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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Arizona State Legislature,

Plaintiff,

v.

Arizona Independent Redistricting
Commission, et al.,

Defendants.

No. 2:12-CV-01211-PGR-MMS-GMS

**PLAINTIFF’S RESPONSE TO
DEFENDANT ARIZONA
INDEPENDENT REDISTRICTING
COMMISSION AND DEFENDANT
COMMISSIONERS’ MOTION TO
DISMISS FOR LACK OF
STANDING**

INTRODUCTION

The Arizona State Legislature (“Legislature”) hereby responds¹ to Defendants’ Second Motion to Dismiss.

¹ The Legislature files this response early in order to give the Court adequate time to consider the jurisdictional issues prior to the consolidated hearing on January 24.

1 Article IV, part 2 section 1 of the Arizona Constitution (“Prop. 106”) eliminates the
2 Legislature’s Constitutional redistricting authority in violation of Article I, section § 4 of the
3 United State Constitution (the “Elections Clause”). The complete removal of this authority
4 represents the necessary Article III “injury in fact,” as it is personal, concrete and particularized
5 to the Legislature. This injury is legally cognizable and affects the Legislature’s direct and
6 tangible interest in congressional redistricting. Neither principles of comity, federalism, nor
7 Arizona state law offer cause to forego or delay adjudication of the Constitutional merits.

8 ARGUMENT

9 In reviewing Defendants’ 12(b)(1) motion to dismiss for lack of standing, this Court
10 “must accept as true all material allegations of the complaint, and must construe the complaint
11 in favor of the complaining party.” *Bras v. Calif. Public Utilities Comm’n*, 59 F.3d 869, 874
12 (9th Cir. 1995) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). In the context of a challenge
13 to standing, the Plaintiff’s arguments on the merits are accepted as valid. *Warth*, 422 U.S. 490
14 at 501. Therefore, courts must “presume that the general allegations in the complaint
15 encompass the specific facts necessary to support those allegations.” *Steel Co. v. Citizens for*
16 *Better Environment*, 523 U.S. 83, 104 (1998).

17 I. The Legislature Has Standing to Bring its Constitutional Claims.

18 A. The Legislature’s Challenge Easily Meets the *Lujan* Test For Article III 19 Standing.

20 For Article III standing, a plaintiff must allege (1) an injury, (2) caused by the conduct
21 complained of, (3) which may be redressed by a favorable decision. *Lujan v. Defenders of*
22 *Wildlife*, 504 U.S. 555, 560 (1992).

23 1. Injury

24 Defendants’ Motion concentrates on the first *Lujan* factor—whether the Legislature’s
25 loss of Constitutional authority under the Elections Clause is a “particularized injury” sufficient
26 to create Constitutional standing. Constitutional standing requires the alleged injury to be direct
27 and personal, and not “wholly abstract or widely dispersed.” *Raines v. Byrd*, 521 U.S. 811, 829
28 (1997); *see also Coleman v. Miller*, 307 U.S. 433, 438 (1939) (majority of state legislators have

1 standing to challenge state Lieutenant Governor’s participation in legislature’s vote to approve
2 federal Constitutional amendments). The *Raines* decision does not put an end to standing for
3 institutional injury; particularly where it is the institution itself that raises a claim. As one three-
4 judge court has already held, an injury is not “widely dispersed” when it “...affects a
5 legislature...in a concrete and particularized manner, and in a manner distinct from the general
6 public.” *US House of Represent. v. US Dept. of Commerce* (Hereinafter “*U.S. House*”), 11
7 F.Supp.2d 76, 90 (D.D.C. 1998), appeal dismissed, 525 U.S. 316, 344 (1999) (House had
8 standing to challenge a particularized injury – the deprivation of census information that would,
9 *inter alia*, determine its composition).

