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Attorneys for the Arizona Independent Redistricting Commission and Commissioners Mathis, McNulty, Herrera, Freeman, and Stertz solely in their official capacities

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Wesley W. Harris, *et al.*, Plaintiffs, vs. Arizona Independent Redistricting Commission, *et al.*, Defendants.	No.: 2:12-CV-00894-ROS-NVW-RRC **DEFENDANTS ARIZONA INDEPENDENT REDISTRICTING COMMISSION AND COMMISSIONERS MATHIS, MCNULTY, HERRERA, FREEMAN, AND STERTZ'S MOTION TO DISMISS** **ORAL ARGUMENT REQUESTED** (Assigned to three-judge panel)

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Defendants Arizona Independent Redistricting Commission and Commissioners Mathis, McNulty, Herrera, Freeman, and Stertz solely in their official capacities (collectively, the "Commission") move, pursuant to Rules 12(b)(6) and 8 of the Rules of Civil Procedure, to dismiss Plaintiffs' First Amended Complaint (the "Complaint").

INTRODUCTION

> "[R]edistricting . . . legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978).

Consistent with the deference routinely and properly accorded by courts, where the maximum population deviation between state legislative districts is less than 10%, the deviation is considered "minor," and the Court presumes that the legislative map satisfies the one-person, one-vote principle. *E.g.*, *Brown v. Thomson*, 462 U.S. 835, 842-43

(1983). This presumption can be rebutted only if Plaintiffs show that the population deviations at issue result *solely* from an unconstitutional or irrational state policy. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y.), *summarily aff'd*, 543 U.S. 997 (2004). Despite Plaintiffs' extensive and immaterial criticism of the Commission, their sole legal challenge is to minor population deviations in Arizona's legislative map. But the Complaint does not and cannot rebut the presumption of constitutionality.

Both the Complaint itself and the legislative record of the Commission's activity establish that the minor population deviations result from rational and legitimate state policies, including compliance with Section 5 of the Voting Rights Act and the other goals articulated in article IV, part 2, section 1(14) of the Arizona Constitution. For example, nine of the eleven underpopulated districts are "Voting Rights Districts," *i.e.* those in which minorities have the ability to elect candidates of choice for purposes of Section 5 of the Voting Rights Act, and the remaining two are, by Plaintiffs' own description, competitive districts. (Dkt. 35, First Amended Complaint ("FAC") ¶ 149.)

Plaintiffs allege that the population deviations are the result of Democratic partisan bias by the Commission. No court, however, has struck down a state legislative map based solely on claims of partisanship, and *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *summarily aff'd*, 542 U.S. 947 (2004), on which Plaintiffs primarily rely, does not hold otherwise. The unsupported allegations of bias also are factually flawed because the Complaint itself establishes that the map favors Republicans. *See Gaffney v. Cummings*, 412 U.S. 735, 752 (1973) (upholding a map drawn to "achieve a rough approximation of the statewide political strengths" of Democrats and Republicans).

Plaintiffs' claim based on the Arizona Constitution's goal of districts of equal population to the extent practicable (the "Arizona Equal Population Goal"), which simply mirrors the federal law, fails for identical reasons. Ariz. Const. art. IV, pt. 2, § 1(14)(B).

Finally, even if the Court does not dismiss the Complaint for its failure to state a claim on which relief may be granted, Rule 8 justifies the dismissal of the Complaint, which is replete with improper and impertinent allegations.

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FACTUAL BACKGROUND[1]

A. The Arizona Constitution Establishes the Commission As an Independent Body That Follows a Four-Step Process When Creating the Legislative Map.

In 2000, Arizona voters passed Proposition 106, which created the Independent Redistricting Commission, thereby removing redistricting from the Legislature and Governor and placing it in the hands of an independent, politically-balanced group of citizen-volunteers. *See* Ariz. Const. art. IV, pt. 2, §§ 1(3)-(23). Two Democrats (Ms. McNulty and Mr. Herrera), two Republicans (Messrs. Freeman and Stertz), and an Independent chair (Ms. Mathis) serve on this Commission. (FAC ¶¶ 16, 24; Dkt. 35-1, Plaintiffs' Exhibit ("Pl. Ex.") 1; Motion to Dismiss Exhibit ("Ex.") 1 at 55-56.[2])

