

1 Joseph A. Kanefield (015838)
2 Brunn W. Roysden III (028698)
3 Ballard Spahr LLP
4 1 East Washington Street, Suite 2300
5 Phoenix, Arizona 85004-2555
6 Telephone: 602.798.5400
7 kanefieldj@ballardspahr.com
8 roysdenb@ballardspahr.com

9 Mary R. O’Grady (011434)
10 Kristin L. Windtberg (024804)
11 OSBORN MALEDON, P.A. (00196000)
12 2929 North Central Avenue, Suite 2100
13 Phoenix, Arizona 85012-2793
14 Telephone: 602.640.9000
15 mogrady@omlaw.com
16 kwindtberg@omlaw.com

17 *Attorneys for the Arizona Independent Redistricting Commission and Commissioners*
18 *Mathis, McNulty, Herrera, Freeman, and Stertz solely in their official capacities*

19
20
21
22
23
24
25
26
27
28
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

1 Arizona State Legislature,
2
3 Plaintiff,
4
5 vs.

6 Arizona Independent Redistricting
7 Commission, and Colleen Mathis, Linda C.
8 McNulty, José M. Herrera, Scott D.
9 Freeman, and Richard Stertz, members
10 thereof, in their official capacities; Ken
11 Bennett, Arizona Secretary of State, in his
12 official capacity,
13
14 Defendants.

NO.: 2:12-cv-01211-PGR

**DEFENDANTS ARIZONA
INDEPENDENT REDISTRICTING
COMMISSION AND
COMMISSIONERS MATHIS,
MCNULTY, HERRERA, FREEMAN,
AND STERTZ’S MOTION TO
DISMISS**

ORAL ARGUMENT REQUESTED
(Assigned to Judge Paul G. Rosenblatt)

22
23 Defendants Arizona Independent Redistricting Commission (the “Commission”),
24 and Commissioners Colleen Mathis, Linda McNulty, José Herrera, Scott Freeman, and
25 Richard Stertz in their official capacities (collectively “the AIRC Defendants”) hereby
26 move, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss Plaintiff’s First
27 Amended Complaint.
28

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

INTRODUCTION

1
2 In 2000, Arizona voters amended the state constitution to create the Commission
3 and assign it the responsibility for drawing Arizona’s legislative and congressional
4 districts. The Arizona Legislature (“the Legislature”), having waited twelve years and
5 two redistricting cycles, now seeks to overturn the will of the voters, take back the power
6 to draw congressional districts, and undo the work of this decade’s Commission. The
7 Legislature’s lawsuit should be dismissed because it is contrary to well-established
8 precedent and is barred by laches.

9 The Legislature incorrectly contends that Article 1, Section 4, Clause 1 (“the
10 Elections Clause”) of the United States Constitution delegates to it exclusive authority
11 over congressional redistricting in Arizona and, therefore, prohibits the state constitution
12 from transferring this responsibility to an independent commission. (E.g., First Amended
13 Complaint (“FAC”) ¶¶ 1, 36-37.) But the Supreme Court rejected this interpretation of
14 the Elections Clause decades ago. In *Ohio ex rel. Davis v. Hildebrant*, the Court
15 construed the term “Legislature” in the Elections Clause to refer broadly to the state’s
16 entire lawmaking process, including the citizens’ referendum authority, rather than only
17 the elected legislature. 241 U.S. 565 (1916); *see also Smiley v. Holm*, 285 U.S. 355
18 (1932) (permitting gubernatorial veto in redistricting); *Hawke v. Smith*, 253 U.S. 221
19 (1920) (contrasting “Legislature” in the Elections Clause with “Legislatures” in the
20 provision governing ratification). These cases establish that the Elections Clause does
21 not limit a state’s authority over how it conducts redistricting, as the Legislature
22 incorrectly contends. (See FAC ¶ 38.)

23 Thus, the Elections Clause does not prohibit a state from delegating responsibility
24 for drawing congressional districts to an independent legislative body, such as the
25 Commission. Because Arizona’s constitutional requirement that an independent
26 commission conduct congressional redistricting does not violate the Election Clause, the
27 Legislature’s First Amended Complaint should be dismissed for failure to state a claim
28 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

1 In addition, by waiting twelve years and until after the Commission completed this
2 decade's redistricting process, the Legislature unreasonably delayed in bringing its
3 challenge to the prejudice of the Commission, Arizona voters, and Arizona candidates.
4 Therefore, the Legislature's First Amended Complaint also warrants dismissal under the
5 doctrine of laches.

