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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Arizona State Legislature,

Plaintiff,

v.

Arizona Independent Redistricting
Commission, et al.,

Defendants.

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

**PLAINTIFF’S REPLY IN SUPPORT
OF MOTION FOR PRELIMINARY
INJUNCTION AND FOR A
CONSOLIDATED HEARING AND
TRIAL ON THE MERITS AND
REQUEST FOR JUDICIAL NOTICE**

I. Introduction

The text and history of the Elections Clause, as well as the relevant judicial precedents, require that the states’ elected legislatures craft “times, places and manner” legislation, and also require that such enactments be made according to the states’ ordinary legislative processes. Defendants’ fail to overcome this clear command of the Constitution.

1 First, Defendants' appeal to federalism to evade the Elections Clause as a limit on state
2 legislative power clashes with the actual federal structure embodied in the Clause itself.
3 Moreover, in the Elections Clause context, states act by express delegation and have no
4 inherent or reserved authority over federal election procedures.

5 Second, Defendants seek to minimize the historical evidence marshaled by the
6 Legislature without even offering an alternative reading of that history to support their
7 attempted departure from the plain text of the Constitution.

8 Third, Defendants falsely claim that Arizona's current scheme still allows the
9 Legislature to participate with meaningful authority under the Elections Clause. The AIRC,
10 however, is known as the Independent Redistricting Commission precisely because it has
11 exclusive authority to conduct redistricting independently from the Legislature.

12 Fourth, Defendants pin their final hopes on avoiding the merits altogether; first by
13 divining a nonjusticiability argument; and second by arguing laches. The former ignores a
14 century of federal court decisions allowing challenges to the states' legislative power under the
15 Elections Clause. The latter may not be applied to a government body bringing a constitutional
16 claim to vindicate the paramount public interest in maintaining the Constitution as the supreme
17 law of the land.

18 **II. Argument**

19 **A. The Clear Language of the Elections Clause Advances Federalism;** 20 **Defendants' Interpretation Disassembles Constitutional Structure.**

21 The Elections Clause specifies that each state must act "by the Legislature." U.S. Const.
22 art. I, § 4, cl. 1. Defendants argue that taking this delegation literally upsets the "delicate
23 balance of state and federal power inherent in" the Elections Clause. (Doc. 37 at 5.) That is
24 wrong. The surest safeguard for federalism is the Constitution itself. Neither federal nor state
25 authority is impaired when interpreting the Elections Clause to mean what it says. Conversely,
26 both state and federal authority are at risk if "by the Legislature" distorts to "by any process of
27 a state's legislative power." The structure of the Elections Clause displays the crucial
28

1 republican principle of the states' representative bodies acting to affect the election of the
2 federal representative body – this is the very essence of federalism. Defendants may prefer a
3 structure of a different stripe, but that would require a Federal constitutional amendment.
4 Reformulating the plain meaning of the Elections Clause is what jeopardizes the constitutional
5 balance of power between the representative bodies.

6
7 Furthermore, Defendants' version of federalism is misplaced in the federal elections
8 context. State legislative authority over congressional elections derives solely from the
9 Constitution itself. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 805 (1995). Therefore, states
10 have no reserved authority under the Tenth Amendment over this domain. *Id.* Applying the
11 Elections Clause as written does not disturb any “delicate balance” between competing state
12 and federal sovereignty. *Gonzalez v. Arizona*, 624 F.3d 1164, 1174 (9th Cir. 2010) *on reh'g en*
13 *banc*, 677 F.3d 383 (9th Cir. 2012) *aff'd sub nom Arizona v. Inter-Tribal Council of Arizona,*
14 *Inc.*, __ U.S. __, 133 S.Ct. 2247, 2253 (2013). Instead, the Elections Clause, as a standalone
15 preemption provision, establishes its own balance and resolves all conflicts in favor of the
16 federal government. *Id.* Thus, the federalism principles that apply to the states' use of their
17 inherent police powers are limited in the Elections Clause context. *Arizona v. Inter-Tribal*
18 *Council of Arizona*, __ U.S. __, 133 S.Ct. 2247, 2257 (2013). The states' role in regulating
19 congressional elections has always existed subject to the express qualification that it
20 “terminates according to federal law.” *Id.* Defendants cannot argue for deference to state
21 sovereignty in an area where states have no traditional, reserved or inherent authority.

