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10 *Mathis, McNulty, Herrera, Freeman, and Stertz solely in their official capacities*

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13 Wesley W. Harris, *et al.*,

14 Plaintiffs,

15 vs.

16 Arizona Independent Redistricting
17 Commission, *et al.*,

18 Defendants.

No.: 2:12-CV-00894-ROS-NVW-RRC

**MOTION FOR JUDGMENT ON THE
PLEADINGS**

ORAL ARGUMENT REQUESTED

(Assigned to three-judge panel)

19 Defendants Arizona Independent Redistricting Commission and Commissioners
20 Mathis, McNulty, Herrera, Freeman, and Stertz solely in their official capacities
21 (collectively, the “Commission”) move, pursuant to Rule 12(c) of the Federal Rules of
22 Civil Procedure, for judgment on the pleadings: (i) dismissing the Commissioners as
23 parties; and (ii) dismissing Plaintiffs’ Second Claim for Relief.

24 **INTRODUCTION**

25 There are two discrete issues in this case that the Court can resolve now without
26 delaying trial. Prompt resolution of these issues will streamline the litigation of the
27 remaining issues, simplify discovery issues, and may eliminate the need to certify
28 questions to the Arizona Supreme Court.

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1 The first issue that requires prompt resolution is the Commissioners’ legislative
2 immunity. In their Complaint, Plaintiffs name the Commissioners in their official
3 capacities as defendants. However, the Commissioners are accorded absolute immunity
4 for legislative acts, both to suits for money damages and equitable remedies.
5 The Commissioners’ development and adoption of the legislative map was clearly a
6 legislative act, and the Commissioners should therefore be dismissed as parties.
7 In addition, the Commissioners should be dismissed because their presence is redundant
8 given that the Commission will remain as a party to defend the constitutionality of the
9 map and the Arizona Secretary of State will remain as a nominal defendant. Moreover,
10 the Commissioners lack any nexus to the administration or enforcement of the map.

11 The second issue necessitating review is the State of Arizona’s Eleventh
12 Amendment immunity for the Second Claim for Relief, which seeks to enjoin state
13 officers to conform their conduct to state law. The Eleventh Amendment prevents a
14 federal court from entertaining, without the State’s consent, “a claim that state officials
15 violated state law in carrying out their official responsibilities.” *Pennhurst State Sch. &*
16 *Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). The Commission is asserting the State’s
17 Eleventh Amendment immunity over Plaintiffs’ Second Claim for relief.

18 For these reasons, the Court should enter judgment dismissing the Commissioners
19 as parties and dismissing Plaintiffs’ Second Claim for Relief.

20 **FACTUAL BACKGROUND**

21 On November 16, 2012, this Court denied the Commission’s motion to dismiss
22 and ordered Plaintiffs’ to file a second amended complaint the same day. Dkt. 54, 55.
23 The Commission filed a timely Answer to the Second Amended Complaint on
24 December 3, 2012 (Dkt. 65), which is its first responsive pleading in this case. This
25 Motion is filed the same day as the Commission’s Answer, and is made early enough not
26 to delay trial. Fed. R. Civ. P. 12(c).¹

27
28 ¹ The allegations raised in this Motion are also enumerated in the Commission’s Answer, including at paragraph 172, so as to preserve these defenses.

ARGUMENT

I. THE COMMISSIONERS SHOULD BE DISMISSED AS PARTIES.

The Commissioners are named solely in their official capacities as a way to sue the Commission and do not have an individual stake in the outcome of the litigation. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). The Commissioners should be dismissed for three reasons: (1) they are protected by legislative immunity; (2) notwithstanding their legislative immunity, their presence as parties is redundant; and (3) they lack any nexus to the administration or enforcement of the legislative map.

A. Having Invoked Legislative Immunity, the Commissioners Should be Dismissed.

1. Legislative Immunity Applies to Plaintiffs’ Claims Against the Commissioners.

Because the function performed by the Commissioners is legislative, they may invoke legislative immunity and be dismissed from the suit. State and local legislators are accorded absolute immunity for legislative acts, both to suits for money damages and equitable remedies. *Supreme Ct. of Va. v. Consumers Union*, 446 U.S. 719, 734 (1980) (recognizing absolute immunity from prospective relief; also equating immunity for state and local legislators with immunity for members of Congress); *see also Lake County Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 406 (1979) (recognizing immunity for local and regional legislators from damages).

