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Arizona lawsuits shape national electoral policy

By **Joseph Kanefield** | Ballard Spahr LLP

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Arizona has become a leader in shaping national election policy through the courts. Three recent U.S. Supreme Court cases involving redistricting and voter registration that originated in Arizona illustrate this point and beg the question why Arizona seems to have more than its proportionate share of election cases on the high court's docket.

The first case, *Arizona Legislature v. Arizona Independent Redistricting Commission*, involves congressional redistricting. In 2000, the Arizona voters amended the state constitution to remove the decennial task of drawing congressional district lines from the Arizona Legislature and placed it in the hands of the five-member Arizona Independent Redistricting Commission.

In 2012, the legislature challenged the current congressional map in federal court arguing that the Commission violated the Election Clause of the U.S. Constitution, which says "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof". The legislature argued that the word "Legislature" as used in that clause means the Arizona legislature and the citizens could not deprive it of its constitutional right to draw the congressional map.

The majority of the court disagreed and held that the term "Legislature" as used in the clause means the legislative process in each state. Thus, the Arizona citizens acted lawfully when they removed the task of drawing congressional districts from the legislature and placed it in the hands of an independent citizen commission. The court's decision could result in more states shifting map-drawing responsibilities to citizen commissions in an effort to combat the practice of partisan gerrymandering.

A day after the court decided the Arizona Legislature's case, it noted probable jurisdiction in *Harris v. Arizona Independent Redistricting Commission*, a one-person, one-vote challenge to Arizona's legislative

map. The challengers, a group of Republican voters, argued that the commission packed them into overpopulated districts to increase Democratic voting strength. After a one-week trial, a divided district court held that there was no evidence that partisanship predominated over legitimate factors in drawing the map and that the minor population deviations (less than 9 percent from the smallest to largest district) was primarily caused by the commission's good faith effort to comply with the Section 5 of the Voting Rights Act, which required the state to preserve minority voting strength.

The court will review the district court's decision this fall and decide (1) whether the one-person, one-vote principle is violated if minor population deviations between the largest and smallest districts are the result of an effort to gain partisan advantage; and (2) whether the commission's justification for its minor population deviation to obtain Department of Justice preclearance under Section 5 of the Voting Rights Act was a legitimate justification given that Section 5 was rendered unenforceable in 2013 (a year and a half after the Commission adopted the legislative map) in *Shelby County v. Holder*, a challenge brought by a county in Alabama.

It is worth noting that another major redistricting case set for the Court's upcoming term — Evenwel v. Abbott — challenges whether district population should be based on total population (as Arizona does) or voter population. That case, which involves Texas, could have a major impact in Arizona (and most other jurisdictions) in the 2020 decennial redistricting.

The last case, Kobach v. EAC, involves the rules governing voter registration for federal elections. In 2004, Arizona voters changed the law to require newly registered voters to provide evidence of U.S. citizenship. In 2013, the Court held in Arizona v. Inter Tribal Council of Arizona, that this requirement conflicted with the federal National Voter Registration Act, which requires each state to permit voters to register for federal elections using a standard form developed by the federal Election Assistance Commission. Justice Scalia, however, suggested in his opinion that Arizona might be able to challenge the EAC's refusal to instruct voters using the federal form about Arizona's proof of citizenship requirement.

Accepting Justice Scalia's invitation, Arizona and Kansas sued the EAC in the U.S. District Court for the District of Kansas. The district court ordered the EAC to include the specific state instructions with the federal form and the EAC appealed that decision to the 10th U.S. Circuit Court of Appeals, which reversed on the ground that the states failed to advance proof that registration fraud in the use of the federal form prevented each state from enforcing their voter qualifications.

The U.S. Supreme Court denied Arizona and Kansas's petition for certiorari to review the 10th Circuit decision last month thereby rendering Arizona's proof of citizenship requirement inapplicable to voters registering using the federal form. It should be noted that this ruling only applies to federal elections and states can still require evidence of citizenship in order to vote in state and local elections.

The election law precedent the court has set as a result of these Arizona cases and others has profoundly changed the manner in which our elections are administered and financed. It may be coincidence that so many Arizona election cases find their way to the Court's docket, but it is more likely the result of Arizona's progressively minded policy leaders and an electorate willing to experiment with major electoral reform. This is not likely to change soon, which is probably good news for us election lawyer types.

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