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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Arizona State Legislature,

Plaintiff,

vs.

Arizona Independent Redistricting Commission, and Colleen Mathis, Linda C. McNulty, José M. Herrera, Scott D. Freeman, and Richard Stertz, members thereof, in their official capacities; Ken Bennett, Arizona Secretary of State, in his official capacity,

Defendants.

NO.: 2:12-cv-01211-PGR-MMS-GMS

REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF STANDING BY DEFENDANT ARIZONA INDEPENDENT REDISTRICTING COMMISSION AND DEFENDANT COMMISSIONERS

Defendants Arizona Independent Redistricting Commission and Commissioners in their official capacities (collectively the "Commission") hereby reply in support of their Motion to Dismiss (Doc. 43). The Commission correctly argued, and the Arizona State Legislature ("Legislature") did not refute, that this case should be dismissed because (1) the Legislature lacks Article III standing, (2) prudential principles and principles of comity support dismissal, and (3) the Legislature lacks authority to bring this lawsuit as a matter of Arizona law.

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I. The Legislature Lacks Standing Because It Has Power to Pass a Congressional Plan, and No Plan Passed By the Legislature Has Been Denied or Nullified.

A. The Legislature Incorrectly Claims It Cannot Approve Its Own Congressional Redistricting Plan.

The constitutional rule is that an "abstract dilution of institutional legislative power" does not confer standing. *See Raines v. Byrd*, 521 U.S. 811, 826 (1997). The "loss" here is real – the Legislature has lost power – but it does not create an Article III "case" or "controversy" until the Legislature has actually suffered the loss via a rejected or nullified vote. *See id*. at 824 & n.7 (there is no injury in fact until plaintiff shows that "they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated" or that the challenged law "will nullify their votes in the future in the same way that the votes of the *Coleman* [*v. Miller*, 307 U.S. 433 (1939)] legislators had been nullified"). As discussed in the Commission's Motion (Doc. 43 at 4-6), that has not happened here. The Legislature has the power to refer its own redistricting plan directly to the people by simple majority vote, but it has not done so.

In an attempt to salvage its standing, the Legislature offers a cramped interpretation of its powers, suggesting it cannot even vote on a plan in the first place without a prior constitutional amendment. (*See* Response (Doc. 45) at 7:26-27.) That is inconsistent with the plain language of the Arizona Constitution and the Legislature's own practice. "*Any* amendment or amendments to [the Arizona] constitution may be proposed in either house of the legislature," and "[w]hen *any* proposed amendment or amendments shall be . . . passed by a majority of each house of the legislature . . . the secretary of state shall submit such proposed amendment or amendments to the vote of the people at the next general [or special] election." Ariz. Const. art. XXI, § 1 (emphasis added). There is nothing in Proposition 106 that explicitly or impliedly limits the Legislature's power to propose constitutional amendments.

Indeed, a proposed constitutional amendment to establish Congressional districts drawn by the Legislature was introduced in 2012. *See* House Concurrent Resolution

2053 (Fiftieth Leg., 2nd Reg. Sess. 2012) ("For elections for congressional districts beginning with the 2012 primary and general election and notwithstanding any maps adopted by the 2011 independent redistricting commission . . . Congressional lines shall be the lines and boundaries described in HR _____ enacted by the fiftieth legislature, second regular session, a copy of which is on file in the office of the secretary of state and which is incorporated herein by this reference.") (Doc. 18-1 at 5-11). The Legislature's cramped interpretation of its ability to vote on a congressional plan is simply wrong, and this error shows why the Legislature lacks standing.[1] *See Raines*, 521 U.S. at 824 (standing not established where "majority" of Senators and Members of Congress could enact bills even in light of the line-item veto act).

To be sure, Proposition 106 is part of Arizona's constitution. Therefore, if the Legislature merely referred a *statute* establishing congressional districts to the voters, the referral would be ineffective because it would conflict with the Arizona Constitution. This does not matter, however, because the Legislature can propose a properly drafted constitutional amendment to the voters by a simple majority vote in both houses, and the amendment, if passed by the voters, would take effect.

