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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
15 Redistricting 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 REPLY
IN SUPPORT OF MOTION TO DISMISS**

(ASSIGNED TO THREE-JUDGE PANEL)

Hearing Date: October 31, 2012 at 10:00 a.m.

17 Plaintiffs do not dispute that the Commission’s legislative map is entitled to a
18 presumption of constitutionality because its total population deviation is under 10%. *See*
19 *Brown v. Thomson*, 462 U.S. 835, 842 (1983); Plaintiffs’ Response (Dkt. 44)
20 (“Response”) at 4. Nor do they dispute that to overcome this presumption, they must
21 “show[] that the deviation in the plan results *solely* from the promotion of an
22 unconstitutional or irrational state policy.” *Rodriguez v. Pataki*, 308 F. Supp. 2d 346,
23 365 (S.D.N.Y.) (quoting *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp.
24 1022, 1032 (D. Md. 1994)), *summarily aff’d*, 543 US 997 (2004); Response at 2-3.
25 Unless Plaintiffs can allege “that the asserted unconstitutional or irrational state policy is
26 the *actual reason* for the deviation,” their Complaint is deficient as a matter of law.
27 *Rodriguez*, 308 F. Supp. 2d at 365 (citation omitted). Plaintiffs’ First Amended
28 Complaint (“Complaint”) does not meet this difficult standard and should be dismissed.

1 **I. PLAINTIFFS' FEDERAL EQUAL PROTECTION CLAIM FAILS.**

2 **A. Plaintiffs' Allegations Do Not Overcome the Legislative Map's**
 3 **Presumption of Constitutionality.**

4 Plaintiffs' Complaint is based on the premise that the Commission's sole
 5 motivation, and the only cause of the population deviations, was an attempt to maximize
 6 the number of Democratic districts. (Response at 2-3.) Even taking their allegations as
 7 true (which they are not), this motivation would not render the map unconstitutional.
 8 Courts have routinely held that political considerations are a legitimate and inevitable
 9 consideration in redistricting. *See Kidd v. Cox*, No. 1:06-cv-997, 2006 WL 1341302, at
 10 *11 (N.D. Ga. May 16, 2006) (recognizing that politics is a permissible basis for minor
 11 deviations); *Rodriguez*, 308 F. Supp. 2d at 353 ("Politics and political considerations are
 12 inseparable from districting and apportionment. . . . The reality is that districting
 13 inevitably has and is intended to have substantial political consequences.") (quoting
 14 *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)); *Cecere v. County of Nassau*, 274 F.
 15 Supp. 2d 308, 315 (E.D.N.Y. 2003) (dismissing complaint and finding that "the alleged
 16 political motivation . . . does not, standing alone, implicate the equal protection clause");
 17 *Gonzalez v. N.J. Apportionment Comm'n*, ___ A.3d ___, 2012 WL 3889021, at *13-14,
 18 21 (N.J. Super. Ct. App. Div. Sept. 10, 2012) (recognizing political considerations and
 19 dismissing complaint). Moreover, creating districts, such as those here, that reflect the
 20 political composition of the state is permissible to "achieve a rough approximation of the
 21 statewide political strengths" of Democrats and Republicans. *Gaffney*, 412 U.S. at 752.¹

22 Plaintiffs cite no case that holds that partisanship itself is an improper motivation.
 23 The court in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *summarily aff'd*, 542 U.S.

24
 25 ¹ Plaintiffs completely sidestep *Gaffney*, except to claim – incorrectly – that the map
 26 at issue was based on a "bipartisan agreement" and that the Commission is relying on a
 27 "straw-man argument." (Response at 2 n.1, 13:4.) A proper reading of *Gaffney* reveals
 28 dissent from the plan at issue and the lack of any bipartisan agreement. *See Cummings v. Meskill*, 341 F. Supp. 139, 141 (D. Conn. 1972) (trial court opinion); *see also Gaffney*, 412 U.S. at 736-37 (appellate opinion). Moreover, *Gaffney* is relevant since Plaintiffs contend that the Commission's "motive was to maximize Democratic strength in the Legislature." (Response at 13:12-13; *accord. id.* at 2:19-3:2.)

