OSBORN MALEDON

A PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

The Phoenix Plaza
21st Floor
2929 North Central Avenue
Phoenix, Arizona 85012-2793

P.O. Box 36379
Phoenix, Arizona 85067-6379

Telephone 602.640.9000
Facsimile 602.640.9050

Mary R. O'Grady, 11434
Jean-Jacques Cabou, 22835
Kristin L. Windtberg, 24804
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
mogrady@omlaw.com
jcabou@omlaw.com
kwindtberg@omlaw.com

Joseph A. Kanefield, 015838
Jaclyn D. Foutz, 024286
BALLARD SPAHR, LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555
(602) 798-5400
kanefieldj@ballardspahr.com
foutzj@ballardspahr.com

Attorneys for Plaintiff Arizona Independent Redistricting Commission

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, ex rel. THOMAS C. HORNE, Attorney General, Petitioner, vs. COMMISSIONER COLLEEN MATHIS, COMMISSIONER LINDA McNULTY, COMMISSIONER JOSE HERRERA, Respondent.	Case No. CV2011-016442 (Consolidated with No. CV2011-017914) **PLAINTIFF ARIZONA INDEPENDENT REDISTRICTING COMMISSION'S** **CONSOLIDATED RESPONSE TO MOTION TO DISMISS** **AND** **MOTION FOR SUMMARY JUDGMENT** (Hon. Dean Fink)
ARIZONA INDEPENDENT REDISTRICTING COMMISSION, an Independent Constitutional Body, Plaintiff/Petitioner, vs. THOMAS C. HORNE, in his official capacity as Attorney General of the State of Arizona, Defendant/Respondent.	

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In conformity with the orders of the Court, the Arizona Independent Redistricting Commission (the "IRC" or "Commission") hereby responds to the Attorney General's Motion to Dismiss and moves for summary judgment on its Complaint in this consolidated filing. This filing is supported by the following Memorandum of Points and Authorities and by the Separate Statement of Facts ("SOF") filed herewith pursuant to Ariz. R. Civ. P. 56(c)(2).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background

A. The IRC was Created by Voters to End Legislative Self-Interest in Redistricting and Bring Independence to the Redistricting Process.

"The legislative authority of the state shall be vested in the legislature…but the people reserve the power to propose laws and amendments…." Ariz. Const. art. 4, pt. 1 § 1. "The first of these reserved powers is the initiative." *Id.*

And in November 2000, Arizona voters exercised the power reserved to them by our State's Constitution by creating an Independent Redistricting Commission in order to remove the singular task of redistricting from the legislature and placing it into the hands of an independent group of citizen-volunteers. (SOF ¶ 1.) The official title of the ballot initiative establishing the IRC, "Prop. 106," explained that the initiative was aimed at "ending the practice of gerrymandering and improving voter and candidate participation in elections by creating an independent commission of balanced appointments." (*Id.* ¶ 2.) Prop. 106 enjoyed broad bipartisan support for its high-minded mission, including from our state's three previous Attorneys General. For example, then-sitting Attorney General Janet Napolitano explained that:

> [t]his initiative takes redistricting out of the hands of incumbents who too often draw district lines to protect their seats rather than to create fair, competitive legislative and congressional districts. This initiative is fair to all Arizonans because it opens up the system to public scrutiny; it eliminates conflicts of interest by taking the process of redistricting out of incumbents' hands…We need a politically neutral commission to handle redistricting.

(*Id.* ¶ 4.)

For the same reasons, Prop 106 also drew support from her predecessor, Grant Woods, and from her successor, Terry Goddard. Mr. Woods, joined by other prominent Republicans explained that "[b]y transferring redistricting responsibility from self-interested politicians to an independent citizen's panel, [Prop. 106] will generate more competition, more accountability and better government for all Arizonans. As long-time Republicans and public servants, we're proud to support this kind of reform for Arizona." (*Id.* ¶ 4.) Similarly, Mr. Goddard's statement of support for Prop. 106 explained that "[r]ight now, legislative and congressional districts are drawn in a way that protects incumbents. [Prop. 106] responsibly reforms our redistricting system in a way that will create more competition for our elected officials, which in turn, will create better government for all of us." (*Id.* ¶ 5.)

As our state's three prior Attorneys General tell us, Prop. 106 represented Arizona voters' considered choice to entrust redistricting to independent citizen-volunteers, thereby eliminating the self-dealing and conflict of interest of the previous, legislatively-conducted redistricting process. Independence is, quite simply, the ***sine qua non*** of the IRC.

B. The Independent Redistricting Commission is Independent and Open to the Public, as Required by the Constitution and as Intended by the Voters.

The IRC has made good on the promises of independence and openness enshrined in Prop. 106. The IRC's commissioners are not politicians; they are five citizen-volunteers: one member nominated by each of the President of the Arizona Senate, the Minority Leader of the Arizona Senate, the Speaker of the Arizona House of Representatives, and the Minority Leader of the Arizona House of Representatives. The four nominated commissioners are then tasked with selecting a chairperson of the Commission, from a pool of eligible, non-partisan applicants. (*Id.* ¶ 6.) The appointment process was completed in March 2011 with the unanimous selection of

Colleen Mathis to serve as the Commission's chair. (*Id.* ¶ 7.) The Commission then began to hire the staff and consultants necessary to fulfill its constitutional duty to adopt new legislative and congressional districts that can be used for Arizona's elections until the next decennial census.

At present, the five commissioners of the IRC are engaged in the most intense period of their work, working with its staff and consultants, considering public comment received at numerous public meetings, and drawing new congressional and legislative district maps for Arizona. (*Id.* ¶ 20.) Before promulgating draft legislative and congressional maps, the IRC received input from elected officials, business leaders, and ordinary citizens at dozens of public meetings throughout the state. (*Id.* ¶ 21.) Within the past few weeks, the Commission has proposed draft maps both for new legislative and congressional districts. (*Id* ¶¶ 43-44.)

