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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

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND FOR A CONSOLIDATED HEARING AND TRIAL ON THE MERITS AND REQUEST FOR JUDICIAL NOTICE

ORAL ARGUMENT REQUESTED

Pursuant to Federal Rule of Civil Procedure 65, the Arizona State Legislature hereby moves this Court to preliminarily enjoin the enforcement of Article VI, part 2, section 1 of the Arizona Constitution insofar as it takes the power to establish congressional districts

away from the Legislature and conveys it to the Arizona Independent Redistricting Commission; as well as the use of any federal redistricting maps created by the Commission; and additionally moves to consolidate the hearing on this motion with the trial on the merits. This motion is accompanied by the following memorandum of points and authorities. Pursuant to Federal Rule of Evidence 201, Plaintiff also requests the Court to take judicial notice of its file and the matters of public record submitted in the supporting Appendix filed herewith, which is incorporated by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

Summary

The Elections Clause grants authority over the times, places and manner of congressional elections in each state to "the Legislature thereof." U.S. Const. art. I, § 4. Accordingly, the Arizona State Legislature (hereinafter the "Legislature") conducted the periodic redrawing of congressional district lines from Arizona's entry into the Union until 2000. In 2000, a voter-generated referendum, Proposition 106 (hereinafter "Prop. 106"), removed the Legislature's constitutional role in that process and granted it instead to the Arizona Independent Redistricting Commission (hereinafter "IRC"), an unelected, nonrepresentative body. The Elections Clause of the United States Constitution requires that the state legislatures ultimately draw and approve congressional district lines. Prop. 106 impermissibly removes the Legislature from its constitutionally-mandated role in the redistricting process. Under Prop. 106, the IRC, not the Legislature, has the authority to draft and approve congressional maps. The Legislature's role is reduced to recommending revisions once the IRC has submitted its draft of the redistricting map. The Legislature's

recommendations are not binding; the IRC maintains complete discretion regarding the final maps. This redistricting process cannot be justified by decisions approving limited checks on a state legislature's redistricting prerogative. Prop. 106 removes the authority to establish district lines from the Legislature and it vests that authority in the IRC. Neither result is consistent with the Elections Clause of the United States Constitution.

Based on the Legislature's likely success on the merits, as well as the likelihood of irreparable harm to the Legislature and to the public interest, this Court should preliminarily and permanently enjoin enforcement of Prop. 106 as to congressional district lines, the operation of the IRC for congressional redistricting, and the use of any congressional district maps established by the IRC. The Legislature and its constituents, the People of Arizona, have already suffered the harm of congressional elections that diverge from the process guaranteed by the Elections Clause. No remedy exists to cure the enforcement of this unconstitutional law. Now, the 2014 general election cycle is underway, and the Legislature once again faces the prospect of being denied its constitutionally-delegated authority to determine the "times, places and manner" of federal elections. To avoid irreparable harm and in accordance with the public interest, the Court should preliminarily enjoin enforcement of Prop. 106 and the use of the IRC's congressional apportionment maps, and upon consolidation of the hearing with the trial on the merits pursuant to Rule 65, enter declaratory judgment that Prop. 106 is unconstitutional and issue a permanent injunction restraining its enforcement.

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Background

I. Factual Background

Prior to 2000, the Legislature established congressional lines through the ordinary legislative process. Ariz. Const. art. IV, pt. 2 § 1, (West Historical Notes) (Appendix ("App."), Ex. A). After final passage, proposed redistricting legislation was sent to the Governor for approval or disapproval, in accordance with Article IV, part 2, § 12 of the Arizona Constitution. The Governor had the authority to approve, disapprove, or take no action on redistricting legislation. Ariz. Const. art. IV, pt. 2, § 12 (App. Ex. B).

On July 6, 2000, an organization identified as "Fair Districts, Fair Elections c/o Arizona Common Cause, Inc." successfully filed an initiative petition with the Arizona Secretary of State. Arizona Secretary of State, 2000 General Election: Ballot Measures, "Fair Districts, Fair Elections" http://www.azsos.gov/election/2000/General/ballotmeasures.htm (last visited September 19, 2013) (App. Ex. C). The application included the following short title:

> This citizen-sponsored Arizona Constitutional amendment will create a new "citizens' independent redistricting commission" to draw new legislative and congressional district boundaries after each U.S. Census. This amendment takes the redistricting power away from the Arizona Legislature and puts it in the hands of a politically neutral commission of citizens who are not active in partisan politics and who will serve without pay to create fair districts that are not "gerrymandered" for any party's or incumbent's advantage.

Id. The Arizona Secretary of State designated the measure as Proposition 106 and placed Prop. 106 on the 2000 general election ballot. Arizona Secretary of State, *2000 Ballot Propositions & Judicial Performance Review* (2000), http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf (last visited

September 19, 2013) (App., Ex. D). The measure passed with 56% of applicable votes cast. Arizona Secretary of State, *State of Arizona Official Canvass* (2000), http://www.azsos.gov/election/2000/General/Canvass2000GE.pdf (last visited September 19, 2013) (App., Ex. E).

Prop. 106 amends Article IV, part 2, § 1 of the Arizona Constitution to remove from the Legislature the authority to prescribe legislative and congressional district lines. Prop. 106 reassigns that authority to the IRC—a new entity created by the proposition. Prop. 106 gives the Legislature a new and extremely limited role. The Legislature has only an opportunity to submit nonbinding recommendations to the IRC, and the obligation to make appropriations for the operation of the IRC. Ariz. Const. art. IV, pt. 2, § 1 (¶¶ 16, 18) (App., Ex. F). Prop. 106 also prescribes the process by which the IRC members are appointed and the process and procedures by which the IRC is to establish legislative and congressional district lines. *Id.* at ¶¶ 3-23.

