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and Commissioners named in their official capacities

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

15 Arizona State Legislature,  
 16  
 17 Plaintiff,

17 vs.

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

Defendants.

No.2:12-CV-01211-PGR-MMS-GMS

**DEFENDANT ARIZONA  
 INDEPENDENT  
 REDISTRICTING COMMISSION  
 AND DEFENDANT  
 COMMISSIONERS RESPONSE  
 TO PLAINTIFF'S MOTION FOR  
 PRELIMINARY INJUNCTION,  
 CONSOLIDATION, AND  
 JUDICIAL NOTICE (Doc. 33)**

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1           The issues raised in the Legislature’s motion have in significant part been fully  
2 briefed for Defendants’ Motion to Dismiss. (*See Docs. 16-18.*) Although this new  
3 briefing brings little new in terms of precedent or other authority, the Legislature’s  
4 motion is remarkable for the extent to which it asks the Court to impose previously non-  
5 existent constraints on the states’ power to order their affairs.

6           Since statehood, the Arizona constitution has reserved for the “people” the power  
7 to “propose laws and amendments to the Constitution” via initiative and referendum.  
8 Ariz. Const. art. IV, pt. 1, § 1(1). In 2000, Arizona’s voters exercised their power by  
9 approving Proposition 106, which amended the Arizona Constitution to create the  
10 Arizona Independent Redistricting Commission. The Commission’s essential purpose  
11 is to “provide for the redistricting of congressional and state legislative districts” each  
12 decade, Ariz. Const. art. IV, pt. 2, § 1(3), a task which is “primarily the duty and  
13 responsibility of the State.” *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2623  
14 (2013). *See also Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (“redistricting . . . is a  
15 legislative task which the federal courts should make every effort not to pre-empt”).

16           This decade’s Commission has completed Arizona’s redistricting, and elections  
17 have occurred using the new districts. Plaintiff, the Arizona Legislature, participated in  
18 the process throughout.

19           Still, the voters’ approval of Proposition 106 was surely a loss of influence for  
20 the Legislature. That was the intent. Concerned more with the loss of power than the  
21 will of the people who elected its members, the Legislature now contends that  
22 Proposition 106 is unconstitutional with respect to congressional redistricting and that  
23 this Court should enjoin the use of Arizona’s duly enacted congressional plan because  
24 the United States Constitution states that “[t]he Times, Places, and Manner of holding  
25 Elections for Senators and Representatives, shall be prescribed in each State by the  
26 Legislature thereof.” U.S. Const. art. I, § 4, cl. 1 (the “Elections Clause”).

27           The Legislature’s argument reduces to this: the Elections Clause delegates power  
28 to a “legislature” *and* withheld power from the “people,” and thus the Elections Clause

1 prohibits the people from using the initiative power to exclude the “legislature” from the  
2 redistricting process. The Legislature is wrong.

3 **First**, the Court need not figure out the constitutional line because the  
4 Legislature’s claim fails even under its own theory. The Legislature has not been  
5 excluded. It is free to make and pass a new plan and submit it to the voters for  
6 approval. This is precisely what was held constitutional in *Ohio ex rel. Davis v.*  
7 *Hildebrant*, 241 U.S. 565 (1916) and *Smiley v. Holm*, 285 U.S. 355 (1932).

8 **Second**, the Elections Clause is an allocation of power between the states and the  
9 federal government, not a federal directive as to how states ought to organize their  
10 internal legislative power. The Court should decline to write into the Elections Clause a  
11 restriction on state power that was never intended. The Legislature’s interpretation of  
12 the cases going against it and the historical record is as flawed as it is opportunistic.  
13 The idea that the Framers intended for the words “legislature thereof” to exclude a  
14 method of legislating that did not exist at the time but that is now commonplace makes  
15 little sense, and the historical references quoted have nothing to do with the issue.

16 **Third**, this question is not justiciable. As the Supreme Court has already held,  
17 whether a state’s organization of legislative power violates the Elections Clause is not a  
18 justiciable question because it is no different than a claim that the method of governing  
19 violates the constitutional guarantee of a republican form of government. *Hildebrant*,  
20 241 U.S. at 569. As with the Guarantee Clause, the Constitution commits this issue to  
21 Congress. And Congress has acted. In 1911 Congress amended the statute governing  
22 reapportionment specifically in response to the then-modern trend of initiative and  
23 referendum.<sup>1</sup> That respect for state sovereignty persists, and this Court should not  
24 interfere with the balance Congress has approved. *See* 2 U.S.C. § 2a(c) (providing for  
25 State redistricting “in the manner provided by the law thereof”).

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26 <sup>1</sup> In the same year, Congress also approved Arizona’s Constitution with its initiative and  
27 referendum provisions. Joint Resolution To Admit the Territories of New Mexico and  
28 Arizona as States into the Union upon an equal footing with the original States, 37 Stat.  
39 (62nd Cong., 1st Sess. 1911) (S.J. Res. 57).