The Commission is now in the midst of a state-wide tour wherein it will meet over two dozen times to receive public input on and discuss the draft maps. (SOF ¶ 22.) In addition to meeting in Phoenix, Tucson, and Flagstaff, the Commission will meet, for example, in Tuba City, Window Rock, Globe, Sierra Vista, and Yuma. (*Id.*) As with all its meetings, the Commission will make live, streaming video of these meetings available via its comprehensive website, www.azredistricting.org. (*Id.*) At every meeting, the Commission's agenda includes time for any member of the public to address the Commission on the record, including by making personal presentations of mapping proposals. (*Id.*) Quite simply, the Commission is the most accessible, open constitutional body in our state.

C. The Attorney General's Investigation Threatens the Independence and Work of the IRC.

In a conspicuous break from the bipartisan support shown for the IRC by Arizona's three prior Attorneys General, Attorney General Tom Horne has personally directed the resources of his powerful office toward "going after the redistricting commission." (SOF ¶ 38.) The Attorney General is conducting, and publicly

promoting, an investigation of the IRC he claims is authorized by Arizona's Open Meeting Law, A.R.S. §38-431 *et. seq* (the "Investigation"). (SOF ¶ 29, 40.) That Investigation, and the peculiarly public manner in which the Attorney General has conducted it, threatens the independence of the Commission, impedes its work, and thereby contravenes the intention of Arizona's voters.

D. Threatened and Eager for Clarity, the Commission has Asked the Courts for Help.

In the face of the Attorney General's unprecedented attack, the Commission turned to the courts for assistance. Both the Commission's constitutional charter and the purposes for which it was enacted make seemingly clear the importance of ensuring that the IRC remains truly independent and free of partisan, self-interested influence by sitting elected officials. The Attorney General, however, has repeatedly and publicly declared that Arizona's Open Meeting Law empowers him to subpoena the IRC's commissioners, compel their testimony about their work on the Commission, ***and to remove them from office***. (*Id.* ¶¶ 29-32; 40-41.) Seeking to vindicate the independence for which it was created, and uninterested in engaging the Attorney General in an unseemly press battle on the issue, the Commission brought a declaratory judgment and special action seeking to resolve the constitutional questions presented by the Attorney General's actions.

E. The Attorney General Claims that the IRC is not Allowed to Ask the Courts to Interpret the Constitution.

The latest salvo in the Attorney General's calculated campaign against the IRC, however, is his insistence that the Commission, even when under attack from his plainly partisan investigation, cannot ask the courts to decide whether he has the power to conduct his investigation. (*Id.* ¶ 46.) The Attorney General has moved to dismiss the IRC's lawsuit, arguing that IRC is not empowered to bring it in the first place. (*Id.*) In effect, the Attorney General's contention is that he and he alone may decide whether and

how the Constitution governs his office. Put differently, the Attorney General seems to believe that the Constitution empowers him to act as the police, the prosecutor, and the judge.

II. The Arizona Attorney General Does Not Have Authority to Conduct the Current Open Meeting Law Investigation into the IRC.

A. The IRC Was Designed by Arizona Voters to be Independent from Political Pressure and Partisan Influence.

The text of Prop. 106, and the circumstances surrounding its adoption, both underscore the singular importance of the IRC's independence. When interpreting a constitutional provision, the court's primary purpose is "to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it." *Heath v. Kiger*, 217 Ariz. 492, 495 ¶ 9, 176 P.3d 690, 693 (2008) (internal quotation and alteration omitted). The title of Prop. 106, as discussed above, makes clear that it was proposed to "end[] the practice of gerrymandering and improv[e] voter and candidate participation in elections by creating an **independent** commission of balanced appointments." (SOF ¶ 2 (emphasis added).) In describing the qualifications for commissioners of the IRC, Prop. 106 proposed, and the constitution now requires, that commissioners be "committed to applying the provisions of this section in an honest, **independent** and impartial fashion…." Ariz. Const. art. 4, pt.2 § 1 (3). Further underscoring the independent nature of service on the Commission, the Constitution requires that commissioners cannot, within the three previous years "have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee." (*Id.* ¶ 10.)

To the extent that the text itself leaves any doubt as to the primacy of independence among the IRC's characteristics, courts "consider the history behind the provision, the purpose sought to be accomplished, and the evil sought to be remedied."

Heath, 217 Ariz. at 495 ¶ 9, 176 P.3d at 693; *see also Jett v. City of Tucson*, 180 Ariz. 115, 119, 882 P.2d 426, 430 (1994). As discussed above, the history of Prop. 106, its purpose, and the evils it sought to address, further confirm the importance of the Commission's independence – especially from incumbent, partisan officeholders. In addition to the reasons for enacting Prop. 106 expressed by our three previous Attorneys General and discussed above, the Arizona School Board Association confirmed in its support of Prop. 106, that 106's purpose was to "remove the redrawing of legislative and congressional district boundaries from those with the greatest conflict of interest, incumbent legislators." (SOF Ex. A at 57.)

The text and history of Prop. 106 both confirm that the IRC was intended to be, and must remain, independent.

B. Preserving its Independence, the IRC's Constitutional Mandate to Conduct Business in "Meetings Open to the Public" Governs its Conduct.

Independence, though the primary characteristic of the IRC, is not the only characteristic the voters sought to constitutionalize via Prop. 106. Indeed, Prop. 106 supporters just as prominently emphasized that the IRC was to conduct its business "[t]hrough open meetings throughout the State…." (SOF ¶ 4.) Therefore the Constitution requires that "[w]here a quorum is present, the independent redistricting commission shall conduct business in meetings open to the public, with 48 or more hours public notice required." (*Id.* ¶ 12.) As partially explained above, the IRC goes to great length, and significant expense to hold meetings throughout our vast state, even in its remote corners. (*Id.* ¶ 14.) The IRC further satisfies its mandate of openness by streaming all its meetings on the internet, by having its meetings transcribed by an official reporter, and by allowing copious opportunities for public comment. (*Id.*) The IRC stands alone among all other constitutional bodies in providing such access and transparency.

