Co-Chair
Charleta B. Tavares
Assistant Minority Leader
15th Senate District

Co-Chair
William G. Batchelder, Speaker
69th House District

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

LEGISLATIVE BRANCH AND EXECUTIVE BRANCH COMMITTEE AGENDA

DATE: Thursday, October 9, 2014

TIME: 2:30 pm

ROOM: Statehouse Room 116

- Call to Order
- Roll Call
- Approval of July 10, 2014 Minutes
- Apportionment and Redistricting Proposal(s)
  - Discussion
- Arizona State Leg. v. Arizona Ind. Redistricting Comm., U.S. Sup. Ct. Docket No. 13-1314
  - Update and discussion
- Future topics
  - Discussion
- Adjourn

77 S. High St., 24th Floor, Columbus, OH 43215
614.644.2022 www.ocmc.ohio.gov

Redistricting Proposal

Modified SJR 1

Highlights of Modified SJR 1

- At least 1 minority party vote required to approve a plan
- Anti-gerrymandering criteria for drawing maps
- Congressional districts drawn by Redistricting Commission
- Referendum can be used to challenge state or congressional maps

Differences between SJR 1 and Modified SJR 1

- Modification: Political subdivisions counties, cities, townships, and wards have to be kept together starting with the largest (counties) and moving to the smallest (townships)
  - Original: SJR 1 had switched the order that's in current law
- Modification: Anti-gerrymandering criteria for drawing state maps also apply to drawing congressional maps
  - Original: SJR 1 leaves congressional map drawing mostly unrestricted
- Modification: Referendum can be used to challenge state or congressional maps
  - Original: SJR 1 eliminated referendum of congressional maps

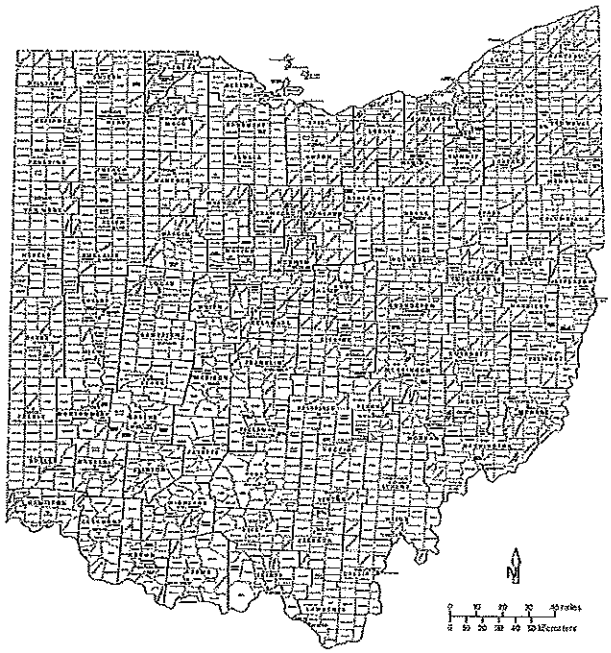
Anti-gerrymandering criteria:

Preserving political subdivisions

SJR 1	Modified SJR 1
Draw districts by first combining the smallest political subdivisions (wards then townships) moving up to the largest subdivisions (cities then counties).	Draw districts by combining political subdivisions from the **largest to the smallest.** Counties first, then cities, then townships, then wards.

*Current law requires preserving subdivisions from largest to smallest. It is an essential check on gerrymandering and must be kept.

Ohio's Townships



Anti-gerrymandering criteria:

For state legislative districts

SJR 1	Modified SJR 1 *(same as SJR 1)*
STATE Legislative Map Drawing criteria:	STATE Legislative Map Drawing criteria:
• A county shall have as many districts within its boundaries as it has population to make up those districts. • The remaining part of the county shall be part of only one district. • Multiple whole counties must be combined to form districts. • Remaining territory shall be combined with one whole county to form districts. • Remaining territory shall be combined to form districts. • Political subdivisions must be preserved from largest to smallest.	• A county shall have as many districts within its boundaries as it has population to make up those districts. • The remaining part of the county shall be part of only one district. • Multiple whole counties must be combined to form districts. • Remaining territory shall be combined with one whole county to form districts. • Remaining territory shall be combined to form districts. • Political subdivisions must be preserved from largest to smallest.

Anti-gerrymandering criteria:

Apply same criteria to maps for Congress

SJR 1	Modified SJR 1
CONGRESSIONAL Map Drawing criteria:	CONGRESSIONAL Map Drawing criteria:
• A county shall have as many districts within its boundaries as it has population to make up those districts. • **The remaining territory shall be combined *in any way* to make up the rest of the congressional districts.**	• A county shall have as many districts within its boundaries as it has population to make up those districts. • The remaining part of the county shall be part of only one district. • Multiple whole counties must be combined to form districts. • Remaining territory shall be combined with one whole county to form districts. • Remaining territory shall be combined to form districts. • Political subdivisions must be preserved from largest to smallest.

Anti-gerrymandering criteria:

No rigging the map or protecting incumbents

SJR 1	Modified SJR 1
No individual district shall be drawn primarily with the intent to favor or disfavor a political party.	No **plan or** individual district shall be drawn for the purpose of favoring a political party, **incumbent legislator or member of congress, or other person or group.**

Referendum of maps:

Voters can challenge bad maps

SJR 1	Modified SJR 1
No referendum provision. Congressional maps no longer can be referred to the ballot by voters.	Restores ability of voters to refer bad congressional maps to the ballot using the standard referendum process. Adds the ability to refer bad state legislative maps as well.

SJR 1 provided a very strong foundation for reform. Modified SJR 1 is ready for consideration.

LSC 130 0659-7

130th General Assembly
Regular Session **Sub. S. J. R. No. 1**
2013-2014

J O I N T R E S O L U T I O N

Proposing to amend Section 1g of Article II, to enact new Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of Article XI, and to repeal Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of Article XI of the Constitution of the State of Ohio to revise the redistricting process for General Assembly and Congressional districts.

Be it resolved by the General Assembly of the State of Ohio, three-fifths of the members elected to each house concurring herein, that there shall be submitted to the electors of the state, in the manner prescribed by law at the general election to be held on November 4, 2014, a proposal to amend Section 1g of Article II and to enact new Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of Article XI of the Constitution of the State of Ohio to read as follows:

ARTICLE II

Section 1g. Any initiative, supplementary, or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof<u>, or district plan</u> sought to be referred, or the proposed law or proposed amendment to the constitution. Each signer of any initiative, supplementary, or referendum

petition must be an elector of the state and shall place on such petition after ~~his~~ the signer's name the date of signing and ~~his~~ the signer's place of residence. A signer residing outside of a municipality shall state the county and the rural route number, post office address, or township of ~~his~~ the signer's residence. A resident of a municipality shall state the street and number, if any, of ~~his~~ the person's residence and the name of the municipality or post office address. The names of all signers to such petitions shall be written in ink, each signer for ~~himself~~ the signer's self. To each part of such petition shall be attached the statement of the circulator, as may be required by law, that ~~he~~ the circulator witnessed the affixing of every signature. The secretary of state shall determine the sufficiency of the signatures not later than one hundred five days before the election.

The Ohio supreme court shall have original, exclusive jurisdiction over all challenges made to petitions and signatures upon such petitions under this section. Any challenge to a petition or signature on a petition shall be filed not later than ninety-five days before the day of the election. The court shall hear and rule on any challenges made to petitions and signatures not later than eighty-five days before the election. If no ruling determining the petition or signatures to be insufficient is issued at least eighty-five days before the election, the petition and signatures upon such petitions shall be presumed to be in all respects sufficient.

If the petitions or signatures are determined to be insufficient, ten additional days shall be allowed for the filing of additional signatures to such petition. If additional signatures are filed, the secretary of state shall determine the sufficiency of those additional signatures not later than sixty-five days before the election. Any challenge to the

additional signatures shall be filed not later than fifty-five days before the day of the election. The court shall hear and rule on any challenges made to the additional signatures not later than forty-five days before the election. If no ruling determining the additional signatures to be insufficient is issued at least forty-five days before the election, the petition and signatures shall be presumed to be in all respects sufficient.

