NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 12/06/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PAUL R. JONES, Plaintiff/Appellant, v. STATE OF ARIZONA; HONORABLE KEN BENNETT, Arizona Secretary of State, in his official and personal capacities, Defendants/Appellees.	No. 1 CA-CV 10-0869 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-052368

The Honorable Linda H. Miles, Judge

AFFIRMED

Paul R. Jones *in propria persona* — Phoenix
Plaintiff/Appellant

Thomas C. Horne, Arizona Attorney General — Phoenix
By Carrie Jane Brennan, Assistant Attorney General
Thomas M. Collins, Assistant Attorney General
Attorneys for Defendants/Appellees

S W A N N, Judge

¶1 Paul R. Jones ("Appellant") sued the state of Arizona and Secretary of State Ken Bennett ("the Secretary") in his personal and official capacities. The court dismissed his

complaint. Because we agree with the Appellees that they were not proper defendants and that Appellant himself lacked standing, we affirm the trial court's ruling.

FACTS AND PROCEDURAL HISTORY

¶2 On July 8, 2010, Appellant filed a complaint against the state of Arizona and the Secretary seeking injunctive and declaratory relief as well as redress under 42 U.S.C. § 1983. The complaint raised various federal constitutional challenges to Proposition 202,[1] a ballot initiative passed by voters in 2002 and which made the Indian Gaming Preservation and Self-Reliance Act ("the Act") state law.[2]

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[1] Proposition 202's description on the ballot read:

> A "yes" vote shall have the effect of directing the Governor to approve new tribal gaming compacts, allocating each tribe 1-4 gaming facilities, 475-1400 slot machines and 75-100 card tables; 1% to 8% of tribes' gross income goes to the state to fund school district programs statewide for classroom size reduction, teacher salary increases, reading and dropout prevention; programs for trauma and emergency services; wildlife conservation, problem gambling and tourism; and to cities, towns and counties for general public services.
>
> A "no" vote shall have the effect of not authorizing the Governor to approve new tribal gaming compacts and not authorizing renewal of the current compacts when they expire.

[2] A.R.S. §§ 5-601.01, 5-601.02, 13-3301, 15-978, 17-002(7), 36-2903.07, 41-1505.12, 41-2306.

¶3 Appellant's Complaint alleged that the Act "brought [Appellant] into violation of the U.S. Constitution without benefit of trial," and that because it amounted to an unratified amendment to the U.S. Constitution, it was a legal nullity. Appellant also alleged that he had standing to bring his suit "as a member of the Body-Politic [sic]" with a fundamental right to be free "from forcibly being made a party . . . to [an] un-Constitutional act by the [s]tate."

¶4 On August 2, 2010, Appellees filed a Motion to Dismiss. The motion argued: (1) that Appellant lacked standing to bring his claims because he had failed to allege a particularized injury; and (2) that the Appellees were improper defendants in a § 1983 action. On August 6, 2010, Appellant filed a motion in the nature of a response[3] claiming to have "trumped" both of Appellee's arguments by means of his wide-ranging legal citations. On August 18, 2010, Appellees filed a reply in support of their Motion to Dismiss. And on October 18, 2010, the trial court issued an unsigned minute entry that granted Appellees' Motion to Dismiss.

¶5 Appellant filed a notice of appeal from that ruling on November 9, 2010. On January 27, 2011, this court suspended

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[3] The motion's caption contained three titles: (1) Rebuttal to Defendant's Motion to Dismiss; (2) Plaintiff's Motion to Deny Defendant's Motion to Dismiss; and (3) Plaintiff's Motion for Oral Arguments.

that appeal until March 10, 2011. We pointed out that the minute entry was unsigned and therefore not appealable under Rule 58(a). We revested jurisdiction in the trial court so that it could consider an application from Appellant for a signed version of its order. On March 9, 2011, the trial court issued a signed order that dismissed Appellant's complaint in its entirety. The trial court's signed minute entry is now part of this court's record. We have jurisdiction under A.R.S. § 12-2101(A)(1).

STANDARD OF REVIEW

¶6 We review an order granting a motion to dismiss for abuse of discretion. *Dressler v. Morrison*, 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006). We will uphold dismissal if the plaintiff would not be entitled to relief under any facts alleged in the complaint. *See Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346, 922 P.2d 308, 311 (1996).

DISCUSSION

¶7 Appellees argue that the trial court's decision to dismiss Appellant's complaint was appropriate because: (1) he lacked standing to file his complaint in an Arizona court; and (2) Appellees are inappropriate defendants for a § 1983 action. We address each argument in turn.