While it is also true that because of Proposition 106 a congressional plan enacted by the Legislature does not become law unless approved by the voters (prior to Proposition 106, it was subject to gubernatorial veto and/or possible voter referendum), this loss of political power without more is not enough to establish Article III standing under *Raines*. In *Raines*, a future appropriation bill that passed out of Congress could be line-item vetoed under the President's new powers. 521 U.S. at 824. However, the possibility of a veto after a bill was passed out of Congress was not enough to show that the vote "will [be] nullif[ied] . . . in the same way" as in *Coleman*. *Id.* Here, the possibility that the voters could reject the Legislature's plan at the polls does not establish the required injury in fact for Article III standing.

[1] The Legislature has other powers relating to redistricting as well. (Doc. 37 at 4:8-12.)

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B. The Legislature's Attempts to Distinguish *Raines* Are Unpersuasive.

As shown above, the rule in *Raines* is straightforward, and the Legislature's attempts to distinguish this controlling precedent fail.

1. The Fact that the Legislature, Rather than Individual Legislators, Filed this Lawsuit Does Not Establish Standing.

The Legislature's primary argument is that *Raines* only involved a suit by individual Members of Congress, and the injury prong of standing is met where "a *legislative body* seeks to vindicate its institutional authority." (Doc. 45 at 3 (emphasis in original).) This argument, however, overstates the relevant portion of *Raines*, and the broad rule the Legislature advocates cannot be reconciled with *Raines*'s actual holding.

First, *Raines* never holds or even suggests that whether the suit is brought by individual members or the legislative body is dispositive. Instead, it merely attached "some importance" to the fact that the case at issue was brought only by individual Members of Congress. *Raines*, 521 U.S. at 829 & n.10.

Moreover, none of the cases cited by the Legislature suggest that a court should generally find a cognizable injury in the absence of vote nullification simply because the suit is brought by the legislative body. *U.S. House of Representatives v. U.S. Department of Commerce* involved a challenge to the Commerce Department's plan to use statistical sampling in the census. 11 F. Supp. 2d 76, 79 (D.D.C. 1998), *appeal dismissed*, 525 U.S. 316, 344 (1999).[2] The case turned on the informational needs of the House and the fact that the census actually determined the composition of the House, which had a particular interest in preventing its own "unlawful composition." *Id.* at 86-87. It was the impairment of these interests – not the fact that the suit was brought by the institution – that established the concrete and particularized injury. Indeed, the court cautioned, "[o]nly in an extremely rare case could a house of Congress claim that existing law, as

[2] The U.S. Supreme Court dismissed the appeal as no longer presenting a substantial federal question because the Court resolved the issue based on a case arising out of the Eastern District of Virginia brought by citizens who would likely suffer vote dilution if sampling were used.

interpreted and implemented by the Executive Branch, injures that house in a matter that satisfies Article III's rigorous demands." *Id.* at 90.[3] Similarly, "[t]he D.C. Circuit has interpreted the *Coleman* exception to mean 'treating a vote that did not pass as if it had, or vice versa.'" *Common Cause v. Biden*, 909 F. Supp. 2d 9, 26 (D.D.C. 2012) (quoting *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000)). Because the instant case involves congressional (not legislative) redistricting, the Arizona Legislature cannot claim that it brought this suit to protect its own lawful composition, and *U.S. House of Representatives* is distinguishable.

The other cases cited by Legislature regarding its "institutional authority" argument provide no support. In *Karcher v. May*, the state legislature was permitted to intervene to defend the constitutionality of a state law where the executive declined to defend the law. 484 U.S. 72, 75 (1987). And in *Forty-Seventh Legislature v. Napolitano*, an actual vote of the Arizona Legislature had been subjected to the line-item veto. 213 Ariz. 482, 484 ¶ 3, 143 P.3d 1023, 1025 (2006). Therefore, it was consistent with *Raines*'s requirement of an actual denial or nullification of a vote on a specific bill.

