1932) 3, 24, 26

United States v. Locke,
471 U.S. 84 (1985) 7

United States v. N.Y. Tel. Co.,
434 U.S. 159 (1977) 7

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 17

Whitfield v. United States,
--- S. Ct. ---, No. 13-9026, 2015 WL 144680,
(U.S. Jan. 13, 2015) 12

CONSTITUTION

U.S. Const. amend. XV 19

U.S. Const. art. I, § 3 ..... 18, 24

U.S. Const. art. I, § 4 .....*passim*

U.S. Const. art. IV, § 4..... 19

U.S. Const. art. V..... 24

FEDERAL STATUTES

2 U.S.C. § 2a(a) 8, 21

2 U.S.C. § 2a(b) 8, 21

2 U.S.C. § 2a(c).....*passim*

2 U.S.C. § 2c..... 10, 22

28 U.S.C. § 1252 7

52 U.S.C. § 10301 11

Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 13..... 12

TABLE OF AUTHORITIES—Continued

Page(s)

Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28 11
Act of Feb. 7, 1891, ch. 116, § 4, 26 Stat. 735 11
Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 5 11
Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 733 .... 11, 12
Act of July 14, 1862, ch. 170, 12 Stat. 572 11
Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761.. 12

STATE CONSTITUTIONS AND STATUTES

Ariz. Const. art. IV, pt. 2, § 1..... 9, 27
Cal. Const. art. XXI, § 2..... 9, 28
Conn. Const. art. III, § 6 ..... 9, 10, 28
Fla. Const. art. III, § 20 ..... 9, 29
Haw. Const. art. IV, § 2 ..... 9, 27
Haw. Const. art. IV, § 10 10
Idaho Const. art. III, § 2 ..... 9, 27
Iowa Const. art. III, § 36..... 10
Iowa Const. art. III, § 37..... 9
Mo. Const. art. III, § 45 9
Mont. Const. art. V, § 14..... 9, 27
N.C. Const. art. II, § 22..... 9
N.J. Const. art. II, § II 9, 27
N.Y. Const. art. III, § 4 ..... 9, 10, 27
N.Y. Const. art. III, § 5-b 9
Va. Const. art. II, § 6 10

TABLE OF AUTHORITIES—Continued

Page(s)

Wash. Const. art. II, § 43 ..... 9, 10, 27
Cal. Gov't Code § 8252 ..... 9, 27
Cal. Gov't Code § 8253 9
Haw. Rev. Stat. § 25-2 ..... 9, 10
Ind. Code § 3-3-2-2 ..... 9, 28
Iowa Code § 42 ..... 9, 10, 27
Me. Rev. Stat. tit. 21-A, § 1206 ..... 9, 10, 28
Mich. Comp. Laws § 3.63 10
Mich. Comp. Laws § 3.73 10
Mich. Comp. Laws § 3.74 10
N.C. Stat. § 120-2.4 10
Or. Rev. Stat. § 188.010 10
Or. Rev. Stat. § 188.125 9
Tenn. Code § 2-16-102 9
Wash. Rev. Code § 44.05.100 10

OTHER AUTHORITIES

47 Cong. Rec. 673 (1911) 14
47 Cong. Rec. 674 (1911) 13, 14
47 Cong. Rec. 701 (1911) 14, 15
47 Cong. Rec. 702 (1911) 14
47 Cong. Rec. 704 (1911) 16
47 Cong. Rec. 3436 (1911) 14, 16
47 Cong. Rec. 3507 (1911) 13, 14, 15

TABLE OF AUTHORITIES—Continued

Page(s)

47 Cong. Rec. 3509 (1911)..... 14, 15

47 Cong. Rec. 3555 (1911)..... 16

47 Cong. Rec. 3558 (1911)..... 16

47 Cong. Rec. 3604 (1911)..... 16

Peter H. Argersinger, *Representation and Inequality in Late-Nineteenth Century America: The Politics of Apportionment* (2012) 2

Peter H. Argersinger, *Structure, Process and Party: Essays in American Political History* (1991) 2

J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (1999) 1

Legislative Parties' Answer Br. & Initial Br. on Cross Appeal, *League of Women Voters of Fla., Inc. v. Detzner*, No. SC14-1905 (Fla. Dec. 19, 2014)..... 29

Office of the Clerk, H.R, Certificate of Entitlement, *available at* http://leg.mt.gov/content/Committees/Interim/2011-2012/Districting/Other-Documents/reapportionment-certificate.pdf (last visited Jan. 20, 2015).. 21

Statement of Apportionment Population, H.R. Doc. No. 112-5 (2011)..... 21

2 J. Story, *Commentaries on the Constitution of the United States* (1833)..... 24

The Federalist No. 59 (Alexander Hamilton) . 17

INTEREST OF THE *AMICI* [1]

Amicus curiae Justin Levitt is Professor of Law at Loyola Law School, Los Angeles. His teaching and scholarship focus on constitutional law and the law of democracy, with a particular focus on election administration and redistricting, including congressional regulation of the redistricting process. He has been invited to testify on these subjects on several occasions by the United States Senate, the United States Civil Rights Commission, State legislative bodies, and both State and federal courts. In addition, he has served as a visiting faculty member at Yale Law School, USC Gould School of Law, and the California Institute of Technology.

Amicus curiae J. Morgan Kousser is the William R. Kenan, Jr., Professor of History and Social Science at the California Institute of Technology. His teaching and scholarship focus on education and voting rights, including the structures of electoral participation in the nineteenth and early twentieth centuries. He has written four books, including *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (1999). He has served as an expert witness in 35 voting rights cases and a consultant in ten others, and was invited to testify before the United States House of Representatives regarding the Voting Rights Act. In addition, he has served as a visiting faculty member at the University of Michigan,

---

[1] Pursuant to Supreme Court Rule 37.3, *amici curiae* certify that all parties have consented to the filing of this brief through letters from the parties on file with the Court. Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief, in whole or in part, and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to its preparation or submission.

