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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Arizona State Legislature, Plaintiff, vs. Arizona Independent Redistricting Commission, *et al.*, Defendants.	**NO. 2:12-cv-01211-PHX-PGR** **RESPONSE TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)** **ORAL ARGUMENT REQUESTED**

Plaintiff Arizona State Legislature hereby files its Response to Defendants' Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) (Doc. 16.), and shows the Court as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Defendants' arguments for dismissal rest entirely on two demonstrably false propositions: 1) that the meaning of "Legislature" in the Elections Clause has been or can be redefined to exclude a state's elected representative, lawmaking body; and 2) that the Arizona State Legislature seeks for itself the exclusive role in congressional redistricting. As shown below, the Supreme Court has expressly defined the term "Legislature" as it appears in the Elections Clause, and no court has ever departed from that express definition. While the Elections Clause permits states to impose some procedural qualifications on their own legislatures' power to establish congressional districts, it does not permit states to completely remove their own legislatures from the congressional redistricting process as the Proposition 106 schema has done in this case. This wholesale exclusion is the nature of the Legislature's challenge to the process and the resulting congressional maps. Thus, this Court should deny Defendants' motion to dismiss.

UNDISPUTED FACTS

In 2000, the redistricting process in Arizona underwent a sea change. Prior to 2000, the Arizona Constitution recognized the federal redistricting power as belonging exclusively to the Arizona Legislature. (Doc. 12 ¶ 10). Proposition 106 ("Prop. 106"), adopted by Arizona voters in 2000, wholly transferred the task of redistricting Congressional districts from the Arizona Legislature to the newly-created "Independent Redistricting Commission" ("IRC"). Ariz. Const. art. IV, pt. 2, § 1. The IRC is composed of four appointees, drawn from a pool of candidates established by the Commission on Appellate Court Appointments and appointed by the Speaker and Minority Leader of the House of Representatives and the President and Minority Leader of the State Senate. *Id*. at (6). The fifth and final member is chosen by the four previously selected members from a pool of candidates chosen by the Appellate Commission. *Id.* at (8). Once the IRC is chosen, the only remaining power the Legislature has is the ability to suggest non-binding recommendations on redistricting lines to the IRC. *Id.* at (16).

ARGUMENT

I. THE DEFENDANTS FAILED TO MEET THEIR RULE 12(B)(6) BURDEN.

It is axiomatic that this Court must accept all factual allegations in the complaint as true in considering the Defendant's Motion to Dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court may exclude the extraneous information Defendants submitted with their motion. FED. R. CIV. P. 12(b). Otherwise, the Court must either convert the motion to a summary judgment proceeding, or take judicial notice of the attached documents as a matter of public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). Plaintiff respectfully suggests that the Court exclude the attached material from consideration and treat the motion as one to dismiss based solely on the pleadings. As the key facts are undisputed, and Plaintiff's legal arguments comport with both precedent and history, the Defendants have failed to meet their burden for dismissal under Rule 12(b)(6).

A. The Elections Clause forbids the complete removal of redistricting from state legislatures.

The federal Elections Clause requires that the Arizona State Legislature play a substantive lawmaking role in redistricting – a role that cannot be constitutionally eliminated.

1. Federal law alone governs the meaning and scope of the Elections Clause.

As a threshold issue, federal law alone controls the interpretation of the Elections Clause. *W. Air Lines, Inc. v. Bd. of Equalization of State of S.D.*, 480 U.S. 123, 129 (1987) ("The general principle [is] that, absent a clear indication to the contrary, the meaning of words in a federal statute is a question of federal law…."); *and see McInnes v. State of Cal.*, 943 F.2d 1088, 1094 (9th Cir. 1991). This concept applies particularly to the Elections Clause because of its peculiar status as the sole source of the states' power to regulate the time, place and manner of congressional elections. *See Brown v. Secretary of State*, 668 F.3d 1271, 1274-75 (11th Cir. 2012) ("It is abundantly clear from the text of the Constitution that the states have no inherent authority to regulate congressional elections."). This power was "delegated to, rather than reserved by, the States," because the "federal

