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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

**REPLY IN SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS**

ORAL ARGUMENT REQUESTED

(Assigned to three-judge panel)

19 The Commission’s Motion (Dkt. 66) seeks early judgment on two separate issues:
20 (i) dismissing the Commissioners as parties based on legislative immunity, and
21 (ii) dismissing Plaintiffs’ Second Claim for Relief based on Eleventh Amendment
22 immunity, and their First Claim for Relief to the extent it seeks to enforce state law.
23 Plaintiffs fail to establish any justification for proceeding with these claims. (Dkt. 84.)

24 The Commissioners should be dismissed as parties to this case based on legislative
25 immunity. Alternatively, the Commissioners should be dismissed because they have no
26 enforcement authority over the map and are redundant parties given that the Arizona
27 Secretary of State and the Commission are defendants. These issues are distinct from
28 Eleventh Amendment immunity.

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1 Plaintiffs' Second Claim for Relief, and their First Claim for Relief to the extent it
 2 seeks to enforce state law, should be dismissed based on Eleventh Amendment immunity.
 3 *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 121 (1984). This
 4 argument is not based on the presence of any particular state defendant. Rather it is
 5 based on the fundamental notion that a federal court lacks jurisdiction, without the state's
 6 consent, to order state officials to conform their conduct to state law. The Commission
 7 timely raised the Eleventh Amendment issue in its Answer and this Motion. And the
 8 issue is not waived merely because the Commission performs its state-constitutional
 9 responsibility to defend the map against the purely federal claim.

10 Legislative immunity and immunity under the Eleventh Amendment are
 11 immunities not just from liability but also from suit itself. Supreme Court and Ninth
 12 Circuit precedent call for prompt resolution of these issues at the pretrial motion stage.

13 **I. THE COMMISSIONERS SHOULD BE DISMISSED AS PARTIES BASED**
 14 **ON THEIR LEGISLATIVE IMMUNITY.**

15 Plaintiffs have not challenged the core principle that the Commissioners were
 16 performing a legislative function and this suit challenges the constitutionality of that
 17 work. None of Plaintiffs' arguments warrant disregarding the Commissioners' legislative
 18 immunity.

19 **A. The Relief Plaintiffs Seek Does Not Require the Commissioners to**
 20 **Remain as Parties.**

21 Plaintiffs argue (Dkt. 84 at 3-4) that the Commissioners must remain as parties
 22 because of the relief sought in this case. But they cite no authority that suggests this is a
 23 basis for ignoring legislative immunity. Moreover, a close look at the relief sought and
 24 the Commissioners' responsibilities shows that this argument fails.

25 The first two categories of relief are a declaration that the map violates the Equal
 26 Protection Clause and 42 U.S.C. § 1983 (for Count 1) and the Arizona Equal Population
 27 goal (for Count 2) and a declaration that the map is null and void. These claims do not
 28 defeat legislative immunity; otherwise, a party could name a state legislator or member of

1 Congress any time he or she sought to have a law declared unconstitutional. This is
2 contrary to the purpose of the legislative immunity doctrine. Moreover, the declaratory
3 relief sought can be obtained against the Secretary of State.

4 The third category of relief seeks to enjoin defendants from implementing or
5 enforcing the Final Legislative Map. But the Commissioners have no responsibilities
6 related to implementing or enforcing the map. These are executive functions assigned to
7 the state and county election officials. *See, e.g.*, Arizona Revised Statutes (“A.R.S.”)
8 §§ 16-311(A), (E); 16-411(A). The Commissioners’ duties are limited to enacting the
9 map, a quintessentially legislative task, and defending the map in court proceedings.