Arizona's Constitution establishes a four-phase redistricting process. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 597 ¶ 29, 208 P.3d 676, 686 (2009). First, the Commission creates "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. IV, pt. 2, § 1(14). Party registration and voting history data are excluded in this phase. *Id.* § 1(15). Next, the Commission adjusts the grid map "as necessary to accommodate" the following six goals: (A) "compl[iance] with the United States Constitution *and the United States voting rights act*"; (B) "equal population *to the extent practicable*"; (C) "geographic[] compact[ness] and contiguous[ness] to the extent practicable"; (D) "respect [for] communities of interest to the extent practicable"; (E) use of "visible geographic features, city, town and county boundaries, and undivided census tracts" to the extent practicable; and (F) to "the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals." *Id.* § 1(14) (emphasis added).

After adjusting for the six constitutional goals, the Commission enters the third phase, "advertis[ing] a draft map" for at least 30 days. *Id.* § 1(16). In the fourth and final

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[1] The facts presented here are either the facts as alleged by Plaintiffs or are based on information in the public record that the Court may properly consider. The Commission is filing concurrently with this Motion a Request for Judicial Notice, requesting that the Court take judicial notice of the materials attached to and supporting this Motion.

[2] Citations to the Exhibits are to the internal page numbers of each exhibit.

phase, the Commission establishes final district boundaries and certifies the districts to the Secretary of State. *Id.* § 1(17). Throughout the process, "[t]he places of residence of incumbents or candidates shall not be identified or considered." *Id.* § 1(15).

B. The Commission Complied with Arizona's Constitutional Requirements in Creating the Legislative Map.[3]

Plaintiffs do not assert a violation of any of the above-stated requirements except the Arizona Equal Population Goal. The Commission completed the initial phase by adopting a grid map on August 18, 2011 by a four-to-one vote, with Mr. Herrera voting against the map. (FAC ¶ 74; Pl. Ex. 7, 8/18/11 Tr. at 51.) In phase two, which took place between August 18 and October 10, 2011, the Commission adjusted the grid based on the state constitutional criteria to develop a draft legislative map. (FAC ¶¶ 75-85.) After extensive public comment and adjustments to the grid map, the Commission approved the draft legislative map on October 10, 2011, by a vote of four to one, with Mr. Stertz voting against the map. (Ex. 2, 10/10/11 Tr. at 209:12-210:2; Pl. Ex. 9, Draft Leg. Map.)

In the third phase, the Commission advertised the map, accepted public comment for over 30 days, and held 30 public hearings throughout the State. (FAC ¶ 91.) From November 29, 2011 through January 17, 2012, the Commission completed the fourth phase by modifying the draft map to arrive at the final map. (*Id.* ¶¶ 104-05.) At this phase, all changes were either documented by change orders that the mapping consultant prepared and that the Commission discussed and approved at public meetings or made during a public session of the Commission. (*See, e.g.*, Ex. 3, 12/5/11 Tr. at 154:7-158:4 (discussing change to District 2 described in Paragraph 104 of the Complaint).)

At the first meeting concerning adjustments to the draft map, the Commission received advice from its voting rights consultant, Bruce Adelson,[4] that it could underpopulate Voting Rights Districts relative to other districts to help ensure that the

[3] The Commission's work in extensive public meetings over several months is documented by transcripts, video recordings, maps, and data. All of this information was and continues to be available on the Commission's website (www.azredistricting.org).

[4] Mr. Adelson is a former U.S. Department of Justice ("DOJ") Senior Attorney, whose team wrote the May 20, 2002 objection letter regarding Arizona's legislative map.

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map would not retrogress and would meet the Commission's burden under Section 5 of the Voting Rights Act. (Ex. 4, 11/29/11 Tr. at 93:13-94:25; Ex. 5, 11/30/11 Tr. at 16:18-22.)[5] The Commission followed this advice and also looked at many other factors when creating Voting Rights Districts. (*E.g.*, Ex. 1 at 56-133; Ex. 6, 12/20/11 Tr. at 220:21-221:4.) The Commission, on December 20, 2011, approved a "tentative final" map, referred it to its expert for additional analysis on whether ten proposed districts were Voting Rights Districts, and directed the mapping consultant to identify any needed technical changes. (*Id.* at 260:11-262:23.) This map was approved by a three-to-two vote, with Messrs. Herrera and Freeman voting against it. On January 17, 2012, the final map, which included only technical changes to the tentative final map, was approved by a three-to-two vote, this time with Messrs. Stertz and Freeman voting against it. (Ex. 7, 1/17/12 Tr. at 43:2-8, 52:17-24; Ex. 1 at 34-36, Final Map.) The final map had a maximum population deviation of 8.8%: the difference between District 7, which is underpopulated by 4.7%, and District 12, which is overpopulated by 4.1%. (*See* Pl. Ex. 13.)

