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

10 **IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

11 Wesley W. Harris, *et al.*,

12 Plaintiffs,

13 vs.

14 Arizona Independent Redistricting
15 Commission, *et al.*,

16 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)

17
18 Defendants Arizona Independent Redistricting Commission and Commissioners
19 Mathis, McNulty, Herrera, Freeman, and Stertz solely in their official capacities
20 (collectively, the “Commission”) move, pursuant to Rules 12(b)(6) and 8 of the Rules of
21 Civil Procedure, to dismiss Plaintiffs’ First Amended Complaint (the “Complaint”).

22 **INTRODUCTION**

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

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

1 (1983). This presumption can be rebutted only if Plaintiffs show that the population
2 deviations at issue result *solely* from an unconstitutional or irrational state policy. *See*
3 *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y.), *summarily aff'd*, 543 U.S. 997
4 (2004). Despite Plaintiffs' extensive and immaterial criticism of the Commission, their
5 sole legal challenge is to minor population deviations in Arizona's legislative map. But
6 the Complaint does not and cannot rebut the presumption of constitutionality.

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

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

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

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

FACTUAL BACKGROUND¹

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

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.

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

4 **B. The Commission Complied with Arizona’s Constitutional**
 5 **Requirements in Creating the Legislative Map.**³

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

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

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

26 ³ The Commission’s work in extensive public meetings over several months is
 27 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).

28 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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1 map would not retrogress and would meet the Commission’s burden under Section 5 of
 2 the Voting Rights Act. (Ex. 4, 11/29/11 Tr. at 93:13-94:25; Ex. 5, 11/30/11 Tr. at 16:18-
 3 22.)⁵ The Commission followed this advice and also looked at many other factors when
 4 creating Voting Rights Districts. (E.g., Ex. 1 at 56-133; Ex. 6, 12/20/11 Tr. at 220:21-
 5 221:4.) The Commission, on December 20, 2011, approved a “tentative final” map,
 6 referred it to its expert for additional analysis on whether ten proposed districts were
 7 Voting Rights Districts, and directed the mapping consultant to identify any needed
 8 technical changes. (*Id.* at 260:11-262:23.) This map was approved by a three-to-two
 9 vote, with Messrs. Herrera and Freeman voting against it. On January 17, 2012, the final
 10 map, which included only technical changes to the tentative final map, was approved by a
 11 three-to-two vote, this time with Messrs. Stertz and Freeman voting against it. (Ex. 7,
 12 1/17/12 Tr. at 43:2-8, 52:17-24; Ex. 1 at 34-36, Final Map.) The final map had a
 13 maximum population deviation of 8.8%: the difference between District 7, which is
 14 underpopulated by 4.7%, and District 12, which is overpopulated by 4.1%. (*See* Pl. Ex.
 15 13.)

16 Although Republicans comprise 54.4% of registered voters who are either
 17 Republicans or Democrats,⁶ 56.7% of the districts contain a Republican plurality (17 out
 18 of 30). (FAC ¶¶ 109-10 (defining a Republican-plurality district as one “in which more
 19 voters are registered with the Republican Party than with any other party”).) Democrats
 20 comprise 45.6% of registered voters who are either Democrats or Republicans, and
 21 43.3% of districts contain a Democratic plurality (13 out of 30). (*Id.* ¶ 113.⁷) According

22 _____
 23 ⁵ It is common to underpopulate Voting Rights Districts. In its Memorial criticizing
 24 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.)

25 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).

26 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.
 27 Voters not registered as Republican or Democrat are excluded.

28 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

(continued...)

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

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

14 The final map includes ten Voting Rights Districts: Districts 2, 3, 4, 7, 19, 24, 26,
 15 27, 29, and 30. (Ex. 1 at 76.) The Commission was advised to attempt to create ten such
 16 districts to avoid retrogression. (Ex. 4, 11/29/11 Tr. at 105:5-8.) The Commission’s
 17 effort to comply with the Voting Rights Act was validated when the Department of
 18 Justice (“DOJ”) precleared the final map on April 26, 2012, allowing the State to
 19 implement its new districts, 28 C.F.R. § 51.1(a)(2). (Ex. 9, DOJ Preclearance Letter.)

