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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 RESPONSE TO PLAINTIFFS' RULE 56(D) MOTION** (Assigned to three-judge panel)

The Court should reject Plaintiffs' improper attempt to delay consideration of the Commission's Motion to Dismiss by relying on Rule 56(d) of the Federal Rules of Civil Procedure. Rule 56(d) is inapplicable because the Commission properly has brought its motion pursuant to Rule 12(b)(6) and the Court may consider the exhibits submitted without converting the motion into one seeking summary judgment. *See* Fed. R. Civ. P. 56(d) (permitting party opposing summary-judgment motion to seek relief where it cannot present sufficient facts to justify its opposition).

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As explained in the Commission's reply briefs supporting its motion and its related Request for Judicial Notice, Plaintiffs cannot prevent dismissal unless they can allege that *not even one* legitimate factor affected and led to the population deviations in the final map. The meeting transcripts, data, preclearance submission, and other documents in the public record provide multiple examples of the Commission's consideration and application of proper redistricting criteria.

Moreover, Plaintiffs' strained attempt to conjure purported areas of factual dispute, through declarations of their counsel and expert, ignores the proper standard for the Court's review of their claims and the purpose for which Plaintiffs rely on the public record. While Plaintiffs allege that discovery is necessary to determine every factor and motive that contributed to the deviations, they ignore the fact that, based on their own articulation of the standard for rebutting the presumption of constitutionality, the Commission needs to show only the existence of at least one legitimate consideration in the Commission's analysis. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004) (Plaintiffs cannot prevail on their claims unless they can show that the deviations "in the plan result[] *solely* from the promotion of an unconstitutional or irrational state policy."), *summarily aff'd*, 542 US 947 (2004); *see also* Response Opposing the Motions to Dismiss ("Response") at 13. Because Plaintiffs do not and could not contend that discovery will disprove every statement in the record establishing that the Commission discussed and applied legitimate factors, their request for needless delay and discovery should fail.

Finally, several of the topics that are listed in the Cantelme Declaration in support of Plaintiffs' Rule 56(d) Motion are publicly available. (Dkt. 46-1.) For example, all public advice by Bruce Adelson is contained in the Commission's Transcripts. (*Id.* at 2 ¶ 3(A).) Likewise, the public change orders are available on the Commission's website. (*Id.* at 2 ¶ 3(B).) The Commissioners' reasoning in deciding to adopt ten ability to elect districts is likewise available on its website and in its preclearance submission. (*Id.* at 2 ¶ 3(D).) And the Commission's consideration of communities of interest, compactness,

contiguity, and competitiveness is available in the Commission's transcripts. (*Id.* at 2 ¶ 3(E)-(G).)

The Court should therefore deny Plaintiffs' motion for the reasons stated above.

RESPECTFULLY SUBMITTED this 28th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28th, 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