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10 **ARIZONA SUPERIOR COURT**

11 **MARICOPA COUNTY**

12 STATE OF ARIZONA, *ex rel.* THOMAS C.
13 HORNE, Attorney General,

14 Petitioner,

15 v.

16 COMMISSIONER COLLEEN MATHIS;
17 COMMISSIONER LINDA McNULTY;
COMMISSIONER JOSE HERRERA,

18 Respondents.

19 ARIZONA INDEPENDENT
20 REDISTRICTING COMMISSION, an
Independent Constitutional Body,

21 Plaintiff,

22 v.

23 THOMAS C. HORNE, in his official capacity
as Attorney General of the State of Arizona,

24 Defendant.

Case No. CV2011-016442
(Consolidated with CV2011-017914)

**REPLY AND SUPPORT OF MOTION
TO DISMISS**

(Assigned to Honorable Dean Fink)

1 **I. THE ISSUE IS JURISDICTIONAL**

2 If a governmental body has not been given the right, by the constitution or statute, to sue
3 or be sued in a particular subject area, then the court has no jurisdiction to hear a lawsuit
4 brought by that entity: “A court has no jurisdiction until a party is brought before it who legally
5 exists and is legally capable of being sued.” *Yamamoto v. Santa Cruz Cty. Brd of Supervisors*,
6 *Ariz.* 538, 539, 606 P.2d 28, 29 (App. 1979). (Emphasis added)

7 Attached as Exhibit A to this reply is the minute entry in the case of *Arizona Biomedical*
8 *Research Commission v. State of Arizona* CV2011-012995 (July 19, 2011), *special action*
9 *denied* 1 CA-SA 11-0185 (July 28, 2011). Though not a binding appellate court case, we
10 present to it to this Court as information about a ruling by a fellow Superior Court Judge on an
11 identical legal issue. In that case, the Court, dismissing an action, held as follows:

12 A governmental entity has no inherent power and possesses only those powers and
13 duties delegated to it by its enabling statutes. *Braillard v. Maricopa Cnty.*, 224
14 *Ariz.* 481, 487, 232 P.3d 1263, 1269 (App. 2010); *Scwartz v. Super Ct.*, 186 *Ariz.*
15 617, 619, 925 P.2d 1068, 1070 (App. 1996) (powers of state administrative agency
16 limited to those granted by statute); *see also Facilitec, Inc. v. Hibbs*, 206 *Ariz.*
17 486, 488, 80 P.3d 765, 767 (2003); *Cox v. Pima County Law Enforcement Merit*
18 *Sys. Council*, 27 *Ariz. App.* 494, 495, 556 P.2d 342, 343 (1976). Thus, a
19 governmental entity may sue or be sued “only if the legislature has so provided.”
20 *Braillard, id.* (dismissing MCSO as a nonjural entity); *see also Kimball v.*
21 *Shofstall*, 17 *Ariz. App.* 11, 13, 494 P.2d 1357, 1359 (1972) (Arizona State Board
22 of Education not an autonomous body with right to sue and be sued).

23 Whether ABRC is a jural entity is the threshold issue of this Court’s jurisdiction.
24 *Cf. Yamamoto v. Santa Cruz Cnty. Bd. Of Supervisors*, 124 *Ariz.* 538, 539, 606
25 P.2d 28, 29 (App 1979) (court has no jurisdiction over a party who is not legally
26 capable of being sued). The enabling statutes pertaining to ABRC do not contain
language allowing it to sue or be sued. The Court finds that the Legislature did
not grant the power to sue or be sued to ABRC; as such, ABRC is not a jural
entity. (Emphasis added)

 The constitution, or statutes, could have given the Commission unlimited authority to
sue and be sued. Those who wrote the initiative creating the Commission instead chose to limit

1 that authority to “legal actions regarding the redistricting plan and the adequacy of resources.”
2 This case does not involve the redistricting plan. The redistricting plan is completely irrelevant
3 to this case.

4 This case involves the question of whether the Open Meeting Law was violated in the
5 process of choosing a consultant, and whether the Attorney General has authority to investigate
6 when there is reasonable cause to believe that there has been such a violation. That would not
7 be covered by the plain language of “legal actions regarding the redistricting plan.”