1 947 (2004), relied on several improper districting criteria, not simply partisan motivation.
2 (Motion (Dkt. 40) at 13:8-17.) These include regionalism and inconsistently applied
3 incumbent protection. (*Id.*) The *Larios* defendants also did not consider the VRA. (*Id.*
4 at 13:23-24.) The purpose of the map in *Larios* was to entrench a political minority in the
5 legislature, which could not be more different than the map at issue here.

6 The other cases cited by Plaintiffs are similarly inapposite. *Vigo County*
7 *Republican Central Committee v. Vigo County*, 834 F. Supp. 1080 (S.D. Ind. 1993),
8 involved “idiosyncratic facts, where the plan’s total deviation when the litigation started
9 was 37%; only to avoid losing in court did the planners consciously try to eliminate pre-
10 existing bad faith by drawing a plan within the ten-percent parameter.” *Rodriguez*, 308
11 F. Supp. 2d at 367 (citing *Vigo*, 834 F. Supp. at 1085-86). In *Hulme v. Madison County*,
12 the defendants never “offered any state (governmental) policy to justify the plan’s
13 population disparity,” but rather “consistently rested upon their contention that a plan
14 with a population deviation of less than 10% is presumptively valid and therefore
15 requires no justification.” 188 F. Supp. 2d 1041, 1052 (S.D. Ill. 2001); *see also Cecere*,
16 274 F. Supp. 2d at 319.

17 Plaintiffs’ attempts to distinguish *Rodriguez* also fail. In fact, by acknowledging
18 the proper standard – while failing to offer any specific allegations to satisfy it –
19 Plaintiffs only underscore their inability to state a cognizable claim. Moreover, Plaintiffs
20 misleadingly argue (Response at 13:20-21) that “*Rodriguez* was driven by a key fact
21 which is not present in the current matter,” namely the low CVAP that existed in
22 overpopulated districts. That factor was noted by the court at the end of its discussion,
23 and it certainly was not dispositive. *See Rodriguez*, 308 F. Supp. 2d at 369. In addition,
24 while the *Rodriguez* court explained that “districting inevitably has and is intended to
25 have substantial political consequences,” *id.* at 353 (quoting *Gaffney*, 412 U.S. at 753),
26 *Rodriguez* was decided before all but one Justice agreed, in *Vieth v. Jubelirer*, that
27 politics “is a traditional criterion, and a constitutional one, so long as it does not go too
28 far.” *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (citing *Vieth*, 541

1 U.S. 267, 285-86 (2004) (plurality opinion); *id.* at 307 (Kennedy, J., concurring in
 2 judgment); *id.* at 344 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting)).
 3 *Rodriguez* also was decided pre-*Twombly*, which now requires that Plaintiffs plead
 4 “enough facts to state a claim to relief that is *plausible* on its face,” which Plaintiffs’
 5 Complaint utterly fails to do. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)
 6 (emphasis added). Thus, Plaintiffs’ allegations fall far short of stating a claim for relief.

7 **B. Strict Scrutiny Does Not Apply to This Case.**

8 Plaintiffs also incorrectly argue that the Commission was improperly motivated by
 9 race, allowing the Court to utilize a more stringent standard. (Response at 5-10.)
 10 Plaintiffs’ new theory, however, is wrong as a matter of law because rational basis
 11 review, not strict scrutiny, applies.