1           **Fourth**, setting aside the merits, the Legislature’s claim does not justify  
2 injunctive relief. The very Legislature that brought this lawsuit participated in the  
3 Commission’s redistricting process at every step, filing suit only after the Commission’s  
4 work was done. The doctrines of laches and waiver are designed to prevent the kind of  
5 gamesmanship used here. The time to enjoin the districting process was before the  
6 process was completed, not after the new districts were in place. Even if the Court  
7 concludes that the Elections Clause prohibits Arizona’s redistricting scheme, any relief  
8 should restrain future redistricting rather than upend the current districting plan.

9           **I. The Court Should Reject the Motion Because It Is Legally Flawed, Non-**  
10           **Justiciable, and the Equities Weigh Against the Requested Relief.**

11           The Court should deny the Legislature’s requested injunction because its claim  
12 fails on the merits, the equities weigh heavily against the Legislature, and an injunction  
13 is contrary to the public interest. *See Winter v. Natural Res. Def. Council, Inc.*, 555  
14 U.S. 7, 20 (2008) (setting forth standard for preliminary injunctive relief).

15           **A. Even Under the Legislature’s Flawed View of the Law, The Legislature**  
16           **Has Not Been Unlawfully “Excluded.”**

17           The Legislature’s preferred constitutional rule is that “states may not go so far as  
18 to exclude the Legislature all together (sic)” from redistricting. (Doc. 33 at 13.) It  
19 contends that Prop 106 violates this new rule because it “gives all lawmaking power  
20 over redistricting” to the Commission and divests the Legislature of “meaningful  
21 authority” by allowing only “recommendations” to the Commission. (*Id.* at 15-16.)

22           To be sure, Prop 106 removes power and influence over redistricting from the  
23 Legislature. But the Court need not decide where the constitutional line falls in the  
24 Elections Clause. Even assuming the Legislature’s newly devised constitutional rule  
25 should apply, however, Prop 106 goes no farther than the types of “exclusions” already  
26 passed on in *Hildebrant* and *Smiley*. There, legislative preferences were wholly rejected  
27 and nullified by way of referendum vote and veto. Regardless of the powers that the  
28 Arizona constitution gives the Commission, at all times the Legislature has retained the  
power to pass a redistricting plan and refer it to the voters for approval. *See Ariz.*

1 Const. art. IV, pt. 1, § 1(15) (“Nothing in this section . . . deprive[s] or limit[s] the  
2 legislature of the right to order the submission to the people . . . of any measure, item,  
3 section, or part of any measure.”); *id.* art. XXI, § 1 (“Any amendment . . . to this  
4 constitution may be proposed in either house of the legislature,” and when approved by  
5 “a majority of the members . . . the secretary of state shall submit such proposed  
6 amendment . . . to the vote of the people . . .”). Thus, even under its own flawed  
7 interpretation of the Elections Clause, the Legislature deserves no relief.

8 And even under Prop 106, the Legislature is not wholly excluded: legislative  
9 leadership selected four of the five Commissioners (Ariz. Const. art. IV, pt. 2, § 1(6)),  
10 the Senate voted to consent to the Governor’s ill-fated removal of the Commission’s  
11 chair (§ 1(10)), the Legislature submitted recommendations that the Commission was  
12 obligated to consider (§ 1(16)), and appropriates funds for the Commission (§ 1(18)).

13 **B. The Elections Clause Does Not Limit the State of Arizona’s Power to**  
14 **Choose How Its Redistricting Laws Are Made.**

15 The Elections Clause reads in relevant part: “The Times, Places and Manner of  
16 holding Elections for Senators and Representatives, shall be prescribed in each State by  
17 the Legislature thereof; but the Congress may at any time by Law make or alter such  
18 Regulations.” U.S. Const. art I, § 4.

19 There can be no dispute that the Commission exercised legislative power when it  
20 created the current congressional districts. The voters’ amendment creating the  
21 Commission is within Article 4, which governs the “Legislative Department.” *See* Ariz.  
22 Const. art. IV, pt. 2, § 1(3)-(23). The Arizona Supreme Court has held that “the  
23 Commission acts as a legislative body,” not merely a “constitutional administrative  
24 body.” *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting*  
25 *Comm’n*, 208 P.3d 676, 683-84 (Ariz. 2009).

26 The Legislature nevertheless argues that the words “by the Legislature thereof”  
27 contain a judicially enforceable limit on a state’s right to govern itself in this manner.  
28 The Legislature argues “the Elections Clause ‘operate[s] as a limitation on . . . the

1 State’s ability to define lawmaking by excluding the legislature.” (Doc. 33 at 14 (citing  
2 *Colorado Gen. Assembly v. Salazar*, 541 U.S. 1093, 1095 (2004) (Rehnquist, C.J.,  
3 dissenting from denial of certiorari)).