The unparalleled extent to which the IRC is open to the public is not surprising in light of the IRC's unprecedented, self-executing, constitutional mandate of openness. *See* Ariz. Const. art. 4 pt. 2, §§ 1 (12) (IRC business must be conducted in "meetings open to the public," (17) (IRC constitutional provisions are self-executing). That mandate of openness is a constitutional imperative shared by no other public board, commission, or body known to the Commission. Certainly, and specifically, it is not shared by any of the public bodies the Attorney General discussed in his odd, and oddly titled, "RESPONSE TO MOTION TO CONSOLIDATE AND MEMORANDUM REGARDING ASSERTIONS IN THE NEW COMPLAINT." Neither the Corporation Commission, the State Board of Education, nor irrigation and improvement districts have a specific, tailored constitutional mandate of openness. *See* Ariz. Const. art. 15, § 6 (Corporation Commission created by constitution but legislature "may prescribe rules and regulations to govern proceedings"); Ariz. Const. art. 11, § 3 (State Board of Education created, but must be conducted as "prescribed by law"); Ariz. Const. art. 13, § 7 (Irrigation and improvement districts created by Constitution but subject to same laws as municipalities); *see also Arizona Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 594-95 ¶¶ 17-19, 208 P.3d 676, 683-84 (2009) (IRC is not merely a "constitutional administrative agency" but "a legislative body").

1. The IRC is Not Subject to the Open Meeting Law Provided in the Arizona Revised Statutes.

The IRC's constitutional mandate of openness has nothing to do with the state's general Open Meeting Law ("OML"); indeed that law does not apply to the IRC. As just discussed, public bodies created in the Constitution yet still subject to the OML are specifically made subject to legislative enactments, like the OML, governing their

conduct. The IRC's self-executing constitutional charter contains no such language. [1]

That the IRC is subject only to its own, uniquely sculpted mandate of openness is clear from the fact that the mandate of openness imposed on the Commission by the Constitution is imposed using different words, imposing different requirements, from those set forth in the generally applicable OML. For example: The OML requires that notice of meetings, including agendas for meetings, for bodies governed by that Law be "posted twenty-four hours before the meeting." (SOF ¶ 13.) But the Constitution requires the IRC to ensure that "48 or more hours public notice" is provided before a meeting. (*Id.*) By way of further example the OML applies to gatherings of a subject body "in person or through technological devices, of a quorum of members...at which they discuss, propose, or take legal action, including any deliberation by a quorum...." (*Id.*) The Constitution requires that the IRC "where a quorum is present...conduct business in meetings open to the public. . . ." (*Id.*)

The Arizona Supreme Court has previously explained, where a statute and a related constitutional provision are in conflict, that where "language of the constitutional provision is plain . . . we may look no further." *State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996). Similarly, it is well established that, in case of a conflict between citizen-enacted constitutional amendments and statutes enacted by the legislature acting through representatives, "the legislative authority, acting in a representative capacity only, was in all respects intended to be subordinate to direct

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[1] To the extent that the Attorney General might later argue that *Roberts v. Spray*, 71 Ariz. 60, 69, 223 P.2d 808, 814 (1950) is to the contrary, he would be wrong. Although *Roberts* notes that the "fact that a constitutional provision is self-executing does not necessarily exhaust legislative power on the subject," *Roberts* also notes that "such legislation must be in harmony with *the spirit of the constitution*." *Id.* (emphasis added). As an initial matter, the legislature has in no way tried to legislate the IRC into the OML. The Attorney General has sought to do that by executive fiat with his Investigation. Furthermore, the *spirit* of Prop. 106 is, as discussed at length here, one of independence and anti-incumbency. A partisan investigation of the IRC under the guise of the OML is the antithesis of the spirit of Prop. 106.

action by the people." *Turley v. Bolin*, 27 Ariz. App. 345 348, 554 P.2d 1288, 1291 (internal citation and quotation omitted).[2]

Here, the language of the Constitution is indeed plain – the IRC must have open meetings when a quorum is present. It does. Neither the Attorney General, nor the courts, can "look further" in order to force upon the IRC and the voters that created it, the requirements of the OML.[3]

2. The Constitution Provides Not Only the Content of the Mandate of Openness, but also the Exclusive Mechanism For Enforcing that Mandate.

The Attorney General says in his Petition that the Commission's "constitutional mandate of openness must be upheld." (Petition at 7.) Agreed. It just is not up to him to do the upholding.

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[2] That the IRC cannot be subjugated to the Attorney General's influence through the use of the OML is also supported by following the related maxim of statutory construction, *expressio unius es exclusio alterius*, the enumeration of specified matters in a constitutional provision usually is construed as an exclusion of matters not enumerated, unless a different intention is apparent. *See Roscoe*, 185 Ariz. at 71, 912 P.2d at 1300 (resolving a claimed conflict between legislative enactment and citizen-enacted constitutional amendment by relying on the plain language of the constitutional provision and applying the "well established rule of statutory construction provides that the expression of one or more items of a class indicates an intent to exclude all items of the same class which are not expressed") (quoting *Pima County v. Heinfeld*, 134 Ariz. 133, 134, 654 P.2d 281, 282 (1982)).