offices at stake aris[e] from the Constitution itself." *Cook v. Gralicke*, 531 U.S. 510, 522 (2001) (internal quotations omitted) (quoting and citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995)). Outside the Elections Clause, there is "[n]o other constitutional provision [that] gives the States authority over congressional elections," and "no such authority could be reserved under the Tenth Amendment." *Cook*, 531 U.S. 522-23. Put another way, this Court need not preserve the typical "delicate balance" between the federal and state sovereigns because states have "no inherent or reserved power" in regulating federal elections under the Elections Clause. *Gonzales v. Arizona*, 677 F.3d 383, 392 (9th Cir. 2012) (en banc). To be sure, "the States may regulate the incidents of such elections" but must operate "only within the exclusive delegation of power under the Elections Clause." *Cook*, 531 U.S. at 523. When viewed through the lens of federal jurisprudence, Prop. 106's removal of authority from the Legislature exceeds the constitutional limits on state power in the Elections Clause.

2. Federal law defines "Legislature" in the Elections Clause conclusively as the state's law-making body of representatives.

Conspicuously, the Defendants completely ignore the Supreme Court's express definition of "Legislature" in the Elections Clause. The Supreme Court settled the definition conclusively in *Smiley v. Holm*, 285 U.S. 355 (1932), a case that remains one of only two controlling Elections Clause cases determining the constitutional parameters of the states' power to impact federal elections. *See Brown*, 668 F.3d at 1272 (deciding the case on legal principles that are "consonant with the understanding given to the Elections Clause by the Supreme Court in two cases that all parties [and the Court] agree are controlling—*Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 . . . (1916), and *Smiley v. Holm*, 285 U.S. 355 . . . (1932)."). In *Smiley*, the Court defined "legislature" very specifically:

> [T]he term was not one 'of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people.'

Smiley v. Holm, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)) (citation omitted and emphasis added); *See also State ex rel. Carroll v. Becker*, 45 S.W.2d 533, 537 (Mo. 1932) (interpreting the Elections Clause and noting "[i]t is the same Legislature which performs all the acts constituting the 'manner of holding elections.' The word 'Legislature' cannot mean one thing for one of such duties and another thing for the rest.").

Thus, the meaning of "Legislature" in the Elections Clause has not been, nor can it be, redefined to exclude the elected representative body that legislates for the state. Not only were the Defendants wrong to completely ignore this clear definition in their misleading discussion of *Smiley*, but the Defendants' position in this case cannot possibly prevail in light of the definition "Legislature" possesses as a matter of law in the Elections Clause.

3. Redistricting is a lawmaking function – states can limit, but not constitutionally remove, the redistricting authority from the legislature.

Every case analyzing the functional aspect of redistricting has dealt with a role played by the people directly, another elected official, or another entity, in addition to the role played by that state's legislature. None have involved the complete transfer of authority away from the only entity actually named in the Elections Clause.

The Defendants cite *Smiley*, *Hawke*, and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), but miss the import of those decisions for this case. In *Hildebrant*, the Court considered whether the addition of referendum power to Ohio's legislative redistricting process violated the Elections Clause. 241 U.S. 566-67. Ohio's referendum power allowed the voters to petition that a newly-enacted law (enacted by the legislature and approved by the governor) be submitted to a vote of the people. *Id.* at 566. The Ohio legislature passed an "act redistricting the state" that was signed by the governor and filed with the Ohio secretary of state. *Id.* Thereafter, Ohio voters successfully petitioned and ultimately disapproved the law. *Id.* The Supreme Court of Ohio denied a mandamus application aimed at state election officials; the application argued that the referendum should be ignored

because the Elections Clause made the referendum power irrelevant to redistricting. *Id.* The U.S. Supreme Court affirmed, examining three points of view: "the state power, the power of Congress, and the operation of the [Elections Clause]." *Hildebrant,* 241 U.S. at 567. The Court concluded that, "so far as the state had the power to do it, the referendum constituted a part of the state Constitution and law, and was contained within the legislative power[.]") *Id.* at 568. The Court noted that the relatively new Congressional apportionment statute of 1911 allowed redistricting to take place by a state "in the manner provided by the laws thereof," and therefore the referendum was properly considered as part of the legislative power. *Id.* at 568. The current statute, codified at 2 U.S.C. § 2a, contains the same phrase.

Hawke likewise analyzed the function of the Ohio state legislature under a U.S. Constitutional provision, but in a different context. After disposing of any confusion over the meaning of "legislature" (253 U.S. at 227) ("the representative body which ma[kes] the laws of the people"), the Court contrasted *Hildebrant* and held that the process for ratification of federal constitutional amendments by the state legislature under Article V was an expression of "assent or dissent" and, as such, Article V neither authorized nor required the "legislative action" taken in *Hildebrant*. *Id.* at 230-31 (noting that the Elections Clause gives the states authority to "legislate within the limitations therein named").

