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21 Independent Redistricting Commission and
22 Commissioners solely in their official
23 capacities

24 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

25 IN AND FOR THE COUNTY OF MARICOPA

26 VINCE LEACH, KAREN GLENNON and
27 LYNNE ST. ANGELO, qualified electors
28 and residents of Congressional District 1 *et*
al.,

Plaintiffs,

vs.

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

Defendants.

NO. CV2012-007344

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

(Assigned to the Honorable Mark Brain)

**Oral Argument July 26, 2013
at 9:15 a.m.**

1 The Arizona Independent Redistricting Commission and Commissioners solely in
2 their official capacities hereby reply in support of the Motion for Judgment on the
3 Pleadings (the “Motion”).¹ The Motion seeks to dismiss the Commissioners as parties
4 based on redundancy, lack of redressability, and legislative immunity. Plaintiffs’
5 Response fails to provide any valid reason why the Motion should be denied, and indeed
6 much of the Response addresses issues that are not implicated by the Motion.

7 **I. DISMISSAL IS PROPER BECAUSE THE COMMISSIONERS ARE**
8 **REDUNDANT PARTIES.**

9 The Commissioners in their official capacities are redundant and unnecessary
10 parties to this suit. Through this action, Plaintiffs seek to prevent the use of the
11 Congressional map adopted by the Commission. The Arizona Constitution makes clear
12 that the Commission, and not the individual Commissioners, is charged with defending
13 the map. *See* Ariz. Const. art. IV, pt. 2, § 1(20) (noting Commission has standing in legal
14 actions regarding its redistricting plans and has sole authority to decide who represents
15 the people in the defense of a redistricting plan). The individual Commissioners serve no
16 separate function as parties to this litigation, and the naming of the Commissioners in
17 their official capacities is simply another way to plead an action against the Commission
18 itself. *See Scheele v. Justices of the Supreme Court*, 211 Ariz. 282, 293 n.1, 120 P.3d
19 1092, 1103 n.1 (2002); *see also* Motion at 3 (collecting cases).

20 Plaintiffs cite no law that requires individual members of a multi-member
21 legislative body to be named as defendants in their official capacity in addition to the
22 legislative body itself. Instead, Plaintiffs suggest that because other cases have named
23 both a board and its board members, the Commissioners are somehow not redundant
24 parties here. (Response at 11.) None of the cases cited by Plaintiffs address the issues of
25 redundancy or proper parties, so they are of no help to the Plaintiffs. Furthermore, the
26 fact that a procedure was not challenged and thus not addressed in an earlier case does

27 _____
28 ¹ Commissioner Herrera was succeeded by Commissioner Cid Kallen. If the
Commissioners in their official capacities are not dismissed as parties, the Commission
will substitute Commissioner Kallen pursuant to Arizona Rule of Civil Procedure 25(e).

1 not make that case precedent for the unchallenged procedure. *See, e.g., Rios v.*
2 *Symington*, 172 Ariz. 3, 5 n.2, 833 P.2d 20, 22 n.2 (1992).

3 Plaintiffs suggest that if individual officers named as parties in their official
4 capacities are redundant when the board or commission on which they sit is also named
5 as a party, Rule 25(e) is rendered unnecessary. (Response at 12.) According to the
6 comment, Rule 25(e) was directed at a problem in prior practice where a suit against an
7 office held by a *single individual* would abate at the end of six months after the removal
8 or retirement of the individual. The comment is clear that this problem never applied to
9 members of continuing boards, whose presence as parties is “immaterial.” Ariz. R. Civ.
10 P. 25(e) cmt. to 1961 Amendment (citing *Ethington, v. Wright*, 66 Ariz. 382, 388-89, 189
11 P.2d 209, 214 (1948)); *see also* Fed. R. Civ. P. 25 at cmt. to 1961 Amendment (no need
12 to name members where action is brought against board with continuity of existence).