22 Defendants cite *Growe v. Emison* for the proposition that states have primary
23 responsibility over congressional redistricting, and that the Elections Clause therefore cannot be
24 a limit on state redistricting authority. (Doc. 37 at 6.) *Growe*, however, does not hold that
25 federalism requires elevation of state procedures over the requirements of federal law. *Growe*
26 focuses on the principles of comity used when federal courts weigh remedial relief amid
27 ongoing state reapportionment efforts, including review by a state's judicial branch. 507 U.S.
28

1 25, 36-37 (1993). Such deference is not applicable here, where the sole issue is interpreting and
2 applying the plain-text mandate of the Constitution.
3

4 **B. Defendants’ Fail to Overcome the Legislature’s Textual Arguments and**
5 **Historical Record.**

6 Defendants misapprehend the Legislature’s textual argument to be that the term
7 “Legislature” completely “excludes other types of state legislative power....” (Doc. 37 at 10.)
8 On the contrary, the Legislature recognizes that checks on a state legislature’s direct exercise of
9 legislative power are permissible – such as the referendum veto in *Hildebrant* and the
10 governor’s veto in *Smiley*. However, the term cannot be construed to exclude the Legislature’s
11 direct exercise of authority under the Elections Clause. Only the Defendants need a new
12 meaning of the term “Legislature” in this case.

13 Rather than provide a contrary historical record, Defendants misconstrue the Elections
14 Clause history in an attempt to minimize its import. (Doc. 37 at 10-12.) The progress of
15 Pinckney’s motions, which reveals the genesis of the Elections Clause, are precisely relevant
16 because they indicate the desire of a large contingent of Convention delegates to channel the
17 will of the people in electing Representatives through their elected state legislatures. These
18 delegates actually argued for direct appointment of Representatives by the legislatures because
19 they felt that this would cause “more refined, and better men” to be sent to Congress. 1 THE
20 RECORDS OF THE FEDERAL CONVENTION OF 1787 365 (Max Farrand ed., 1911), *available at*
21 http://files.libertyfund.org/files/1057/0544-01_Bk.pdf (“RECORDS OF THE FEDERAL
22 CONVENTION”) (proceedings of June 21, 1787). Though the Convention ultimately decided
23 direct election was necessary, it reached a compromise: Representatives would be “elected by
24 the people in such mode as the Legislatures should direct.” 1 RECORDS OF THE FEDERAL
25 CONVENTION 360 (proceedings of June 21, 1787). James Madison confirmed this
26 understanding by writing in THE FEDERALIST that “the House of Representatives, though drawn
27 immediately from the people, will be chosen very much under the influence of that class of
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1 men, whose influence over the people obtains for themselves an election into the State
2 legislatures.” THE FEDERALIST NO. 45, at 240 (James Madison) (George W. Carey and James
3 McClellan eds., 2001), *available at* http://files.libertyfund.org/files/788/0084_LFeBk.pdf. This
4 foundational purpose of the Elections Clause is thwarted by excluding the elected legislatures
5 from redistricting.

6
7 Defendants’ only contribution to the historical record comes in footnote 4, wherein they
8 assert that Pinckney equated initiative-style direct democracy with republican governance while
9 speaking at the South Carolina ratifying convention. (Doc. 37 at n.4.) However, his specific
10 statements and proffered drafts of the Elections Clause during its actual construction are the
11 more reliable evidence for the meaning of that provision than a later-in-time speech at one
12 state’s ratifying convention. 1 RECORDS OF THE FEDERAL CONVENTION 364 (proceedings of June
13 21, 1787) (arguing that Representative elections should be made “in such manner as the several
14 state legislatures shall direct”).

