No. 13-1314

In the Supreme Court of the United States

ARIZONA STATE LEGISLATURE, APPELLANT

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTIONS PRESENTED

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

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

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Summary of argument 8
Argument:
I. The district court lacked jurisdiction over appellant's suit 11
A. Appellant's alleged injury is necessarily premised on a prediction that state officials would implement the Commission's redistricting plan, rather than one that might be enacted by the legislature 11
B. Appellant's challenge to state officials' future rejection of districts drawn by the legislature is both speculative and otherwise inappropriate for resolution in federal district court 14
1. Any injury to appellant is contingent on future events that may not occur 14
2. A suit by the Arizona legislature concerning the implementation of its legislation is nonjusticiable 17
II. Under 2 U.S.C. 2a(c), the Commission may draw Arizona's congressional districts 23
A. Section 2a(c) adopts a district map drawn in accordance with state law as the presumptive district map under federal law 24
B. Section 2a(c) is a permissible exercise of Congress's authority under the Elections Clause 30
Conclusion 33

TABLE OF AUTHORITIES

Cases: Page

Arizona Citizens Clean Elections Comm'n v. *Brain*, 322 P.3d 139 (Ariz. 2014) 12
Arizona Early Childhood Dev. & Health Bd. v. *Brewer*, 212 P.3d 805 (Ariz. 2009) 12
Arizona v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013) 30, 31
Arizona Indep. Redistricting Comm'n v. *Fields*, 75 P.3d 1088 (Ariz. Ct. App. 2003) 7
Arizona Minority Coal. for Fair Redistricting v. *Arizona Indep. Redistricting Comm'n*, 121 P. 3d 843 (Ariz. Ct. App. 2005) 17
Barnes v. *Kline,* 759 F.2d 21, 47 (D.C. Cir. 1985), rev'd on other grounds, 479 U.S. 361 (1987) 18, 19
Biggs v. *Cooper*, No. CV-14-0132-PR, 2014 WL 7449757 (Ariz. Dec. 31, 2014) 22
Bowsher v. *Synar*, 478 U.S. 714 (1986) 19
Bragdon v. *Abbott*, 524 U.S. 624 (1998) 27
Branch v. *Smith*, 538 U.S. 254 (2003) 16, 28, 29
Buckley v. *Valeo*, 424 U.S. at 1 (1976) 19
Clapper v. *Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) ..... *passim*
Coleman v. *Miller*, 307 U.S. 433 (1939) 21, 23
DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 18
Dobson v. *State*, 309 P.3d 1289 (Ariz. 2013) 12
Forty-Seventh Legislature v. *Napolitano*, 143 P.3d 1023 (Ariz. 2006) 22
Foster v. *Love*, 522 U.S. 67 (1997) 2
Hollingsworth v. *Perry*, 133 S. Ct. 2652 (2013) 20, 21

Cases—Continued: Page

Jerman v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573 (2010) 27
Karcher v. *May*, 484 U.S. 72 (1987) 20
Lance v. *Dennis*, 546 U.S. 459 (2006) 16
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 13, 14, 15, 21
McPherson v. *Blacker*, 146 U.S. 1 (1892) 32
Ohio v. *Hildebrant*, 241 U.S. 565 (1916) 4, 10, 16, 26
Raines v. *Byrd*, 521 U.S. 811 (1997) 19, 21
Rios v. *Symington*, 833 P.2d 20 (Ariz. 1992) 20
Seattle Sch. Dist. No. 1 v. *Washington*, 473 F. Supp. 996 (W.D. Wash. 1979) 22
Siebold, Ex parte, 100 U.S. 371 (1880) 31, 32
Smiley v. *Holm*, 285 U.S. 355 (1932) ..... *passim*
State v. *Mathis*, 290 P.3d 1226 (Ariz. Ct. App. 2012) 12
Summers v. *Earth Island Inst.*, 555 U.S. 488 (2009) 15
Susan B. Anthony List v. *Driehaus*, 134 S. Ct. 2334 (2014) 11, 13, 14
United States v. *Sharpnack*, 355 U.S. 286 (1958) 32
United States v. *Windsor*, 133 S. Ct. 2675 (2013) 18
Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 5, 30, 31
Washington v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) 22
Wesberry v. *Sanders*, 376 U.S. 1 (1964) 28
Whitmore v. *Arkansas*, 495 U.S. 149 (1990) 14, 15
Wood v. *Broom*, 287 U.S. 1 (1932) 27
Yarbrough, Ex parte, 110 U.S. 651 (1884) 2

Constitutions and statutes: Page

U.S. Const.:
Art. I, § 1 ..... 12, 19
Art. I, § 4, Cl. 1 (Elections Clause) ..... *passim*
Art. II, § 1, Cl. 2 32
Art. II ..... *passim*
Art. VI, Cl. 2 (Supremacy Clause) 17
Ariz. Const.:
Art. II:
§ 3 17
Art. IV:
Pt. 1:
§ 1:
¶¶ 2-6 16
¶ 6(B)-(D) 12
¶ 14 12
Pt. 2:
§ 1:
¶¶ 3-8 5
¶¶ 5-6 5
¶ 8 5
¶ 10 6
¶ 14 6
¶ 15 ..... 6, 15
¶ 16 6
¶¶ 16-17 6
¶ 17 ..... 6, 14
§ 12 16
§ 15 15
Art V:
§ 1 17

Statutes—Continued: Page

§ 4 20
§ 7 16
Cal. Const. Art XXI 5
Haw. Const. Art. IV, § 2 5
Idaho Const. Art. III, § 2 5
Mont. Const. Art. V, § 14 5
N.J. Const. Art. II, § 2 5
Wash. Const. Art. II, § 43 5
Act of Aug. 8, 1911, ch. 5, § 4, 37 Stat. 14 ..... 3, 25
Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28 2
Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 6 2
Act of Feb. 9, 1891, ch. 121, § 4, 26 Stat. 736 2
Act of Jan. 16, 1901, ch. 93, §4, 31 Stat. 734 ..... 2, 3
Act of July 14, 1862, ch. 170, 12 Stat. 572 2
Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491 2
Act of Nov. 15, 1941, ch. 470, 55 Stat. 761-762 27
Voting Rights Act of 1965, 52 U.S.C. 10101 *et seq.* 6
2 U.S.C. 2a(c) ..... *passim*
2 U.S.C. 2a(c)(1)-(4) 28
2 U.S.C. 2c 2
28 U.S.C. 2284(a) 7
Ariz. Rev. Stat. Ann.:
§ 16-311(E) (Supp. 2014) 14
§ 16-411 (Supp. 2014) 32
§ 16-650 (2006) 14
§ 38-231(B) (2011) 17
§ 38-231(E)-(F) (2011) 17
Voters First Act, 2010 Cal. Legis. Serv. Prop. 20 5