10 Legislative standing cases fall into two general categories. The first category is where
11 legislators—either individually or as a group—seek to challenge a deprivation of their authority
12 as sitting legislators. The plaintiffs in *Powell v. McCormack*, 395 U.S. 486 (1969) (one member
13 of Congress), *Coleman v. Miller, supra* (twenty members of the state legislature), and *Raines v.*
14 *Byrd, supra* (six members of Congress) are all in this category. *See generally, Newdow v. U.S.*
15 *Cong.*, 313 F.3d 495, 499 (9th Cir. 2002) (“at least as to individual legislators, there is no
16 standing unless their own institutional position, as opposed to their position as a member of the
17 body politic, is affected.”).

18 The second category of legislative standing is where a legislative body seeks to vindicate
19 its institutional authority. Institutional standing can either be invoked by the body itself (as it is
20 this case), or through its officers. *Cf., Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S.
21 187, 194, 92 S. Ct. 1477, 1482, 32 L. Ed. 2d 1 (1972) (state senate recognized with standing to
22 appeal apportionment order); *Karcher v. May*, 484 U.S. 72, 81, 108 S. Ct. 388, 394-95, 98 L.
23 Ed. 2d 327 (1987) (recognizing that House Speaker and Senate President “participated in this
24 lawsuit in their official capacities as presiding officers of the New Jersey Legislature.”); *and*
25 *Forty-Seventh Legislature of State v. Napolitano*, 213 Ariz. 482, 487, 143 P.3d 1023, 1028
26 (2006) (“both the House of Representatives and the Senate authorized the Forty-seventh
27 Legislature to challenge the Governor's item veto of Section 5 of HB 2661, making it clear that
28 the Legislature as a body intended to challenge the Governor's action.”).

1 This is clearly an institutional injury case. The Legislature sues in its institutional
2 capacity. (Doc. 12, 1st Amnd. Compl. at ¶ 2.) This suit was authorized by specific resolution
3 adopted in both chambers to “defend” the authority to conduct redistricting “on behalf of the
4 Legislature as a whole.” (Doc. 12-1, at pp. 3, 11.) And the Legislature’s complaint makes clear
5 that its constitutional claim raises institutional injury under the Elections Clause. (Doc. 12, at ¶¶
6 38-9.)

7 The *Coleman* and *Raines* cases are useful for understanding the individualized injury
8 requirement, but they do not purport to narrow the universe of legislative standing to exclude
9 institutional injury. Neither case addressed a clear institutional claim. And as the Court
10 suggested in *Raines*, the outcome in that case was at least partially determined by the fact that
11 the legislative plaintiffs were not authorized to represent the institutional interests of their
12 chambers. *Raines*, 521 U.S. at 830, n. 10 (citing *Bender v. Williamsport Ara Sch. Dist.*, 475
13 U.S. 534, 544 (1986) (recognizing the difference between individual members and the body as
14 a whole); *United States v. Ballin*, 144 U.S. 1, 7 (1892) (same)). *Coleman* and *Raines* are no bar
15 to direct, constitutional-injury claims by legislative bodies. However, both decisions do
16 illuminate the palpable nature of the constitutional injury suffered by the Legislature as a result
17 of Prop. 106--nullification of the Legislature’s ability to prescribe the manner of congressional
18 elections under the Elections Clause.

19 In *Coleman*, a multiple Kansas state legislators appealed a state court decision that
20 denied their right to approve Constitutional amendments under U.S. Const. art. V. *Coleman*,
21 307 U.S. at 436. The Court held that the legislators had a “plain, direct and adequate interest” in
22 the right and privilege under the Constitution to have their ratification votes given effect. *Id.* at
23 438. The Court reviewed many instances where it allowed state officials standing in their
24 official capacities to determine the effect of Constitutional provisions on their official duties.
25 *Id.* at 444-45. These officials too had an “adequate interest” in the controversies alleged though
26 they did not claim any “private damage.” *Id.* at 445. The Court upheld Article III jurisdiction on
27 the legislators’ Constitutional claims. *Id.* at 446.