No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions by which such submission of the same was procured; nor shall the rejection of any law or district plan submitted by referendum petition be held invalid for such insufficiency. Upon all initiative, supplementary, and referendum petitions provided for in any of the sections of this article, it shall be necessary to file from each of one-half of the counties of the state, petitions bearing the signatures of not less than one-half of the designated percentage of the electors of such county. A true copy of all laws or proposed laws, district plans, or proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. The person or persons who prepare the argument or explanation, or both, against any law, section, ~~or~~ item, or district plan, submitted to the electors by referendum petition, may be named in such petition and the persons who prepare the argument or explanation, or both, for any proposed law or proposed amendment to the constitution may be named in the petition proposing the same. The person or persons who prepare the argument or explanation, or both, for the law, section, or item, submitted to the electors by referendum petition, or against any proposed law submitted by supplementary petition, shall be named by the general assembly, if in session, and if not in session then

by the governor. For a district plan submitted to the electors by referendum petition, the Ohio redistricting commission shall name the person or persons who prepare the argument or explanation, or both, for the plan. The law, ~~or~~ district plan, proposed law, or proposed amendment to the constitution, together with the arguments and explanations, not exceeding a total of three hundred words for each, and also the arguments and explanations, not exceeding a total of three hundred words against each, shall be published once a week for three consecutive weeks preceding the election, in at least one newspaper of general circulation in each county of the state, where a newspaper is published. The secretary of state shall cause to be placed upon the ballots, the ballot language for any such law, ~~or~~ district plan, proposed law, or proposed amendment to the constitution, to be submitted. The ballot language shall be prescribed by the Ohio ballot board in the same manner, and subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of this Constitution. The ballot language shall be so prescribed and the secretary of state shall cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution. For a referendum concerning a district plan, the ballot language shall be so prescribed and the secretary of state shall cause the ballots to be so printed as to permit an affirmative or negative vote upon the congressional district plan, upon the senate and house of representatives district plans together, or upon the congressional, senate, and house of representatives district plans together, as specified by the applicable referendum petition under Section 12 of Article XI of this Constitution. The style of all laws submitted by initiative and supplementary petition shall be: "Be it Enacted by the People of the State of Ohio," and of all constitutional amendments: "Be it Resolved by the People of the

State of Ohio." The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of governor at the last preceding election therefor. The foregoing provisions of this section shall be self-executing, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved.

ARTICLE XI

Section 1. (A) The Ohio redistricting commission shall be responsible for the redistricting of this state for congress and the general assembly. The commission shall consist of the following seven members:

(1) The governor;

(2) The auditor of state;

(3) The secretary of state;

(4) One person appointed by the speaker of the house of representatives;

(5) One person appointed by the legislative leader of the largest political party in the house of representatives of which the speaker of the house of representatives is not a member;

(6) One person appointed by the president of the senate;

(7) One person appointed by the legislative leader of the largest political party in the senate of which the president of the senate is not a member.

No appointed member of the commission shall be a current member of the general assembly or of congress.

(B) Unless otherwise specified in this article, a simple majority of the commission members shall be required for any action by the commission. The affirmative vote of five members of

the commission, including at least one member of the commission who is a member of a major political party other than the largest major political party represented on the commission, shall be required to adopt any plan.

(C) At the first meeting of the commission, which the governor shall convene only in a year ending in the numeral one, except as provided in sections 11 and 12 of this Article, the members shall select co-chairpersons, one of whom shall be a member of a political party other than the largest one represented on the commission, and set a schedule for the adoption of procedural rules for the operation of the commission.

Not later than the fifteenth day of September of a year ending in the numeral one, the commission shall release to the public a proposed plan for the boundaries for each of the ninety-nine house of representatives districts and the thirty-three senate districts, and a proposed plan for the prescribed number of congressional districts as apportioned to the state pursuant to Section 2 of Article I of the Constitution of the United States. The commission shall draft each proposed plan in the manner prescribed in this article. Before adopting, but after introducing, a final congressional or general assembly district plan, the commission shall conduct a minimum of three public hearings across the state to present the plans and shall seek public input regarding the proposed plans. All meetings of the commission shall be open to the public. Meetings shall be broadcast by electronic means of transmission using a medium readily accessible by the general public.

The commission shall adopt final plans not earlier than the last week of October of a year ending in the numeral one but not later than the second week of November of a year ending in the numeral one. After the commission adopts a plan, the commission shall file the plan with the secretary of state. Upon filing with

the secretary of state, the plan shall become effective.

Not more than six weeks after the adoption of a congressional plan and a general assembly plan, the co-chairpersons of the commission shall jointly dissolve the commission.

(D) The general assembly shall appropriate the funds the commission determines are necessary in order for the commission to perform its duties under this article. The commission shall make that determination by the affirmative vote of five members of the commission, including at least one member of the commission who is a member of a major political party other than the largest major political party represented on the commission.

(E) The attorney general shall be responsible for defending a plan adopted by the commission in any legal action arising from the process described in this article.

Section 2. Each congressional district shall be entitled to a single representative in the United States house of representatives in each congress. Each house of representatives district shall be entitled to a single representative in each general assembly. Each senate district shall be entitled to a single senator in each general assembly.

Section 3. (A) The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and by the number "thirty-three" and the quotients shall be the ratio of representation in the house of representatives and in the senate, respectively, for ten years next succeeding such redistricting.

(B) The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, and the population of each senate district shall be substantially equal to the ratio of

representation in the senate, as provided in division (A) of this section. In no event shall any district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the applicable ratio of representation.

Section 4. (A) Any plan adopted by the commission shall comply with all applicable provisions of the Constitutions of Ohio and the United States and of federal law.

(B) No plan or individual district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of congress, or other person or group.

(C)(1) Every congressional and general assembly district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line.

(2) The commission shall avoid splitting political subdivisions. As used in this section and Sections 6 and 9 of this Article, "political subdivision" means a county, a municipal corporation, a township, or a municipal ward.

(a) Dividing a noncontiguous political subdivision shall not be considered splitting the political subdivision if its noncontiguous portions are included in separate districts. However, dividing a noncontiguous political subdivision shall be considered splitting the political subdivision if any noncontiguous portion is divided into separate districts.

(b) Dividing, along a county line, a political subdivision that has territory in more than one county shall not be considered splitting the political subdivision.

(D) Notwithstanding the other provisions of this article, where it is necessary to divide political subdivisions, only two political subdivisions, other than a county, may be divided per house of representatives district or congressional district.

(E) Subject to all other requirements of this article, the commission shall preserve together whole suburban, urban, and rural communities that share similar characteristics.

Section 5. A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation for the house of representatives determined under Section 3 of this Article.

Section 6. The standards prescribed in this section and Sections 3, 4, and 5 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in Section 3 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio, shall be designated a representative district.

(B)(1) If political subdivisions must be divided in order to create the remaining representative districts, those districts shall be formed by combining the whole areas of political subdivisions, beginning with the political subdivisions with the largest populations and proceeding to the smallest.

(2) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole

ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(3) Of the remaining territory of the state, where feasible, multiple whole counties shall be combined as single representative districts.

(4) Of the remaining territory of the state, the commission shall draw the boundary lines of representative districts as to delineate an area containing at least one whole county and the necessary additional territory.

(C) The remaining territory of the state shall be combined into representative districts.

Section 7. Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under Section 3 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in Section 10 of this Article.

Section 8. The standards prescribed in this section and Section 4 of this Article shall govern the establishment of

congressional districts, which shall be created in the following order so long as such order is consistent with the foregoing standards:

(A) The whole population of the state, as determined by the federal decennial census, shall be divided by the number of congressional districts apportioned to the state pursuant to Section 2 of Article I of the Constitution of the United States, and the quotient shall be the congressional ratio of representation for ten years next succeeding such apportionment.

(B) The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the congressional ratio of representation.

(C)(1) When political subdivisions are divided in order to create congressional districts, those districts shall be formed by combining the whole areas of political subdivisions, beginning with the political subdivisions with the largest populations and proceeding to the smallest.

(2) Proceeding in succession from the largest to the smallest, each county containing more than one whole ratio of representation shall be divided into the appropriate number of congressional districts, as that county contains whole ratios of representation. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one congressional district by combining it with adjoining territory outside the county.

(3) Of the remaining territory of the state, where feasible, multiple whole counties shall be combined as single congressional districts.

(4) Of the remaining territory of the state, the commission shall draw the boundary lines of congressional districts as to delineate an area containing at least one whole county and the

necessary additional territory.

(D) The remaining territory of the state shall be combined into congressional districts.

Section 9. Notwithstanding the fact that boundaries of political subdivisions within a district may be changed, district boundaries shall be created by using the boundaries of political subdivisions as they exist at the time of the federal decennial census on which the redistricting is based, or, if unavailable, on such other basis as the general assembly has directed.