Although Republicans comprise 54.4% of registered voters who are either Republicans or Democrats,[6] 56.7% of the districts contain a Republican plurality (17 out of 30). (FAC ¶¶ 109-10 (defining a Republican-plurality district as one "in which more voters are registered with the Republican Party than with any other party").) Democrats comprise 45.6% of registered voters who are either Democrats or Republicans, and 43.3% of districts contain a Democratic plurality (13 out of 30). (*Id.* ¶ 113.[7]) According

[5] It is common to underpopulate Voting Rights Districts. In its Memorial criticizing the Commission's work, the Legislature noted that last decade the State's Independent Redistricting Commission "underpopulated the legislative majority-minority districts to meet Voting Rights Act benchmarks." (Pl. Ex. 10 at 2:12-14.)

[6] *See* Ex. 8 (Sec'y of State's June 1, 2012 voter registration report, http://www.azsos.gov/election/voterreg/Active_Voter_Count.pdf).

The Republican percentage is the number of registered Republicans divided by the sum of registered Republicans and Democrats. The Democratic percentage is the number of registered Democrats divided by the sum of registered Republicans and Democrats. Voters not registered as Republican or Democrat are excluded.

[7] Although Paragraph 113 erroneously lists District 13 as a Democratic-plurality district, Paragraph 110 correctly lists it as Republican-plurality. This is shown by the fact that District 13 is 41.2% Republican and 25.3% Democrat. (Pl. Ex. 14.) Also, two of the

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to Plaintiffs, only one of the 17 Republican-plurality districts is competitive, District 18. (*Compare id.* ¶ 110, *with id.* ¶ 149.) Plaintiffs define a competitive district as one in which "a candidate of either party with a reasonably well-run campaign ha[s] a chance of winning election." (*Id.* ¶ 148.) Thus, based on Plaintiffs' allegations, the final map essentially assures that 16 of the 30 legislative districts (53.33%) will elect Republicans. Plaintiffs also consider three of the 13 Democratic plurality districts to be competitive, Districts 8, 9, and 10. (*Compare id.* ¶ 113, *with id.* ¶ 149.) Thus, based on Plaintiffs' allegations, the final map essentially assures that only ten of the 30 legislative districts will elect Democrats. Under Plaintiffs' characterization of the districts, the Republicans could elect candidates in 16 to 20 of the 30 legislative districts, and the Democrats could elect candidates in ten to 14 districts.

C. The Final Map's Compliance with Section 5 of the Voting Rights Act Was Confirmed by the United States Department of Justice.

The final map includes ten Voting Rights Districts: Districts 2, 3, 4, 7, 19, 24, 26, 27, 29, and 30. (Ex. 1 at 76.) The Commission was advised to attempt to create ten such districts to avoid retrogression. (Ex. 4, 11/29/11 Tr. at 105:5-8.) The Commission's effort to comply with the Voting Rights Act was validated when the Department of Justice ("DOJ") precleared the final map on April 26, 2012, allowing the State to implement its new districts, 28 C.F.R. § 51.1(a)(2). (Ex. 9, DOJ Preclearance Letter.)

ARGUMENT

I. PLAINTIFFS' FEDERAL EQUAL PROTECTION CLAIM FAILS.

Plaintiffs' cause of action under the federal Equal Protection Clause should be dismissed because Plaintiffs fail to state a valid claim based on a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). It is fundamental that Plaintiffs are required to plead "sufficient factual matter, accepted as true, to 'state a

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(...continued)
other districts that Plaintiffs identify as containing a Democratic plurality, Districts 19 and 26, in fact have a plurality of voters registered as other than Republican or Democrat. (*Id.*) This Motion will omit District 13 from the list of Democratic-plurality districts, but will count Districts 19 and 26 because they are listed in Paragraph 113.

