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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

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

v.

Arizona Independent Redistricting  
Commission, *et al.*,  
Defendants.

Case No. CV 12-0894-PHX-ROS

**PLAINTIFFS' RESPONSE  
OPPOSING THE MOTION FOR  
JUDGMENT ON THE  
PLEADINGS MADE BY  
DEFENDANTS ARIZONA  
INDEPENDENT REDISTRICTING  
COMMISSION AND ITS  
MEMBERS**

Oral Argument Requested

1 Plaintiffs hereby respond to, oppose, and request the Court to deny the motion  
2 for judgment on the pleadings filed by Defendant Arizona Independent Redistricting  
3 Commission (“IRC”) and its individual members. The Court should deny the motion  
4 for the following reasons: (1) Since *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), it  
5 has been appropriate to name state officers, because official-capacity actions for  
6 prospective relief are not treated as actions against the State under 42 U.S.C. § 1983.  
7 (2) To the extent that the IRC would carve out an exception to *Ex Parte Young* for state  
8 legislators, the exception does not shield the commissioners from prospective injunctive  
9 relief to prevent them from implementing or enforcing an unconstitutional plan. (3) The  
10 IRC’s putative exception does not work for the further reason that federal courts apply  
11 legislative immunity only to the extent that it exists at common law and Arizona  
12 common law permits injunctive relief against the individual commissioners in their  
13 official capacities. (4) Regarding the *Pennhurst* argument on the state-law claim, the  
14 Commission waived the Eleventh Amendment by consent and its waiver cannot be  
15 “sliced and diced” to apply to some state-law claims but not others. This response and  
16 opposition are supported by the accompanying memorandum of points and authorities,  
17 which is adopted herein by reference.

## 18 MEMORANDUM OF POINTS AND AUTHORITIES

### 19 I. INTRODUCTION.

20 When Plaintiffs filed this action, the capacity of the IRS to sue or be sued was  
21 unclear. *See Ariz. Indep. Redistricting Comm’n v. Brewer*, 229 Ariz. 347, 351, ¶ 15,  
22 275 P.3d 1267, 1271 (2011) (“Respondents argue that the IRC is not a jural entity and  
23 therefore lacks standing to sue except in certain constitutionally specified areas. *See*  
24 ARIZ. CONST. art. 4, pt. 2, § 1(20).”) Recently, however, the Arizona Court of Appeals  
25 construed ARIZ. CONST. art. 4, pt. 2, § 1(20) to confer capacity on the IRC to sue or be  
26

1 sued. *State of Arizona v. Mathis*, \_\_ P.3d \_\_, 2012 WL 6134868, \*7, ¶ 24 (Ariz. App.  
2 Dec. 11, 2012).<sup>1</sup>

3 Before determining whether the individual commissioners enjoy immunity from  
4 process or whether the Eleventh Amendment compels a remand of the second claim for  
5 relief to state court, it is useful to consider the relief Plaintiffs have requested, for such  
6 relief will draw the focus of the lens through which the motion should be viewed. In  
7 paragraph 163 of the first claim for relief of the Second Amended Complaint, based on  
8 the equal protection clause of the Fourteenth Amendment, Plaintiffs ask for the  
9 following relief:

10 Plaintiffs therefore are entitled to judgment declaring that the Final  
11 Legislative Map violates the equal protection clause of the Fourteenth  
12 Amendment, and 28 U.S.C. § 1983, and thereby injures Plaintiffs, and  
13 each of them, and is null and void, enjoining Defendants and each of them  
14 from implementing or enforcing the Final Legislative Map, mandating  
15 that the IRC draft a new map for legislative elections following the 2012  
elections, and awarding Plaintiffs reasonable attorneys fees under 28  
U.S.C. § 1988 against the IRC.