Miscellaneous: Page

47 Cong. Rec. (1911):
pp. 673-675....26
p. 701....26
p. 703....26
p. 704-705....26
p. 3436....3, 25
p. 3437....26
p. 3508....3, 4, 26
p. 3604....26
The Federalist No. 48 (James Madison) (Jacob E. Cooke ed., 1982)....18

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INTEREST OF THE UNITED STATES

This case involves a suit by a state legislature seeking relief against other state officials based on the assertion that a state popular initiative violates the federal Elections Clause, U.S. Const. Art. I, § 4, Cl. 1. The United States has a substantial interest in the question of the popular initiative's validity, which may turn on the application of an Act of Congress, 2 U.S.C. 2a(c). The United States, which frequently litigates jurisdictional issues in suits against official defendants, also has an interest in addressing the standing question in this case.

STATEMENT

1. The federal Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed

in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. Art. I, § 4, Cl. 1. As this Court has recognized, the second subclause "gives Congress 'comprehensive' authority to regulate the details of [congressional] elections, including the power to impose 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'" *Foster* v. *Love*, 522 U.S. 67, 71 n.2 (1997) (quoting *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932)).

Beginning in 1842, Congress has repeatedly exercised this authority to generally require that each State, if apportioned more than one congressional Representative, elect its Representatives individually from separate districts. See, *e.g.*, Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491; 2 U.S.C. 2c; *Ex parte Yarbrough*, 110 U.S. 651, 660-661 (1884). From 1862 through 1901, the decennial congressional-apportionment acts imposing that requirement also generally provided that unless or until the "legislature" of a State drew new (or initial) district lines, the State would be required to follow certain default election procedures (involving the use of preexisting districts and, where necessary, at-large elections). See Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28; Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 6; Act of Feb. 9, 1891, ch. 121, § 4, 26 Stat. 736; Act of Jan. 16, 1901 (1901 Act), ch. 93, § 4, 31 Stat. 734.

In drafting the 1911 congressional-apportionment act, Congress recognized an emerging development in several States to supplement the traditional legisla-

ture-based model of lawmaking with a direct lawmaking role for the people, through the processes of initiative (positive legislation by the electorate) and referendum (approval or disapproval of legislative acts by the electorate). 47 Cong. Rec. 3508 (1911) (statement of Sen. Burton). The text of the 1911 law accordingly eliminated the statutory reference to redistricting by the state "legislature" and instead directed that, if a State's apportionment of Representatives increased, the State should use the statutory default procedures "until such State shall be redistricted *in the manner provided by the laws thereof*." Act of Aug. 8, 1911 (1911 Act), ch. 5, § 4, 37 Stat. 14 (emphasis added).[1]

The new language was drafted on the view that "[i]f there is anything which is clearly a distinct denial of the rights of popular government it is a gerrymander," and that to the extent a State generally provided for legislation to be considered by "the whole electorate," such procedures should also be effective in the context of redistricting. 47 Cong. Rec. at 3436 (statement of Sen. Burton). This Court has accordingly recognized that the revised text was "plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative

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[1] The 1911 Act also imposed certain federal requirements on state redistricting. § 4, 37 Stat. 14. And it separately provided that if a State's apportionment of Representatives had stayed the same, it should continue to use its preexisting districts "until such State shall be redistricted as herein prescribed." *Ibid.* The 1911 Act did not address procedures for a decreased number of Representatives, presumably because no State was in that situation. Compare 1901 Act § 1, 31 Stat. 733-734, with 1911 Act § 1, 37 Stat. 14-15.

power for the purpose of creating congressional districts by law." *Ohio* v. *Hildebrant*, 241 U.S. 565, 568 (1916). The amendment's sponsor emphasized that if the "laws and methods of the States * * * include initiative, it is included" within the scope of the amended language as well. 47 Cong. Rec. at 3508 (statement of Sen. Burton).

The current statute governing the apportionment of Representatives to States, which has been in effect at all times relevant to this case, is codified at 2 U.S.C. 2a(c). Using language similar to the 1911 Act, Section 2a(c) provides that certain default election procedures will be followed "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment."

2. In 2000, the people of Arizona passed a popular initiative that amended their state constitution to provide for an independent commission to draw Arizona's congressional districts (as well as its state-legislative districts). J.S. App. 3; see J.A. 50-80. The initiative's sponsors explained that the measure would place redistricting authority "in the hands of a politically neutral commission of citizens who are not active in partisan politics and who will serve without pay to create fair districts that are not 'gerrymandered' for any party's or incumbent's advantage." J.S. App. 43. Supporters of the measure argued, *inter alia*, that it would increase the number of competitive districts in which voters would have a meaningful electoral choice and force representatives to be more responsive to constituents' concerns. J.A. 63-74.

Arizona's general approach to congressional districting is similar to that of several other States, whose constitutions likewise provide for redistricting

by commission. See Cal. Const. Art XXI; Haw. Const. Art. IV, § 2; Idaho Const. Art. III, § 2; N.J. Const. Art. II, § 2; Wash. Const. Art. II, § 43; see also Mont. Const. Art. V, § 14 (same, in State with only one Representative); see generally Nat'l Conference of State Legislatures Amicus Br. 5-17. California, like Arizona, adopted that system by popular initiative. See Voters First Act, 2010 Cal. Legis. Serv. Prop. 20. In the absence of a "judicially enforceable limit" on state legislatures' ability to skew district lines in favor of particular Representatives or political parties, *Vieth* v. *Jubelirer*, 541 U.S. 267, 305 (2004) (plurality opinion), redistricting by commission may serve as the only meaningful check against "severe partisan gerrymanders" that would be "incompatib[le] with democratic principles," *id.* at 292; see *id.* at 316 (Kennedy, J, concurring in the judgment); *id.* at 317 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

The Arizona initiative provides for the creation each decade of an Arizona Independent Redistricting Commission, whose five members have not recently held elected office (other than a school-board position). Ariz. Const. Art. IV, Pt. 2, § 1, ¶¶ 3-8. The leadership of the two main political parties in the state legislature take turns selecting the first four Commission members (who may be partisans) from a slate prepared by the state commission on appellate-court appointments. *Id.* ¶¶ 5-6. The fifth member (the chair) is generally a non-partisan selected from that same slate by the other four. *Id.* ¶ 8. A Commission member may be removed by the governor, with the concurrence of two-thirds of the state senate, "for

substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." *Id.* ¶ 10.