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claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Conclusory allegations are insufficient to state a claim. *Id.*

Even if Plaintiffs' allegations were true, their claim fails because no court has ever invalidated a state legislative map with minor population deviations based solely on allegations of partisan political motivations. Such a claim is particularly implausible when the map actually favors, albeit slightly, Plaintiffs' political interests. *Cf. Davis v. Bandemer*, 478 U.S. 109, 127, 139 (1986) (requiring showing of "actual discriminatory effect" and intent such that plaintiffs have "essentially been shut out of the political process" to establish partisan gerrymandering). Moreover, the Complaint itself and the public record show that the Commission applied legitimate redistricting criteria in drafting the map. As such, the Complaint should be dismissed. *See Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 315 (E.D.N.Y. 2003) (dismissing complaint and finding that "the alleged political motivation . . . does not, standing alone, implicate the equal protection clause"); *see also NAACP v. Snyder*, Civ. No. 11-15385, 2012 WL 1150989, at *14-*15 (E.D. Mich. Apr. 6, 2012) (dismissing complaint where "Plaintiffs' allegations are facially insufficient to support the legal theories they raise and are otherwise too factually underdeveloped to proceed past the pleading stage").

A. Plaintiffs' Complaint Cannot Overcome the Legislative Map's Presumption of Constitutionality.

It is well-established that a legislative map with a maximum population deviation under 10% is presumptively constitutional. *E.g.*, *Brown*, 462 U.S. at 842.[8] Courts that review maps within the presumptively valid 10% range nonetheless place a formidable

[8] Many courts interpret this as establishing a "safe harbor" against allegations of improper population deviations when the deviations are under 10%. *See, e.g., Fund for Accurate & Informed Representation v. Weprin*, 796 F. Supp. 662, 668 (N.D.N.Y.), *summarily aff'd*, 506 U.S. 1017 (1992) (concession that deviation is less than 10% is "fatal to the one person, one vote claim because, absent credible evidence that the maximum deviation exceeds 10 percent, plaintiffs fail to establish a *prima facie* case of discrimination under that principle sufficient to warrant further analysis by this Court."); *see also Wright v. City of Albany*, 306 F. Supp. 2d 1228, 1231 n.5 (M.D. Ga. 2003); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 631 (D.S.C. 2002).

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burden on challengers, who must "show[] that the deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy." *Rodriguez*, 308 F. Supp. 2d at 365 (quoting *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994)); *Cecere*, 274 F. Supp. 2d at 311 ("Given that the deviation rate is under 10%, the plan is presumptively constitutional."). Stated differently, when the deviation rate is under 10%, "the plaintiffs . . . must demonstrate . . . that the asserted unconstitutional or irrational state policy is the *actual reason* for the deviation." *Rodriguez*, 308 F. Supp. 2d at 365. Where the deviation can be explained, even in part, by legitimate and rational state interests, the challenge fails as a matter of law. Moreover, it is not enough to show merely that the Commission *could* have adopted a map with better population equality (*i.e.*, a smaller deviation rate). *See Gaffney*, 412 U.S. at 750-51. Plaintiffs therefore misstate the law when they allege that "the Fourteenth Amendment does not permit legislative districts to deviate from the ideal population except when justified by a compelling state interest." (FAC ¶ 159.)

Every lower court case addressing statewide legislative maps with a deviation of less than 10%, save one,[9] has upheld the maps. *See, e.g.*, *Rodriguez*, 308 F. Supp. 2d 346 (upholding state senate plan where total population deviation was 9.78%); *Montiel v. Davis*, 215 F. Supp. 2d 1279, 1282-86 (S.D. Ala. 2002) (upholding legislative plans with deviations of 9.93% and 9.78%); *Marylanders for Fair Representation*, 849 F. Supp. 1022 (upholding plan with 9.84% total deviation); *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 646, 655 & n.39 (Fla. Mar. 9, 2012) (approving maps with maximum deviations of 3.97% and 1.99%); *Bonneville County v. Ysursa*, 129 P.3d 1213, 1217 (Idaho 2005) (approving map with maximum deviation of 9.71%); *State ex rel. Cooper v. Tennant*, __ S.E.2d __, 2012 WL 517520 (W. Va. Feb. 13, 2012) (upholding map with 9.998% deviation).

[9] Not surprisingly, Plaintiffs rely exclusively on the only case to strike down a state legislative map that was within the 10% safe harbor, *Larios v. Cox*, 300 F. Supp. 2d 1320. However, as explained in Part I(D) below, *Larios* does not hold that political motivations are improper, and it involved idiosyncratic facts that are inapposite to this case.