[3] The Attorney General has previously argued that the IRC has subjected itself to his authority under the OML by referencing the provisions of the OML in its agendas and by employing certain procedures often observed by bodies bound by the OML. (SOF ¶ 45.) Nonsense. The IRC's independence is its constitutional birthright. And while the OML is a convenient and permissible reference for the IRC in fulfilling its mandate of openness, that mandate, too, is a constitutional one. The Constitution cannot be amended through a course of dealing. *See* Ariz. Const. art. 21 (setting forth the "Mode of Amending" of the Arizona Constitution, which is limited to amendments proposed by the legislature and approved by the people in a ratification election, amendments proposed by initiative petition, and amendments enacted at a constitutional convention approved by the voters).

To be clear, through the extraordinary diligence and procedures discussed above, the IRC has fulfilled its constitutional mandate of openness. Should the IRC falter, however, the laws and Constitution of Arizona provide specific means by which *any citizen*, not just the Attorney General, can enforce the mandate of openness and the Constitution provides a specific, tailored procedure by which other constitutional officers, just not the Attorney General, can punish individual commissioners for misconduct. The Constitution specifically provides that commissioners of the IRC can be removed from office upon action by the Governor, with the concurrence of two-thirds of the Senate, for "substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office." Ariz. Const. art. 4, pt. 2 § 1 (10).[4]

Simply put, neither Prop. 106, nor Article 4, part 2, section 1 of the Constitution, explicitly empower, or even mention, the Attorney General with respect to any enforcement or investigative power over the acts of the IRC or its commissioners. In fact, the only mention of the Attorney General in Article 4, part 2, section 1 is one which *specifically divests him of responsibilities he otherwise holds. See* Ariz. Const. art. 4, pt. 2 § 1 (20) ("The independent redistricting commission shall have **sole authority** to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan." (emphasis added)). By enacting a specific, exclusive mandate of openness and by providing for enforcement of that mandate through the governor and a super-majority of the legislature, the voters specifically chose to keep the vast general power of the partisan, incumbent Attorney General far away from the Commission. With the Commission's independence similarly in mind, the voters also specifically divested the Attorney General of the power to represent the people in

[4] Indeed, the Governor recently threatened to initiate this constitutional impeachment process against unnamed commissioners unless the draft congressional map adopted by the Commission on October 3, 2011 is adjusted to favor the Republican Party before the final maps are adopted. (SOF ¶ 47.)

litigation involving the redistricting plan. The facts of this case illustrate the wisdom of those choices; the voters' choices should not be second-guessed or judicially overruled.

3. Basic Principles of Separation of Powers Also Confirm that the IRC Cannot be Investigated by the Attorney General Using his General OML Authority.

The Attorney General insists that he is authorized to conduct the Investigation in the manner in which he has conducted it based only on the fact that the Constitution requires the Commission to, when a quorum is present, conduct its business "in meetings open to the public." Ariz. Const. art. 4 pt. 2 §1 (12). That phrase, which is clear on its face, and which is followed by specific provisions effectuating it, does not also function to subject the IRC to the statutory requirements of the OML. In addition to the several reasons explained above for which the Commission is not subject to the general OML, empowering the Attorney General in this fashion would, as aptly demonstrated by the facts of this case, permit the executive branch to interfere in the legitimate functions of the legislative branch – the IRC. *Cf. Mecham v. Gordon*, 156 Ariz. 297, 302, 751 P.2d 957, 962 (1988) (noting that "Article 3 of the state Constitution prohibits judicial interference in the legitimate functions of the other branches of our government. We will not tell the legislature when to meet, what its agenda should be, what it should submit to the people, what bills it may draft or what language it may use. The separation of powers required by our Constitution prohibits us from intervening in the legislative process.").

Article 3 of the Arizona Constitution provides that "[t]he powers of the government of the state of Arizona shall be divided into three separate departments . . . and except as provided in this constitution . . . no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. 3. The Commission is created in Article 4 of the Arizona Constitution, which governs the legislative branch. The Arizona Supreme Court has held that the Commission acts as a legislative body. *Ariz. Minority Coal.*, 220 Ariz. at 595 ¶ 19, 208 P.3d at 683-84. Thus, the Commission is part of the legislative branch of government in contrast to the

Attorney General whose office is created under Article 5 of the Arizona Constitution and is part of the executive branch.

Under this separation of powers doctrine, no other branch can usurp the power of the legislative branch. *See Woods v. Block*, 189 Ariz. 269, 275, 942 P.2d 428, 434 (1997) ("The Arizona Constitution contains a clause specifically dealing with the separation of powers and precluding any department of government from exercising the powers of any other department.") To permit the Attorney General to wield – at his whim and without oversight – the OML as a sword against a co-equal branch of our state's government would eviscerate the separation of powers. If allowed to do so, the Attorney General could, as he has done here, seek to compel testimony and production of documents whenever he disagreed with a decision of the IRC.[5] Such power would, as a practical matter, empanel the Attorney General as a functional czar of the Commission, accountable to no one, yet requiring submission to his whim by everyone on the Commission.

Unsurprisingly, considering the relative youth of the IRC and considering the hoped-for rarity of the Attorney General's behavior in this case, the precise application of the separation of powers doctrine to these facts has not previously been considered by Arizona's courts or by the courts of our sister states. But rulings in other states and in Arizona, on related facts, demonstrate that the constitutional separation of powers mandate proscribes the application of the OML to the Commission.

In *Hughes v. Speaker of the New Hampshire House of Reps.*, 876 A.2d 736, 744 (N.H. 2005), the New Hampshire Supreme Court considered a case in which the plaintiff claimed that ***both*** the New Hampshire open meeting law (referred to as the "Right to Know Law") ***and*** a New Hampshire constitutional mandate of openness were violated by members and the speaker of the New Hampshire House of Representatives.

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[5] That he began his Investigation here because of his disagreement with the selection of the IRC's mapping consultant is clear from, among other things, his own comments at the September 8, 2011 political meeting. (*See* SOF ¶¶ 36-41.)

Surveying cases, the New Hampshire court noted that "[c]ourts throughout the country have found that whether a legislature has violated the procedures of a state right-to-know law is not justiciable." *Id.* (collecting cases).