Using the 2010 Census data, on January 17, 2012, the IRC approved a "final congressional map" and forwarded it to the U.S. Department of Justice for preclearance. Declaration of Amy B. Chan ["Chan Decl."] ¶ 12 (App., Ex. G). On April 9, 2012, the Department of Justice precleared the IRC's congressional maps. *Id.* As directed by Prop. 106, the Arizona Secretary of State was mandated to use the IRC's congressional maps as election districts for the 2012 general election. *Id.* ¶ 14. Under current law, the IRC's congressional maps will continue to be used in congressional elections until a new IRC is chosen in 2021. Ariz. Const. art. IV., pt. 2, § 1 (¶¶ 5, 17, and 23) (App., Ex. F).

The Secretary of State will use the IRC's federal redistricting maps for the 2014 general election. Chan Decl. ¶ 3 (App., Ex. G). Arizona will hold elections for the Representatives from each of its nine (9) congressional districts. Nineteen (19) candidates for these positions have already registered their candidacy with the Federal Elections Commission. Federal Election Commission, 2014 Candidate Summary (http://www.fec.gov/data/CandidateSummary.doc) (last visited September 19, 2013) (App., Ex. H). Under Arizona law, county boards of supervisors must establish voting precinct boundaries by December 1, 2013. Chan Decl. ¶ 7 (App., Ex. G). Precinct boundaries are dependent on congressional district lines. *Id.* Candidates may file Candidate Nomination Petitions, which are required to include candidates on primary ballots, between April 28, 2014, and May 28, 2014. *Id.* at ¶ 10. Early voting for primary elections begins July 31, 2014, and the primary election itself will be held August 26, 2014. *Id.* at ¶ 6. Arizona general elections will be held November 4, 2014. *Id.*

II. Procedural Background

The Legislature first filed a Complaint on June 7, 2012, requesting declaratory and injunctive relief to invalidate Prop. 106 and any congressional map created under Prop. 106 by the IRC. (Doc. 1). Because the 2012 Arizona General Election was well underway, the Complaint did not seek injunctive relief as to 2012, but did seek relief as to the 2014 election. (Doc. 1 at 9). On June 8, 2012, the Legislature filed a formal motion requesting a three-judge panel be convened pursuant to 28 U.S.C. § 2284(a) ("a district court of three judges shall be convened…when an action is filed challenging the constitutionality of the apportionment of congressional districts…"). (Doc. 3). The District Court granted the

motion, and on June 13, 2012, signed an order instructing the Clerk of the Court to initiate the procedure to convene a three-judge court. (Doc. 4).

After issuance of the order, the IRC filed a motion for reconsideration on June 27, 2012. (Doc. 9). On July 3, 2012, the District Court ordered the Legislature to respond pursuant to the Local Rules for the District of Arizona, Rule 7.2(g)(2). (Doc. 10). The Legislature filed its Response, as well as a First Amended Complaint responding to issues raised in the motion for reconsideration, on July 20, 2012. (Doc. 11-12). The IRC in turn filed a Reply in support of their motion for reconsideration on July 30, 2012. (Doc. 13). During the pendency of its motion for reconsideration, the IRC also filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on August 10, 2012. (Doc. 16). The Legislature filed its Response in opposition on August 27, 2012, and the IRC filed its Reply in support on September 7, 2012. (Doc. 17-18).

On August 14, 2013, the Court issued a Minute Order denying the IRC's Motion for Reconsideration, and confirming its June 13, 2012 Order instructing the Clerk of the Court to notify the Chief Judge of the Ninth Circuit Court of Appeals of the need to convene a three-judge court. (Doc. 24). The Chief Judge of the Ninth Circuit Court of Appeals issued an order convening the three-judge court on August 23, 2013. (Doc. 25).

Legal Standard

Courts considering whether to grant a preliminary injunction consider four factors: (1) whether the moving party is likely to succeed on the merits; (2) the likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities; and (4) the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 16 (2008); *Stormans,*

Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009); *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009); *see* Fed. R. Civ. P. 65.

Argument

I. The Arizona State Legislature is Likely to Succeed on the Merits

In granting a preliminary injunction, the "success on the merits" factor, along with the likelihood of irreparable harm, is "the most critical." *Nken v. Holder*, 555 U.S. 418, 430 (2009). Based on the history of the Elections clause, and on the body of Supreme and Circuit Court interpretations of state legislatures' roles under the Elections Clause, the Legislature's constitutional challenge to Prop. 106 has a strong likelihood of success on the merits.

A. The Elections Clause Vests Authority Over Congressional Redistricting In the State Legislature and Precludes Any State From Divesting its Legislature From That Role

The Elections Clause grants provisional authority over the "times, places and manner" of congressional elections in each state to "the Legislature thereof." U.S. Const. art. I, § 4. This provision also explicitly limits the states' authority by reserving the right to override state regulations to Congress. *Arizona v. Inter Tribal Council of Arizona, Inc.*, __ U.S. __, 133 S.Ct. 2247, 2253 (2013). The Elections Clause is an "express delegation[] of power to the States to act with respect to federal elections." *U.S Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995). "[T]he power to regulate the incidents of the federal system is not a reserved power of the States…" *Id.* at 805. "No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved by the Tenth Amendment." *Cook v. Gralike*, 531 U.S. 510, 522-23

(2001). Thus any state regulation of federal elections must be confined to the "exclusive delegation of power under the Elections Clause." *Id.* at 523; *see also Gonzalez v. Arizona*, 624 F.3d 1162, 1174 (9th Cir. 2010) *on reh'g en banc*, 677 F.3d 383 (9th Cir. 2012) *aff'd sub nom Arizona v. Inter Tribal Council of Arizona, Inc.*, __ U.S. __, 133 S.Ct. 2247, 2253 (2013) ("[T]he Elections Clause, as a standalone provision, establishes its own balance, resolving all conflicts in favor of the federal government") (citations omitted).