12 Plaintiffs cite *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny to argue that
 13 strict scrutiny applies because “race was the primary motivating factor in the population
 14 deviations.” (Response at 5:2-11.)² However, Plaintiffs do not seek relief under the
 15 *Shaw* line of cases, and even if they had, those cases only apply to districts whose shape
 16 is gerrymandered on racial lines and involve scenarios that “cannot be understood as
 17 anything other than an effort to separate voters into different districts on the basis of race
 18 . . . [that] lacks sufficient justification.” *Shaw*, 509 U.S. at 648; *see also Hunt v.*
 19 *Cromartie (Cromartie I)*, 526 U.S. 541, 547-49 (1999) (considering district’s shape in
 20 conjunction with its racial and population densities); *Lawyer v. Dep’t of Justice*, 521 U.S.
 21 567, 580-81 (1997) (same); *Bush v. Vera*, 517 U.S. 952, 979 (1996) (plurality) (same);
 22 *Miller v. Johnson*, 515 U.S. 900, 917 (1995) (same). Plaintiffs have made no such
 23 allegations. Nor do they cite any case that applies strict scrutiny to minor population
 24 deviations – the only constitutional violation alleged by Plaintiffs.

25 Plaintiffs have not – and could not – plausibly allege that race is the “predominant
 26 factor” motivating the Commission’s decisions and that the map is “unexplainable on

27 _____
 28 ² The Complaint relies on *Larios* to allege that strict scrutiny is the proper standard.
 (Complaint, ¶ 159.) *Larios*, however, does not support the application of strict scrutiny.
 See 300 F. Supp. 2d at 1339.

1 grounds other than race.” *Easley v. Cromartie (Cromartie II)*, 532 U.S. 234, 241-42
 2 (2001) (citations and quotation marks omitted). “Courts must ‘exercise *extraordinary*
 3 *caution* in adjudicating claims that a State has drawn district lines on the basis of race.”
 4 *Id.* at 242 (emphasis in original) (quoting *Miller*, 515 U.S. at 916). Plaintiffs must prove
 5 that “racial considerations are dominant and controlling, given the demanding nature of
 6 that burden of proof.” *Id.* at 257 (citations and quotation marks omitted). Minor
 7 population deviations, even if based in part on race, do not establish that race was
 8 “dominant or controlling” and trigger strict scrutiny. (Motion at 9:7-14.)

9 Undermining their strict scrutiny argument, Plaintiffs argue that the deviations are
 10 politically, not racially, motivated.³ If political, rather than racial, considerations could
 11 help explain the map, strict scrutiny would not apply. *Cromartie I*, 526 U.S. at 549-51
 12 (holding that creation of a safe Democratic seat would be a constitutional political
 13 objective that would defeat strict scrutiny); *see Cromartie II*, 532 U.S. at 243, 257
 14 (same). Plaintiffs’ own theory, therefore, defeats their argument that strict scrutiny
 15 applies. The proper standard for the Court’s review of the policies the Commission
 16 chooses to follow is whether a rational basis exists. *Brown*, 462 U.S. at 843 (“The
 17 ultimate inquiry . . . is whether the legislature’s plan ‘may reasonably be said to advance
 18 [a] rational state policy’ and, if so, ‘whether the population disparities among the districts
 19 that have resulted from the pursuit of this plan exceed constitutional limits.’”), *cited with*
 20 *approval in* Response at 11:5-7. Plaintiffs cannot plausibly rebut this presumption
 21 because they do not and cannot allege that the decisions made by the Commission in
 22 drawing the final legislative map were based on any factor other than consideration of
 23 legitimate policies, including compliance with the VRA.

24 _____
 25 ³ Response at 5:17-7:13 (arguing that the alleged underpopulation of Democratic
 26 districts did not materially increase the minority voting age percentage (“VAP”) of the
 27 Voting Rights Districts); *id.* at 7:8-13 (citing Complaint, ¶ 130 that the Commission
 28 could have *increased* the minority percentage of the Voting Rights Districts to equalize
 population among districts); *id.* at 8:5-8 (arguing that the Commission “wanted to peel off
 Hispanic voters from the VRA districts and shove them into adjacent White districts to
 increase Democratic voting strength”); *id.* Ex. 3 at 2-3 ¶¶ 5, 8 (proposing districts with
 “the same or greater percentages of adult Latino population” and concluding that the
 Commission “deliberately under populat[ed] Democratic districts” (emphasis added)).

