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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 William A. Graven,

No. CV-16-01249-PHX-GMS

10 Plaintiff,

**ORDER**

11 v.

12 State of Arizona, et al.,

13 Defendants.  
14

15 Pending before the Court is Defendants State of Arizona, et al.'s motion to  
16 dismiss. (Doc. 14.) For the following reasons, the Court grants the motion.<sup>1</sup>

17 **BACKGROUND**

18 Plaintiff claims that he suffered a “catastrophic business failure” after a “pervasive  
19 internal criminal enterprise [was] formed and operated [between] several of [Plaintiff’s]  
20 executives,” and attorneys from the law firm of Snell & Wilmer. (Compl. ¶¶ 36, 44, 47,  
21 50–52, Ex. 6.)<sup>2</sup> After the Special Investigations Section of the Attorney General’s Office  
22 reviewed Plaintiff’s allegations, a formal case was opened on June 16, 2012. (*Id.* ¶¶ 38–  
23 39.) To date, nine of Plaintiff’s former employees “have been indicted or negotiated pre-  
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26 <sup>1</sup> Defendant does not contest Plaintiff’s motions to correct, (Docs. 7, and 11).  
27 Those motions are thus granted without objection. Plaintiff’s motion for declaration of  
28 effective service, (Doc. 8), motion for effective service (Doc. 9), and requests for judicial  
notice (Docs. 10 and 12), are denied as moot.

<sup>2</sup> On a motion to dismiss the Court may consider documents that are attached to  
the complaint “without converting the motion to dismiss into a motion for summary  
judgment.” *Lee v. City. of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001).

1 indictment plea agreements, in five criminal cases for 60 felony counts.” (*Id.* ¶ 43.) The  
2 Attorney General, however, brought no criminal charges against Snell & Wilmer. (*Id.*  
3 ¶¶ 56–58.) On December 14, 2015, Plaintiff met with Assistant Attorney General  
4 Michael Bailey and Chief of the Criminal Division Don Conrad who explained that  
5 “Snell & Wilmer[’s conduct] . . . did not rise to the level of being criminal.” (*Id.* ¶¶ 79–  
6 80.) Plaintiff’s Complaint alleges that the Defendants’ refusal to seek criminal  
7 indictments against third persons constitutes a violation of his rights under the Fifth and  
8 Fourteenth Amendments to the United States Constitution, and also constitute the state  
9 law torts of selective prosecution, selective enforcement, prosecutorial misconduct,  
10 conspiracy to commit prosecutorial misconduct, and abuse of prosecutorial discretion.  
11 (*Id.* ¶¶ 112–146.)

## 12 DISCUSSION

### 13 I. Legal Standard

14 The lack of subject matter jurisdiction may be raised at any time by the parties or  
15 the Court. *See* Fed. R. Civ. P. 12(h)(3); *Augustine v. United States*, 704 F.2d 1074, 1077  
16 (9th Cir. 1983).

17 To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a  
18 complaint must contain more than “labels and conclusions” or a “formulaic recitation of  
19 the elements of a cause of action;” it must contain factual allegations sufficient to “raise  
20 a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
21 555 (2007). While “a complaint need not contain detailed factual allegations . . . it must  
22 plead ‘enough facts to state a claim to relief that is plausible on its face.’” *Clemens v.*  
23 *DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550  
24 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content  
25 that allows the court to draw the reasonable inference that the defendant is liable for the  
26 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550  
27 U.S. at 556).

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1           When analyzing a complaint for failure to state a claim under Rule 12(b)(6), “[a]ll  
2 allegations of material fact are taken as true and construed in the light most favorable to  
3 the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). However,  
4 legal conclusions couched as factual allegations are not given a presumption of  
5 truthfulness, and “conclusory allegations of law and unwarranted inferences are not  
6 sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.  
7 1998).

