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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Arizona State Legislature,

Plaintiff,

v.

Arizona Independent Redistricting
Commission, et al.,

Defendants.

No. 2:12-CV-01211-PGR-MMS-GMS

**PLAINTIFF’S RESPONSE TO
BRIEF OF *AMICI CURIAE***

I. Introduction

Plaintiff Arizona State Legislature (the “Legislature”) responds to the Brief of *Amici Curiae* Dennis Burke, Bart Turner, League of Women Voters of Arizona, Arizona Advocacy Network, and Inter Tribal Council of Arizona, Inc. (“*Amici*”) with the following points and authorities:

1 *Amici* argue incorrectly that the present action violates the “Voter Protection Act” (the
2 “VPA”), Article IV, pt. 1 § 1 of the Arizona Constitution, which restricts the Legislature’s
3 ability to legislatively repeal, amend or supersede voter initiatives or referendums. They argue
4 that the Legislature’s mere authorization of this lawsuit constitutes an “indirect repeal” of Ariz.
5 Const. art. IV, pt. 2 § 1 (“Prop. 106”), the voter-initiated provision governing redistricting in
6 Arizona. (Doc. 42 at 8).¹

7 The VPA is not implicated in this action because the Legislature does not seek to repeal
8 Prop. 106—the Legislature does not challenge any provisions in Prop. 106 regarding Arizona’s
9 state legislative redistricting process. The Legislature only seeks redress for the direct harm to
10 its authority: Prop. 106’s complete removal of the Legislature’s ability to conduct congressional
11 redistricting in violation of the Elections Clause. In contrast, *Amici* would have this Court
12 declare that the Legislature’s mere seeking of relief from a constitutional violation is forbidden
13 by the VPA. *Amici*’s enterprising reading of the VPA runs contrary to federal supremacy and
14 the language of the VPA itself, and is unsupported by any legal authority. In fact, the VPA
15 makes this lawsuit the Legislature’s only direct avenue to challenge Prop. 106.
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20 ¹ Ordinarily, *amicus curiae* cannot expand the issues before the Court beyond what the parties
21 have raised. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, n. 2 (1981) (“We decline
22 to consider [amicus’] argument since it was not raised by either of the parties here or below.”)
23 However, Defendants Arizona Independent Redistricting Commission and Commissioners
24 Mathis, McNulty, Kallen, Freeman and Stertz’s (“Defendants”) latest pleading echoes at least
25 some of *Amici*’s attempt to avoid the merits of the constitutional question through a state-law
26 VPA argument. (Doc. 43 at 8). To the extent *Amici* raise legal issues outside those raised by the
27 parties this Court has discretion to ignore them. *See, e.g., Citizens Against Casino Gambling in*
28 *Erie Cnty. v. Stevens*, 945 F. Supp. 2d 391, 406 (W.D.N.Y. 2013) (“absent exceptional
circumstances, *amicus curiae* cannot implicate issues not presented by the parties.”); *Citizens*
Against Casino Gambling in Erie Cnty. v. Kempthorne, 471 F. Supp. 2d 295, 311 (W.D.N.Y.
2007) *amended on reconsideration in part*, 06-CV-0001S, 2007 WL 1200473 (W.D.N.Y. Apr.
20, 2007) (“*Amicus* participation goes beyond its proper role if the submission is used to
present wholly new issues not raised by the parties.”).

1 II. Legal Argument

2 A. The Brief of *Amici Curiae* Further Demonstrates That The Purpose And Effect 3 of Prop. 106 Is Divesting The Legislature of All Authority To Establish the 4 Manner of Congressional Elections.

5 *Amici* include the authors of Prop. 106 itself. (Doc. 42 at 2; Doc. 40 at 2.) The text of
6 the Arizona Constitution (as amended by Prop. 106) is already clear in its removal of
7 redistricting authority from the Legislature and exclusive delegation of that authority to the
8 AIRC. Now, the drafters of Prop. 106 confirm that Prop. 106 was “...intended to remove
9 responsibility for redistricting from the Arizona Legislature...” (Doc 42. at 3). Both the text
10 and the intent of Prop. 106 are fundamentally at odds with the Elections Clause. Further,
11 *Amici’s* arguments that the Legislature retains any residual ability to affect congressional
12 districts lack discernible cohesion.