4 The Legislature’s argument has superficial textual appeal and nothing more. The  
5 text should not be read in a vacuum. The Elections Clause is a balance of state and  
6 federal power over election regulation; it had nothing to do with limiting states’ rights to  
7 define the operation of state legislative power. To interpret the word “Legislature” as  
8 the Legislature argues would upend the delicate balance of state and federal power  
9 inherent in the Clause and ignore a century of Supreme Court precedent.

10 **1. The Elections Clause Is Not a Federal Limitation on Internal State**  
11 **Lawmaking Power; It Is a Careful Balance of Power Between**  
12 **States and the Federal Government.**

13 “The Elections Clause has two functions. Upon the States it imposes the duty . . .  
14 to prescribe the time, place, and manner of electing Representatives and Senators; upon  
15 Congress it confers the power to alter those regulations or supplant them altogether.”  
16 *Ariz. v. Inter-Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253 (2013). The  
17 Legislature argues for a third function: imposing limits on how states pass laws  
18 regarding elections. The text and history, however, are silent at best on this issue.

19 The Constitution included the Elections Clause because of “a very real concern  
20 in the founding era” that “a State would refuse to provide for the election of  
21 representatives of the Federal Congress.” *Id.* This grant of Congressional power over  
22 state legislation “proved to be one of the most controversial provisions in the new  
23 Constitution.” Robert G. Natelson, *The Original Scope of the Congressional Power to*  
24 *Regulate Elections*, 13 U. Pa. J. Const. L. 1, 23 (2010). The principal concern of anti-  
25 federalists was that the proposal gave Congress too much power over the states. *Id.* at  
26 25. The “decisive argument, however” was that “the Clause was needed to enable  
27 Congress to preserve its own existence.” *Id.* at 35. *See also Inter-Tribal Council*, 133  
28 S. Ct. at 2253 (same).

The debate over the Elections Clause “focused almost exclusively on the

1 Clause’s second part” giving oversight authority to Congress. *Brown v. Sec’y of State of*  
2 *Florida*, 668 F.3d 1271, 1275-76 (11th Cir. 2012) (holding that amendment passed via  
3 voter initiative constitutionally limited legislature’s discretion over redistricting). The  
4 “Framers said precious little about the first part of the Clause, and they said nothing that  
5 would help to resolve the issue now before us: what it means to repose a state’s  
6 Elections Clause power in ‘the Legislature thereof.’” *Id.*

7 Given the intense opposition to the Election Clause’s imposition on state  
8 sovereignty, it would be especially odd to interpret the use of the word “Legislature” as  
9 an implied limitation on a state’s power to organize its own legislative powers over  
10 redistricting. Indeed, the Supreme Court has repeatedly stated “that the Constitution  
11 leaves with the States primary responsibility for apportionment of their federal  
12 congressional and state legislative districts.” *Grove v. Emison*, 507 U.S. 25, 34 (1993)  
13 (“renew[ing the Court’s] adherence” to this principle of federalism); *Shelby Cnty.*, 133  
14 S. Ct. at 2623 (“Drawing lines for congressional districts is . . . primarily the duty and  
15 responsibility of the State” (internal quotation marks and citation omitted)).

## 16 **2. No Court Has Held That the Elections Clause Imposes a Limit on** 17 **Internal State Lawmaking Power.**

18 In light of the overarching concern for state sovereignty, it should be no surprise  
19 that every court to address this issue has concluded that the Elections Clause does not  
20 restrict the use of otherwise lawful state legislative power, except insofar as Congress  
21 uses its express preemption power. *See Brown*, 668 F.3d at 1276 (“The Supreme Court”  
22 has held that “the term ‘Legislature’ in the Elections Clause refers not just to a state’s  
23 legislative body but more broadly to the entire lawmaking process of the state.”). In  
24 other words, the Elections Clause empowers the state to enact legislation; it does not  
25 obligate the states to organize their lawmaking process in a certain way.

26 The principal cases are *Hildebrant* and *Smiley v. Holm*. In *Hildebrant*, the Ohio  
27 legislature passed a redistricting measure and the people rejected it via referendum,  
28 rendering the law a nullity. 241 U.S. at 566. The Supreme Court affirmed the use of

1 the referendum to void the Ohio legislature’s redistricting legislation. 241 U.S. at 567-  
2 70. The Court examined the case from “three points of view, -- the state power, the  
3 power of Congress, and the operation of the” Elections Clause. *Id.* at 567. As to state  
4 power, “the referendum constituted a part of the state Constitution and laws, and was  
5 contained within the legislative power.” *Id.* at 568. Thus, there was no merit to the idea  
6 that the General Assembly’s preferred law “was yet valid and operative.” *Id.* As to  
7 congressional power, Congress had amended the relevant statute to say that states  
8 should redistrict “in the manner provided by the laws thereof,” deleting a reference to  
9 redistricting by “the legislature of such state.” *Id.* The Court explained that Congress  
10 made the amendment “for the express purpose. . . of excluding the” very argument  
11 being advanced against the referendum power. *Id.* at 568-69.