13 Plaintiffs claim the individual Commissioners “are necessary parties to effectuate
14 the relief Plaintiff seeks” (Response at 13), but the individual Commissioners cannot
15 grant Plaintiffs the relief they seek. First, any declaratory or injunctive relief sought by
16 Plaintiffs with respect to the invalidation of the current map and/or to prevent its use and
17 enforcement can be had against the Commission and Secretary of State, who also remains
18 a party. *See* Part II(A); Motion at 4. Second, Plaintiffs are not entitled to a court order
19 compelling individual Commissioners to enact a new redistricting plan. *See* Part II(B).

20 When redundant parties are named, it is not uncommon for courts to dismiss the
21 additional parties in order to streamline the litigation. *See, e.g., Fernandez v. Ariz. Water*
22 *Co.*, 21 Ariz. App. 107, 110, 516 P.2d 49, 52 (1973) (failure to name correct Corporation
23 Commissioner in notice of appeal did not defeat appellate jurisdiction; court simply
24 deleted names of commissioners from caption because they were not necessary parties),
25 *vacated on other grounds*, 111 Ariz. 74, 523 P.2d 505 (1974); *see also* Motion at 3-4
26 (collecting cases).² The Motion can be granted for the simple reason that the
27 Commissioners are redundant and unnecessary parties.

28 ² Plaintiffs cite *Doe v. Lawrence Livermore Nat’l Lab.*, 131 F.3d 836, 839 (9th Cir.
1997), in an attempt to distinguish cases seeking monetary relief from those seeking

1 **II. THE COMMISSIONERS CANNOT REDRESS PLAINTIFFS' ALLEGED**
2 **INJURIES.**

3 **A. The Commissioners Have No Enforcement or Implementation**
4 **Authority With Respect to the Congressional Map.**

5 Plaintiffs seek an order striking down the Congressional map and enjoining the
6 enforcement or use of the map in any election. (Second Am. Compl. at 29-32.) Such
7 relief is more appropriately directed at the Secretary of State – an executive official.
8 *See, e.g.*, A.R.S. § 16-311(A), (E) (requiring candidates to file nomination papers
9 specifying their districts with the Secretary of State). Unlike the Secretary of State, the
10 Commissioners have no enforcement or implementation authority with respect to the
11 map, and therefore cannot provide the relief Plaintiffs seek.

12 **B. Plaintiffs Cannot Obtain a Court Order Compelling the Individual**
13 **Commissioners to Enact a New Redistricting Plan.**

14 Plaintiffs' Response is also flawed because it argues that the Commissioners must
15 remain as parties so that the Court can order each of them individually to draw a new
16 map. Not only does this argument fail because no single Commissioner can create a new
17 map, it also offends principles of separation of powers: courts may not order legislators to
18 pass legislation. *E.g.*, *Winkle v. City of Tucson*, 190 Ariz. 413, 415, 949 P.2d 502, 504
19 (1997) ("This court has carefully observed [separation of powers], particularly in cases
20 where we are asked to prohibit or require legislative action. . . . We have long held that
21 Article III requires the judiciary to refrain from meddling in the workings of the
22 legislative process."); *Mecham v. Gordon*, 156 Ariz. 297, 302, 751 P.2d 957, 962 (1988)
23 (Courts will not "tell the legislature when to meet, what its agenda should be, what it
24 should submit to the people, what bills it may draft or what language it may use. The
25 separation of powers required by our constitution prohibits us from intervening in the

26 prospective relief. (Response at 13 n.4.) But this case simply recites the rule in *Ex Parte*
27 *Young*, 209 U.S. 123 (1908), that a suit for prospective relief can be maintained against a
28 state official without violating the Eleventh Amendment. In such a situation, the state
official is not redundant because the state agency cannot be named as a party under the
Eleventh Amendment. Here, the Commission is properly named as a party, rendering
Lawrence Livermore inapplicable.

1 legislative process.”). As these cases make clear, the fact that courts have general powers
2 to issue writs and injunctions to state officers (*see* Response at 7-8 (citing Ariz. Const.
3 art. VI, § 5(1); A.R.S. § 12-1801)) does not change this fundamental separation-of-
4 powers principle. Any departures from this rule are notable exceptions, which usually
5 involve ministerial activity or procedural requirements for placing measures on the ballot.