All parties agree that delineating congressional districts is one of the responsibilities included in the determination of the "times, places and manner" of elections. This case turns on the definition and extent of the term "Legislature" in the Elections Clause. "Legislature" clearly means the representative body that makes the laws of the State. In *Smiley v. Holm*, the Supreme Court explained "legislature" as follows:

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

Smiley v. Holm, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)) (citation omitted and emphasis added); *see also State ex rel. Carroll v. Becker*, 45 S.W.2d 533, 537 (Mo. 1932) (interpreting the Elections Clause and noting "[it] is the same Legislature which performs all the acts constituting the 'manner of holding elections.' The word 'Legislature' cannot mean one thing for one of such duties and another thing for the rest."). By unequivocally defining the term, the Court in *Smiley* made clear the elected, representative state Legislature's preeminent role in the redistricting process.

Because the word "Legislature" refers to a state's representative, law-making body, cases analyzing the Elections Clause for purposes of determining the state legislatures' role focus primarily on the extent to which other aspects of a state's lawmaking process—direct citizen referendums, gubernatorial veto, etc.—can impact the state legislature's role in the redistricting process. Although these cases often uphold some checks and balances on the Legislature's redistricting authority, no case upholds a redistricting scheme such as Prop. 106 that excludes the legislature altogether.

The first Supreme Court decision to touch on the state legislature's role under the Elections Clause was *Davis v. Hildebrandt*, 241 U.S. 565 (1916). In *Hildebrandt*, the Court analyzed an amendment to the Ohio state constitution that allowed the people of Ohio to approve or disapprove any law enacted by the General Assembly by way of referendum. *Id.* at 566. The people of Ohio utilized this referendum power to disapprove the General Assembly's 1915 redistricting plan. Thereafter, a suit was brought against the state election officials for mandamus relief directing the officials to disregard the referendum. *Id.* The basis alleged for mandamus relief was that the Elections Clause gave the Legislature absolute authority over redistricting, which could not be affected by Ohio's law-making process. *Id.* at 567. The Ohio Supreme Court denied the challenge, and the Supreme Court affirmed, but did not reach the precise issue of the Legislature's role in redistricting. Instead, the Court assumed the Elections Clause claim "rest[ed] upon the assumption that to include…referendum…in the scope of the legislative power…causes a State…to be not republican in form in violation of the guarantee of the Constitution" *Id.* at 569 (citations omitted). Rather than address the Elections Clause issues directly, the court ruled based on a

line of cases holding that violation of the guaranty of a republican form of government does not create a justiciable controversy and may not therefore be challenged in the courts. *Id.* (citations omitted).

Building on the issues raised in *Hildebrandt*, *Smiley v. Holm*, addressed directly the role of the state legislature under the Elections Clause, and is most important to this case. In *Smiley*, the governor of Minnesota vetoed a congressional map drawn by the state legislature. Despite the veto, the legislature registered the map with the Minnesota secretary of state on the grounds that both houses of the Minnesota legislature approved of it and the governor's approval or disapproval had no legal effect because of the Elections Clause references to "the Legislature." A citizen filed suit, arguing that "Legislature" in the Elections Clause encompassed the entire legislative power of the state, and thus the map could be of no effect because, after the governor's veto, "it was not repassed by the Legislature as required by law…" *Smiley*, 285 U.S. at 361-62 (emphasis added). Minnesota argued (and its supreme court held) that the Elections Clause vested the state legislature with the total authority to draw maps acting as the "representative of the people of the state" without regard to the governor's veto. *Id.* at 364.

The Supreme Court disagreed and held the legislature could not enact laws in any way other than what is provided within their state's constitution. *Id.* at 368. In reaching this decision, the Court clearly affirmed the traditional meaning of the term legislature as "the representative body which ma[kes] the laws of the people." *Id.* at 365. Most crucially for this case, the Court went on to distinguish the body that acts under the Elections Clause (the state legislature) from the function that body performs under the Elections Clause. In

analyzing the function a state legislature performs under the Elections Clause, the Court first noted four distinct functions of state legislatures under the U.S. Constitution: ratifying, electoral [formerly of senators], consenting, and legislative functions. *Id.* at 365-66. Some of these functions, such as ratification under Article 5, act as a particular "grant of authority," which "imports a function different from that of a lawgiver," and allows the state legislature to act outside the legislative process. *Id.* at 365; *see also Hawke*, 254 U.S. at 227 ("The Fifth Article is a grant of authority by the people to Congress"). In contrast, other constitutional references to "the Legislature" contemplate the state legislature's function of making laws. The issue in *Smiley* was whether redistricting under the Elections Clause refers to the legislature's legislative function.

After careful analysis, the *Smiley* Court concluded that every conceivable act a state legislature might perform under the authority granted by the Elections Clause "involves lawmaking in its essential features and most important aspect." *Smiley* at 365. The legislature's authority is "conferred for the purpose of making laws for the state…" *Id.* at 367. As the Elections Clause invests state legislatures with the authority to make laws regarding congressional redistricting, "it follows, in the absence of an indication of a contrary intent that the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Id.* (emphasis added). Therefore, under the interpretation of the Elections Clause articulated in *Smiley*, there is only one permissible framework for states to operate under when establishing congressional districts. First, a state may only establish congressional districts through the agency of its legislature. Second, its legislature must follow the full legislative enactment processes defined in the

state's constitution. No court has ever held that a state may completely divest its legislature of its lawmaking role in the redistricting process. Such a result would contravene the *Smiley* decision by replacing the first stage of its analysis—the definition of "legislature"—with the secondary analysis of the function performed by the legislature.