Here, because the maximum deviation is only 8.8%, the map is constitutional unless Plaintiffs establish that the deviation resulted *solely* from the promotion of an unconstitutional or irrational state policy. *See Rodriguez*, 308 F. Supp. 2d at 365. As shown below, Plaintiffs' Complaint falls far short of this high standard.

B. The Commission Implemented Valid Policies in Drafting Arizona's Legislative Map.

Plaintiffs' sole legal challenge is based on the legislative plan's minor population deviations, which are well within the presumptively valid 10% range. With the exception of the Arizona Equal Population Goal, Plaintiffs do not claim that the Commission failed to comply with the complex, state-constitutional procedural and substantive requirements that govern the Commission's work. *See generally* Ariz. Const. art. IV, pt. 2, § 1(11)-(17); *Ariz. Minority Coal.*, 220 Ariz. 587, 208 P.3d 676. These requirements include six goals that overlap with traditional redistricting criteria. *See* Ariz. Const. art IV, pt. 2, § 1(14). Plaintiffs thus implicitly concede that permissible bases for the deviations exist.

The Complaint also is deficient because it largely ignores the extensive public record regarding the Commission's deliberations and instead relies on baseless, conclusory allegations that legitimate state interests do not justify the population deviations. (FAC ¶¶ 119-57.) But even focusing only on the allegations of the Complaint, there are legitimate explanations for the population deviations, which Plaintiffs fail plausibly to rebut.

The record establishes that the Commission received advice to underpopulate Voting Rights Districts, and the statistics show that it followed that advice. (Exs. 7-9.) In fact, nine of the 11 underpopulated Democratic-plurality districts are Voting Rights Districts. (FAC ¶¶ 113, 126; Pl. Ex. 13.) All seven districts that Plaintiffs identify as districts in which Hispanic voters have the ability to elect candidates of their choice – Districts 2, 3, 4, 19, 27, 29, and 30 – are among the eleven underpopulated districts about which Plaintiffs complain. (FAC ¶¶ 113, 126.) Plaintiffs erroneously omit District 24, which is one of the underpopulated districts, from their list of districts that afford

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Hispanic voters the ability to elect candidates of their choice. (*See* Pl. Ex. 13.)[10] And the most underpopulated district in the State is District 7, which is the State's only majority Native American district. Plaintiffs acknowledge that "[t]he correlation between the under-populated districts and the minority percentages in those districts is stronger than the partisan deviation correlation." (FAC ¶ 128.) The remaining two underpopulated Democratic-plurality districts (Districts 8 and 10) are, by Plaintiffs' description, competitive districts. (FAC ¶ 149.)[11] Constructing districts to favor competitiveness is another goal of Arizona's redistricting process, Ariz. Const. art. IV, pt. 2, § 1(14). Thus, Plaintiffs' claims of partisan population manipulation are not only unsupported by the law, but they also are unsupported by the allegations, exhibits, and public record.

Plaintiffs also allege that approximately 90,000 Hispanics border the seven districts that Plaintiffs identify as providing Hispanic voters the ability to elect candidates of their choice. (FAC ¶ 130.) They argue that these highly Hispanic precincts were "deliberately separated . . . from the IRC's seven Hispanic opportunity districts to use their Democratic votes to shore up the partisan composition of neighboring Democratic-plurality districts, and or [sic] to directly or indirectly weaken Republican-plurality districts." (*Id*.) Setting aside the fact that there are actually nine districts in which Hispanic voters have the ability to elect candidates of their choice, the Commission is not required (and the Voting Rights Act does not permit it) to pack all Hispanic voters into Hispanic districts. Simply because more Hispanic voters could have been placed within such districts does not establish that the Commission acted improperly or that the plan violated the Voting Rights Act. In any event, the DOJ's preclearance establishes that this map is not retrogressive. (Ex. 9.) If the map avoids retrogression, the Commission could leave some Hispanic voters in adjacent districts that may be dominated by either

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[10] The Legislature's Memorial acknowledges that the Commission considered District 24 to be a Voting Rights District. (Pl. Ex. 10 at 4:7-12.)

[11] In addition, District 8, while not a Voting Rights District, was relevant to the Voting Rights analysis, and the public record demonstrates that changes to the district were made to attempt to provide minority voters the ability to elect candidates of choice in that area. (*See, e.g.*, Ex. 10, 12/16/11 Tr. at 144:6-145:8, 166:2-167:9.)