1 **C. Plaintiffs' Incorrect Voting Analysis Does Not Support Their Equal**
 2 **Protection Claim.**

3 Plaintiffs' VRA discussion incorrectly applies Section 2 principles to Section 5
 4 decisions. Section 5 of the VRA mandates that the Commission “ensure that ‘the gains
 5 thus far achieved in minority political participation [are] not destroyed.’” *Texas v. United*
 6 *States*, ___ F. Supp. 2d ___, 2012 WL 3671924, at *10 (D.D.C. Aug. 28, 2012) (three-
 7 judge panel) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)). Section 5,
 8 therefore, covers not just majority-minority districts, but also coalition and crossover
 9 districts that offer minority voters the ability to elect candidates of their choice. *Id.* at *8-
 10 9.⁴ Plaintiffs base their entire argument on – and cite only cases relating to – Section 2 of
 11 the VRA. (Response at 7:17-10:8 (citing *Bartlett*, 566 U.S. at 14, 19-20; *Voinovich v.*
 12 *Quilter*, 507 U.S. 146 (1993); *Grove v. Emison*, 507 U.S. 25 (1993); *League of Latin Am.*
 13 *Citizens v. Perry (LULAC)*, 548 U.S. 399, 430 (2006)); *see also* Response at 12:25-13:2.)
 14 Section 2 does not compel states to draw new crossover districts, *see Bartlett*, 556 U.S. at
 15 14, 19-20; these cases do not hold that states can disregard the existence of established
 16 crossover and coalition districts in a Section 5 inquiry.

17 The Commission necessarily has discretion to determine how best to comply with
 18 the VRA, in light of all of the relevant redistricting criteria, and it could decide to
 19 underpopulate certain districts by a small percentage to facilitate compliance with Section
 20 5. *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003) (noting that states have flexibility to
 21 choose between “theor[ies] of effective representation”). Here, the Commission
 22 rationally decided to create ten districts in which minorities have the ability to elect their
 23 candidate of choice to satisfy Section 5. (Motion at 6:14 (noting the Commission was
 24 advised by its voting rights consultant to create ten districts in which minorities could
 25 elect candidates of choice);⁵ *id.* at 11:7-16 (noting that the Commission purported that its

26 ⁴ In a crossover district, a minority group “is large enough to elect the candidate of
 27 its choice with help from voters who are members of the majority and who cross over to
 28 support the minority’s preferred candidate.” *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009).
 In a coalition district, two or more minority groups work together to elect their preferred
 candidate. *Id.*

⁵ Mr. Adelson’s advice regarding slightly underpopulating Voting Rights districts is
 (continued...)

1 plan provided Hispanic voters the ability to elect candidates of choice in nine legislative
 2 districts, the tenth ability-to-elect district being majority Native American.) This
 3 determination is a “legislative fact” that the Court should accept as true so long as the
 4 question is at least debatable. *Vance v. Bradley*, 440 U.S. 93, 111 (1979) (In equal
 5 protection cases, “those challenging the legislative judgment must convince the court that
 6 the legislative facts on which the classification is apparently based could not reasonably
 7 be conceived to be true by the governmental decisionmaker.”); *see also Nordlinger v.*
 8 *Hahn*, 505 U.S. 1, 11 (1992); *Minnesota v. Clover Leaf Co.*, 449 U.S. 456, 464 (1981).