6 FACTUAL BACKGROUND

7 At statehood, the people of Arizona vested the Legislature with legislative power,
8 but reserved for themselves the power to propose laws and constitutional amendments
9 through initiative. Ariz. Const. art. IV, pt. 1, § 1(2); (*see* FAC ¶ 2). In 2000, Arizona
10 voters passed Proposition 106, the initiative that amended the state constitution to create
11 the Commission. Proposition 106 delegated responsibility for redistricting to an
12 independent and politically balanced group of citizen-volunteers. *See* Ariz. Const. art.
13 IV, pt. 2, §§ 1(3)-(23); (*see* FAC ¶¶ 3, 17).

14 The Commission consists of five commissioners, chosen from a pool of candidates
15 nominated by Arizona's Commission on Appellate Court Appointments. Ariz. Const. art.
16 IV, pt. 2, § 1(3)-(5). The Speaker and Minority Leader of the State House of
17 Representatives and the President and Minority Leader of the State Senate each have one
18 appointment to the Commission. *Id.* at § 1(6); (*see* FAC ¶¶ 22-23). The four appointed
19 commissioners then select the Chair of the Commission from the remaining nominees.
20 Ariz. Const. art. IV, pt. 2, § 1(8). The Chair may not be registered with any party already
21 represented on the Commission. *Id.*

22 When delegating authority to draw congressional and legislative districts to the
23 Commission, the voters also placed procedural and substantive limits on the
24 Commission's exercise of its powers. Redistricting is performed pursuant to a four-phase
25 process. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*,
26 220 Ariz. 587, 597 ¶ 29, 208 P.3d 676, 686 (2009). First, the Commission creates
27 "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. IV,
28 pt. 2, § 1(14). Party registration and voting history data are excluded in this phase. *Id.* at

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

1 § 1(15). Next, the Commission adjusts the grid map “as necessary to accommodate” the
2 following six goals: (A) “compl[iance] with the United States Constitution and the
3 United States voting rights act”; (B) “equal population to the extent practicable”;
4 (C) “geographic[] compact[ness] and contiguous[ness] to the extent practicable”;
5 (D) “respect [for] communities of interest to the extent practicable”; (E) “use [of] visible
6 geographic features, city, town and county boundaries, and undivided census tracts” to
7 the extent practicable; and (F) “[t]o the extent practicable, competitive districts should be
8 favored where to do so would create no significant detriment to the other goals.” *Id.* at
9 § 1(14).

10 After adjusting for the six constitutional goals, the Commission enters the third
11 phase, “advertis[ing] a draft map” for at least thirty days. *Id.* at § 1(16). During this
12 phase, both houses of the Legislature may make recommendations to the Commission by
13 memorial or by minority report, which the Commission must consider. *Id.* In the fourth
14 and final phase, the Commission “establish[es] final district boundaries” and certifies the
15 new districts to the Secretary of State. *Id.* at § 1(16)-(17). Throughout the process, “[t]he
16 places of residence of incumbents or candidates shall not be identified or considered.” *Id.*
17 at § 1(15).

18 This decade’s Commission completed its congressional map on January 17, 2012,
19 and certified the congressional districts to the Arizona Secretary of State. (FAC ¶ 27.)
20 The Commission then submitted its map to the United States Department of Justice for
21 preclearance pursuant to the Voting Rights Act, and on April 9, 2012, the congressional
22 map was precleared. (*Id.* ¶ 28.)

23 //
24 //
25 //
26 //
27 //
28 //

ARGUMENT

I. The Elections Clause Does Not Prohibit Arizona from Establishing An Independent Commission to Draw Congressional Districts.

A. The Term “Legislature” in the Elections Clause Refers to the Entire Lawmaking Process Of A State, Not Just the Elected Legislature.

The Elections Clause provides that

[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; 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 the Ninth Circuit recently explained, although “power over federal election procedures is ultimately ‘committed to the exclusive control of Congress,’” the Elections Clause “gives states the default authority to prescribe the ‘Times, Places and Manner’ of conducting federal elections.” *Gonzalez v. Arizona*, 677 F.3d 383, 391 (9th Cir. 2012) (en banc) (citation omitted).