The Commission must start the process of drawing district lines by creating "districts of equal population in a grid-like pattern across the state." Ariz. Const. Art. IV, Pt. 2, § 1, ¶ 14. The Commission then adjusts the grid "as necessary to accommodate" the requirements of the federal Constitution and the Voting Rights Act of 1965 (52 U.S.C. 10101 *et seq.*), and, "to the extent practicable," the goals of equally populous districts; compact and contiguous districts; districts that "respect communities of interest"; districts whose lines reflect "visible geographic features, city, town and county boundaries, and undivided census tracts"; and districts that are politically competitive. Ariz. Const. Art. IV, Pt. 2, § 1, ¶ 14. The Commission may not use "[p]arty registration and voting data" in "the initial phase of the mapping process," but may use it "to test maps for compliance" with the stated redistricting goals. *Id.* ¶ 15. "The places of residence of incumbents or candidates shall not be identified or considered." *Ibid.*

When it completes a "draft map," the Commission must "advertise" that map "to the public" with a public-comment period of at least 30 days. Ariz. Const. Art. IV, Pt. 2, § 1, ¶ 16. Either house of the state legislature may make recommendations to the Commission during that time, and the Commission is required to consider those recommendations. *Ibid.* The Commission must then "establish final district boundaries" and certify their establishment to the Arizona secretary of state. *Id.* ¶¶ 16-17. The boundaries established by the Commission "ha[ve] the force of law," without any need for "ancillary" action by the state

legislature. *Arizona Indep. Redistricting Comm'n* v. *Fields*, 75 P.3d 1088, 1096, 1097 & n.7 (Ariz. Ct. App. 2003); see Ariz. Const. Art. IV, Pt. 2, § 1, ¶ 17 (describing redistricting provisions as "self-executing").

3. In 2012, appellant Arizona State Legislature challenged the popular initiative's constitutionality by filing suit in federal district court against the Commission, its current members, and the Arizona secretary of state. J.S. App. 4; see J.A. 13-49. Appellant alleged that the initiative "violates the Elections Clause * * * insofar as it removes the authority to prescribe the times, places, and manner of congressional elections from the Arizona Legislature." J.A. 22; see J.A. 21-22. Appellant sought a declaration that the initiative is "preempted, null and void"; a declaration that district maps adopted by the Commission are similarly "null and void"; an injunction prohibiting the defendants from "adopting, implementing or enforcing any congressional map" created under the initiative; and any other appropriate relief. J.A. 22-23.

The district court convened a three-judge panel and dismissed the complaint on the merits. J.S. App. 2-23; see 28 U.S.C. 2284(a). The court exercised jurisdiction over the case on the belief that appellant had "demonstrated that its loss of redistricting power constitutes a concrete injury" sufficient for standing under Article III. J.S. App. 5; see *id.* at 5-6. It held, however, that the Elections Clause authorized the popular initiative. J.S. App. 8-19. The court reasoned that decisions of this Court "demonstrate that the word 'Legislature' in the Elections Clause refers to the legislative process used in [a] state, determined by that state's own constitution and laws." *Id.* at 15. Because "[i]n Arizona the lawmaking power plainly

includes the power to enact laws through initiative, * * * the Elections Clause permits the establishment and use" of the Commission. *Id.* at 19.

Judge Rosenblatt concurred in part and dissented in part. J.S. App. 20-23. He agreed that the court had jurisdiction over the case, but believed that the popular initiative unconstitutionally denied the state legislature the "ability to have any outcome-defining effect on the congressional redistricting process." *Ibid.*

4. On appeal, this Court postponed consideration of the jurisdictional question to a hearing on the merits. 135 S. Ct. 46. The Court specified that potential consideration of the merits would include the issue of whether 2 U.S.C. 2a(c) "permit[s] Arizona's use of a commission to adopt congressional districts." *Ibid.*

SUMMARY OF ARGUMENT

I. The district court lacked jurisdiction over this case. At bottom, appellant's asserted injury cannot rest on an unadorned claim of "usurpation" of legislative authority (Appellant's Br. 16), because nothing appears to prevent the Arizona Legislature from enacting its own districting legislation. Instead, the claim of Article III injury must be based on the premise that Arizona's secretary of state would disregard any future district map drafted by the legislature in favor of one promulgated by the Commission. That theory of injury does not satisfy the requirements of Article III.

First, the injury is not "certainly impending," *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). The assumption that the secretary of state would implement the Commission's map over the legislature's is based upon "a highly attenuated chain of possibilities," *ibid.*, and is thus too speculative to

support jurisdiction. It is not clear that the legislature would in fact agree on legislation adjusting or superseding the Commission's map, and it is not clear that any such legislation would survive gubernatorial veto or popular referendum in order to become law. And even if all that occurred, the secretary of state might well implement the districts drawn by the legislature. She has sworn to uphold the federal Constitution and could interpret the Elections Clause, as appellant does, to require use of the legislature's map rather than the Commission's in the event of a conflict.

Second, assuming *arguendo* the asserted injury were imminent, a federal district court is not the proper forum for this intramural state dispute. Although federal separation-of-powers doctrine does not bar this suit, as it would a suit by Congress against the Executive Branch, federalism principles counsel respect for Arizona's own constitutional structure. Arizona's constitution does not appear to grant the state legislature an interest cognizable under Article III in whether the secretary of state would implement its redistricting legislation. The proper course is accordingly to dismiss the suit and allow appellant to refile in state court, with the possibility that, if the state courts find the legislature's interest to be sufficient as a matter of state law for the case to proceed, this Court could then determine whether it can exercise certiorari jurisdiction.

II. Should this Court reach the merits, it should hold that the Commission may draw valid congressional-district maps. Whether or not the Elections Clause inherently permits the people of Arizona to provide for redistricting by independent commission,

Congress has exercised its own authority to take account of the range of state approaches to lawmaking and to allow States to choose the method by which they redistrict.

In 2 U.S.C. 2a(c), Congress prescribed a comprehensive plan for state redistricting, under which a State must follow certain default election procedures "[u]ntil [it] is redistricted in the manner provided by the law thereof." The intent and effect of that provision is to respect a State's own lawmaking procedures and regard as valid under federal law the districts that a State adopts in accordance with its own law, whether or not the state legislature was involved. The language of Section 2a(c) repeats similar language in the 1911 Act's redistricting provision, which was a deliberate departure from Congress's prior practice of recognizing only districts drawn by a State's "legislature." The specific purpose of the change was to acknowledge state experimentation with a more populist approach to lawmaking and to enable the people of a State to use whatever popular-voting mechanisms might be available under state law to resist gerrymandering by the state legislature. The effect of the provision is that such popular measures are "held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Ohio* v. *Hildebrant*, 241 U.S. 565, 568 (1916).