1 In *U.S. House*, a three-judge court affirmed the standing of the House of
2 Representatives to challenge the Department of Commerce’s proposed use of statistical
3 sampling in taking the 2000 census as unlawful and/or unconstitutional under U.S. Const. art. I
4 § 2 cl. 2. In deciding the House’s Constitutional standing, the court first reviewed whether the
5 type of alleged injury—inability to receive information which a person is entitled to by law—
6 was cognizable under Article III. 11 F.Supp. 2d at 85-86 (finding this type of injury “concrete
7 and particularized”). The court next found that the House as a legislative body had a cognizable
8 interest in receiving the information. *Id.* at 87. Finally, the court addressed *Raines* and held that
9 legislative plaintiffs may establish Constitutional standing where they allege particularized
10 institutional injuries. *Id.* at 90.

11 Just as in *Coleman* and *U.S. House*, the Legislature’s challenge meets all Article III
12 standing requirements for an “injury in fact.” First, it is well-settled by the primary authorities
13 cited by both sides in this dispute that an injury to authority under the Elections Clause is the
14 type of injury that may create an Article III “case” or “controversy.” *See e.g. Smiley v. Holm*,
15 285 U.S. 355 (1932) (determining the extent of Elections Clause authority); *Brown v. Secretary*
16 *of State of Florida*, 668 F.3d 1271 (11th Cir. 2012) (same).

17 Further, the Legislature has a cognizable interest in maintaining authority granted by the
18 U.S. Constitution. *See Coleman*, 307 U.S. 433, 436 (majority of state legislators have a “plain,
19 direct and adequate interest” in maintaining power to vote on federal Constitutional
20 amendments under U.S. Const. art. V); *see also Hawke v. Smith*, 253 U.S. 221 (1920)
21 (reversing state court decision in order to uphold state legislature’s right to ratify amendments
22 to the Constitution); *and see Bush v. Gore*, 531 U.S. 98, 115 (Rehnquist, C.J., concurring)
23 (concurring in judgment based on “respect for the constitutionally prescribed role of state
24 legislatures”). Based on *Coleman*, the Legislature has a judicially cognizable interest in
25 determining and upholding its Constitutional authority, whether or not the challenged conduct
26 is ultimately deemed in violation of the Elections Clause.

27 Finally, the Legislature’s claim falls within the “area left by the Court” in *Raines v. Byrd*
28 for upholding standing for challenges to personal and particularized institutional injuries to

1 legislative bodies. *U.S. House*, 11 F.Supp.2d at 89. In this suit, like *Raines*, the Legislature
2 alleges that Prop. 106 “deprives [it] of an element of [its] legislative power; as a factual matter
3 [it has] a more direct and tangible interest in the preservation of that power than the general
4 citizenry has.” *Raines*, 521 U.S. at 832 (Souter, J., concurring). Again, in the language of
5 *Raines*, the Legislature is “claim[ing] that [it is being] deprived of something to which [it]
6 personally [is] entitled,”: the ability to make final decisions regarding state regulation of
7 congressional elections. *U.S. House*, 11 F.Supp.2d at 89 (quoting *Raines*, 521 U.S. at 821).
8 This kind of direct constitutional injury clearly constitutes injury for purposes of Article III
9 standing. As the United States District Court for the District of Colorado recently stated in an
10 analogous situation:

11 As alleged, this injury is of a greater magnitude than the single instance of vote
12 nullification in *Coleman*, and is far more concrete than the alleged injury in
13 *Raines*. The injury alleged here is a concrete injury involving the removal of a
14 “core” legislative power of the General Assembly. The allegations of the
15 Operative Complaint are of such a magnitude that the term “dilution of
16 institutional power” appears insufficient to describe the alleged injury...on
17 Plaintiffs’ core representative powers. More importantly, the allegations...detail
18 anything but an abstract dilution of power. As a consequence, the concreteness of
19 the injury alleged here weighs in favor of finding standing.