9 Rather than focus on what the Commission actually did (based on its verbatim
 10 transcripts), Plaintiffs ask the Court to substitute its judgment for the Commission’s.
 11 (Response at 5:17-6:14 (noting HVAP in only seven Hispanic ability-to-elect districts, as
 12 well as one Native American district); *id.* at 7:11 (arguing that the Commission only
 13 needed to create seven Hispanic VRA districts); *id.* at 9:12 (same); *id.* Ex. 3 at 11 ¶ 37
 14 (concluding that the Commission should have raised the percentage of Hispanics in seven
 15 districts, rather than creating two additional districts).) This lawsuit concerning minor
 16 population deviations cannot succeed by second-guessing the Commission’s decisions
 17 about how to comply with Section 5.⁶ *See Brown*, 462 U.S. at 842; *cf. Scott v. Dep’t of*
 18 *Justice*, 920 F. Supp. 1248, 1252, 1255 (M.D. Fla. 1996) (The state may decide to settle a
 19 claim where “a material constitutional issue exists,” even in the absence of a judicial
 20 finding that the existing map is unconstitutional.), *aff’d sub nom., Lawyer v. Dep’t of*
 21 *Justice*, 521 U.S. 567 (1997).

22 _____
 (...continued)

23 not analogous to the mindset of the legislators in *Larios*, who did not even consider the
 24 VRA and who sought to get the population deviations as close to 10% as possible. *See*
 25 *Larios*, 300 F. Supp. 2d at 1328, n.3 (“[T]he defendant has never claimed that the
 26 population deviations were necessary to achieve compliance with the Voting Rights
 Act.”) The consequences here are notably different from *Larios*. Nine of the thirty
 legislative districts have less than a 1% population deviation, and only four districts (12,
 16, 17, and 25) have populations that exceed 3% of the ideal district population.

27 ⁶ The State’s interest in preclearance is significant. In the event of an objection, the
 State would probably not have had new districts in place for the 2012 election,
 necessitating emergency relief from the courts and perhaps a court-drawn plan for at least
 28 one election cycle. Also, if the State receives an objection, it is ineligible to bail out from
 under Section 5 for ten years. 42 U.S.C. § 1973b(a).

1 Plaintiffs focus on the underpopulation of Districts 8 and 24 (Response at 6:21-23,
2 8:15-10:8). Districts 8 and 24 are underpopulated by only 2.2% and 3.0%, respectively,
3 and Plaintiffs’ allegations regarding these two districts provide no facts that rebut the
4 presumption of constitutionality that applies to minor deviations. The minor
5 underpopulation of Districts 8 and 24 reasonably facilitated creating ten ability-to-elect
6 districts. While Plaintiffs dispute whether District 24 qualifies as a Voting Rights District
7 (Complaint, ¶ 126; Response at 8:15-10:8),⁷ they do not plausibly allege that the
8 Commission could not have rationally concluded that District 24 was a Voting Rights
9 District and that slightly underpopulating the district helped maintain its minority voting
10 strength. (*See also* Motion at 9:27-10:1 & n.10 (noting that Legislature’s memorial
11 acknowledged that the Commission considered District 24 to be a Voting Rights
12 District).) The Complaint also does not plausibly challenge the slight underpopulation of
13 District 8, which helped preserve minority voters’ ability to elect candidates of choice in
14 Pinal County, where minority voters had enjoyed some success with Benchmark District
15 23. (Motion at 10 n.11; Dkt 41-1, Ex. 1 at 2, 77.)⁸

16 Plaintiffs’ expert’s substitute plans are irrelevant and inappropriate for
17 consideration in deciding this Motion. However, even when considered, the plans
18 offered do not create ten ability-to-elect districts. (Response, Exs. 2-3.) Instead, they
19 only purport to create eight ability-to-elect districts, and there is no way of predicting if
20 the Department of Justice would have precleared such a map, given its preclearance of

21 _____
22 ⁷ Plaintiffs’ argument that District 24 is merely an “influence district” (Response at
23 8:15-10:8; *see also* Complaint, ¶ 126) does not state a claim challenging the district’s
24 population deviation. The Commission could rationally conclude that District 24 was a
25 crossover or coalition district. (Dkt. 40-1, Ex. 1 at 117 (noting that in District 24 the
minority candidate of choice won in each of the state-wide elections tested).) Plaintiffs’
purported argument about the race of the candidates running in 2012 in Districts 24 and
26 (Response at 9:10-19) is irrelevant under *Thornburg v. Gingles*, 478 U.S. 30, 68.
(Motion at 11 n.12.)