Section 2a(c) is a permissible exercise of Congress's power under the Elections Clause. The Elections Clause confers final authority on Congress to regulate the times, places, and manner of congressional elections. There is no dispute that the Clause covers redistricting, and it is accordingly clear that Congress could draw its own district map for a State if

it so desired. It follows that Congress may also validate under federal law the map that a State, through its own lawmaking process, selects for itself.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION OVER APPELLANT'S SUIT

A. Appellant's Alleged Injury Is Necessarily Premised On A Prediction That State Officials Would Implement The Commission's Redistricting Plan, Rather Than One That Might Be Enacted By The Legislature

At the outset, it is important to identify the precise nature of appellant's claim to Article III standing. To establish Article III standing, a plaintiff must show, *inter alia*, that it has suffered "an injury in fact." *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2341 (2014) (internal quotation marks and citations omitted) (*SBA List*). In this case, appellant asserts (Br. 16) that it has "suffered an injury in fact in the form of a direct usurpation of its constitutionally-conferred authority to adopt congressional districts." Nothing in the Arizona constitution, however, would appear to prevent the legislature from adopting redistricting legislation. Appellant's real complaint, therefore, is not that its power to enact legislation has been "usurped," but rather the distinct claim that any redistricting legislation it enacts will be ignored by state officials. That is, the claim of injury here is based on a predicted failure of state officials to *enforce* a district map adopted by the legislature, not on any regulation of the legislature's own primary conduct in *enacting* such legislation.

The challenged popular initiative appears to impose no practical obstacle to the legislature simply passing

redistricting legislation that actualizes its view that it is the only entity in the State that may draw district lines. The provisions of the Arizona constitution declaring popular initiatives superior to acts of the legislature, while phrased as limitations on the legislature's authority, see Ariz. Const. Art IV, Pt. 1, § 1, ¶¶ 6(B)-(D) and 14, do not appear in practice to preclude the act of passing legislation—such as a district map that purports either to modify or supplant the Commission's—that conflicts with a popular initiative. See *Arizona Early Childhood Dev. & Health Bd.* v. *Brewer*, 212 P.3d 805, 807 (Ariz. 2009) (en banc) (describing conflicting legislation as "enacted" by "[l]awmakers"); see also *Dobson* v. *State*, 309 P.3d 1289, 1291, 1294 (Ariz. 2013) (similar where popular initiative amended state constitution). Rather, as in the analogous context of the federal Constitution's First Amendment—which is likewise worded as a limitation on legislative authority, see U.S. Const. Amend. I ("Congress shall make no law * * * ")—the apparent effect of the Arizona constitutional provisions is instead to render any such legislation unenforceable. See *Dobson*, 309 P.3d at 1294 (enjoining application of legislation conflicting with popular state-constitutional amendment); *Arizona Early Childhood*, 212 P.3d at 810 (ordering relief reversing effect of provision that conflicted with popular initiative); see also *Arizona Citizens Clean Elections Comm'n* v. *Brain*, 322 P.3d 139, 141 (Ariz. 2014) (addressing claim that law conflicted with popular initiatives in context of request for declaration of its unconstitutionality and preliminary injunction against "implementing" it); *State* v. *Mathis*, 290 P.3d 1226, 1238 (Ariz. Ct. App. 2012) (discussing validity of legislation

on topics covered by self-executing state-constitutional provision).

Because the popular initiative directly affects only the enforcement (not the enactment) of a legislative redistricting plan, appellant cannot establish the necessary "concrete and particularized" injury, *SBA List*, 134 S. Ct. at 2341, merely from the fact that the Commission has drawn, and the secretary of state has implemented, a congressional-district map in the *absence* of a map enacted by the legislature itself. When the legislature has not enacted its own redistricting plan, other officials' actions to fill the legal void cannot amount to a "direct usurpation" (Appellant's Br. 16) of the legislature's assertedly exclusive redistricting power. Appellant acknowledges that even under its view of the Elections Clause, courts may "draw temporary, lawful districting maps if a state legislature fails to do so in a timely fashion." *Id.* at 51 (emphasis omitted). If the legislature itself is not drawing districts, then its asserted interest in its authority to do so is no more impugned by having the districts drawn by the Commission than by a court.

Accordingly, to the extent it could be anything more than a nonjusticiable "generalized grievance" that asserts "every citizen's interest in proper application of the Constitution," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573-575 (1992), appellant's asserted "usurpation" injury must in reality be a claim about how its own future legislative acts would be treated. In particular, it must be a claim that Arizona's secretary of state, in implementing the State's election procedures, would necessarily disregard any redistricting efforts that might be undertaken by the legis-

lature, in favor of the district map promulgated by the Commission.[2]

B. Appellant's Challenge To State Officials' Future Rejection Of Districts Drawn By The Legislature Is Both Speculative And Otherwise Inappropriate For Resolution In Federal District Court

As thus described, the legislature's claim to Article III injury fails for two independent reasons. First, the claim is entirely dependent on future events that may or may not occur. Second, a suit by the legislature against state officials to ensure full implementation of its legislation is not justiciable in federal courts, at least absent further direction from state courts.

1. Any injury to appellant is contingent on future events that may not occur

An alleged injury satisfies Article III only if the plaintiff shows it to be "actual or imminent, not 'conjectural' or 'hypothetical.'" *SBA List*, 134 S. Ct. at 2341 (quoting *Defenders of Wildlife*, 504 U.S. at 560). This Court has "repeatedly reiterated" that a "'threatened injury must be *certainly impending* to constitute injury in fact'" and that "'allegations of *possible* future injury' are not sufficient." *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (quoting *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990))

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[2] The secretary of state—the only executive officer whom appellant has sued—is the official to whom the Commission's map is certified, see Ariz. Const. Art. IV, Pt. 2, §1, ¶ 17, and her election-related duties under state law necessarily require use of district lines, see, *e.g.*, Ariz. Rev. Stat. Ann. § 16-311(E) (Supp. 2014) (accepting nomination papers); *id.* § 16-650 (2006) (declaring winners).

(brackets omitted). Where a "theory of standing * * * relies on a highly attenuated chain of possibilities," it "does not satisfy the requirement that threatened injury must be certainly impending." *Id.* at 1148 (citing *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 496 (2009), and *Whitmore*, 495 U.S. at 157-160).[3] Appellant's theory of injury here depends on just such a hypothetical sequence.

