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Attorneys for the Arizona Independent Redistricting Commission and Commissioners named in their official capacities

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Arizona State Legislature,

Plaintiff,

vs.

Arizona Independent Redistricting Commission, and Colleen Mathis, Linda C. McNulty, Cid Kallen, Scott D. Freeman, and Richard Stertz, members thereof, in their official capacities; Ken Bennett, Arizona Secretary of State, in his official capacity,

Defendants.

NO.: 2:12-cv-01211-PGR-MMS-GMS

DEFENDANT ARIZONA INDEPENDENT REDISTRICTING COMMISSION AND DEFENDANT COMMISSIONERS MOTION TO DISMISS FOR LACK OF STANDING

(Oral Argument Requested)

Defendants Arizona Independent Redistricting Commission and Commissioners Mathis, McNulty, Kallen[1], Freeman, and Stertz in their official capacities (collectively the "Commission") hereby move to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(1) because (1) the Arizona State Legislature ("Legislature") lacks

[1] Pursuant to Rule 25(d), Commissioner Kallen is substituted for former Commissioner Herrera as a defendant in his official capacity.

Article III standing to bring this lawsuit, (2) prudential principles and principles of comity support dismissing the case, and (3) the Legislature lacks authority to bring this lawsuit as a matter of Arizona law.[2] This motion is supported by the following memorandum of points and authorities and the entire file in this matter.

MEMORANDUM AND POINTS OF AUTHORITIES

The Legislature brought this suit on the theory that Proposition 106 – the voter-approved constitutional amendment that created the Arizona Independent Redistricting Commission – impermissibly reduced the Legislature's power by excluding it from congressional redistricting. Although the parties dispute the merits of the substantive constitutional question, Article III's "case" or "controversy" requirement forbids this Court from deciding this case. Legislators do not have standing to challenge an "abstract dilution of institutional legislative power" and that is what the claims amount to here. *Raines v. Byrd*, 521 U.S. 811, 826 (1997). The Legislature has not suffered a concrete injury sufficient to confer standing unless and until it has actually suffered a denial or nullification of its vote on a specific legislative act.

Moreover, the Legislature's loss of influence is not the type of harm that the Elections Clause was designed to prevent against, and this Court should therefore dismiss this case under prudential principles of standing and comity. Finally, the Legislature lacks legal authority under Arizona law to seek to invalidate a portion of the Arizona Constitution.

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[2] While the Commission currently has pending a motion to dismiss pursuant to 12(b)(6) (Dkt. 16), this motion, which addresses the lack of subject matter jurisdiction, is proper. *See* Fed. R. Civ. P. 12(g)(2), (h)(3) (requiring Court to dismiss action "at any time" if it determines that it lacks subject matter jurisdiction). This motion is filed to assure that these issues are briefed before the January 24, 2014 hearing.

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I. The Arizona Legislature Lacks Standing to Bring this Lawsuit.

A. Legislative Standing Requires that a Vote of the Legislature Has Been Denied or Nullified.

Article III, § 2 of the Constitution gives federal courts jurisdiction only when there is a "case" or "controversy." Among other requirements, this means that a plaintiff must have standing to raise the claims it is asking the federal court to decide. In general, to have standing a plaintiff must allege a "*personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines,* 521 U.S. at 818 (internal quotation marks and citation omitted). The injury must be "legally and judicially cognizable" which means that the plaintiff must have "suffered an invasion of a legally protected interest which is . . . concrete and particularized." *Id.*at 819 (internal quotation marks and citation omitted).

In the legislative context, an allegation of the "dilution of institutional legislative power" is not a judicially cognizable injury. *Id*. at 826. In *Raines*, members of Congress filed suit to challenge the constitutionality of the line item veto act, which authorized the President to cancel certain spending and tax measures. *Id*. at 812. The Supreme Court held that the plaintiffs lacked standing. Though the line item veto act surely impacted Congress's legislative power, the plaintiffs had "not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. . . . Nor [could] they allege that the Act [would] nullify their votes in the future. . . . In the future, a majority of Senators and Congressmen can pass or reject the appropriations bills, the Act has no effect on that process."[3] *Id.* at 824. To allow standing based on the "abstract dilution of institutional legislative power" would have "require[d] a drastic extension" of the law governing legislative standing. *Id.* at 826.

The "one case" in which the Supreme Court has authorized legislator standing is

[3] Note that the line item veto act was ultimately declared unconstitutional when plaintiffs with proper standing brought suit challenging an exercise of the line item veto by the President. *See Clinton v. City of New York*, 524 U.S. 417 (1998).

Coleman v. Miller, 307 U.S. 433 (1939). There, the Court narrowly held that a majority of the Kansas legislature had standing to challenge the state's ratification of a proposed amendment to the U.S. Constitution.[4] *Id*. at 446. The Kansas senate had deadlocked 20-20 on the ratification vote and the Lt. Governor broke the tie in favor of ratification; plaintiffs contended "that the legislature had not in fact ratified the amendment." *Raines*, 521 U.S. at 822 (describing background); *Coleman*, 307 U.S. at 436-37.