15 **C. Defendants Show No Authority to Support The Exclusion of the Legislature** 16 **From Congressional Redistricting**

17 In their Response, Defendants state that “every court to address this issue [i.e. the state
18 legislatures’ role under the Elections Clause] has concluded that the Elections Clause does not
19 restrict the use of otherwise lawful state legislative power.” (Doc. 37 at 6.) This claim belies the
20 fact that none of the cases cited dealt with the complete exclusion of the legislature from the
21 redistricting process, but only with qualifications on the legislatures’ use of power. Though the
22 United States Supreme Court has not yet ruled on a congressional redistricting scheme that
23 wholly excludes a state’s legislature, dissenting opinions by former Justices Stevens and
24 Rehnquist acknowledge that the language of the Elections Clause itself operates as a limit on
25 the state legislative process. *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004)
26 (Rehnquist, C.J., dissenting from denial of certiorari) (“there must be some limit on the State’s
27 ability to define lawmaking by excluding the legislature itself...”); *California Democratic*
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1 *Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J. dissenting) (suggesting that redistricting
2 by popular initiative, unreviewable by legislative action, could potentially be unconstitutional).

3 Defendants' analysis of *Hildebrant* and *Smiley* is not persuasive. Defendants make the
4 curious assertion that the legislature in *Hildebrant* was "wholly excluded" from redistricting,
5 and that the decision in *Hildebrant* therefore controls this case. (Doc. 37 at 8.) They base this
6 assertion on the fact that the people of Ohio used their referendum veto power to void the state
7 legislature's proposed redistricting scheme. *Id.* However, the referendum veto simply meant
8 that Ohio reverted to using the Ohio legislature's previously enacted district boundaries. *State*
9 *ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 168 (1916) ("We therefore hold that the act of
10 April 28, 1913, passed by the General Assembly of Ohio, was valid, and that the act of May 27,
11 1915, thereafter passed by the General Assembly and failing of approval by popular vote under
12 the referendum, was invalid and void"). The Ohio Legislature, after the referendum veto,
13 maintained the right to legislate congressional districts. Though they elected to keep the April
14 28, 1913 districts until the after the 1950 census, the Ohio legislature passed new redistricting
15 legislation first used in the 1952 congressional election. Kenneth C. Martis, *The Historical*
16 *Atlas of United States Congressional Districts, 1789-1983* (1982). No other body ever drew
17 congressional district lines in Ohio, and the Ohio General Assembly to this day controls
18 congressional redistricting, establishing districts by statute. *See* Ohio Revised Code § 3521.01
19 (laying out current congressional district boundaries). Thus, the legislature in *Hildebrant* was
20 never excluded from redistricting, but was simply subject to Ohio's ordinary state legislative
21 enactment procedure of referendum veto.
22

23 Likewise, the Legislature does not, as Defendants claim, try to "distinguish and
24 minimize the import of" *Smiley v. Holm*. (Doc. 37 at 8.) Next to the Elections Clause itself,
25 *Smiley* is the primary authority that confirms the Legislature's position regarding its preeminent
26 role in congressional redistricting. Defendants attempt to minimize *Smiley*'s clear definition of
27 the "Legislature" as the "representative body which makes the laws of the people," likely
28 because this definition directly contradicts Defendants' necessarily-expansive view of the