In evaluating whether an act is legislative in its “character and effect” to be protected by legislative immunity, the Ninth Circuit considers four factors: (1) whether the act involves ad hoc decision-making, or the formulation of policy; (2) whether the act applies to a few individuals or to the public at large; (3) whether the act is formally legislative in character; and (4) whether it bears all the hallmarks of traditional legislation. *Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220 (9th Cir. 2003); *Cnty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 960 (9th Cir. 2010).² “The first two

² *See also Bechard v. Rappold*, 287 F.3d 827, 829 (9th Cir. 2002) (“[I]n evaluating whether an act is legislative, we have been directed by the United States Supreme Court to look to whether the act is ‘formally legislative [in] character’ and whether it bears ‘all

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1 factors are largely related, as are the last two factors, and they are not mutually
2 exclusive.” *Cnty. House, Inc.*, 623 F.3d at 960.

3 The Arizona Supreme Court has already determined that the actions at issue in this
4 case, specifically the Commission’s development and adoption of legislative districts,
5 constitute legislative acts. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep.*
6 *Redistricting Comm’n (Minority Coal. II)*, 220 Ariz. 587, 594-95 ¶¶ 18-19, 208 P.3d 676,
7 683-84 (2009). The court found that the Commissioners do not “merely implement
8 established redistricting policy; rather, guided by the Arizona Constitution, they decide
9 where to draw district boundaries.” *Id.* This work requires that the “[C]ommissioners
10 exercise discretion and make policy decisions.” *Id.* Their decisions affect the entire
11 state, not just a few people. “In addition, Commission enactments carry the force of law
12 and have prospective implications, other hallmarks of traditional legislation. Finally, the
13 Commission’s function is one that a legislature traditionally performs.” *Id.*³ For all of
14 these reasons, the Commissioners’ actions qualify as “legislative,” and trigger legislative
15 immunity. Here, both the First and Second Claims for Relief relate to the actions of the
16 Commissioners in adopting legislative districts, and there is no question that the
17 Commissioners’ actions are legislative rather than administrative in this context.

18 2. The Commissioners Are Protected by Legislative Immunity.

19 A state official, sued in his or her official capacity, may invoke legislative
20 immunity even for official capacity suits. *See Supreme Ct. of Va.*, 446 U.S. at 732
21 (“[S]tate legislators enjoy common law immunity from liability for their legislative
22 acts”); *Cnty. House, Inc.*, 623 F.3d at 964 (mayor sued in his official capacity was

23
24 _____
25 (...continued)
the hallmarks of traditional legislation.”) (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 55
(1998)).

26 ³ *See also id.* (“Not only do enactments that carry the force of law traditionally originate
27 in the legislature, but the process of redistricting is itself traditionally viewed as a
legislative task. The United States Supreme Court ‘has repeatedly held that redistricting
28 . . . is a legislative task.’ *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). Indeed, in
Arizona, the legislature performed the task of redistricting until 2000. *Ariz. Const. art. 4,*
pt. 2, § 1(1) (amended 2000).”).

1 protected by legislative immunity); *State Employees Bargaining Agent v. Rowland*, 494
 2 F.3d 71, 82-88 (2d Cir. 2007) (holding legislative immunity applies to official capacity
 3 suit for prospective relief against state official); *Scott v. Taylor*, 405 F.3d 1251, 1252
 4 (11th Cir. 2005) (same in redistricting case). Here, the Commissioners are state officials
 5 who have been sued in their official capacities for the decisions they made while
 6 performing a legislative function. See Dkt. 55 (“Complaint”) at ¶ 6. Consequently, the
 7 Commissioners are permitted, and hereby do, invoke legislative immunity, thus barring
 8 Plaintiffs’ claims against them in this action. For these reasons, the Commissioners must
 9 be dismissed from this action.⁴

10 **B. Alternatively, the Commissioners Should Be Dismissed Because Their**
 11 **Presence As Parties Is Redundant and They Lack Any Nexus to the**
 12 **Enforcement or Administration of the Legislative Map.**

13 The Commissioners in their official capacities are redundant parties because the
 14 Commission and the Secretary of State remain as defendants. “[C]ourts have routinely
 15 dismissed . . . claims against individuals named in their official capacity as redundant and
 16 an inefficient use of judicial resources.” *Schubert v. City of Rye*, 775 F. Supp. 2d 689,
 17 699-700 (S.D.N.Y. 2011); see also *Center for Bio-Ethical Reform, Inc. v. L.A. Cnty.*
 18 *Sheriff Dep’t*, 533 F.3d 780, 799 (9th Cir. 2008).

