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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.

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

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

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

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

II. Argument

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

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

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

Furthermore, Defendants' version of federalism is misplaced in the federal elections context. State legislative authority over congressional elections derives solely from the Constitution itself. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 805 (1995). Therefore, states have no reserved authority under the Tenth Amendment over this domain. *Id.* Applying the Elections Clause as written does not disturb any "delicate balance" between competing state and federal sovereignty. *Gonzalez v. Arizona*, 624 F.3d 1164, 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). Instead, the Elections Clause, as a standalone preemption provision, establishes its own balance and resolves all conflicts in favor of the federal government. *Id.* Thus, the federalism principles that apply to the states' use of their inherent police powers are limited in the Elections Clause context. *Arizona v. Inter-Tribal Council of Arizona*, __ U.S. __, 133 S.Ct. 2247, 2257 (2013). The states' role in regulating congressional elections has always existed subject to the express qualification that it "terminates according to federal law." *Id.* Defendants cannot argue for deference to state sovereignty in an area where states have no traditional, reserved or inherent authority.

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

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

B. Defendants' Fail to Overcome the Legislature's Textual Arguments and Historical Record.

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

Rather than provide a contrary historical record, Defendants misconstrue the Elections Clause history in an attempt to minimize its import. (Doc. 37 at 10-12.) The progress of Pinckney's motions, which reveals the genesis of the Elections Clause, are precisely relevant because they indicate the desire of a large contingent of Convention delegates to channel the will of the people in electing Representatives through their elected state legislatures. These delegates actually argued for direct appointment of Representatives by the legislatures because they felt that this would cause "more refined, and better men" to be sent to Congress. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 365 (Max Farrand ed., 1911), *available at* http://files.libertyfund.org/files/1057/0544-01_Bk.pdf ("RECORDS OF THE FEDERAL CONVENTION") (proceedings of June 21, 1787). Though the Convention ultimately decided direct election was necessary, it reached a compromise: Representatives would be "elected by the people in such mode as the Legislatures should direct." 1 RECORDS OF THE FEDERAL CONVENTION 360 (proceedings of June 21, 1787). James Madison confirmed this understanding by writing in THE FEDERALIST that "the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of

men, whose influence over the people obtains for themselves an election into the State legislatures." THE FEDERALIST NO. 45, at 240 (James Madison) (George W. Carey and James McClellan eds., 2001), *available at* http://files.libertyfund.org/files/788/0084_LFeBk.pdf. This foundational purpose of the Elections Clause is thwarted by excluding the elected legislatures from redistricting.

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

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

In their Response, Defendants state that "every court to address this issue [i.e. the state legislatures' role under the Elections Clause] has concluded that the Elections Clause does not restrict the use of otherwise lawful state legislative power." (Doc. 37 at 6.) This claim belies the fact that none of the cases cited dealt with the complete exclusion of the legislature from the redistricting process, but only with qualifications on the legislatures' use of power. Though the United States Supreme Court has not yet ruled on a congressional redistricting scheme that wholly excludes a state's legislature, dissenting opinions by former Justices Stevens and Rehnquist acknowledge that the language of the Elections Clause itself operates as a limit on the state legislative process. *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., dissenting from denial of certiorari) ("there must be some limit on the State's ability to define lawmaking by excluding the legislature itself…"); *California Democratic*

Party v. Jones, 530 U.S. 567, 602 (2000) (Stevens, J. dissenting) (suggesting that redistricting by popular initiative, unreviewable by legislative action, could potentially be unconstitutional).

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

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

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

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

Defendants inaccurately point to two provisions in the Arizona Constitution which they claim allow the Legislature meaningful participation in the redistricting process. (Doc. 37 at 3-4.) First, Defendants point to Ariz. Const. art. XXI, § 1, which allows the Legislature to submit proposed constitutional amendments to a vote of the people. The mere ability to offer a proposed constitutional amendment to the electorate is a far cry from prescribing the times,

places, and manner of congressional elections. It is certainly not the authority to prescribe the "manner" of congressional elections that the Elections Clause requires the Legislature to have.

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

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

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

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

E. Defendants' Non-Justiciability Claim is Foreclosed by a Century of Election Clause Precedent.

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

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

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

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

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

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

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

2. Defendants Fail to Assert and Prove Any Equitable Elements

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

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

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

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

III. Conclusion

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

RESPECTFULLY SUBMITTED this 28th day of October, 2013,

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