The New Hampshire court explained these holdings by first quoting the Wisconsin Supreme Court, which has held that, owing to separation of powers concerns, "courts generally consider that the legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution." *Id*. at 744 (quoting *State ex rel. La Follette v. Stitt*, 338 N.W.2d 684, 687 (Wis. 1983)); *see also Ozanne v. Fitzgerald*, 798 N.W.2d 436, 440 (Wis. 2011), (also refusing to enforce state open meeting law against legislature citing separation of powers concerns)). The New Hampshire court discussed and quoted from a Tennessee appellate decision in which the question was whether the legislature "had violated the state open meetings act." *Hughes*, 876 A.2d at 745 (citing *Mayhew v. Wilder*, 46 S.W. 3d 760 (Tenn. Ct. App. 2001)). The Tennessee court refused to apply the statute to the legislature, holding, on separation of powers grounds, that "it is constitutional, and not statutory, prohibitions which bind the legislature." *Id.* at 770. Following the logic of *Mayhew*, the court in *Hughes*, refused to subject the legislature to the statutory Right to Know Law, but made clear that while claims to enforce a statutory open meeting obligation against the legislature were "nonjusticiable," "[**c]laims regarding compliance with [the] mandatory constitutional [openness] provisions are justiciable**." *Hughes*, 876 A.2d at 747 (emphasis added).

Holding the IRC subject to its constitutional mandate of openness but not to the statutory OML, as did the courts in the cases just discussed, is precisely the outcome prayed for in the Commission's declaratory judgment action, and it is the outcome required. And while not previously confronted with the exact issue posed by this case, our own Supreme Court has already held that legislative bodies formed under our state's

Constitution cannot be forced to submit to judicial enforcement of statutes and procedural rules. Specifically, when asked to review the Arizona Senate's "impeachment trial procedures and rules" in the matter of the impeachment of Governor Mecham, our Supreme Court refused to do so. *Mecham v. Gordon*, 156 Ariz.297, 302, 751 P.2d 957, 962 (1988). The Arizona Supreme Court went on to hold, however, that the "Court does have power to ensure that the legislature follows the constitutional rules on impeachment." *Id.* In other words, constitutional mandates, like the mandate of openness in Article 4, Part 2 Section 1 (12), can be enforced through the courts against the Commission; statutory mandates, like the OML, cannot.

III. Even if the Attorney General Was Authorized to Conduct the Current OML Investigation, the Investigative Demands Issued by the Attorney General Invade the Commissioners' Legislative Privilege.

A. IRC Commissioners Hold Legislative Privilege.

In the last redistricting cycle, Arizona's courts established that the IRC commissioners "are cloaked with legislative privilege for actions that are an 'integral part of the deliberative and communicative processes' utilized in developing and finalizing a redistricting plan[.]" *Arizona Indep. Redistricting Comm'n v. Fields*, 206 Ariz. 130, 139 ¶ 24, 75 P.3d 1088, 1097 (App. 2003). As explained in *Fields*, legislative immunity derives from the common law and is embodied in both the federal and state constitutions. *Id.* at 136–37 ¶¶ 15-16, 75 P.3d at 1094-95. Particularly notable in light of the history of the Attorney General's Investigation, is that legislative immunity was born "to prevent intimidation by the executive . . . ." *United States v. Johnson*, 383 U.S. 169, 181 (1966). The doctrine recognizes that our scheme of government depends upon the independent functioning of the three branches of government, and that courts should not generally "inquire into the motives of legislators." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998); *see also Gravel v. United States*, 408 U.S. 606, 624 (1972). Thus, legislative immunity bars both criminal and civil liability for legislative acts, and legislative privilege serves as a testimonial and evidentiary privilege. *Fields*, 206 Ariz.

at 138-39 ¶¶ 20-24, 75 P.3d at 1096-97. Accordingly, the commissioners cannot be required either to produce documents or answer questions, whether in a deposition or on the witness stand. *See id*. at 140–41 ¶ 32, 75 P.3d at 1098-99 (citing *Marylanders For Fair Representation, Inc v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992)).

B. The Discussions into which the Attorney General Seeks to Inquire are Within the Legislative Privilege of the IRC Commissioners.

To be sure, legislative immunity is not absolute; it does not protect every action of a legislator. In the specific context of the IRC, the Arizona Court of Appeals has explained that legislative privilege protects only those actions that are "an integral part of the deliberative and communicative processes utilized in developing and finalizing a redistricting plan, and when necessary to prevent indirect impairment of such deliberations." *Id.* at 139 ¶ 24, 75 P.3d at 1097. In other words, the legislative privilege only protects conduct relating to the legislative process and does not protect political or administrative tasks. *See id*. (citing *Gravel*, 408 U.S. at 625). Activities that are not legislative "include a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *United States v. Brewster*, 408 U.S. 501, 512 (1972). These activities are considered political and not legislative in nature.

The ultimate purpose of the IRC is to draw congressional and legislative maps for Arizona's elections. *See* Ariz. Const. art. 4 pt. 2 §1 (14). But the citizen-volunteer commissioners of the IRC likely cannot do this work alone. Because the work requires the commissioners to learn and act upon such complex and diverse considerations as population data, voter registration data, geographic boundaries, and legal concerns, Article 4, Part 2, Section 1 (19) of the Arizona Constitution specifically empowers the Commission to hire staff, consultants and attorneys, without whom the technical,

intricate work of mapping could not be accomplished by a group of citizen-volunteers. (SOF ¶ 18.)