16 In paragraph 171 of the second claim for relief, Plaintiffs ask for the following relief:

17 Plaintiffs therefore are entitled to judgment declaring that the Final  
18 Legislative Map violates the equal population requirement of ARIZ.  
19 CONST. art. 4, pt. 2, § 1(14)(B), and therefore is null and void, enjoining  
20 Defendants and each of them from implementing or enforcing the Final  
21 Legislative Map, mandating that the IRC draft a new map for legislative  
22 elections following the 2012 elections, and awarding Plaintiffs reasonable  
23 attorneys fees and other expenses as provided for in A.R.S. § 12-2030  
against the IRC.

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24 <sup>1</sup> Though related concepts, capacity should be distinguished from standing. In this  
25 context, capacity refers to an entity's right or ability to come into court and sue or be  
26 sued. *Mathis*, 2012 WL 6134868 at \*7, ¶ 24. In contrast, standing refers to whether a  
party has a justiciable interest in a case or controversy sufficient to vindicate in court.  
*Id.*

1 Thus, putting aside fees, Plaintiffs have asked for (1) a declaration that the Final  
2 Legislative Map is void, because it violates both the equal protection clause of the  
3 Fourteenth Amendment and the equal population clause of the Arizona Constitution, (2)  
4 an injunction prohibiting the IRC and its members and the Secretary of State from  
5 implementing or enforcing the map, and (3) a mandatory injunction that the IRC and its  
6 members return to their task and draft a new map for the elections following 2012.

7 The motion should be denied. Declaratory relief is available against the IRC,  
8 even if the individual commissioners enjoy immunity, a point that we do not concede.  
9 Regardless of whether legislative immunity exists, its reach does not extend to preclude  
10 injunctive relief against the individual commissioners to prevent them from  
11 implementing or enforcing the map once it is declared unconstitutional. Regarding the  
12 suggestion that keeping the individual commissioners in the lawsuit is redundant, their  
13 presence is essential to maintaining section 1983 relief, which includes an award of  
14 attorneys' fees under 42 U.S.C. § 1988. Last, the IRC waived the Eleventh Amendment  
15 regarding the first claim for relief, and the state-law issues implicit in it, and the waiver  
16 extends to the second claim for relief as well.

17 **II. THE ORDINARY RULE PERMITS AN OFFICIAL-CAPACITY**  
18 **LAWSUIT.**

19 42 U.S.C. § 1983 does not provide a cause of action for a money judgment  
20 against a State. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). For a  
21 money judgment, a suit against state officers in their official capacities is treated as a  
22 suit against the State. *Id.* at 71. The rule is different for prospective relief:

23 Of course a state official in his or her official capacity, when sued for  
24 injunctive relief, would be a person under § 1983 because 'official-  
25 capacity actions for prospective relief are not treated as actions against the  
26 State.' *Kentucky v. Graham*, 473 U.S., at 167, n. 14, 105 S.Ct., at 3106,  
n. 14; *Ex parte Young*, 209 U.S. 123, 159-160, 28 S.Ct. 441, 453-454, 52  
L.Ed. 714 (1908). This distinction is 'commonplace in sovereign

1 immunity doctrine,' L. Tribe, AMERICAN CONSTITUTIONAL LAW § 3-27,  
2 p. 190, n. 3 (2d ed. 1988), and would not have been foreign to the 19th-  
3 century Congress that enacted § 1983 . . . .

4 Thus, the individual commissioners are properly joined unless they can claim a  
5 valid exception to *Ex Parte Young* applicable to the facts of this case. They cannot.  
6 Legislative immunity does not shield the individual commissioners from injunctive  
7 relief to prevent them from enforcing or implementing an unconstitutional map, and  
8 legislative immunity, at least in the sense that the individual commissioners now claim  
9 it, has been abrogated in Arizona. This all is significant, because of the difference in  
10 scope of relief afforded by section 1983 (coupled with section 1988) and the relief  
11 afforded by the Fourteenth Amendment alone. The former supplements and adds to the  
12 latter.

