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IN THE PUBLIC INTEREST**
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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

ARIZONA STATE LEGISLATURE,)
) No.: 2:12-CV-01211-PGR-MMS-GMS
)
Plaintiff,)
) **BRIEF OF AMICI CURIAE**
vs.)
)
ARIZONA INDEPENDENT)
REDISTRICTING COMMISSION, et al.,)
)
Defendants.)
)
)

I. INTRODUCTION.

This lawsuit is an attempt by the Arizona legislature to circumvent the will of the people of Arizona as expressed in two constitutional provisions that were approved by voters. These constitutional provisions are the Independent Redistricting provisions,

1 Ariz. Const, Art. 4, Pt. 2 § 1, and the provisions enacted through the Voter Protection
2 Act, Ariz. Const., Art. 4, Pt. 1, § 1, (6)(B) and (C).

3 Amici in this case¹ include the drafters of the Arizona Independent Redistricting
4 Initiative (Proposition 106) which amended the Arizona Constitution to reposit authority
5 for redistricting in the Arizona Independent Redistricting Commission. Proposition 106
6 was approved by Arizona voters in 2000. Ariz. Const, Art. 4, Pt. 2 § 1.

7 Other Amici supported the enactment of Proposition 106 on numerous grounds,
8 including that it would open the redistricting process to public scrutiny and remove the
9 responsibility for redrawing district boundaries from legislators who have “the ultimate
10 conflict of interest” in doing so. Arizona Sec’y of State, 2000 Publicity Pamphlet, p.57
11 (2000), available at

12 <http://www.azsos.gov/election/2000/Info/pubpamphlet/englis/prop106.pdf>. (Argument
13 for Proposition 106 by Miriam Neiman, Treasurer, Arizona Common Cause, Sun City
14 and Dennis Burke, Executive Officer, Arizona Common Cause, Phoenix).

15 The individuals and organizations that appear as Amici in this case do so not only
16 to defend Proposition 106 but also to vindicate the Voter Protection Act (Proposition
17 105) which was approved by Arizona voters in 1998. The Voter Protection Act amended
18 the Arizona Constitution to establish that Arizona initiatives approved in the 1998
19 election or thereafter could not be repealed by the Arizona legislature, nor could they be
20 amended unless the amendment furthered the purposes of the initiative and was passed
21 with a three-fourths vote in each house of the Arizona legislature. Ariz. Const., Art. 4,
22 Pt. 1, § 1, (6)(B) and (C).

23
24
25 ¹ Dennis Burke, Bart Turner, League of Women Voters of Arizona, Arizona Advocacy
26 Network, and Inter Tribal Council of Arizona, Inc.

1 In the view of Amici, the Voter Protection Act bars this lawsuit by the Arizona
2 state legislature to invalidate Proposition 106.

3
4 **II. PROPOSITION 106 WAS INTENDED TO TRANSFER RESPONSIBILITY**
5 **FOR REDISTRICTING FROM THE LEGISLATURE TO THE ARIZONA**
6 **INDEPENDENT REDISTRICTING COMMISSION**

6 To be clear, Proposition 106 was intended to remove responsibility for
7 redistricting from the Arizona legislature and establish an independent body with no
8 vested interest to “oversee the mapping of fair and competitive congressional and
9 legislative districts.” Ariz. Sec’y of State, 2000 Publicity Pamphlet, p. 54 (2000),
10 available at <http://www.azsos.gov/election/2000/Info/pubpamphlet/englis/prop106.pdf>.
11 Proposition 106 was initiated by Arizona voters because both major political parties, for
12 too long, drew legislative and congressional districts for the purpose of protecting
13 incumbents. *Id.* at 57 (Argument for Proposition 106 by Grant Woods, Phoenix, former
14 Attorney General and Susan Gerard, Phoenix Representative, District 18). Proposition
15 106 removed the responsibility of redrawing of legislative and congressional district
16 boundaries from those with the greatest conflict of interest, incumbent legislators. *Id.*
17 (Argument for Proposition 106 by Myrna Shepherd, President, Arizona School Boards
18 Association, Phoenix and Harry Garewal, Vice President, Arizona School Boards
19 Association, Phoenix). The objective was to create competitive districts to encourage
20 citizens to vote, people to run for office, and representatives to respond to constituents’
21 concerns. *Id.* at 58 (Argument for Proposition 106 by Anne Eschinger, President, League
22 of Women Voters of Arizona, Phoenix and Willi Waltrip, 2nd Vice President, League of
23 Women Voters of Arizona, Phoenix).

24 Arizona law requires that Legislative Council prepare an analysis of each
25 proposition approved for the ballot. A.R.S. § 19-124(B). If there had been any question
26 about the constitutionality of Proposition 106, it would have been identified by

1 Legislative Council. However, no such issue was ever identified by Legislative Council.
2 Nor was the Election Clause issue, now advanced by the legislature, ever mentioned or
3 discussed in the Publicity Pamphlet for the 2000 election or at any time during the
4 campaign prior to the election.