Harvard University, Oxford University, and Claremont Graduate School.

Amicus curiae Peter H. Argersinger is Professor of History at Southern Illinois University. His teaching and scholarship focus on American history, with a particular focus on political history and expertise in the redistricting battles of the mid-nineteenth and early twentieth centuries. He is the author or co-author of six books, including *Structure, Process and Party: Essays in American Political History* (1991) and *Representation and Inequality in Late-Nineteenth Century America: The Politics of Apportionment* (2012). In addition, he previously taught at the University of Maryland, Baltimore County.

As recognized leaders in the fields of election law and the historical regulation of the law of democracy, with substantial expertise in voting rights and redistricting, *amici curiae* strongly believe that this Court should resolve the instant dispute through reference to and interpretation of the governing federal statute, rather than addressing the scope and meaning of the Elections Clause where it is unnecessary to do so. Pursuant to 2 U.S.C. § 2a(c), the judgment of the three-judge court below should be affirmed.

SUMMARY OF THE ARGUMENT

Article I, § 4 of the Constitution—known as the Elections Clause—states 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." The Elections Clause thereby establishes a basic federalist

structure: States are given the default responsibility to regulate federal elections until, but only until, Congress intercedes.

This case concerns a sovereign State's choice of procedure and institution for drawing district lines for federal elections. Federal redistricting is covered by the Elections Clause. *See Branch v. Smith*, 538 U.S. 254, 266 (2003). If there were no applicable federal statute, the case would therefore turn on the interpretation of the first portion of the clause: specifically, the text's designation of "the Legislature." U.S. Const. art I, § 4. This Court has never interpreted the Elections Clause's designation of "the Legislature" in its literal, exclusive sense—and no party in this case asks for a literal construction. *See, e.g., Ohio* ex rel. *Davis v. Hildebrant*, 241 U.S. 565, 568-69 (1916) (rejecting the contention that "Legislature" precluded Ohio's use of popular referendum); *Smiley v. Holm*, 285 U.S. 355, 367-69 (1932) (rejecting the contention that "Legislature" precluded Minnesota's gubernatorial veto). Instead, this Court's decisions have validated reasonable State lawmaking choices. Given the diversity of State lawmaking institutions and procedures, any contrary interpretation would present several difficult and highly contested questions.

However, the Court need not and should not answer those questions in this case—because Congress has passed applicable legislation. Under the Elections Clause, once Congress has acted, the precise meaning and scope of "the Legislature" is no longer relevant.

For purposes of this case, Congress exercised its authority regarding redistricting in the statute now codified at 2 U.S.C. § 2a(c) ("Section 2a" or "§ 2a"). Pursuant to its power under the Elections Clause, *Branch*, 538 U.S. at 266, Congress in this statute

determined that the district lines for federal representatives are to be drawn by each State "in the manner provided by the law thereof." 2 U.S.C. § 2a(c).

That is, Congress took the authority that it was granted under the Elections Clause and used that power to remove any ambiguity concerning the legality of State redistricting procedures. Congress expressly allowed the States to draw federal district lines pursuant to the commands of State law, embracing the diversity of differing State approaches. Some States would draw lines using a legislative process; some would draw lines using a multibranch process with the legislature in a central role; some would draw lines using a process with legislative input but not primacy; and some would draw lines using a different process entirely. Congress exercised its regulatory power over federal elections to authorize each sovereign State to proceed as it wishes, pursuant to its own lawmaking procedures.

The Court can and should find that § 2a resolves this case, allowing Arizona to draw federal district lines pursuant to the structure outlined in the Arizona State Constitution. The statutory text is clear. The statute's design and legislative history show that the textual choices were intentional. The resulting outcome is not only lawful, but avoids the far more difficult implications of an unnecessary foray into contentious constitutional interpretation.

ARGUMENT

I. SECTION 2A ALLOWS EACH STATE TO DECIDE FOR ITSELF HOW CONGRESSIONAL LINES ARE DRAWN, FULFILLING THE CONSTITUTION'S FEDERALIST DESIGN

A. The Principle of Constitutional Avoidance Strongly Suggests That This Case Should Be Resolved on Statutory Grounds

The principal issue in this case concerns a State's authority to regulate its elections for federal representatives. Appellant claims that its own State Constitution is invalid to the extent that it authorizes the Arizona Independent Redistricting Commission to draw congressional district lines.

One path to resolving the instant dispute involves a straightforward interpretation of the text of a federal statute, 2 U.S.C. § 2a(c). Section 2a, which expressly authorizes States to draw congressional districts "in the manner provided by the law thereof," furthers the Constitution's broader federalist design and fosters a diversity of approaches reflecting each State's distinct political culture and public institutional heritage. The alternative path to resolving the instant dispute requires ignoring or invalidating that federal statute in order to reach a highly contested question of constitutional interpretation. That constitutional question—the meaning of "the Legislature" as used in the Elections Clause—is more difficult than it appears. Moreover, it would offer a resolution different from the federal statutory path only to the extent that it restricted State autonomy and deeply unsettled States' existing electoral infrastructure.

This Court generally resolves such disputes on statutory grounds without unnecessarily addressing contested constitutional questions. Just last Term, this Court reaffirmed that "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (quoting *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)). *See also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) ("Our usual practice is to avoid the unnecessary resolution of constitutional questions."). Such action, in the service of avoiding unnecessarily aggressive forays into contested constitutional territory, fosters important and long-treasured norms of judicial restraint. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. . . . The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.") (internal quotation marks and citations omitted).