The *Smiley* decision gives the most definitive analysis of legislative function and is most important to this case. In *Smiley*, the Minnesota legislature enacted a congressional map that was vetoed by the governor. After the veto, the legislature registered the map with the Minnesota secretary of state on the grounds that both houses of the Minnesota legislature had approved of it and the governor's approval or disapproval had no legal effect because the Elections Clause only references the "Legislature." A citizen filed suit, arguing that "Legislature" in the Elections Clause encompassed the entire legislative power of the state, and thus the map could be of no effect because, after the governor's veto, "it was not repassed by the Legislature as required by law . . . ." *Smiley*, 285 U.S. at 361-62 (recounting the facts of the case) (emphasis added). Minnesota argued (and its supreme court held) that the Elections Clause vested the state legislature with the total authority to

draw maps acting as the "representative of the people of the state" without regard to the governor's veto. *Id.* at 364. In other words, the argument went, even though the ordinary processes of legislation would include the governor's veto power, the Elections Clause made the legislature the "mere agency to discharge the particular duty." *Id.*

The Supreme Court disagreed and held that the legislature could not enact laws in any way other than what is provided within their state's constitution. *Id.* at 368. In reaching this decision, the Court clearly affirmed the traditional meaning of the term legislature, previously announced in *Hawke. Id.* at 365 ("the representative body which ma[kes] the laws of the people"). However—and most crucially for this case—the Court distinguished the body that acts under the Elections Clause (the state legislature) from the function that body performs under the Elections Clause. In analyzing the function the legislature performs under the Elections Clause, the Court noted four distinct functions performed by state legislatures under the U.S. Constitution: ratifying, electoral [formerly of senators], consenting, and legislative functions. *Id.* at 365-66. Thus, the issue in *Smiley* was whether the Elections Clause invests the representative lawmaking body of a state with a particular authority, "the definition of which imports a function different from that of a lawgiver, and thus renders inapplicable the conditions which attach to the making of state laws." *Id.* at 365. Stated more simply, the issue was whether redistricting under the Elections Clause is a legislative function.

After a careful analysis and interpretation of the Elections Clause, the *Smiley* Court concluded that every conceivable act a state legislature might perform under the authority granted by the Elections Clause "involves lawmaking in its essential features and most important aspect." *Id.* The legislature's "authority is conferred for the purpose of making laws for the state . . . ." *Id.* at 367. As the Elections Clause invests state legislatures with the authority to make laws regarding congressional redistricting, "it follows, in the absence of an indication of a contrary intent that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367 (emphasis added). Therefore, under the interpretation of the Elections Clause

articulated in *Smiley*, there is only one permissible framework for states to operate under when establishing congressional districts. A state may only establish congressional districts through the agency of its legislature, but its legislature must follow the full legislative enactment processes defined in the state's constitution.

The Defendants also invoke the *Brown* decision, but fail to fully present the facts of that case. In fact, *Brown* illustrates the principled distinction articulated in *Smiley*, between the body that acts under the Elections Clause, and the function that body performs under the Elections Clause. *Brown* involved an initiative-generated amendment to the Florida constitution that set standards for the legislature to use in the congressional redistricting process. 668 F.3d at 1273. The Eleventh Circuit concluded that the Supreme Court's jurisprudence interpreted the Elections Clause to refer not just to the state's legislative body, but to the lawmaking process of the state. *Id.* at 1276. The appellate court reasoned that the previously-recognized legitimate limits on the state legislature's lawmaking function – the referendum power and/or gubernatorial veto – could also include guidance adopted by the people of that state (pursuant to their direct state constitution amendment authority) on "how the legislature may exercise its discretion in drawing congressional districts." *Id.* at 1279; *and see id.* at 1282-83 (noting that several state legislatures had already adopted similar guidelines on the exercise of their redistricting discretion). The court went on to note that the state constitutional limits imposed on the legislature in all of the previous cases (as well as in Florida) were housed in the "legislative article" of their respective constitutions (*Id.* at 1279), but that "at the end of the day, Florida's legislature is still responsible for drawing the congressional district lines." *Id.* at 1281 (emphasis added). The court reasoned that "the standards imposed by the text of [the initiative in question]," could not be said to "so limit the state legislature's discretion as to eviscerate its constitutionally delegated power [i.e., delegated by the Elections Clause] and effectively exclude the legislature from the redistricting process." *Id.* at 1280 (emphasis added). Thus, *Brown* is consistent with the *Smiley* framework in its holding that, under the Elections

Clause, the state can subject the legislature's power to conditions, but it cannot deprive the legislature entirely of its power.