13 **III. LEGISLATIVE IMMUNITY DOES NOT SHIELD THE INDIVIDUAL**  
14 **COMMISSIONERS ACTING IN THEIR OFFICIAL CAPACITIES IN**  
15 **IMPLEMENTING OR ENFORCING THE MAP.**

16 When Congress adopted 42 U.S.C. § 1983, it did not abrogate the immunity from  
17 civil suit to the extent enjoyed by state legislators at common law. *Supreme Court of*  
18 *Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 732-33 (1980). *See also*  
19 *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (“Did Congress by the general language  
20 of its 1871 statute mean to overturn the tradition of legislative freedom achieved in  
21 England by Civil War and carefully preserved in the formation of State and National  
22 Governments here? Did it mean to subject legislators to civil liability for acts done  
23 within the sphere of legislative activity . . . . We cannot believe that Congress-itself a  
24 staunch advocate of legislative freedom-would impinge on a tradition so well grounded  
25 in history and reason by covert inclusion in the general language before us.”)

26 Yet, Congress also did not create any such immunity in the adoption of 42 U.S.C.  
§ 1983. Congress merely took what immunity already existed and neither increased it  
nor diminished it. It would make little sense for the commissioners to enjoy a greater

1 immunity in federal court than they enjoy in state court. Thus, if immunity exists under  
2 Arizona law, an issue analyzed below, it extends at most to purely legislative acts. It  
3 does not shield any other functions the commissioners might have a state-constitutional  
4 duty to perform, such as certifying their maps to the Arizona Secretary of State, as  
5 required by ARIZ. CONST. art. 4, pt. 2, § 1(17). *Supreme Court of Virginia*, 446 U.S. at  
6 734; *Mathis*, 2012 WL 6134868, \*17-18, ¶¶ 75-76.

7 As a result, any legislative immunity the commissioners might enjoy will not  
8 extend to prohibit a declaratory judgment in these circumstances, nor will it preclude an  
9 appropriately tailored injunction. *See Supreme Court of Virginia*, 446 U.S. at 736 (“For  
10 this reason the Virginia Court and its members were proper defendants in a suit for  
11 declaratory and injunctive relief, just as other enforcement officers and agencies were.”)

12 The duty or discretion of the individual commissioners to implement and enforce  
13 the map will support declaratory and injunctive relief, even if declaratory or injunctive  
14 relief could not have been afforded for purely legislative acts. *Id.*

#### 15 **IV. ARIZONA ABROGATED LEGISLATIVE IMMUNITY WITH RESPECT** 16 **TO DECLARATORY AND INJUNCTIVE RELIEF.**

17 Arizona is not a jurisdiction inviting to the concept of immunity from process.  
18 Nearly 50 years ago, following Justice Lockwood’s lead, the Arizona Supreme Court  
19 abrogated the common-law doctrine of sovereign immunity in Arizona. *Stone v. State*  
20 *Highway Comm’n*, 93 Ariz. 384, 387, 381 P.2d 107, 109 (1963). While the immunity  
21 the IRC commissioners claim is not sovereign immunity, the abrogation of sovereign  
22 immunity illustrates the overarching Arizona policy that the state or its officials may be  
23 held accountable for what they do wrong.

24 The Arizona Legislature later restored immunity in part in its adoption of A.R.S.  
25 §§ 12-820 through 12-820.02, and it granted immunity for the exercise of a legislative  
26

1 function in A.R.S. § 12-820.01(A)(1), but these statutes apply only to an action for  
2 money damages. *Zeigler v. Kirschner*, 162 Ariz. 77, 84, 781 P.2d 54, 61 (App. 1989).

3 The 1960 wholesale revision of Article 6 of the Arizona Constitution, which  
4 dealt with the judiciary, vested original jurisdiction in the Arizona Supreme Court under  
5 ARIZ. CONST. art 6, § 5(1) to issue to issue injunctions against state officers. Before the  
6 1960 revision, the Arizona Supreme Court had no original jurisdiction to do so. *Lindsey*  
7 *v. Duncan*, 88 Ariz. 289, 291, 356 P.2d 392, 393 (1960). The voters' enlargement of the  
8 Arizona Supreme Court's jurisdiction to enjoin state officers implicitly abrogated the  
9 doctrine of legislative immunity from injunctive process.