As in *Bond*, statutory construction offers the more prudent resolution of the instant dispute. Whatever the meaning of the Elections Clause, it plainly divests "the Legislature" of the authority to regulate congressional elections to the extent that Congress chooses to regulate their "Times, Places and Manner."

Here, Congress has enacted a statute on point, thereby rendering unnecessary a construction of the first half of the Elections Clause. And a straightforward interpretation of the federal statute resolves the case—offering ample grounds to affirm the court below, albeit on a different basis than that reached by the district court. *See United States v. N.Y. Tel. Co.*, 434 U.S. 159, 166 n.8 (1977) ("we have discretion to consider [arguments] . . . on any ground which the law and the record permit that would not expand the relief [the prevailing party below] has been granted."); *see also Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (noting, on direct appeal to this Court, that "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.").[2]

The Court need not engage in a difficult examination of the scope of the Elections Clause's

---

[2] Section 2a is explicitly referenced in the Court's order postponing a determination of jurisdiction and designating the merits questions to be addressed, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 46 (2014), and was invoked in proceedings below, *see* Defs.' Mot. Dismiss 9; Defs.' Resp. to Pl.'s Mot. Prelim. Inj., Consol., & Judicial Notice 13-14. *Cf. United States v. Locke*, 471 U.S. 84, 92 (1985) (construing appellate jurisdiction under 28 U.S.C. § 1252 to bring before the Court the "entire case," including "nonconstitutional questions actually decided by the lower court as well as nonconstitutional grounds presented to, but not passed on, by the lower court," and noting that "[t]hese principles are important aids in the prudential exercise of our appellate jurisdiction, for when a case arrives here by appeal under 28 U.S.C. § 1252, this Court will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided").

delegation of authority to the States' "Legislature[s]" because § 2a remains good law. Addressing the constitutional dispute is not only unnecessary, but would have wide-ranging consequences well beyond the case at hand. Consistent with this Court's prior approach, the instant dispute should be resolved on statutory grounds.[3]

B. The Clear Text of § 2a Allows States to Decide for Themselves How Congressional District Lines Are Drawn

Here, the relevant statutory text offers a plain and uncontroversial construction. Section 2a is the congressional scheme for determining the allocation and design of congressional districts. It sets forth the means to determine the number of federal representatives to which each State is entitled after each decennial Census, and the means to notify the executive of each State of the appropriate allotment. 2 U.S.C. § 2a(a)-(b). And, as relevant here, it sets a default geographic constituency for these federal representatives after each such reapportionment "[u]ntil a State is redistricted in the manner provided by the law thereof." 2 U.S.C. § 2a(c).

That is, in § 2a, Congress has used its enumerated constitutional authority to regulate the manner by which federal representatives are chosen. In the

---

[3] Under the statutory approach, the Court may have to address whether § 2a is a valid exercise of Congress's enumerated power to regulate federal elections. That question, however, has previously been answered by this Court, *see Hildebrant*, 241 U.S. at 568-69, and is neither as difficult nor as controversial as the question posed by the alternative path: the scope of the delegation of authority to the States' "Legislature[s]."

aftermath of each Census, once federal representatives are apportioned by formula, Congress provided that congressional district lines are to be redrawn by each State "in the manner provided by the law thereof." *Id.*

The requirement that each State redraw district lines "in the manner provided by the law thereof" incorporates whatever procedures State law establishes for the drawing of district lines. Many States have no codified process particular to federal redistricting; in these States, State law "provides" for the drawing of federal district lines just as it provides for the passage of other pieces of legislation. In other States, the State constitution specifies distinct rules for the drawing of lawful federal district lines. Some such State constitutional provisions specify distinct procedures;[4] others specify distinct institutions;[5] and still others specify particular criteria that district lines must meet.[6] In the event that congressional district

---

[4] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(16); Cal. Const. art. XXI, § 2(h); Conn. Const. art. III, § 6(a), amend. art. XXX; Haw. Const. art. IV, § 2; Idaho Const. art. III, § 2(4); Mont. Const. art. V, § 14(3)-(4); N.C. Const. art. II, § 22(5)(d); N.J. Const. art. II, § II(4)-(5); N.Y. Const. art. III, § 4(b); Wash. Const. art. II, § 43(6)-(7); *see also* Cal. Gov't Code § 8253; Haw. Rev. Stat. § 25-2(b); Ind. Code § 3-3-2-2; Iowa Code §§ 42.3, 42.6; Me. Rev. Stat. tit. 21-A, § 1206; Tenn. Code § 2-16-102.

[5] *See, e.g.*, Ariz. Const. art. § IV, pt. 2, § 1(3)-(8); Cal. Const. art. XXI, § 2; Conn. Const. art. III, § 6, amend. art. XXVI(b); Haw. Const. art. IV, § 2; Idaho Const. art. III, § 2(2); Mont. Const. art. V, § 14(2); N.J. Const. art. II, § II(1)(a)-(c); N.Y. Const. art. III, § 5-b; Wash. Const. art. II, § 43(1)-(3); *see also* Cal. Gov't Code § 8252; Ind. Code § 3-3-2-2; Iowa Code §§ 42.5-42.6; Me. Rev. Stat. tit. 21-A, § 1206; Or. Rev. Stat. § 188.125.