By the Attorney General's own admission, the Investigation seeks to inquire into considerations and deliberations integral to the mapping work of the Commission. The Attorney General's Petition for Enforcement ("Petition"), the pleading that began this now-consolidated case, sets forth at length the Attorney General's theory about how the commissioners deliberated or negotiated over one of the first decisions in the process of drawing legislative maps – the decision to retain Strategic Telemetry as its mapping consultant. (Petition at 9-11.) His Investigation seeks the production of documents and seeks to compel testimony from commissioners about these deliberations – deliberations requiring the commissioners to consider and decide upon the technical merits of various approaches to map-drawing presented by the candidates for the mapping consultancy. (SOF ¶¶ 23, 30.)

The Attorney General's Petition claims, supported only by a general citation to one non-controlling case, that the deliberations of the commissioners regarding the mapping consultancy are not within their legislative privilege. (Petition at 14.) Not true. The lone case relied on by the Attorney General, *Cinevision v. Burbank*, 745 F.2d 560 (9th Cir. 1984) held that city councilmen did not enjoy legislative immunity when approving particular musical acts at a city concert venue for which a contract had previously been awarded to a particular concert promoter. The Ninth Circuit in *Cinevision* based its holding on the fact that the city council was "simply monitoring and administering the contract by voting on the various proposed concerts." *Id.* at 580.

Far from the ancillary nature of the Burbank City Council's approval of concerts in a public space, the integral nature of the mapping consultancy to the IRC's core purpose places the commissioners' deliberations about it squarely within the commissioners' legislative privilege. The selection of a mapping consultant is fundamental to the IRC's work. The Commission literally could not fulfill its

constitutional duties without its mapping consultant. Thus, it is not surprising that the Arizona Court of Appeals has already established that the "acts of independent contractors retained by that legislator that would be privileged legislative conduct if personally performed by the legislator." *Fields*, 206 Ariz. at 140 ¶ 30, 75 P.3d at 1098.

And while no Arizona court has confronted the precise issue posed in the Attorney General's Investigation, the U.S. District Court for the Northern District of Illinois has explained, when confronted with the exact question of whether retaining aids needed for core legislative functions is within the legislative privilege that,"[t]o the extent that such aids or assistants have some opportunity for meaningful input into the legislative process, this Court believes that the decision to hire or fire such aids or assistants is within the sphere of legitimate legislative activity." *Hudson v. Burke*, 617 F. Supp. 1501, 1511 (N.D. Ill. 1985).

The sole purpose for which the Commission exists is to draw Arizona's legislative and congressional maps. That work requires the assistance of a mapping consultant – a consultant who, while controlled and directed by the commissioners, clearly has "meaningful input" into the mapping process. The selection of that consultant and the deliberations surrounding that consultant, are legislative acts and are within the legislative privilege. The Investigation, by intruding on the legislative privilege of the members of the Commission, is unlawful and in excess of the authority granted to the Attorney General by the Constitution and laws of Arizona.

IV. The IRC has Standing to Sue in Order to Fulfill its Constitutional Mandate of Independence.

The IRC's suit asks the court to determine the scope of the independence that was and remains at the core of its founding. Specifically, the suit asks whether the independence of one constitutional body can, pursuant to Arizona's generally enacted OML, be compromised by the Attorney General. Oddly, in light of the significant, foundational questions of constitutional interpretation presented by the IRC's lawsuit, the Attorney General has moved to dismiss that suit on the grounds that the IRC lacks

the ability to bring it. That can't be.

As confirmed by the U.S. Supreme Court in *Marbury v. Madison*, 5 U.S 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is… If two laws conflict with each other, the courts must decide on the operation of each." *Id.* Here, the IRC asks the courts to do exactly that – "say what the law is." The IRC's Complaint makes clear that "if Arizona's courts decide that the Attorney General, under the OML, is both empowered and qualified to enforce that law against the IRC, then the Commission and its commissioners will comply." (Compl. ¶ 34.) Following the principles and direction of *Marbury*, though, the IRC's complaint also notes that "one person—an elected, executive branch official being overtly urged on by partisan critics of the Commission—should not be allowed to unilaterally make that decision." (*Id.*) Why the Attorney General believes that he can insulate his conduct against a coordinate branch of government from judicial scrutiny is, candidly, vexing.

More specifically, though, the Attorney General's Motion to Dismiss must be denied for several other reasons: (1) the Commission alleges a distinct and palpable injury at the hands of a coordinate branch of government and therefore has standing under Arizona's general standing rules; (2) the Court may and should address the merits of this action, notwithstanding any question regarding standing, to resolve the significant constitutional issues raised by the Commission with respect to its authority in relation to the Attorney General and (3) the Arizona Constitution specifically provides the Commission standing "in all legal actions regarding the redistricting plan," which by necessity includes an action defending the very independence for which the Commission was designed.

A. The IRC Has Standing Pursuant to its Constitutional Charter.

The Commission's constitutional charter itself empowers the Commission to conduct litigation "regarding the redistricting plan." Ariz. Const. art. 4, pt. 2, § 1 (20). The Commission was established "to provide for the redistricting of congressional and

state legislative districts." *Id.* at § 1 (3); *Ariz. Minority Coalition*, 220 Ariz. at 592 ¶ 5, 208 P.3d at 681 ("The sole task of the Commission is to establish congressional and legislative districts."). The Attorney General's insistence on "going after the Redistricting Commission" (SOF ¶ 38) in an attempt to remove one or more commissioners from office (*Id.* ¶ 41) threatens to impede the Commission from even formulating a redistricting plan. Thus, the express language of its constitutional charter empowers it to bring this action, which seeks a declaration regarding the scope of its authority under Article IV, Part 2, Section 1 of the Arizona Constitution.

B. Arizona Does Not Have a Constitutional Standing Requirement, and the IRC Satisfies the Prudential Requirements for Standing.