13 B. *Amici’s* Argument Places State Law Above the United States Constitution.

14 Even if the Legislature retained some ability to impact Prop. 106 (it does not, as
15 discussed in Part C below), federal supremacy in the administration of federal powers cannot be
16 trumped by any state. This case raises a fundamental Constitutional question: whether a state
17 may entirely remove its elected legislature from the congressional redistricting process, despite
18 the deliberate structure created by the Elections Clause. U.S. Const. art. I, § 4 (federal elections
19 regulated “in each State by the Legislature thereof.”).

20 This Court has jurisdiction to address the merits of the Elections Clause claim, as both
21 federal supremacy law and Arizona law are contrary to *Amici’s* novel state-law theories.
22 *Harman v. Forssenius*, 380 U.S. 528, 535 (1965) (“[I]t is the duty of the federal court to
23 exercise its properly invoked jurisdiction.”). It is axiomatic that “any state law, however clearly
24 within a State’s acknowledged power, which interferes with or is contrary to federal law, must
25 yield.” *Felder v. Casey*, 487 U.S. 131, 138 (1988). Thus, the VPA cannot be construed to bar
26 the Legislature’s opportunity to vindicate its rights under the federal Constitution in federal
27 court. “State laws or requirements which are inconsistent with federal law or its objectives are
28

1 subordinated to the federal law by virtue of the Supremacy Clause.” *Hindes v. FDIC*, 137 F.3d
2 148, 169 (3d Cir. 1998); *see e.g. Felder*, 487 U.S. at 108; *Burnett v. Grattan*, 468 U.S. 42, 50
3 (1984); *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). Simply put, even if the VPA
4 were applicable, it could not trump the Elections Clause’s express delegation of authority over
5 congressional redistricting to the Legislature.

6
7 **C. The VPA Cannot Bar the Legislature’s Vindication of its Constitutional Authority.**

8 *Amici* contend that the VPA acts as an explicit prohibition on the Legislature’s authority
9 to bring this action. However, on its face, the VPA restricts only the Legislature’s ability to
10 legislatively supersede state initiative and referendum measures. It does not restrict the
11 Legislature’s ability to ask Article III Courts to vindicate Constitutional rights.² The VPA states
12 in relevant part:

13
14 The legislature shall not have the power to repeal an initiative measure approved
15 by a majority of the votes cast thereon or to repeal a referendum measure decided
16 by a majority of the votes cast thereon.

17 The legislature shall not have the power to amend an initiative measure approved
18 by a majority of the votes cast thereon, unless the amending legislation furthers
19 the purposes of such measure and at least three-fourths of the members of each
20 house of the legislature, by a roll call of ayes and nays, vote to amend such
21 measure.

22 Ariz. Const. art. IV, pt. 1 § 1(6)(B)-(C) (headers omitted). The VPA is intended to bar the
23 Legislature from creating competing legislation that repeals or amends voter-approved laws.

24 ² Indeed, no state constitutional measure could remove the Legislature’s Article III standing.
25 *See Sullivan v. Murphy*, 156 U.S. App. D.C. 28, 478 F.2d 938, 972 (D.C. Cir.), *cert. denied*,
26 414 U.S. 880, 38 L. Ed. 2d 125, 94 S. Ct. 162 (1973) (when constitutional rights are infringed,
27 federal rather than state law defines those rights); *see also Pennhurst State School & Hospital*
28 *v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 911, 79 L. Ed. 2d 67 (1984); *Watson v. Tarpley*, 59
U.S. (18 How.) 517, 520, 15 L. Ed. 509 (1855) (“the laws of the several States . . . cannot
affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as
vested and prescribed by the constitution and laws of the United States, nor destroy or control
the rights of parties litigant to whom the right of resort to these courts has been secured by the
laws and constitution.”).