5 Defendants have more than adequately addressed the Elections Clause argument
6 advanced by the legislature in this case and Amici will not duplicate that discussion.
7 Instead, Amici address issues of Arizona constitutional law that divest the Arizona
8 legislature of the authority to even pursue its claim in this case.

9
10 **III. THE VOTER PROTECTION ACT CHANGED THE BALANCE OF**
11 **POWER BETWEEN THE LEGISLATURE AND THE PEOPLE IN**
12 **ARIZONA**

12 Arizona has a long and rich tradition of direct democracy that took root in the
13 progressive era when Arizona was admitted to the Union. The Making of the Arizona
14 Constitution, John O. Leshy, Ariz. St. L. J. 20; 1 at 46. Arizona's Constitution provides
15 that legislative authority is jointly shared between the legislature and the people. The
16 Constitution specifically provides that:

17 The legislative authority of the state shall be vested in the legislature,
18 consisting of a senate and a house of representatives, but the people reserve
19 the power to propose laws and amendments to the Constitution and to enact
20 or reject such laws and amendments at the polls, independently of the
21 legislature; and they also reserve, for use at their own option, the power to
22 approve or reject at the polls any act, or item, section, or any part of any
23 act, of the legislature.

22 Ariz. Const., Art. 4, Pt. 1, § 1(1).

23 Unlike the federal constitution, the Arizona Constitution does not grant
24 enumerated legislative power but instead limits its exercise and scope. *Earhart v.*
25 *Frohmler*, 65 Ariz. 221, 224, 178 P.2d 436, 437-38 (1947). The legislature and the
26 people can enact any law that is not prohibited by the U.S. or Arizona Constitutions. The

1 legislative authority of the people is coextensive (and even greater under the Voter
2 Protection Act) with that of the legislature. *Tilson v. Mofford*, 153 Ariz. 468, 470, 737
3 P.2d 1367, 1369 (1987) (“[T]he legislative power of the people is as great as that of the
4 legislature.”); Ariz. Const., Art. 22, § 14 (“Any law which may be enacted by the
5 legislature under this constitution may be enacted by the people under the initiative.”).

6 Arizona’s Constitution has always prohibited the legislature from repealing or
7 amending an initiative measure approved by voters under certain circumstances. From
8 1914 until 1998 when the Voter Protection Act was approved, the Arizona
9 Constitution provided that:

10 The veto power of the governor or the power of the legislature, to repeal or
11 amend shall not extend to initiative or referendum measures approved by a
12 majority vote of the qualified electors.

13 Ariz. Const., Art. 4, Pt.1 § 1(6).

14 In 1952, the Arizona Supreme Court interpreted this provision to mean that
15 initiative measures were insulated from repeal or amendment by the legislature only if the
16 measure had been approved by a majority of registered voters as opposed to a majority of
17 voters casting ballots. *Adams v. Bolin*, 74 Ariz. 269, 247 P.2d 617 (1952). As a practical
18 matter, the Court’s decision meant that no voter approved initiative was safe from
19 legislative repeal or amendment because the number of affirmative votes would rarely, if
20 ever, equal or exceed the majority of registered voters.

21 The Supreme Court’s decision in *Adams v. Bolin* meant that the legislature could
22 repeal or amend voter approved initiatives without legal limitation. To the consternation
23 of Arizona voters, the legislature did so with increasing frequency. Things came to a boil
24 in the late 1990s. A number of citizen measures dealing with campaign finance, health
25 care, and the environment were threatened and one measure was actually repealed by the
26

1 legislature. Voters were chagrined at the relative indifference with which the legislature
2 had subverted initiatives that required substantial resources to circulate the necessary
3 number of petitions to qualify for the ballot and then be approved by the voters in the
4 general election.

5 As a result, in 1998, voters circulated initiative petitions for a ballot proposition
6 that would significantly constrain the legislature's ability to repeal or amend voter
7 approved initiatives. In fact, the voters had two similar such initiatives from which to
8 choose at the 1998 election. They approved Proposition 105. The relevant constitutional
9 provision now provides that:

10 The legislature shall not have the power to repeal an initiative measure
11 approved by a majority of the votes cast thereon or to repeal a referendum
12 measure decided by a majority of the votes cast thereon.

13 Ariz. Const., Art. 4, Pt. 1 § 1 (6)(B).

14 Proposition 105 also included a new provision that prohibits the legislature from
15 amending an initiative measure:

16 Unless the amending legislation furthers the purposes of such measure and
17 at least three-fourths of the members of each house of the legislature, by a
roll call of ayes and nays, vote to amend such measure.

18 Ariz. Const., Art. 4, Pt. 1 § 1(6)(C).

19 With these provisions, Arizona voters reversed the holding of the *Adams v. Bolin*
20 decision and limited amendments of voter approved measures in such a way that the
21 legislature could not subvert them.