12 Finally, as to the Elections Clause, the Supreme Court refused to entertain the  
13 notion that the state and Congress could not include the referendum within the  
14 “legislative power” for redistricting. *Id.* at 569. The Court held that the issue was not  
15 justiciable because the argument that referendum violated some limit in the Elections  
16 Clause’s assignment of power to the “Legislature” reduced to a contention that  
17 including “referendum in the scope of legislative power is to introduce a virus which  
18 destroys that power” in violation of the guaranty of a republican form of government.  
19 *Id.* at 569-70. Implicit in the Court’s holding is that the Elections Clause authorizes a  
20 state’s “legislative power” to enact laws, not merely a specific legislative body.

21 In *Smiley v. Holm*, the Court turned away a challenge to a governor’s veto of a  
22 legislature’s redistricting legislation. 285 U.S. at 361-62. The Court again rejected the  
23 idea that the Elections Clause entitled the legislature as a body to a “particular  
24 authority” that would “render[] inapplicable the conditions which attach to the making  
25 of state laws.” *Id.* at 398-99. Focusing the issue, the Court explained that the word  
26 “Legislature” referred to the “representative body which made the laws of the people,”  
27 but that did not answer the constitutional question. *Id.* at 365. The question was “not  
28 with respect to the ‘body’ . . . but as to the function to be performed.” *Id.* The



1 “function” was the normal lawmaking function and the Court found “no suggestion in  
2 the federal constitutional provision of an attempt to endow the Legislature of the state  
3 with power to enact laws in any manner other than that in which the Constitution of the  
4 state has provided that laws shall be enacted.” *Id.* at 368. Limits such as the executive  
5 veto are “a matter of state polity.” *Id.* See also *Hawke v. Smith*, 253 U.S. 221, 230-31  
6 (1920) (in holding that particular power was given to the Legislature in another  
7 constitutional context, the Supreme Court distinguished this line of cases by explaining  
8 that the Elections Clause “plainly gives authority to the state to legislate within the  
9 limitations therein named,” i.e., the limits Congress imposes).<sup>2</sup>

10 The Legislature’s effort to distinguish and minimize the import of *Hildebrandt*  
11 and *Holm* fails. (See Doc. 33 at 10-15.) Based on these cases, the Legislature argues  
12 that the legislature as a body “may be informed and impacted by the procedural  
13 channels of the state law-making power, such as voter referendum and executive  
14 approval,” but the Elections Clause does not allow Arizona to exclude the Legislature.  
15 These cases, however, do not support the Legislature’s theory.

16 In *Hildebrant*, the legislature was wholly excluded. It passed a law and the  
17 people used the power of referendum to void it. 241 U.S. at 566. Call it rebuffed,  
18 reproached, or rejected, the result is the same: the legislature was excluded from being  
19 able to legislate the issue. The Legislature does not contend with *Hildebrant*, instead  
20 saying that the Court “did not reach the precise issue of the Legislature’s role in  
21 redistricting.” (Doc. 33 at 10.) The Legislature also faults the *Hildebrant* Court for not  
22 “address[ing] the Elections Clause issue directly” because the Court found the issue

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23  
24 <sup>2</sup> Other courts have also rejected arguments like the one the Legislature makes here. See  
25 *Brown*, 668 F.3d at 1278-79 (“Supreme Court has plainly instructed us that [the phrase  
26 ‘the Legislature thereof’] encompasses the entire lawmaking function of the state”);  
27 *Salazar v. Davidson*, 79 P.3d 1221, 1232 (Colo. 2003) *cert. denied* 541 U.S. 1093; *State*  
28 *v. Polley*, 127 N.W. 848, 850-51 (S.D. 1910) (“The term ‘Legislature’ has a restricted  
meaning which only applies to the membership thereof, and it also has a general  
meaning which applies to that body of persons within a state clothed with authority to  
make the laws [citing sources], and which, in this state . . . includes the people.”).

1 non-justiciable. But what the Legislature misses is that the Court assumes that the  
2 Elections Clause delegates to the “state legislative power,” not merely a state’s  
3 bicameral elected legislative body. 241 U.S. at 569. Moreover, when the state law and  
4 Congress both conclude that the referendum process is properly part of the state’s  
5 legislative power, the Court should not second guess that judgment. In any case,  
6 *Hildebrant* does not stand for the restrictive interpretation the Legislature advances.