10 *Supreme Court of Virginia v. Consumers Union* shows why the difference between
11 a legislative act and the executive role of implementing and enforcing a legislative act is
12 critical to the legislative immunity analysis. 446 U.S. 719, 732-34 (1980). The Virginia
13 Supreme Court Justices not only had legislative responsibilities, *i.e.* adopting rules
14 governing lawyer conduct, they also had responsibility for enforcing the rules. *Id.* at 724,
15 734. The justices acted in a legislative capacity when promulgating the disciplinary rules
16 thereby shielding them from suit. *Id.* at 733-34. But prospective relief was available
17 against the chief justice due to the court’s enforcement role. *See id.* at 736-37.

18 The Commissioners have no comparable non-legislative responsibilities. The
19 Commissioners’ constitutional obligations end when the maps are certified to the
20 Secretary of State. Plaintiffs’ argument that certifying the adopted map to the Secretary
21 of State counts as enforcement or implementation is not supported by the Arizona
22 Constitution and ignores the fact that state and county election officials enforce the maps.

23 Plaintiffs’ fourth category of relief seeks an order mandating that the Commission
24 draft a new map for legislative elections following the 2012 elections. If the Court
25 declares the map unconstitutional, the Commission is obligated to proceed to draw a new
26 map under the provisions of the Arizona Constitution. Ariz. Const. art. 4, pt. 2, § 1(14)
27 (The Commission “shall establish . . . legislative districts.”). But Plaintiffs correctly
28 concede that “Arizona courts could [not] order the Legislature or individual legislators to

1 vote or to exercise their legislative prerogatives in any affirmative manner.” (Dkt. 84 at
2 8; Dkt. 86 12/19/2012 Hr’g Tr. at 6:5-9). This same logic applies to this Court ordering
3 the Commissioners to adopt a new map, which Plaintiffs agree is a legislative activity.

4 Therefore, the appropriate relief in this situation is not to order a new map be
5 drafted but rather to establish a deadline for the Commission to act in accordance with the
6 Court’s order. *See Growe v. Emison*, 507 U.S. 25, 36 (1993); *accord Scott v. Germano*,
7 381 U.S. 407, 409 (1965) (per curiam). If the Commission does not act by the deadline,
8 then the Plaintiffs could request the Court draw an interim map as opposed to finding the
9 Commission out of compliance with a court order. *See Perry v. Perez*, 132 S. Ct. 934,
10 943-44 (2012). Because there is no basis to order affirmative legislative action, this
11 requested relief cannot overcome legislative immunity.

12 Plaintiffs’ final category of relief – attorney’s fees under 42 U.S.C. § 1988 and
13 A.R.S. § 12-2030 – does not defeat legislative immunity. Plaintiffs cite no case law that
14 the attorney’s fees provisions were intended to abrogate legislative immunity.
15 *See Supreme Court of Va.*, 446 U.S. at 738 (noting that District Court erred in basing
16 attorney’s fees award on legislative acts or omissions of justices). It is simply a way for
17 Plaintiffs to recover their attorney’s fees if they can demonstrate that they have met the
18 applicable requirements. And Plaintiffs have not argued how the presence of the
19 Commissioners is necessary to an award of attorney’s fees considering that the Secretary
20 of State will remain a defendant. *See Navajo Nation v. Ariz. Independent Redistricting*
21 *Comm’n*, No. CV 02-0799-PHX-ROS, Slip op. at 10-11 (D. Ariz. Sept. 30, 2003)
22 (ordering nominal party Secretary of State to pay fees and costs pursuant to 42 U.S.C.
23 §§ 1973l(e) and 1988). For these reasons, the relief Plaintiffs seek does not require the
24 Commissioners to remain as parties.

25 **B. The Fact that Proper State Officials Can Be Parties Under § 1983**
26 **Is Irrelevant to the Legislative Immunity Analysis.**

27 Plaintiffs argue (Dkt. 84 at 4-5) that § 1983 and *Ex parte Young* permit official
28 capacity suits against state officials for prospective relief. They also argue that *Ex parte*

1 *Young* permits a suit to prevent enforcement or implementation of an unconstitutional
2 map. (Dkt. 84 at 5.) The Commission does not dispute this. However, this has nothing
3 to do with the question of legislative immunity. The Commissioners do not have any
4 responsibilities for enforcing or implementing the legislative map. Rather, their
5 responsibilities are limited to legislative acts, and are protected from suit by legislative
6 immunity. (Dkt. 66 at 3-4.) The principles in *Ex parte Young* and § 1983 do not
7 undermine legislative immunity.