6 Plaintiffs cite two cases that illustrate the exceptions. In *Brewer v. Burns*, the
7 court specifically noted that the dispute involved a situation where “bills are finally
8 passed” and all that is left is “the ministerial tasks of signing the bills and arranging for
9 formal transmittal.” 222 Ariz. 234, 238-39 ¶ 20, 213 P.3d 671, 675-76 (2009). That is,
10 the Court was not ordering or disrupting actual legislative activity. *See id.* ¶ 21.
11 Likewise, in *Fairness & Accountability in Insurance Reform v. Greene*, the Court ordered
12 the Legislative Council to take certain action only after making clear that the Council
13 functioned in a ministerial, not legislative, capacity. 180 Ariz. 582, 588-89, 886 P.2d
14 1338, 1344-45 (1994).³ These cases therefore stand for the proposition that courts may
15 not use their equitable powers to intervene in an ongoing legislative process.

16 Plaintiffs’ proposed remedy, if successful, is an order striking down the map and
17 enjoining the Secretary of State – an executive official – from using it in elections.
18 Unlike the Secretary, the Commissioners have no enforcement or implementation
19 authority. The Commission may adopt a new map, *see* Ariz. Const. art. IV, pt. 2, § 1(23)
20 (noting Commission may “revise districts if required by court decisions”). And if the
21 Commission does not, this Court or another court with jurisdiction may order that an
22 emergency map be used. *See, e.g., Navajo Nation v. Ariz. Indep. Redistricting Comm’n*,
23 230 F. Supp. 2d 998 (D. Ariz. 2002). However, nowhere in this path would the Court
24 order the individual Commissioners to affirmatively draft a new map and supervise their
25 exercise of this legislative function.⁴

26 _____
27 ³ *Fairness and Accountability* also arose in the context of a ballot initiative, where
28 the court held it could not review compliance with the requirements for an initiative to
appear on the ballot after the election. 180 Ariz. at 588-89, 886 P.2d at 1344-45.

⁴ Plaintiffs argue that the previous commission was “ordered” to draft a new map.
However, these orders were reversed by the Arizona Court of Appeals and the Arizona

1 Finally Plaintiffs’ argument that if the Commissioners cannot be individually
2 ordered to draw a new map, then this places the map “beyond judicial review” is nothing
3 more than a straw man. (See Response at 3-4.) The Court may review the
4 constitutionality of a final redistricting plan and enjoin the enforcement or use of an
5 unconstitutional plan. See *Ariz. Minority Coal. v. Ariz. Indep. Redistricting Comm’n*, 220
6 *Ariz.* 587, 596 ¶ 26, 208 P.3d 676, 685 (2009) (*Minority Coal. II*). This review
7 encompasses whether the Commission sufficiently complied with the mandatory
8 *procedure*. *Id.* For all of these reasons, the individual Commissioners cannot redress the
9 injuries that Plaintiffs allege, making them unnecessary parties.

10 **III. THE COMMISSIONERS SHOULD ALSO BE DISMISSED BASED ON**
11 **LEGISLATIVE IMMUNITY**

12 **A. Legislative Immunity Applies to the Commissioners, and it Applies to**
13 **Suits for Prospective Relief.**

14 Legislative immunity is a well-established governmental immunity that protects
15 those who function in a legislative capacity not just from liability but also from the
16 burdens of litigation itself regarding their legislative acts. *E.g., Sable v. Myers*, 563 F.3d
17 1120, 1123-24 (10th Cir. 2009) (discussing Supreme Court cases). The immunity is well-
18 recognized in both state and federal law and applies to state legislators and congressmen.
19 *Ariz. Indep. Redistricting Comm’n v. Fields*, 206 *Ariz.* 130, 137 ¶ 16, 75 P.3d 1088, 1095
20 (App. 2003) (*Legislative Immunity Opinion*) (“The United States Supreme Court has held
21 that common law legislative immunity similar to that embodied in the Speech or Debate
22 Clause exists for state legislators acting in a legislative capacity.”) Indeed, the Arizona
23 Court of Appeals specifically recognized the application of legislative immunity to the
24 Commission in the context of a challenge to last decade’s Commission’s maps. *Id.*⁵
25 Plaintiffs incorrectly argue that legislative immunity serves only as an evidentiary or

26 Supreme Court, which ultimately held at the end of last-decade’s litigation that the
27 Commission was a legislative body. *Ariz. Minority Coal. v. Ariz. Indep. Redistricting*
28 *Comm’n*, 220 *Ariz.* 587, 595 ¶ 19, 208 P.3d 676, 684 (2009).