Section 10. At any time the boundaries of senate districts are changed in any plan of redistricting made pursuant to any provision of this article, a senator whose term will not expire within two years of the time the plan of redistricting is made shall represent, for the remainder of the term for which the senator was elected, the senate district which contains the largest portion of the population of the district from which the senator was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the commission, by the affirmative vote of five members of the commission, including at least one member of the commission who is a member of a major political party other than the largest major political party represented on the commission, shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms.

Section 11. (A) The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this article.

(B) In the event that any section of this constitution

relating to redistricting or any plan of redistricting made by the Ohio redistricting commission is determined to be invalid by an unappealed final order of a court of competent jurisdiction then, notwithstanding any other provisions of this constitution, the commission shall reconvene to ascertain and determine a plan of redistricting in conformity with such provisions of this constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next regular redistricting in conformity with such provisions of this constitution as are then valid.

(C) Notwithstanding any provision of this constitution or any law regarding the residence of senators and representatives, a plan of redistricting made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

(D) No court shall order, in any circumstance, the implementation or enforcement of any plan that has not been approved by the commission in the manner prescribed by this article.

Section 12. (A) The electors of the state may circulate a referendum petition seeking to reject a district plan adopted by the Ohio redistricting commission under this article. The petition shall specify one of the following:

(1) That the electors wish to reject the congressional district plan adopted by the commission;

(2) That the electors wish to reject the senate and house of representatives district plans adopted by the commission;

(3) That the electors wish to reject the congressional, senate, and house of representatives district plans adopted by the commission.

(B) The signatures of six per cent of the electors shall be required upon a referendum petition to order that the applicable district plan or set of district plans be submitted to the electors of the state for their approval or rejection. When a referendum petition meeting the requirements of this section and Section 1g of Article II of this Constitution has been filed with the secretary of state within ninety days after the commission filed the applicable district plan or plans with the secretary of state under Section 1 of this article, the secretary of state shall submit the applicable district plan or plans to the electors of the state for their approval or rejection at the next succeeding regular or general election in any year occurring subsequent to one hundred twenty-five days after the petition was filed. Section 1g of Article II of this Constitution applies to a referendum petition filed under this section.

(C) If a majority of the electors rejects a district plan that is the subject of a referendum petition, the district plan shall cease to be effective, and the Ohio redistricting commission shall reconvene to adopt a new district plan of that type in accordance with this article.

Section 13. The various provisions of this article are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

EFFECTIVE DATE AND REPEAL

If adopted by a majority of the electors voting on this proposal, Section 1g of Article II as amended by this proposal and new Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 of Article XI as enacted by this proposal take effect January 1, 2021, and existing Section 1g of Article II and Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of Article XI of the Constitution of the State of Ohio are repealed from that effective

date.

SCHEDULE

The amendments to Section 1g of Article II of the Ohio Constitution in part substitute gender neutral for gender specific language. These gender neutralizing amendments are not intended to make a substantive change in the Ohio Constitution. The gender neutral language is to be construed as a restatement of, and substituted in a continuing way for, the corresponding gender specific language existing prior to adoption of the gender neutralizing amendments.

Lyle Denniston *Reporter*

Posted Thu, October 2nd, 2014 1:04 pm

Fate of non-partisan redistricting on the line

The Supreme Court, taking on new controversy on the eve of opening a new Term, on Thursday stepped into an Arizona case that may settle the future of attempts to take the redrawing of congressional districts out of the hands of legislatures to make that effort non-partisan.

If the Court does reach the core issues in the case of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, and it gave itself a couple of options not to do so, it could make a major difference in the degree to which future membership in the House of Representatives is politically polarized. In recent years, state legislatures dominated by one or the other major political party have carved up districts in ways to help their party's candidates.

The Arizona case was one of eleven that the Justices added to their docket for decision in the Term that formally opens next Monday. Despite very wide and deep public interest in the new cases awaiting the Court on same-sex marriage, the Court took no action on any of those Thursday. If they are going to be denied review, that might become known next Monday. Otherwise, they are likely to be taken up by the Court at its next Conference, on October 10.

In its new appeal, the Arizona legislature urged the Court to rule that the Constitution's Elections Clause prohibits a state from cutting its legislature mostly, or totally, out of the process of drafting new election districts for its House members, after each new federal Census.

From the time Arizona became a state in 1912, until 2000, its legislature had the authority under the state constitution to draw the lines of congressional districts, subject to possible veto by the governor. However, in 2000, the voters of the state-approved "Proposition 106," an amendment to the state constitution assigning that task to an independent, five-member body — four chosen by legislative leaders but only from a list handed to it by another state agency, and a fifth member to act as chairman when chosen from that same list by the other four members.

In 2012, after the commission carried out its duty following the 2010 Census, the state legislature sued, claiming that this took away its power that, it argued, was given to it by the federal Constitution's Elections Clause.

In taking on the case and planning to hold a hearing on it after full briefing, the Court said that it could rule on two issues on the merits: does the Elections Clause allow the task to be shifted away from the legislature; and, alternatively, is that forbidden by a federal law that assigns the redistricting task "in the manner provided" by state law?

But the Court, in the end, may not answer either of those questions. It also told lawyers to argue whether the state legislature had a legal right even to file its lawsuit — a technical question about "legislative standing." If a party that sues does not have "standing," then the Constitution's Article III will not allow a federal court to rule on that case.

And, because the case reached the Court in the form of a formal appeal, the kind over which the Court has little or no discretion to bypass, there is a separate question of whether the Court did actually have to take on the case (that is, does it have formal jurisdiction). In deciding that issue, the Court may consider not only the "standing" issue but also claims by the supporters of the independent approach that the dispute is a "political question" not open at all to decision in the federal courts.

In preparing their briefs and in the coming oral argument, lawyers will have to deal with all of the questions the Court posed.

The Court has not yet assigned that case, or the other ten newly granted review, for oral argument. It still has four slots open in its January hearing schedule, so some are likely to be put in those slots, and the others could go into the February calendar, or later.

Here, in summary form only, are the issues at stake in each of the other newly granted cases:

Tibble v. Edison International — time limit for suing the manager of an employee benefit plan for faulty decisions on investing plan assets (review limited to question written by the Court)

Coleman-Bey v. Tollefson — scope of federal law barring a prison inmate from filing a new lawsuit over prison conditions in federal court if three prior lawsuits had failed because they had no merit

Ohio v. Clark — constitutional limits under the Confrontation Clause on the use in a criminal trial of out-of-court statements made by a child about being sexually or physically abused

Texas Department of Housing and Community Affairs v. The Inclusive Communities Project — whether federal law against racial bias in home sales and rentals allows lawsuits based on the theory that a policy treats minorities less favorably (This case involves an issue the Court has agreed to decide twice before, in cases that ultimately ended without rulings on it.)

Kerry v. Din — scope of the authority of State Department consular officers to deny visas to individuals seeking to enter the United States — in this case, the non-citizen spouse of a citizen

Williams-Yulee v. The Florida Bar — constitutionality under the First Amendment of a state ethical rule barring candidates for state judicial posts to personally solicit campaign funds

Rodriguez v. United States — justification needed by police officer, after he has pulled over a vehicle for a traffic violation, to go beyond minimally intrusive searching of questioning

Armstrong v. Exceptional Child Center — right of providers of Medicare services to sue under the Constitution for a state's failure to provide adequate funds for such services (The Court had agreed to rule on this issue in 2011, but wound up not doing so then.)

EEOC v. Abercrombie & Fitch Stores — scope of the legal duty of a company under the federal law banning workplace discrimination based on a worker or job applicant's religion

Baker Botts, L.L.P. v. ASARCO L.L.C. – power of a judge in a bankruptcy case to award to a law firm the recovery of professional fees for the time and effort spent in defending an application for such fees

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Posted in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, Featured, Merits Cases

Arizona State Legislature, Plaintiff, v. Arizona Independent Redistricting Commission, et al., Defendants.

No. CV-12-01211-PHX-PGR-MMS-GMS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

997 F. Supp. 2d 1047*; *2014 U.S. Dist. LEXIS 21871

February 21, 2014, Decided
February 21, 2014, Filed

SUBSEQUENT HISTORY: Later proceeding at *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 2014 U.S. LEXIS 4898 (U.S., Oct. 2, 2014)*

PRIOR HISTORY: *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 2013 U.S. Dist. LEXIS 114868 (D. Ariz., Aug. 12, 2013)*

COUNSEL: [**1] For Arizona State Legislature, Plaintiff: Gregory G Jernigan, LEAD ATTORNEY, Arizona State Senate, Phoenix, AZ; Joshua William Carden, LEAD ATTORNEY, Davis Miles McGuire Gardner PLLC, Tempe, AZ; Pele Kay Peacock, LEAD ATTORNEY, Arizona Legislature, Phoenix, AZ; Peter Andrew Gentala, LEAD ATTORNEY, Arizona House of Representatives, Phoenix, AZ.