1 actual text. (*Id.* at 9.) The import of this definition is clear when viewed in light of the
2 underlying state court decision, *State ex rel. Smiley v. Holm*, 184 Minn. 228 (1931). The state
3 court decision made two holdings regarding redistricting processes under the Elections Clause:
4 the body which is authorized to make the laws; and the manner in which the body may operate.
5 The state court first held that the word “Legislature” in the Elections Clause carries the ordinary
6 meaning of the word, “the representative body, which makes the laws of the state,” as opposed
7 to the more expansive meaning occasionally applied wherein “Legislature” “indicate[s] the
8 lawmaking power of the state.” *State ex rel. Smiley*, 184 Minn. at 235-36. The state court then
9 additionally held that the legislature, when acting under the Elections Clause, does not act in a
10 mere legislative capacity, but under a deliberate grant of Constitutional authority. *Id.* at 238.
11 Therefore, when the Court in *Smiley* reviewed the state court decision, the Court reviewed both
12 holdings. The Court confirmed the first holding that the elected state “Legislature,” as that term
13 is ordinarily understood, is the body with Constitutional redistricting authority, not the general
14 law-making power of the state. *Smiley*, 285 U.S. at 365. However, the Court rejected the second
15 holding: that the manner through which the state legislature must pass redistricting legislation is
16 not legislative. While *Smiley* does hold that a state legislature may not avoid the ordinary state
17 legislative process (i.e., vetoes), *Smiley* offers no support for the position that a state legislature
18 may be excluded from federal redistricting.
19

20 **D. Defendants Misrepresent the Arizona Constitution in Their Attempt to**
21 **Show That the Legislature May Still Participate in Redistricting**

22 Defendants inaccurately point to two provisions in the Arizona Constitution which they
23 claim allow the Legislature meaningful participation in the redistricting process. (Doc. 37 at 3-
24 4.) First, Defendants point to Ariz. Const. art. XXI, § 1, which allows the Legislature to submit
25 proposed constitutional amendments to a vote of the people. The mere ability to offer a
26 proposed constitutional amendment to the electorate is a far cry from prescribing the times,
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1 places, and manner of congressional elections. It is certainly not the authority to prescribe the
2 “manner” of congressional elections that the Elections Clause requires the Legislature to have.

3 Defendants’ other argument is an out-of-context reading of the Arizona constitutional
4 text. Defendants point to Ariz. Const. art. IV, pt. 1, § 1(15), which states that “Nothing in this
5 section...deprive[s] or limit[s] the legislature of the right to order the submission to the
6 people...of any measure, item, section, or part of any measure” (emphasis added). (Doc. 37 at
7 4.) Defendants claim that, under this provision, the Legislature retains the power to submit its
8 own redistricting plan to the voting public for approval (apparently at the expense of the
9 AIRC’s plan), and that the Legislature may therefore still meaningfully participate in drawing
10 congressional district lines. (Doc. 37 at 3.)

11
12 Suspending all judgment on whether this “competing plan” hypothetical would actually
13 secure to the Legislature its constitutional redistricting authority, the provision cited still does
14 not allow the Legislature this right. The people of Arizona added art. IV, pt. 1, § 1(15) to the
15 Arizona Constitution in 1998 (prior to the amendment creating the AIRC), by an initiative
16 aimed at reducing the Governor’s and the Legislature’s ability to change voter-approved laws.
17 Arizona Secretary of State, 1998 General Election: Ballot Measures, “Initiative and
18 Referendum” <http://www.azsos.gov/election/1998/General/ballotmeasures.htm> (last visited
19 October 23, 2013). The text, as quoted by Defendants, states only that “this section” (i.e. art.
20 IV, pt. 1, § 1) does not limit the Legislature’s ability to submit referendum measures to the
21 people. In contrast, Ariz. Const. art. IV, pt. 2, § 1, added by amendment two years later in 2000
22 to create Arizona’s current redistricting scheme, does limit the Legislature’s ability to submit
23 referendum measures to the people specifically with regard to redistricting. “[A]n independent
24 redistricting commission shall be established to provide for the redistricting of congressional []
25 districts.” Ariz. Const. art. IV, pt. 2, § 1. “The independent redistricting commission shall then
26 establish final district boundaries.” Ariz. Const. art. IV, pt. 2, § 1(16). Further, Article IV, pt. 2,
27 § 1(17) states that Arizona’s redistricting scheme is self-executing. Thus, though there is no
28

1 ruling by the Arizona Supreme Court on the issue, it would appear from the text that art. IV, pt.
2 2, § 1 entirely excludes the Legislature (and the referendum power of the people as well) from
3 redistricting by giving both initial drafting and final decision-making authority exclusively to
4 the AIRC. Redistricting authority is not shared between the AIRC and the Legislature. The
5 word “Independent” is more than part of the AIRC’s name—it is a description of its authority
6 under the Arizona Constitution.