The Defendants ultimately use *Hildebrant*, *Hawke*, *Smiley*, and *Brown* cases to argue that (1) because the Elections Clause encompasses the "entire lawmaking process of the state"; and (2) because the IRC provisions are included in the legislative article of the Arizona constitution; then (3) the IRC is properly part of the lawmaking process and thus constitutional under the Elections Clause. (Doc. 16 at 5-7.) This argument fails because the first premise is false: it fails to account for the definition of "Legislature" expressly articulated in *Smiley*, as well as the consequences that flow from that definition. Each of these cases dealt with limitations placed on the legislature's ability to redistrict via the inclusion of some other entity or official in the process. The legislature could redistrict in each case "subject to" the involvement of the people directly or the governor, as that involvement was specified in the particular state's constitution. In no case has the legislature's ability to redistrict been eliminated as it has in Arizona. *Cf. Preisler v. Sec'y of State of Mo.*, 257 F. Supp. 953, 961 (W.D. Mo. 1966) (noting that the Federal constitution places the primary duty for redistricting upon the state legislative body), *aff'd sub nom. Kirkpatrick v. Preisler*, 385 U.S. 450 (1967). Under the Elections Clause, the type of activity contemplated is a state Legislature itself acting pursuant to the procedures the state constitution specifies for the enactment of legislation, which, in Arizona, include the limitations of veto and referendum. Ariz. Const. art. IV, pt. 1, § 1 (referendum power); art. IV, pt. 2, § 12 (veto by governor). The Elections Clause does not countenance the complete substitution of an unrepresentative body like the IRC controlling the process without regard for the legislature's ordinary lawmaking procedures in Arizona. *See Branigin v. Duddleston*, 391 U.S. 364 (1968) ((affirming *Grills v. Branigin*, 284 F. Supp. 176 (S.D. Ind. 1968) (per curiam) ("Article I, Section 4, Clause 1 of the United States Constitution clearly does not authorize the defendants, as members of the Election Board of Indiana, to create congressional districts. This power is granted [by the Elections Clause] to the Indiana General Assembly . . . .") (emphasis added) (citing and relying on *Smiley*)).

Defendants equate "Legislature" under the Elections Clause with the legislative power of a state generally. But, as *Smiley* makes abundantly clear, though the general legislative power of the state over congressional redistricting is broad, it is still circumscribed by the definition of "Legislature," which has a concrete meaning under the Elections Clause. Given the meaning of "Legislature" in the Elections Clause, a state's power is limited to subjecting the legislature's congressional redistricting power to conditions—it cannot deprive the legislature entirely of its power. Thus, in their argument, Defendants ignored the Supreme Court's definition of legislature and relied entirely on the legislative function to be performed – something no court has ever done. This Court should not be the first.

B. Proposition 106 Violates the Federal Elections Clause as to Congressional Elections.

Proposition 106 took the authority to establish congressional districts away from the Arizona Legislature and gave it to the IRC. (Doc. 12 ¶¶ 1, 30-32.) This absolute supplanting of the Legislature's authority to redistrict congressional lines is unconstitutional.

1. The Independent Redistricting Commission is not a representative lawmaking body under the meaning of the Elections Clause.

The first step in an Elections Clause analysis is to determine which body within the state constitutes its "legislature." In Arizona, the legislature consists of a Senate and a House of Representatives. Ariz. Const. art. 4, pt. 1, § 1. While the Arizona Legislature does not possess exclusively the legislative authority – *see e.g.*, *id.* (expressly reserving certain legislative powers to the people) – it is exclusively "the representative body which makes the laws of the people" for purposes of an Elections Clause analysis. *See* Ariz. Const. art. 4, pt. 2, § 1(1) (providing that the Senate and House are to be composed of elected members). Thus, the Arizona Senate and the Arizona House of Representatives together constitute the "Legislature" (subject to the governor's veto and direct referendum power of the people)

for purposes of "who" the Elections Clause authorizes to establish Arizona's congressional districts.

