

1 Mary R. O'Grady, 011434  
2 Kristin L. Windtberg, 024804  
3 Joseph N. Roth, 025725  
4 OSBORN MALEDON, P.A.  
5 2929 N. Central Avenue, Suite 2100  
6 Phoenix, Arizona 85012-2793  
7 (602) 640-9000  
8 [mogrady@omlaw.com](mailto:mogrady@omlaw.com)  
9 [kwindtberg@omlaw.com](mailto:kwindtberg@omlaw.com)  
10 [jroth@omlaw.com](mailto:jroth@omlaw.com)

11 Joseph A. Kanefield, 015838  
12 Brunn W. Roysden, 028698  
13 BALLARD SPAHR, LLP  
14 1 East Washington Street, Suite 2300  
15 Phoenix, Arizona 85004-2555  
16 [kanefieldj@ballardspahr.com](mailto:kanefieldj@ballardspahr.com)  
17 [roysdenb@ballardspahr.com](mailto:roysdenb@ballardspahr.com)

18 *Attorneys for Defendant Arizona Independent*  
19 *Redistricting Commission*

20 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

21 IN AND FOR THE COUNTY OF MARICOPA

22 VINCE LEACH, KAREN GLENNON and  
23 LYNNE ST. ANGELO, qualified electors  
24 and residents of Congressional District 1; et  
25 al.,

26 Plaintiffs,

27 v.

28 ARIZONA INDEPENDENT  
REDISTRICTING COMMISSION, a  
legislative body of the State of Arizona; et  
al.,

Defendants.

No. CV2012-007344

**MOTION FOR JUDGMENT ON  
THE PLEADINGS**

(Assigned to the Hon. Mark Brain)

Defendants Arizona Independent Redistricting Commission and Commissioners  
Mathis, McNulty, Herrera, Freeman, and Stertz solely in their official capacities move,  
pursuant to Rule 12(c) of the Arizona Rules of Civil Procedure, for judgment on the

1 pleadings dismissing the Commissioners as parties to this lawsuit.<sup>1</sup> The Second  
2 Amended Complaint names the Commissioners as defendants in their official capacities  
3 only. (*See* Second Am. Compl. ¶¶ 8-12.) The Court should dismiss the Commissioners  
4 because:

5 (1) The Commissioners are redundant parties. The Commission is a named  
6 defendant and the Plaintiffs' claim against the Commissioners in their official  
7 capacities is simply another way of pleading this case against the  
8 Commission.

9 (2) The Commissioners individually lack any power to "create a new  
10 Congressional Map" or otherwise satisfy the judgment Plaintiffs seek. (*See*  
11 *id.* at 29-30.) In addition, the Secretary of State implements and enforces the  
12 congressional map. Thus, this lack of "redressability" establishes that the  
13 Commissioners are mere proxies for this lawsuit against the Commission's  
14 final map and they are not proper parties.

15 (3) The Commissioners are protected by legislative immunity, "an absolute bar to  
16 . . . civil liability." *Ariz. Indep. Redistricting Comm'n v. Fields*, 206 Ariz.  
17 130, 136 ¶ 15, 75 P.3d 1088, 1094 (App. 2003).

18 **I. The Commissioners Must Be Dismissed Because Their Presence Is**  
19 **Redundant to that of the Commission.**

20 The Commissioners in their official capacities are redundant and unnecessary  
21 parties because the Commission is already named as a defendant. The final  
22 Congressional map is being challenged, and the Commission, not the individual  
23 Commissioners, is charged with defending the map. *See* Ariz. Const. art. IV, pt. 2,  
24 § 1(20) (The Commission "shall have sole authority to determine whether the Arizona  
25 attorney general or counsel hired or selected by the independent redistricting

---

27 <sup>1</sup> As of May 21, 2013, Jose Herrera no longer serves as a member of the  
28 Commission. Pursuant to Arizona Rule of Civil Procedure 25(e), the individual  
appointed in his place will be substituted as a party if this motion is not granted.

1 commission shall represent the people of Arizona in the legal defense of a redistricting  
2 plan.”). Thus, it is unnecessary for the Commissioners to remain as parties.