26 ⁸ Plaintiffs ask for a “take back” on their allegation that District 8 is competitive.
27 (Response at 6:21-23.) Because Plaintiffs’ have not sought leave to amend their
28 Complaint, this allegation for purposes of the Motion should be accepted as true. *See*
Rodriguez v. U.S. Bank Nat. Ass’n, No. C 12-00989 WHA, 2012 WL 1996929, at *3
(N.D. Cal. June 4, 2012) (“It must be stressed that plaintiff may not add allegations to his
complaint through his briefings.”). Nonetheless, the Complaint’s allegations do not
undermine the constitutionality of the map and District 8

1 the map with 10 ability to elect districts. The fact that these newly created alternative
 2 plans allegedly contain smaller total population deviations than the Commission’s map
 3 does not rebut the presumption of constitutionality that applies to the map that the
 4 Commission itself adopted. Plaintiffs’ argument that the Commission could have added
 5 more Hispanic voters to majority-HVAP districts (which excludes Districts 8, 24, and 26)
 6 is irrelevant for the same reason. (Complaint, ¶ 130; Motion at 10:11-11:6.) Finally,
 7 insinuation of vote dilution (Complaint, ¶¶ 132-138, 140) is also irrelevant because
 8 Plaintiffs do not bring a vote dilution claim under § 2 of the VRA.

9 **D. Plaintiffs’ Cannot Establish the Commission’s Map is Unconstitutional**
 10 **Because They Believe It Could Have Approved a Better Map.**

11 Much of Plaintiffs’ argument boils down to the notion that they can draw a
 12 “better” map than the Commission. (*E.g.*, Response at 2:15-19; *id.* at 7:8-13 (claiming
 13 that VRA could have been satisfied by adding more minorities to Voting Rights
 14 districts)). That allegation, however, does not state a claim because it merely represents
 15 an effort to substitute a third party’s judgment for the judgment of the Commission. As
 16 the Supreme Court has explained, judicial involvement in the inherently political and
 17 legislative process of apportionment “must end at some point, but that point constantly
 18 recedes if those who litigate need only produce a plan that is marginally ‘better’ when
 19 measured against a rigid and unyielding population-equality standard. The point is, that
 20 such involvements should never begin.” *See, e.g., Gaffney*, 412 U.S. at 750-51; *Cecere*,
 21 274 F. Supp. 2d at 312 (same); *Gonzalez*, 2012 WL 3889021, at *13 (same); *see also*
 22 *Marylanders*, 849 F. Supp. at 1036 (that a plan with mathematical equality could have
 23 been drawn does not demonstrate that the deviation was caused by an improper policy).

24 Plaintiffs also allude to technological advancements since *Reynolds v. Sims*, 377
 25 U.S. 533 (1964), presumably to argue that because technology allows for legislative maps
 26 with equal population, such should now be the standard. (Response at 10:18-21.) While
 27 there undoubtedly have been advancements, they do not change the standard applied to
 28 an equal protection challenge. *Tennant v. Jefferson County Comm’n*, No. 11-1184, 2012

1 WL 4343861, at *4 (U.S. Sept. 25, 2012) (per curiam). Districting plans for state
 2 legislative seats require only “substantial” population equality. *See Gaffney*, 412 U.S. at
 3 748; *see also id.* at 741-42 (There are “fundamental differences” between equal
 4 population in congressional and legislative redistricting that have “consistently been
 5 maintained.”). This Court should decline Plaintiffs’ invitation to change the decades-old
 6 standard applied to one-person, one-vote claims challenging state legislative maps.