## 8       **II.     Analysis**

9           The Eleventh Amendment acts as a limit on federal subject matter jurisdiction.  
10 *Demery v. Kupperman*, 735 F.2d 1139, 1149 n.8 (9th Cir. 1984). “The Eleventh  
11 Amendment prohibits federal courts from hearing suits brought against an unconsenting  
12 state.” *Brooks v. Sulphur Springs Valley Elec. Coop.*, 951 F.2d 1050, 1053 (9th Cir.  
13 1991). State agencies are also immune under the Eleventh Amendment from private  
14 actions or suits for injunctive relief in federal court. *Mitchell v. L.A. Cmty. Coll. Dist.*,  
15 861 F.2d 198, 201 (9th Cir. 1988). Additionally, the Eleventh Amendment bars damages  
16 suits against state officials in their official capacities. *Will v. Mich. Dep’t of State Police*,  
17 491 U.S. 58, 71 (1989). Here, Plaintiff’s complaint in its entirety is barred by the  
18 Eleventh Amendment.<sup>3</sup>

19           Plaintiff’s complaint also fails to state a claim that is plausible on its face. As an  
20 initial matter, Plaintiff’s complaint is comprised almost entirely of legal conclusions,  
21 which are erroneous. Plaintiff does not cite to any legal authority that suggests that he  
22 has a federal right to have third parties criminally prosecuted by state officials. Nor does  
23 Plaintiff cite any authority that would allow him to bring a state law claim against state  
24 officials for their failure to criminally prosecute third persons that he believes should be  
25 prosecuted. In fact, it is axiomatic that “criminal prosecutors may claim absolute  
26 immunity from damages liability for actions ‘intimately associated with the judicial phase  
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28           <sup>3</sup> Plaintiff explicitly asserted in his briefings that he sought to sue the individually  
named defendants in their official capacity and not as individuals. (See Doc. 8 at 2.)

1 of the criminal process,' such as the prosecutor's initiation of a prosecution and  
2 presentation of the state's case." *Torres v. Goddard*, 793 F.3d 1046, 1051 (9th Cir. 2015)  
3 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). "Absolute prosecutorial  
4 immunity is meant to protect[ ] the prosecutor from harassing litigation that would divert  
5 his time and attention from his official duties' and to enabl[e] him to exercise  
6 independent judgment when deciding which suits to bring and in conducting them in  
7 court." *Id.* (internal quotation marks and citation omitted). Here, Plaintiff's claims assert  
8 an infringement of his rights based on the Defendants' decision not to prosecute third-  
9 party individuals. The pertinent actions of the Defendants being challenged here were the  
10 actions of an advocate of the state determining whether to bring charges, not the actions  
11 of an administrator or an investigator; thus, Defendants' actions are entitled to absolute  
12 immunity. *Id.* To the extent the Plaintiff names other non-prosecutors as defendants in  
13 his Complaint, he sets forth no plausible allegations suggesting that they have deprived  
14 him of a right under federal law or state law.

15 Accordingly, Defendants' motion to dismiss is granted.

16 **IT IS THEREFORE ORDERED:**

- 17 1. Plaintiff's motions to amend (Docs. 7, 11) are **GRANTED**.  
18 2. Plaintiff's motion for declaration of effective service (Doc. 8) is **DENIED**  
19 as moot.  
20 3. Plaintiff's motion for effective service (Doc. 9) is **DENIED** as moot.  
21 4. Defendants' motion to dismiss (Doc. 14) is **GRANTED**.  
22 5. Plaintiff's motion for judgment on the pleadings<sup>4</sup> (Doc. 20) is **DENIED** as  
23 moot.

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27 <sup>4</sup> Plaintiff framed his response to Defendants' motion to dismiss as a motion for  
28 judgment on the pleadings. (*See* Doc. 20.) As a result, the brief triggered a new pending  
motion for judgment on the pleadings. The Court only addresses and rules upon  
Defendants' motion to dismiss. (Doc. 14.)

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- 6. Plaintiff's motion for hearing (Doc. 22) is **DENIED**.
  - 7. The Clerk of Court is directed to enter judgment accordingly.
- Dated this 22nd day of September, 2016.

  
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Honorable G. Murray Snow  
United States District Judge