3 Under Arizona law, official-capacity suits are generally just another way to plead  
4 an action against the entity that the named official leads. *See, e.g., Scheehle v. Justices*  
5 *of the Supreme Court*, 211 Ariz. 282, 293 n.1, 120 P.3d 1092, 1103 n.1 (2005) (“[S]uits  
6 brought against individual officers for injunctive relief are for all practical purposes suits  
7 against the State itself.” (citation omitted)); *Ethington v. Wright*, 66 Ariz. 382, 388-89,  
8 189 P.2d 209, 214 (1948) (noting that fact that one member of three-member  
9 Corporation Commission had left office and another member appeared to change  
10 position regarding meaning of law at issue did not eliminate case or controversy because  
11 Commission could be presumed to follow the law). Arizona law mirrors federal law in  
12 this respect. *See, e.g., Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 89 (1989);  
13 *Karcher v. May*, 484 U.S. 72, 78 (1987).

14 The Arizona Rules of Civil Procedure recognize that it is unnecessary to name  
15 individual members of a multi-member board as defendants by establishing that there is  
16 no requirement to substitute parties when the board personnel changes. *See* Ariz. R. Civ.  
17 P. 25(d) cmt. to 1961 Amendment (substitution of new member of continuing board as a  
18 party is “immaterial”) (citing *Ethington*, 66 Ariz. 382, 189 P.2d 209); *see also* Fed. R.  
19 Civ. P. 25 at cmt. to 1961 Amendment (“Where an action is brought by or against a  
20 board or agency with continuity of existence, it has been often decided that there is no  
21 need to name the individual members and substitution is irrelevant when the personnel  
22 changes.” (citation omitted)).

23 Because the Commission is a defendant, the Commissioners in their official  
24 capacities are redundant parties who may be dismissed. *Schubert v. City of Rye*, 775 F.  
25 Supp. 2d 689, 699-700 (S.D.N.Y. 2011) (“[C]ourts have routinely dismissed . . . claims  
26 against individuals named in their official capacity as redundant and an inefficient use of  
27 judicial resources.”) (citation omitted); *see also Center for Bio-Ethical Reform, Inc. v.*  
28 *L.A. Cnty. Sheriff Dep’t*, 533 F.3d 780, 799 (9th Cir. 2008). In addition, the Secretary of

1 State will also remain as a defendant. Therefore, if the Plaintiffs prevail, the Court can  
2 provide any declaratory and injunctive relief against the Commission and the Secretary.

3 **II. The Individual Commissioners Cannot Redress the Plaintiffs' Claims.**

4 Dismissing the Commissioners as parties in their official capacity is proper in this  
5 case because the primary relief sought is an order declaring the Congressional map  
6 unconstitutional, and enjoining the Defendants from “enforcing or otherwise using” the  
7 Congressional map. (Second Am. Compl. at 29-31.) With respect to this relief, the  
8 Commission and Commissioners have no enforcement or implementation authority.  
9 That rests solely with the Secretary of State and county election officials, who are  
10 charged with administering the districts once finalized. *See, e.g.*, A.R.S. § 16-311(A),  
11 (E) (requiring candidates to file nomination papers specifying their districts with the  
12 Secretary of State); *Id.* § 16-411(A) (requiring county board of supervisors to assign  
13 election precincts within election district boundaries).

14 Plaintiffs also seek an order compelling the Commission to create a new  
15 redistricting plan for Congressional districts. (Second Am. Compl. at 30.) Only the  
16 Commission, not any Commissioner, could satisfy a judgment giving such an order. *See*  
17 *Ariz. Const. Art. IV, pt. 2, § 1(12)* (requiring three or more votes “for any official  
18 action” of the Commission). Moreover, as described in Part III, *infra*, ordering the  
19 Commissioners to perform a discretionary legislative act of adopting a new  
20 Congressional map would violate the Commissioners’ legislative immunity.

21 The lack of redressability for all of Plaintiffs’ requested relief establishes that the  
22 Commissioners are improper and redundant parties and the Court should enter judgment  
23 on the pleadings dismissing them as defendants.