1 *See Cave Creek Unified Sch. Dist. v. Ducey*, 308 P.3d 1152 (2013) (“...the finding of implied
2 repeal [under the VPA]...is required when conflicting statutes cannot be harmonized to give
3 each effect...”) (emphasis added).

4 *Amici* argue that the Legislature’s attempt to vindicate its Constitutional authority is an
5 “indirect repeal of Proposition 106” barred by the VPA. (Doc. 42 at 8). They argue that by
6 authorizing the present suit and submitting the question to an Article III Court, the Legislature
7 enacted “legislative action to repeal Proposition 106 no less than if the legislature had enacted
8 repealing legislation.” *Id.* This misses the mark. Authorizing litigation is not a repeal and it is
9 not an amendment. Further, no authority exists for the expansive theory that merely
10 authorizing litigation to determine the federal Constitutionality of an Arizona constitutional
11 provision constitutes an “indirect repeal” in violation of the VPA. “Finding an implied repeal or
12 amendment is generally disfavored.” *Ducey*, 308 P.3d 1152. Whenever possible, courts adopt a
13 construction that reconciles alleged conflicts. *UNUM Life Ins. Co. of America v. Craig*, 200
14 Ariz. 327, 333, 26 P.3d 510, 516 (2001).

15 *Amici’s* attempt to characterize this suit as an “indirect repeal” in violation of the VPA
16 grossly misapplies the state constitutional provision. The VPA does not define the word
17 “repeal.” In accepted legal usage, however, “repeal” means an “abrogation of an existing law
18 by legislative act.” Black’s Law Dictionary (9th ed.) The Legislature does not have the
19 authority to repeal Prop. 106. But it does have the authority to invoke this Court’s jurisdiction
20 to decide a question of federal law. The Legislature’s decision to file this suit cannot have
21 “repealed” Prop. 106 under any definition of the word. To find an implied amendment or
22 repeal, Arizona law requires the Legislature to have passed “an act...complete in itself,
23 exhibiting on its face what the law is to be” that must “change or modify some other law upon
24 the same subject.” *Arizona State Tax Comm’n v. Reiser*, 109 Ariz. 473, 479, 512 P.2d 16, 22
25 (1973). The Legislature has not passed a competing act on the same subject. It has not made
26 any determination of what the law is to be after a court challenge. The Legislature identified a
27 harm suffered in violation of the U.S. Constitution and authorized the seeking of redress in the
28

1 appropriate forum. The Legislature’s challenge raises only the federal constitutional issue, and
2 leaves undisturbed state legislative redistricting, which is not in violation of the Elections
3 Clause. Therefore, under even the loosest construction of the VPA, authorizing the present
4 litigation did not “repeal” Prop. 106.

5 Nothing in the cases cited by *Amici* supports their theory. *Ariz. Early Childhood Dev. &*
6 *Health Bd. v. Brewer*, 221 Ariz. 467, 212 P.3d 805 (2009) involved an actual legislative
7 enactment which the Arizona Supreme Court deemed to violate the VPA. Similarly, in
8 *Fogliano v. Brain*, 229 Ariz. 12, 270 P.3d 839 (Ariz. App. 2011), the court analyzed a question
9 of funding through legislative appropriations, but decided the controversy presented a non-
10 justiciable question. Finally, *Ducey*, 308 P.3d 1152, involved a full legislative budget
11 enactment, which the court held impermissibly modified funding for a voter-approved law.
12 Thus, no case-law supports the concept that the VPA restricts the Legislature from seeking to
13 restore its Constitutionally-guaranteed authority by merely authorizing a lawsuit on its own
14 behalf in federal court.