8 The “standing” cases raised by the Commission are mostly individuals, where
9 jurisdiction was not an issue. The Commission has cited some cases in which commissions
10 were parties to actions, even though the Redistricting Commission believes that those other
11 commissions may not have been given authority to sue or be sued. The issue of jurisdiction
12 was not raised in those cases. In this case, we are raising the issue of lack of jurisdiction.

13 **II. THE COMMISSION HIRED, AT TAXPAYER EXPENSE, THREE**
14 **DISTINGUISHED LAW FIRMS TO DEFEND THIS CASE; THERE IS NO NEED TO**
15 **ADD THREE MORE LAW FIRMS WITH THE CONSOLIDATE CASE ADDED BY**
16 **THE COMMISSION.**

17 The Commission’s response accuses the Attorney General of believing “that the
18 constitution empowers him to act as the police, the prosecutor, and the judge.” (Commission’s
19 Motion pg 5) That is a false, overheated, and irrational accusation.

20 The Commission has hired, at taxpayer expense, the following three law firms to defend
21 the Commissioners in this case: Coppersmith Schermer & Brockelman, Gallagher & Kennedy,
22 and Tim Nelson, PLLC. The pleadings reflect that, counting all three law firms, at least five
23 lawyers are defending the Commissioners: Andrew Gordon, Roopali Desai, Paul Charlton,
24 Kiersten Murphy, and Tim Nelson.

25 If this Motion to Dismiss is not granted, the three Commissioners, who control the
26 Commission, will be adding another two law firms, including at least four lawyers, to the

1 defense team, at taxpayer expense: Osborn Maledon (Mary O'Grady and Jean Jacques Cabou)
2 and Ballard Spahr, LLP (Joseph Kanefield and Jaclyn Foutz).

3 The hourly rates being paid to these five law firms and nine lawyers are as follows:

4 COMMISSION/COMMISSIONER 5 LAWYERS	6 COST TO TAXPAYERS PER HOUR
7 Mary O'Grady	\$280.00
8 Jacques Cabou	\$280.00
9 Joe Kanefield	\$300.00
10 Jaclyn Foutz	\$225.00
11 Andrew S. Gordon	\$300.00
12 Roopali H. Desai	\$220.00 ¹
13 Tim Nelson	\$295.00
14 Paul Charlton	\$350.00
15 Kiersten A. Murphy	\$350.00 ¹

16 The attorneys have already billed the Commission \$444,357.00 to be paid by the
17 taxpayers for work related to this dispute and other Commission work.

18 By contrast, the costs to the taxpayers for lawyers appearing in court for the Attorney
19 General are the following:

20 ATTORNEY GENERAL LAWYERS	21 COST TO TAXPAYERS PER HOUR
22 Tom Horne	\$43.26
23 Mark Wilson	\$63.49
24 MaryJo Foster	\$53.77

25 Granting the Motion to Dismiss the consolidated case brought by the Commission will
26 not leave Respondents without representation. It will simply reduce the number of law firms
from five to three, and the number of lawyers from eleven to five. Being reduced from 11
lawyers to five in defending the case is hardly the same as having the Attorney General act as
"police, prosecutor, and judge."

///

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¹ Based on the state contract which might differ from the Commission's contract.

1 **III. CONCLUSION**

2 The Commission's authority to sue or be sued is limited to "legal actions regarding the
3 districting plan and the adequacy of resources." This case falls in neither of those categories.
4 A Court has no jurisdiction to hear a case brought by a governmental entity which lacks
5 authority to sue or be sued in that subject area. *Yamamoto supra; Arizona Biomedical supra;*
6 *Braillard supra.*

7 It is therefore respectfully requested that the Motion to Dismiss be granted.

8 RESPECTFULLY SUBMITTED this 25th day of October, 2011.

9 THOMAS C. HORNE
 Attorney General

11 /s/ Thomas C. Horne

 THOMAS C. HORNE
 Attorney General
 Mark D. Wilson
 Assistant Attorney General
 Attorneys for Plaintiff

16 ORIGINAL efiled October 25, 2011.

17 COPY emailed October 25, 2011, to:

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2377478

EXHIBIT A

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-012995

07/19/2011

HONORABLE J. RICHARD GAMA

CLERK OF THE COURT
R. Aguilera
Deputy

ARIZONA BIOMEDICAL RESEARCH
COMMISSION, et al.

KIMBERLY ANNE DEMARCHI

v.