In its First Amended Complaint, the Legislature asserts that “[t]he word ‘Legislature’ in the Elections Clause means the representative body which makes the laws of the people.” (FAC ¶ 37.) However, the Supreme Court has made clear that the term refers to the entire lawmaking process of the state, and not just the state’s legislative body.

The Court has construed the term “Legislature” in the Elections Clause on three occasions – *Hildebrant*, 241 U.S. 565, *Hawke*, 253 U.S. 221, and *Smiley*, 285 U.S. 355. *Hildebrant* was the first case to consider a direct challenge to a state’s method of congressional redistricting under the Elections Clause. In that case, the people of Ohio had exercised their referendum power under the Ohio constitution to reject the general assembly’s congressional redistricting plan. *Hildebrant*, 241 U.S. at 566. The Supreme Court upheld this use of the referendum power. *Id.* at 570. The Court stated that “so far as the state had the power to do it, the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power.” *Id.* at 568. The

1 Court therefore rejected the argument that use of the referendum for congressional
2 redistricting violated the Elections Clause. *Id.* at 569-70.

3 Four years later in *Hawke*, the Court held that this same referendum power could
4 not be used to disapprove the Ohio Legislature’s ratification of a proposed amendment to
5 the United States Constitution because, pursuant to Article V of the U.S. Constitution,
6 ratification must be done “by the Legislatures.” *Hawke*, 253 U.S. at 226 (quoting U.S.
7 Const. art. V). In so holding, the Court rejected an argument that all that is required by
8 Article V is “ratification by the legislative action of the states through the medium
9 provided” in state law, explaining that ratification “is not an act of legislation within the
10 proper sense of the word.” *Id.* at 229. Importantly, the Court distinguished *Hildebrant*,
11 reasoning: “Article 1, section 4 [the Elections Clause], plainly gives authority to the state
12 to legislate within the limitations therein named. Such legislative action is entirely
13 different from the requirement of the Constitution as to the expression of assent or dissent
14 to a proposed amendment to the Constitution,” an act in which “no legislative action is
15 authorized or required.” *Id.* at 230-31.

16 In *Smiley*, the Court expanded upon the “functional analysis” that it had adopted in
17 *Hildebrant*. 285 U.S. at 361-72. That case involved a challenge to the Minnesota
18 governor’s veto of the state legislature’s congressional redistricting act. *Id.* at 361-63.
19 The Court explained that the term “Legislature” means different things in different
20 constitutional provisions, depending on “the function to be performed.” *Id.* Thus, the
21 Constitution provides in different sections for a state legislature to act in different
22 capacities, including as an electoral body, ratifying body, consenting body, or lawmaking
23 body. *Id.* at 365-66. The Court concluded that the Elections Clause “embrace[s]
24 authority to provide a complete code for congressional elections” and thus “involves
25 lawmaking in its essential features and most important aspect.” *Id.* at 366.

26 The Elections Clause does not limit a state’s authority to determine how it makes
27 laws. As the Supreme Court stated, there was “no suggestion in the federal constitutional
28 provision of an attempt to endow the Legislature of the state with power to enact laws in

1 any manner other than that in which the Constitution of the state has provided that laws
2 shall be enacted.” *Id.* at 367-68. The Court observed that “[w]hether the Governor of the
3 state, through the veto power, shall have a part in the making of state laws, is a matter of
4 state polity,” and that the Elections Clause “neither requires nor excludes such
5 participation.” *Id.* at 368. Accordingly, the Court held that nothing in the Elections
6 Clause “precludes a state from providing that legislative action in districting the state for
7 congressional elections shall be subject to the veto power of the Governor as in other
8 cases of the exercise of the lawmaking power,” *id.* at 372-73, because the Elections
9 Clause confers no authority upon the state legislature to redistrict “independently of the
10 participation of the Governor as required by the state Constitution,” *id.* at 373. Under the
11 Supreme Court’s holdings in *Hildebrant*, *Hawke*, and *Smiley*, there can be no doubt that,
12 as used in the Elections Clause, the term “Legislature” contemplates the entire
13 lawmaking process of the state.¹