20 **ARGUMENT**

21 **I. PLAINTIFFS’ FEDERAL EQUAL PROTECTION CLAIM FAILS.**

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

26 _____
 (...continued)

27 other districts that Plaintiffs identify as containing a Democratic plurality, Districts 19
 28 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.

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

4 Even if Plaintiffs’ allegations were true, their claim fails because no court has ever
 5 invalidated a state legislative map with minor population deviations based solely on
 6 allegations of partisan political motivations. Such a claim is particularly implausible
 7 when the map actually favors, albeit slightly, Plaintiffs’ political interests. *Cf. Davis v.*
 8 *Bandemer*, 478 U.S. 109, 127, 139 (1986) (requiring showing of “actual discriminatory
 9 effect” and intent such that plaintiffs have “essentially been shut out of the political
 10 process” to establish partisan gerrymandering). Moreover, the Complaint itself and the
 11 public record show that the Commission applied legitimate redistricting criteria in
 12 drafting the map. As such, the Complaint should be dismissed. *See Cecere v. County of*
 13 *Nassau*, 274 F. Supp. 2d 308, 315 (E.D.N.Y. 2003) (dismissing complaint and finding
 14 that “the alleged political motivation . . . does not, standing alone, implicate the equal
 15 protection clause”); *see also NAACP v. Snyder*, Civ. No. 11-15385, 2012 WL 1150989, at
 16 *14-*15 (E.D. Mich. Apr. 6, 2012) (dismissing complaint where “Plaintiffs’ allegations
 17 are facially insufficient to support the legal theories they raise and are otherwise too
 18 factually underdeveloped to proceed past the pleading stage”).

19 **A. Plaintiffs’ Complaint Cannot Overcome the Legislative Map’s**
 20 **Presumption of Constitutionality.**

21 It is well-established that a legislative map with a maximum population deviation
 22 under 10% is presumptively constitutional. *E.g., Brown*, 462 U.S. at 842.⁸ Courts that
 23 review maps within the presumptively valid 10% range nonetheless place a formidable

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 25 ⁸ Many courts interpret this as establishing a “safe harbor” against allegations of
 26 improper population deviations when the deviations are under 10%. *See, e.g., Fund for*
 27 *Accurate & Informed Representation v. Weprin*, 796 F. Supp. 662, 668 (N.D.N.Y.),
 28 *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).

1 burden on challengers, who must “show[] that the deviation in the plan results *solely*
 2 from the promotion of an unconstitutional or irrational state policy.” *Rodriguez*, 308 F.
 3 Supp. 2d at 365 (quoting *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp.
 4 1022, 1032 (D. Md. 1994)); *Cecere*, 274 F. Supp. 2d at 311 (“Given that the deviation
 5 rate is under 10%, the plan is presumptively constitutional.”). Stated differently, when
 6 the deviation rate is under 10%, “the plaintiffs . . . must demonstrate . . . that the asserted
 7 unconstitutional or irrational state policy is the *actual reason* for the deviation.”
 8 *Rodriguez*, 308 F. Supp. 2d at 365. Where the deviation can be explained, even in part,
 9 by legitimate and rational state interests, the challenge fails as a matter of law. Moreover,
 10 it is not enough to show merely that the Commission *could* have adopted a map with
 11 better population equality (*i.e.*, a smaller deviation rate). *See Gaffney*, 412 U.S. at 750-
 12 51. Plaintiffs therefore misstate the law when they allege that “the Fourteenth
 13 Amendment does not permit legislative districts to deviate from the ideal population
 14 except when justified by a compelling state interest.” (FAC ¶ 159.)

15 Every lower court case addressing statewide legislative maps with a deviation of
 16 less than 10%, save one,⁹ has upheld the maps. *See, e.g., Rodriguez*, 308 F. Supp. 2d 346
 17 (upholding state senate plan where total population deviation was 9.78%); *Montiel v.*
 18 *Davis*, 215 F. Supp. 2d 1279, 1282-86 (S.D. Ala. 2002) (upholding legislative plans with
 19 deviations of 9.93% and 9.78%); *Marylanders for Fair Representation*, 849 F. Supp.
 20 1022 (upholding plan with 9.84% total deviation); *In re Senate Joint Resolution of*
 21 *Legislative Apportionment 1176*, 83 So. 3d 597, 646, 655 & n.39 (Fla. Mar. 9, 2012)
 22 (approving maps with maximum deviations of 3.97% and 1.99%); *Bonneville County v.*
 23 *Ysursa*, 129 P.3d 1213, 1217 (Idaho 2005) (approving map with maximum deviation of
 24 9.71%); *State ex rel. Cooper v. Tennant*, __ S.E.2d __, 2012 WL 517520 (W. Va. Feb.
 25 13, 2012) (upholding map with 9.998% deviation).