7 The Legislature’s analysis of *Holm* is likewise unavailing. The Legislature  
8 zeroes in on the fact that the Court provided a definition for “Legislature.” (Doc. 33 at  
9 11-12.) From that, the Legislature asserts that the case creates “only one permissible  
10 framework:” “a state may only establish congressional districts through the agency of its  
11 legislature.” (*Id.* at 12.) While that is a necessary premise of the Legislature’s  
12 argument, it is not found in *Holm* or *Hildebrant*. The significance of *Holm* is that the  
13 Legislature as a body did not get special power to avoid the veto any more than the  
14 legislature could evade the people’s referendum in *Hildebrant*. Neither case establishes  
15 that a “state may only” redistrict “through the agency of its legislature.” The  
16 Legislature’s contention that this is the “only one permissible framework for states to  
17 operate under” is made up.

18 Finally, the Legislature’s citation of Chief Justice Rehnquist’s dissent from a  
19 denial of certiorari does nothing to help its cause. *See Colo. Gen. Assembly v. Salazar*,  
20 541 U.S. 1093 (2004) (Rehnquist, C.J., dissenting from denial of certiorari). There,  
21 Colorado’s General Assembly failed to create a redistricting plan after the 2000 census.  
22 *Salazar*, 79 P.3d at 1226-27. Colorado courts thus stepped in and created a plan. *Id.* at  
23 1227.<sup>3</sup> The court rejected the argument that the Elections Clause “grant[s] the General  
24 Assembly exclusive authority to draw congressional districts,” reasoning that the word  
25 “legislature, as used in Article I . . . encompasses court orders.” *Salazar*, 79 P.3d at

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26 <sup>3</sup> *See also Scott v. Germano*, 381 U.S. 407, 409 (1965) (“The power of the judiciary of a  
27 State . . . to formulate a valid redistricting plan has not only been recognized by this  
28 Court but appropriate action by the States in such cases has been specifically  
encouraged.”).

1 1231-31. The Supreme Court denied review of the case. 541 U.S. 1093. In his dissent  
2 from denial, the Chief Justice cast doubt on the fact that the state court’s construction of  
3 Colorado law excluded the legislature “in favor of the courts” without requiring  
4 “participation in the process by a body representing the people, or the people themselves  
5 in a referendum.” 541 U.S. at 1095. But the Legislature’s position here is that  
6 “participation . . . of the people themselves” must be subordinated to the Legislature,  
7 that the “Legislature must maintain primary decision-making.” (Doc. 33 at 15.)  
8 Nothing in the *Salazar* dissent or in any other authority supports that extreme view of  
9 federal judicial power to dictate state policy.

### 10 **3. The Legislature’s Textual and Historical Arguments Are Flawed.**

11 The Legislature has essentially two responses: (1) the Constitution uses the word  
12 “Legislature” to mean the state’s elected representative lawmaking body, and (2) the  
13 historical record shows that the Constitution delegated legislative power to the “actual  
14 body of the state legislature” and not the “people,” and thus the “total exclusion of the  
15 Legislature from its redistricting role” is unconstitutional. (*See* Doc. 33 at 27.)

16 First, as to the text, the Legislature assumes too much. “A Legislature was then  
17 the representative body which made the laws of the people.” *Smiley*, 285 U.S. at 365.  
18 The Legislature takes it a step further, assuming that the word refers to the legislature as  
19 a body *and* excludes other types of state legislative power or somehow makes the  
20 legislative body “preeminent,” even if such preeminence is directly contrary to state  
21 law. (Doc. 33 at 9.) *See Cave Creek Unified Sch. Dist. v. Ducey*, 308 P.3d 1152, 1155  
22 (Ariz. 2013) (“The legislature and electorate share lawmaking power under Arizona’s  
23 system of government” (internal quotation marks and citation omitted)). This is  
24 precisely what *Holm* rejected. 285 U.S. at 367-68 (holding that Elections Clause does  
25 not “endow the Legislature . . . with power to enact laws in any manner other than that  
26 in which” the laws and constitution of the state allow).

27 Moreover, the initiative and referendum process was not at the time of framing a  
28 competing form of legislative power. Arizona’s splitting of legislative power between

1 the people and the elected legislature was part of a turn-of-the-century movement. *See,*  
2 *e.g.,* Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the*  
3 *Initiative, Referendum and Recall Developed in the American West*, 2 Mich. L. & Pol’y  
4 Rev. 11, 16 (1997) (showing chronology of adoption of initiative and referendum  
5 beginning in 1898). The Legislature reads too much into this historical vacuum.

6 Second, the Legislature’s use of the historical record, though lengthy, illuminates  
7 nothing. The Legislature merely plucks out instances where the word “legislature” is  
8 used separately from the “people.” Presumably, this is intended to imply that the  
9 Founders would have disapproved of the use of initiative and referendum. The  
10 historical references quoted show no more than that there was a predominant concern  
11 with the reach of federal power created in the Elections Clause. The dichotomy with  
12 which the Legislature’s historical sources were concerned was the balance between the  
13 federal and state governments, not the people and the people’s legislative body.