19 In addition, the Commissioners have no non-legislative responsibilities with
 20 respect to the legislative districts. The Secretary of State and county election officials are
 21 charged with administering the districts once finalized. See, e.g., A.R.S. § 16-311(A), (E)
 22 (requiring legislative candidates to file nomination papers specifying their districts with
 23 the Secretary of State); A.R.S. § 16-411(A) (requiring county board of supervisors to
 24 assign election precincts within election district boundaries). Therefore, the

⁴ In a recent Ninth Circuit case, the Court stated *in dicta* that legislative immunity does not apply to a **county official** who is sued in his official capacity. *Schmidt v. Contra Costa County*, 693 F.3d 1122, 1131 n.10 (9th Cir. 2012). That decision is inapplicable to this case because Plaintiffs are suing state officials (not county officials) and state officials are protected by legislative immunity in official capacity suits for prospective relief. See *Supreme Ct. of Va.*, 446 U.S. at 732; *State Employees Bargaining Agent*, 494 F.3d at 86-88; *Scott*, 405 F.3d at 1255. Further, *Schmidt* is inconsistent with the Ninth Circuit’s decision in *Community House, Inc.*, where the Court ruled that a city official, the mayor of Boise, was protected by legislative immunity. 623 F.3d at 964.

1 Commissioners, even in their official capacities, are not proper defendants. *Rounds v.*
2 *Oregon State Bd. of Higher Ed.*, 166 F.3d 1032, 1036 n.2 (9th Cir. 1999); *see also State*
3 *Employees Bargaining Agent*, 494 F.3d at 88 (citing *Larsen v. Senate of Pa.*, 152 F.3d
4 240, 252-54 (3d Cir. 1998)); *Scott*, 405 F.3d at 1257 n.8 (“The relief Scott seeks pertains
5 to the enforcement and implementation of the challenged voting district; the undisputed
6 fact is that these legislator defendants have absolutely no role to play in that regard.”).

7 **II. PLAINTIFFS’ STATE-LAW CLAIM SHOULD BE DISMISSED UNDER**
8 **PENNHURST.**

9 Plaintiffs’ Second Claim for Relief should be dismissed because the State is
10 granted sovereign immunity by the Eleventh Amendment. The Eleventh Amendment
11 prevents a federal court from entertaining, without the State’s consent, “a claim that state
12 officials violated state law in carrying out their official responsibilities.” *Pennhurst State*
13 *Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984). Eleventh Amendment immunity
14 applies unless the state unequivocally expresses its consent or Congress properly
15 abrogates the immunity. *Id.* at 99; *see also Holley v. California Dept. of Corr.*, 599 F.3d
16 1108, 1111 (9th Cir. 2010) (“To be a valid waiver, a state’s consent to suit must be
17 ‘unequivocally expressed in the statutory text.’”) (citing *Lane v. Pena*, 518 U.S. 187, 192
18 (1996)). Further, a state’s waiver of sovereign immunity in its own courts “is not a
19 waiver of the Eleventh Amendment immunity in the federal courts.” *Pennhurst*, 465 U.S.
20 at 99 n.9.