[6] *See, e.g.*, Ariz. Const. art. IV, pt. 2, § 1(14)-(15); Cal. Const. art. XXI, § 2(d); Fla. Const. art. III, § 20; Iowa Const. art. III, § 37; Mo. Const. art. III, § 45; Mont. Const. art. V, § 14(1); N.Y.

lines violate State law, some States expressly permit State courts to draw district lines.[7] The federal statutory command in § 2a that each State must redraw district lines "in the manner provided by the law thereof" embraces each and all of these choices — including Arizona's choice to provide in its State constitution for a commission to conduct redistricting.

C. The Legislative History of § 2a Shows that Congress Intended to Allow States to Decide for Themselves How Congressional District Lines Would Be Drawn

Section 2a, which allows States to draw congressional district lines by whatever procedure and pursuant to whatever criteria State law permits,[8] was

---

Const. art. III, § 4(c); Va. Const. art. II, § 6; Wash. Const. art. II, § 43(5); *see also* Haw. Rev. Stat. § 25-2(b); Iowa Code § 42.4; Me. Rev. Stat. tit. 21-A, § 1206; Mich. Comp. Laws § 3.63; Or. Rev. Stat. § 188.010.

[7] *See, e.g.*, Conn. Const. art. III, § 6(d), amend. art. XXVI(d); Haw. Const. art. IV, § 10; Iowa Const. art. III, § 36; *Hall v. Moreno*, 270 P.3d 961, 963 (Colo. 2012) (en banc); *In re 2003 Apportionment of State Senate & U.S. Congressional Dists.*, 827 A.2d 844, 845 (Me. 2003); *Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. 2012); *Guy v. Miller*, No. 11 OC 00042 1B, slip op. at 2-3 (Nev. 1st Jud. Dist. Ct. Carson City Oct. 27, 2011); *Egolf v. Duran*, No. D-101-CV-2011-02942, slip op. at 2-3, 9 (N.M. 1st Jud. Dist. Ct. Santa Fe Cnty. Dec. 29, 2011); *Alexander v. Taylor*, 51 P.3d 1204, 1207-10 (Okla. 2002); *Perrin v. Kitzhaber*, 83 P.3d 368, 370-71 (Or. Ct. App. 2004); *see also* Me. Rev. Stat. 21-A, § 1206; Mich. Comp. Laws §§ 3.73-3.74; N.C. Stat. § 120-2.4; Wash. Rev. Code Wash. § 44.05.100(d). This Court approved state judicial drawing of congressional districts in *Growe v. Emison*, 507 U.S. 25, 34, 37 (1993).

[8] There are two other federal statutory requirements relevant to congressional district lines. First, each representative must be elected from a single-member district. 2 U.S.C. § 2c. Second, the

the product of a very deliberate choice to validate a diverse array of State redistricting procedures. Congress's clear intent in this regard is demonstrated by both the statutory text and the legislative history.

First, the text of § 2a evinces a distinct congressional choice. Congress certainly knew of the Elections Clause and its reference to "the Legislature" of each State. If Congress wished § 2a to do no more than reflect the constitutional grant of authority, the most natural means to do so would have been to simply repeat the constitutional text verbatim. *Cf. Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality opinion) (construing statutory language mirroring constitutional text to "have an effect no different from" the constitutional text itself). Indeed, in decennial reapportionment statutes from 1862 through 1901, Congress provided rules that would govern the territory for the election of federal representatives after each apportionment "unless the legislature of said State should otherwise provide[.]" Act of July 14, 1862, ch. 170, 12 Stat. 572; *see also* Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28, 28 (similarly specifying the state legislature); Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 5, 6 (same); Act of Feb. 7, 1891, ch. 116, § 4, 26 Stat. 735, 736 (same); Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 733, 734 (same).

Then, in 1911, the statutory language changed. Previously, in the 1901 reapportionment statute, Congress set direction for the territories governing the election of federal representatives "until such State be

---

Voting Rights Act prohibits abridging the right to vote on account of race, color, or language minority status. 52 U.S.C. § 10301.

redistricted . . . by the legislature of said State[.]"[9] Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 733, 734 (emphasis added). Ten years later, Congress set direction for the territories governing the election of newly apportioned federal representatives "until such State shall be redistricted in the manner provided by the laws thereof[.]" Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 13, 14 (emphasis added).

This same language, allowing States to redistrict in the manner provided by State law, reappeared in all-but-identical form in 1941. *See* Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761, 762 ("Until a State is redistricted in the manner provided by the law thereof after any apportionment, ..."); *cf. Whitfield v. United States*, --- S. Ct. ---, No. 13-9026, 2015 WL 144680, slip op. at 2 (U.S. Jan. 13, 2015) (statutory text that remains unchanged "presumptively retains its original meaning"). The latter language has not since been amended. It is the language of § 2a today, which still provides that federal districts are to be drawn by the States "in the manner provided by the law thereof" and not "by the legislature thereof." The textual change reflects a

[9] Specifically, Congress provided that if the number of representatives for a State increased, the new representatives would be elected at-large, and the pre-existing representatives would be elected in the pre-existing districts "until the legislature of such State . . . shall redistrict such State"; if the number of representatives remained constant, they would be elected in the pre-existing districts "until such State be redistricted . . . by the legislature of said State"; and if the number of representatives declined, then all representatives would be elected at-large, "unless the legislatures of said States have provided or shall otherwise provide[.]" Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 733, 734.

distinct congressional choice that should be acknowledged as legally meaningful.

Second, the legislative history of § 2a confirms that the choice was intentional, and designed precisely to allow each State its choice of redistricting mechanism. There is little in the legislative record of the 1941 law to explain this portion of the text. But when the relevant language was first amended in 1911, changing the statute's focus from a State's "legislature" to its "law," there was rather robust debate regarding the change.