8 **C. The Availability of Legislative Immunity in State Court is Irrelevant.**

9 Plaintiffs' final argument is that Arizona law does not recognize legislative
10 immunity under the circumstances of this case, and therefore legislative immunity should
11 be unavailable as a matter of federal law. (Dkt. 84 at 5-8.) This argument fails because
12 the test for legislative immunity in federal court does not inquire into whether legislative
13 immunity would be available in state court and because Arizona courts do recognize
14 legislative immunity.

15 **1. Federal Legislative Immunity Does Not Depend on State Law.**

16 The test for legislative immunity for state and local legislators is based on *federal*
17 common law. The Ninth Circuit has a well-developed test for determining when
18 legislative immunity applies. *E.g., Kaahumanu v. County of Maui*, 315 F.3d 1215, 1220
19 (9th Cir. 2003). For the reasons discussed in the Motion, this test is satisfied. (Dkt. 66 at
20 3-4.) And this test does not contain any requirement that legislative immunity would
21 attach in state court, nor do Plaintiffs cite any case holding to the contrary.

22 **2. Arizona Courts Recognize Legislative Immunity.**

23 Plaintiffs' argument also fails because Arizona does recognize legislative
24 immunity. In *Arizona Independent Redistricting Commission v. Fields (Legislative*
25 *Immunity Opinion)*, the Arizona Court of Appeals stated, "[t]he United States Supreme
26 Court has held that common law legislative immunity similar to that embodied in the
27 Speech or Debate Clause exists for state legislators acting in a legislative capacity. . . .
28 Additionally, most states, including Arizona, have preserved this common law immunity

1 in state constitutions.” 206 Ariz. 130, 137 ¶ 16, 75 P.3d 1088, 1095 (App. 2003).
2 Likewise, in *Sanchez v. Coxon*, the Arizona Supreme Court recognized the Arizona
3 Constitution as source of immunity for state and local legislators. 175 Ariz. 93, 95, 854
4 P.2d 126, 128 (1993). And in *Kromko v. Ariz. Bd. of Regents*, the Arizona Court of
5 Appeals affirmed the dismissal of the legislature as immune from suit “in exercising the
6 ‘quintessential legislative function’ of passing a budget.” 213 Ariz. 607, 613 ¶ 22-23,
7 146 P.3d 1016, 1022 (App. 2006) (citation omitted), *vacated in part on other grounds*,
8 216 Ariz. 190, 165 P.3d 168 (2007).

9 Moreover, Plaintiffs incorrectly argue (Dkt. 84 at 6) that legislative immunity is
10 “restored” only to the extent codified in A.R.S. §§ 12-820 through -820.02. But “A.R.S.
11 section 12-820.01 does not abrogate anything; it simply codifies the ‘obvious’ immunities
12 expressly recognized in [*Ryan v. State*, 134 Ariz. 308, 310-11, 656 P.2d 597, 599-600
13 (1982)].” *Evenstad v. State*, 178 Ariz. 578, 586, 875 P.2d 811, 819 (App. 1993).

14 Plaintiffs cite *Brewer v. Burns*, 222 Ariz. 234, 213 P.3d 671 (2009), to argue that
15 legislative immunity has been abrogated in Arizona even though the issue was never
16 raised or addressed in that case. *Brewer v. Burns* involved the unique situation where the
17 Arizona State Senate President refused to perform the ministerial duty of presenting a law
18 passed by both houses of the Legislature to the Governor. This case might be of some
19 interest had the Commission created a map but refused to present it to the Secretary of
20 State for certification, or to perform some other nondiscretionary duty, but that is not
21 what happened. More to the point, the defendants in *Brewer v. Burns* did not raise, and
22 therefore waived, legislative immunity as a defense. See *Bennett v. Napolitano*, 206 Ariz.
23 520, 525 ¶ 21, 81 P.3d 311, 316 (2003) (“[C]ourts traditionally do not address issues not
24 properly raised.”). Thus, *Brewer v. Burns* provides no support for Plaintiffs’ position.