In *Brown v. Secretary of State*, 668 F.3d 1271 (11th Cir. 2012), the Eleventh Circuit recently confirmed the analysis of *Smiley* when hearing a challenge to an initiative-generated amendment to the Florida constitution. The amendment mandated six standards for the Florida state legislature to follow when undertaking the congressional redistricting process. *Brown*, 668 F.3d at 1273. The Court in *Brown* concluded that the initiative was similar to other previously-recognized legitimate limits on the state legislature's lawmaking function—the referendum power in *Hildebrandt* and/or gubernatorial veto in *Smiley*—and upheld the constitutional amendment. In affirming the constitutionality of the amendment, however, the Court made sure to note that "at the end of the day, Florida's legislature is still responsible for drawing the congressional district lines." *Id.* at 1281. The court further reasoned that "the standards imposed by the text of [the initiative]," could not be said to "so limit the state legislature's discretion as to eviscerate its constitutionally delegated power [i.e. from the Elections Clause] and effectively exclude the legislature from the redistricting process." *Id.* Just as in *Smiley*, though affirming a legitimate check on the redistricting process, the *Brown* court recognized the state legislature's necessary role in redistricting, and confirmed that, while the role may be limited, states may not go so far as to exclude the Legislature all together.

Smiley and *Hildebrandt* represent the entirety of the Supreme Court's jurisprudence deciding challenges to a state legislature's role in the redistricting process under the Elections clause. Informed by the recent decision in *Brown*, a clear picture of the authority granted to the states "and the Legislatures thereof" emerges. The term "Legislature," as used in the Elections Clause, clearly means the "representative body which [makes] the laws of the people." *Smiley* at 365. In the context of establishing congressional district lines, the Elections Clause clearly does not refer to an exceptional grant of authority, such as the authority to ratify constitutional amendments, but rather refers to the state legislature's ordinary, law-making function. This function may be informed and impacted by the procedural channels of the state law-making power, such as voter referendum and executive approval. Nevertheless, by specifically vesting authority to state legislatures the Elections Clause "operate[s] as a limitation on…the State's ability to define lawmaking by excluding the legislature…" *Colorado Gen. Assembly v. Salazaar*, 541 U.S. 1093, 1095 (2004) (REHNQUIST, J., dissenting from denial of certiorari).

With this framework in mind, the process by which the Legislature enacts laws in Arizona and, by which it performed its redistricting function under the Elections Clause prior to Prop. 106, is defined by Article IV of the Arizona Constitution. This includes reading any proposed bill by sections before the houses of the Legislature, and voting for passage of the bill into law by ayes and nays. Ariz. Const. art. IV, pt. 2 § 12. A majority of all members in each house is necessary to pass any bill. Ariz. Const. art . IV, pt. 2 § 15. When passed the bill is presented to the governor for approval or disapproval. Ariz. Const. art. IV, pt. 2 § 12. Other sections of Article IV allow for limitations on the Legislature's

law-making power, such as the citizen referendum power exercised in *Hildebrandt* and the governor's veto power exercised in *Smiley*. However, while the Legislature's law-making function may be informed and balanced by these limitations for purposes of congressional apportionment, the authority of Supreme Court precedent makes plain that under the Elections Clause, the Legislature must maintain primary decision-making.

B. The IRC Unconstitutionally Excludes the Legislature from the Redistricting Process

Hildebrandt, *Smiley* and *Brown* are no harbor of refuge for Prop. 106. In contrast to the procedure-based limits on the state legislatures approved in those decisions, Prop. 106 does in fact—to use the Eleventh Circuit's term—"eviscerate" the Legislature's constitutionally delegated power by excluding the Legislature wholly from congressional apportionment by upending the legislative process. *See* Ariz. Const. art. IV, pt. 2, § 1 ("The independent redistricting commission shall establish congressional and legislative districts."). Prop. 106 creates the IRC, an unelected, nonrepresentative body, and gives it all lawmaking power over redistricting. *See* Ariz. Const. art. IV, pt. 2, § 1(6) ("Appointments to the independent redistricting commission shall be made in the manner set forth below"); *see also* Ariz. Const. art. IV, pt. 2, § 1(16) ("The independent redistricting commission shall then establish final district boundaries"). The Legislature, is divested of all meaningful authority, and is reduced to making nonbinding "recommendations" to the IRC, and this only after a "draft map" has been drawn. Ariz. Const. art. IV, pt. 2 § 1(16). Notably, such recommendations do not create any legal obligation upon the IRC. *Id.* ("The independent redistricting commission shall then establish final district boundaries."). Prop. 106 is not a

mere "check on the legislative process," as with the provisions approved in *Smiley* and *Brown*, but instead replaces the grant of authority made by the Elections Clause with a grant to a new entity "independent" of the Legislature. Prop. 106 goes too far because it ousts the Legislature from any meaningful participation in congressional apportionment. Proposition 106 does not limit or regulate the Legislature's redistricting authority—it obliterates it. *See* Ariz. Const. art. IV, pt. 2, § 1 ("The independent redistricting commission shall then establish final district boundaries.").

Prop. 106's unconstitutional purpose is unambiguous. The official ballot in 2000 made clear that a vote for Prop. 106 meant "removing redistricting authority from the Arizona Legislature." Arizona Secretary of State, *2000 Ballot Propositions & Judicial Performance Review Nov. 7, 2000 General Election*, at 60 http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf (last visited Sept. 17, 2013) (App., Ex. D at 60). As the IRC was created by an unconstitutional amendment to the Arizona Constitution, the redistricting lines drawn by the IRC lack constitutional authority. Based on the language of the Elections Clause, and on the above Supreme Court precedent confirming the Legislature's necessary role in the redistricting process, the Legislature is likely to succeed on the merits at trial.

C. The Text of the Elections Clause Supports the Legislature's Likely Success on the Merits

Perhaps the plainest argument for state legislatures' role in Congressional redistricting comes from the text of the Elections Clause itself. By delegating authority over the "times, places and manner" of Congressional elections to "the several States, by the

Legislatures thereof," the Framers unambiguously entrusted representative state assemblies with safeguarding the composition of the federal legislature.