From 1862 until 1901, Congress had delegated federal redistricting authority explicitly to state legislatures. Mirroring the ambiguity of the designation in the Elections Clause, some members of Congress believed that this statutory language permitted involvement by actors and institutions other than the legislature itself, while others did not. *See, e.g.*, 47 Cong. Rec. 674-75, 3507-08 (1911).

Representative Crumpacker, Republican of Indiana, and Senator Burton, Republican of Ohio, led the effort to remove any ambiguity in the flexibility afforded to each State, by amending the language of the late nineteenth-century model. As Representative Crumpacker explained:

> Up to that time there had been no other method established by any State in the Union for the redistricting, except by the legislature thereof. Since then a number of reforms have been accomplished; a number of States in the Union have established the institution of initiative and referendum. Some States are so equipped with the lawmaking machinery that they can legislate; they can redistrict

> their territory for congressional purposes without the aid or assistance of the legislature. Voters may initiate propositions, and they may refer them to the people. This provision [specifying control by the State legislature], if it has any effect at all, will prevent those States from exercising that great function of redistricting their States for congressional purposes by the initiative and referendum altogether.

47 Cong. Rec. 673 (1911); *see also id.* at 3436 (statement of Senator Burton).

Further debate discussed the possibility, given the strength of national political parties unknown in the Founding Era, that a State legislature that was itself unfairly gerrymandered might similarly gerrymander congressional districts. This debate was deeply informed by the vicious redistricting battles of the late nineteenth century, including bitterly contested disputes over congressional lines. States had recently begun to experiment with different institutional mechanisms to control such political conflicts of interest. The members of Congress proposing the change in language thought it therefore desirable to allow States, if they chose, to create non-legislative means to draw congressional districts, or to create non-legislative means to approve or disapprove proposed districts. *Id.* at 673-74, 702-03, 3436, 3507.

The relevant floor debate focused primarily on the newly prominent mechanisms of statewide initiative and referendum, *see Hildebrant*, 241 U.S. at 568-69, but it also included discussion of redistricting by gubernatorial action or nonpartisan commission, and review of federal districts by the courts. 47 Cong. Rec. at 675, 701-03, 3436-37, 3507-09. The floor debate

makes clear that the 62d Congress understood the Elections Clause to give it power to delegate the responsibility for drawing federal districts to the institution of its choice—and, likewise, to give it power to allow State law to determine the appropriate institution instead, encompassing each of the options above. *Id.* at 3509 (statement of Senator Burton).

Representative Crumpacker explained his proposed change from a specific delegation to the State "legislature" to any institution or process authorized by State "law" by stating that "the effect of this amendment, if it goes through, will leave to the several States the power of choosing the manner in which the redistricting shall be made." *Id.* at 701.

Similarly, Senator Burton pressed for change by asking "[w]hat right" the Senate had "to fix one inflexible way and require that every State shall be divided into congressional districts in that manner" despite States' "different methods and laws pertaining to the enactment of legislation." *Id.* at 3507. Though "[i]t was very natural in 1890, and even in 1900, that a provision should be incorporated that the State should be redistricted 'by the legislature thereof'" when "that was the only law-making power," Senator Burton recognized that States had since devised "a new method of making laws," and that Congress could "not afford to cling either to obsolete phraseology, or . . . obsolete methods—that is, to ignore their methods of enacting laws." *Id.* at 3508. Senator Burton pressed for his amendment because "[a] due 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 and by their statutes," rather than commanding, contrary to State

law, that they "act by the legislature alone." *Id.* at 3436. And he concluded:

> So I have suggested that the Senate strike out the words "by the legislature thereof in the manner herein prescribed," and insert in lieu thereof, first, the words "in the manner provided by the laws thereof." This gives to each State full authority to employ in the creation of congressional districts its own laws and regulations. What objection can be made to a provision of that kind? Pass this amendment, and you will transmit to each State the message "Proceed and district your State in accordance with your laws." This act [prior to amendment] does not do that. It sends the message, "Do it in only one specified way; that is, by your legislature."

Id. at 3437.

Representative Crumpacker's amendment was originally rejected in the House, *id.* at 704, but Senator Burton's parallel amendment was approved. *Id.* at 3555-56. The bill, as amended, passed the Senate, *id.* at 3558, and the amendments were then approved by the House. *Id.* at 3604.

The legislative history demonstrates that the 1911 change in language—enacting the same operative language that now appears in § 2a—was deliberate, that it was carefully considered by the Congress, and that it was designed to do exactly what it appears to do: to authorize States like Arizona to draw federal district lines by any means authorized by State law.

D. Section 2a Is a Valid Statute that Fulfills the Federalist Constitutional Design

The text and history described above demonstrate that when Congress deliberately chose to exercise its authority under the Elections Clause, it did so by ceding primary redistricting responsibility back to the States, allowing each State to use whatever means are provided by that State's law. Indeed, the statute is sufficiently clear that Appellant presents no alternative construction of § 2a. Instead, Appellant suggests that this text and history should be ignored or that the statute should itself be deemed unconstitutional. This aggressive response is unwarranted: Section 2a is entirely in keeping with the constitutional design.

The Elections Clause has always been an instrument of federalism. As a default, it allows each State to develop its own regulations for electing federal representatives, recognizing that the laboratories of democracy may well foster worthwhile innovation, and that the diversity of State regimes may yield a stronger federal legislature overall. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting). But it recognizes as well the danger in plenary State control over national elections, particularly in a climate of hostility to the national government. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808-09 (1995); The Federalist No. 59 (Alexander Hamilton). And so it allows Congress "comprehensive" power over the manner in which federal legislative elections are conducted, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253-54, 2256-57 (2013), exempting only the places of choosing Senators (which, given the

legislative selection of Senators prescribed by Art. I, § 3, were effectively the State capitol buildings).