7 Finally, Plaintiffs’ argument that only Arizona’s constitutional goals can count as
 8 legitimate state policies (Response at 11:17-19, 12:21-25, 13:10-12) improperly melds
 9 state-law and federal-law claims. The Commission does not dispute that it must follow
 10 the six goals in article 4, part 2, section 1(14) of the Arizona Constitution. However, a
 11 claim that the Commission has failed to follow those goals is a claim under the Arizona
 12 Constitution, not the federal Equal Protection Clause. Plaintiffs have not alleged that the
 13 Commission violated the state constitutional requirements, and, if they had, a deferential
 14 standard would govern the Court’s review. *See Ariz. Minority Coal. for Fair Redistricting*
 15 *v. Ariz. Indep. Redistricting Comm’n*, 220 Ariz. 587, 600 ¶ 45, 208 P.3d 676, 689 (2009).

16 For all of these reasons, Plaintiffs have failed to state a plausible one-person, one-
 17 vote claim.

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

20 Plaintiffs do not dispute that the Arizona Supreme Court stated that the Arizona
 21 Equal Population Goal, Ariz. Const. art. 4, pt. 2, § 1(14)(B), “require[s] compliance with
 22 the Federal Constitution.” *Ariz. Minority Coal.*, 220 Ariz. at 597 ¶ 32, 208 P.3d at 686;
 23 Response at 14:19-15:1. Instead, Plaintiffs argue that this statement is dicta. (Response
 24 at 15:1-5.) While the Equal Population Goal was not specifically at issue in *Minority*
 25 *Coalition*, this statement is still the best indication of how the Arizona Supreme Court
 26 would rule on the question.

27 Plaintiffs’ argument that the Equal Population Goal must mean something other
 28 than the federal requirement or it is “meaning[less]” is wrong. (Response at 15:6-11.)

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1 The Arizona Supreme Court treated the first two goals – compliance with the U.S.
2 Constitution and the VRA and equal population to the extent practicable – as a unit in its
3 analysis. *Ariz. Minority Coal.*, 220 Ariz. at 597 ¶ 32, 208 P.3d at 686. Indeed, the other
4 half of the Equal Population Goal – that Congressional districts must have equal
5 population to the extent practicable – indisputably mirrors federal law. *See Karcher v.*
6 *Daggett*, 462 U.S. 725, 730 (1983) (requiring a good-faith effort to achieve absolute
7 equality). It would be anomalous to conclude that every part of the first two goals
8 mirrors federal law, except for the one that Plaintiffs rely on in this case.

9 Alternatively, if the Court dismisses Plaintiffs’ Equal Protection Claim but does
10 not wish to dismiss Plaintiffs’ claim under the Arizona Constitution, it should decline to
11 exercise supplemental jurisdiction. (Motion at 14:23-15:2.)

12 **III. THE COMPLAINT SHOULD ALSO BE DISMISSED UNDER RULE 8.**

13 If the Complaint is not dismissed for failure to state a claim, it should be dismissed
14 under Rule 8. Far from a “rant,” the Commission’s argument cogently explains how the
15 Complaint fails to perform the essential functions of a complaint. (Motion at 15:6-10.)
16 The Complaint is replete with disparaging, immaterial, and irrelevant allegations, and it
17 omits information from the public record that makes it blatantly misleading. (*Id.* at
18 15:22-16:5.) Therefore, if the Court does not dismiss under Rule 12(b)(6), it should
19 dismiss under Rule 8.

20 **CONCLUSION**

21 For the foregoing reasons, the Commission respectfully requests that this Court
22 dismiss Plaintiffs’ First Amended Complaint with prejudice.

23 RESPECTFULLY SUBMITTED this 28th day of September, 2012.

24 BALLARD SPAHR LLP

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 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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