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Republicans or Democrats. At best, Plaintiffs' theory asks the Court to second-guess matters within the Commission's discretion as it balances the various redistricting factors. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) (Redistricting "is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."). At worst, it seeks to impose questionable racially-based redistricting.

Plaintiffs' theory fails as well because it hinges on allegations that readily available public records establish are wrong. First, Plaintiffs undercount the districts in which Hispanic voters have the ability to elect candidates of their choice in the plan. Contrary to the allegation in Paragraph 126, it is a matter of public record that the Commission purported that its plan provided Hispanic voters the ability to elect candidates of choice in nine legislative districts, not seven as Plaintiffs assert. (Ex. 1 at 76-77.) Because Paragraph 126 is wrong, it need not be regarded as true for purposes of this motion to dismiss. *Mullis*, 828 F.2d at 1388. Other paragraphs based in part on the same incorrect figure – including Paragraphs 128, 129, 130, 133, 134, and 135 – likewise should be disregarded insofar as they rely on that erroneous information.[12]

The Commission's efforts to satisfy the Voting Rights Act are among the many appropriate considerations that caused the final population deviations. Because Plaintiffs do not even attempt to allege, and could not possibly establish, that the plan results "*solely* from the promotion of an unconstitutional or irrational state policy, the Complaint fails as a matter of law. *See Rodriguez*, 308 F. Supp. 2d at 365.

C. Plaintiffs' Claim That the Map Was Drawn with Improper Partisan Motives Is not Plausible Because the Map Favors Republicans.

Plaintiffs' case is premised entirely on alleged political discrimination that supposedly resulted in a legislative map that favors Democrats at the expense of

[12] Contrary to Plaintiff's allegation in Paragraph 142, the fact that mostly non-Hispanic candidates are running in particular districts does not mean that Hispanic voters in those districts are unable to elect candidates of their choice. *See Thornburg v. Gingles*, 478 U.S. 30, 68 (1986) ("[O]nly the race of the voter, not the race of the candidate, is relevant to vote dilution analysis.").

Republicans. Plaintiffs' argument is implausible on its face because, based on their allegations and exhibits, the final map actually favors Republicans. If Republicans and Democrats win the districts in which they have a plurality of the registered voters, Republicans would control 17 out of the 30 districts (56.7%), and Democrats would control only 13 districts (43.3%). (FAC ¶¶ 109, 113.) This is very close to the relative proportions of registered Republicans and Democrats statewide as of June 2012 because 54.4% of the registered voters who are either Republicans or Democrats are Republicans and 45.6% are Democrats. (Ex. 8; *see* n.6, *supra*.) Including those who are not members of these parties, the statewide registration is 35.9% Republican, 30.1% Democrat, and 34.0% "other." (*Id.*)

The U.S. Supreme Court's one-person, one-vote decisions confirm that Arizona's final map satisfies the Equal Protection requirements. In *Gaffney*, the Court considered a legislative map for Connecticut that was drawn to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752. The Court rejected a one-person, one-vote challenge, being persuaded that the map "provide[d] a rough sort of proportional representation in the legislative halls of the State." *Id.* at 754. The Court concluded that the allegations "failed to make out a prima facie violation of the Equal Protection Clause." *Id.* at 740-41. Other courts have since reached the same result, relying on *Gaffney*. *See Kidd v. Cox*, No. 1:06-cv-997, 2006 WL 1341302, at *11 (N.D. Ga. May 16, 2006) (recognizing that politics are permissible basis for minor deviations); *Rodriguez*, 308 F. Supp. 2d at 353 (granting summary judgment on one-person, one-vote claim and recognizing permissible role of politics); *Cecere*, 274 F. Supp. 2d at 319 (dismissing one-person, one-vote challenge to county's redistricting plan based on allegations that redistricting was crafted to favor Democrats in part because deviation rate was below 10%).

Thus, Plaintiffs' claims of partisan population manipulation do not give rise to a cognizable claim for relief and are not supported by the facts alleged in their Complaint.

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D. *Larios v. Cox* Does Not Support Plaintiffs' Claim.

Larios v. Cox is the only case to strike down a state legislative map with a population deviation under 10% for alleged political and regional discrimination by the mapmakers. 300 F. Supp. 2d 1320.[13] *Larios* applied the rule that "deviations from exact population equality may be allowed in some instances in order to further legitimate state interests," *id.* at 1337, but struck down the maps based on facts that are strikingly different from those here.