14 A recent opinion by the Eleventh Circuit reviewed this precedent and “ha[d] little
15 difficulty in rejecting the [Florida legislature’s] claim that the phrase ‘by the Legislature
16 thereof’ in the Elections Clause somehow refers only to a state’s legislative body.”
17 *Brown v. Sec’y of State of Fla.*, 668 F.3d 1271, 1278 (11th Cir. 2012). The court
18 concluded that, under Supreme Court precedent, the term “Legislature” in the Elections
19 Clause “encompasses the entire lawmaking function of the state,” and the fact “[t]hat a
20 law was enacted by the people themselves, pursuant to state law, rather than by the state
21 legislative body, is not enough to invalidate that action under the Elections Clause.” *Id.*
22 at 1278-79. The court stated that the “focus remains on the state’s lawmaking process.”
23 *Id.* at 1279.

24 ¹ Although not addressing the specific issue of whether the Elections Clause
25 imposes structural constraints on states, the Court has repeated on several occasions that,
26 under the Elections Clause, “reapportionment is primarily the duty and responsibility of
27 the State through its legislature or other body.” *League of United Latin Am. Citizens v.*
28 *Perry (LULAC)*, 548 U.S. 399, 414-15 (2006) (opinion of Kennedy, J.) (quoting
Chapman v. Meier, 420 U. S. 1, 27 (1975)) (emphasis added); accord. *Branch v. Smith*,
538 U.S. 254, 261-62 (2003); *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Grove v.*
Emison, 507 U.S. 25, 34 (1993).

1 The history of the Elections Clause shows no evidence that the framers intended to
2 limit the states' lawmaking discretion through the first part of the clause, which provides
3 that "[t]he Times, Places and Manner of holding Elections for Senators and
4 Representatives, shall be prescribed in each State by the Legislature thereof." *See Brown*,
5 668 F.3d at 1275-76 & n.5. In addition, although the Elections Clause establishes state
6 authority over federal elections, it also specifically gives Congress the power to override
7 the state's decisions about the times, places, and manner of congressional elections. The
8 second part of the Elections Clause provides that "Congress may at any time by Law
9 make or alter [the states'] Regulations" regarding the times, places, and manner of
10 holding congressional elections. U.S. Const. art. I, § 4, cl. 1. Congress has not used its
11 authority under the Elections Clause to impose any restraints on a state's redistricting
12 discretion.

13 In *Hildebrant*, the Court reviewed the history of the statute governing redistricting.
14 241 U.S. at 568-69. In 1911, Congress "expressly modified the phraseology of the
15 previous acts" related to congressional redistricting by states, and "insert[ed] a clause
16 plainly intended to provide that where, by the State Constitution and laws, the
17 referendum was treated as part of the legislative power, the power as thus constituted
18 should be held and treated to be the state legislative power for the purpose of creating
19 congressional districts by law." *Id.* at 568. Under the pre-1911 version of the statute,
20 "the existing districts in a state should continue in force 'until the legislature of such
21 state, in the manner herein prescribed, shall redistrict such state.'" *Id.* at 568 (citation
22 omitted). Congress changed the language in 1911 to state "*in the manner provided by the*
23 *laws thereof.*" *Id.* (emphasis added and citation omitted). The Court concluded that "the
24 legislative history . . . leaves no room for doubt that the prior words were stricken out and
25 the new words inserted for the express purpose, in so far as Congress had power to do it,
26 of excluding the possibility of making the contention" that use of the referendum was
27 barred in congressional redistricting. *Id.* at 568-69; *accord. Smiley*, 285 U.S. at 371.

1 The current version of the statute governing reapportionment of representatives, 2
3 U.S.C. § 2a(c), maintains that redistricting is performed pursuant to state law. The statute
4 begins as follows: “Until a State is redistricted *in the manner provided by the law thereof*
5 after any apportionment” 2 U.S.C. § 2a(c) (emphasis added). Therefore, just as
6 observed in *Hildebrant*, Congress has chosen not to limit how legislative power is
7 exercised within a state for congressional redistricting. *Smith v. Clark*, 189 F. Supp. 2d
8 548, 551 n.5 (S.D. Miss. 2002), *affirmed on other grounds sub nom.*, *Branch v. Smith*,
9 538 U.S. 254 (2003). Thus, although Congress could use its authority under the Elections
10 Clause to preempt states from establishing commissions responsible for congressional
11 redistricting, it has not done so.

