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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Arizona State Legislature,

Plaintiff,

vs.

Arizona Independent Redistricting Commission, and Colleen Mathis, Linda C. McNulty, José M. Herrera, Scott D. Freeman, and Richard Stertz, members thereof, in their official capacities; Ken Bennett, Arizona Secretary of State, in his official capacity,

Defendants.

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

DEFENDANTS ARIZONA INDEPENDENT REDISTRICTING COMMISSION AND COMMISSIONERS MATHIS, MCNULTY, HERRERA, FREEMAN, AND STERTZ'S REPLY IN SUPPORT OF MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

(Assigned to Judge Paul G. Rosenblatt)

The Legislature misuses the Elections Clause to elevate its own authority at the expense of Arizona's Constitution and voters. Its argument would eliminate not only the authority of the Arizona Independent Redistricting Commission (the "Commission") over congressional redistricting, but would eliminate all citizens' initiatives that affect the time, place, and manner of federal elections. As explained in the Motion to Dismiss (the "Motion"), the Supreme Court long ago, however, established that the Elections Clause

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does not impose restrictions on a state's lawmaking process. *Smiley v. Holm*, 285 U.S. 355, 367-68 (1932). Instead, the Elections Clause gives states broad authority to regulate federal elections, while also establishing Congressional authority to preempt state requirements. *Gonzalez v. Arizona*, 677 F.3d 383, 391 (9th Cir. 2012) (en banc) (citing *Colegrove v. Green,* 328 U.S. 549, 554 (1946)). Because the Elections Clause does not favor a state legislature over decisions of its citizens, or other lawmaking processes established in a state constitution, the Legislature's claim should be dismissed. Additionally, the First Amended Complaint warrants dismissal under the doctrine of laches because the Legislature unreasonably delayed in filing this lawsuit, which has resulted in prejudice to the Commission and the people of Arizona.

ARGUMENT

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

A. The Elections Clause Does Not Require Redistricting to be Performed Exclusively by the Arizona Legislature.

Despite the Legislature's argument to the contrary, the Supreme Court has never held that the Elections Clause's use of the term "Legislature" grants exclusive authority to each state's legislative body to draw congressional lines. Rather, the Court has held that this term refers to the state's legislative process, as defined by its constitution, and that a state retains authority to define the lawmaking process it will use to regulate the times, places and manner of congressional elections in accordance with the Elections Clause. *Smiley*, 285 U.S. 355; *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916). As the exclusive source of legislative power, the Arizona Constitution serves as a blueprint for the exercise of legislative authority.

In Arizona, the people vested legislative authority in the Legislature, but also reserved for themselves the power to enact laws and constitutional amendments independently of the Legislature. Ariz. Const. art. 4, pt. 1, § 1(1); *see also id.* art. 2, § 2 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual

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rights."). The Legislature is but an instrumentality created by the Arizona Constitution to exercise a part of its sovereign prerogatives, namely, the lawmaking power. *State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 395, 265 P. 2d 447, 452 (1953). By reserving the power to amend the Constitution themselves, the people retain the power to alter and reshape the legislative power of the state and the processes by which legislative enactments become law. The citizens exercised this authority in 2000 to create the Commission and did so in compliance with the Elections Clause.

The Commission exercises its legislative power pursuant to procedural and substantive requirements established by the voters. Ariz. Const. art. 4, pt. 2, § 1(14)-(17). Moreover, the Commission remains accountable to the people – the source of its delegated power – because its power can be removed through a voter initiative or a measure referred to the people by the Legislature. Ariz. Const. art. 4, pt. 1, § 1(2); *id.* at art. 21, § 1.[1] Indeed, the Arizona Supreme Court has definitively held that the Commission acts as a legislative body under Arizona law, through delegation of legislative power from the people. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 594-95 ¶ 19, 208 P.3d 676, 683-84 (2009). The Legislature's argument that this interpretation was made in deciding the state court's standard of review does not alter the nature of the Commission's constitutional authority. (*See* Doc. 17 at 14.)

The Legislature relies almost exclusively on a sentence in *Smiley*, which says the term "Legislature" means the state's representative body, but neglects to cite the following sentence which states that "[t]he question here is not with respect to the 'body' as thus described but as to the function to be performed." 285 U.S. at 365. Thus, the Court held a functional analysis must be performed when construing the term

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[1] The Legislature is certainly aware of this option. Earlier this year one house of the Legislature passed Senate Concurrent Resolution 1035 (attached as **Exhibit 1**) to refer to the 2012 general election ballot a proposal to eliminate the Commission and reinstate the Legislature's authority to draw congressional and legislative districts. The Commission respectfully requests that the Court take judicial notice of this proposed bill, which is a matter of public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (2001).