For Arizona Independent Redistricting Commission, Colleen Mathis, in her official capacity, Linda C McNulty, in her official capacity, Jose M Herrera, in his official capacity, Scott D Freeman, in his official capacity, Richard Stertz, in his official capacity, Defendants: Brunn Wall Roysden , III, Joseph Andrew Kanefield, LEAD ATTORNEYS, Ballard Spahr LLP, Phoenix, AZ; Kristin Louise Windtberg, Mary Ruth OGrady, Joseph Nathaniel Roth, Osborn Maledon PA, Phoenix, AZ.

For Ken Bennett, Arizona Secretary of State, in his official capacity, Defendant: Michele Lee Forney, LEAD ATTORNEY, Office of the Attorney General, Phoenix, AZ.

For Dennis Burke, Arizona Advocacy Network, League of Women Voters of Arizona, Bart Turner, Amicus: Joy E Herr-Cardillo, Timothy Michael Hogan, Arizona Center for Law in the Public Interest - Tucson, AZ, Tucson, AZ.

For Inter [**2] Tribal Council of Arizona Incorporated, Amicus: Joe P Sparks, LEAD ATTORNEY, Sparks Tehan & Ryley PC, Scottsdale, AZ; Joy E Herr-Cardillo, Timothy Michael Hogan, Arizona Center for Law in the Public Interest - Tucson, AZ, Tucson, AZ.

JUDGES: G. Murray Snow, United States District Judge. Paul G. Rosenblatt, United States District Judge, concurring in part and dissenting in part.

OPINION BY: G. Murray Snow

OPINION

[*1048] **ORDER**

Order by Snow. J.

This three-judge statutory court has jurisdiction pursuant to *28 U.S.C. § 2284(a)*. Pending before it are Defendants' Motion to Dismiss for Failure to State a Claim (Doc. 16), Plaintiff's Motion for Preliminary Injunction (Doc. 33), and Defendants' Motion to Dismiss for Lack of Jurisdiction for Lack of Standing (Doc. 43). For the following reasons, Defendants' Motion to Dismiss for Lack of Jurisdiction is denied, Defendants' Motion to Dismiss for Failure to State a Claim is granted, and Plaintiff's Motion for Preliminary Injunction is denied as moot.

BACKGROUND

From the first year of its statehood in 1912 until 2000, the Arizona State Legislature ("Legislature") was granted the authority by the Arizona Constitution to draw congressional districts, subject to the possibility of gubernatorial [**3] veto. In 2000, Arizona voters, through the initiative power, amended the state Constitution by passing Proposition 106. Proposition 106 removed congressional redistricting authority from the Legislature and vested that authority in a new entity, the Arizona Independent Redistricting Commission ("IRC"). *Ariz. Const. art. IV, pt. 2, § 1.* [*1049] Proposition 106 prescribes the process by which IRC members are appointed and the procedures the IRC must follow in establishing legislative and congressional districts. Once this process is complete, the IRC establishes final district boundaries and certifies the new districts to the Secretary of State. *Id.* at ¶¶ 16-17.

Under the IRC redistricting process, the legislative leadership may select four of the five IRC members from candidates nominated by the State's commission on appellate court appointments. The highest ranking officer and minority leader of each house of the legislature each select one member of the IRC from that list. *Id.* at ¶¶ 4-7. The fifth member, who is the chairperson, is chosen by the four previously selected members from the list of nominated candidates. The governor, with the concurrence of two-thirds of the senate, may remove [**4] an IRC member for substantial neglect of duty or other cause. *Id.* at ¶ 10. The IRC is required to allow a period for public comment after it advertises a draft of its proposed congressional map during which it must review any comments received from either or both bodies of the Legislature. *Id.* at ¶ 16.

On January 17, 2012, the IRC approved a final congressional map to be used in all congressional elections until a new IRC is selected in 2021 and completes the redistricting process for the next decade. *Ariz. Const. art. IV, pt. 2, § 1* ¶¶ 5, 17.

On June 6, 2012, the Legislature filed the present suit against the IRC, its current members, and the Arizona Secretary of State. (Doc. 1.) In its First Amended Complaint, the Legislature seeks a judgment declaring that Proposition 106 violates the *Elections Clause of the United States Constitution* by removing congressional redistricting authority from the Legislature and that, as a result, the congressional maps adopted by the IRC are unconstitutional and void. (Doc. 12 at 9.) The Legislature also asks the Court to permanently enjoin Defendants from adopting, implementing, or enforcing any congressional map created by the IRC, beginning the day [**5] after the 2012 congressional elections. (*Id.*) Defendants move to dismiss on the grounds that Plaintiff fails to state a claim (Doc. 16) and lacks standing to bring this action (Doc. 43). Plaintiff moves for a preliminary injunction. (Doc. 33.) The Court held a consolidated hearing before a three-judge panel on these motions on January 24, 2014.

DISCUSSION

I. Legal Standard

Rule 12(b)(6) is designed to "test[] the legal sufficiency of a claim." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).* While "a complaint need not contain detailed factual allegations . . . it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp., 534 F.3d 1017, 1022 (9th Cir. 2008)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).* "However, conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998).* Here, none of the essential facts of Plaintiff's claim are subject to dispute. The parties dispute only the proper legal interpretation of the *Elections Clause of the United States Constitution*, in light of Supreme Court precedent.

II. Plaintiff's [**6] Claim is Justiciable and Not Barred by Laches or by State Law

As preliminary matters Defendants assert that: (1) Plaintiff lacks standing to bring its First Amended Complaint (Doc. 43), (2) Plaintiff's claims should be barred by the doctrine of laches (Doc. 16 at 11), [*1050] and (3) Plaintiff's First Amended Complaint presents a non-justiciable political question (Doc. 37 at 13). Finally, the Amici assert that this claim is barred by the Arizona Voter Protection Act. (Doc. 42.)

Plaintiff has standing to bring the present action. It has demonstrated that its loss of redistricting power constitutes a concrete injury, unlike the "abstract dilution of institutional legislative power" rejected by the Supreme Court as a basis for legislature standing. *Raines v. Byrd, 521 U.S. 811, 826, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997)* (holding that members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act). Here, Proposition 106 resulted in the Legislature losing its authority to draw congressional districts even if it retains some influence over the redistricting process via other means. In addition, prior Supreme Court precedent strongly suggests that the Plaintiff has suffered a cognizable injury. [**7] The Court has twice entertained challenges raised by state officials under the *Elections Clause. See Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932); Davis v. Hildebrant, 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172 (1916).* In neither did the Court refuse to address the merits for lack of standing.

Nor does laches bar the present action, at least at this stage of the litigation. To establish laches, a "defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself." *Evergreen Safety Council v. RSA Network Inc., 697 F.3d 1221, 1226 (9th Cir. 2012)* (quoting *Couveau v. Am. Airlines, Inc., 218 F.3d 1078, 1083 (9th Cir. 2000)).* "[A] claim of laches depends on a close evaluation of all the particular facts in a case" and thus is rarely appropriate for resolution at the motion to dismiss phase. *Kourtis v. Cameron, 419 F.3d 989, 1000 (9th Cir. 2005) abrogated on other grounds by Taylor v. Sturgell, 553 U.S. 880, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008).* In addition, courts are hesitant to apply laches against state entities or agencies to the extent that it would limit a full exploration of the public interest, or governmental or sovereign functions. *See United States v. Ruby Co., 588 F.2d 697, 705 (9th Cir. 1978)*; *Mohave Cnty. v. Mohave-Kingman Estates, Inc., 120 Ariz. 417, 421, 586 P.2d 978, 982 (Ariz. 1978).* [**8] Further, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under [an] invalid plan." *Reynolds v. Sims, 377 U.S. 533, 585, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).*

In asserting the defense of laches at this stage, "the defendant must rely exclusively upon the factual allegations set forth in the complaint." *Kourtis, 419 F.3d at 1000.* Here, it is unclear based on the facts set forth in the complaint whether Plaintiff's delay in filing this action was unreasonable or whether or to what extent Defendants were prejudiced by this delay. Thus, Defendants have failed to establish a laches claim sufficient to prevail on a motion to dismiss.