12 For these reasons, this Court should reject the Legislature’s argument that the
13 Elections Clause guarantees it an exclusive role in congressional redistricting. The
14 Elections Clause does not prohibit the people of Arizona from establishing an
15 independent commission that is responsible for congressional redistricting.

16 **B. The Commission is Part of Arizona’s Lawmaking Process.**

17 Fundamental to Arizona’s structure of government is that the people, while
18 establishing the Legislature and vesting it with legislative power, nonetheless also
19 reserved legislative power for themselves. Ariz. Const. art. IV, pt. 1, § 1(1) (“[T]he
20 people reserve the power to propose laws and amendments to the constitution and to
21 enact or reject such laws and amendments at the polls, independently of the
22 legislature”); *id.* art. II, § 2 (“All political power is inherent in the people, and
23 governments derive their just powers from the consent of the governed, and are
24 established to protect and maintain individual rights.”).

25 In 2000, the voters exercised that power to establish the Commission. They
26 granted to the Commission the power and responsibility to draw congressional districts.
27 (FAC ¶ 17.) Article IV of the Arizona Constitution, which governs the legislative
28 department of Arizona, states that “[t]he independent redistricting commission shall
29 establish congressional and legislative districts.” Ariz. Const. art. IV, pt. 2, § 1(14). This

1 power must be exercised consistent with a constitutionally prescribed process and six
2 constitutional goals that were established by the people through initiative. *Id.* at § 1(14)-
3 (17). The voters placed the provision regarding the Commission in Article IV of the
4 Arizona Constitution, which governs the legislative department, thereby establishing the
5 Commission as a legislative body. *See Brown*, 668 F.3d at 1279 & n.7 (noting that the
6 constitutional provision at issue in *Brown*, like the provisions in *Hildebrant* and *Smiley*,
7 were housed in the legislative articles of their respective state constitutions.).

8 The question of the proper interpretation of the state constitution is a question of
9 state law. *See California ex rel. RoNo, LLC v. Altus Fin. S.A.*, 344 F.3d 920, 926 (9th
10 Cir. 2003) (“Thus, this case involves knotty issues of internal state governance. As a
11 matter of comity, we consider the California Supreme Court better positioned to address
12 the two questions presented”); *United Beverage Co. of South Bend, Inc. v. Indiana*
13 *Alcoholic Beverage Comm’n*, 760 F.2d 155, 160 (7th Cir. 1985) (“[C]onsiderations of
14 comity and federalism argue for the federal courts’ avoiding whenever possible getting
15 involved in delicate issues concerning the internal structure of state government.”).

16 The Arizona Supreme Court has “conclude[d] that the Commission acts as a
17 legislative body.” *Ariz. Minority Coal.*, 220 Ariz. at 595 ¶ 19, 208 P.3d at 684. Thus, it
18 is settled as a matter of Arizona law that the Commission is a legislative body that
19 exercises legislative power for the specific purposes of drawing legislative and
20 congressional districts. Consequently, the Commission is the legislative body under
21 Arizona law that exercises the State’s authority under the Elections Clause with regard to
22 congressional redistricting. Because the Elections Clause does not prohibit Arizona
23 voters from requiring that the Commission draw the state’s congressional districts, the
24 First Amended Complaint fails to state a claim and should be dismissed pursuant to Fed.
25 R. Civ. P. 12(b)(6).

26 //
27 //
28 //

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

1 **II. The Legislature’s Claim Is Barred by the Doctrine of Laches Because the**
 2 **Legislature’s Unreasonable Delay in Bringing Suit Prejudiced the**
 3 **Commission and Others.**

4 The Legislature’s claim is also barred by laches. The Legislature unreasonably
 5 delayed in bringing this challenge, resulting in prejudice to the Commission and the
 6 state.² During the Legislature’s delay, the Commission has expended the state’s
 7 resources to draw and secure preclearance of not one, but two sets of congressional
 8 districts. The Commission certified the congressional maps for this decade to Arizona’s
 9 Secretary of State in January 2012 (FAC ¶ 27), and secured preclearance from the
 10 Department of Justice in April 2012 (*id.* ¶ 28). In reliance on the process established in
 11 the Arizona Constitution, the public participated and commented on the Commission’s
 12 process, the Legislature itself commented by memorial and minority report, and
 13 candidates are now running in the new congressional districts drawn and certified by the
 14 Commission.³