20 *Kerr v. Hickenlooper*, 880 F.Supp.2d 1112, 1131 (D. Colo. 2012) (plaintiff legislators’ claims
21 involved a Colorado constitutional provision severely limiting the state legislature’s power to
22 tax) (emphasis in original). As in *Kerr*, the Legislature claims a particular, concrete injury: loss
23 of the Constitutional authority to participate in drawing district lines. There is nothing abstract
24 in this claim. Prop. 106 directly targeted the Legislature and its authority, being designed for
25 the specific purpose of “remov[ing] responsibility for redistricting from the Arizona
26 legislature.” (Brief of Amici Curiae [Doc. 42 at 3]). Prop. 106 has already directly achieved this
27 purpose by excluding the Legislature from redistricting through two (2) redistricting cycles, and
28 will continue to do so in future cycles absent judicial intervention.

To support their characterization of Prop. 106 as a mere “abstract dilution of institutional
legislative power,” Defendants continue to place great weight on the fact that the Legislature

1 could refer a constitutional amendment to the people to change Arizona’s redistricting scheme
2 (Defendants’ Mtn. to Dismiss [Doc. 43 at 4-6]). However, “[c]onstitutional rights can hardly be
3 infringed simply because a majority of the people choose that it be...,” and “...constitutional
4 rights cannot be deprived, or denied judicial effectuation, because of the existence of a
5 nonjudicial remedy.” *Lucas v. Forty-Fourth General Assembly of the State of Colorado*, 377
6 U.S. 713, 736-37 (1964). Just as a Constitutional “injury in fact” may not be caused by the
7 “independent action of some third party not before the court,” *Bennett v. Spear*, 520 U.S. 154,
8 167 (1997), injury in fact in turn is not obviated by the possibility that independent action of
9 some third party not before the court might cure the Constitutional violation. It is true that the
10 people of Arizona have the authority to choose to revert Arizona’s redistricting scheme to
11 conform to the Elections Clause. However, this has no bearing on the particularity and actuality
12 of the Legislature’s injury in the meantime – an injury for which the Legislature itself can seek
13 redress.

14 It is unclear whether Defendants also advance the theory that the Legislature could
15 create its own congressional district maps and refer them to the people. (Doc. 43 at 4-6)
16 (referring obliquely to the Legislature’s supposed ability to create “its own redistricting plan”
17 but citing only Ariz. Const. art. XXI § 1, the section regarding constitutional amendments). To
18 be clear, Prop. 106 removed *all* responsibility over drawing congressional maps from the
19 Legislature. The Arizona constitution is unequivocal that “the independent redistricting
20 commission shall...establish final district boundaries.” Ariz. Const. art. IV, pt. 2 § 1(16). The
21 AIRC’s congressional maps are not subject to referendum by the people. *See* Ariz. Const. art.
22 IV, pt. 1 § 1(3) (the referendum power applies only to measures “enacted by the legislature”—
23 i.e. not the AIRC’s congressional district maps—are subject to the referendum power); *cf.* Cal.
24 Const. art. XXI, § 6(h)(i) (redistricting maps created by California’s redistricting commission
25 are “subject to referendum in the same manner that a statute is subject to referendum;” no such
26 provision exists in Prop. 106). No provision allows the Legislature to change the AIRC’s maps,
27 or to ask the people of Arizona to do so.
28

2. *Causation and Redressability*

Defendants do not dispute that the second and third *Lujan* elements—causation and redressability—are satisfied. That Prop. 106 caused the Legislature’s injury and that the declaratory and injunctive relief requested would cure that injury is apparent. *See U.S. House*, 11 F.Supp.2d at 84 (where parties do not dispute the elements of causation and redressability, and they are clearly satisfied, Court limits discussion to injury in fact). Thus, these two elements conclusively weigh in the Legislature’s favor. Clearly, the Legislature’s institutional injury is caused by the removal of its authority under the Elections Clause. It is equally clear that the relief sought—declaratory and injunctive relief—is adequate to redress that constitutional injury. (Doc. 12, 1st Amnd. Compl. at 9 (relief requested); Doc. 27, Pls. Mtn. for Prelim. Injunc.)