Under Arizona law, standing is not a constitutional requirement necessary to give a court jurisdiction. *See, e.g.*, *Bennett v. Brownlow*, 211 Ariz. 193, 195 ¶ 14, 119 P.3d 460, 462 (2005); *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 24, 961 P.2d 1013, 1019 (1998). "Unlike the Constitution of the United States, the Arizona Constitution does not require a party to assert an actual 'case or controversy' in order to establish standing. . . . The Arizona requirement that plaintiffs establish standing is prudential and constitutes an exercise of judicial restraint." *Bennett*, 211 Ariz. at 195 ¶ 14, 119 P.3d at 462 (internal citations and quotation marks omitted). The IRC's action satisfies the usual, prudential rules of standing.

To establish standing to sue in Arizona state court, a plaintiff must show a particularized injury. *Id.* at 196 ¶ 17, 119 P.3d at 463. As described in the Complaint, the IRC has suffered a particularized injury here. The Attorney General has taken the position that the Commission is subject to his oversight with respect to the Open Meeting Law and is subject to all of the enforcement measures available under that statute. As discussed above, the Investigation itself (not to mention the statutory penalties the Attorney General contends are applicable) is doing violence to the independence of the Commission. (*See, e.g.*, Compl. ¶¶ 33, 41.) The threat to the

Commission's independence – an entity the Constitution expressly identifies as an ***independent*** body – is a distinct and palpable injury. (*See, e.g., id.* at ¶¶ 33, 41, 74) (Investigation is impeding and will impede work of the Commission and Attorney General is considering removing commissioners from office under OML). Moreover, the Attorney General does not even attempt to address the well-established Arizona law on standing, nor does he mention whether or not the IRC's complaint alleges an injury. This is because there is no dispute that the IRC's Complaint alleges a distinct and palpable injury. The IRC has standing to bring this suit.

C. The Cases Cited by the Attorney General Demonstrate that the IRC Has Standing.

The Commission is charged by the Constitution with a task fundamental to our representative democracy – the drawing of congressional and legislative district maps. As a matter of law and of logic, the Commission must be able to seek relief from the courts to protect itself when its ability to do its work is threatened, no matter where that threat comes from. In other words, it must be able to sue when faced with a "distinct and palpable injury" like those just discussed. *See Sears*, 192 Ariz. at, 69 ¶ 16, 961 P.2d at 1017.

Because the precedents on standing make clear that the IRC has the power to bring its action in defense of its constitutional obligations, the Attorney General's arguments to the contrary ignore those precedents and attempt to rest, instead, on inapposite authorities or on a misreading of the cited authorities. For example, in *Arizona Corp. Comm'n v. Woods*, 171 Ariz. 286, 830 P.2d 807 (1992) and *Burlington N. and Santa Fe Ry. Co. v. Arizona Corp. Comm'n*, 198 Ariz. 604, 12 P.3d 1208 (App. 2000), Arizona's courts were asked to determine the scope of the Corporation Commission's regulatory powers as specified in the Constitution. The Corporation Commission's authority to sue was not at issue.

In fact, *Woods* itself confirms that the IRC can bring this action, which asks the Court to resolve a dispute with a coordinate branch of government over the scope of its powers. *Woods* involved a dispute between the Arizona Corporation Commission and the Attorney General regarding the scope of the Corporation Commission's powers. 171 Ariz. at 286, 830 P.2d at 807. The Corporation Commission's constitutional charter, found in Article 15 of the Arizona Constitution, did not explicitly authorize the Corporation Commission to bring its action. If, as the Attorney General argues here, the lack of explicit authorization was a jurisdictional bar to pursuing the action, the Corporation Commission's action would have been dismissed. *See, e.g.* Ariz. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *Rojas v. Kimble*, 89 Ariz. 276, 361 P.2d 403 (1961) (Subject matter jurisdiction cannot be waived, and can be raised at any stage of the proceedings.). But the Supreme Court in *Woods* addressed the merits of that dispute without ever questioning either its jurisdiction or the Corporation Commission's standing. *Woods* then confirms that a constitutionally chartered body has standing to sue, at least when the suit asks for a determination of the scope of the body's constitutional powers.[6] To hold otherwise would leave an agency powerless to ascertain the scope of its own powers and authority in court.

The Attorney General's attempt to prevent the court from scrutinizing his actions also finds no support in the cases he cites discussing the State Board of Education. For example, *Harkins v. School Dist. No. 4 of Maricopa Cnty.*, 79 Ariz. 287, 288 P.2d 777 (1955) and *Mirkin v. School Dist. No. 38 of Maricopa Cnty.*, 4 Ariz. App. 473, 421 P.2d 906 (1967) address the scope of the powers of the State Board of Education. These

[6] *Burlington N.*, also relied upon by the Attorney General, is to the same effect. The case involved a lawsuit in which the Corporation Commission was a party. There was no question raised regarding the Corporation Commission's standing to sue or be sued. 198 Ariz. 604, 12 P.2d 1208.

cases have nothing to do with standing. Another case cited by the Attorney General involving the State Board of Education, *Kimball v. Shofstall*, 17 Ariz. App. 11, 494 P.2d 1357. (App. 1972), also raises the issue that the constitutional and statutory provisions creating the Board do not explicitly provide that the Board has the capacity to sue. *Id.* at 13, 494 P.2d at 1359. As with the cases involving the Corporation Commission, however, this case does not stand for the proposition that the Board cannot be a party to a lawsuit. In fact, the State Board of Education is often a party to litigation – typically represented by the Attorney General. *See, e.g.*, *Winters v. Ariz. Bd. of Educ.*, 207 Ariz. 173, 83 P.3d 1114 (App. 2004); *Shelby School v. Ariz. State Bd. of Educ.*, 192 Ariz. 156, 962 P.2d 230 (App. 1998). *Kimball* decided only that, on the facts before the court in that matter, the Board was not a necessary party to a lawsuit against individual Board members. 17 Ariz. App. at 13, 494 P.2d at 1359.