14 For example, the Legislature quotes (at 19) Madison’s comments that “the  
15 Legislatures of the States ought not to have uncontrouled right of regulating” elections  
16 because the people would be electing the members of the House of Representatives, and  
17 the election outcomes “will be somewhat influenced by the mode” of the elections.  
18 James Madison, *Debates in the Federal Convention of 1787* 371 (Prometheus ed., 2007)  
19 (attached hereto). From this, the Legislature extrapolates that “the separation of the  
20 people from the legislatures is meant to ensure that legislatures don’t possess  
21 ‘uncontrouled right’ over congressional elections.” (Doc. 33 at 19.) How that supports  
22 the Legislature’s legal theory is unclear. As the rest of Madison’s comment show,  
23 however, his concern was how the inclusion of *congressional* oversight deprived the  
24 legislatures of “uncontrouled right” over elections. *See* Madison, *supra*, at 372 (“What  
25 danger could there be in giving a controuling power to the Nat. Legislature?”). The  
26 discussion is not relevant to the issue at hand.

27 The discourse on Federalist Nos. 59-60 and the ratification debates is unhelpful  
28 for the same reasons. (Doc. 33 at 21-22.) Both Federalist 59 and 60 focus on justifying

1 the Election Clause’s allocation of preemptive power over elections to Congress.  
2 Nothing in either publication speaks to whether the Elections Clause should be  
3 interpreted to limit state power separate from the allocation of authority to Congress.  
4 The title of Federalist 59 is “Concerning the Power of Congress to Regulate the  
5 Elections of Members.” If anything, the documents show a deep suspicion of  
6 concentrating too much power within the state legislatures. *See* Federalist 59 (“an  
7 exclusive power of regulating elections for the national government, in the hands of the  
8 State legislatures, would leave the existence of the Union entirely at their mercy”); *id.*  
9 (“If the State legislatures were to be invested with an exclusive power of regulating  
10 these elections, every period of making them would be a delicate crisis in the national  
11 situation, which might issue in a dissolution of the Union . . .”).

12 Furthermore, Charles Pinckney’s view on who should elect House members, the  
13 people or the legislatures, is also minimally relevant. (*See* Doc. 33 at 19-20.) The fact  
14 that Pinckney and others debated how to divide the electoral power between direct  
15 elections and legislature-controlled elections does not tell the reader much about what  
16 limits on state legislative power, if any, the Elections Clause implies through the use of  
17 the word “Legislature.”<sup>4</sup>

18 In sum, the Legislature’s effort to cobble together a historical record to support  
19 its interpretation is fruitless. The Elections Clause does not, merely by using the words  
20 “Legislature thereof,” imply an invasive federal limit on a state’s power to organize its  
21 own legislative power.

### 22 **C. The Legislature’s Claim Is Not Justiciable.**

23 There is no dispute that Prop 106 was lawfully enacted under Arizona law, and

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24 <sup>4</sup> In fact, persuasive evidence indicates that Pinckney would have viewed initiative-style  
25 direct democracy as fully consistent with republican, legislative governance. Akhil R.  
26 Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority*  
27 *Rule, and the Denominator Problem*, 65 U. Colo. L. Rev. 749, 758 (1994) (“In the  
28 South Carolina ratifying convention, Charles Pinckney described a Republican  
Government as one where ‘the people at large, *either collectively or* by representation,  
form the legislature” (citation omitted).).

1 that the voter-approved Commission exercises legislative power under Arizona law.  
2 *Minority Coalition*, 208 P.3d at 683-84. At bottom, the Legislature’s claim is that  
3 including Prop 106 “within state legislative power for the purpose apportionment is  
4 repugnant to” the Elections Clause. *Hildebrant*, 241 U.S. at 569. This is a question that  
5 the Constitution reserved for Congress, not the courts, and Congress has expressly  
6 authorized Arizona to redistrict in whatever “manner provided by the laws” of the state.  
7 *See id.* at 569-70 (internal quotation marks and citation omitted); 2 U.S.C. § 2a(c).

8 A controversy is a non-justiciable “political question” when “there is a textually  
9 demonstrable constitutional commitment of the issue to a coordinate political  
10 department; or a lack of judicially discoverable and manageable standards for resolving  
11 it.” *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Nixon v. United States*,  
12 506 U.S. 224, 228 (1993) and *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

13 The Court need not consider this question on a blank slate; the Supreme Court  
14 has already answered it. In *Hildebrant*, the plaintiffs argued that the peoples’  
15 referendum striking down the Ohio legislature’s redistricting plan violated the Elections  
16 Clause for the same reasons advanced in this case. 241 U.S. at 569. The Court rejected  
17 the claim as “plainly without substance” because the claim necessarily reduced to a  
18 contention that the referendum was inconsistent with the guarantee of a republican form  
19 of government, a question that “presents no justiciable controversy, but involves the  
20 exercise by Congress of the authority vested in it by the Constitution.” *Id.* Indeed, the  
21 Court had already held that challenges to the voter initiative process under the  
22 Guarantee Clause were non-justiciable questions reserved for Congress. *See Pac. States*  
23 *Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (challenge to initiative held non-justiciable).