Finally, *Kerr v. Hickenlooper*, involved Colorado's Taxpayers Bill of Rights, which required approval by the people of any tax increase. 880 F. Supp. 2d 1112, 1130-31 (D. Colo. 2012). The district court distinguished *Raines* only by claiming that "taxation and appropriation" are "core functions" of the legislature.[4] *Id.* Even assuming the court's approach to *Raines* is correct,[5] there is no basis to conclude that decennial congressional redistricting can be considered a "core function" of a state legislature on

[3] Another case cited by the Legislature, *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972), is a redistricting case about the composition of the state legislature itself, and is distinguishable for the same reason.

[4] The *Kerr* court (at note 20) also had to distinguish *Alaska Legislative Council v. Babbitt*, in which the D.C. Circuit applied *Raines* and denied standing to state legislators challenging a federal statute that took away the power of the Alaska Legislature to control hunting and fishing on federal lands within Alaska. 181 F.3d 1333, 1137-39 (D.C. Cir. 1999).

[5] This case is currently on interlocutory appeal to the Tenth Circuit.

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par with "taxation and appropriation." Moreover, as analyzed by the district court, legislative self-help was essentially unavailable. In order for the Colorado Legislature to submit a proposed constitutional amendment to the electorate, a vote by two-thirds of each House of the General Assembly was required. *See id.*[6]

These cases, individually and together, cannot properly be read to suggest that an "abstract dilution of institutional legislative power" is a concrete and particularized injury when brought by the legislative body, because this would overrule the core holding of *Raines*. In *Raines*, Congress's powers were particularly affected by the line item veto act, but this was insufficient to establish standing in the absence of the denial or nullification of a specific vote. Whether the suit is brought by the legislative body or individual legislators, this core principle remains the same.[7]

2. The Legislature's Existing Powers Undermine its Position.

Next, the Legislature misapprehends the significance of its ability to enact relevant legislation. The Commission is not arguing here that the Legislature's ability to pass a redistricting plan is a "non-judicial remedy" that cures an otherwise concrete injury it has suffered. (Doc. 45 at 7 (citing *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964)).) Instead, the injury in fact has not yet occurred because no vote has been denied or nullified. The Legislature cites *Lucas*, but that case involved a suit against a legislature by voters in malapportioned districts; the injury (to the voters) had already occurred. 377 U.S. at 736-37.

In any event, the ability to enact a redistricting plan as a constitutional amendment is an absolutely proper consideration. *See Campbell*, 302 F.3d at 23-24 (contrasting case

[6] Whether a super-majority requirement would change the standing analysis is an issue not presented by this case. *See* Part I(A), *supra*.

[7] The Legislature also cites *Newdow v. U.S. Congress*, 313 F.3d 495, 498 (9th Cir. 2002). That case cites to several pre-*Raines* cases but it makes clear that the legislature cannot be given a "roving commission to obtain judicial relief under most circumstances." *Id.* at 499 (citation omitted). Indeed, the Ninth Circuit denied the state senate's motion to intervene, and Mr. Newdow was ultimately held not to have standing. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004).

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before court with *Coleman*, where the Kansas legislators "may well have been powerless to rescind a ratification of a constitutional amendment that they claimed had been defeated."); *see also Raines*, 521 U.S. at 824 (same); *Kucinich v. Obama*, 821 F. Supp. 2d 110, 119-20 (D.D.C. 2011) (noting "plaintiffs' arguments overlook the important role political remedies have in the standing analysis").