"Legislature" under the Elections Clause. *Id.* The functional analysis applied by the Court in *Hildebrant* and *Smiley*, and recognized in *Hawke v. Smith*, 253 U.S. 221 (1920), does not require redistricting to be performed solely by the Legislature but rather pursuant to the state's legislative process, which in Arizona, includes the citizen initiative. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) ("The States possess a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices.").

Significantly, *Smiley* and *Hildebrant* demonstrate that the Elections Clause does not exempt state legislatures from the normal course of regulation by state constitutions. *Smiley*, 285 U.S. at 365. Where the U.S. Constitution calls upon the state legislature to engage in lawmaking, a state constitution's supremacy as to legislative authority remains intact. *Id.* at 365-69; *see also People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003) (the U.S. Constitution does not grant redistricting power to the state legislatures exclusively and the state may draw congressional districts via any process it deems appropriate), *cert. denied sub nom. Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093 (2004).[2]

The lower-court cases cited by the Legislature (Doc. 17 at 13) support the Commission's position because they establish that congressional redistricting may be carried out by a body other than the Legislature. In *Smith v. Clark*, the court stated that *Hildebrant* and its progeny "suggest that congressional redistricting must be done within the perimeters of the legislative process, *whether the redistricting is done by the legislature itself or pursuant to the valid delegation of legislative power*." 189 F. Supp. 2d 548, 554 (S.D. Miss. 2002) (emphasis added), *aff'd on other grounds*, *Branch v. Smith*, 538 U.S. 254 (2003). The court found "no cases that support a contrary

[2] The Colorado Supreme Court, citing the Arizona Constitution, also recognized that the term "legislature" in the Elections Clause extends to an independent commission separate from the state legislature. *Davidson*, 79 P.3d at 1232.

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conclusion." *Id.* In *Grills v. Branigin*, the court rejected the contention that the state elections board could draw a congressional map, but only because it did not possess the legislative or judicial power *under the Indiana Constitution*. 284 F. Supp. 176, 180 (S.D. Ind.) (emphasis added), *summarily aff'd*, 391 U.S. 364 (1968). Finally, in *Preisler v. Secretary of State of Missouri*, the court stated that it reached its conclusion based on "*[b]oth the state and* federal constitutions." 257 F. Supp. 953, 961 (W.D. Mo. 1966) (emphasis added), *summarily aff'd sub nom. Kirkpatrick v. Preisler*, 385 U.S. 450 (1967).[3]

These cases all recognize that the legislative power over congressional redistricting can properly be delegated to a body other than "the Legislature," and that state law must be considered when interpreting the Elections Clause. *See also Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (recognizing that "[c]ongressional redistricting is a lawmaking function subject to the state's constitutional procedures."). Indeed, state courts are often called upon to create redistricting plans when a state legislature fails to do so, even in congressional redistricting. *Growe v. Emison*, 507 U.S. 25, 34 (1993) (state courts have a significant role in congressional redistricting and the federal courts must defer consideration of disputes involving redistricting where the state, through its legislative *or* judicial branch, has begun to address the task itself); *Branch*, 538 U.S. at 261-62 (quoting *Growe*, 538 U.S. at 34); *Grills*, 284 F. Supp. at 180.

The Legislature's argument that there is "concrete" evidence that the Framers distinguished a state's citizens from its legislature under the Elections Clause (Doc. 17 at 14) is contradicted by the authority it cites for this proposition. The Legislature refers to a Charles Pinckney draft of the Elections Clause (*id.* at 15), but the source cited by the Legislature states that the Charles Pinckney "draft" was created many years after the convention and "beyond all doubt" does not represent Pinckney's original plan or even

[3] Likewise the Legislature simply ignores the court cases cited by the Commission in its Motion (Doc. 16) at 7 n.1. All of these cases are consistent with the Commission's position.

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have that plan as its basis. 3 *The Records of the Federal Convention of 1787* at 603-04 (Max Farrand ed., Yale Univ. Press rev. ed. 1966). In fact, the "reconstructed" Pinckney draft, which reflects Pinckney's draft as presented to the convention, contains no language similar to the Elections Clause. *Id.* at 604-09; *see also Gonzalez*, 677 F.3d at 390 & n.6 (noting that Pinckney actually opposed the Elections Clause). It is well established that the Framers "focused almost exclusively on the Elections Clause's second part, which allows congress to supervise or alter the states' exercise of their Elections Clause power." *Brown v. Sec'y of State of Fla.*, 668 F.3d 1271, 1275 (11th Cir. 2012).