⁵ Recognizing the direct link between legislative immunity and privilege, the
Arizona Supreme Court refers to this opinion as the “Legislative Immunity Opinion.”
See *Minority Coalition II*, 220 *Ariz.* at 594 ¶ 17, 208 P.3d at 683.

1 testimonial bar and not as a basis upon which to dismiss the Commissioners from this
2 case. (Response at 5, 8.)

3 The legislative *privilege* afforded to the Commissioners does serve as a
4 testimonial and evidentiary bar, *Legislative Immunity Opinion*, 206 Ariz. at 137 ¶ 17, 75
5 P.3d at 1095 (“The legislative immunity doctrine also functions as a testimonial and
6 evidentiary privilege.”), but this privilege is only part of the protection afforded to
7 legislators under the broader concept of legislative immunity. Legislative immunity,
8 from which the privilege stems, is an absolute protection against civil liability. *Id.* at 136
9 ¶ 15, 75 P.3d at 1094 (“The so-called ‘legislative privilege’ asserted by the IRC *stems*
10 *from the doctrine of legislative immunity . . .*”) (emphasis added); Ariz. Const., art. IV,
11 pt. 2, § 7 (No member of the Legislature shall be liable in any civil or criminal
12 prosecution for words spoken in debate.”); *see also Sup. Ct. of Va. v. Consumers Union*
13 *of U.S., Inc.*, 446 U.S. 719, 731-32, 738 (1980) (recognizing absolute legislative
14 immunity). This includes immunity not only from the relief requested but also from the
15 burden of having to defend against claims in the first place. *Cf. Mitchell v. Forsyth*, 472
16 U.S. 511, 526 (1985) (noting that qualified immunity is an “immunity from suit rather
17 than a mere defense to liability”).

18 Plaintiffs’ argument that legislative immunity does not apply to actions for
19 prospective relief (Response at 2, 8) is contradicted by Arizona case law that dates back
20 to statehood. *See Part II, supra; see also Supreme Ct. of Va.*, 446 U.S. at 734
21 (recognizing absolute legislative immunity from prospective relief). The authorities cited
22 in the Response (at 9) do not contradict this fundamental principle. As noted in Part II,
23 *supra, Brewer v. Burns* was based on the fact that the legislative process was complete
24 and only ministerial activity remained. The other cases Plaintiffs cite do not even discuss
25 legislative immunity and appear to involve executive activity.

26 Finally, Plaintiffs’ exaggerated claim (at 9) that legislative immunity would “call
27 into question every past lawsuit filed against a county, city, or town board”
28 fundamentally misunderstands legislative versus executive functions. Legislation

1 requires executive action to give it effect, and plaintiffs can sue the executive to enjoin
2 implementation or enforcement of unconstitutional legislation. The same officials may
3 wear both executive and legislative hats (as often happens in counties, cities, and towns),
4 but in that situation legislative immunity does not result in complete dismissal. *Cf.*
5 *Supreme Ct. of Va.*, 446 U.S. at 734-37 (judges entitled to legislative immunity for
6 legislative act of adopting court rules regulating practice of law but remained as parties
7 because of executive responsibility to enforce the rules). Indeed, the case Plaintiffs cite
8 addresses enforcement. *Bd. of Regents v. City of Tempe*, 88 Ariz. 299, 303, 356 P.2d
9 399, 401 (1960) (The Board of Regents contended that the City is “without power to
10 enforce” building codes and regulations against ASU.). Here, the Secretary of State, as
11 the state’s chief election officer, must implement the Commission’s map for it to have
12 any effect. Plaintiffs have properly sued the Secretary and can obtain an injunction
13 against him if they prevail and meet the requirements for an injunction.