3. The Legislative Standing Principles in *Raines* Apply to Suits by State Legislators.

The Legislature also attempts to limit *Raines* to cases by the U.S. Congress against the federal executive branch. (Doc. 45 at 10.) Such a narrow reading is wrong because principles of federalism supplant principles of separation of powers when the case involves state legislators. See 13B Wright & Miller, Federal Practice & Procedure § 3531.11.3 (3d ed. 2013) ("State legislator standing raises issues similar to the issues of congressional plaintiff standing, although the separation-of-powers concerns are much diminished and largely replaced by concerns of federalism."); *see also Alaska Legislative Council*, 181 F.3d at 1137 (stating that the *Raines* Court "did not limit its analysis to interbranch disputes, and we read its discussion of *Coleman* to apply to suits brought by state as well as federal legislators"). As shown in Part II, *infra*, principles of federalism and comity are an important consideration for federal courts in the context of redistricting in particular, and support dismissal here.

4. This Case is Procedurally Distinguishable From Previous Cases Where Courts Have Addressed Election Clause Challenges.

Finally, the Legislature's citation to other Election Clause challenges does not excuse it from establishing standing in this case. (Doc. 45 at 5.) *Smiley v. Holm*, 285 U.S. 355 (1932), and *Ohio ex. rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), both involved appellate review of state court cases filed by a relator on behalf of the State. And in both cases, the state legislature had passed a specific plan. The U.S. Supreme Court found the procedural posture of *Smiley* and *Hildebrant* significant when it dismissed a citizen suit under the Elections Clause for lack of standing. *Lance v.*

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Coffman, 549 U.S. 437, 442 (2007). Finally, *Brown v. Secretary of State of Florida*, 668 F.3d 1271 (11th Cir. 2012), never addressed standing and therefore provides no help on the issue here. *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1448-49 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

In sum, this suit must be dismissed because the Legislature has suffered no "injury in fact" based on an alleged infringement of its legislative power. And as shown in the motion to dismiss – and not disputed by the Legislature – any complaint regarding the map passed by the Commission, in the absence of a cognizable injury to the Legislature's power, is merely a generalized grievance that the state is not following the Elections Clause. (Doc. 43 at 6); *see also Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir. 2009) ("[A]bstract outrage at the enactment of an unconstitutional law" is insufficient.) (quoting *City of South Lake Tahoe v. Cal. Tahoe Reg'l Planning Agency*, 625 F.2d 231, 237 (9th Cir.1980)).

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II. Prudential Principles of Standing and Principles of Federal-State Comity Support Dismissal.

This case involves sensitive issues of state policy. (Response to Motion for Preliminary Injunction (Doc. 37) at 6.) As the Supreme Court has recognized, "the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993); *see also Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) ("Drawing lines for congressional districts is . . . primarily the duty and responsibility of the State." (internal quotation marks and citation omitted)). Moreover, the Court has already found "no suggestion in the [Elections Clause] of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 368. In light of this binding precedent, this Court should dismiss the Legislature's complaint under principles of prudential standing because its complaint about Proposition 106 does not

"fall within the zone of interests" protected by the Elections Clause. *See Allen v. Wright*, 468 U.S. 737, 751 (1984).

The doctrine of comity also counsels in favor of dismissal. As a preliminary matter, the Commission has not waived application of the comity doctrine. The underlying rationale of comity is to promote federalism. In light of this, the Court has set a high bar for waiver. It noted that cases found waiver where "the State expressly urged [the federal courts] to proceed to an adjudication of the constitutional merits." *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 626 (1986). The Commission's actions in this case come nowhere close to "expressly urg[ing]" a federal adjudication of the merits. The Commission has not yet answered and has a pending motion to dismiss. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (holding Eleventh Amendment immunity applies unless the state unequivocally expresses its consent or Congress properly abrogates the immunity); *see also Gamboa v. Rubin*, 80 F.3d 1338, 1350 (9th Cir. 1996) (finding no waiver where the state asserted its Eleventh Amendment defense in its answer); *Ashker v. California Dep't of Corrections*, 112 F.3d 392, 393-94 (9th Cir. 1997) (same).