The textual meaning of the Elections Clause is equally apparent from the fact that originally the provision applied to both houses of Congress. At the time the state ratifying conventions adopted the Elections Clause, the Constitution provided for the appointment of Senators by the state legislatures. U.S. Const. art. I § 3. Until the passage of the Seventeenth Amendment, this was a specific grant of authority which existed outside the state law-making power, and was uniquely bestowed on the states' representative assemblies. *See Hawke*, 253 U.S. at 227-228 (discussing the use of the term "Legislature" in Article I, § 3). Therefore, when the Elections Clause granted authority over the times, places and manner of holding Elections for "Senators and Representatives," it necessarily referred both to the state legislatures' legislative authority to set the times, places and manner of general elections to the House of Representatives, as well as the state legislatures' electoral authority to set the times, places and manner of Senatorial appointments. This is particularly true of the state legislatures' role in determining the *places* of Senatorial appointments, as not even Congress retained oversight over the places for Senatorial appointment. U.S. Const. art I § 4 ("…but the Congress may at any time by Law make or alter such Regulations, except as to the place of chusing Senators").

By understanding the dual-nature of the authority initially granted by the Elections Clause, it is clear that reference to "in each State by the Legislatures thereof" necessarily refers to the actual body of the legislature, and entrusts that body with a necessary role in determining Congressional Elections. The term "Legislature" cannot have referred broadly

to the entire law-making process of the states, because the term encompasses within it not only the state legislatures' legislative authority over Representative elections, but also a deliberate grant of authority to determine the times, places and manner of appointing Senators. By referring to both law-making and electoral functions using the same instance of the word "Legislature," the Framers made clear their reference to the plain meaning of the word "Legislature," and foreclosed any alternate interpretation. State legislatures no longer serve an electoral function because of the Seventeenth Amendment. By the same token, it would take another amendment to the Constitution to change the clear role state legislatures have with regard to congressional elections under the Elections Clause.

D. The History of the Elections Clause Confirms the Legislature's Primary and Necessary Role in Drawing Redistricting Lines

Finally, this understanding of the Elections Clause—and in turn the Legislature's likelihood of success—is supported by the constitutional and legal history of the Elections Clause. Specifically, the history of the Elections Clause highlights an all-important distinction between a state's people, who depending on state law may have a role in the legislative process, and a state's legislature. The minutes of the Constitutional Convention, THE FEDERALIST, and later Congressional legal proceedings clearly establish a marked distinction between the people, and the body of the legislature referenced in the Elections Clause.

The Framers' understanding of the Elections Clause is illustrated by James Madison's remarks, spoken during the debates regarding the Elections Clause at the Federal Convention on August 9, 1787:

> The policy of referring the appointment of the House of Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode [of the elections]. This view of the question seems to decide that the Legislatures of the States ought not to have uncontrouled [sic] right of regulating the times[,] places & manner of holding elections.

JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787: WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA / REPORTED BY JAMES MADISON 371 (Prometheus ed., 2007 [1787]) ("RECORDS OF THE FEDERAL CONVENTION") (proceedings of August 9, 1787) (emphasis added). This comment recognizes several important distinctions: that (1) the people of the states elect congressional representatives, (2) the legislatures of the states regulate those elections, and (3) the separation of the people from the legislatures is meant to ensure that legislatures don't possess "uncontrouled right" over congressional elections. A state's people and a state's legislature were not only distinguished from each other, they were deliberately balanced one against the other.

This distinction is also highlighted by motions and arguments raised by Charles Pinckney during the Federal Convention. Pinckney introduced the following motion into debate of the Committee of the Whole on June 6, 1787: "that the first branch of the national Legislature be elected by the State Legislatures, and not by the people." *Id.* at 62 (proceedings of June 6, 1787) (emphasis added). Thus the convention itself recognized and debated the distinction between state legislators and the people of the state generally. *Id.* at 62-64 (Delegates debating Pinckney's motion).

Significantly, Pinckney's motion was prompted by his displeasure with the outcome of a vote taken by the Convention a week earlier. The Fourth Resolution of Edmund

Randolph's plan provided that "the members of the first branch of the National Legislature ought to be elected by the people of the Several States . . . ." *Id.* at 24 (proceedings of May 29, 1787) (emphasis added). The ensuing debate on the resolution concerned the specific question whether it should be the *people* of the states, or the *legislatures* of the states, who elect congressional representatives. Delegate Roger Sherman opened the debate as follows: "Mr. Sherman opposed the election by the people, insisting that it ought to be by the State Legislatures." *Id.* at 31 (proceedings of May 31, 1787). Delegate James Wilson disagreed, arguing "strenuously for drawing the most numerous branch of the Legislature from the people," because it would be "wrong to increase the weight of the State Legislatures by making them the electors of the national Legislature." *Id.* at 32-33. James Madison entered the debate and argued that "the great fabric to be raised would be more stable and durable, if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislatures." *Id.* at 33.

Having lost his previous battle on the balance of power between the people of a state and the elected legislature, on June 21, 1787, Pinckney tried a new angle. He moved "that the 1st branch, instead of being elected by the people, sh[d] [sic] be elected in such manner as the Legislature of each State should direct." *Id.* at 142 (internal quotation marks omitted) (emphasis added). This way, each state could decide for itself whether the people would elect their representatives or not. After much debate focusing on the balance of power between the people of the states and the legislatures of the states, Pinckney's motion failed—whereupon he immediately moved "that the 1st branch be elected by the people in such mode as the Legislatures should direct . . . ." *Id.* at 142-44. Pinckney's second motion

of June 21 clearly is the germ of the Elections Clause[1]. It also expressly distinguishes between a state's people and its legislature. The progression of these motions highlights the Framers' intention to entrust the state legislatures with directing Congressional elections, as a balance on the elective power retained by the people.

