

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES HOUSE OF REPRESENTATIVES,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:14-cv-01967-RMC
)	
SYLVIA MATHEWS BURWELL, in her official)	
capacity as Secretary of Health and Human Services, <i>et al.</i> ,)	
)	
Defendants.)	
)	

DEFENDANTS’ RESPONSE TO PLAINTIFF’S NOTICE OF NEW AUTHORITY

The defendants respectfully submit this response to the notice of new authority filed by the plaintiff in this action, ECF 32, regarding *Arizona State Legislature v. Arizona Independent Redistricting Commission* (“AIRC”), --- S. Ct. ---, 2015 WL 2473452 (June 29, 2015).

AIRC concerned a suit brought by both houses of Arizona’s state legislature to challenge an amendment to the state constitution. Arizona voters had adopted a citizen initiative, Proposition 106, which “amended the Arizona Constitution to remove congressional redistricting authority from the state legislature, lodging that authority, instead, in a new entity, the AIRC.” *AIRC*, 2015 WL 2473452, at *7. Proposition 106 not only granted the AIRC the authority to adopt a congressional redistricting plan in the first instance, but it also disabled the state legislature, now or in the future, from adopting any measure that would supersede the AIRC’s redistricting plan. *Id.* at *9. The Arizona State Legislature filed suit “after authorizing votes in both of its chambers,” *id.* at *10, contending that Proposition 106 violated the Elections Clause of the federal Constitution, U.S. Const., art. I, § 4, cl. 1. The district court rejected its

claim on the merits. The Supreme Court affirmed, holding that the state legislature had standing, but that Proposition 106 did not violate the Elections Clause.

For three reasons, the House of Representatives errs in relying on *AIRC* to support its unprecedented claim for standing to sue the Executive over the interpretation and implementation of federal law. *First*, contrary to the House's characterization, the Supreme Court made clear that its holding would not extend to a suit, like this one, by a congressional entity against the Executive. As the Court emphasized, "[t]he case before [it did] not touch or concern the question whether Congress has standing to bring a suit against the President," and "a suit between Congress and the President would raise separation-of-powers concerns absent" in *AIRC* itself. *AIRC*, 2015 WL 2473452, at *10 n.12. Those separation-of-powers principles are well-established. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("The Constitution does not contemplate an active role for Congress in the supervision of officials charged with the execution of the laws it enacts."); *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) ("discretionary power to seek judicial relief is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress").

Second, the state legislature in *AIRC* asserted a type of injury that the House has not alleged (and could not allege) in this lawsuit. The Court emphasized that the Arizona Legislature had sued to challenge a voter initiative that had amended the state constitution to vest authority over a particular subject in an independent commission and had disabled the state legislature from adopting legislation on that subject. *See AIRC*, 2015 WL 2473452, at *9. Regardless of whether the legislature enacted a competing redistricting plan, Arizona law required Arizona's Secretary of State to "implement [the *AIRC*'s] plan and no other." *Id.* As

a result, the Court concluded that the voter initiative injured the Arizona Legislature because “Proposition 106, together with the Arizona Constitution’s ban on efforts to undermine the purposes of an initiative ... would ‘completely nullify’ any vote by the Legislature, now or ‘in the future,’ purporting to adopt a redistricting plan.” *Id.* at *10 (quoting *Raines*, 521 U.S. at 823-34) (internal citation and alterations omitted). Here, by contrast, neither the House nor the full Congress is disabled from legislating, “now or in the future,” as the Arizona Legislature was in *AIRC*.

Third, *AIRC* observed that both houses of Arizona’s legislature voted to authorize the lawsuit in concluding that the state legislature as a whole had standing. *AIRC*, 2015 WL 2473452, at *10. Here, only one House of Congress has brought suit, without the participation of its sister chamber – an elemental distinction under the United States Constitution given the bicameral structure of Congress. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276 (1991) (“In short, when Congress takes action that has the purpose and effect of altering the legal rights, duties, and relations of persons ... outside the Legislative Branch, it must take that action by the procedures authorized in the Constitution.”) (internal quotation and alterations omitted).

In sum, as the Supreme Court emphasized, this Court must apply an “‘especially rigorous’” standing analysis in a case involving a constitutional challenge to “‘an action taken by one of the other two branches of the Federal Government,’” *AIRC*, 2015 WL 2473452, at *10 n.12 (quoting *Raines*, 521 U.S. at 819-20). Under this especially rigorous analysis, the plaintiff in this action has not alleged any legally cognizable injury that would permit one House of Congress to sue the Executive Branch over the meaning or implementation of federal law.

Dated: July 17, 2015

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

KATHLEEN R. HARTNETT
Deputy Assistant Attorney General

VINCENT H. COHEN, JR.
United States Attorney

JENNIFER D. RICKETTS
Director

SHEILA LIEBER
Deputy Branch Director

/s/ Joel McElvain
JOEL McELVAIN
Assistant Branch Director
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, D.C. 20530
(202) 514-2988
Joel.McElvain@usdoj.gov
Counsel for the Defendants