24 **III. Legislative Immunity Requires Dismissal of the Commissioners.**

25 Legislative immunity provides an additional, alternative basis for dismissing the  
26 Commissioners as parties. That doctrine protects members of legislative bodies when  
27 they are “acting within their ‘legitimate legislative sphere.’” *Fields*, 206 Ariz. at 136  
28 ¶ 15, 75 P.3d at 1094 (quoting *Gravel v. United States*, 408 U.S. 606, 624 (1972)). The

1 immunity “springs from [the] common law and is embodied in the” United States and  
2 Arizona constitutions. *Id.* ¶¶ 15-16 (noting that the immunity applies to “state legislators  
3 acting in a legislative capacity” and that Arizona “preserved this common law immunity  
4 in” the state constitution).

5 Legislative immunity is an absolute protection against civil liability, including  
6 both prospective relief and damages. *See Sup. Ct. of Va. v. Consumers Union of U.S.,*  
7 *Inc.*, 446 U.S. 719, 731-32, 738 (1980). “To preserve legislative independence . . .  
8 legislators engaged in the sphere of legitimate legislative activity . . . should be protected  
9 not only from the consequences of litigation’s results but also from the burden of  
10 defending themselves.” *Id.* at 731-32 (internal quotation marks and citations omitted).  
11 Moreover, legislative immunity shields legislators from an award of attorneys’ fees  
12 “premised on acts or omissions for which [defendants] enjoyed absolute legislative  
13 immunity.” *Id.* at 738 (reversing award of fees against officials in “official capacities”  
14 to extent fee award based on legislative acts).

15 Legislative immunity applies in full force in this case with regard to the five  
16 Commissioner defendants. Arizona courts have already held that immunity (and its  
17 component parts, the testimonial and evidentiary privilege) covers the Commissioners  
18 “for actions that are an ‘integral part of the deliberative and communicative process  
19 utilized in developing and finalizing a redistricting plan, and ‘when necessary to prevent  
20 indirect impairment of such deliberations.’” *Fields*, 206 Ariz. at 139 ¶ 24, 75 P.3d at  
21 1097 (quoting *Gravel*, 408 U.S. at 625); *see also Ariz. Minority Coal. for Fair*  
22 *Redistricting v. Ariz. Indep. Redistricting Comm’n*, 220 Ariz. 587, 594-95 ¶¶ 18-19, 208  
23 P.3d 676, 683-84 (2009) (*Minority Coalition II*) (holding that development and adoption  
24 of redistricting plan are legislative acts that bear the “hallmarks of traditional  
25 legislation”).

26 Immunity plainly protects the Commissioners from Claims 2 through 5<sup>2</sup> of the

---

27  
28 <sup>2</sup> Claim 1 relating to the grid map was dismissed by this Court for failure to state a claim.

1 Second Amended Complaint because they unquestionably concern acts that are an  
2 “integral part of the deliberative and communicative process utilized in developing and  
3 finalizing [the congressional] redistricting plan.” *See id.* (internal quotation marks and  
4 citation omitted). Each of these claims challenge the manner in which the Commission  
5 drafted (Claims 2 and 5) and adopted (Claims 3 and 4) the final Congressional map.  
6 (*See* Second Am. Compl. ¶¶ 100-131.) The actions challenged by Plaintiffs fall within  
7 “the sphere of legitimate legislative activity,” thus, legislative immunity bars Plaintiffs’  
8 claims as against the individual Commissioners. *Consumers Union*, 446 U.S. at 732  
9 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

10 The final claim, Claim 6 alleges a violation of the Constitutional Open Meeting  
11 Clause with respect to the hiring of the commission’s mapping consultant, Strategic  
12 Telemetry, in June 2011. (Second Am. Compl. ¶¶ 132-39.) But just as with the other  
13 process-based requirements in the Arizona Constitution regarding the Commission’s  
14 work, the Open Meeting Clause, by its terms, applies to the Commission. *See* Ariz.  
15 Const. art. IV, pt. 2, § 1(12). Indeed, it only applies “[w]here a quorum is present,”  
16 further indicating that it is a requirement the Commission, as a body must follow. *See*  
17 *id.* Therefore, any relief Plaintiffs may properly seek is only against the Commission, not  
18 against individual Commissioners.<sup>3</sup> There is thus no basis to keep the Commissioners as  
19 parties to this lawsuit based on an alleged Open Meeting Clause violation.