In § 2a, Congress has used this enumerated power to prescribe regulations for electing federal representatives. No matter what interpretation is given to the first half of the Elections Clause—whether the designation of "the Legislature" is literal and exclusive, or whether (consistent with this Court's precedent) it is not—once Congress intervened to set redistricting rules, "the Legislature[s]" were constitutionally divested of the power to set the rules. Congress's exercise of its enumerated authority overrides any designation in the first part of the Elections Clause and renders a conflict over the meaning of that designation irrelevant.

Once in plenary possession of regulatory authority over redistricting, Congress chose to cede primary authority back to each State, to redistrict in any manner provided by State law, whether "through [the] legislature or [some] other body." *Branch*, 538 U.S. at 261 (internal quotations and citations omitted). That is, Congress exercised its power under the Elections Clause to preserve precisely the federalist balance animating the Elections Clause. The natural reading of § 2a is entirely consistent with the "basic principles of federalism embodied in the Constitution" that properly informs this Court's statutory interpretation. *Bond*, 134 S. Ct. at 2090.

Moreover, nothing in the Elections Clause suggests that Congress is constrained in any way in its authority to "make or alter" whatever rules it chooses for the manner of electing federal representatives, so long as it does not alter the places of choosing Senators. No text within the Elections Clause limits either the substance or process of redistricting

regulation: once Congress has properly exercised its authority, the control granted by the Elections Clause itself is plenary. Restrictions on Congress's exercise of this authority arise only from different constitutional provisions imposing separate constraints.[10] None with any relevance has been suggested here.

The explanation above follows this Court's approach in *Ohio* ex rel. *Davis v. Hildebrant*. Faced with a challenge to the constitutionality of the 1911 precursor to § 2a, this Court quickly dismissed the notion that the Elections Clause could limit Congress's authority to regulate the procedures for federal elections. Instead, attempting to make sense of plaintiffs' search for a plausible collateral limit on that authority, this Court turned briefly to the Guaranty Clause. The reason that this Court believed the challengers to be asserting a Guaranty Clause claim is that the Court recognized that within the Elections Clause itself, there is no limit to Congress's enumerated power to regulate the manner of federal elections. *See Hildebrant*, 241 U.S. at 569.

As for Congress's choice to exercise its plenary authority by authorizing each State to conduct redistricting as it wishes, this Court has deferred to Congress in its choice of institutional delegees under the Elections Clause. In *Buckley v. Valeo*, for example, this Court faced a challenge to the newly formed Federal Election Commission. The FEC was given recordkeeping, disclosure, investigative, and enforcement responsibilities, but it was also delegated substantive policymaking authority, including the ability to exceed direct statutory spending limits and

---

[10] For example, Congress may not exercise this power in a manner violating the Fifteenth Amendment.

the unique ability to issue policy-based advisory opinions that effectively grant the recipient immunity for statutory violations. 424 U.S. 1, 110-11 (1976). The Court invalidated Congress's attempt to directly appoint members of the FEC to the extent that such members were charged with performing the tasks of "Officers of the United States," but did not otherwise question Congress's power to delegate its regulatory function under the Elections Clause to a body like the FEC. *Id.* at 131-32, 137-38.

Here, Congress has chosen to exercise its power under the Elections Clause by authorizing any institutions empowered by State law to conduct congressional redistricting. The choice may be unconventional, but it preserves rather than undermines the original federalist balance of the Elections Clause. There are neither textual nor atextual constitutional grounds for restricting that choice.

Indeed, Appellant makes only a weak and unsupported assertion that § 2a is itself unconstitutional. Br. for Appellant 56. In doing so, it fails to address that this Court has previously rejected precisely that argument. *See Hildebrant*, 241 U.S. at 569 ("In so far as the proposition challenges the power of Congress . . . the argument but asserts . . . that Congress had no power to do that which, from the point of view of § 4 of article 1, . . . the Constitution expressly gave the right to do.").

Instead, Appellant essentially asks this Court to ignore the statute, contending that it has been impliedly repealed or that it has lapsed into desuetude. Br. for Appellant 14 (characterizing the statute as "largely obsolete"); *id.* at 56 (characterizing

the statute as "obscure" and "narrowed . . . to the brink of irrelevance").

This Court should reject the invitation to ignore federal law. Implicit repeals of federal statutes are strongly disfavored, and, indeed, the Court has rejected the notion that portions of this very statute have been implicitly repealed. *See Branch*, 538 U.S. at 273 (plurality opinion). Nor is it at all clear that time has passed the statute by. Pursuant to 2 U.S.C. § 2a(a), the President transmitted his most recent report on the apportionment population to the Congress on January 5, 2011. *See* Statement of Apportionment Population, H.R. Doc. No. 112-5 (2011). Not two weeks later, the Clerk of the House of Representatives transmitted her most recent certificates of entitlement, designating the number of representatives for each State, pursuant to 2 U.S.C. § 2a(b). Office of the Clerk, H.R, Certificate of Entitlement, *available at* http://leg.mt.gov/content/Committees/Interim/2011-2012/Districting/Other-Documents/reapportionment-certificate.pdf (last visited Jan. 20, 2015). And 2 U.S.C. § 2a(c)(1)-(5) set forth provisions for redrawing district lines if States do not exercise that responsibility; perhaps precisely because these default provisions exist, States (or federal courts) have in fact redrawn the lines, and the provisions themselves have not determined the geographic territory for congressional elections. Still, the provisions remain valid in certain circumstances, and though it is unlikely that they would be deployed, they could nevertheless be binding following any future census.[11]