In contrast, under Prop. 106, members of the IRC are not elected but rather are selected from a complicated selection process between individual officers at the Arizona Legislature and the Arizona Commission on Appellate Court Appointments. (Doc. 16 at 3)(giving details of selection process). Once appointed, members of the IRC can only be removed by the Governor with concurrence of two-thirds of the Senate for "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." Ariz. Const. art. IV, pt. 2, § 1 (10). The IRC is simply not the "Legislature" contemplated by the Elections Clause.

2. The Independent Redistricting Commission cannot claim to be "part" of Arizona's constitutional lawmaking process when Prop. 106 entirely replaces that process for redistricting.

Under the Arizona Constitution, there are many constitutionally-defined processes that result in the enactment of law. However, in order for the Legislature itself to enact law, there are only four constitutionally-defined processes: (1) *Traditional* – If a bill is passed by a majority of all members elected to each house, signed by the presiding officer of each house in open session, and presented to and approved by the governor, the bill becomes a law. *See* Ariz. Const. art. 4, pt. 2, §§ 12, 15, and art. 5, § 7. (2) *Veto Override* – If the governor disapproves such a bill after its presentment, the bill becomes a law if two-thirds of the members of each house so vote. *See* Ariz. Const. art. 5, § 7. (3) *Executive Inaction* – If the governor does not return such a bill to the legislature within five days of its presentment, the bill becomes a law. *See id.* (4) *Referendum* – If the legislature passes such a bill, it may avoid presentment to the governor by ordering the submission of the bill to the people at the polls for their approval or disapproval (alternatively, qualified electors who meet certain conditions may order submission of any bill enacted by the legislature for the people's approval or disapproval at the polls); if met with the voters' approval, such a bill becomes a law. *See* Ariz. Const. art. 4, pt. 1, § 1.

Therefore, applying the Supreme Court's interpretation of the Elections Clause to Arizona, anything that deviates from constitutional process (1), (2), (3), or (4) violates the Elections Clause because (1)-(4) are the only constitutionally-permissible processes available to the Legislature to enact statutes. Not only does Prop. 106 plainly deviate from (1)-(4), its stated purpose was to exclude the legislature from congressional redistricting. Thus, it fails because, under *Smiley*, the Legislature's power to set congressional districts can be conditioned, but it cannot be removed entirely.

Despite this, Defendants reason as follows: because the people reserved initiative power to themselves, and the people created the IRC through Prop. 106, and because redistricting is an inherently legislative process, therefore the IRC must be part of the lawmaking process and thus constitutional under the Elections Clause. (Doc. 16 at 9-10.) Again, this misses the constitutional point. The Elections Clause requires lawmaking by the Legislature. Other non-legislative actors may have a role in the lawmaking process for congressional redistricting—such as the Governor's approval authority—but a state may not take the redistricting authority away from its legislature and give it over to some other individual or body. Neither the placement of the IRC in the legislative article, nor the holdings that redistricting is inherently legislative, can transform the IRC into a "part" of Arizona's lawmaking process. The only role left to the Legislature in congressional redistricting under the Arizona Constitution is to "make recommendations" to the IRC after a "draft map" has been drawn by the district, if the legislature so desires. Ariz. Const. art. 4, pt. 2, § 1(16). However, such recommendations do not create binding legal obligations upon the IRC. *Id.* ("The independent redistricting commission shall then establish final district boundaries."). Importantly, Prop. 106 allows no other aspect of the state's lawmaking power – i.e. veto or referendum –to interfere with its exclusive delegation of redistricting power to the IRC. Rather than being a "part" of Arizona's lawmaking process, the IRC usurps the entire lawmaking process for redistricting and removes the Legislature from its constitutionally-mandated role in the process. Because the Elections Clause requires the Legislature to establish congressional districts, Prop. 106 must fail

constitutionally. Proposition 106 simply cannot transform the IRC into the Legislature for purposes of congressional redistricting.