The Legislature's interpretation of the Elections Clause would prohibit *all* laws regulating the "times, places and manner" of federal elections enacted through the citizen initiative. However, as noted, the Court in *Hildebrant* soundly rejected this narrow interpretation of the Elections Clause *by accepting a functional analysis of state legislative processes.* 241 U.S. at 569-70. Not surprisingly, the Legislature does not cite a single case striking down any law under the Elections Clause because of the manner in which it was enacted. *See Brown*, 668 F.3d at 1279 (the fact "[t]hat a law was enacted by the people themselves, pursuant to state law, rather than by the state legislative body is not enough to invalidate that action under the Elections Clause.").[4] Because the Elections Clause does not preclude state constitutions from establishing independent commissions to conduct congressional redistricting, the Legislature's First Amended Complaint should be dismissed.

[4] The federal courts have never limited the states' authority to provide for a citizen initiative process to enact state laws. *Pacific States Telephone Co. v. Oregon*, 223 U.S. 118, 151 (1912) (holding nonjusticiable a claim that a state tax was unconstitutional because it was passed through a voter initiative); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself").

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B. The Legislature Has Not Been Excluded From Congressional Redistricting.

The Legislature also argues that it has been improperly excluded from congressional redistricting. (*See* Doc. 17 at 8-9.) It cites dicta in *Brown* that suggests that a state cannot "so limit the legislature's discretion as to *eviscerate* its constitutionally delegated power" and "*effectively exclude*" it from congressional redistricting. *Brown*, 668 F.3d at 1280 (emphasis added). Thus, the Legislature posits, "the state can subject the legislature's power to conditions, but it cannot *deprive the legislature entirely* of its power." (Doc. 17 at 9 (emphasis added).) However, even accepting the *Brown* dicta as persuasive, the Legislature has not been effectively excluded from any role in congressional redistricting in Arizona.

As discussed in the Motion, the Legislature is provided several opportunities to participate in the redistricting process by the Arizona Constitution. (*See* Doc. 16 at 3-4.) More fundamentally, the Legislature retains the power to refer its own redistricting plan directly to the people by a majority vote in both houses, which will become law if it is approved by a majority of the votes cast at a special election or the next general election. Ariz. Const. art. 21, § 1. Notably, the Speaker of the House introduced a bill to do just that with respect to the 2012 redistricting cycle.[5] Nothing in the provisions of the Arizona Constitution, which establish the Commission, limits this power.

Accordingly, even if the Elections Clause requires that the Legislature itself have a role in congressional redistricting, Arizona's Constitution satisfies that requirement. The better analysis, however, recognizes that the Elections Clause permits any exercise of state legislative authority to establish the times, places or manner of congressional elections, provided that it does not conflict with an act of Congress. Under either

[5] *See* House Concurrent Resolution 2053, attached hereto as **Exhibit 2**. The Commission respectfully requests that the Court take judicial notice of this proposed bill. *See* note 1, *supra*.

approach, the First Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed.

II. Laches Bars the Legislature's Claim.

Recognizing that its unreasonable and inexcusable delay in challenging the existence of the Commission bars its lawsuit, the Legislature attempts to avoid the application of the laches doctrine altogether by arguing that equitable defenses such as laches and estoppel generally do not lie against state, and because it seeks to pursue the public interest. (Doc. 17 at 17.) The Legislature's arguments are unavailing.

It is well-established that equitable defenses such as estoppel and laches can, and do, apply to claims asserted by the state. *See United States v. Ruby Co.*, 588 F.2d 697, 702-03 (9th Cir. 1978) (holding that "estoppel may be applied against the government even when acting in its sovereign capacity" (citation omitted)); *see also Valencia Energy v. Ariz. Dept. of Revenue*, 191 Ariz. 565, 959 P.2d 1256 (1998) (same.) As the court explained in *Ruby*, equitable doctrines should be applied "where justice and fair play require it." 588 F.2d at 702 (quoting *United States v. Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973)). Here, justice requires that the Legislature's untimely challenge to the Commission's authority and existence be precluded. The people of Arizona decided over a decade ago that they no longer wanted the Legislature in charge of redistricting and therefore created an independent commission. Since that time, the Commission has diligently performed its duties, spending considerable time and resources to complete the complex work of redistricting. After having sat idly by while this work was performed, and after having participated in the Commission's redistricting process, the Legislature is precluded by the doctrine of laches from now challenging the constitutionality of the Commission to the detriment of the Commission and the public.