24 But even using the more modern language of *Baker v. Carr*, the Elections Clause  
25 textually commits authority over state legislative action to Congress: “the Congress may  
26 at any time by Law make or alter such Regulations.” U. S. Const. art. I, § 4. And  
27 Congress has passed judgment on this very issue, amending its reapportionment statute  
28 purposefully to clarify that States may use initiative and referendum to legislate in this

1 arena. *See Hildebrant*, 241 U.S. at 568-69 (discussing amendment to what is now  
2 codified at 2 U.S.C. § 2a). Before 1911, Congress’s reapportionment statute stated that  
3 a state’s existing districting plan would be in effect “until the legislature of such state”  
4 redistricted. *See id.* at 568 (discussing pre-1911 version of statute). In 1911, Congress  
5 struck the language “the legislature of such state” and replaced it with “a provision that  
6 the redistricting should be made by a state ‘in the manner provided by the laws  
7 thereof.’” *Id.*

8 Congress’s change was not mere style. The intent was to remove the impression  
9 that states had to leave redistricting to the legislature: “[W]hatever our views may be on  
10 the subject of the initiative or referendum we can not ignore the existence of statutes in  
11 divers[e] States of the union under which they are recognized methods of enacting  
12 laws.” 47 Cong. Rec. 3436 (1911) (attached hereto). The Senator continued, “A due  
13 respect to the rights, to the established methods, and to the laws of the respective States  
14 requires us to allow them to establish congressional districts in whatever way they may  
15 have provided by their constitution and by their statutes.” *Id.*; *see also Hildebrant*, 241  
16 U.S. at 568-69 (describing this legislative history as “leav[ing] no room for doubt” that  
17 the amendment was passed “for the express purpose” of “excluding” the argument that  
18 the initiative and referendum should not be considered part of a state’s legislative  
19 power). The change made in 1911 is still in force in the current version of the statute,  
20 codified at 2 U.S.C. § 2a. Congress has therefore spoken clearly on the issue, and the  
21 Constitution gives it ultimate authority to do so.

22 **D. The Equities Favor Denying the Legislature’s Requested Relief,**  
23 **Whatever the Court’s Interpretation of the Elections Clause.**

24 Before issuing an injunction, the Court “must balance the competing claims of  
25 injury.” *Winter*, 555 U.S. at 24 (internal quotation marks and citation omitted).  
26 “[C]ourts of equity should pay particular regard for the public consequences in  
27 employing the extraordinary remedy of injunction.” *Id.* (internal quotation marks and  
28 citation omitted). The Legislature seeks two forms of injunctive relief: one that enjoins

1 the enforcement of the constitutional provisions governing the Commission *and* one  
2 that enjoins “the use of any federal redistricting maps created by the Commission.”  
3 (Doc. 33 at 1-2.) Even if the Court declares that Prop 106 crosses the boundaries of the  
4 Elections Clause, there is no legitimate basis to enjoin use of the current districting plan.

5       Aside from disregarding the will of the voters, enjoining the current districting  
6 map would put to waste tens of thousands man hours – including dozens of public  
7 meetings in every corner of the state, and other public investment in the current  
8 districting plan. Worse, the Legislature – the Legislature that brought this lawsuit in  
9 June 2012 – could have avoided the trouble by timely bringing the claim.

10       By waiting until after the Commission completed its redistricting work, the  
11 Legislature has unreasonably and inexcusably delayed in raising its challenge, resulting  
12 in prejudice to the Commission and the state. *Miller v. Glenn Miller Prods., Inc.*, 454  
13 F.3d 975, 997 (9th Cir. 2006). “In considering whether a plaintiff’s delay was  
14 unreasonable, courts consider: (1) the length of the delay, measured from the time the  
15 plaintiff knew or should have known about his potential cause of action, and (2)  
16 whether the plaintiff’s delay was reasonable, including whether the plaintiff has  
17 proffered a legitimate excuse for his delay.” *Id.* (citing *Jarrow Formulas, Inc. v.*  
18 *Nutrition Now, Inc.*, 304 F.3d 829, 838 (9th Cir. 2002)).

19       The Legislature began its first regular session in January 2011, over a year before  
20 this Commission completed its redistricting work and a decade after the Commission  
21 had already been in existence. (*See* First Amended Complaint ¶ 27 (the Commission  
22 *completed* its work on the congressional map on January 17, 2012).) Rather than bring  
23 its legal claim, the Legislature chose to let the entire redistricting process play out.