B. *Raines* Does Not Require the Legislature to Have Voted, and the Holding of *Raines* Does Not Control This Case.

Defendants next attempt to create a new standing rule beyond to the *Lujan* factors to be applied “in the legislative context,” based on their expansive reading of *Raines* (Doc. 43 at 3). Defendants argue that the Legislature must vote on a redistricting plan, and have that vote nullified, to establish an Article III ‘case’ or ‘controversy.’” (Doc. 43 at 5). Defendants’ argument, however, pulls *Raines* “too far from its moorings.” *Raines*, 521 U.S. at 825. *Raines* does not create a “voting requirement.” Such a requirement could not be applied here, where the Legislature lacks even the opportunity to vote on an alternative congressional districting plan under Arizona law. Beyond surface similarities involving legislators and legislatures as parties, *Raines* is largely dissimilar to the present controversy and its holding does not control.

In *Raines*, six (6) individual Members of Congress challenged the Line Item Veto Act, legislation passed by Congress, in their official capacities as congressmen. *Raines*, 521 U.S. at 814, 816. Their respective Houses of Congress actively opposed the suit. *Id.* at 828. The plaintiffs claimed *an institutional injury to the effectiveness of their votes* because the President might veto portions of future congressional enactments. Based on the nature of this claim, the Court held that the individual legislators must show a concrete injury that amounts to vote

1 nullification to achieve standing. For instance, they could allege that they “voted for a specific
2 act, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed
3 defeated.” *Id.* at 824. Although the Court held that the individual congressmen in *Raines* did
4 not allege a “concrete injury” sufficient to establish standing, the Court limited its holding to
5 the immediate facts of that case. *Id.* at 829-30.

6 Here, the Legislature’s claim regarding Prop. 106 is not similar to the legislators claim
7 in *Raines*. The Legislature alleges a particular Constitutional injury: Prop. 106 flatly denies the
8 Legislature the authority under the Elections Clause to regulate congressional elections in
9 violation of federal law. The Legislature need not attempt to vote where it is already
10 unauthorized to do so in order to make its injury “concrete.” *Raines* did not create a general
11 requirement that legislators or legislatures vote and have their votes nullified before obtaining
12 standing. Rather, the Court in *Raines* held that, under the *Lujan* framework, the particular
13 injury alleged—that the Line Item Veto Act diluted the effectiveness of individual legislators’
14 general voting power—was not concrete and did not give rise to Article III standing where the
15 individual congressmen had not actually voted on anything. *Raines*, 521 U.S. at 829.² *Raines*
16 simply used the plaintiff-legislators’ lack of a vote as a consideration in determining legislative
17 standing under *Lujan* based on the injury alleged. Where, as here, the Legislature cannot vote at
18 all, it need not attempt to do so to create standing. *See Forty-Seventh Legislature v. Napolitano*,
19 143 P.3d 1023, 1028 (2006) (“the Legislature should not be put to the task of attempting to
20 override an invalid [law] before being able to challenge an allegedly unauthorized action in
21 court”).

22 The Legislature’s injury is certain. Prop. 106 has denied the Legislature the opportunity
23 to create congressional district maps for thirteen (13) years, two (2) redistricting cycles, and six
24 (6) Representative elections. *See Kerr*, 880 F.Supp. at 1130 (state legislators alleged “injury in
25 fact” where they had been denied power to tax without voter approval of voters for twenty (20)
26

27 ² Notably, the Court in *Raines* still upheld *Coleman*, where the Court deemed “nullification” of
28 just one vote an “injury in fact.” *Raines*, 521 U.S. at 824. Here the Legislature’s entire
opportunity to vote is denied.

1 years). The Legislature presents injury not to a nebulous “voting power,” but to the complete
2 removal of a specific grant of authority under the Constitution. The holding of *Raines* does
3 limit the Legislature’s standing based on a failure to attempt to override Prop. 106 where
4 Arizona law bars it from doing so.