In addition to the records of the Federal Convention, the arguments made by Madison and Hamilton in THE FEDERALIST confirm the Founders' distinction between the people and the legislature. This distinction is particularly clear in THE FEDERALIST NOS. 59-61, which specifically address the Elections Clause. For instance, in THE FEDERALIST NO. 59 (Alexander Hamilton), Hamilton distinguishes the people of a state from the legislature while defending the grant of authority to Congress to regulate its own elections. Hamilton points out that the interests of the people of a state might conflict with the interests of the Legislature of the State:

> "The people of America may be warmly attached to the government of the Union, at times when the particular rulers of particular States, stimulated by the natural rivalship of power, and by the hopes of personal aggrandizement, and supported by a strong faction in each of those States, may be in a very opposite temper. This diversity of sentiment between a majority of the people and the individuals who have the greatest credit in their councils is exemplified in some of the States at the present moment, on the present question."

THE FEDERALIST NO. 59, at 306-307 (Alexander Hamilton) (William R. Brock ed., 2000) (emphasis added). In other words, not only does he distinguish a state's people from a

[1] Pinckney waived his final motion, when it was "hinted that such a provision might be more properly tried in the detail of the plan." *Id.* Pinckney's suggestion was in fact taken up by the Committee of Detail, and the first iteration of the Elections Clause emerged in written form in the Committee of Detail's report of August 6, 1787. William M. Meigs, *The Growth of the Constitution in the Federal Convention of 1787*, pp. 87-89 (1st Ed. 1900).

state's legislature, he makes the observation that, at the time of his writing, there is a conflict between the people of some states and the legislatures of those states. THE FEDERALIST NO. 59 justifies the Election Clause's grant of oversight to Congress *because* the interests of the people of a state might conflict with the interests of the legislature of a state.

THE FEDERALIST NO. 60 continues the discussion of federal elections begun in THE FEDERALIST NO. 59 and explores the question why Congress should not have exclusive authority over federal elections. Importantly, in his discussion, Hamilton distinguishes between all the different "classes of electors." These include: (1) The People; (2) The State Legislatures; and (3) Electoral College Electors. All three classes are taken to be distinct entities, and Hamilton distinguishes them to defend his claim that diversity in "constituting the several component parts of the [federal] government" will protect against factions assuming control of the federal government:

> "The House of Representatives being [sic] to be elected immediately by the people, the Senate by the State Legislatures, the President by electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors."

THE FEDERALIST NO. 60 at 308-309 (Alexander Hamilton) (William R. Brock ed., 2000) (emphasis added). Clearly the Founders understood the distinction, and referred to the state legislatures deliberately and considered these entities as key components of the federal structure.

The ratification debates themselves, which occurred in the legislatures of the states, often focused on the importance of involving the state legislatures in the elections of

Congress. For example, during the ratification debates in North Carolina, Representative Samuel Spenser expressed concerns that the Elections Clause would remove authority to the legislatures of the states:

> This appears to me to be a reprehensible clause; because it seems to strike at the state legislatures, and seems to take away that power of elections which reason dictates they ought to have among themselves. It apparently looks forward to a consolidation of the government of the United States, when the state legislatures may entirely decay away.

Debate in North Carolina Ratifying Convention, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 50-72 (Jonathan Elliot ed., 1888) [hereinafter ELLIOT'S DEBATES], *quoted in The Founders' Constitution* (Philip b. Kurland and Ralph Lerner ed., 2000), available at http://press-pubs.uchicago.edu/founders/documents/a1_4_1s18.html. In response to these concerns, Representative James Iredell, who had served as a delegate to the Constitutional Convention, sought to reassure that the Elections Clause was no enemy of the state legislatures.

> The very existence of the general government depends on that of the state governments. The state legislatures are to choose the senators. Without a Senate there can be no Congress. The state legislatures are also to direct the manner of choosing the President. Unless, therefore, there are state legislatures to direct that manner, no President can be chosen. The same observation may be made as to the House of Representatives, since, as they are to be chosen by the electors of the most numerous branch of each state legislature, if there are no state legislatures, there are no persons to choose the House of Representatives. Thus it is evident that the very existence of the general government depends on that of the state legislatures, and of course, that their continuance cannot be endangered by it.

Id. Similarly, in an example from Virginia, James Madison responded to questions about the structure of the Elections Clause by clarifying that the language was drafted to protect the role of the state legislatures in selecting senators:

> …if Congress could fix the place of choosing the senators, it might compel the state legislatures to elect them in a different place from that of their usual sessions, which would produce some inconvenience, and was not necessary for the object of regulating the elections.

Debate in Virginia Ratifying Convention, 3 ELLIOT'S DEBATES 9-11, 60, 175-76, 366-67, *quoted in The Founders' Constitution* (Philip b. Kurland and Ralph Lerner ed., 2000), available at http://press-pubs.uchicago.edu/founders/documents/a1_4_1s16.html. Ratification of the Constitution was often a process of assuaging concerns arising in the legislatures of the states. The concept that a body other than a state's legislature would exercise control under the Elections Clause would have been utterly foreign to all concerned at the time of ratification.

Finally, other legal history regarding the Elections Clause also supports this distinction. For instance, in 1842, the U.S. House of Representatives took up this very historical question directly. Acting in a judicial capacity, the House discussed the framing history of the Elections Clause in these terms:

> When General Pinckney proposed in the convention which formed the Constitution that the representatives "should be elected in such manner as the legislatures of each state should direct," he urged, among other reasons in support of his plan, "that this liberty would give more satisfaction, as the legislature could then accommodate the mode to the convenience and opinions of the people."
>
> After the substance of this provision had been fully and ably discussed, maturely considered, and unanimously adopted, the latter clause of the section

> conferring upon Congress the power to make regulations, or to alter those prescribed by the states, was agreed to . . . .

The Case of the Representatives from New Hampshire, Georgia, Mississippi, and Missouri, 1 Bartlett[2] 47, 50 (U.S. House of Reps. 1842) (emphasis added). The House's discussion is simply further concrete evidence that the Framers distinguished a state's people from a state's legislature, and distinguished them in framing the Elections Clause specifically.