Analyzing *Coleman*, the *Raines* Court recognized that *Coleman* involved the denial or nullification of a vote, something that the line-item veto act did not do in *Raines*. It explained: "Just as appellees cannot show that their vote was denied or nullified as in *Coleman* (in the sense that a bill they voted for would have become law if their vote had not been stripped of its validity), so are they unable to show that their vote was denied or nullified in a discriminatory manner (in the sense that their vote was denied its full validity in relation to the votes of their colleagues)." *Raines*, 521 U.S. at 824 n.7.[5] Thus, although the line item veto may have worked a "change in the 'meaning' and 'effectiveness' of [Congress members'] vote[s]," the legislators lacked standing unless a legislator suffered a concrete injury because the line item veto act actually denied or nullified a vote that had taken place. *Id*. at 825.

B. No Vote of the Legislature Has Been Denied or Nullified; Nor Can the Legislature Allege that Its Vote Will be Denied or Nullified in the Future.

The Legislature's only injury asserted in this lawsuit is its loss of influence over congressional redistricting as a result of Arizona voters' approval of Proposition 106 more than a decade ago. (First Am. Compl. [Dkt. 12] ¶¶ 37-39.) That is just the sort of "dilution of institutional legislative power" held to be inadequate in *Raines*. 521 U.S. at

[4] The *Coleman* decision had several opinions, ultimately resulting in a 5-4 holding in favor of standing. *See Raines*, 521 U.S. at 822 & n.5 (explaining 5-4 result). Four justices would have held that the legislators lacked standing. *See Coleman*, 307 U.S. at 469-70 (Frankfurter, J., concurring in the judgment).

[5] The other basis for legislative standing described above, when one or more members of a legislative body has been singled out for especially unfavorable treatment compared to other members of the body, is not implicated by this case.

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826.

The Legislature retains but has not exercised the power to refer its own redistricting plan directly to the people by a majority vote in both houses. Ariz. Const. art. 21, § 1. Notably, the Speaker of the House, now a congressional candidate himself, introduced a resolution to do just that with respect to the 2012-2020 redistricting cycle.[6] But the Legislature never voted to adopt this or any other congressional redistricting plan. (*See* Reply in Support of Mtn. to Dismiss [Dkt. 18] at 7; *see also* Response to Mtn. for Preliminary Injunction [Dkt. 37] at 3-4.) In the absence of a nullified vote, the Legislature is indistinguishable from the challengers in *Raines*. *See* 521 U.S. at 824 n.7 (A vote is "denied or nullified" when "a bill [the members of Congress] voted for would have become law if their vote had not been stripped of its validity").

If the Legislature passes its own plan by a simple majority vote in both houses, and then refers it to the people, the people could very well approve it at the polls. In that case, the law would go into effect. *See* Ariz. Const. art. XXI, § 1. In other words, the people have always had a power to override or veto the Legislature's redistricting plans through the initiative and referendum process that is part of the Arizona Constitution. With Proposition 106 in effect, that power has expanded because the Legislature would have to seek voter approval if it passed a redistricting plan. The same was true in *Raines*: the President's new line-item veto power was an expansion of the veto power that imposed a new, hypothetical limit on the plaintiff-legislators' votes. But there was no concrete injury until a vote actually occurred and suffered denial or nullification because of the exercise of the veto.[7] Until that happened, the Court would not enter the debate

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[6] *See* House Concurrent Resolution 2053 (Fiftieth Leg., 2nd Reg. Sess. 2012); *see also* andytobin.com (website for Tobin for Congress).

[7] For the same reasons, any claim that the Legislature may suffer a denial or nullification of its vote in the future is not ripe. *See, e.g. O'Shea v. Littleton*, 414 U.S. 488 (1974) (finding claims of discrimination in setting bail not ripe because none of the plaintiffs currently faced proceedings in the defendants' courtrooms).

merely to address whether the Constitution permitted an "abstract dilution of institutional legislative power." *Raines*, 521 U.S. at 826.[8] The same should hold true here.

Finally, any request by the Legislature to enjoin the Commission's map, separate from an alleged infringement on the Legislature's powers, is based on nothing more than a generalized grievance that the state is not following the law (in this case, the Elections Clause). The Legislature has not suffered a concrete and particularized injury from the Commission adopting any particular Congressional map or the State of Arizona using that map in its elections. In *Lance v. Coffman*, the U.S. Supreme Court dismissed a suit by private citizens challenging a congressional map under the Elections Clause for this very reason. 549 U.S. 437, 441-42 (2007). The Court further recognized that its previous cases regarding Elections Clause challenges to congressional maps were brought by relators on behalf of the state. *Id.* at 442. For several reasons, the Legislature does not have this power under Arizona law. *See* Part III, *infra*. In sum, unless and until a vote of the Legislature is denied or nullified, there is not a "case" or "controversy" over which this Court may exercise jurisdiction.