In *Larios*, the district court found that the population deviations in the state legislative plans were based on two expressly enumerated objectives: (1) "a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta," *id.* at 1327, and (2) "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another." *Id.* at 1329. These goals of regionalism and inconsistently applied incumbent protection, absent any evidence of legitimate factors, were held impermissible justifications for a 9.98% population deviation. *Id.* at 1352-53.

The court's holding was bolstered by the fact that the drafters intentionally "pushed the deviation as close to the 10% line as they thought they could get away with, conceding the absence of an 'honest and good faith effort' to construct equal districts." *Id.* at 1352 (citing *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)). In fact, the Georgia Legislature did not consider *any* traditional districting criteria, including compactness, contiguity, communities of interest, and whole counties. *Id.* at 1325, 1341-42. Nor were the population deviations used to comply with the Voting Rights Act. *Id.* at 1328 n.3.

None of this is true here. As described above, Arizona's Commission drew most of the underpopulated districts to comply with Section 5 of the Voting Rights Act.

[13] Although *Larios* was summarily affirmed, this "affirms only the judgment of the court below, and no more may be read into [the Court's] action than was essential to sustain that judgment." *Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983).

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Moreover, the Commission followed a constitutionally-mandated process that entailed creating a grid of districts of equal population and then adjusting the grid to accommodate the six constitutional goals. *See* Factual Background, Part B, *supra*. Neither these facts nor the underlying procedural framework existed in *Larios*.

In addition, the *Larios* court did not hold that political affiliation was an improper basis for population deviations. *Id.* at 1351 & n.15. Rather, the court stated that it did not "decide whether partisan advantage alone would have been enough to justify minor population deviations." *Id.* at 1351.[14] Thus, even *Larios* does not support Plaintiffs' claim, which is based only on allegations that partisan motivation resulted in minor population deviations. For these reasons and those explained above, Plaintiffs' Equal Protection claim fails.

II. PLAINTIFFS' CLAIM BASED ON THE EQUAL POPULATION GOAL IN THE ARIZONA CONSTITUTION ALSO FAILS.

If the Court dismisses Plaintiffs' claim under the Federal Equal Protection Clause, it also should dismiss Plaintiffs' claim based on the Arizona Equal Population Goal for two reasons. First, the relevant state constitutional provision mirrors federal law. Article 4, part 2, section 1(14)(B) of the Arizona Constitution provides in relevant part that "state legislative districts shall have equal population to the extent practicable." The Arizona Supreme Court has held that this goal, "which require[s] compliance with the Federal Constitution . . . , [is] only as flexible as the federal requirement[] permit[s], and compliance . . . can be decided by a court as a matter of law." *Ariz. Minority Coal.*, 220 Ariz. at 597 ¶ 32, 208 P.3d at 686 (citing *League of Latin Am. Citizens*, 548 U.S. at 425; *Reynolds*, 377 U.S. at 561). Second, and alternatively, if the Court dismisses Plaintiffs' federal Equal Protection Clause claim, it should decline to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(c)(3). *See Cecere*, 274 F. Supp. 2d at 319; *see*

[14] Justice Kennedy, joined by Justices Souter and Ginsburg, recognized that "in addressing political motivation as a justification for an equal-population violation, . . . *Larios* does not give clear guidance." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 422-23 (2006) (plurality).

also Ariz. Minority Coal. v. Ariz. Indep. Redistricting Comm'n, 366 F. Supp. 2d 887, 889 (D. Ariz. 2005) (dismissing state claims after finding federal claims had no merit).

III. THE COMPLAINT SHOULD BE DISMISSED UNDER RULE 8 BECAUSE IT CONTAINS IRRELEVANT AND IMPROPER ALLEGATIONS AND FAILS TO PERFORM THE ESSENTIAL FUNCTIONS OF A COMPLAINT.

If the Complaint is not dismissed for failure to state a claim, it should be dismissed under Rule 8 because the Complaint as written "indulge[s] in general disparagement of other parties" and "fails to perform the essential functions of a complaint." *Donahoe v. Arpaio*, No. 2:10-cv-2756-NVW, 2011 WL 5119008, at *2, *3 (D. Ariz. Oct. 28, 2011) (quoting *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996)).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Each allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). "A complaint that is 'argumentative, prolix, replete with redundancy . . . [and] consists largely of immaterial background information' is subject to dismissal." *Donahoe*, 2011 WL 5119008, at *2 (quoting *McHenry*, 84 F.3d at 1177).[15] Plaintiffs' 41-page Complaint does not meet the standards for pleading described above and contains long sections that are irrelevant, inflammatory, or included for an improper purpose. Both counts in the Complaint relate to alleged improper population deviations among districts. However, the Complaint contains allegations that in no way relate to this issue and is replete with immaterial, impertinent, and scandalous matters.