D. Even if the Court had Standing Concerns, they Should be Waived.

Because the standing requirement is not jurisdictional, the court may exercise its discretion to waive it in appropriate circumstances. *Bennett*, 211 Ariz. at 196 ¶ 16, 119 P.3d at 463; *Sears*, 192 Ariz. at 71 ¶ 24, 961 P.2d at 1019.[7] Although waiver is a narrow exception to the general, prudential rule of standing, it is appropriate if a case presents an issue of great public importance that will be fully developed between true adversaries, and would not involve the Court in issuing an advisory opinion or in a case that is not yet ripe. *See Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs in Ariz.*, 148

[7] The Attorney General has conflated the related, but separate, concepts of subject matter jurisdiction and standing. His motion begins by stating that the IRC "lacks standing to bring this action and thus, there is no subject matter jurisdiction." (Motion to Dismiss at 1.) As one leading commentator has explained "[a]n issue related to, but also quite distinct from, that of subject matter jurisdiction is that of 'standing to sue'." Daniel J. McCauliffe, Ariz. Civ. R. Handbook 204 (2011 ed.). That commentator goes on to succinctly explain that because Arizona's Constitution "does not have a 'case or controversy' requirement such as is found in the federal constitution, the [standing] issue is not one of constitutional dimension." *Id.*

Ariz. 1, 6, 712 P.2d 914, 919 (1985); *see also Sears*, 192 Ariz. at 71, ¶ 25, 961 P.2d at 1019.

This case is precisely the type of dispute that the Court should address on the merits notwithstanding any question regarding standing. It involves a dispute regarding the respective powers and authority of two constitutionally created entities, the Attorney General and the IRC. Whether the Attorney General may seek to enforce the OML against a commission specifically created in the Constitution to be an independent entity with carefully defined oversight by offices and agencies other than the Attorney General is a matter of great significance. The Arizona Supreme Court addressed the merits of a similar dispute in ***Rios v. Symington***, 172 Ariz. 3, 833 P.2d 20 (1992). In that case, a dispute arose between the Governor and the President of the Senate regarding the boundaries of the Governor's line-item veto authority. Despite "potential standing issues," the Supreme Court addressed the merits of the dispute because it involved a "dispute at the highest levels of state government" and the issues were substantial and presented matters of first impression. ***Id.*** at 5, 833 P.2d at 22. To the extent the Court were to believe there was a standing issue here – and there is not – the Court should exercise the same discretion demonstrated in ***Rios*** for the same reason.

V. Conclusion.

For the foregoing reasons, the IRC respectfully requests that this Court grant its Motion for Summary Judgment on its Verified Complaint. Specifically, the IRC requests:

1. A judgment declaring:

    a. That, as concerns the need for its business to be publicly conducted, the IRC is subject only to the specific constitutional provisions of Article IV, Part. 2, Section 1, requiring that, "where a quorum is present" it "conduct business in meetings open to the public."

b. That the exclusive vehicle in which to raise alleged violation of the IRC's constitutional "open to the public" mandate is a civil action brought by any citizen with standing against the IRC to enforce Article IV, Part 2, Section 1(12) of the Arizona Constitution.

c. That no mechanism for punishing an individual commissioner of the IRC for violating the "open to the public" mandate exists, except that if such a violation rises to the level of "substantial neglect of duty [or] gross misconduct in office," the commissioner may be subject to a removal proceeding under Article IV, pt. 2, sec. 10.

d. That the OML, while a permissible reference for the conduct of the IRC, is unenforceable against the IRC.

e. That the Attorney General lacks the power to investigate members of the IRC for alleged violations of the OML.

f. The mapping work and deliberations related thereto, including the deliberations regarding the hiring of a mapping consultant, are covered by legislative privilege.

g. The Investigation, by intruding on the legislative privilege of the members of the Commission, is unlawful and in excess of the authority granted to the Attorney General by the Constitution and laws of Arizona.

2. An order for injunctive relief prohibiting the Attorney General from investigating the IRC or its commissioners under the OML.

Additionally, for the reasons stated herein, the IRC requests that the Attorney General's Motion to Dismiss be denied because the IRC has standing to bring this lawsuit.

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RESPECTFULLY SUBMITTED this 19th day of October, 2011.

OSBORN MALEDON, P.A.

/s/ Jean-Jacques Cabou
Mary R. O'Grady
Jean-Jacques Cabou
Kristin L. Windtberg
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793

BALLARD SPAHR, LLP
Joseph A. Kanefield
Jaclyn D. Foutz
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555

Attorneys for Plaintiff

ORIGINAL of the foregoing electronically filed and a COPY electronically mailed this 19th day of October, 2011, to:

The Honorable Dean Fink
Maricopa County Superior Court
125 West Washington, OCH 202
Phoenix, AZ 85003

Thomas C. Horne
Mark D. Wilson
Office of the Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
mark.wilson@azag.gov

Paul K. Charlton
Kiersten A. Murphy
Gallagher & Kennedy, P.A.
2575 E. Camelback Road
Phoenix, AZ 85016
paul.charlton@gknet.com
kam@gknet.com
Attorneys for Commissioner Colleen Mathis

Andrew S. Gordon
Roopali H. Desai
Coppersmith Schermer & Brockelman PLC
2800 N. Central Avenue, Suite 1200
Phoenix, AZ 85004
agordon@csblaw.com
rdesai@csblaw.com
Attorneys for Commissioner Linda McNulty

Timothy A. Nelson
Tim Nelson, PLLC
Citiscape Executive Suites
1 E. Washington Street, Suite 500
Phoenix, AZ 85004
tim@timnelsonpllc.com
A*ttorneys for Commissioner Jose Herrera*

Joseph A. Kanefield
Jaclyn D. Foutz
Ballard Spahr, LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555
kanefieldj@ballardspahr.com
foutzj@ballardspahr.com
Co-Counsel for Arizona Independent Redistricting Commission

/s/ J. Lopez

3894228