3. The Independent Redistricting Commission is unique among challenged state redistricting schemas.

Proposition 106 is different from every other redistricting regime that has survived Elections Clause scrutiny because it explicitly takes the power of redistricting away from the Legislature and places it into an independent commission.[1] *See* Ariz. Const. art. IV, pt. 2, § 1 ("The independent redistricting commission shall establish congressional and legislative districts."). In the scenarios previously examined, the state legislatures were subjected to various checks and balances, but they still retained the authority to draw the lines. *Cf. Grills v. Branigin*, 284 F.Supp. 176, 180 (D.C. Ind. 1968) (a three judge panel of the Southern District of Indiana held that the Elections Clause precludes the Election Board of Indiana from drawing district lines because it lacked legislative or judicial power under the Indiana Constitution); *Smith v. Clark*, 189 F. Supp. 2d 548, 556 (S.D. Miss. 2002) *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003) and *amended sub nom. Smith v. Hosemann*, 3:01-CV-855-HTW-DCB, 2011 WL 6950914 (S.D. Miss. Dec. 30, 2011) (holding the Mississippi State Constitution unconstitutional because it granted the Mississippi Supreme Court the authority to redistrict circuit and chancery court districts in the State of Mississippi when the legislature fails to do so. *See* Miss. Const. Art. 6, § 152. (emphasis added)). Proposition 106 does not limit or regulate the Legislature's redistricting authority - it obliterates it. *See* Ariz. Const. art. IV, pt. 2, § 1 ("The independent redistricting commission shall then establish *final* district boundaries.") (emphasis added).

4.

[1] In fact, only four states have redistricting commissions that act entirely without direct legislative involvement. Hawaii (Haw. Const. art. IV); Montana (Mont. Const. art. V, § 14); Idaho (Idaho Const., art. III, § 2); and Arizona. Of the four, only Hawaii utilized this method before the 1990s redistricting.

5. Proposition 106 is not saved by the Arizona Supreme Court's unrelated analysis of judicial review of the IRC's actions.

Defendants cite *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, to support their argument that because the IRC acts legislatively it must be part of the lawmaking process. (Doc. 16 at 10) (citing *id.*, 208 P.3d 565 (Ariz. 2009). However, that case dealt with the "extent to which a court can review Commission decisions." *Id.* at 680. Given the large body of case law on the topic of deference to lawmaking acts, the Arizona Supreme Court had little difficulty in that for purposes of judicial deference and judicial review within the state, the IRC is a legislative body. *Id.* at 684. However, nothing in that case resolved the issue of whether the IRC was "the representative body which made the laws of the people" under the Elections Clause. *Smiley*, 285 U.S. at 365.

C. The history and context of the Elections Clause supports the Legislature's position that it, and not the IRC, shall provide the "Times, Places and Manner of holding Elections."

By the final draft of the Constitution, the Framers' understanding of the distribution of power established under the Elections Clause was clear: (1) the people of the states elect representatives to the House of Representatives; (2) the legislatures of the states regulate those elections; and (3) Congress has the power to alter and overrule federal election regulations enacted by the state legislatures, as well as to regulate federal elections on its own initiative. Moreover, there is concrete evidence that the Framers distinguished the people—understood as non-government individuals in society—from the legislatures of the states—understood as representative bodies of state officers that made the laws of the people. The Framers ultimately empowered only two entities to directly regulate congressional elections: the federal and state legislatures.

On June 21, 1787, delegate Charles Pinkney introduced the first draft of what would become the Elections Clause. JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787: WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA / REPORTED BY JAMES MADISON 22, 137 (proceedings of June 21, 1787)

(Prometheus ed., 2007 [1787]). Specifically, Pinkney moved "that the 1st branch, instead of being elected by the people, should [sic] be elected in such manner as the Legislature of each State should direct." *Id.* (internal quotations omitted). Delegate Alexander Hamilton objected to Pinkney's proposal on grounds it could nullify the twice voted-upon resolution that the people of the states would elect representatives. *Id*. After much debate that again focused on the balance of power between the people of the states and the legislatures of the states, Pinkney's motion failed by a vote of 4-6. *Id.* at 142-44.

On July 26, 1787, the Federal Convention finished voting on a set of resolutions that would form the framework of the U.S. Constitution. *Id.* 332-33 (proceedings of July 26, 1787). The delegates unanimously referred the resolutions to the Committee of Detail to draft a proposed constitution to be presented to the Committee of the Whole for debate on August 6. *Id.* at 332. While in committee, Pinkney introduced a draft constitution to the Committee of Detail; his version of the Elections Clause read as follows:

> [Article] 5
> Each State shall prescribe the time & manner of holding elections by the People for the house of Delegates & the House of Delegates shall be the judges of the elections returns & Qualifications of their members.