First, both houses of the Arizona legislature would have to agree upon, and vote to adopt, a particular redistricting plan that either amends or replaces the Commission's. Ariz. Const. Art. IV, Pt. 2, § 15. Although Arizona's legislators presumably have the diffuse intention of doing that at some point, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [this Court's] cases require." *Summers*, 555 U.S. at 496 (quoting *Defenders of Wildlife*, 504 U.S. at 564). Appellant has not specifically alleged any standalone tweak that a majority of legislators would make to the Commission's map. Nor has it alleged anything that would concretely establish that a majority of legislators would come together on a particular district map

[3] This Court has sometimes "found standing based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Amnesty Int'l*, 133 S. Ct. at 1150 n.5. It is unclear whether "the 'substantial risk' standard is relevant and distinct from the 'clearly impending' requirement," *ibid.*, particularly in a case like this one, where the plaintiff's theory of standing does not involve any avoidance or mitigation costs. In any event, the substantial-risk standard, like the certainly-impending standard, cannot be satisfied by an "attenuated chain of inferences." *Ibid.*

drawn from scratch—a task at which legislatures sometimes fail, see, *e.g.*, *Lance* v. *Dennis*, 546 U.S. 459, 460 (2006) (per curiam); *Branch* v. *Smith*, 538 U.S. 254, 258 (2003). The map-drawing task may be all the more difficult here, where many legislators might prefer, for political or other reasons, simply to approve of the work the Commission has already done.

Second, unless the legislature referred its redistricting bill directly to the people for a referendum, the bill would have to be presented to the governor for approval. Ariz. Const. Art. IV, Pt. 2, § 12; *id.* Art. V, § 7. In order for the bill to become law, either the governor would have to sign it, or he would have to leave it undisturbed, or the legislature would have to override the governor's veto by a supermajority vote of each house. *Id.* Art. V, § 7; see *Smiley* v. *Holm*, 285 U.S. 355, 372-373 (1932) (Elections Clause permits gubernatorial veto of congressional-election-related legislation).

Third, whether or not signed by the governor, the measure would have to avoid popular override through Arizona's initiative or referendum procedures. See Ariz. Const. Art. IV, Pt. 1, § 1, ¶¶ 2-6; *Ohio* v. *Hildebrant*, 241 U.S. 565, 568 (1916) (Elections Clause permits rejection of congressional-election-related legislation by referendum). This Court has recognized that the potential for nullification by a third party, such as a judge, may be fatal to a contingent theory of standing. See *Amnesty Int'l*, 133 S. Ct. at 1149-1150.

Finally, Arizona's secretary of state would have to determine that the Commission's map, rather than the legislature's, is the one she must implement. Although *state* law requires the secretary to "use [the Commission's map] in conducting the next election,"

Arizona Minority Coal. for Fair Redistricting v. *Arizona Indep. Redistricting Comm'n*, 121 P.3d 843, 857 (Ariz. Ct. App. 2005) (per curiam), the secretary takes an oath to uphold the superseding requirements of the federal Constitution as well, Ariz. Rev. Stat. Ann. § 38-231(B) and (E)-(F) (2011); see U.S. Const. Art. VI, Cl. 2 (Supremacy Clause); Ariz. Const. Art. II, § 3 (recognizing federal Constitution's supremacy). As an independently elected state-constitutional officer, see Ariz. Const. Art V, § 1, she could reach her own conclusion about the application of the Elections Clause. Should she agree with the state legislature that the Elections Clause requires implementation of the legislature's map, the legislature would not be injured.

In analogous circumstances, the Minnesota secretary of state in *Smiley* v. *Holm*, *supra*, relied on the Elections Clause (erroneously, as this Court later concluded) to insist upon the validity of a congressional-district map passed by the legislature but vetoed by the governor. 285 U.S. at 362. In this case, it is unclear what judgment the Arizona secretary of state would make. Presented with the constitutional issue for the first time in this litigation, her predecessor explicitly "t[ook] no position" on either "the constitutionality" of the popular initiative that created the Commission or "the constitutionality of the Final Congressional Map adopted by" the Commission. 12-cv-01211 Docket entry No. 15, at 1. She herself has not filed anything in the case.

2. A suit by the Arizona legislature concerning the implementation of its legislation is nonjusticiable

Even assuming Arizona's secretary of state were certain to reject a redistricting plan enacted by the

state legislature, the district court would still lack jurisdiction to entertain appellant's request to compel enforcement of its future enactments.

a. In the context of the federal government, the Framers deliberately chose not to adopt a "system in which Congress * * * can pop immediately into court, in [its] institutional capacity, whenever the President refuses to implement a statute he believes to be unconstitutional, and whenever he implements a law in a manner that is not to Congress's liking." *United States* v. *Windsor*, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting). The structure of the federal Constitution instead reflects the Framers' intention that no branch of the federal government "ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers." *The Federalist No. 48*, at 332 (James Madison) (Jacob E. Cooke ed., 1982). Allowing a federal court to referee a dispute between Congress and the President, in the absence of a claim of injury by a private party, would abandon "the proper—and properly limited—role of the courts in a democratic society," *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006) (citation omitted); see *Barnes* v. *Kline*, 759 F.2d 21, 47 (D.C. Cir. 1985) (Bork, J., dissenting) ("It is easily demonstrated from several different lines of cases that the doctrine of congressional standing is ruled out by binding Supreme Court precedent."), vacated on other grounds, 479 U.S. 361 (1987).

Article III does not give Congress a cognizable interest, capable of being implemented through the agency of the federal courts, in overseeing the manner in which the Executive Branch interprets and executes the law. For a claim to be "legally and judicially

cognizable," it must, *inter alia*, present a "dispute * * * traditionally thought to be capable of resolution through the judicial process." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997) (internal quotation marks and citation omitted). Judicial resolution of disputes between Congress and the President, however, "is obviously not the regime that has obtained under our Constitution to date." *Id.* at 828; see *id.* at 826-830. In light of the Framers' clearly expressed concern that Congress might "aggrandize itself at the expense of the other two branches," *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976) (per curiam), the Framers would not have added a powerful weapon—enlistment of the Judiciary to compel action by the Executive—to Congress's arsenal without saying so explicitly. See *Barnes*, 759 F.2d at 57 (Bork, J., dissenting). Far from doing so, they instead provided that "once Congress makes its choice in enacting legislation, its participation ends," and it can "thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher* v. *Synar*, 478 U.S. 714, 733-734 (1986).

b. The structural constitutional considerations that undergird the bar on congressional suits against the Executive are not directly applicable here.[4] Federal-court adjudication of this case would not, for