STATE OF ARIZONA, et al.

BRIAN P LUSE

MINUTE ENTRY

Plaintiffs Arizona Biomedical Research Commission (“ABRC”) and Commissioner T. Lon Owen’s (collectively, “Plaintiffs”) request for a preliminary injunction was taken under advisement following oral argument on July 18, 2011. Plaintiffs challenge SB 1615 to the extent it divests ABRC of authority over State scientific research funding and transfers that authority to Defendant Arizona Department of Health Services (“DHS”). Having read and considered the pleadings, the supplemental briefing, and oral argument, the Court issues the following rulings.

Background:

ABRC is a nine-member commission with members appointed by the Governor to serve three-year terms; three members are drawn from the medical community, three from the scientific research community, and three from the general public. A.R.S. § 36-272. ABRC administers monies in the Disease Control Research Fund, the Health Research Account, and the Health Research Fund (collectively, the “Accounts”), which are funded by revenue dedicated by three voter initiatives passed after 1998.¹ ABRC distributes these monies to support disease research using a matrix that considers factors including scientific merit, investigator productivity, relevance to Arizona, novelty and originality, and appropriateness of the projected budget.

¹ See Proposition 200, *enacting* A.R.S. § 42-3251; Proposition 204, *enacting* A.R.S. § 36-2901.02; Proposition 303, *enacting* A.R.S. §§ 36-770, 36-772, 42-3251.01.

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SB 1615, effective July 20, 2011, divests ABRC of authority over the Accounts, shifting that authority to DHS and converting ABRC to an advisory role within DHS.

Analysis

I.

A. ABRC.

Defendants argue that ABRC's claims should be dismissed because it lacks the power to sue or be sued. At oral argument, ABRC essentially conceded this issue.²

A governmental entity has no inherent power, and possesses only those powers and duties delegated to it by its enabling statutes. *Braillard v. Maricopa Cnty.*, 224 Ariz. 481, 487, 232 P.3d 1263, 1269 (App. 2010); *Schwartz v. Super. Ct.*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996) (powers of state administrative agency limited to those granted by statute); *see also Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, 80 P.3d 765, 767 (2003); *Cox v. Pima County Law Enforcement Merit Sys. Council*, 27 Ariz. App. 494, 495, 556 P.2d 342, 343 (1976). Thus, a governmental entity may sue or be sued "only if the legislature has so provided." *Braillard, id.* (dismissing MCSO as a nonjural entity); *see also Kimball v. Shofstall*, 17 Ariz. App. 11, 13, 494 P.2d 1357, 1359 (1972) (Arizona State Board of Education not an autonomous body with right to sue and be sued).

Whether ABRC is a jural entity is a threshold issue of this Court's jurisdiction. *Cf. Yamamoto v. Santa Cruz Cnty. Bd. of Supervisors*, 124 Ariz. 538, 539, 606 P.2d 28, 29 (App. 1979) (court has no jurisdiction over party who is not legally capable of being sued). The enabling statutes pertaining to ABRC do not contain language allowing it to sue or be sued.³ The Court finds that the Legislature did not grant the power to sue or be sued to ABRC; as such, ABRC is not a jural entity. Accordingly,

² In its briefing, ABRC argued that it has standing to bring this action because it has alleged a direct institutional injury. *See Forty-Seventh Legislature of the State of Ariz. v. Napolitano*, 213 Ariz. 482, 486-87, 143 P.3d 1023, 1027-28 (2006). This standing argument misses the point. The dispute in *Forty-Seventh Legislature* was not whether the Legislature was a jural entity that could bring *an action* against the Governor, but rather whether it had standing to bring *that action*.

³ *See* A.R.S. §§ 36-272 through -276 *and compare with* A.R.S. §§ 38-714(A) (Arizona State Retirement System), 23-981(D) (State Compensation Fund), 30-102(B) (Arizona Power Authority), *and* 41-1554.02(A), renumbered as 41-2253(A), eff. July 1, 2011 (Greater Arizona Development Authority).

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IT IS ORDERED dismissing this action as to ABRC for lack of jurisdiction.