5 Importantly, the Court in *Raines* emphasized the fact that the plaintiffs were not
6 authorized to bring their challenge by their respective Houses of Congress, and that both
7 Houses actively opposed the suit, as an important factor in their decision. *Raines*, 521 U.S. at
8 829. The congressmen as individuals could not allege a personal injury to their voting power as
9 required by Article III because the alleged injury was to not to them, but to “the Member’s
10 seat...which the Member holds...as trustee for his constituents.” *Id.* at 821. The Court
11 explicitly declined to extend its holding to cases where a legislative body authorizes a challenge
12 and brings suit collectively. *Id.* at 829-30; *see also U.S. House of Represent.*, 11 F.Supp.2d at
13 89 (House of Representatives as an entity has standing to address institutional injuries where
14 the House is deprived of an information necessary for a constitutional function); *and see U.S. v.*
15 *Windsor*, 133 S.Ct. 2675, 2713 (2013) (Scalia, J., dissenting) (in *Raines*, “individual Member’s
16 lack of institutional endorsement [was] a sign of their standing problem”). That the Legislature
17 here brings suit as a body, alleging a particular injury to its Constitutional authority, weighs in
18 favor of standing.

19 The Court in *Raines* also attached importance to the fact that the Act complained of by
20 the individual congressmen was a creation of Congress; the congressmen-plaintiffs retained the
21 power to repeal the Act. *Raines*, 521 U.S. at 829. The Legislature retains no such power in the
22 present controversy. *See Ariz. Const. art. IV, pt. 1 § 1(6)*. A Constitutional challenge in federal
23 court is the Legislature’s only adequate remedy.

24 Finally, at the heart of the decision in *Raines* is the Court’s concern over separation of
25 powers in the federal government. *Raines*, 521 U.S. at 819-20 (“...our standing inquiry has
26 been especially rigorous when reaching the merits of the dispute would force us to decide
27 whether an action taken by one of the other two branches of the Federal Government was
28 unconstitutional”). The Court in *Raines* thus distinguished *Coleman* by the fact that it was

1 brought by state legislators. *Id.* at 821 (“The one case in which we have upheld standing for
2 legislators (albeit *state* legislators) claiming an institutional injury is *Coleman...*) (emphasis in
3 original). As in *Coleman*, separation of powers concerns are not present here, where the
4 controversy involves state government bodies. On the whole, neither the facts nor the principles
5 of law that led the *Raines* Court to conclude that its plaintiffs lacked an injury-in-fact are
6 present here.

7
8 **C. The Legislature’s Interest in Redistricting is Precisely the Type of Interest Protected by the Elections Clause.**

9 Defendants also appeal to prudential standing principles that require plaintiffs’ claims to
10 fall within the zone of interests protected by the law invoked. (Doc. 43 at 7). Although
11 Defendants’ reading of the Elections Clause would divorce the phrase “by the Legislature
12 thereof” of all obvious meaning, federal case law is clear that the Elections Clause is in fact
13 meant to ensure that states perform congressional redistricting according to the Founders’
14 Constitutional structure. *Smiley v. Holm*, 285 U.S. at 372 (“Article I, section 4, plainly gives
15 authority to the State to legislate within the limitations therein named”); *Grills v. Branigin*, 284
16 F.Supp. 176, 180 (S.D. Ind. 1968) (Elections Clause bars state election board from performing
17 congressional redistricting). This includes protecting the preeminent role of the state
18 legislatures in redistricting. *Smith v. Clark*, 189 F. Supp. 2d 548, 550 (S.D. Miss. 2002) (“...the
19 state authority that produces the redistricting plan must, in order to comply with Article I,
20 Section 4 of the United States Constitution, find the source of its power to redistrict in some act
21 of the legislature”), *aff’d sub nom. Branch v. Smith*, 538 U.S. 254 (2003) and amended *sub*
22 *nom. Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011). Prudential principles do not
23 bar adjudication on the merits.