Additionally, as will be further explained below, the Court is not barred from determining whether the *Elections Clause of the United States Constitution, U.S. Const, art. I § 4,* prohibits state voters from amending the Arizona Constitution to place the congressional re-districting function in the IRC. To the extent, however, that the Legislature makes arguments that the IRC cannot be the repository of legislative authority because it is not a representative body, such arguments arise under the [**9] republican *guarantee clause of the Constitution* and, as such, are not justiciable. *Ohio ex. rel. Davis v. Hildebrant, 241 U.S. 565, 569, 36 S. Ct. 708, 60 L. Ed. 1172 (1916)* (citing *Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912)).*

[*1051] Finally, the Amici assert that this action is barred by the Arizona Voter Protection Act ("VPA") which states that the Legislature "shall not have the power to repeal an initiative measure approved by a majority of the votes cast" and "shall not have the power to amend an initiative measure . . . unless the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each house . . . vote to amend such measure." *Ariz. Const., art. IV, pt.1, § 1,* ¶¶ 6(B) - (C), The Amici argue that this suit is barred because both houses of the Legislature authorized filing this action, and thus it constitutes legislative action to repeal Proposition 106. (Doc. 42 at 8.) However, the text of the VPA clearly refers to the Legislature passing a bill to repeal or amend a duly approved initiative matter, not the filing of a lawsuit that asserts such an initiative is invalid as it violates the United States Constitution. Thus, Plaintiff's action is [**10] not barred by the VPA.

III. The *Elections Clause* Does Not Prohibit Arizona From Using Its Lawmaking Process to Give Congressional Redistricting Authority to the IRC

No material facts related to the merits of this lawsuit are in dispute. Neither party contests that, since its inception, the Arizona Constitution has reserved the initiative power to its people. Neither party contests that the initiative power is a legislative power. *Ariz. Const. art. IV, pt.1, § 1(1)* ("[T]he people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature . . . .").[1] Neither party contests that the people of Arizona used that legislative power to create the IRC. Neither party contests that the IRC is a separate entity from the Legislature. Neither party can effectively contest that in fulfilling its function of establishing congressional and legislative districts, the IRC is acting as a legislative body under Arizona law. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 220 Ariz. 587, 594-95, ¶ 19, 208 P.3d 676, 683-84 (2009).* Neither party contests the Legislature's [**11] role in selecting the members of the IRC, or in suggesting modifications to the IRC's redistricting plan.

> 1 In addition, the initiative power is contained within article IV, the legislative article of the Arizona Constitution. This was also the case with the provisions at issue in *Brown, Hildebrant,* and *Smiley,* discussed below. *Smiley v. Holm, 285 U.S. 355, 363, 52 S. Ct. 397, 76 L. Ed. 795 (1932)*; *Hildebrant, 241 U.S. at 566*; *Brown v. Sec'y of State of Fla., 668 F.3d 1271, 1279, n.7 (11th Cir. 2012).*

What the parties dispute is the meaning of the *Elections Clause of the United States Constitution.* That clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter

such Regulations, except as to the Places of chusing Senators." *U.S. Const, art. I, § 4, cl.1.*

Plaintiff asserts that because the word "legislature" means "the representative body which makes the laws of the people," (Doc. 12 at ¶ 37), and the Clause allows the legislature to prescribe the time, place and manner of holding elections for congresspersons, the Clause specifically grants the power to realign [**12] congressional districts to the legislature.[2] The Supreme Court, [*1052] however, has at least twice rejected the notion that when it comes to congressional redistricting the *Elections Clause* vests only in the legislature responsibilities relating to redistricting. Both cases found that states were not prohibited from designing their own lawmaking processes and using those processes for the congressional redistricting authorized by the Clause. In subsequent cases, the Supreme Court has reaffirmed that a state can place the redistricting function in state bodies other than the legislature.

> 2 It is not clear if any court has explicitly decided that the "Time, Places and Manner of holding Elections" includes authority to conduct congressional redistricting. However, Supreme Court precedent has assumed this authority is included within the Clause, without undertaking a detailed textual analysis of the question. *See, e.g., Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932); Ohio ex. rel. Davis v. Hildebrant, 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172 (1916).*

In the first case, *Ohio ex. rel. Davis v. Hildebrant,* the Ohio state constitution reserved to its voters the legislative power to approve or disapprove by popular vote any law passed by the [**13] state legislature. *241 U.S. 565, 566, 36 S. Ct. 708, 60 L. Ed. 1172 (1916).* Ohio voters used this referendum power to disapprove of a congressional redistricting plan drawn by the state legislature. *Id.* In response, a mandamus action was brought against state election officials to direct them to disregard that vote and proceed as if the redistricting plan passed by the legislature remained valid. *Id.* The petitioner's argument was "based upon the charge that the referendum vote was not and could not be part of the legislative authority of the state, and therefore could have no influence on the subject of the law creating congressional districts." *Id. at 567.* Specifically, the petitioner argued that to allow the referendum to block the legislature's plan would violate both the *Elections Clause* and the controlling act of Congress. *Id.* The State Supreme Court "held that the provisions as to referendum were a part of the legislative power of the state, made so by the [state] Constitution, and that nothing in the act of Congress of 1911, or in the constitutional provision, operated to the contrary, and that therefore the disapproved [redistricting] had no existence and was not entitled to be enforced by mandamus." *Id.*

In [**14] reviewing this decision, the United States Supreme Court first looked to the power of the state and explained that "the referendum constituted a part of the state Constitution and laws, and was contained within the legislative power," and thus the claim that the rejected plan nonetheless remained valid despite the referendum was "conclusively established to be wanting in merit." *Id. at 568.*

Next, the Court looked to how Congress had spoken on the issue under its own *Elections Clause* power to make or alter state regulations, remarking that the act of 1911 had "expressly modified the phraseology of the previous acts relating to [redistricting] by inserting a clause plainly intended to provide that where, by the state Constitution and laws, the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law." *Id. at 568.* The Court noted that while the earlier federal statute relating to apportionment had described redistricting by "the legislature" of each state, the 1911 act modified this language, describing redistricting be done by states "in [**15] the manner provided by the laws thereof." *Id.* The Court further noted that "the legislative history of this [1911 act] leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, so far as Congress has power to do it, of excluding" the argument made by petitioner. *Id. at 568-69.*

[*1053] Finally, the Court considered whether the act of 1911 may itself have violated the *Elections Clause.* In doing so the Court declined to hold that the Clause granted redistricting authority uniquely to the state legislature as opposed to any other entity, including the people, which the state may have endowed with "legislative power." Thus the Court observed that the argument that Congress had violated the *Elections Clause* by authorizing re-districting to be accomplished "in the manner provided by the laws [of the state]" including referendum as it had been used in Ohio to reject the legislature's redistricting map, "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government." *Id. at 569.* The Court further noted [**16] that the question of whether legislative procedures such as the referendum that Ohio had adopted violated the republican *guarantee clause* "presents no justiciable controversy." *Id.* (citing *Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912)).*

Had the Court interpreted the *Elections Clause* as requiring that redistricting authority was vested uniquely in the legislature as opposed to giving the states discretion of where to place such authority within the scope of the "state's legislative power," there would have been no need for the Court to hold that the question of granting the people of Ohio the right to participate in congressional redistricting through the referendum power was not justiciable. Thus, in affirming the State Supreme Court's denial of the writ of mandamus in favor of the validity of the referendum, the Court necessarily held that to the extent that the *Elections Clause* vested some constitutional authority in a state to re-district national congressional districts, that authority was vested in the operation of a state's legislative power; not necessarily in the state legislature. It further held that questions as to whether the exercise of democratic forms [**17] of legislative authority violated the *Guarantee Clause* were political questions to be directed to Congress and not to the Courts. *Id.*

Sixteen years later, the Court considered this same question in the context of a gubernatorial veto. *Smiley v. Holm, 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795 (1932).* In *Smiley*, the Minnesota legislature approved a redistricting plan and, as permitted under the Minnesota constitution, it was vetoed by the Governor. The Secretary of State asserted that the legislature had the sole authority to redistrict under the *Elections Clause* and thus its map was valid despite the veto. *Id. at 362-63.* The State Supreme Court agreed, and held that in exercising the redistricting power which had been conferred upon it by the *Elections Clause*, the legislature was not exercising a legislative power. *Id. at 364.* Rather it was acting as an agent of the federal government with federal power delegated to it by the *Elections Clause* to redistrict the federal congressional districts within the state. *Id.* Because the Constitution's delegation was of federal power, the state court held that it did not constitute state legislative power, and the legislature's redistricting decision was thus not subject to [**18] gubernatorial veto, as were other state legislative acts. *Id. at 364-65.*