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II. Under Principles of Federal State Comity, this Case Should be Dismissed.

Prudential standing principles and principles of comity also support dismissing the Legislature's challenge. This is a case about the State of Arizona's sovereign authority to determine how to conduct redistricting. Congress has explicitly deferred to the States on these matters (Resp. to Mtn. for Preliminary Injunction [Dkt. 37] at 2, 13-14), and the Court should decline to entertain the Legislature's attempt to enhance its power by usurping the authority that the voters of Arizona purposefully transferred to an independent commission within the legislative branch.

Prudential standing requirements mandate that, in addition to the injury-in-fact

[8] Unsurprisingly, the key Supreme Court cases involving Elections Clause challenges like the one here satisfy the rule identified in *Raines*. *See Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 566 (1916) (challenge brought after legislature's congressional redistricting plan rejected by people through referendum vote, thus nullifying legislative action); *see also Smiley v. Holm*, 285 U.S. 355 (1932) (challenge brought after governor vetoed legislature's redistricting plan).

requirement, Plaintiff's claims must "fall within the zone of interests protected by the law invoked." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Here, the Elections Clause was not designed to protect the authority of State Legislatures. Rather, it was to establish the division between state and federal responsibility and to assure that federal elections would proceed without state interference. (Resp. to Mtn. for Preliminary Injunction [Dkt. 37] at 6-7.) The Legislature's complaint about constitutional restrictions on its power do not warrant an exercise of this Court's jurisdiction based on prudential principles.

Likewise, the comity doctrine favors dismissal. Under the comity doctrine, federal courts "resist engagement" in cases within their jurisdiction based on "respect for state functions." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 421 (2010) (internal quotation marks and citation omitted). The doctrine is premised on "the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways." *Id.* (quoting *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 112 (1981); *Younger v. Harris*, 401 U.S. 37, 44 (1971)). This principle squarely applies in this case where the Legislature challenges fundamental principles governing its authority that are established in Arizona's constitution.

There are particularly sensitive federalism concerns when one branch of a state's government brings suit to try to overturn a constitutional amendment approved by the state's citizens. For this reason, the Court should not entertain this suit.

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III. The Legislature Lacks Authority to Bring this Challenge As A Matter of Arizona Law.

The Legislature also lacks authority under the Arizona Constitution to bring this action.[9] The Legislature's authority is established in Article IV of the Arizona Constitution. The Arizona Supreme Court has established that directing litigation is an executive, not legislative, function. *State ex rel. Woods v. Block*, 189 Ariz. 269, 276, 942 P.2d 428, 435 (1997). Although Arizona courts have recognized the Legislature's standing under Arizona law to enforce the provisions of the Arizona Constitution that establish the Legislature's powers, *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 143 P.3d 1023 (2006), it has never recognized the Legislature's authority to initiate litigation to nullify a provision of the Arizona Constitution in order to enhance its own institutional power. In short, nothing in the Arizona Constitution authorizes the Arizona Legislature to use litigation to expand its authority beyond what the Arizona voters have provided in the Arizona Constitution.

To the contrary, the Arizona Constitution mandates that the Legislature respect voter-approved measures. Since statehood, legislative authority in Arizona has been divided between the Legislature and the People. Ariz. Const. art. IV, pt. 1, § 1(1). Only the People can amend the Arizona Constitution, which establishes the parameters for state legislative authority. Ariz. Const. Art. XXI, § 1. The Legislature also has no authority to repeal voter-approved measures, Ariz. Const. art. IV, pt. 1, § 1(6)(B), and very limited authority to amend or supersede voter-approved measures, Ariz. Const. art. IV, pt. 1, § 1(6)(C), (14). These provisions further demonstrate that the Legislature has exceeded its constitutional authority by seeking to invalidate a portion of an initiative amending Arizona's constitution.

[9] This state-law issue should be certified to the Arizona Supreme Court for resolution. A.R.S. § 12-1861 (giving the Arizona Supreme Court over "questions of law certified to it" by federal courts).

If the Legislature seeks to override a voter-approved measure, such as Proposition 106, it must do so by using its legislative power to refer the issue to the People, not through litigation. For these reasons, this lawsuit exceeds the Legislature's state constitutional authority and should be dismissed.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court dismiss this case.

DATED this 23rd day of December, 2013.

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of December, 2013, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Court, using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants listed for this matter.

Pursuant to local rule, courtesy copies of this Motion to Dismiss have been mailed to the chambers of the Honorable Mary M. Schroeder, the Honorable Paul G. Rosenblatt, and the Honorable G. Murray Snow.

By: /s/ *Melissa De Marie*