15 Laches derives “from the maxim that those who sleep on their rights, lose them.”
 16 *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 997 (9th Cir. 2006); *accord. Jarrow*
 17 *Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836 (9th Cir. 2002). To determine
 18 whether a suit is barred by laches, the Court considers the diligence of the party against
 19 whom the defense is asserted and the prejudice to the party asserting the defense. *Apache*
 20 *Survival Coal. v. United States*, 21 F.3d 895, 905 (9th Cir. 1994). Laches may be
 21 asserted in a motion to dismiss, when the elements of laches are apparent on the face of a

22 ² The Commission selects counsel to represent “the people of Arizona in the legal
 23 defense of a redistricting plan.” Ariz. Const. art. IV, pt. 2, § 1(20). Thus, in analyzing
 24 the prejudice suffered, the proper party is not merely the Commission but also the people
 25 of the State of Arizona. *See also Mathieu v. Mahoney*, 174 Ariz. 456, 460, 851 P.2d 81,
 26 85 (1993) (recognizing that for purposes of laches in election matters, prejudice extends
 27 beyond the specific parties to the litigation).

28 ³ Moreover, candidates and citizens also may reasonably rely that there will not be
 mid-decade redistricting, absent some problem with the maps adopted by the
 Commission. *See* Ariz. Const. art. IV, pt. 2, § 1(23) (The Commission “shall not meet or
 incur expenses after the redistricting plan is completed, except if litigation or any
 government approval of the plan is pending, or *to revise districts if required by court*
decisions or if the number of congressional or legislative districts is changed.” (emphasis
 added)).

1 complaint. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting*
2 *Comm’n*, 366 F. Supp. 2d 887, 907 n.19 (D. Ariz. 2005).

3 In *Arizona Minority Coalition*, this Court granted a motion to dismiss a challenge
4 to the legislative districts drawn during the last redistricting cycle on the basis of laches.
5 *Ariz. Minority Coal.*, 366 F. Supp. 2d at 907. The Arizona Minority Coalition waited
6 until just weeks before critical election deadlines to file suit. *Id.* at 909.

7 In *Simkins v. Gressette*, the Fourth Circuit found that injunctive relief, which
8 involves the same equitable balancing as laches, was unavailable to the plaintiffs as a
9 result of their delay in filing suit. 631 F.2d 287, 296 (4th Cir. 1980). The plaintiffs
10 waited until shortly before the candidates’ filing deadline to file their lawsuit, despite the
11 fact that the basis of their claims was the last election, which had taken place three years
12 prior. *Id.* The Fourth Circuit found that the plaintiffs offered no good reason for their
13 delay and that the delay in filing “would clearly cause a major disruption in the election.”
14 *Id.* The *Simkins* decision was based on the holding in *Maryland Citizens for a*
15 *Representative General Assembly v. Governor of Maryland*, in which the court found
16 injunctive relief unavailable because the plaintiffs in that case waited until thirteen weeks
17 before the filing deadline to file suit. 429 F.2d 606, 610 (4th Cir. 1970).

18 The Legislature’s delay in filing this case is even more egregious than the delay in
19 *Arizona Minority Coalition* or *Simkins*. As noted above, the Legislature challenges the
20 constitutionality of the Commission itself. The Commission was created in 2000, when
21 Arizona’s voters passed Proposition 106. (FAC ¶¶ 16-17.) If the Legislature believed
22 that the creation of an independent commission to engage in the redistricting of Arizona’s
23 congressional districts violated the Elections Clause, it should have filed suit in 2000,
24 shortly after Proposition 106 was enacted. Instead, the Legislature has waited twelve
25 years – until after completion of the second decennial redistricting by the Commission
26 and preclearance by the Department of Justice.