Congress's jurisprudence concerning the election of its members also recognizes the specific role of state legislatures under the Elections Clause.[3] In *Baldwin v. Trowbridge*, 2 Bartlett[4] 46 (U.S. House of Reps. 1866), for example, the House directly took up the following question under the Elections Clause: "But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine*[5], as known in the political history of the country?" 2 Bartlett at 47. The House expressly adopted the latter definition and held that "if there is any legislative body in the State that can be properly called a *legislature*," the words of the Elections Clause "appertain to it." *Id.* (emphasis in original).

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[2] The full name of the case reporter is D. W. BARTLETT, CASES OF CONTESTED ELECTIONS IN CONGRESS FROM 1834 TO 1865, INCLUSIVE (1865).

3 *See generally*, *Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 613 (1929) (recognizing that Congress's authority to judge the elections of its members is "judicial, in character," and includes the power "…to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review.")

[4] The full title of this case reporter is D. W. BARTLETT, CASES OF CONTESTED ELECTIONS IN CONGRESS FROM 1865 TO 1871, INCLUSIVE (1870).

[5] According to BLACK'S LAW DICTIONARY 9th ed. (2009) at 615, *eo nomine* means "By or in that name."

In his dissenting opinion in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), Justice Stevens discussed *Baldwin* in his brief exploration of an Elections Clause question relating to California's regulation of congressional elections through the citizens' initiative process, rather than through the state legislature.[6] Justice Stevens points out that the U.S. House of Representatives has had occasion—in *Baldwin*—to answer the question whether the term "Legislature" in the Elections Clause refers to the representative body of the state, or whether it is so broad as to encompass the "general legislative power of [the] State." *Id.* at 603 & n.11 (internal quotation marks omitted) (citing *Baldwin v. Trowbridge*). As Justice Stevens observed, the House of Representatives determined that "Legislature" in the Elections Clause does not encompass the general legislative power of the State. *Id.* This apparently suggested to Stevens that a state's classification "of voter-approved initiatives as an exercise of legislative power would not render such initiatives the act of the [state] Legislature within the meaning of the Elections Clause." *Id.*

Justice Stevens also remarked that the "text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the [Elections] Clause vests in state 'Legislature[s].'" 530 U.S. at 602 (Stevens, J., dissenting). Justice Stevens continues:

> It could be argued that this reasoning does not apply in California, as the California Constitution further provides that "[t]he legislative power of this State is vested in the California Legislature . . . , but the people reserve to themselves the powers of initiative and referendum." The vicissitudes of state

[6] The majority opinion in *California Democratic Party* did not address the Elections Clause question.

> nomenclature, however, do not necessarily control the meaning of the Federal Constitution.

Id. at 602-03 (emphasis added). Justice Stevens' reasoning follows closely the House's opinion in *Baldwin*, where the House explained that "[t]he people authorize a convention to do that where they (the people) have power; but certainly the people of Michigan had no power to enlarge or restrict the language of the Constitution of the United States," as spelled out in the Elections Clause. 2 Bartlett at 48 (emphasis added).

The distinction between a state's people and a state's legislature is well-established throughout the constitutional and other legal history of the Elections Clause. This key distinction supports the contention that it is the actual body of the state legislature, not the general law-making power of the state, which is contemplated by the Elections Clause. This constitutional and legal history supports a holding that Prop. 106 is unconstitutional as to its total exclusion of the Legislature from its redistricting role, and weighs in favor of the Legislature's likely success on the merits.

II. The Legislature is Likely to Suffer Irreparable Harm without a Preliminary Injunction

In addition to its likely success on the merits, the Legislature is further entitled to a preliminary injunction because continued application of Prop. 106 will cause irreparable harm. "An alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (reversing a District Court's denial of a preliminary injunction against enforcing a California law alleged to violate the Equal Protection Clause). This is because, "unlike monetary injuries, constitutional violations cannot be adequately remedied through damages." *Nelson v.*

National Aeronautics and Space Admin., 540 F.3d 865, 882 (9th Cir. 2008). Prop. 106 already forced Arizona to suffer the irreparable harm of utilizing an unconstitutional redistricting scheme for the 2012 general election. The relative proximity of the 2014 general election puts the State in danger of further "suffer[ing] the injury of obeying the law during the pendency of the proceedings and any further review." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (referring to the harm suffered by following an unconstitutional law as a basis for injunctive relief).

The Legislature's likely success on the merits of its constitutional challenge necessarily confirms the likelihood of irreparable harm. The very fact that Prop. 106 violates the Legislature's rights under the Elections Clause creates a presumption of irreparable harm. *See* 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2948, at 440 (1973) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.").

Arizona's redistricting scheme has in fact already caused and threatens to continue to cause the irreparable harm associated with obeying an unconstitutional law. The Legislature first filed its complaint in June 2012, after the IRC received preliminary approval of its redistricting maps from the U.S. Department of Justice, in hopes of enjoining use of the IRC's redistricting maps in the 2012 election. However, the procedural requirements of the Legislature's challenge delayed resolution, forcing the 2012 general election in Arizona to be made based on the IRC's unconstitutional congressional maps. Now, one year later, the 2014 general election cycle is underway, and Arizona will once again be faced with the prospect of electing its representatives based on an unconstitutional redistricting scheme.

Were the Court to deny this motion, the 2014 elections would likely be held before final resolution of the case, and the State would once again be forced to utilize the IRC's unconstitutional congressional maps. Further, the Legislature would be left with no recourse to cure the continuing deprivation of its role in redistricting under the Elections Clause. In order to avoid the irreparable harm caused by continuing application of unconstitutional laws, the Court should grant the requested preliminary injunction.