The United States Supreme Court rejected this holding. It explained that "[t]he question then is whether the provision of the Federal Constitution . . . invests the Legislature with a particular [federal] authority . . . and thus renders inapplicable the conditions which attach to the making of state laws." *Id. at 365* [*1054] . It noted that the function to be performed under the *Elections Clause* is to prescribe the time, place and manner of holding elections. "As the authority is conferred for the purpose of making laws for the state, 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. at 367.* The Court found "no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id. at 367-68.* Thus, the use of a gubernatorial veto "is a matter of state polity" that the *Elections Clause* "neither requires [**19] nor excludes." *Id.*

The Court went on to explain that while "[g]eneral acquiescence cannot justify a departure from the law," "long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning." *Id. at 369.* Here, "the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practices in the states." *Id.* The Court then described its earlier opinion in *Hildebrant*, explaining that "it was because of the authority of the state to determine what should constitute its legislative process that the validity of the requirement of the state Constitution of Ohio, in its application to congressional elections, was sustained." *Id. at 372.* Looking to Minnesota's use of the gubernatorial veto, "[i]t clearly follows that there is nothing in [the *Elections Clause*] which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power." *Id. at 372-73.* The Court upheld the use of the veto and reversed [**20] the state court. *Id.*

Hildebrant and *Smiley* thus demonstrate that the word "Legislature" in the *Elections Clause* refers to the legislative process used in that state, determined by that state's own constitution and laws. Other Courts have arrived at the same conclusion. "The Supreme Court has plainly instructed . . . that this phrase ['the Legislature'] encompasses the entire lawmaking function of the state." *Brown v. Sec'y of State of Fla., 668 F.3d 1271, 1278-79 (11th Cir. 2012).*

The Supreme Court has further made clear that, in appropriate instances, a state court has authority to formulate a congressional redistricting plan. In reinstating an interim congressional redistricting plan that was ordered by a state court to correct flaws in a legislative redistricting plan, the Supreme Court reaffirmed that a state may place the redistricting authority in entities other than the legislature. "We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature ***or other body***, rather than of a federal court." *Growe v. Emison, 507 U.S. 25, 34, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993)* (quoting *Chapman v. Meier, 420 U.S. 1, 27, 95 S. Ct. 751, 42 L. Ed. 2d 766 (1975))* (emphasis [**21] added). *See also Scott v. Germano, 381 U.S. 407,*

409, 85 S. Ct. 1525, 14 L. Ed. 2d 477 (1965) (per curiam) (holding in a state reapportionment case that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.")

The Arizona Constitution allows multiple avenues for lawmaking and one of those [*1055] avenues is the ballot initiative, as employed here through Proposition 106. Plaintiff notes that the ballot initiative is not one of the four constitutionally-defined processes by which the Legislature itself may enact laws (Doc. 17 at 11), but it cannot dispute that the Arizona Constitution specifies that the initiative power is legislative. *Ariz. Const. art. IV, pt. 1, § 1,* ¶ 1 ("The legislative authority of the state shall be vested in the legislature, consisting of a senate and a house of representatives, but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature."). *Cf. Brown, 668 F.3d at 1279* ("Like the veto provisions at [**22] issue in *Hildebrandt* and *Smiley*, Florida's citizen initiative is every bit a part of the state's lawmaking function.").

The Legislature argues that the IRC cannot constitute "the Legislature" as that term is used in the *Elections Clause*, because the IRC is not a representative body. As *Hildebrant* and *Smiley* both demonstrate, however, the relevant inquiry is not whether Arizona has uniquely conferred its legislative power in representative bodies, it is whether the redistricting process it has designated results from the appropriate exercise of state law. There is no dispute that the IRC was created through the legislative power reserved in the people through the initiative with the specific purpose of conducting the redistricting within the state, and that in exercising its functions the IRC exercises the state's legislative power. *Ariz. Minority Coal., 220 Ariz. at 597,* ¶ *19, 208 P.3d at 683-84*. To the extent that this argument is a veiled assertion that the IRC violates the *Guarantee Clause*, the argument is not justiciable. *Hildebrant, 241 U.S. at 569* (citing *Pacific States Teleph. & Teleg. Co. v. Oregon, 223 U.S. 118, 32 S. Ct. 224, 56 L. Ed. 377 (1912))*. Similarly unjusticiable is any argument that the people's [**23] exercise of their initiative power in the re-districting setting is not a republican exercise of legislative power.[3]

> 3 The Legislature also includes within its briefing citations to the debates at the Constitutional Convention, and other historical materials, to illustrate that the Framers knew the difference between the legislature and the people. Nevertheless such citations arise from other contexts and do not shed any particular light on the present question. As the court in *Brown* observed, "[t]he Framers said precious little about the first part of the Clause, and they said nothing that would help to resolve the issue now before us: what it means to repose a State's *Elections Clause* power in "the Legislature thereof." *Brown, 668 F.3d at 1276*. None of the legislative history provided by the Legislature in this case changes the *Brown* Court's assessment.

Plaintiff attempts to distinguish this case from *Hildebrant* and *Smiley*. Plaintiff apparently recognizes, in light of *Hildebrant* and *Smiley*, that the *Elections Clause* does not give unique authority to state legislatures to conduct redistricting. It nevertheless asserts that Arizona has gone too far in excluding the Legislature from congressional [**24] redistricting, as opposed to merely placing checks on that power. It argues, without setting forth any authority that would establish such constitutional limits, that "[n]o state can constitutionally divest its Legislature entirely of the redistricting authority conveyed by *Article I, Section 4*." (Doc. 12 at ¶ 38.) This argument is inconsistent with the Court's observations in *Growe* that states can place redistricting authority in other state entities and appears to be primarily based on dicta in *Brown*. But, in that case, as opposed to this one, Florida voters had only used their initiative power to create binding instructions for the legislature to follow in its congressional redistricting. *668 F.3d at 1273*. They did not [*1056] vest the primary redistricting responsibility in another state entity. Thus, the *Brown* Court observed that in the case of the Florida initiative, the standards imposed on the legislature did not go so far as to "effectively exclude the legislature from the redistricting process." *Id. at 1280*.

Nevertheless, that dicta does not apply to the present case or flow from the analysis adopted in *Hildebrant* and *Smiley*. *Brown* recognized as much. Those cases make it clear that [**25] the relevant inquiry is not what role, if any, the state legislature plays in redistricting, but rather whether the state has appropriately exercised its authority in providing for that redistricting. As the Supreme Court stated in *Smiley*, the *Elections Clause* includes no "attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *285 U.S. at 367-68*. Thus, the *Elections Clause* does not prohibit a state from vesting the power to conduct congressional districting elsewhere within its legislative powers. The *Brown* Court also adopted this analysis, explaining that the Supreme Court's decisions in *Hildebrant* and *Smiley* "provided a clear and unambiguous answer . . . twice explaining that the term 'Legislature' in the *Elections Clause* refers not just to a state's

legislative body but more broadly to the entire lawmaking process of the state." *668 F.3d at 1276.*[4]

> 4 Arizona has not entirely divested the legislature of any redistricting power. The Legislature retains the right to select the IRC commissioners, and the IRC is required to consider the Legislature's suggested modifications [**26] to the draft maps. *Ariz. Const. art. IV, pt. 2, § 1* ¶¶ 6, 10, 16.

In Arizona the lawmaking power plainly includes the power to enact laws through initiative, and thus the *Elections Clause* permits the establishment and use of the IRC. Therefore,

IT IS ORDERED THAT Defendants' Motion to Dismiss for Failure to State a Claim (Doc. 16) is **granted.**

IT IS FURTHER ORDERED THAT Defendants' Motion to Dismiss for Lack of Jurisdiction for Lack of Standing (Doc. 43) is **denied.**

IT IS FURTHER ORDERED THAT Plaintiffs Motion for Preliminary Injunction (Doc. 33) is **denied as moot.**

Dated this 21st day of February, 2014.

I certify that Circuit Judge Mary M. Schroeder concurs with this Order.