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1 **II. COUNT 2 SEEKS TO ENFORCE STATE LAW AND THEREFORE**
2 **SHOULD BE DISMISSED UNDER PENNHURST.**

3 **A. Supplemental Jurisdiction Does Not Defeat Pennhurst.**

4 Plaintiffs cite only *Vigo County Republican Central Committee v. Vigo County*
5 *Commissioners*, 834 F. Supp. 1080, 1084 (S.D. Ind. 1993), to support their argument that
6 supplemental jurisdiction defeats Eleventh Amendment immunity. (Dkt. 84 at 8.)
7 However, *Vigo County* is distinguishable because *Pennhurst* was not at issue in that case.
8 Moreover, the Supreme Court cases cited by the Commission show that the Eleventh
9 Amendment and *Pennhurst* apply to defeat supplemental jurisdiction and each claim
10 must be analyzed independently. (Dkt. 66 at 7 (citing *Raygor v. Regents of Univ. of*
11 *Minn.*, 534 U.S. 533, 541-42 (2002); *Pennhurst*, 466 U.S. at 121).) Not surprisingly,
12 Plaintiffs fail to acknowledge these cases because they are inconsistent with Plaintiffs'
13 erroneous argument regarding supplemental jurisdiction.

14 **B. Eleventh Amendment Immunity Has Not Been Waived by Delay.**

15 Plaintiffs' argument that Eleventh Amendment immunity has been waived by
16 delay (Dkt. 84 at 8-9) is contrary to the procedural history of this case. The eight months
17 between the filing of Plaintiffs' original complaint and the Commission's assertion of
18 Eleventh Amendment immunity must be reviewed in context. The original complaint
19 was filed in late-April, 2012. (*See* Dkt. 1.) The Commission filed a timely motion to
20 dismiss in May. (Dkt. 23.) Plaintiffs then amended their Complaint and the parties
21 stipulated to withdraw the pending motion to dismiss (Dkt. 34.), thus starting the case
22 over. The Plaintiffs filed their First Amended Complaint (Dkt. 35) on July 5, 2012. The
23 Commission then filed a timely motion to dismiss the First Amended Complaint (Dkt.
24 40) on August 3, 2012, and briefing on that motion was completed on September 28,
25 2012. This Court heard oral argument on October 31, 2012, and denied the motion to
26 dismiss on November 16, 2012. (Dkt. 54.)

27 Following the ruling, the Commission raised the Eleventh Amendment as an
28 affirmative defense in its timely filed Answer on December 3, 2012, which was its first

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1 responsive pleading in this case. (Dkt. 65 ¶ 172(a).) It also moved the same day for
2 judgment on the pleadings based on the Eleventh Amendment. (Dkt. 66.) Thus, the case
3 was still in the pretrial motions phase when the Commission asserted the Eleventh
4 Amendment defense. The case cited by Plaintiffs to argue that the Commission has
5 waived its Eleventh Amendment defense by delay, *Hill v. Blind Industries and Services*
6 *of Maryland*, 179 F.3d 754, 760-62 (9th Cir. 1999), is inapposite. In that case, the
7 defendant “appear[ed] and actively litigat[ed] this case on the merits, while *waiting until*
8 *the opening day of trial to first assert immunity* under the Eleventh Amendment.” *Id.* at
9 763 (emphasis added). Indeed, the fact that the Commission has not waived the
10 immunity is clear from the very cases that *Hill* discusses. 179 F.3d at 762-63 (noting in
11 *Gamboa v. Rubin*, 80 F.3d 1338, 1350 (9th Cir. 1996), and *Ashker v. California Dep’t of*
12 *Corrections*, 112 F.3d 392, 393-94 (9th Cir. 1997), that there was no waiver where the
13 state asserted its Eleventh Amendment defense in its answer).