Contrary to the Legislature's arguments otherwise, the Commission has established the necessary elements of laches. There can be no question that the Legislature inexcusably and unreasonably delayed in bringing suit.

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> In considering whether a plaintiff's delay was unreasonable, courts consider: (1) the length of the delay, measured from the time the plaintiff knew or should have known about his potential cause of action, and (2) whether the plaintiff's delay was reasonable, including whether the plaintiff has proffered a legitimate excuse for his delay.

Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 997 (9th Cir. 2006) (citing *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 836 (9th Cir. 2002)).

The Legislature does not offer a single explanation, much less a legitimate excuse, for its lengthy delay in bringing the instant lawsuit. Instead, it tries to down-play the twelve years that have passed since the creation of the Commission by noting that it – the Fiftieth Legislature – is an entirely different legislature than that which existed at the time Proposition 106 was passed – the Forty-Fifth Legislature. (Doc. 17 at 18.) It claims that it cannot be bound by a prior legislature, and that it "is entitled to come to a different conclusion concerning its authority under the Elections Clause." (*Id.*) Whether or not this may be true in certain circumstances, there must be some outer limit to this principle. The Legislature should not be permitted to wait an indefinite amount of time to raise a constitutional challenge to a citizen's initiative. The people of Arizona deserve finality.[6]

Moreover, the Legislature does not explain or justify the *current* Legislature's unreasonable delay in raising its constitutional challenge to the existence of the Commission. The current Legislature began its first regular session in January 2011, over a year before the Commission completed any of its redistricting work. (*See* Doc. 12 ¶ 27 (indicating the Commission *completed* its work on the congressional map on January 17, 2012)). To comply with one-person, one-vote requirements and create Arizona's new ninth congressional district, this decade's congressional redistricting work had to be done in time for the 2012 elections, the election following the most recent decennial census.

[6] Curiously, although the Legislature places emphasis on the fact that it is a different legislature than the Forty-Fifth Legislature, it did not file this lawsuit as the Fiftieth Legislature. Rather, it filed suit as the "Arizona State Legislature." (*See* First Amended Complaint (Doc. 12).) *Contra Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 143 P.3d 1023 (2006).

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Thus, if the Legislature believed that the use of an independent redistricting commission violated the Elections Clause, it should have brought suit to challenge the constitutionality of the Commission before any redistricting work was begun and certainly before that time-sensitive work was completed. Instead, the Legislature chose to let the entire redistricting process play out before bringing its challenge. And, as set forth in the Motion (Doc. 16 at 13), the Legislature participated in this process by challenging the pool of applicants selected by the Commission on Appellate Court Appointments, selecting members of Commission, providing recommendations to the Commission through memorial and minority report, and attempting to remove the Chairperson of the Commission. The Legislature has provided no excuse for its unreasonable delay in bringing suit. The laches doctrine is designed to prohibit the Legislature's "wait and see" strategy.

The Commission has likewise established that the Legislature's delay has resulted in prejudice to the Commission and the citizens of Arizona. Prejudice can be demonstrated by showing that the defendant "took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly." *Danjaq, LLC v. Sony Corp.*, 263 F.3d 942, 955 (9th Cir. 2001). As a result of the Legislature's delay, both the Commission and the citizens of Arizona have suffered prejudice in the form of actions taken to establish and rely upon the new congressional districts and monies spent. As explained more fully in the Motion, the Commission has spent significant amounts of time and taxpayer money to redistrict the congressional districts of Arizona. (Doc. 16 at 11-13.) The Commission's work has been completed, the citizens of Arizona have participated in the redistricting process and have an interest in seeing the districts adopted by the Commission (and pre-cleared by the Department of Justice) used for the next ten years. The Commission and the people have acted in reliance on the premise that the Commission is the constitutional legislative body empowered to perform the task of redistricting in this State. The Legislature's failure to raise its constitutional challenge in a timely fashion after the creation of the Commission bars this lawsuit.

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CONCLUSION

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

RESPECTFULLY SUBMITTED this 7th day of September, 2012.

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CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 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 reply and the exhibits have been mailed to the Honorable Paul G. Rosenblatt's chambers pursuant to Local Rule.

By: /s/ *Lisa Black*