/s/ G. Murray Snow

G. Murray Snow

United States District Judge

CONCUR BY: Rosenblatt (In part)

DISSENT BY: Rosenblatt (In part)

DISSENT

Rosenblatt, District Judge, concurring in part and dissenting in part:

I concur with the majority's conclusions that the present action is justiciable, that Plaintiff has standing to bring it, and that Plaintiffs claims are not barred by the Arizona Voter Protection Act, and I join in those portions of the majority's opinion. I also concur with the majority's conclusion that Plaintiffs action is not barred by the doctrine of [**27] laches, although I believe that the issue can be resolved simply on the ground that laches cannot be appropriately applied to bar this action, no matter its procedural stage, given the public's overriding interest in having the *Elections Clause* issue litigated and resolved.

I respectfully dissent, however, from the majority's conclusion that the *Elections Clause* permits Arizona to use its lawmaking process to divest Plaintiff of its redistricting authority in the manner adopted by Proposition 106. I believe that the extent of Arizona's delegation of redistricting authority to the Independent Redistricting Commission ("IRC") extends beyond the state's constitutional authority to do so, and I would declare that Proposition [*1057] 106 violates the *Elections Clause, art. 1, § 4, cl. 1 of the United States Constitution* and that the congressional maps adopted by the IRC under that unconstitutional authority are null and void, and I would enjoin their use.

States have the authority to regulate the mechanics of congressional elections only to the extent delegated to them by the *Elections Clause. Cook v. Gralike, 531 U.S. 510, 522-23, 121 S. Ct. 1029, 149 L. Ed. 2d 44 (2001).* Among the powers constitutionally delegated to them is the [**28] primary responsibility for the apportionment of their congressional districts. *Growe, 507 U.S. at 34.* The *Elections Clause* mandates that the times, places, and manner of holding congressional elections "shall be prescribed in each State by the Legislature thereof[.]" It cannot be disputed that the *Elections Clause*'s reference to "the Legislature," as that term has been interpreted by the Supreme Court, refers to the totality of a state's lawmaking function as defined by state law, and that in Arizona a citizen initiative, such as that used to enact Proposition 106 to amend the state constitution, is an integral part of the state's legislative process. But the fact that Arizona has appropriately used its initiative process to establish the IRC cannot be the end of the inquiry under the *Elections Clause*, as found by the majority, because it also cannot be disputed that any law passed by a state, whether through an initiative or referendum or directly by the legislature, must abide by the United States Constitution.

That the Supreme Court has concluded that the *Election Clause* properly permits a state to include some other state entity or official in the redistricting process as a limiting [**29] check on its legislature's role in that process does not mean that the *Elections Clause* places no limit on a state's authority to define the legislative process it uses to regulate redistricting. I find it instructive that the scant case law permitting non-legislature entities to participate in the redistricting process, for example *Hildebrant, 241 U.S. 565, 36 S. Ct. 708, 60 L. Ed. 1172, Smiley 285 U.S. 355, 52 S. Ct. 397, 76 L. Ed. 795,* and *Brown, 668 F.3d 1271,* all involved situations in which the state legislature participated in the redistricting decision-making process in some very significant and meaningful capacity. For example, in *Hildebrant,* the state legislature's congressional redistricting act was rejected by the voters through a referendum; in *Smiley,* the

state legislature's congressional districts maps were vetoed by the governor; and in *Brown*, the state legislature created the congressional district maps based on guidelines for redistricting enacted through an initiative. In short, these cases all involved constraints on the ability of the state legislature to redistrict, and none directly held that the *Elections Clause* can be so broadly interpreted as to permit a state to remove all substantive redistricting authority from its [**30] legislature. Proposition 106 overreaches under the *Elections Clause* because the initiative's acknowledged and undisputed purpose was to supplant Plaintiff's constitutionally delegated authority to redistrict by establishing the IRC as Arizona's sole redistricting authority.

The majority notes that Proposition 106 does not entirely divest Plaintiff of its redistricting participation inasmuch as it permits Plaintiff to retain some ability to influence the redistricting process. The majority points out that Plaintiff's majority and minority leaders pick four of the five IRC members and that the IRC is required to consider any modifications to its draft redistricting maps suggested by Plaintiff. But such minor procedural influences must be evaluated in light of the fact that Proposition 106 requires Plaintiff to choose IRC members from a list selected [*1058] not by it but by the state's commission on appellate court appointments, and the fact that the IRC has the complete discretion not to implement any map changes suggested by Plaintiff. What Plaintiff does not have under Proposition 106 is the ability to have any outcome-defining effect on the congressional redistricting process. I believe that [**31] Proposition 106's evisceration of that ability is repugnant to the *Elections Clause*'s grant of legislative authority.

Dated this 21st day of February, 2014.

/s/ Paul G. Rosenblatt

Paul G. Rosenblatt

United States District Judge

The Latest Supreme Court Ruling on the "Equal Size" of Congressional Districts:

Tennant v. Jefferson County Commission (Docket 11-1184)

The background to this case:

The 2011 redistricting process in West Virginia created Congressional districts that varied in population by 0.79%. Challengers to this plan contended that the legislature could have done much better, given improved the technical capabilities of computer models now used in redistricting. Indeed, one of the plans considered had only one of three districts that did not have the precisely equal size (617,665 persons), and it fell short of that criterion by only one person.

The Supreme Court ruling:

"Reinforcing its view that courts should try to stay mostly out of the way of politicians drawing new election districts, the Supreme Court on Tuesday [September 25, 2012]--by an apparent unanimous vote--told lower-court judges not to insist on close-to-zero differences in the population of each of a state' districts for choosing members of the U.S. House of Representatives. 'Zero variance' in population is not the new constitutional norm for redistricting, the Court made clear. Just because computers can produce almost exactly equal-sized districts, the Constitution does not require it, the decision said."[1]

"Today's ruling gave state legislators constitutional permission to have some variation in size between congressional districts.... In what appeared to be a novel new declaration, the Court stressed that lower courts should not demand that a state prove specifically how each of those goals would be satisfied by moving away from equally populated districts. And, ini another legal innovation, the Court said that a variation that is not really very big does not become a constitutionally suspect one just because a sophisticated computer program could be used to avoid nearly all such variations. If the difference between a state's largest House district and its smallest one is small--such as the 0.79% deviation in the West Virginia plan--that does not become unconstitutionally large just because it could be avoided by "technological advances in redistricting and mapping software."[1]

[1] Lyle Denniston, "Hedging on 'One Person, One Vote," www.scotusblog.com/2012/09/opinion-recap-hedging-on-one-person-one-vote/

133 S.Ct. 3 (2012)

Natalie E. TENNANT, West Virginia Secretary of State, et al.
v.
JEFFERSON COUNTY COMMISSION, et al.

No. 11-1184.

Supreme Court of United States.

September 25, 2012.

5*5 PER CURIAM.

Plaintiffs in this case claim that West Virginia's 2011 congressional redistricting plan violates the "one person, one vote" principle that we have held to be embodied in Article I, § 2, of the United States Constitution. A three-judge District Court for the Southern District of West Virginia agreed, declaring the plan "null and void" and enjoining West Virginia's Secretary of State from implementing it. App. to Juris. Statement 4. The state defendants appealed directly to this Court. See 28 U.S.C. § 1253. Because the District Court misapplied the standard for evaluating such challenges set out in *Karcher v. Daggett*, 462 U.S. 725, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983), and failed to afford appropriate deference to West Virginia's reasonable exercise of its political judgment, we reverse.

* * *

Article I, § 2, of the United States Constitution requires that Members of the House of Representatives "be apportioned among the several States ... according to their respective Numbers" and "chosen every second Year by the People of the several States." In *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), we held that these commands require that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.*, at 7-8, 84 S.Ct. 526. We have since explained that the "as nearly as is practicable" standard does not require that congressional districts be drawn with "precise mathematical equality," but instead that the State justify population differences between districts that could have been avoided by "a good-faith effort to achieve absolute equality." *Karcher, supra*, at 730, 103 S.Ct. 2653 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969); internal quotation marks omitted).

Karcher set out a two-prong test to determine whether a State's congressional redistricting plan meets this standard. First, the parties challenging the plan bear the burden of proving the existence of population differences that "could practicably be avoided." 462 U.S., at 734, 103 S.Ct. 2653. If they do so, the burden shifts to the State to "show with some specificity" that the population differences "were necessary to achieve some legitimate state objective." *Id.*, at 741, 740, 103 S.Ct. 2653. This burden is a "flexible" one, which "depend[s] on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.*, at 741, 103 S.Ct. 2653. As we recently reaffirmed, redistricting "ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Perry v. Perez*, 565 U.S. ___, ___, 132 S.Ct. 934, 941, 181 L.Ed.2d 900 (2012) (*per curiam*). "[W]e are willing to defer to [such] state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts." *Karcher, supra*, at 740, 103 S.Ct. 2653.