14 Adopting Plaintiffs’ proposed rule – that filing a Rule 12 motion to dismiss and
15 not raising Eleventh Amendment immunity in that motion constitutes waiver – is not
16 supported by any case cited by Plaintiffs. Moreover, Plaintiffs’ argument is contrary to
17 Rule 12, which only lists four defenses that are waived by not raising them in a Rule 12
18 motion – personal jurisdiction, venue, process, and service of process. Fed. R. Civ.
19 12(h)(1)(A). *See Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005)
20 (en banc) (noting presumption that when statute designates certain things “all omissions
21 should be understood as exclusions”). Thus, Rule 12 neither required the Commission to
22 raise its Eleventh Amendment defense in its Motion to Dismiss nor precluded it from
23 raising the defense in its Answer.

24 C. **Eleventh Amendment Immunity Has Not Been Waived by the**
25 **Commission’s Defense of the Federal Claim.**

26 Plaintiffs’ argument that the Commission waives any right to object to claims
27 seeking to enforce state law against state officers in federal court by defending a purely
28 federal claim (Dkt. 84 at 8) eviscerates the federalism principles that the Eleventh

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1 Amendment was intended to protect. There is no question that Plaintiffs' First Claim for
 2 Relief (assuming it is actually seeking to enforce federal law, as it is pled) can proceed
 3 against the Secretary of State in federal court. Under *Ex parte Young*, the Secretary has
 4 no Eleventh Amendment defense to that claim. Therefore, the only question is who
 5 speaks for the state in the defense of that claim. Under binding Supreme Court and Ninth
 6 Circuit precedent, the State gets to decide, as a matter of state law, who speaks for it.
 7 *Karcher v. May*, 484 U.S. 72, 82 (1987) (noting that state was properly represented in
 8 litigation by legislative leaders because legislature had authority under state law to
 9 represent the state's interests); *Perry v. Brown*, 671 F.3d 1052, 1071 (9th Cir. 2012)
 10 (noting that it is states' "prerogative, as independent sovereigns, to decide for themselves
 11 who may assert their interests and under what circumstances, and to bestow that authority
 12 accordingly"), *cert. granted on other grounds sub nom. Hollingsworth v. Perry*, No. 12-
 13 144, 2012 WL 3134429 (Dec. 7, 2012).¹ Here the state constitution charges the
 14 Commission to defend the map and speak in defense of the claim. Ariz. Const. art. 4, pt.
 15 2, § 1(20). The Commission can assert appropriate jurisdictional defenses such as the
 16 Eleventh Amendment to state law claims, and defend any remaining federal claims.

17 Recognizing that the Commission is charged by the state constitution to defend the
 18 map, Plaintiff named the Commission a party defendant. Speaking for the State of
 19 Arizona, the Commission had raised the Eleventh Amendment as a bar to all state-law
 20 claims. The fact that the Commission remains as a party defendant to defend a purely
 21 federal claim is in no way a "waiver" of Eleventh Amendment immunity for state claims

22
 23 ¹ The Supreme Court granted certiorari and requested briefing on the issue of whether the
 24 petitioners in *Hollingsworth v. Perry* have standing under Article III, § 2 of the U.S.
 25 Constitution. However, that question is different from the question presented in this case.
 26 The petitioners in *Hollingsworth* are not state officers but rather citizens who were the
 27 proponents of the voter initiative at issue. Here, the Commission is a state agency that
 28 has authority to decide who defends the map under the Arizona Constitution, and the
 Commission exercises the legislative authority of the state with respect to redistricting,
Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 220
Ariz. 587, 594-95 ¶ 19, 208 P.3d 676, 683-84 (2009). And under Ninth Circuit
 precedent, this Court is bound by a panel opinion even if it is reversed on other grounds
 by the U.S. Supreme Court. *See United States v. Arizona*, 641 F.3d 339, 357 (9th Cir.
 2011), *rev'd in part on other grounds*, 132 S. Ct. 2492 (2012).