22 Despite the enactment of the Voter Protection Act in 1998, the legislature
23 continued to interfere with voter approved measures and test the limits of the Voter
24 Protection Act. In 2009, the legislature enacted legislation to divert funding from the
25 Early Childhood Development and Health Fund intended for early childhood programs.
26 The Arizona Supreme Court rejected that effort. *Ariz. Early Childhood Dev. & Health*

1 *Bd. v. Brewer*, 221 Ariz. 467, 469, 212 P.3d 805, 807 (2009). In 2011, the legislature
2 refused to provide the necessary funding to insure Medicaid eligibility as required by
3 Proposition 204. *Fogliano v. Brain*, 229 Ariz. 12, 270 P.3d 839 (Ariz. App. 2011)
4 (holding that legislature is required to comply with voter-approved measure but that the
5 action was non-reviewable as a political question) *rev. denied* 2012 Ariz. LEXIS 56 (Feb.
6 15, 2012).

7 This year, the Arizona Supreme Court rebuffed yet another effort of the legislature
8 to circumvent the Voter Protection Act. *Cave Creek Unified School District v. Ducey*,
9 308 P.3d 1152, 1213 Ariz. Lexis 207 (2013). In *Cave Creek*, the legislature had ignored
10 a voter approved measure requiring that the funding for the public school system be
11 annually inflated. Even though the legislature had not affirmatively repealed or amended
12 the voter approved statute requiring inflationary funding, the court held that it is the
13 legislation’s effect on the fundamental purposes underlying the Voter Protection Act that
14 is critical. *Id.* at ¶ 23 (citing *Caldwell v. Bd. of Regents*, 54 Ariz. 404, 410, 96 P.2d 401,
15 403 (1939) (“[T]he legislature may not do indirectly what it is prohibited from doing
16 directly.”)).

17 The legislature’s lawsuit in this case is nothing less than an attempt to circumvent
18 the Voter Protection Act and should be rejected by the Court.

19
20 **A. Before Filing this Lawsuit, the Legislature Should Have Complied with
the Voter Protection Act**

21 Although Amici do not believe any additional legislative involvement is required
22 by the Elections Clause, if it did, Proposition 106 could have been supplemented through
23 legislation in numerous different ways to achieve what the legislature now regards as
24 compliance with the U.S. Constitution. For example, the legislature could have enacted
25 supplemental legislation that required congressional maps be reviewed by the legislature
26

1 in a formal process or put to the voters for their approval. Such legislation would have
2 required a three-fourths vote in each house and a determination that the amendment
3 furthered the purposes of Proposition 106. The legislature’s justification for such
4 supplemental legislation would presumably be that it was necessary to bring the
5 Proposition into compliance with the U.S. Constitution. Whether such legislation would
6 actually further the purpose of Proposition 106 under the Voter Protection Act is certainly
7 arguable, but it is an issue that should be decided by Arizona courts first. Instead, the
8 legislature simply disregarded the Voter Protection Act and proceeded directly to this
9 Court in an effort to invalidate the entire Proposition.

10
11 **B. This Lawsuit Represents Legislative Action to Repeal Proposition 106
and, Therefore, it Violates the Voter Protection Act**

12 As noted above and by the Commission, the legislature had other alternatives
13 available to it. It could have attempted to amend Proposition 106 in compliance with the
14 Voter Protection Act. Similarly, it could have referred to Arizona voters for their
15 approval a different set of maps than those adopted by the Commission. It chose neither
16 course of action, but proceeded directly to this Court seeking an indirect repeal of
17 Proposition 106.

18 This lawsuit was filed in the name of the Arizona State Legislature. On May 2,
19 2012, both houses of the legislature authorized the filing of this action by majority vote.
20 First Amended Complaint at 2, ¶ 2. The Complaint seeks the invalidation of Proposition
21 106 by this Court on the grounds that it is unconstitutional.

22 To the extent the complaint in this case was authorized by a majority of each
23 house of the legislature, it constitutes legislative action to repeal Proposition 106 no less
24 than if the legislature had enacted repealing legislation. However, the legislature “may
25 not do indirectly what it is prohibited from doing directly.” *Caldwell*, 54 Ariz. at 410, 96
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1 P.2d at 403. The Voter Protection Act prohibits the legislature from repealing
2 Proposition 106. It cannot avoid that prohibition by invoking this Court’s jurisdiction to
3 do what Arizona’s voters, through a constitutional amendment, have prohibited it from
4 doing.

5 “The Voter Protection Act altered the balance of power between the electorate and
6 the legislature, which share law making power under Arizona’s system of government.”
7 *Ariz. Early Childhood Dev. & Health Bd.*, 221 Ariz. at 469, 212 P.3d at 807. The
8 legislature’s overarching obligation is to comply with the Arizona Constitution including
9 the Voter Protection Act. Had it done so, it would not have filed this lawsuit.

10 **IV. CONCLUSION**

11 Amici are individuals and groups in Arizona who support fair, impartial, and
12 robust elections through a transparent redistricting process. The legislature’s lawsuit in
13 this case undermines those objectives, thwarts the will of the people, and violates the
14 Arizona Constitution.
15

16 RESPECTFULLY SUBMITTED this 5th day of December, 2013.

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18 THE PUBLIC INTEREST

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on December 5, 2013, I electronically transmitted the attached
3 document to the Clerk's office using the CM/ECF system for filing and transmittal of a
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