7
8 Defendants’ passing references to the Legislature’s role in appointing the AIRC,
9 appropriating funding, and making non-binding recommendations do not equate to
10 “prescrib[ing]” the manner of congressional elections in Arizona. (Doc. 37 at 4.) The key issue
11 in this case is the Legislature’s constitutional authority to make ultimate decisions regarding the
12 drawing of congressional district lines. Neither appointment input for selecting AIRC
13 commissioners nor non-binding recommendations allow the Legislature any semblance of its
14 constitutional redistricting prerogative.

15 **E. Defendants’ Non-Justiciability Claim is Foreclosed by a Century of Election**
16 **Clause Precedent.**

17
18 Defendants again cite *Hildebrant* to argue that the Legislature’s constitutional challenge
19 reduces to a nonjusticiable claim under the Guaranty Clause. (Doc. 37 at 13.) This argument
20 fails for two reasons. First, interpreting the United States Constitution as it relates to state
21 power over elections is the proper role of the federal judiciary. *See, e.g., McPherson v. Blacker*,
22 146 U.S. 1, 23 (1892) (deciding the validity of a state law alleged to be repugnant to the
23 Constitution in the context of presidential electors). Second, the Defendants’ argument ignores
24 the cases maintaining jurisdiction over the precise issue of whether the Elections Clause limits
25 the states’ organization of legislative power. *Smiley v. Holm*, 285 U.S. at 372 (hearing and
26 ruling on a challenge to state legislative power based on the fact that “Article I, section 4,
27 plainly gives authority to the State to legislate within the limitations therein named”); *Grills v.*
28 *Branigin*, 284 F.Supp. 176, 180 (S.D. Ind. 1968) (considering but ultimately rejecting state

1 election board's request to perform redistricting by reference to the Elections Clause); *Smith v.*
2 *Clark*, 189 F. Supp. 2d 548, 550 (S.D. Miss. 2002) (limiting state legislative power by stating
3 that "the state authority that produces the redistricting plan must, in order to comply with
4 Article I, Section 4 of the United States Constitution, find the source of its power to redistrict in
5 some act of the legislature"), *aff'd sub nom. Branch v. Smith*, 538 U.S. 254 (2003) and amended
6 *sub nom. Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011). These decisions make
7 clear that the Legislature's claim is in fact justiciable.
8

9 Defendants' contention that the Legislature's claim is not justiciable because the
10 Elections Clause commits the regulation of state election procedures solely to the purview of
11 Congress also must fail. (Doc. 37 at 12-13.) The Elections Clause makes two textual
12 commitments: one to the state legislatures and one to Congress. And the Supreme Court has made
13 clear that Congress cannot revoke the role of state legislatures. In *Smiley*, the Court clarified the
14 limited significance of federal reapportionment statute. "It is manifest that the Congress had no
15 power to alter Article I, section 4, and that the Act of 1911, in its reference to state laws, could
16 but operate as a legislative recognition of the nature of the authority deemed to have been
17 conferred by the constitutional provision." 285 U.S. at 372. Thus, Congress is authorized to
18 make its own regulations as to the time, place, and manner of federal elections, but it is not
19 authorized to substitute some other entity in the place of the Legislature. Any Congressional
20 enactment must be read in light of the authority bestowed perpetually upon the Legislature by
21 the Constitution.
22

23 **F. Laches Does Not Bar Enforcement of the Elections Clause.**

24 **1. Laches May Not be Asserted Against a Government Entity Acting in the 25 Public Interest.**