1 that should be decided in state court under *Pennhurst*. Plaintiffs cite no authority to
2 support their argument. Indeed, the Eleventh Amendment interest regarding Plaintiffs’
3 Second Claim for Relief (and the First Claim, to the extent it seeks to enforce state law) is
4 about “judicial federalism” – the authority of state courts to decide issues of state law that
5 govern the conduct of state officials. That concern is not implicated by the Commission
6 staying in the case to fulfill its state constitutional responsibility to defend the State’s
7 maps against a federal constitutional challenge. But if the State is held to have waived its
8 Eleventh Amendment immunity against state-law claims – protected by *Pennhurst* –
9 simply because the Commission exercised its state responsibility to defend the legislative
10 districts against a federal claim, the right of the state to decide who speaks for it and to
11 protect its rights under *Pennhurst* would be eviscerated.

12 Finally, two brief points are worth mentioning. The Commission did not move to
13 intervene but rather was named as a defendant. Although the Commission does not
14 believe this would change the Eleventh Amendment analysis, the issue is not presented in
15 this case. Second, Plaintiffs mischaracterize the Commission’s position regarding the
16 First Claim for Relief when they argue that the Commission “expressly waived the
17 Eleventh Amendment with respect to the first claim for relief . . . and any state law issues
18 implicated therein.” (Dkt. 84 at 8.) The Commission has consistently said that it believes
19 the First Claim for Relief can only go forward in federal court if, as pled, it actually seeks
20 to enforce federal law. (Dkt. 66 at 7 n.5.) The Commission asserted this as an
21 affirmative defense in its answer. (Dkt. 65 ¶ 172(a).) To the extent that Plaintiffs are
22 seeking to enforce state law through their First Claim for Relief, this is likewise barred by
23 *Pennhurst* and should be dismissed.

24 CONCLUSION

25 Ninth Circuit precedent requires this Court to address the immunity issues as
26 threshold questions. *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133
27 (9th Cir. 2012); *Norita v. Northern Mariana Islands*, 331 F.3d 690, 692 & n.1 (9th Cir.
28 2003); *Cardenas v. Anzai*, 311 F.3d 929, 934 n.2 (9th Cir. 2002). “[T]he value to the

1 States of their Eleventh Amendment immunity, like the benefit conferred by qualified
2 immunity to individual officials, is for the most part lost as litigation proceeds past
3 motion practice.” *Puerto Rico Aqueduct & Sewer Authority v. Metcalf*, 506 U.S. 139,
4 145 (1993); *see also Ex parte New York*, 256 U.S. 490 (1921) (issuing extraordinary
5 writ); *Constantine v. Regents of George Mason Univ.*, 411 F.3d 474, 482 n.4 (4th Cir.
6 2005).²

7 For the foregoing reasons, the Commission respectfully requests that this Court
8 enter judgment (i) dismissing the Commissioners as parties based on legislative
9 immunity, and (ii) dismissing Plaintiffs’ Second Claim for Relief based on Eleventh
10 Amendment immunity, as well as their First Claim for Relief to the extent it seeks to
11 enforce state law.

12 RESPECTFULLY SUBMITTED this 8th day of January, 2013.

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25 _____
26 ² Moreover, the fact that the federal constitutional claim may proceed against the
27 Secretary under *Ex parte Young*, is not a basis for delaying dismissal of the state law
28 issues under *Pennhurst* as those issues expand the scope of the litigation. *Vermont*
Agency of Nat. Res. v. United States, 529 U.S. 765, 778 (2000) (question is whether
addressing issues “will expand the [c]ourt’s power beyond the limits that the
jurisdictional restriction has imposed.”); *Thomas v. Nakatani*, 309 F.3d 1203, 1207-08
(9th Cir. 2002).

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CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2013, 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.

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