[4] This case, which involves an asserted conflict between two sources of positive state law (popular initiative and enactment by the legislature), has no analogue in the federal context. Any law that could constrict Congress's authority in an allegedly unconstitutional way would necessarily have been passed by Congress itself and could thus be undone by an Act of Congress. See U.S. Const. Art. I, § 1 (vesting Congress with "[a]ll legislative Powers herein granted"); see also Appellant's Br. 22; *Byrd*, 521 U.S. at 829.

example, impermissibly expand the authority of Congress and the Judiciary at the expense of the President. In addition, a State may give its legislature a wider role in state government than Congress has been given under the federal Constitution—potentially even a role that includes an interest in the implementation and enforcement of state law sufficient for standing under Article III. Cf. *Karcher* v. *May*, 484 U.S. 72, 82 (1987) (recognizing state legislature's authority under state law "to represent the State's interests" by intervening "in defense of a legislative enactment"). Principles of federalism, however, counsel against lightly presuming that a State has given its legislature such a role, when doing so would embroil a federal court in an intragovernmental state dispute like this one. And Arizona law does not clearly indicate that its legislature would have standing here.

Arizona's constitution vests its legislature with "lawmaking power." *Rios* v. *Symington*, 833 P.2d 20, 29 (Ariz. 1992). "[I]n the exercise of that lawmaking power," the Arizona legislature "establishes state policies and priorities and, through the appropriation power, gives those policies and priorities effect." *Ibid.* "Once the Legislature has acted, however, it becomes the duty of the Executive to 'take care that the laws be faithfully executed.'" *Ibid.* (quoting Ariz. Const. Art. V, § 4). As this Court made clear in *Hollingsworth* v. *Perry*, 133 S. Ct. 2652 (2013), a plaintiff whose only relationship to a state law arises from "the process of enacting the law" has "no 'personal stake'" in its enforcement. *Id.* at 2662-2663. That principle strongly suggests that the state legislature here lacks a "'particularized' interest sufficient to create a case

or controversy under Article III," *id.* at 2663 (quoting *Defenders of Wildlife*, 504 U.S. at 560 & n.1), in the issue of whether the secretary of state would use its districting plan.

c. Appellant identifies no decision of this Court holding that a state legislature may bring suit in circumstances like this. The Court's decision in *Coleman* v. *Miller*, 307 U.S. 433 (1939)—"[t]he one case in which [the Court has] upheld standing for legislators * * * claiming an institutional injury," *Byrd*, 521 U.S. at 821—provides no support for appellant here. The Court has explained that "*Coleman* stands (at most * * *) for the proposition that legislators 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." *Id.* at 823. That is not the situation in this case. As previously noted, appellant has not identified any "specific" redistricting legislation that a sufficient number of state legislators have voted, or would vote, to enact.

Furthermore, the suit in *Coleman*, unlike the suit here, originated in state court, not federal court. See *Byrd*, 521 U.S. at 824 n.8 (noting this and other potential limitations of *Coleman*). In explaining the rationale for federal certiorari jurisdiction, this Court emphasized that the state supreme court in *Coleman* had itself "treated" the legislators' interest "as a basis for entertaining and deciding the federal questions." 307 U.S. at 446. In this case, however, it is by no means clear that the Arizona courts would find the legislature to have standing under state law. The Supreme Court of Arizona has historically recognized

legislative standing under state law only in circumstances involving the procedural requirements by which an act of the legislature, within its state-constitutional authority, becomes law. See *Forty-Seventh Legislature* v. *Napolitano*, 143 P.3d 1023, 1027-1028 (2006) (en banc) (legislature's challenge to allegedly improper gubernatorial line-item veto); see also *Biggs* v. *Cooper*, No. CV-14-0132-PR, 2014 WL 7449757, ¶¶ 8-19 (Dec. 31, 2014) (legislators' challenge to validity of statute that had allegedly required, but not received, a supermajority vote).

In exercising jurisdiction over this case, the district court effectively assumed that the Arizona courts would dramatically expand their prior jurisprudence to recognize an interest of the legislature in overriding the will of its own constituents, as expressed through a popular initiative. It also effectively assumed that such a ruling by the Arizona courts would be sufficient to grant a federal district court jurisdiction over a suit like this in the first instance. Neither assumption was warranted.[5]

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[5] The only decision of this Court appellant cites (Br. 19) involving a district-court suit with different state entities on opposing sides is *Washington* v. *Seattle School District. No. 1*, 458 U.S. 457 (1982). In that case, both school districts and affected private individuals challenged the constitutionality of a popular initiative that prohibited a school-district program. *Id.* at 459-464; see *Seattle Sch. Dist. No. 1* v. *Washington*, 473 F. Supp. 996, 998-999 (W.D. Wash. 1979). This Court did not address jurisdiction, which was clearly present because of the private plaintiffs. In any event, the primary school-district plaintiff was not a purely lawmaking entity with questionable interest in law enforcement, but instead had administrative powers. *Seattle Sch. Dist. No. 1*, 458 U.S. at 459.

d. If appellant's suit could find its way into federal court at all, it should proceed through state court first; if the state courts adjudicate the merits of the federal question, this Court could then decide whether it has certiorari jurisdiction. See *Coleman*, 307 U.S. at 446. The Elections Clause question might also be justiciable in federal court in a suit by a plaintiff with a stronger standing argument (perhaps an incumbent Representative facing a tougher reelection battle after being placed in the same district as another incumbent), with appellant participating as an amicus. But appellant's apparent preference for a federal forum does not in itself provide a sound reason for endorsing its novel standing argument. See *Amnesty Int'l*, 133 S. Ct. at 1154 ("[T]he assumption that if [appellant has] no standing to sue, no one would have standing, is not a reason to find standing.") (citation omitted).

II. UNDER 2 U.S.C. 2a(c), THE COMMISSION MAY DRAW ARIZONA'S CONGRESSIONAL DISTRICTS

If the Court determines that it has jurisdiction over this case, it should affirm the district court's judgment. Regardless of whether the Elections Clause would in itself permit the people of Arizona to create an independent redistricting commission (an issue on which the United States takes no view), Congress's enactment of 2 U.S.C. 2a(c) is an exercise of cooperative federalism that takes account of the range of state approaches to lawmaking and permits States to choose the method by which they redistrict, consistent with each State's unique history and set of political values.