In this case, plaintiffs claim that West Virginia's redistricting plan, adopted following the 2010 decennial United States census, violates Article I, § 2, of the United 6*6 States Constitution and, separately, the West Virginia Constitution. The 2010 census did not

alter West Virginia's allocation of three congressional seats. But due to population shifts within the State, West Virginia nonetheless began redistricting to comply with the requirements in our precedents.

In August 2011, the West Virginia Legislature convened an extraordinary session, and the State Senate formed a 17-member Select Committee on Redistricting. The committee first considered a redistricting plan championed by its chair, Majority Leader John Unger, and dubbed "the Perfect Plan" because it achieved a population difference of a single person between the largest and smallest districts. That appears, however, to have been the only perfect aspect of the Perfect Plan. State legislators expressed concern that the plan contravened the State's longstanding rule against splitting counties, placed two incumbents' residences in the same district, and moved one-third of the State's population from one district to another.

The following day, members of the Redistricting Committee introduced seven additional plans. The committee eventually reported to the full Senate the eighth proposal, referred to as S.B. 1008. The full Senate rejected a ninth proposal offered as an amendment on the floor and adopted S.B. 1008 by a vote of 27 to 4. The House of Delegates approved the bill without debate by a vote of 90 to 5. Governor Earl Tomblin signed the bill into law on August 18, 2011.

S.B. 1008, codified at W. Va.Code Ann. § 1-2-3 (Lexis 2012 Supp.), does not split **county** lines, redistrict incumbents into the same district, or require dramatic shifts in the population of the current districts. Indeed, S.B. 1008's chief selling point was that it required very little change to the existing districts: It moved just one **county**, representing 1.5% of the State's population, from one district to another. This was the smallest shift of any plan considered by the legislature. S.B. 1008, however, has a population variance of 0.79%, the second highest variance of the plans the legislature considered. That is, the population difference between the largest and smallest districts in S.B. 1008 equals 0.79% of the population of the average district.

The **Jefferson County** Commission and two of its **county** commissioners sued to enjoin the State from implementing S.B. 1008. At trial, the State conceded that it could have adopted a plan with lower population variations. The State argued, however, that legitimate state policies justified the slightly higher variances in S.B. 1008, citing this Court's statement from *Karcher* that "[a]ny number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." 462 U.S., at 740, 103 S.Ct. 2653. The State noted *Karcher*'s approving reference to a District Court opinion upholding a previous West Virginia redistricting plan with a population variance of 0.78% — virtually identical to the variance in S.B. 1008. See *id.*, at 740-741, 103 S.Ct. 2653 (citing *West Virginia Civil Liberties Union v. Rockefeller*, 336 F.Supp. 395 (S.D.W.Va.1972)).

The District Court nonetheless granted the injunction, holding that the State's asserted objectives did not justify the population variance. With respect to the objective of not splitting counties, the District Court acknowledged that West Virginia had never in its history divided a **county** between two or more congressional districts. The court speculated, however, that the practice of *other* States dividing 7*7 counties between districts "may portend the eventual deletion" of respecting such boundaries as a potentially legitimate justification for population variances. App. to Juris. Statement 15, n. 6. The court also faulted the West Virginia Legislature for failing "to create a contemporaneous record sufficient to show that S.B. 1008's entire 4,871-person variance — or even a discrete, numerically precise portion thereof — was attributable" to the State's interest in respecting **county** boundaries and noted that several other plans under consideration also did not split counties. *Id.*, at 15, 16.

The court further questioned the State's assertion that S.B. 1008 best preserved the core of existing districts. Preserving the core of a district, the court reasoned, involved respecting the "'[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area,'" *id.*, at 17 (quoting *Graham v. Thornburgh*, 207 F.Supp.2d 1280, 1286 (D.Kan.2002)), not a "dogged insistence that change be minimized for the benefit of the delicate citizenry," App. to Juris. Statement 20. The District Court concluded that although acclimating to a new congressional district and Congressperson "may give rise to a modicum of anxiety and inconvenience, avoiding constituent discomfort at the margins is not among those policies recognized in *Karcher* as capable of legitimizing a variance." *Ibid.*

With respect to preventing contests between incumbents, the District Court again faulted the legislature for failing to build a record "linking all or a specific part of the variance" to that asserted interest. *Id.*, at 22. And the District Court found that although 0.79% was a minor variation when *Karcher* was decided, the feasibility of achieving smaller variances due to improved technology meant that the same variance must now be considered major. Because the District Court concluded that the redistricting plan was unconstitutional under Article I, § 2, it did not reach plaintiffs' challenges under the West Virginia Constitution.

Chief Judge Bailey dissented. He argued that the record demonstrated the legitimacy of the State's concerns, and that no other plan satisfied all those concerns as well as S.B. 1008. He also took issue with the majority's disregard for *Karcher*'s characterization of 0.78% as an acceptable disparity. App. to Juris. Statement 39.

We stayed the District Court's order pending appeal to this Court, 565 U.S. ___, 132 S.Ct. 934, 181 L.Ed.2d 900 (2012), and now reverse.

Given the State's concession that it could achieve smaller population variations, the remaining question under *Karcher* is whether the State can demonstrate that "the population deviations in its plan were necessary to achieve some legitimate state objective." 462 U.S., at 740, 103 S.Ct. 2653. Considering, as *Karcher* instructs, "the size of the deviations, the importance of the State's

interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests," *id.*, at 741, 103 S.Ct. 2653, it is clear that West Virginia has carried its burden.

As an initial matter, the District Court erred in concluding that improved technology has converted a "minor" variation in *Karcher* into a "major" variation today. Nothing about technological advances in redistricting and mapping software has, for example, decreased population variations between a State's counties. See *id.*, at 733, n. 5, 103 S.Ct. 2653. Thus, if a State wishes to maintain whole counties, it will inevitably have population variations between 8*8 districts reflecting the fact that its districts are composed of unevenly populated counties. Despite technological advances, a variance of 0.79% results in no more (or less) vote dilution today than in 1983, when this Court said that such a minor harm could be justified by legitimate state objectives.

Moreover, our cases leave little doubt that avoiding contests between incumbents and not splitting political subdivisions are valid, neutral state districting policies. See, *e.g.*, *id.*, at 740, 103 S.Ct. 2653. The majority cited no precedent for requiring legislative findings on the "discrete, numerically precise portion" of the variance attributable to each factor, and we are aware of none.

The District Court dismissed the State's interest in limiting the shift of population between old and new districts as "ham-handed," *id.*, at 19, because the State considered only "discrete bounds of geography," rather than "`[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area.'" *Id.*, at 17 (quoting *Graham v. Thornburgh*, *supra*, at 1286). According to the District Court, that did not qualify as "preserving the cores of prior districts" under *Karcher*, 462 U.S., at 740-741, 103 S.Ct. 2653.

Regardless of how to read that language from *Karcher*, however, our opinion made clear that its list of possible justifications for population variations was not exclusive. See *id.*, at 740, 103 S.Ct. 2653 ("Any number of consistently applied legislative policies might justify some variance, including, for instance, ..."). The desire to minimize population shifts between districts is clearly a valid, neutral state policy. See, *e.g.*, *Turner v. Arkansas*, 784 F.Supp. 585, 588-589 (E.D.Ark.1991), summarily aff'd, 504 U.S. 952, 112 S.Ct. 2296, 119 L.Ed.2d 220 (1992). S.B. 1008 achieves significantly lower population shifts than the alternative plans — more than four times lower than the closest alternative, and more than 25 times lower than others.

None of the alternative plans came close to vindicating all three of the State's legitimate objectives while achieving a lower variance. All other plans failed to serve at least one objective as well as S.B. 1008 does; several were worse with respect to two objectives; and the Perfect Plan failed as to all three of the State's objectives. See App. to Juris. Statement 43-45. This is not to say that anytime a State must choose between serving an additional legitimate objective and achieving a lower variance, it may choose the former. But here, given the small "size of the deviations," as balanced against "the importance of the State's interests, the consistency with which the plan as a whole reflects those interests," and the lack of available "alternatives that might substantially vindicate those interests yet approximate population equality more closely," *Karcher*, *supra*, at 741, 103 S.Ct. 2653, S.B. 1008 is justified by the State's legitimate objectives.

Because the District Court did not reach plaintiffs' claims under the West Virginia Constitution and the issue has not been briefed by the parties, we leave it to the District Court to address the remaining claims in the first instance. The judgment of the United States District Court for the Southern District of West Virginia is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.