B. Commissioner Owen.

Defendants argue that Commissioner Owen lacks standing to bring this action; Commissioner Owen argues to the contrary. Although the Arizona Constitution does not require that a plaintiff allege an actual case or controversy, as a matter of sound jurisprudence a plaintiff must establish standing to sue. *See, e.g., Bennett v. Napolitano ("Bennett")*, 206 Ariz. 520, 525, 81 P.3d 311, 316 (2003). The issue of standing is particularly acute when the Court intrudes into a political dispute. *See id.*

First, Commissioner Owen contends that he has standing to seek relief on behalf of ABRC because he was so authorized by ABRC. *Forty-Seventh Legislature*, 213 Ariz. at 487, 143 P.3d at 1028 (legislators had standing to assert claim of injury to legislature as a whole when authorized to do so by legislature); *cf. Bennett*, 206 Ariz. at 527, 81 P.3d at 318. Again, ABRC has only those powers granted to it by statute. *Schwartz*, 186 Ariz. at 619, 925 P.2d at 1070. It is axiomatic that ABRC cannot empower an individual commissioner to bring an action on its behalf when it was not granted the power to do so in its own name.

Second, Commissioner Owen contends that he has standing to seek a determination whether his authority as an ABRC commissioner was unconstitutionally reduced by SB 1615. *See Kimball*, 17 Ariz. App. at 13, 494 P.2d at 1359 (when Board could not sue or be sued, members of Board were only necessary parties); *see also* A.R.S. § 12-1832 (Uniform Declaratory Judgments Act). This inquiry focuses on whether Owen has made a sufficient showing of a particularized injury to himself. *See Bennett v. Brownlow*, 211 Ariz. 193, 196, 119 P.3d 460, 463 (2005); *Bennett*, 206 Ariz. at 526, 81 P.3d at 317. In *Raines v. Byrd*, 521 U.S. 811 (1997), which was discussed at length in *Bennett*, six members of Congress who challenged the constitutionality of the Line Item Veto Act argued they had standing on the basis that the Act reduced the meaning and effectiveness of their votes. *Id.* at 816. The Supreme Court disagreed, finding a "vast difference" between the level of vote nullification required to find standing and the "abstract dilution of institutional legislative power" that was alleged by the six members. *Id.* at 825-26; *see Bennett*, 206 Ariz. at 526-27, 81 P.3d at 317-18 (because no legislator's vote was nullified, legislators' injury was "wholly abstract and widely dispersed"). Here, Commissioner Owen alleges SB 1615 will reduce his role to that of a mere advisor. This abstract dilution of institutional power is a far cry from the level of vote nullification that Commissioner Owen must show to support a finding of standing.

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Last, the Court does not find exceptional circumstances would allow it to waive the standing requirement. *See Bennett*, 206 Ariz. at 527-28, 81 P.3d at 318-19 (factors militating against finding of waiver of standing); *Sears v. Hull*, 192 Ariz. 65, 71, 961 P.2d 1013, 1019 (1998). “The paucity of cases in which we have waived the standing requirement demonstrates both our reluctance to do so and the narrowness of the exception.” *Sears, id.* The Court specifically does not reach the merits of this action. However, the Court believes that in passing the three initiatives the voters intended to dedicate funds to support specific programs, not to designate a specific entity to control such funds.⁴ *See Ariz. Const. art. 4, pt. 1, § 1(6)(C)-(D); Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 221 Ariz. 467, 469, 212 P.3d 805, 807 (2009). Thus, SB 1615 would not thwart the “strong public policy favoring the initiative and referendum.” *Western Devcor, Inc. v. City of Scottsdale*, 168 Ariz. 426, 428, 814 P.2d 767, 769 (1991). In addition, although Commissioner Owen argues that uncertainty regarding ABRC’s role and the availability of funding for projects it currently supports may have widespread effects in the scientific community, ultimately resulting in a deleterious effect on Arizona’s economic development, this argument is completely unsupported by evidence. The Court is disinclined to enter this dispute predicated on an unfounded inference that DHS will not be as effective as ABRC in giving effect to the intent of the voters.

Accordingly,

IT IS ORDERED, dismissing this action as to Commissioner Owen for his lack of standing.

DATE: July 19, 2011

/ s / HONORABLE J. RICHARD GAMA

JUDICIAL OFFICER OF THE SUPERIOR COURT

ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.

⁴ In the Court’s opinion, that two of the initiatives specifically gave DHS control over other funds does not evidence voters’ intent to exclude DHS from control of these funds.