10 To illustrate, the Arizona Supreme Court recently granted declaratory relief  
11 against the Senate president and Legislature. *Brewer v. Burns*, 222 Ariz. 234, 237, ¶¶ 7-  
12 8, 213 P.3d 671, 674 (2009). The Court also could have granted injunctive relief  
13 against the Legislature, but for prudential reasons declined to do so. *Id.* at 242, ¶ 42,  
14 213 P.3d at 679. Yet, the Court could not have granted the Governor such relief against  
15 the Senate president and Legislature if legislative immunity existed in this sense in  
16 Arizona.

17 The IRC commissioners are undoubtedly state officers, and thus the implicit  
18 abrogation of legislative immunity caused by the adoption of ARIZ. CONST. art 6, § 5(1)  
19 should apply equally to them. They certainly cannot enjoy a greater immunity than the  
20 Senate president or Legislature had in *Brewer*.

21 In this vein, it also should be noted that, while immunity never was presented as  
22 an issue on appeal, the individual commissioners were named as defendants in their  
23 official capacities throughout the last decade's state-court litigation. *See Arizona*  
24 *Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n et al.*, No.  
25 CV 2002-004380, Arizona Superior Court, Maricopa County; *Arizona Minority Coal.*

26

1 *for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 208 P.3d 676  
2 (2009).

3 Plaintiffs do not contend that the Arizona courts could order the Legislature or  
4 individual legislators to vote or to exercise their legislative prerogatives in any  
5 affirmative manner. Separation of powers would prevent them from doing so.  
6 Limitations based on separation of powers, however, are different from legislative  
7 immunity. The latter derives from the speech and debate clause. *Tenney*, 341 U.S. at  
8 372-73. But one cannot square absolute legislative immunity with the Arizona Supreme  
9 Court's holding in *Brewer*. At any rate, *Brewer* makes clear that a court can enjoin  
10 individual legislators from taking unconstitutional actions.

11 **V. THE ELEVENTH AMENDMENT DOES NOT BAR THE SECOND**  
12 **CLAIM FOR RELIEF.**

13 The Court has supplemental jurisdiction under 28 U.S.C. § 1367(a) of the second  
14 claim for relief, based on the equal population clause of ARIZ. CONST. art. 4, pt. 2, §  
15 1(14)(B), because the second claim for relief is "so related to claims in the action within  
16 such original jurisdiction that they form part of the same case or controversy under  
17 Article III of the United States Constitution." *Vigo County Republican Cent. v. Vigo*  
18 *County Comm'rs*, 834 F. Supp. 1080, 1084 (S.D. Ind. 1993).

19 The IRC now has interposed an Eleventh Amendment objection to continuing  
20 jurisdiction in this Court of the second claim for relief. Regardless of whether the  
21 Eleventh Amendment would apply to these circumstances under *Pennhurst State Sch. &*  
22 *Hosp. v. Halderman*, 465 U.S. 19, 121 (1984), the IRC expressly waived the Eleventh  
23 Amendment with respect to the first claim for relief at the hearing of December 19,  
24 2012, and any state law issues implicated therein, and it has waited eight months to  
25 assert the Eleventh Amendment defense. In so doing, the IRC has also waived its  
26



1 Eleventh Amendment defense to the second claim for relief. *Hill v. Blind Indus. and*  
2 *Serv. of Maryland*, 179 F.3d 754, 760-62 (9<sup>th</sup> Cir. 1999).

3 **VI. CONCLUSION.**

4 For these reasons, the Court should deny the motion or alternatively reserve its  
5 ruling until the conclusion of the evidence at trial.

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7 RESPECTFULLY SUBMITTED ON December 21, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 21, 2012, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants appearing in this case.

s/ Taryn Cantrell