26 The clear majority rule, followed by Arizona and the Ninth Circuit, holds that equitable
27 doctrines such as estoppel and laches may not generally be applied against government bodies
28 acting in the public interest. *George v. Arizona Corp. IRC*, 83 Ariz. 387, 392, 322 P.2d 369,

1 372 (1958) (“[W]here the public interest is involved neither estoppel nor laches can be
2 permitted to override that interest.”); *U.S. v. Ruby Co.*, 588 F.2d 697, 705 n.10 (9th Cir. 1978)
3 (same, suggesting laches only available in cases of “affirmative misconduct” by the
4 government). The Legislature brings this action to vindicate the unquestionably important
5 public interest of maintaining compliance with the United States Constitution. *See California*
6 *Pharmacists Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009) (public interest
7 weighs in favor of preserving the supremacy of federal law, which “is paramount”); *and see*
8 *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (“it would be the unusual case in which a court
9 would be justified in not taking appropriate action to ensure that no further elections are
10 conducted under the invalid plan”). The Defendants do not attempt to argue that this case falls
11 outside the public interest.
12

13 **2. Defendants Fail to Assert and Prove Any Equitable Elements**

14 To the extent that the Court is willing to explore the possibility of applying laches under
15 an exception to the general rule, Defendants do not even attempt to meet their burden to show
16 affirmative misconduct. *See e.g. Ruby*, 588 F.2d at 705 n. 10 (“...invocation of [estoppel]
17 against the government requires a showing of affirmative misconduct. Even if there were some
18 allowance for laches against the government, there is no reason why that doctrine should not be
19 subject to at least the same strictures as estoppel.”). Indeed, Defendants rely solely on the
20 Legislature’s alleged “delay” regarding the AIRC’s redistricting plan to support their claim of
21 laches. (Doc. 37 at 14-17.) By failing to even allege the required elements, Defendants have not
22 met the burden of proof for their affirmative defense. *Costello v. U.S.*, 365 U.S. 265, 282
23 (1961).

24 Moreover, Defendants were not prejudiced, as “prejudice” in the context of laches
25 “typically refers to the fact that a defendant...has altered its position in reliance on a plaintiff’s
26 inaction.” *Wauchope v. U.S. Dept. of State*, 985 F.2d 1407, 1412 (9th Cir. 1993) (citations and
27 quotations omitted). State resources expended on redistricting are not a result of AIRC reliance
28 on any inaction by the Legislature. The AIRC has merely proceeded with its duties as required

1 under the Arizona Constitution – which duties will continue at least as to state elections even
2 after this case is ultimately decided. *Cf. Perez-Mejia v. Holder*, 663 F.3d 403, 417 (9th Cir.
3 2011) (“[A] party cannot obtain estoppel against the government if he did not lose any rights to
4 which he was entitled.”).

5 Finally, Defendants argue fleetingly that the Legislature has waived its authority under
6 the Elections Clause. (Doc. 37 at 17.) Defendants offer no case law regarding a state legislature
7 or any state entity “waiving” authority conveyed by the Constitution. Moreover, the relevant
8 case law informs that constitutional principles under the Elections Clause may not be waived.
9 *Smiley*, 285 U.S. at 369 (“General acquiescence cannot justify departure from the law”).
10

11 **III. Conclusion**

12 Defendants’ do not raise any persuasive challenges to the Legislature’s likelihood of
13 success on the merits of its constitutional challenge. Defendants do not even address the
14 irreparable harm prong of the Motion’s preliminary injunction analysis. And Defendants’
15 appeal to equity fails both as to its applicability to the Legislature as a government body and as
16 compared to the strong public interest in upholding the Constitution. The Court should
17 therefore grant the Legislature’s Motion and, at the unopposed consolidated trial on the merits,
18 preliminarily and permanently enjoin the operation of the AIRC and the use of their
19 congressional district maps.

20 RESPECTFULLY SUBMITTED this 28th day of October, 2013,
21

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 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 to the following:

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