24 **II. Defendants Comity Defense Has Already Been Waived, Has Never Been Applied in**
25 **These Circumstances, and Does Not Bar Federal Adjudication of Federal Questions**

26 Defendants’ appeal to comity is waived and is not properly before the Court. Unlike
27 Defendants’ standing argument, the comity doctrine “is not a jurisdictional limitation” but may
28 be waived. *Ohio Civil Rights Comm’n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986).

1 Abstention may be waived if a party “expressly urge[s] [the] Court...to proceed to an
2 adjudication of the constitutional merits.” *Id.* In the present case, Defendants have already
3 urged the Court to proceed to a trial on the merits. (Defendants’ Resp. to Motion for
4 Preliminary Injunction [Doc. 37 at n. 5]). Defendants’ thus waived their comity argument.

5 Further, the comity doctrine does not extend to the present controversy. “In the main,
6 federal courts are obliged to decide cases within the scope of federal jurisdiction.” *Sprint*
7 *Communications, INC. v. Jacobs*, No. 12-815, slip. op. (U.S. Dec. 10, 2013),
8 http://www.supremecourt.gov/opinions/13pdf/12-815_qol1.pdf. “[O]nly exceptional
9 circumstances justify a federal court’s refusal to decide a case in deference to the States.” *New*
10 *Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989).
11 Courts abstain from exercising jurisdiction based on comity only in defined, limited
12 circumstances, such as in the state taxation cases cited by Defendants. Defendants point to no
13 authority justifying extension of the comity doctrine to this case.

14 Moreover, the scope of the Legislature’s authority to regulate federal elections is a
15 purely federal issue, delegated expressly by the Constitution, over which states have no
16 traditional or reserved powers. (Reply in Support of Mtn. for Preliminary Injunction [Doc. 38 at
17 3]). The Clause itself establishes the proper balance of federalism in regulating federal
18 elections. *Id.* The federalism and/or the comity doctrine do not bar federal adjudication of
19 federal questions under the Elections Clause simply because adjudication may affect the
20 relationships of state governmental bodies:

21 Where...state law has made particular federal questions determinative of relations
22 within the structure of state government, not in challenge of it, the Court has
23 resolved such narrow, legally defined questions in proper proceedings. In such
24 instances there is no conflict between state policy and the exercise of federal
judicial power.

25 *Baker v. Carr*, 369 U.S. 186, 285-85 (1962) (Frankfurter, J., dissenting) (though dissenting,
26 Justice Frankfurter notably cites *Smiley v. Holm* as such an instance where federal courts should
27 decide the extent of federal constitutional requirements though they affect the structure of state
28

1 governmental relations) (citations and quotations omitted); *see also Valdivia v.*
2 *Schwarzenegger*, 599 F.3d 984, 991 n.6 (9th Cir. 2010) “[P]rinciples of federalism do not
3 permit a state to violate...a constitutionally-protected right”); *Mackin v. City of Boston*, 969
4 F.2d 1273, 1275-76 (1st Cir. 1992) (“...the legal justification for displacement of local
5 authority is a violation of the Constitution by the local authorities”).

6 Finally, Prop. 106 became Arizona law in 2000. “[A] federal court might properly wait a
7 short period to allow a state’s electorate to remedy an unconstitutional measure passed by ballot
8 initiative, but...otherwise the federal court must act to remedy the constitutional violation.”
9 *Kerr*, 880 F.Supp.2d at 1136. At this point, comity and/or federalism principles cannot bar
10 adjudication of the questionable Constitutional merits of Prop. 106.

11 **III. The Legislature Has Clear Authority to Bring this Challenge Under Arizona** 12 **Law and No Cause Exists to Certify Questions of Arizona Law to the Arizona** 13 **Supreme Court**