---

[11] As Appellant apparently recognizes, paragraph 2a(c)(5)—which directs the at-large election of representatives when a State has a greater number of districts (from a prior redistricting)

Yet even if the remainder of § 2a had fallen into disuse or were otherwise superseded, the most important provision for these purposes is still very much in active service: the clause at issue in this very case, performing the very function that its proponents intended by giving States the authority to draw federal lines by any means provided in State law. No other federal statute conflicts with § 2a's provision that a State may draw federal district lines "in the manner provided by the laws thereof." And this provision continues to play a vital role. In virtually every State, some entity other than the State legislature plays some role in redistricting; each of these States has been able to rely on § 2a to confirm that its choice of redistricting authority is lawful despite any ambiguity in the Elections Clause. Arizona relied on § 2a in the redistricting at issue in this very case, when it redrew district lines as

---

than the number of districts that State is allotted—would always be consistent with constitutional equal population requirements. *Cf.* Br. for Appellant at 54 (claiming that "four-fifths of the default options . . . have been rendered unconstitutional"). Contrary to Appellant's claim, the other four specifically articulated conditional provisions in § 2a(c)(1)-(4) would be entirely consistent with constitutional equal population requirements if decennial population increase or decrease were relatively even across a State. *See Branch*, 538 U.S. at 273 (plurality opinion) (noting that such a scenario is possible, but unlikely). And in any event, these provisions might represent lawful temporary measures if it were unfeasible to draw constitutionally permissible districts—or single-member districts required by 2 U.S.C. § 2c—before upcoming elections. *Id.* at 275 (plurality opinion); *cf. Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (recognizing, in the context of state legislative districts, that "under certain circumstances . . . equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid").

provided by its State Constitution. This portion of the statute has not withered from lack of application.

Appellant claims that *Branch v. Smith* has reduced § 2a to an effective nullity, Br. for Appellant 55, but no part of *Branch* addressed this most relevant text. And this Court has described as "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Section 2a should be reaffirmed as a valid exercise of congressional power, allowing Arizona's Constitution to designate the means by which Arizona's State institutions draw Arizona's congressional districts.

II. THE STRAIGHTFORWARD CONSTRUCTION OF THE VALID STATUTE AVOIDS DIFFICULT CONSTITUTIONAL QUESTIONS

A. No Party Seeks a Literal Construction of the Constitutional Text

If Congress had not enacted § 2a, the authority to draw Arizona's federal district lines would have been governed by the first half of the Elections Clause: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof[.]" Unlike the plain text of § 2a, this text's apparent simplicity masks a host of exceedingly difficult choices.

Indeed, no party to this case urges a strictly textual reading of the Elections Clause. Appellees urge that this clause be interpreted, consistent with this Court's

precedent, to give power to the State to regulate federal elections by the mechanisms and institutions in which State law vests the State's lawmaking power. *See* Br. for Appellees 33, 35-38. Appellant urges that this clause be interpreted to give power to the State to regulate federal elections in a manner reflecting the "ordinary" legislative process and preserving a primary role for the State legislature, but also accommodating atextual roles for the governor or courts. *See* Br. for Appellant 44, 47, 51, 53. But neither party insists on a strictly textual reading, wherein the only State institution with the power to regulate federal elections is the State legislature itself.

Such strict textual readings are not unheard of when legislatures are asked to take on authority of a non-regulatory character. The designation of the State "Legislatures" in Article V as the body responsible for ratification of constitutional amendments in the absence of State conventions, for example, has been understood to be (as the text suggests) an exclusive grant, with no role for the State executive or any other actor. *See Hawke v. Smith*, 253 U.S. 221, 227-28 (1920). The same is true of the designation of the State "Legislature" in Article I, § 3, as the body responsible for electing United States Senators. *See* 2 J. Story, *Commentaries on the Constitution of the United States* § 703 (1833). This approach, however, does not reflect the Court's consistent interpretation with respect to the regulatory function of the Elections Clause. *See, e.g., Hildebrant*, 241 U.S. at 568-69 (rejecting the contention that a popular referendum violates the Elections Clause); *Smiley*, 285 U.S. at 367-69 (rejecting the contention that a gubernatorial veto violates the Elections

Clause).[12] Moreover, neither party has proposed such a resolution here.

B. Reaching Beyond the Clear Statute to Interpret the Constitutional Text Presents Many Difficult Constitutional Questions

In arguing for non-literal interpretations of the Elections Clause, both parties implicitly concede that construing its text involves a host of contested and exceedingly thorny questions. Moreover, the different nonliteral interpretations of the constitutional text represent deeply contested and often troubling interference with sovereign State lawmaking processes. Section 2a gives States plenary authority to select the institutions of their choice in drawing district lines; any constitutional construction yielding a result different from the result of the straightforward

---

[12] *Cf. Koenig v. Flynn*, 179 N.E. 705, 707 (N.Y. 1932) ("When this government began to function under the Constitution adopted in 1787–1789, the then existing states apparently understood section 4, article 1, of the Federal Constitution to refer to the lawmaking power of the Legislature or to such bodies as the individual states had created for the enactment of laws. The uninterrupted practice in all of the states has been to create congressional districts by laws enacted in accordance with the Constitution of the respective states, whatever that may be. While the plain and direct provisions of a Constitution cannot be modified or amended by practice, custom, or violation, no matter how long continued, such uniformity by all the states in the method of electing Congressmen indicates quite clearly the meaning which was given to section 4 of article 1, especially in the early days when the people were so sensitive to intrusion and control by individual executives. A uniform course of action involving the right to the exercise of an important power by the state government without question is no unsatisfactory evidence that the power is rightfully exercised.").

statutory reading only restricts a State's sovereign autonomy.