14 **B. The Allegation that the Commissioners Failed to Engage in the Proper**
15 **Deliberative Process Does Not Extinguish Legislative Immunity.**

16 Plaintiffs’ argument that “failure to engage in *proper* deliberations altogether”
17 makes legislative immunity unavailable (Response at 3, 6 (emphasis added)) is clearly
18 incorrect. The inquiry is not whether the activity is “proper,” but whether the activity is
19 legislative as opposed to administrative or political. Otherwise, legislative immunity
20 would simply turn on the merits of Plaintiffs’ claims, which would render it a nullity.

21 Plaintiffs’ own cases undercut their argument. *Galati v. Lake Havasu City*
22 addresses municipal liability for street safety and holds that when a municipality fails to
23 make a decision regarding a particular street safety issue, it is not entitled to the
24 fundamental government policy exception to liability. 186 Ariz. 131, 136, 920 P.2d 11,
25 16 (App. 1996). This case does not hold that legislative immunity turns on whether the
26 deliberations were “proper,” as Plaintiffs argue here.

27 Likewise, the application of legislative immunity in *Manders v. Brown*, 643 A.2d
28 931 (Md. Ct. Spec. App. 1994), did not turn on whether the legislator’s deliberations

1 were “proper.” The court simply required “some manifestation that the council member
2 was acting in some manner with regard to proposed legislation” *Id.* at 942. In
3 *Manders*, the plaintiffs alleged that no proposed legislation existed. *Id.* Here, however, it
4 is undisputed that the Commissioners were acting with regard to proposed legislation.
5 The act of redistricting is a legislative activity, rendering the redistricting plan proposed
6 legislation. *See Minority Coal. II*, 220 Ariz. at 595 ¶ 19, 208 P.3d at 684. Further, the
7 court in *Manders* stated that if the council members were legislating, as opposed to
8 enforcing the plan, legislative immunity may well apply even if they were acting with a
9 bad or immoral purpose. *See* 643 A.2d at 942-43. Here, the Commissioners necessarily
10 were legislating, as they have no executive functions with respect to the maps.

11 **C. Claim Six Does Not Defeat Legislative Immunity Because It Fails As A**
12 **Matter of Law.**

13 Plaintiffs improperly attempt to use Claim Six to make an end run around
14 legislative immunity. (Response at 5, 7-8.) Claim Six alleges that the Commission
15 violated the Open Meeting Clause, Ariz. Const. art. IV, pt. 2, § 1(12), in discussions
16 leading up to the selection of Strategic Telemetry as the mapping consultant. (Compl.
17 ¶ 137.) Plaintiffs now argue that the hiring of the consultant is an administrative task,
18 and legislative immunity does not apply. (Response at 5.) At most, this argument
19 renders legislative immunity inapplicable to Count Six only. However, it fails even with
20 respect that because this case seeks to nullify the Congressional map; it is not a
21 freestanding challenge to the selection of Strategic Telemetry. The selection of Strategic
22 Telemetry cannot invalidate the map under basic principles of open meeting law.

23 It is settled law that a meeting in violation of the analogous Open Meeting Law,
24 A.R.S. § 38-431.05(A), does not “taint . . . a subsequently and properly taken ‘legal
25 action’ with invalidity on account” of the earlier violation. *City of Prescott v. Town of*
26 *Chino Valley*, 163 Ariz. 608, 614-15, 790 P.2d 263, 269-70 (App. 1989) (excerpt attached
27 as Exhibit 1) (refusing to nullify imposition of a tax based on improper discussions prior
28 to its adoption), *vacated in part on other grounds*, 166 Ariz. 480, 803 P.2d 891 (1990).