Included in the disparaging and immaterial allegations are: (1) the Chair omitted facts from her application regarding political contributions (FAC ¶¶ 1, 17-19, 21-22); (2) the Chair's spouse was present at public Commission meetings and on phone calls and discussed the drawing of the legislative map (*id.* ¶¶ 25-26); (3) the Commission's work was late and wasted public money (*id.* ¶ 1); (4) the Chair is ineligible under the

[15] In addition, the Court may strike "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

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Arizona Constitution (*id.* ¶ 17); (5) the State's open meeting law was violated (*id.* ¶¶ 23, 33, 39, 41, 44-63); (6) the Commission improperly selected two commissioners to alternate as vice-chair (*id.* ¶¶ 27-28); (7) the Commission did not hire the Republican legal counsel favored by the Republican Commissioners (*id.* ¶¶ 30-37); (8) various improprieties regarding the selection of the mapping consultant in June 2011 (*id.* ¶¶ 38-44); (9) the procurement process for the Commission's legal counsel and mapping consultant was flawed (*id.* ¶¶ 32, 49); (10) the process of adopting the congressional map was flawed (*id.* ¶¶ 1, 71-73, 77, 82-83); and (11) advertising the draft map without completing a racial block voting analysis was "fraudulent" (*id.* ¶ 88). These have nothing to do with the federal Equal Protection Clause or the Arizona Equal Population Goal.

Plaintiffs' allegations of retrogression (*e.g.*, *id.* ¶¶ 139-41) also are irrelevant because the districts have been precleared and, although the districts may be challenged for other reasons, they cannot be challenged based on allegations of retrogression, which is solely relevant to Section 5. 28 C.F.R. §§ 51.49, 51.54(b). These allegations must have been raised in a request to the Department of Justice to reconsider its decision not to object to the legislative map under 28 C.F.R. § 51.46. The "decision of the Attorney General not to object to a submitted change . . . is not reviewable." 28 C.F.R. § 51.49.

Plaintiffs also omit information from the extensive public record and include allegations that a responsible review of the public record reveals are blatantly misleading or simply wrong. The allegations concerning the Voting Rights Act and Paragraph 126, as described above, provide just a few examples, but there are more. For example, the allegations regarding the Commission's failure to consider the Legislature's comments (FAC ¶¶ 98-103) are both irrelevant and wrong.[16] Plaintiffs' statement in Paragraph 104 that Marana was moved to District 3 is wrong, and this is evident from the "Components Report" on the Commission's website that is attached as Exhibit 12.

[16] The Complaint mentions the discussion of the Legislature's comments at the November 29, 2011 meeting (Ex. 4, 11/29/11 Agenda and Tr. at 144:18-152:21), but omits the discussion on October 30 (Ex. 5, 11/30/11 Agenda and Tr. at 6:4-8) and the lengthy presentations on December 7 (Ex. 11, 12/7/11 Agenda and Tr. at 4:5, 31:6).

Plaintiffs' allegations reflect a "'throw spaghetti at the wall and hope something sticks' approach." *Givs v. City of Eunice*, 512 F. Supp. 2d 522, 542 (W.D. La. 2007). They merely state non-cognizable partisan critiques of the Commission's work that have nothing to do with the legislative map. If not dismissed for failure to state a claim, the Complaint must be dismissed under Rule 8 as impermissible and fundamentally flawed.

CONCLUSION

As Justice Scalia aptly observed, challenges to legislative maps with deviations under 10% based on "impermissible *political* bias" are "more likely to encourage politically motivated litigation than to vindicate political rights." *Cox*, 542 U.S. at 951-52 (Scalia, J., dissenting) (emphasis in original). The Complaint alleges nothing more than political bias based on speculation and alleged conspiracies. For the foregoing reasons, the Commission respectfully requests that this Court dismiss Plaintiffs' First Amended Complaint with prejudice.

RESPECTFULLY SUBMITTED this 3rd day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/Lisa Black

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