Appendix IV, No. 3, RECORDS OF THE FEDERAL CONVENTION 602 (full draft of Pinkney's proposed constitution) (emphasis added).

Pinkney's version of the Elections Clause empowered "Each State" to regulate congressional elections, without reference to each state's legislature. The Committee of Detail changed that language before the draft constitution's submission to the Committee of the Whole. On August 6, the Committee of Detail submitted its draft constitution with an amended Elections Clause that read as follows:

> [Article] VI
> Sect. 1. The times and places and manner of holding the elections of the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.

RECORDS OF THE FEDERAL CONVENTION 339 (Committee on Detail presenting its draft constitution to the Federal Convention) (proceedings of August 6, 1787) (emphasis added).

Thus, the evidence shows that the Framers expressly considered vesting the power to regulate congressional elections in "Each State," but consciously changed the language from "Each State" to "the Legislature of each State." This clearly suggests that the term Legislature does not refer only to the legislative power of a state generally, but rather contemplates a specific role to be played by the representative body that makes the laws of the people – an interpretation corroborated by the earlier debates over the distinctions between the "people" and the "State" as separate entities relating to the federal government.

This interpretation is bolstered by James Madison's argument that Congressional authority would trump the power of the state legislatures (as distinct from the actions of the people) in the field of regulating congressional elections:

> The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode [of the elections]. This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrouled [sic] right of regulating the times[,] places & manner of holding elections. . . . What danger could there be in giving a controuling power to the Natl [sic] Legislature?

Id. at 371, 372 (proceedings of August 9, 1787).

Defendants argue that nothing in the legislative history of the Elections Clause suggests that the Framers intended to limit the states' lawmaking discretion. (Doc. 16 at 8.) As shown in this section, this is far from the truth. The legislative history of the Elections Clause straightforwardly lays out the rationale for why the people are deliberately excluded from the congressional redistricting process—in Madison's words, empowering state legislatures at the expense of the people "supposes that the result will be somewhat influenced by the mode." Accordingly, Defendants have neither history nor precedent on their side to argue that the Elections Clause's use of the word "Legislature" was a gratuitous reference to an entire state's lawmaking ability.

II. LACHES IS INAPPLICABLE TO THIS CASE.

The IRC invokes laches in order to avoid the constitutional merits. The Court should reject this maneuver because the Legislature is a governmental entity pursuing the public

interest; and because the Defendants cannot establish the essential elements of laches on the basis of the First Amended Complaint without inclusion of matters outside the pleadings.

"In general, equitable defenses, such as estoppel and laches, will not lie against the state, its agencies or subdivisions in matters affecting governmental or sovereign functions." *Mohave County v. Mohave-Kingman Estates, Inc.*, 586 P.2d 978, 982 (Ariz. 1978); *see also Kerby v. State ex rel. Frohmiller*, 157 P.2d 698, 704 (Ariz. 1945) (same); *and see* 30A C.J.S. *Equity* § 141 (2012)(multiple citations showing that this is the strong majority rule). "[W]here the public interest is involved neither estoppel nor laches can be permitted to override that interest." *George v. Arizona Corp. Comm'n*, 322 P.2d 369, 372 (Ariz. 1958); *U.S. v. Ruby Co.*, 588 F.2d 697, 705 (9th Cir. 1978) (same).

The Legislature brings this action to vindicate the unquestionably important public interest of maintaining compliance with the United States Constitution. *See Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) ("it is always in the public interest to prevent the violation of a party's constitutional rights."); *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."). By the same token, it would cut against the public interest to ignore the authority granted to the Legislature by the Elections Clause on the basis of laches.

Beyond the fact that laches does not apply to the Legislature as a governmental entity pursuing the public interest, Defendants fail to meet the standard elements applicable to private parties. Laches is an equitable defense, requiring "proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. U. S.*, 365 U.S. 265, 282 (1961). Laches does not apply unless both elements are substantiated as a matter of fact. *Brown v. Continental Can Co.*, 765 F.2d 810, 814 (9th Cir. 1985) ("Laches is an equitable doctrine. Its application depends upon the facts of the particular case.") The party alleging laches bears the burden of proof. *Costello*, 365 U.S. at 282. The Defendants cannot meet that burden.