A. Section 2a(c) Adopts A District Map Drawn In Accordance With State Law As The Presumptive District Map Under Federal Law

1. The procedural validity of the Commission's congressional-district map for Arizona follows directly from the text of 2 U.S.C. 2a(c). Section 2a(c) sets forth congressional-election procedures to be followed "[u]ntil a State is redistricted *in the manner provided by the law thereof* after any apportionment" (emphasis added). The intent and effect of the italicized language is to respect, as a matter of federal law, the redistricting procedures adopted by the States. So long as a State has "redistricted in the manner provided by the law thereof"—as Arizona has done by utilizing its constitution's independent-commission procedure—the resulting redistricting plan becomes the presumptive district map under federal law.[6] Were it otherwise, Section 2a(c) would require the State to use one of the statutory default election procedures.

Under the plain text of Section 2a(c), a State can be "redistricted in the manner provided by the law thereof," and thus create congressionally-recognized districts, without the involvement of the state legislature. First, the use of "redistricted" in the passive voice, without specifying who must draw the districts, naturally suggests that the districts are valid if drawn by *any* entity empowered to do so under state law. Second, the phrase "in the manner provided by the

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[6] Because a State is required to comply with the federal Constitution, the Voting Rights Act, and other federal laws when it draws and implements its district map, nothing in Section 2a(c) precludes or affects a challenge to a state district map on the ground that it violates one or more of those federal requirements.

law thereof" does not limit the relevant "law" to acts of the legislature to the exclusion of popularly-adopted state constitutional provisions or statutes.

2. The history of Section 2a(c) confirms the plain import of its text. As previously explained (pp. 2-4, *supra*), Congress's apportionment acts before 1911 had typically provided that default election procedures would apply unless or until a State's "legislature" drew district lines. In the 1911 Act, against the backdrop of state experimentation with increasing levels of popular participation in state lawmaking, Congress jettisoned the prior language in favor of the phrase "until such State shall be redistricted in the manner provided by the laws thereof." § 4, 37 Stat. 14; see 47 Cong. Rec. 3508 (1911). It did so for the precise purpose of allowing the electorate in States that authorized either the referendum or the initiative to use those measures as a bulwark against gerrymandering by the state legislature.

Senator Burton, the sponsor of the new language, declared that "[i]f there is anything which is clearly a distinct denial of the rights of popular government it is a gerrymander," which could "absolutely defeat the will of the people." 47 Cong. Rec. at 3436. He observed that the preexisting statutory phrase "'by the legislature thereof'" restricted States to redistricting by "legislature alone" and amounted to a "distinct and unequivocal condemnation of any legislation by referendum or initiative." *Ibid.* He urged that "[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." *Ibid.* And he explained

that the new language "gives to each State full authority to employ in the creation of congressional districts its own laws and regulations," *id.* at 3437, thereby "leav[ing] the question" of proper redistricting procedure "to the laws and methods of the States," *id.* at 3508. If, for example, those laws and methods "include initiative, it is included" under the modified language. *Ibid.*[7]

This Court recognized the import of the 1911 Act's new language in *Ohio* v. *Hildebrant*, *supra*, which rejected a claim that Ohio's referendum process was invalid as applied to congressional redistricting legislation. See 241 U.S. at 566-570. Although the holding in *Hildebrant* may ultimately have turned on Ohio's own inherent authority under the Elections Clause, see *Smiley*, 285 U.S. at 372, the Court in *Hildebrant* described the design of the 1911 Act in unequivocal terms. The Court concluded that "[s]o far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject," the challenger's claim was "without merit." 241 U.S. at 568. "[I]t is clear," the Court explained, "that Congress in 1911 * * * expressly modified the phraseology of the previous acts * * * by inserting a clause plainly intended to

[7] Representative Crumpacker, who had sponsored similar language in the House of Representatives, had likewise emphasized that the altered language would "enable the States that have the institution of initiative and referendum to appeal direct to the people" on the subject of redistricting. 47 Cong. Rec. at 701; see *id.* at 673-675; *id.* at 703 (statement of Rep. Bartholdt). Representative Crumpacker's proposal was initially voted down. *Id.* at 704-705. But the House ultimately agreed to the "somewhat similar" language proposed by Senator Burton. *Id.* at 3604 (statement of Rep. Houston).

provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Ibid.* The Court found that "the legislative history" of the 1911 Act "leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do it, of excluding the possibility of making the contention as to referendum which is now urged." *Id.* at 568-569.[8]

While the 1911 Act applied only to the reapportionment following the 1910 census, *Wood* v. *Broom*, 287 U.S. 1, 6-7 (1932), Congress used virtually identical language when it enacted Section 2a(c) in 1941. See Act of Nov. 15, 1941, ch. 470, 55 Stat. 761-762. This Court has "often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 589-590 (2010) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998)). Congress thus presumably expected that courts would

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[8] The Court has subsequently suggested that Congress, in enacting the 1911 Act, may have believed that the Elections Clause would inherently allow States to use the referendum process in redistricting, even in the absence of congressional legislation. See *Smiley*, 285 U.S. at 371-372. As *Hildebrant* and the legislative history on which it relies make clear, however, Congress intended to exercise its authority to its fullest extent to enable States to employ popular measures in redistricting, even if those measures would not be authorized by the Elections Clause alone.

interpret the relevant language of Section 2a(c) in accordance with *Hildebrant* and the underlying legislative intent recognized in that decision. Indeed, a majority of Justices in *Branch* v. *Smith*, *supra*, recognized the relevance of the early apportionment statutes in the interpretation of the current Section 2a(c). See 538 U.S. at 274 (plurality opinion); *id.* at 293-295 (O'Connor, J., concurring in part and dissenting in part).

3. Appellant errs in relying (Br. 55-56) on the plurality opinion in *Branch* to argue that Section 2a(c) "has no relevance here." As appellant acknowledges (*id.* at 54), the Court in *Branch* directly *rejected* the argument that that Section 2a(c) was implicitly repealed by a later statute. See 538 U.S. at 273-276 (plurality opinion); *id.* at 292-298 (O'Connor, J., concurring in part and dissenting in part). The plurality opinion did observe, in passing, that many of the default election procedures in Section 2a(c)—that is, the procedures that apply when a State is *not* "redistricted in the manner provided by [state] law"—had "become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional." *Id.* at 273-274.[9] That observation, however, has no bearing on the question of *whether* a State has been "redistricted in the manner provided by [state] law," or the effect under federal law of such a redistricting. On its face, Section 2a(c) provides a comprehensive procedure for redistricting: if the State has been "redistricted in the manner provided by [state]

[9] In particular, 2 U.S.C. 2a(c)(1)-(4) contemplate that a State would continue to use preexisting districts following a new census, which would likely violate the one-person-one-vote principle announced in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964).

law," those districts are used; otherwise, a different procedure applies for each possible contingency. Regardless of any constitutional infirmities in some of the latter procedures, courts can and should continue to give effect to Congress's manifest intent that when a State has been "redistricted in the manner provided by [state] law"—whether by the legislature or otherwise—the resulting districts are the ones that presumptively will be used to elect Representatives.