Because the Arizona Legislature challenges fundamental principles governing its authority that are established in the Arizona Constitution, comity is appropriate here. "The ultimate power of sovereignty is in the people, and they . . . must have a right to change their constitution." *Pacific States Tel. & Tel. v. Oregon*, 223 U.S. 118, 145 (1912); *see* Ariz. Const. art. II, § 2 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed . . . ."). The point of "Our Federalism" is that the People of each state are governed by a system of their own choosing, without undue interference from the federal courts. *Younger v. Harris*, 401 U.S. 37, 44 (1971) ("[T]he National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."). The

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Legislature's complaint in this case strikes at the core of these broad principles. For that reason, this case is "exceptional" and dismissal based on comity is appropriate.[8]

III. The Legislature Does Not Have Authority Under Arizona Law to Seek to Invalidate a Provision of the Arizona Constitution.

The Legislature lacks authority under the Arizona constitution to bring this action. The Arizona courts have never recognized the Legislature's power to initiate litigation to nullify a provision of the Arizona Constitution in order to enhance the Legislature's own institutional power.

The Legislature's primary argument is that the state constitution is a limitation, not grant, on its power and "[t]he Arizona constitution does not limit by inference or express provision the Legislature's ability to authorize federal court challenges to unconstitutional laws." (Doc. 45 at 13.) However, this argument is directly foreclosed as a matter of state law. In *State ex rel. Woods v. Block*, the Arizona Supreme Court was clear: "conducting litigation on behalf of the state, *as authorized by the Legislature*, is an executive function, because doing so carries out the purposes of the Legislature." 189 Ariz. 269, 277, 942 P.2d 428, 436 (1997) (emphasis added). The fact that the Legislature may have the power to authorize litigation, does not transform conducting litigation into a legislative function.

Moreover, courts have, as a matter of federal law, rejected attempts by those unauthorized by state law to bring lawsuits. In *Thomas v. Mundell*, the Ninth Circuit found it "dubious" that the Maricopa County Attorney could be considered a representative of the state regarding an alleged unconstitutional DUI court, in light of the silence of the Arizona Attorney General. 572 F.3d at 762. Moreover, *Alaska Legislative Council* held that the party injured (if any) by removal of authority to manage fish and wildlife was the state itself, and that the Governor, not the Legislature, is authorized to

[8] The Legislature cites *Sprint Communications Inc. v. Jacobs*, 134 S. Ct. 584 (2013). That case involves regulation of interstate phone calls, and does not implicate the same sensitive state interests as are implicated here.

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sue on behalf of the state. 181 F.3d at 1138-39. The Supreme Court's recent statement about Election Clause cases, which recognized that previous challenges were brought by a relator on behalf of the state, comports with these holdings. *Lance*, 549 U.S. at 442.[9]

Finally, while the Legislature attempts to argue that its lawsuit to invalidate a portion of Proposition 106 is not specifically prohibited by the Arizona Voter Protection Act ("VPA"), Ariz. Const. art. IV, pt. 1, §§ 1(6), (14), the purpose of the Legislature's lawsuit is directly contrary to the VPA. This Court should therefore dismiss.

CONCLUSION

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines*, 521 U.S. at 818 (citation omitted). For the foregoing reasons, the Commission respectfully requests that the Court grant the Motion and dismiss this case.

DATED this 30th day of January, 2014.

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[9] Cases cited by the Legislature are distinguishable. *Forty-Seventh Legislature v. Napolitano* involved a challenge by the Legislature to enforce the Arizona Constitution, not invalidate it. 213 Ariz. at 484 ¶ 4, 143 P.3d at 1025. And in *Karcher v. May* the state legislature was permitted to intervene to defend the constitutionality of a state law where the executive declined to defend the law. 484 U.S. at 75. *See* Part I(B)(1), *supra*.

CERTIFICATE OF SERVICE

I certify that on the 30th day of January, 2014, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Court, using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants listed for this matter.

Pursuant to local rule, courtesy copies of this Motion to Dismiss have been mailed to the chambers of the Honorable Mary M. Schroeder, the Honorable Paul G. Rosenblatt, and the Honorable G. Murray Snow.

By: /s/ *Lisa Black*

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