26
 27 ⁹ Not surprisingly, Plaintiffs rely exclusively on the only case to strike down a state
 28 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.

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

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

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

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

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

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

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

25
 26 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.)

27 ¹¹ In addition, District 8, while not a Voting Rights District, was relevant to the
 28 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.)

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

7 Plaintiffs’ theory fails as well because it hinges on allegations that readily
 8 available public records establish are wrong. First, Plaintiffs undercount the districts in
 9 which Hispanic voters have the ability to elect candidates of their choice in the plan.
 10 Contrary to the allegation in Paragraph 126, it is a matter of public record that the
 11 Commission purported that its plan provided Hispanic voters the ability to elect
 12 candidates of choice in nine legislative districts, not seven as Plaintiffs assert. (Ex. 1 at
 13 76-77.) Because Paragraph 126 is wrong, it need not be regarded as true for purposes of
 14 this motion to dismiss. *Mullis*, 828 F.2d at 1388. Other paragraphs based in part on the
 15 same incorrect figure – including Paragraphs 128, 129, 130, 133, 134, and 135 – likewise
 16 should be disregarded insofar as they rely on that erroneous information.¹²

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

22 **C. Plaintiffs’ Claim That the Map Was Drawn with Improper Partisan**
 23 **Motives Is not Plausible Because the Map Favors Republicans.**

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

26 _____
 27 ¹² Contrary to Plaintiff’s allegation in Paragraph 142, the fact that mostly non-
 28 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.”).

1 Republicans. Plaintiffs' argument is implausible on its face because, based on their
2 allegations and exhibits, the final map actually favors Republicans. If Republicans and
3 Democrats win the districts in which they have a plurality of the registered voters,
4 Republicans would control 17 out of the 30 districts (56.7%), and Democrats would
5 control only 13 districts (43.3%). (FAC ¶¶ 109, 113.) This is very close to the relative
6 proportions of registered Republicans and Democrats statewide as of June 2012 because
7 54.4% of the registered voters who are either Republicans or Democrats are Republicans
8 and 45.6% are Democrats. (Ex. 8; *see n.6, supra.*) Including those who are not members
9 of these parties, the statewide registration is 35.9% Republican, 30.1% Democrat, and
10 34.0% "other." (*Id.*)

11 The U.S. Supreme Court's one-person, one-vote decisions confirm that Arizona's
12 final map satisfies the Equal Protection requirements. In *Gaffney*, the Court considered a
13 legislative map for Connecticut that was drawn to "achieve a rough approximation of the
14 statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752.
15 The Court rejected a one-person, one-vote challenge, being persuaded that the map
16 "provide[d] a rough sort of proportional representation in the legislative halls of the
17 State." *Id.* at 754. The Court concluded that the allegations "failed to make out a prima
18 facie violation of the Equal Protection Clause." *Id.* at 740-41. Other courts have since
19 reached the same result, relying on *Gaffney*. *See Kidd v. Cox*, No. 1:06-cv-997, 2006 WL
20 1341302, at *11 (N.D. Ga. May 16, 2006) (recognizing that politics are permissible basis
21 for minor deviations); *Rodriguez*, 308 F. Supp. 2d at 353 (granting summary judgment on
22 one-person, one-vote claim and recognizing permissible role of politics); *Cecere*, 274 F.
23 Supp. 2d at 319 (dismissing one-person, one-vote challenge to county's redistricting plan
24 based on allegations that redistricting was crafted to favor Democrats in part because
25 deviation rate was below 10%).