1 There is no reason to interpret the constitutional Open Meeting Clause differently.
2 The Open Meeting Clause contains no language indicating that nullification of the maps
3 is available as a remedy for a violation of that provision. The clause simply provides:
4 “[w]here a quorum is present, the independent redistricting commission shall conduct
5 business in meetings open to the public, with 48 or more hours public notice provided.”
6 Ariz. Const. art. IV, pt. 2, § 1(12). Thus, there is no basis to infer that the voters intended
7 to introduce the concept of “taint” into this provision, such that subsequent decisions
8 made at public meetings are rendered invalid because of an earlier violation.

9 Moreover, permitting nullification of the map as a remedy for a violation
10 occurring outside of the mapping process would unnecessarily and improperly open the
11 entire redistricting process up to uncertainty. In *Minority Coalition II*, the court stated
12 that the scope of judicial review is whether the Commission followed “the mandated
13 procedure” set forth in Article IV, Part 2, Sections 1(14)-(16). 220 Ariz. at 596-97
14 ¶¶ 26, 29, 208 P.3d at 685-86 (noting “four ‘phases’ of the redistricting process.”).

15 As Plaintiffs’ Response makes clear, the alleged open meeting violation in Claim
16 Six involves the hiring of the mapping consultant and is not part of the mandated four-
17 phase process set forth in Section 1(14)-(16). Instead, it falls within the Commission’s
18 discretionary powers that are provided in Section 1(19) to assist the Commissioners with
19 the technical complexity of their work. Moreover, the mapping consultant has no
20 independent power to carry out the redistricting process but rather is a legislative aide
21 who assists the Commissioners, who in turn must take all official action themselves. *See*
22 *id.* at § 1(12) (requiring three Commissioner votes for any official action). Because the
23 mapping consultant does not take official action, any irregularities in its hiring cannot –
24 as a matter of law – result in nullification of the Commission’s official mapping actions.
25 Claim Six is therefore not a proper basis for defeating legislative immunity here.

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1 **IV. CONCLUSION: THE PRACTICAL EFFECT OF THE MOTION IS TO**
2 **STREAMLINE THE LITIGATION AND AVOID UNNECESSARY ISSUES.**

3 The practical effect of the Motion is to streamline the litigation and avoid having
4 to spend time and resources wading through the nuances of the role of the Commissioners
5 if they remain as parties. Parties generally have responsibilities of responding to written
6 discovery (interrogatories, RFAs), filing and responding to motions, and presenting
7 evidence at trial. But here, the Commissioners were named solely in their official
8 capacities as another way of suing the Commission. *See* Part I, *supra*. It will simplify
9 the case to have one defendant, the Commission, who defends the map, Ariz. Const. art.
10 IV, pt. 2, § 1(20), rather than having to deal on an *ad hoc* basis with the nuances of any
11 additional responsibilities the Commissioners bear as parties.

12 Indeed, Plaintiffs' counsel recently made clear that Plaintiffs intend to serve
13 different written discovery to each Commissioner in order to exceed the presumptive
14 discovery limits in Rules 33.1(a) and 36(b) by simply multiplying the limits for
15 interrogatories and requests for admission by the number of Commissioners. (Exhibit 2.)
16 However, the purpose of written discovery is to obtain the party's position in litigation.
17 The Commission has only one position – the legal defense of the redistricting plan on
18 behalf of Arizona voters. Plaintiffs essentially concede that the real purpose of naming
19 the individual Commissioners is to increase the amount of discovery they can acquire.
20 This cannot be a legitimate reason to deny the Motion.

21 Regardless of the resolution of this Motion, important legislative privilege issues
22 remain in this case. The legislative privilege held by the Commissioners is an issue that
23 will arise in discovery, regardless of whether the Commissioners are parties. Indeed, in a
24 related federal lawsuit, the Commissioners were dismissed as parties, and issues of
25 legislative privilege were addressed separately. Plaintiffs have the opportunity to get
26 documents and testimony through discovery requests to the Commission and none of the
27 reasons Plaintiffs cite support denying dismissal of the Commissioners as parties. For the
28 foregoing reasons, the Commission respectfully requests that the Court grant the Motion.

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RESPECTFULLY SUBMITTED this 22nd day of July, 2013.

OSBORN MALEDON, P.A.

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