27 Moreover, this unreasonable delay has resulted in prejudice to the Commission
28 (and more generally the State of Arizona). Over the course of these twelve years, two

Ballard Spahr LLP
 1 East Washington Street, Suite 2300
 Phoenix, AZ 85004-2555
 Telephone: 602.798.5400

1 separate Independent Redistricting Commissions have been appointed and completed
 2 their work. Putting aside all of the resources expended in the first redistricting cycle from
 3 2002-2010, significant state resources have been expended on compliance with the state
 4 constitutional and federal requirements for congressional redistricting for the 2012-2020
 5 cycle. The Commission expended resources to conduct hearings throughout Arizona. It
 6 hired staff. It advertised a draft map, and after several months approved a final map.
 7 Indeed, the Legislature participated in this process. Legislative leaders of both parties
 8 have selected the members of the Commission. (*Id.* ¶ 22.) The Speaker and the President
 9 even filed a special action in the Arizona Supreme Court in January 2011 to challenge the
 10 pool of applicants that the Commission on Appellate Court Appointments Commission
 11 forwarded to them. *Adams v. Comm’n on Appellate Court Appointments*, 227 Ariz. 128,
 12 131 ¶ 7, 254 P.3d 367, 370 (2011). In November 2011, the Legislature met in a special
 13 session in which the Senate concurred in the Governor’s illegal removal of the
 14 Commission’s Chair from her office. *Ariz. Indep. Redistricting Comm’n v. Brewer*, 229
 15 Ariz. 347, 348 ¶ 9, 275 P.3d 1269, 1270 (2012). In addition, the Legislature commented
 16 on the draft map by memorial and minority report. (*Id.* ¶ 21(a); *see also* Exs. 1-2.)⁴

17 There is absolutely no justification for the Legislature’s delay in bringing this
 18 lawsuit. The Legislature waited until the Commission completed its work and the
 19 Department of Justice precleared the new districts before raising an objection that should
 20 have been raised more than a decade ago and certainly should have been raised well
 21 before this decade’s Commission completed its redistricting work.

22 The Legislature recognizes that “the 2012 election cycle is already well
 23 underway.” (FAC ¶ 1; *see id.* ¶¶ 30-32.) But it wrongly suggests that its unjustifiable

24 _____
 25 ⁴ The Commission requests that the Court take judicial notice of the memorial and
 26 minority report. These materials are matters of public record, constitute the legislative
 27 history behind the redistricting plan at issue, and are proper subjects for judicial notice.
 28 *See Anderson v. Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) (proper to take judicial
 notice of legislative history and records of administrative bodies); *Korematsu v. United
 States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984) (“[C]ourts frequently take judicial
 notice of legislative history . . .”).

1 delay can be cured by simply applying any relief “beginning the day after the 2012
2 congressional election in Arizona.” (*Id.* ¶ 1; *see id.* at 9 (Relief Requested).) The
3 redistricting process that the Commission completed before the Legislature filed this
4 lawsuit established congressional districts that will be used until the next redistricting
5 process is completed in 2022. (*Id.* ¶ 29.) The timing problem here is not just about the
6 2012 election; it is about more than a decade of delay and complex redistricting work for
7 the next decade that was completed before this lawsuit was filed.

8 Because of the Legislature’s unjustifiable delay in filing this lawsuit and the harm
9 that this delay has caused, this Court should dismiss this lawsuit based on laches.

10 **CONCLUSION**

11 For the foregoing reasons, the AIRC Defendants request that this Court dismiss
12 Plaintiff’s First Amended Complaint because it fails to state a claim upon which relief
13 can be granted.

14 RESPECTFULLY SUBMITTED this 10th day of August, 2012.

15 BALLARD SPAHR LLP

16 By: /s/ Joseph A. Kanefield
17 Joseph A. Kanefield (015838)
18 Brunn W. Roysden III (028698)

19 OSBORN MALEDON, P.A.

20 By: /s/ Mary R. O’Grady (with permission)
21 Mary R. O’Grady (011434)
22 Kristin L. Windtberg (024804)

23 *Attorneys for the Arizona Independent Redistricting Commission*
24 *and Commissioners Mathis, McNulty, Herrera, Freeman, and*
25 *Sertz solely in their official capacities*
26
27
28

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

CERTIFICATE OF SERVICE

I certify that on the 10th day of August, 2012, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Court, using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants listed for this matter.

A courtesy copy of this motion and the exhibit have been mailed to the Honorable Paul G. Rosenblatt's chambers pursuant to Local Rule.

By: /s/ Beau Roysden

Ballard Spahr LLP
1 East Washington Street, Suite 2300
Phoenix, AZ 85004-2555
Telephone: 602.798.5400

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28