A. There Is No Unreasonable Delay Here

Here, the IRC is wrong to assert that these elements can be established on the face of the First Amended Complaint. As to the first element—delay—the IRC argues that there is unreasonable delay because the Legislature did not bring an Elections-Clause challenged in 2000. (Doc. 16 at 12.) That logic is flawed, however, because it is axiomatic that the actions of a prior legislature are not attributable to the current legislature. The first legislature to convene after the passage of Proposition 106 was the Forty-Fifth Legislature. As a matter of public record, the current Legislature—the Fiftieth Legislature—is comprised of almost entirely different members. This Legislature is entitled to come to a different conclusion concerning its authority under the Elections Clause. Otherwise one legislature would bind another in the future—an outcome fundamentally inconsistent with the legislative power in Arizona. *Arizona Tax IRC v. Dairy & Consumers Co-op. Ass'n*, 215 P.2d 235, 239 (Ariz. 1950); *Frohmiller v. J. D. Halstead Lumber Co.*, 272 P. 95, 96 (Ariz. 1928).

B. The IRC Has Not Been Prejudiced

The question of delay is not viewed in isolation. "[L]aches is not a doctrine concerned solely with timing. Rather, it is primarily concerned with prejudice. A lengthy delay, even if unexcused, that does not result in prejudice does not support a laches defense." *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 988 (9th Cir. 2004) (citations omitted). "[P]rejudice typically refers to the fact that a defendant no longer has witnesses or evidence available to it as a result of the passage of time, or that it has altered its position in reliance on a plaintiff's inaction." *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1412 (9th Cir. 1993) (citations and quotations omitted). "'Common forms of prejudice to defendant are loss of evidence to meet the claim of plaintiff, change in situation induced by the delay, and change in the value of the subject-matter involved....'" The IRC makes no argument that the delay in this case harms its ability to muster evidence. Indeed, this is a purely legal case turning on the constitutional command of the Elections Clause. As for any reliance-based change in situation, the IRC points to state

resources expended on redistricting since 2000. (Doc. 16 at 12-13.) But these are not true reliance costs. The IRC has merely proceeded with its duties under Prop. 106. It would have gone to these lengths—which are required by the Arizona Constitution—even if the Legislature filed an Elections Clause challenge in early 2001.

The cases the IRC cites do not apply here for two reasons. First, the prejudice in those cases was premised on a looming election deadline. (Doc. 16 at 12.) Here, as specifically alleged, the Legislature is clearly not attempting to obtain relief touching the 2012 election cycle. (Doc. 12 ¶¶ 1, 30-32.) Second, none of the cases cited by the IRC apply laches to a governmental plaintiff, much less a governmental plaintiff seeking to vindicate authority conveyed by the United States Constitution. *See* discussion, *supra*.

The IRC attempts to build a theory of prejudice based on seeing its work persist throughout the next decade. (Doc. 16 at 13-14.) But this is no different from claiming prejudice on the basis of the potential of losing this case. This clearly falls short of the applicable standard for prejudice: "[T]he mere prospect that a defendant might lose a case does not suffice to warrant the imposition of laches as a barrier to a plaintiff's action. . . . [T]hat sort of prejudice could be claimed by all defendants all of the time." *Wauchope*, 985 F.2d at 1412 (quotation omitted; emphasis added). The IRC claims that the general public is prejudiced by this action. (Doc. 16 at 11 n. 2.) That assertion ignores the Elections Clause mandate that the public has a right to have congressional districts constitutionally established by their elected representatives, as opposed to an unelected body. Equity should not bar judicial review of the important constitutional questions raised here. That result would work great prejudice on the public. *Sears v. Treasurer and Receiver General*, 98 N.E.2d 621, 632 (Mass. 1951) ("An unconstitutional law cannot be made valid by the laches of anyone or by any lapse of time."); *Asbury Park Press, Inc. v. Woolley*, 161 A.2d 705, 711 (N.J. 1960) ("Acquiescence for no length of time can legalize a clear violation of duty where the people have plainly expressed their will in the Constitution and have appointed judicial tribunals to enforce it."). The IRC's laches arguments are unavailing.

CONCLUSION

The Legislature has presented ample authority for its causes of action. The constitutional framework does not countenance the complete exclusion of the Legislature from the redistricting process, and laches does not bar the claims. The Legislature respectfully requests the Court to deny Defendants' Motion to Dismiss and order Defendants to answer.

RESPECTFULLY SUBMITTED on August 27, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2012, I electronically transmitted the attached document to the Clerk's office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the CM/ECF to the following:

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