15 *Amici* make the already-crystalline point that the purpose of “Proposition 106 was...to
16 remove responsibility for redistricting from the Arizona legislature....” (Doc. 42 at 3). Thus,
17 the VPA itself forbids any disturbance of voter-enacted Prop. 106 by the Legislature using its
18 ordinary legislative power. *Amici’s* suggestions of what the Legislature might have done under
19 the VPA to amend Arizona’s redistricting process are both completely inconsistent with Prop.
20 106 and ultimately irrelevant. *Amici* argue that the VPA requires the Legislature to attempt
21 amendment of Prop. 106 by a three-fourths majority passing a bill “furthering the measure,” or
22 to refer competing district maps to the people as alternatives via referendum prior to litigation.
23 (Doc. 42 at 7-8). *Amici* also suggest that the Legislature could still have vindicated its
24 Constitutional rights by passing legislation to aggrandize its role in redistricting. (Doc. 42 at 7)
25 (“...the legislature could have enacted supplemental legislation that required congressional
26 maps be reviewed by the legislature...”).
27

28 However, nothing in the text or history of the VPA supports these hypothetical

1 requirements. Even if the Legislature were able to utilize these procedures against Prop. 106 as
2 a matter of state law, such requirements could not bar the Legislature’s access to adjudication
3 of its federal Constitutional claims in federal court. Further, *Amici’s* actions items for the
4 Legislature would be directly contrary to the purpose of Prop. 106 to remove the Legislature
5 from the redistricting process. The Arizona constitution is unequivocal that only “the
6 independent redistricting commission shall...establish final district boundaries.” Ariz. Const.
7 art. IV, pt. 2 § 1(16). Prop. 106 does not allow the Legislature (or any other body, including the
8 voters) to create competing maps, nor does it allow submission of district maps to the people of
9 Arizona. It would be a different matter entirely if the Arizona constitution permitted the
10 AIRC’s maps to be submitted to the people. *Cf.* Cal. Const. art. XXI, § 6(h)(i) (redistricting
11 maps created by California’s redistricting commission are expressly “subject to referendum in
12 the same manner that a statute is subject to referendum”). No comparable provision exists in
13 Prop. 106. *See also* Ariz. Const. art. IV, pt. 1 § 1(3) (only measures “enacted by the
14 legislature”—i.e. not the AIRC’s district maps—are subject to the referendum power). If taken,
15 any of these actions would violate the VPA itself by attempting to thwart the purpose of Prop.
16 106 rather than further it. The Legislature is not required to engage in futility before bringing a
17 court challenge. *Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 487, 143 P.3d 1023,
18 1028 (2006) (“the Legislature should not be put to the task of attempting to [take legislative
19 action] before being able to challenge an allegedly unauthorized action in court”).

21 **D. The Legislature Has Authority to Bring the Present Suit Under Arizona Law**

22 Under Arizona law, the Legislature’s authority to act is subject only to express or
23 implied limitations in the Arizona and federal constitutions. *Citizens Clean Elections Com’n v.*
24 *Myers*, 196 Ariz. 516, 520, 1 P.3d 706, 710 (2000). (“...except for those things necessarily
25 inhibited by the Federal or state constitution, the state legislature may pass any act”) (emphasis
26 in original) (citations and quotations omitted). Thus, absent any restrictions, the Legislature has
27 power to authorize the present suit. Moreover, the Legislature has standing under Arizona law
28 to seek redress for particularized injuries to its constitutional authority. *Forty-Seventh*

1 *Legislature*, 213 Ariz. at 487, 143 P.3d at 1028.

2 **III. Conclusion**

3 Based on the foregoing, the *Amici's* argument regarding the VPA should be rejected.
4 The VPA does not affect the Legislature's suit as the Legislature's actions do not implicate a
5 legislative repeal or amendment to Prop. 106, and this Court should proceed to the merits of
6 this case.

7 RESPECTFULLY SUBMITTED this 8th day of January, 2014,

8 **ARIZONA STATE LEGISLATURE**

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CERTIFICATE OF SERVICE

I hereby certify that on January 8th, 2014, 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 to the following:

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