This Court has already determined that the Elections Clause does not preclude a State's use of popular referendum or gubernatorial veto in regulating federal elections. *Hildebrant*, 241 U.S. at 568-69; *Smiley*, 285 U.S. at 367-69. Even without disturbing these holdings, a host of contested issues would inevitably flood the courts with litigation if § 2a were ignored or invalidated, including the following questions:

- Is the federal constitutional designation of "the Legislature"—whatever the content of that term—intended to be a protection for a State that the State may validly waive by selecting alternative actors or institutions pursuant to its own constitutional processes?
- Does the federal constitutional designation preclude or accommodate the traditional understanding that State lawmaking institutions are normally authorized to act only pursuant to the procedural limitations in their own States' constitutions?
- Does the federal constitutional designation preclude or accommodate a State legislature's decision to delegate, limit, or shape its own authority when the State legislature itself initiates constitutional change to the procedure or criteria for drawing lines, as in at least eight States, or for otherwise regulating federal elections?
- Does the federal constitutional designation preclude or accommodate a State's use of a commission in which the legislative leadership

selects most commissioners from a nominations pool, as in Arizona, Ariz. Const. art. IV, pt. 2, § 1(3)-(8); or a commission in which the legislative leadership strikes commissioners from a nominations pool, as in California, Cal. Gov't Code § 8252?

- Does the federal constitutional designation preclude or accommodate a State constitution's designation of a commission in which the legislative leadership directly selects commissioners based on certain criteria, as in Idaho, Idaho Const. art. III, § 2(2); or Washington, Wash. Const. art. II, § 43(2)-(3); or—if apportioned more than one district—Montana, Mont. Const. art. V, § 14(2)?
- Does the federal constitutional designation preclude or accommodate a State constitution's designation of a commission in which the legislative leadership selects most commissioners, who may themselves be legislators, as in Hawaii, Haw. Const. art. IV, § 2; or New Jersey, N.J. Const. art. II, § II(1)(a)-(c)?
- Does the federal constitutional designation preclude or accommodate a State's use of an advisory entity, which must make recommendations before the legislature is legally empowered to act, and the recommendations of which must be rejected multiple times by the legislature before the legislature is empowered to make the ultimate decision regarding district lines, as in Iowa, Iowa Code §§ 42.3, 42.5, 42.6; or New York, N.Y. Const. art. III, § 4(b)?
- Does the federal constitutional designation preclude or accommodate a State constitution's

use of a backup commission to draw the lines if the legislature fails to do so by a certain time, as in Connecticut, Conn. Const. art. III, § 6(b); or Indiana, Ind. Code § 3-3-2-2?

- Does the federal constitutional designation preclude or accommodate a State's establishment of legislative supermajority requirements distinct from the majority needed to pass "ordinary" legislation, as in Connecticut, Conn. Const. art. III, § 6(a); or Maine, Me. Rev. Stat. tit. 21-A, § 1206?
- Does the federal constitutional designation preclude or accommodate State constitutional or statutory provisions allowing the State judiciary to draw federal district lines, as in at least fourteen different States?
- Does the federal constitutional designation preclude or accommodate State constitutional provisions allowing State judicial review of federal district lines and other federal election regulation, as in every State?
- Does the federal constitutional designation preclude or accommodate a State's legal provisions that provide that federal district lines are valid under State law only when recorded by the Secretary of State, as in California, Cal. Const. art. XXI, § 2(i)-(j)?
- Does the federal constitutional designation preclude or accommodate a State's delegation of regulatory authority over federal elections to statewide or local administrative authorities, as in every State?
- Does the federal constitutional designation preclude or accommodate State constitutional

> provisions constraining the substantive choices of a State legislature, including rules (entirely absent from binding federal law) requiring congressional districts to be contiguous or compact, as in Florida, Fla. Const. art. III, § 20(a), and at least eight other States? And if such State constitutional provisions are not precluded, does it matter whether the provisions were enacted by a citizens' initiative or by a measure initiated by the legislature but now serving to constrain legislative discretion? *See, e.g.*, Legislative Parties' Answer Br. & Initial Br. on Cross Appeal at 148-49, *League of Women Voters of Fla., Inc. v. Detzner*, No. SC14-1905 (Fla. Dec. 19, 2014) (claiming that the Elections Clause releases a State legislature from the obligation to follow redistricting criteria placed in a State's constitution by the initiative process).

If the Court chooses to ignore or invalidate § 2a in order to construe the Elections Clause, these questions would inevitably arise not only in the context of redistricting, but with respect to all State regulation of the federal election process, including many long-established and uncontroversial rules of nuts-and-bolts election administration. The result would be deeply unsettling to traditional understandings of the regulatory regime governing the election process. Indeed, a constitutional ruling on terms other than Appellees' favored construction might well lead to a bifurcated—and far more chaotic—election structure, with the rules for congressional elections within a State different from the rules for State elections in that State. It is far more prudent, and more consistent with this Court's precedent, to instead resolve this case on statutory grounds.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge court should be affirmed.

Respectfully submitted,

ROBERT A. ATKINS
ANDREW J. EHRLICH
MICHAEL L. NADLER
Of Counsel
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

JUSTIN LEVITT
Counsel of Record
LOYOLA LAW SCHOOL*
919 Albany St.
Los Angeles, CA 90015
(213) 736-7417
justin.levitt@lls.edu

* Institutional affiliation for purpose of identification only

Counsel for Amici Curiae

January 23, 2015