I. DID APPELLANT LACK STANDING TO BRING HIS CLAIMS?

¶8 Although the Arizona Constitution contains no express case or controversy requirement, Arizona courts nevertheless exercise restraint to ensure that we do not issue advisory opinions or attempt to settle issues that have not been fully developed by true adversaries. *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377, ¶ 9, 199 P.3d 629, 632 (App. 2008) (citation omitted). In practice this means that our courts impose a "rigorous" standing requirement. *Id.* at 377, ¶ 10, 199 P.3d at 632 (citing *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140, ¶ 6, 108 P.3d 917, 919 (2005)). To meet that standing requirement, a party must show that he or she has suffered a personal, palpable injury. *Bennett v. Napolitano*, 206 Ariz. 520, 524, ¶ 16, 81 P.3d 311, 315 (2003).

¶9 In *Sears v. Hull*, residents of an area near a proposed casino sought to enjoin the governor from entering into a gaming compact that they believed would run afoul of federal law. 192 Ariz. 65, 961 P.2d 1013 (1998). Our supreme court held that the mere fact that the plaintiffs lived within a few miles of the proposed gaming activity constituted only "generalized harm" and noted that "[t]o achieve standing in an action for public nuisance, a plaintiff must show that the defendant's conduct caused 'damage special in nature and different in kind from that

experienced by the residents of the city in general.'" *Id.* at 71, ¶ 19, 961 P.2d at 1018.

¶10 The same principle applies here. By his complaint's own admission, Appellant's alleged injuries are neither personal nor palpable. Among other things asserted in that complaint, Appellant describes the Act as a "racial entitlement" that raises "significant State of Arizona political" issues. In his opening brief, he argues that the Act favors Indian tribes and that "[n]o other non-'Indian' Arizona citizen, including the Appellant, receives such largess as the other select group of Arizona citizens with 'Indian' ancestry."[4] If the injuries that Appellant claims to suffer were real, then by his own admission they are injuries spread out among a class -- a class he refers to as "non-'Indian' Arizona citizen[s]." He cannot allege that he has been injured personally and particularly. Furthermore, he has identified the issue that he complains about as a "political" issue. Arizona's courts are not the proper forum for settling political issues that have no "palpable" effect on

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[4] Appellant apparently puts "Indian" in quotation marks because he believes "post Indian Citizenship Act of 1924, there are no more 'Indians' within the sovereign State of Arizona . . . only Arizona citizens with 'Indian ancestry' . . . ." Appellant's belief is -- at best –- inaccurate. It is still true, as it was in Justice John Marshall's day, that "Indian tribes are quasi-sovereign entities with *sui generis* status as 'domestic, dependent nations' under federal law." *Tracy v. Superior Court of Maricopa Cnty.*, 168 Ariz. 23, 31, 810 P.2d 1030, 1038 (1991) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831)).

Appellant beyond his irritation "as a member of the Body-Politic." Such generalized grievances belong to Arizona's political process, not its judiciary.

¶11 We agree with Appellees that the complaint was properly dismissed because of Appellant's lack of standing.

II. ARE APPELLEES PROPER DEFENDANTS FOR A § 1983 ACTION?

¶12 Appellant's complaint alleged that his constitutional rights were violated in various ways[5] and that he was seeking relief against Appellees under 42 U.S.C. § 1983. That statute declares that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . or other proper proceeding for redress.

¶13 Appellant names two Appellees: the state of Arizona and the Secretary, both in his official and personal capacities. However, "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Therefore,

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[5] For example, Appellant alleged in his complaint: "Plaintiff has standing as the true sovereign citizen of the State of Arizona and the United States under the First Amendment to seek redress in a recognized Article III Court for the State of Arizona actions of the State of Arizona . . . ."

neither Arizona nor the Secretary acting in his official capacity are proper § 1983 defendants.

¶14 This means that Appellant's action against the Secretary could have survived the trial court's motion to dismiss only if he adequately alleged a claim against the Secretary acting in his individual capacity with regard to Proposition 202 or the Act. *Carrillo v. State*, 169 Ariz. 126, 128-29, 817 P.2d 493, 495-96 (App. 1991). "To establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

¶15 Here, the allegations Appellant made were not adequate. The closest Appellant comes to alleging that the Secretary acted as an individual "under color of state law" is in the allegation that the Secretary failed to "protect [Appellant] from Bills of Attainder/Ex Post Facto legislation manifest in Prop. 202." But because Proposition 202 is a law that imposes no statutory duties on the Secretary, we can only assume that Appellant is arguing that the Secretary failed to protect him while the Proposition was still a ballot initiative. That argument meets with an insurmountable difficulty: the initiative passed in 2002 and the Secretary did not enter his office until 2009.

¶16 We conclude, then, that neither the Secretary nor the state of Arizona were properly named as defendants in Appellant's complaint.

CONCLUSION

¶17 The trial court did not abuse its discretion when it dismissed Appellant's complaint.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

DONN KESSLER, Judge