20 Immunity also prohibits the Plaintiffs from making a claim for attorneys’ fees  
21 against Commissioners. When the award of attorneys’ fees is “premised on acts or  
22 omissions for which [the Commissioners] enjoyed absolute legislative immunity,” it is  
23 similarly barred. *Consumers Union*, 446 U.S. at 738. Plaintiffs seek fees under A.R.S. §  
24 12-2030, which permits fees in mandamus actions, and under the “private attorney

---

25  
26 <sup>3</sup> Plaintiffs’ remedy against individual commissioners can be in the nature of a  
27 complaint for special action to compel compliance (e.g., a writ of mandamus). Plaintiffs  
28 seek instead a remedy only the Commission can provide, not the commissioners. *Cf.*  
A.R.S. § 38-431.07 (noting suit may be brought “for the purpose of requiring  
compliance with, or the prevention of violations of” open meeting law).

1 general” doctrine, *see Arnold v. Ariz. Dep’t. of Health Servs.*, 160 Ariz. 593, 609, 775  
2 P.2d 521, 537 (1989). (*See* Second Am. Compl. at 31.) Under either theory, any  
3 attorneys’ fee award would necessarily be “premised on acts or omissions for which [the  
4 Commissioners] enjoyed absolute legislative immunity,” and such an award is  
5 prohibited. *Consumers Union*, 446 U.S. at 738.

6 Legislative immunity protects the individual Commissioners from defending the  
7 remaining substantive claims in this case and any award of fees premised on those  
8 claims. The Commissioners therefore respectfully request that the Court dismiss them  
9 as defendants.

10 **IV. Conclusion.**

11 The individual Commissioners, who have not been named other than in their  
12 official capacities, may have roles as potential witnesses should they waive legislative  
13 privilege. But there is no need, and indeed it is improper, for them to remain as named  
14 parties. The Court should dismiss them because their presence is redundant, there is no  
15 “redressability,” and because keeping them as parties violates their legislative immunity.

16 For the foregoing reasons, the Commission respectfully requests that the Court  
17 enter a judgment dismissing the Commissioners from this action.

18 Respectfully submitted this 5<sup>th</sup> day of June, 2013.

19 OSBORN MALEDON, P.A.

20 By /s/ Kristin L. Windtberg

21 Mary R. O’Grady

22 Kristin L. Windtberg

23 Joseph N. Roth

24 2929 N. Central Avenue, Suite 2100

Phoenix, Arizona 85012-2794

25 BALLARD SPAHR, LLP

26 Joseph A. Kanefield, 015838

27 Brunn W. Roysden, 028698

1 East Washington Street, Suite 2300

Phoenix, Arizona 85004-2555

28 *Attorneys for Arizona Independent Redistricting  
Commission*

1 ORIGINAL of the foregoing e-filed and a COPY  
2 e-delivered this 5<sup>th</sup> day of June, 2013, to:

3 The Honorable Mark Brain  
4 MARICOPA COUNTY SUPERIOR COURT  
5 101 W. Jefferson, ECB 413  
6 Phoenix, AZ 85003

7 COPY of the foregoing mailed this  
8 5<sup>th</sup> day of June, 2013, to:

9 Lisa T. Hauser  
10 GAMMAGE & BURNHAM  
11 Two North Central Avenue, 15<sup>th</sup> Floor  
12 Phoenix, Arizona 85004

13 Michael T. Liburdi  
14 SNELL & WILMER, LLP  
15 One Arizona Center  
16 400 East Van Buren  
17 Phoenix, Arizona 85004

18 *Attorneys for the Plaintiffs*

19 Michele L. Forney  
20 ARIZONA ATTORNEY GENERAL'S OFFICE  
21 1275 West Washington  
22 Phoenix, Arizona 85007

23 *Attorney for Defendant Ken Bennett*

24 /s/ Jessica A. Lopez

25 \_\_\_\_\_  
26 4877525

27

28