26 Thus, Plaintiffs' claims of partisan population manipulation do not give rise to a
27 cognizable claim for relief and are not supported by the facts alleged in their Complaint.
28

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

2 *Larios v. Cox* is the only case to strike down a state legislative map with a
3 population deviation under 10% for alleged political and regional discrimination by the
4 mapmakers. 300 F. Supp. 2d 1320.¹³ *Larios* applied the rule that “deviations from exact
5 population equality may be allowed in some instances in order to further legitimate state
6 interests,” *id.* at 1337, but struck down the maps based on facts that are strikingly
7 different from those here.

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

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

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

27 _____
28 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).

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

5 In addition, the *Larios* court did not hold that political affiliation was an improper
 6 basis for population deviations. *Id.* at 1351 & n.15. Rather, the court stated that it did
 7 not “decide whether partisan advantage alone would have been enough to justify minor
 8 population deviations.” *Id.* at 1351.¹⁴ Thus, even *Larios* does not support Plaintiffs’
 9 claim, which is based only on allegations that partisan motivation resulted in minor
 10 population deviations. For these reasons and those explained above, Plaintiffs’ Equal
 11 Protection claim fails.

12 **II. PLAINTIFFS’ CLAIM BASED ON THE EQUAL POPULATION GOAL IN**
 13 **THE ARIZONA CONSTITUTION ALSO FAILS.**

14 If the Court dismisses Plaintiffs’ claim under the Federal Equal Protection Clause,
 15 it also should dismiss Plaintiffs’ claim based on the Arizona Equal Population Goal for
 16 two reasons. First, the relevant state constitutional provision mirrors federal law. Article
 17 4, part 2, section 1(14)(B) of the Arizona Constitution provides in relevant part that “state
 18 legislative districts shall have equal population to the extent practicable.” The Arizona
 19 Supreme Court has held that this goal, “which require[s] compliance with the Federal
 20 Constitution . . . , [is] only as flexible as the federal requirement[] permit[s], and
 21 compliance . . . can be decided by a court as a matter of law.” *Ariz. Minority Coal.*, 220
 22 *Ariz.* at 597 ¶ 32, 208 P.3d at 686 (citing *League of Latin Am. Citizens*, 548 U.S. at 425;
 23 *Reynolds*, 377 U.S. at 561). Second, and alternatively, if the Court dismisses Plaintiffs’
 24 federal Equal Protection Clause claim, it should decline to exercise supplemental
 25 jurisdiction pursuant to 28 U.S.C. § 1367(c)(3). *See Cecere*, 274 F. Supp. 2d at 319; *see*

26
 27 ¹⁴ Justice Kennedy, joined by Justices Souter and Ginsburg, recognized that “in
 28 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).

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

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

7 If the Complaint is not dismissed for failure to state a claim, it should be dismissed
 8 under Rule 8 because the Complaint as written “indulge[s] in general disparagement of
 9 other parties” and “fails to perform the essential functions of a complaint.” *Donahoe v.*
 10 *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)).

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

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

27
 28 ¹⁵ In addition, the Court may strike “any redundant, immaterial, impertinent, or
 scandalous matter.” Fed. R. Civ. P. 12(f).

1 Arizona Constitution (*id.* ¶ 17); (5) the State’s open meeting law was violated (*id.* ¶¶ 23,
 2 33, 39, 41, 44-63); (6) the Commission improperly selected two commissioners to
 3 alternate as vice-chair (*id.* ¶¶ 27-28); (7) the Commission did not hire the Republican
 4 legal counsel favored by the Republican Commissioners (*id.* ¶¶ 30-37); (8) various
 5 improprieties regarding the selection of the mapping consultant in June 2011 (*id.* ¶¶ 38-
 6 44); (9) the procurement process for the Commission’s legal counsel and mapping
 7 consultant was flawed (*id.* ¶¶ 32, 49); (10) the process of adopting the congressional map
 8 was flawed (*id.* ¶¶ 1, 71-73, 77, 82-83); and (11) advertising the draft map without
 9 completing a racial block voting analysis was “fraudulent” (*id.* ¶ 88). These have nothing
 10 to do with the federal Equal Protection Clause or the Arizona Equal Population Goal.

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

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

26
 27 ¹⁶ The Complaint mentions the discussion of the Legislature’s comments at the
 28 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).

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

6 **CONCLUSION**

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

14 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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