14 The Court need not certify the issue of the Legislature’s authority to bring this challenge
15 under Arizona law to the Arizona Supreme Court. Defendants argue that “nothing in the
16 Arizona Constitution authorizes the Arizona Legislature to use litigation to expand its authority
17 beyond...the Arizona Constitution.” (Doc. 43 at 8). However, “[u]nlike the Federal
18 Constitution, state constitutions are not grants of power, but...limitations thereof.” *Cox v.*
19 *Superior Court*, 237 P.2d 820 (1951). “...[E]xcept those things necessarily inhibited by the
20 Federal or state constitution, the state legislature may pass any act...” *Id.*; *see also Earhart v.*
21 *Frohmler*, 65 Ariz. 221, 178 P.2d 436 (“We do not look to the Constitution to determine
22 whether the Legislature is authorized to do an act, but only to see if it is prohibited”); *Citizens*
23 *Clean Elections Comm’n v. Myers*, 1 P.3d 706, 710 (2000) (“the legislature need not look to an
24 express grant of authority in order to justify an enactment”); *Whitney v. Bolin*, 48, 330 P.2d
25 1003 (1958) (“...the power of the legislature is plenary and unless that power is limited by
26 express or inferential provisions of the Constitution, the legislature may enact any law which in
27 its discretion it may desire”). The Arizona constitution does not limit by inference or express
28 provision the Legislature’s ability to authorize federal court challenges to unconstitutional laws.

1 This is well-settled Arizona law, and no cause exists to certify the question of the Legislature's
2 authority to bring suit to the Arizona Supreme Court.

3 Although the Legislature's standing to sue under Arizona law is not determinative of the
4 Legislature's Article III standing, even Defendants' Arizona case-law conclusively establishes
5 the Legislature's standing to seek redress for injuries to its institutional authority. (Doc. 43 at 8)
6 (citing *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 143 P.3d 1023 (2006) (granting
7 the Legislature standing with reference to *Coleman* and *Raines*)). It is immaterial that
8 conducting litigation on behalf of the state, to enforce Arizona state laws, is generally
9 considered an executive function. *See, e.g., State ex rel. Woods v. Block*, 189 Ariz. 269, 276,
10 942 P.2d 428, 435 (1997). The Legislature brings this suit in its own name to address a
11 particularized injury to its own authority under the U.S. Constitution. The Legislature as an
12 institutional body may bring suit in federal or Arizona state court to address particularized
13 harms to its constitutional authority.

14 Finally, Defendants attempt to conjure a limit on the Legislature's authority to bring suit
15 by echoing *amici curiae*'s argument (Doc. 42) that the VPA somehow bars the Legislature from
16 authorizing this litigation. In short, nothing in the text, history or adjudication of the VPA lends
17 any credence to the theory that federal court litigation alleging claims under the U.S.
18 Constitution and requesting an injunction barring the operation of *part* of Prop. 106 constitutes
19 a "repeal" in violation of the VPA. *See* Plaintiff's Resp. to Brief of Amici Curia (Doc. 44 at 2-
20 8). Defendants offer no explanation of how the VPA "demonstrate[s] that the Legislature has
21 exceeded its [state] constitutional authority" by bringing this suit. (Doc. 43 at 8). The
22 Legislature has not repealed or amended Prop. 106. This litigation does not call into question
23 Prop. 106's removal of the Legislature from the role of state-legislative redistricting.

24 Interpreting the United States Constitution as it relates to state power over elections is
25 the proper role of the federal judiciary. *See, e.g., McPherson v. Blacker*, 146 U.S. 1, 23 (1892)
26 (deciding the validity of a state law alleged to be repugnant to the Constitution in the context of
27 presidential electors). The Legislature invoked that authority by authorizing this suit. No
28 Arizona courts deem federal litigation a violation of the VPA. Even if such a holding did exist,

1 Federal supremacy would require that state policy yield to federal law. *Felder v. Casey*, 487
2 U.S. 131, 138 (1988) (state notice of claim statute preempted by 42 U.S.C. § 1983).

3
4 **CONCLUSION**

5 The Legislature's Elections Clause claim is properly before this Court. This Court
6 should use its authority to say what the law is.

7 RESPECTFULLY SUBMITTED this 20th day of January, 2014,

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CERTIFICATE OF SERVICE

I certify that on the 20th day of January, 2014, 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.

/s/ Kelly Labadie