Appellant also errs in contending (Br. 55-56) that the plurality opinion in *Branch* limited Section 2a(c)'s reference to "redistrict[ing] in the manner provided by [state] law" to redistricting by courts and legislatures. To the contrary, the *Branch* plurality's construction of the phrase "'[u]ntil a state is redistricted'" to "refer to redistricting by courts as well as legislatures," 538 U.S. at 274, simply confirms that Section 2a(c) imposes no textual restriction on who may redistrict. Although certain statements by the plurality focused only on redistricting by legislatures and courts, and did not mention redistricting by other means (such as popular initiative or independent commission), see *id.* at 274-275, those statements were simply a product of the fact that the only two potential redistricting authorities at issue in *Branch* were the legislature and the courts.

In all, six Justices in *Branch* (everyone who addressed the issue) found the language of Section 2a(c) to extend beyond redistricting by legislatures alone. See 538 U.S. at 274 (plurality opinion); *id.* at 300 n.1 (O'Connor, J., concurring in part and dissenting in part) ("To the extent that courts are part of the 'manner provided by the law thereof,' courts may redistrict."). Appellant offers no plausible textual basis for

why Section 2a(c) would encompass redistricting by courts and legislatures but not redistricting by other lawfully designated actors.

B. Section 2a(c) Is A Permissible Exercise Of Congress's Authority Under The Elections Clause

Congress has direct authority under the Elections Clause to provide that congressional districts adopted "in the manner provided by [state] law" are the districts that should be used for purposes of federal law. As the Court recognized in *Hildebrant*, a challenge to Congress's decision in the 1911 Act to "treat[] the referendum as a part of the legislative power for the purpose of apportionment where so ordained by the state constitution and laws" is the equivalent of asserting "that Congress had no power to do that which from the point of view of § 4 of Article I * * * the Constitution expressly gave the right to do." 241 U.S. at 569; see *Vieth* v. *Jubelirer*, 541 U.S. 267, 275 (2004) (plurality opinion) (observing that James Madison defended congressional election power as necessary "to check partisan manipulation of the election process by the States").

1. The Elections Clause "has two functions." *Arizona* v. *Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013). First, "[u]pon the States it imposes the duty * * * to prescribe the time, place, and manner of electing Representatives and Senators." *Ibid.* Second, "upon Congress it confers the power to alter those regulations or supplant them altogether." *Ibid.* "The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient.'" *Id.* at 2253-2254 (quoting

U.S. Const. Art. I, § 4, Cl. 1 and *Ex Parte Siebold*, 100 U.S. 371, 392 (1880)).

Appellant cannot dispute that the Elections Clause authorizes Congress to itself draw a State's congressional-district boundaries. The proposition that "congressional redistricting" is part of the "times, places, and manner of congressional elections" is central to appellant's argument that the Election Clause's *first* subclause assigns that function to state legislatures in the first instance. Appellant's Br. 23-24; see *Inter Tribal Council*, 133 S. Ct. at 2253 (emphasizing that "'Times, Places, and Manner' * * * are 'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections'") (quoting *Smiley*, 285 U.S. at 366). It necessarily follows that Congress itself has superseding authority to draw district lines under the Election Clause's *second* subclause. See Appellant's Br. 56 ("The second subclause of the Elections Clause gives Congress the power to override 'such regulations' as the state legislatures prescribe and to make its own regulations of those elections."); see also *Vieth*, 541 U.S. at 275 (plurality opinion) (observing that the Elections Clause "permit[s] Congress to 'make or alter'" the "districts for federal elections"); *Smiley*, 285 U.S. at 366-367 (explaining that the second subclause gives Congress "'a general supervisory power over the whole subject'" by authorizing it to "'make or alter' * * * regulations of the same general character that the legislature of the State is authorized to prescribe") (quoting U.S. Const. Art. I, § 4, Cl. 1 and *Siebold*, 100 U.S. at 387).

2. Congress's authority to draw district lines necessarily encompasses the authority to recognize, for purposes of federal law, the district lines that a State

itself has drawn in accordance with its own law. Congress, when it legislates on a subject within its domain, may assimilate current or future state laws into federal law. See *United States* v. *Sharpnack*, 355 U.S. 286, 293-297 (1958) (upholding the constitutionality of statute prospectively incorporating state criminal law on federal enclaves). And the Constitution allows both Congress and state legislatures to prospectively ratify the decisions of outside actors in the context of election regulation. See *Siebold*, 100 U.S. at 377-399 (upholding statute imposing federal criminal penalties for violations of state election laws); *McPherson* v. *Blacker*, 146 U.S. 1, 24-36 (1892) (appointment of State's presidential electors "in such manner as the legislature thereof may direct" under U.S. Const. Art. II, § 1, Cl. 2 may be carried out through individual-district popular voting); see also Ariz. Rev. Stat. Ann. § 16-411 (Supp. 2014) (providing that county officials will establish precincts and polling places).

Appellant's contention (Br. 56) that the Elections Clause "does not remotely authorize Congress to rewrite the Constitution by authorizing the delegation of the primary authority to prescribe regulations of congressional elections to an entity other than that specified by the Framers in the Constitution" is accordingly misplaced. It is undisputed that "Congress ha[s] no power to alter Article I, section 4," *Smiley*, 285 U.S. at 372, and Section 2a(c) does not attempt to do so. Nor does it attempt to reconfigure the structure of state government. Instead, as applied here, it simply validates, for purposes of federal law, the districts adopted under state law.[10] And nothing could

[10] The operation of Section 2a(c) in this case differs somewhat from the operation of the 1911 Act in *Hildebrant*. In *Hildebrant*,

provide a more natural, legitimate, or respectful source for a State's district map under federal law than the district map approved by the State itself, in the manner provided by state law.

CONCLUSION

The district court's judgment should be vacated and remanded with instructions to dismiss for lack of jurisdiction. In the alternative, it should be affirmed.

Respectfully submitted.

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the State had used the referendum procedure to reject a district map, meaning that no state-law map existed for the federal law to act upon. The Court has accordingly explained that in *Hildebrant*, "the Act of 1911, in its reference to state laws, could but operate as a legislative recognition of the nature of the authority deemed to have been conferred" by the Elections Clause. *Smiley*, 285 U.S. at 372. This case, in contrast, involves a State's adoption of a district map through a process approved by popular initiative. In that circumstance, Section 2a(c) can and does provide that the map should be used for purposes of federal law.