III. A Balancing of Equities and Consideration of Relevant Public Policy Concerns Weigh in Favor of Granting Injunctive Relief

Finally, injunctive relief is necessary given a consideration of the public interest and a balancing of the equities between the Parties. It is neither equitable nor in the public interest to allow a state to continually violate the requirements of federal law. *California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 852-53 (9th Cir. 2009) (holding that the "equities" and "public interest" factors in preliminary injunction analysis should weigh in favor of preserving the supremacy of federal law, which "is paramount"). Federal supremacy deserves special weight in the context of the Elections Clause, as it contains a "standalone preemption provision," which "establishes its own balance, resolving all conflicts in favor of the federal government." *Gonzalez*, 624 F.3d at 1174. As detailed above, Prop. 106 and the IRC directly contravene the requirements of federal law as contained in the Elections Clause. Prop. 106 allowed the IRC to unconstitutionally establish redistricting lines in 2012, and the unconstitutional lines stand to endure through subsequent election cycles in continual violation of federal law. The public interest in maintaining and

preserving the Constitution as the supreme law of the land weighs heavily in favor of enjoining enforcement of Prop. 106.

Defendants cannot argue that equitable considerations and/or public policy weigh in their favor. To the extent that the requested injunction may burden the IRC or the Secretary of State, for instance by requiring a reopening of the redistricting process, such hardships "must be balanced against the public interest represented in…the Constitution's declaration that federal law is to be supreme." *American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1060 (9th Cir. 2009) (considering the weight afforded to maintaining the supremacy of the Constitution when granting a preliminary injunction). Maintaining the Constitution as the supreme law of the land is of paramount importance to the public interest, and necessarily weighs the balancing of equities in favor of granting the preliminary injunction.

IV. In the Interest of Preserving Judicial Resources the Three-Judge Panel Should Consolidate the Preliminary Injunction Hearing with the Trial on the Merits

Rule 65(a)(2) of the Federal Rules of Civil Procedure allows that "the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." Whereas here, the material facts are uncontested and resolution of the case turns on purely legal issues – and the Court consists of three judges rather than one – the Court should consolidate in order to "preserve judicial resources and save the parties from wasteful duplication of effort." *NOW v. Operation Rescue*, 747 F.Supp. 760, 768 (D.D.C. 1990); see also *Bright v. Nunn*, 448 F.2d 245, 247 n.1 (6th Cir. 1971) (preliminary

injunction hearing and trial on the merits may be consolidated where facts disclosed by the record are uncontested).

Consolidation in this case will allow the Court to avoid needless repetition of evidence and arguments, as the same arguments advanced in this motion would be used in the trial on the merits. *Amoco Production Co. v. Gambell*, 480 U.S. 531, n. 12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff show a likelihood of success on the merits rather than actual success"). The advisory committee to the Federal Rules of Civil Procedure noted that Rule 65(a)(2) consolidation "can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application [for a preliminary injunction] will be relevant to the merits. Fed.R. Civ. P. 65(a)(2) 1966 advisory committee's note. Here, the material facts are undisputed. Therefore only legal considerations remain: whether it is unconstitutional for Prop. 106. to wholly remove the Legislature from the redistricting process. As all the facts necessary to resolve this case are contained in the motions and pleadings before the Court, the Court should consolidate the hearing and the trial on the merits.

Additionally, consolidation would be in keeping with the priority afforded to the Legislature's challenge. This case is being heard before a three-judge court based on 28 U.S.C. § 2284, which provides that such a court must be convened for a claim challenging the apportionment of congressional districts. Such challenges are entitled to priority under Federal Rules of Civil Procedure, Rule 40. Rule 40, Fed. R. Civ. Pro. ("The Court must give priority to actions entitled to priority by a federal statute."); *and see* Rule 40 Advisory

Committee Notes (identifying actions under the prior codification of 28 U.S.C. § 2284 as an example of a statute "giving precedence."). Given the impending election, consolidation would be an effective means of prioritizing the resolution of this case.

Finally, the Legislature has asked the Court for declaratory relief pursuant to 28 U.S.C. § 2201. Federal Rule of Civil Procedure 57 authorizes the Court to "order a speedy hearing of a declaratory-judgment action." As the injunctive and declaratory judgment issues are essentially coequal, consolidation of the two would be appropriate in this case.

V. This Court is Authorized to Take Judicial Notice of Undisputed Matters of Public Record Supporting the Facts in This Case

This Court should take judicial notice of an adjudicative fact if requested by a party and supplied with the necessary information. FED.R.EVID. 201. Judicial notice of an adjudicative fact must "not [be] subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." FED.R.EVID. 201(b); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.2001) (judicial notice may be taken of public records); *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir.1953) (judicial notice may be taken of records and reports of administrative bodies); *accord. Hernandez v. Frohmiller*, 68 Ariz. 242, 258, 204 P.2d 854, 865 (1949) (judicial notice under state rule of evidence may be taken of the Arizona secretary of state records). Here, the Legislature respectfully requests that this Court take judicial notice of the following:

- the filings of the parties in this matter;
- the filing date, text, and stated purpose of the Prop. 106 application;
- the official ballot for Prop. 106;
- the passage of Prop. 106 as written in 2000;
- the pre- and post-Prop. 106 versions of Arizona Constitution, Article IV, part 2, section 1;
- Arizona Constitution, Article IV, part 2, sections 12 & 15; and
- the current registration with the Federal Election Commission of candidates for the 2014 congressional elections.

The public records to support this request for judicial notice are submitted in the Appendix filed herewith. As these matters are undisputed and in the public record, they are a proper subject for this Court's judicial notice.

Conclusion

Based on the Legislature's likely success on the merits, the likelihood of irreparable harm, and public policy considerations the Court should preliminary enjoin further use of the IRC's unconstitutional redistricting maps for congressional elections. In the interest of conserving scarce judicial resources, the Court should consolidate the hearing on this motion with the trial on the merits and declare Prop. 106 unconstitutional as to congressional elections, and permanently enjoin the IRC from congressional redistricting.

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RESPECTFULLY SUBMITTED this 20th day of September, 2013,

ARIZONA STATE LEGISLATURE

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