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

12 IN THE UNITED STATES DISTRICT COURT

13 FOR THE DISTRICT OF ARIZONA

14 Arizona State Legislature,

15 Plaintiff,

16 vs.

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

21 Defendants.
22

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)

23 Defendants Arizona Independent Redistricting Commission and Commissioners
24 Mathis, McNulty, Kallen¹, Freeman, and Stertz in their official capacities (collectively
25 the “Commission”) hereby move to dismiss this case pursuant to Federal Rule of Civil
26 Procedure 12(b)(1) because (1) the Arizona State Legislature (“Legislature”) lacks

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

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

5 **MEMORANDUM AND POINTS OF AUTHORITIES**

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

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

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26 ² While the Commission currently has pending a motion to dismiss pursuant to
27 12(b)(6) (Dkt. 16), this motion, which addresses the lack of subject matter jurisdiction, is
28 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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1 **I. The Arizona Legislature Lacks Standing to Bring this Lawsuit.**

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

4 Article III, § 2 of the Constitution gives federal courts jurisdiction only when there
 5 is a “case” or “controversy.” Among other requirements, this means that a plaintiff must
 6 have standing to raise the claims it is asking the federal court to decide. In general, to
 7 have standing a plaintiff must allege a “*personal injury* fairly traceable to the defendant’s
 8 allegedly unlawful conduct and likely to be redressed by the requested relief.” *Raines*,
 9 521 U.S. at 818 (internal quotation marks and citation omitted). The injury must be
 10 “legally and judicially cognizable” which means that the plaintiff must have “suffered an
 11 invasion of a legally protected interest which is . . . concrete and particularized.” *Id.* at
 12 819 (internal quotation marks and citation omitted).

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

25 The “one case” in which the Supreme Court has authorized legislator standing is

26 _____
 27 ³ Note that the line item veto act was ultimately declared unconstitutional when
 28 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).

1 *Coleman v. Miller*, 307 U.S. 433 (1939). There, the Court narrowly held that a majority
 2 of the Kansas legislature had standing to challenge the state’s ratification of a proposed
 3 amendment to the U.S. Constitution.⁴ *Id.* at 446. The Kansas senate had deadlocked 20-
 4 20 on the ratification vote and the Lt. Governor broke the tie in favor of ratification;
 5 plaintiffs contended “that the legislature had not in fact ratified the amendment.” *Raines*,
 6 521 U.S. at 822 (describing background); *Coleman*, 307 U.S. at 436-37.

7 Analyzing *Coleman*, the *Raines* Court recognized that *Coleman* involved the
 8 denial or nullification of a vote, something that the line-item veto act did not do in
 9 *Raines*. It explained: “Just as appellees cannot show that their vote was denied or
 10 nullified as in *Coleman* (in the sense that a bill they voted for would have become law if
 11 their vote had not been stripped of its validity), so are they unable to show that their vote
 12 was denied or nullified in a discriminatory manner (in the sense that their vote was
 13 denied its full validity in relation to the votes of their colleagues).” *Raines*, 521 U.S. at
 14 824 n.7.⁵ Thus, although the line item veto may have worked a “change in the ‘meaning’
 15 and ‘effectiveness’ of [Congress members’] vote[s],” the legislators lacked standing
 16 unless a legislator suffered a concrete injury because the line item veto act actually
 17 denied or nullified a vote that had taken place. *Id.* at 825.

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

21 The Legislature’s only injury asserted in this lawsuit is its loss of influence over
 22 congressional redistricting as a result of Arizona voters’ approval of Proposition 106
 23 “dilution of institutional legislative power” held to be inadequate in *Raines*. 521 U.S. at

24 ⁴ The *Coleman* decision had several opinions, ultimately resulting in a 5-4 holding
 25 in favor of standing. See *Raines*, 521 U.S. at 822 & n.5 (explaining 5-4 result). Four
 26 justices would have held that the legislators lacked standing. See *Coleman*, 307 U.S. at
 27 469-70 (Frankfurter, J., concurring in the judgment).

28 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.

1 826.

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

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

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24

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

27 For the same reasons, any claim that the Legislature may suffer a denial or
28 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).

1 merely to address whether the Constitution permitted an “abstract dilution of institutional
2 legislative power.” *Raines*, 521 U.S. at 826.⁸ The same should hold true here.

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

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

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

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

25 ⁸ Unsurprisingly, the key Supreme Court cases involving Elections Clause
26 challenges like the one here satisfy the rule identified in *Raines*. *See Ohio ex rel. Davis v.*
27 *Hildebrant*, 241 U.S. 565, 566 (1916) (challenge brought after legislature’s congressional
28 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).

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

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

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

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

4 The Legislature also lacks authority under the Arizona Constitution to bring this
5 action.⁹ The Legislature's authority is established in Article IV of the Arizona
6 Constitution. The Arizona Supreme Court has established that directing litigation is an
7 executive, not legislative, function. *State ex rel. Woods v. Block*, 189 Ariz. 269, 276, 942
8 P.2d 428, 435 (1997). Although Arizona courts have recognized the Legislature's
9 standing under Arizona law to enforce the provisions of the Arizona Constitution that
10 establish the Legislature's powers, *Forty-Seventh Legislature v. Napolitano*, 213 Ariz.
11 482, 143 P.3d 1023 (2006), it has never recognized the Legislature's authority to initiate
12 litigation to nullify a provision of the Arizona Constitution in order to enhance its own
13 institutional power. In short, nothing in the Arizona Constitution authorizes the Arizona
14 Legislature to use litigation to expand its authority beyond what the Arizona voters have
15 provided in the Arizona Constitution.

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

26
27 ⁹ This state-law issue should be certified to the Arizona Supreme Court for
28 resolution. A.R.S. § 12-1861 (giving the Arizona Supreme Court over "questions of law certified to it" by federal courts).

1 If the Legislature seeks to override a voter-approved measure, such as Proposition
2 106, it must do so by using its legislative power to refer the issue to the People, not
3 through litigation. For these reasons, this lawsuit exceeds the Legislature’s state
4 constitutional authority and should be dismissed.

5 **CONCLUSION**

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

8 DATED this 23rd day of December, 2013.

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18 *Attorneys for the Arizona Independent
19 Redistricting Commission and
20 Commissioners Mathis, McNulty, Herrera,
21 Freeman, and Stertz solely in their official
22 capacities*

23 **CERTIFICATE OF SERVICE**

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

28 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

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