21 States have sovereign immunity from federal court intrusion because, among other
22 things, “it is difficult to think of a greater intrusion on state sovereignty than when a
23 federal court instructs state officials on how to conform their conduct to state law.”
24 *Pennhurst*, 465 U.S. at 106. In fact, federal courts lack jurisdiction to even hear state law
25 claims against state agencies and officials. *See Lucas v. Ariz. Supreme Ct. Fiduciary*
26 *Certification Program*, No. CV09-2599-PHX-NVW, 2010 WL 2573557 (D. Ariz. June
27 23, 2010), *aff’d*, 457 F. App’x 689 (9th Cir. 2011) (“To the extent the Complaint seeks to
28 compel the Arizona Supreme Court to comply with state law, it is plainly barred by the

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1 Eleventh Amendment”); *Wennihan v. AHCCCS*, 515 F. Supp. 2d 1040, 1048 (D. Ariz.
 2 2005) (“Plaintiff’s proposed claims focusing on state law violations are barred because of
 3 Eleventh Amendment immunity.”). This limitation applies even to supplemental
 4 jurisdiction under 28 U.S.C. § 1367. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533,
 5 541-42 (2002); *Pennhurst*, 466 U.S. at 121 (“[N]either pendant jurisdiction nor any other
 6 basis of jurisdiction may override the Eleventh Amendment.”).

7 Here, Plaintiffs’ Second Claim for Relief seeks to have this Court determine that
 8 Defendants’ conduct violated state law. *See* Complaint ¶ 171. Defendants, however, are
 9 state agencies and officials. *Id.* at ¶¶ 5-7. Moreover, the Arizona Constitution clearly
 10 states that the Commission “shall have sole authority to determine [who] shall represent
 11 the people of Arizona in the legal defense of a redistricting plan,” Ariz. Const. art. 4, pt.
 12 2, § 1(20), and “[a]ll political power is inherent in the people.” *Id.* at art. 2, § 2. The
 13 State has not waived its immunity in federal court, and the Commission is properly
 14 asserting the immunity in its Answer and this Motion. Thus, the Eleventh Amendment
 15 bars Plaintiffs’ Second Claim for Relief, *see Pennhurst*, 466 U.S. at 121, and this Court
 16 lacks jurisdiction over this claim.⁵

17 _____
 18 ⁵ Plaintiffs’ First Claim for Relief alleges improper population deviations under the
 19 federal Equal Protection Clause and makes no mention of state law. *See* Complaint at
 20 ¶¶ 158-163. During oral argument, the Court asked whether state law limits the
 21 permissible bases for population deviations under the federal Equal Protection Clause.
 22 *Compare, e.g.*, 10/31/2012 Tr. (Dkt. 63) at 30:22 (Wake, J.) (“[I]f a state has made the
 23 decision to reject a potential purpose. . . that can cease to be a justification for federal
 24 equal protection analysis for the population deviation; right?”), *with, e.g., id.* at 51:20
 25 (Clifton, J.) (“I guess I still don’t understand how the federal standards get changed
 26 because of state law.”). And in its Order denying the Commission’s Motion to Dismiss,
 27 the Court stated that state law “may bear on the federal Equal Protection claim,” but did
 28 not resolve that newly raised question. *See* Order (Dkt. 54) at 6:4.

State law does not limit the permissible justifications for population deviations
 under the federal Equal Protection Clause. Reply in Support of Motion to Dismiss (Dkt.
 48) at 10:7-15. But if the Court disagrees, then Plaintiffs’ First Claim for Relief is barred
 by the Eleventh Amendment because it seeks relief for a violation of state law. *See, e.g.,*
Californians for Renewable Energy v. Cal. Public Utils. Comm’n, 401 F. App’x. 238, 239
 (9th Cir. 2010) (unpublished) (“The district court properly determined that the Eleventh
 Amendment bars Appellants’ federal claim because it actually seeks to enforce state law
 against state officials in federal court.”); *Bragg v. W. Virginia Coal Ass’n*, 248 F.3d 275,
 295-96 (4th Cir. 2001) (concluding under regulatory scheme at issue, that only state law
 is operative and directly regulates the conduct at issue, and therefore the Eleventh
 Amendment bars suit in federal court). The Commission is asserting the State’s Eleventh

(continued...)

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court enter judgment dismissing the Commissioners as parties and dismissing Plaintiffs' Second Claim for Relief.

RESPECTFULLY SUBMITTED this 3rd day of December, 2012.

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Amendment immunity, and the Court should dismiss Plaintiffs' First Claim for Relief if it construes that claim as alleging, directly or by incorporation, a violation of state law. If that claim does implicate state law and is not barred by the Eleventh Amendment, then the Court should either abstain or certify any underlying state law question to the Arizona Supreme Court, and the Commission intends to file a conditional motion to this effect.

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2012, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/ Lisa Black

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