24       Moreover, the Legislature was not a passive observer merely waiting to see what  
25 would happen. Rather, the Legislature exerted influence over every phase of the  
26 Commission’s process. Legislative leaders of both parties selected members of the  
27 Commission. (First Amended Complaint ¶ 22.) The Speaker and the President even  
28 filed a special action in the Arizona Supreme Court in January 2011 to challenge the



1 pool of applicants that the Commission on Appellate Court Appointments Commission  
2 forwarded to them. *Adams v. Comm'n on Appellate Court Appointments*, 227 Ariz. 128,  
3 131 ¶ 7, 254 P.3d 367, 370 (Ariz. 2011). In November 2011, the Legislature met in a  
4 special session in which the Senate concurred in the Governor's illegal removal of the  
5 Commission's Chair. *Ariz. Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267,  
6 1270 (Ariz. 2012). And throughout the entire process, the Legislature made  
7 appropriations to support the Commission's work. *See* Ariz. Const. art. 4, pt. 2, § 1(18).

8 Beyond this, in October 2011, the Legislature held hearings on the Commission's  
9 draft maps and formally approved comments on both the Congressional and Legislative  
10 draft maps on November 1, 2011. (Declaration of Ray Bladine, attached hereto as  
11 Exhibit A, ¶ 7.) Members of the Legislature presented comments to the Commission  
12 during its December 7, 2011 public meeting. (*Id.* ¶ 8.) At no point in this process did  
13 the Legislature raise the claim it is pushing now. Instead, in the concurrent memorial,  
14 the Legislature urged "***the Independent Redistricting Commission immediately***  
15 ***commence a new mapping process for both the congressional*** and legislative districts .  
16 . . ." (*Id.*, Ex. 1 at 6 (emphasis added).)

17 Thus, even setting aside the twelve year delay from the time the Commission was  
18 created to the time the Legislature brought this case, there is absolutely no justification  
19 for the Legislature's delay in bringing this lawsuit.

20 The Legislature's delay has resulted in substantial prejudice to both the  
21 Commission and the people of the State of Arizona. In this decade's redistricting cycle  
22 alone, the Commission conducted more than 50 public hearings and 67 business  
23 meetings throughout the state at which thousands of Arizona citizens appeared to  
24 provide input into the process. (Ex. A ¶¶ 2-5.) Individuals appeared in person at  
25 Commission meetings and public hearings, and countless people participated in the  
26 process remotely by watching the Commission's live video stream and submitting  
27 comments to the Commission. (*Id.* ¶ 5.) In addition to the participation of Arizona  
28 citizens, the Commission itself has spent thousands of man-hours and millions of

1 taxpayer dollars to complete its work. (*Id.* ¶ 6.) Candidates ran in the Congressional  
2 districts drawn and certified by the Commission in the 2012 election and others are now  
3 preparing to run in these districts in the 2014 election.

4 The Commission's work has been completed, the citizens of Arizona have  
5 participated in the redistricting process and have an interest in seeing the districts  
6 adopted by the Commission (and pre-cleared by the Department of Justice) used as  
7 intended. The Legislature cynically waited to see what political influence it could exert,  
8 letting the entire process conclude before bringing this claim and now rushes to court  
9 asking for an injunction of the districting plan,

10 Given the unreasonable delay and resulting prejudice, the Legislature's claim is  
11 barred by the doctrine of laches and fails as a matter of law. At a minimum, laches  
12 should prevent any relief other than declaratory relief for the next redistricting cycle  
13 beginning in 2022. Moreover, based on its participation throughout this Commission's  
14 work and its delay, the Court should deny all relief because the Legislature waived its  
15 claim that the Commission lacks authority to draw a Congressional map. *See, e.g.,*  
16 *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir.1992) (finding implied  
17 waiver of sovereign immunity where foreign country had engaged U.S. courts in the  
18 very course of activity for which the plaintiff subsequently sought redress); *Terrovona*  
19 *v. Kincheloe*, 912 F.2d 1176, 1180 (9th Cir. 1990) (implied waiver of Miranda rights);  
20 *Hecht v. Harris, Upham & Co.*, 430 F.2d 1202 (9th Cir. 1970) (waiver of fraud claim).

## 21 **II. Conclusion**

22 The Elections Clause is an important balancing of federal and state power. To  
23 increase its own political power, the Legislature advances a theory that upends that  
24 balance using the federal constitution to act as an invasive limit on Arizona's right to  
25 structure its legislative power as it sees fit. For all of the reasons explained above, the  
26 Court should reject the Legislature's claim and enter judgment for defendants.<sup>5</sup>

27 \_\_\_\_\_  
28 <sup>5</sup> The Commission does not object to consolidating the preliminary injunction  
with a trial of the merits under Rule 65(a)(2) if this Court denies the Motion to Dismiss.

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DATED this 18<sup>th</sup> day of October, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 18, 2013, 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 registrants on record.

s/ Sara C. Sanchez