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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 FOR PROTECTIVE ORDER** **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 Rule of Civil Procedure 26(c), for a protective order (1) forbidding depositions of the Commissioners, Commission staff, consultants, and Christopher Mathis; and (2) limiting the scope of certain requests for production and interrogatories that seek information protected by legislative privilege.

INTRODUCTION

Many of Plaintiffs' discovery requests strike at the core of the legislative privilege. The Commissioners, Commission staff, and consultants are protected by an absolute privilege against "compulsory evidentiary process" concerning conduct undertaken in their legislative capacity. *E.g.*, *EEOC v. Wash. Suburban Sanitary Comm'n* (*Wash.*

Suburban), 631 F.3d 174, 180-81 (4th Cir. 2011); *accord Jeff D. v. Otter* (*Jeff D. II*), 643 F.3d 278, 289-90 (9th Cir. 2011). The privilege also protects against disclosure of non-public communications and thought processes related to the Commissioners' legislative acts. *See, e.g.*, *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-31 (9th Cir. 1983); *Cano v. Davis*, 193 F. Supp. 2d 1177, 1180-81 (C.D. Cal. 2002). These protections are intended to enable legislators and those who assist them to fully discharge their duties and remove the cost, inconvenience, and distraction of actual or potential lawsuits. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *see Miller*, 709 F.2d at 526 (applying privilege to former congressman).

Moreover, even if the privilege were qualified, this Commission – unlike many state legislatures – has created a thorough record of its activities, which contains the Commissioners' contemporaneous statements as to their motives, comments from the public, and snapshots that show the development of the legislative map from grid to final. Therefore, Plaintiffs cannot make the required showing of need to overcome a qualified privilege. For these reasons, the Court should grant this Motion for protective order.

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FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs allege a single federal claim – a violation of the one-person, one-vote rule under the Equal Protection Clause. (Dkt. 55 at ¶¶ 158-163.) Plaintiffs' state law claim is likewise based on population deviations among districts. (*Id.* at ¶¶ 164-171.) Yet Plaintiffs' initial disclosure lists no less than twenty-two categories of information from the Commissioners that Plaintiffs may use to support their claims. (Ex. A, Plaintiffs' Initial Disclosure Statement at 2-3.) At least half of these topics do not even relate to the population deviations. (See Topics 1-9, 11-12, and 22.)[1]

[1] These are: "**[1]** Selection of the IRC chair, **[2]** the process for selection of IRC counsel, **[3]** the process for selection of the mapping consultant, **[4]** IRC failure to comply with the Arizona Open Meeting Laws, **[5]** adoption of the grid map, **[6]** proposed adjustments to the grid map between the time of its adoption and the adoption of the draft legislative map published to the public, **[7]** selection of a Voting Rights consultant, **[8]** failure to obtain a racial bloc voting analysis before adoption of the draft map, **[9]** failure to adopt definitions of the terms or methodologies for determining compactness and contiguity of districts, communities of interest, visible geographic features, and competitiveness of districts, **[10]** adjustments to the draft map after its publication and before adoption of the

(continued...)

Plaintiffs' disclosures for the Commission's mapping consultants, Ken Strasma and Willie Desmond, and its Executive Director, Ray Bladine, contain many of the same irrelevant and improper categories of information. (Ex. A at 3-6). Plaintiffs also disclosed Bruce Adelson, a consultant on the Voting Rights Act, and Christopher Mathis, Commissioner Mathis's husband. (*Id.* at 5-6.) Finally, Plaintiffs' requests for production and interrogatories seek information protected by legislative privilege. (*See* Ex. B.)

ARGUMENT

I. LEGISLATIVE PRIVILEGE APPLIES TO THIS CASE.

The Commissioners acted in a legislative capacity when creating the legislative map at issue (*see* Dkt. 66 at 3-4), and, like state legislators, they enjoy a privilege against being compelled to offer testimony or evidence regarding their legislative activities. *See, e.g.*, *Wash. Suburban*, 631 F.3d at 180-81; *Jeff D. II*, 643 F.3d at 289-90. The privilege also protects against disclosure of non-public communications and thought processes related to the Commissioners' legislative acts. *See, e.g.*, *Miller*, 709 F.2d at 530-31; *Cano*, 193 F. Supp. 2d at 1180-81.

Legislative privilege, which is incorporated into federal law through Federal Rule of Evidence 501, is firmly rooted in history and tradition. *See, e.g.*, *Tenney*, 341 U.S. at

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(...continued)
final map, **[11]** the extent, if any, to which the Commissioners gave any consideration to HCM 2001, adopted by the Arizona Legislature on November 1, 2011, **[12]** the issues raised in HCM 2001, **[13]** the extent, if any, to which the IRC attempted to comply, and actually did comply, with Section 2 of the Voting Rights Act, **[14]** the extent, if any, to which the IRC attempted to comply, and actually did comply, with Section 5 of the Voting Rights Act, **[15]** whether any of the criteria in Ariz. Const. art. 4, pt. 2, § 1(14)(A)-(F) caused the systematic underpopulation of Democrat-plurality legislative districts and the systematic overpopulation of Republican -plurality districts, **[16]** whether the true objective of the IRC majority in systematically underpopulating Democrat-plurality legislative districts and systematically overpopulating Republican-plurality districts was to strengthen Democrat representation at the Legislature, **[17]** the extent, if any, to which the IRC majority underpopulated Voting Rights districts relative to other districts to avoid retrogression, **[18]** the extent, if any, to which the IRC treated a ten percent deviation from exact equality as a safe harbor, **[19]** the extent, if any to which the IRC's motivation in underpopulating and overpopulating districts was racial or ethnic, **[20]** any of the issues framed by the briefing of the IRC's motion to dismiss the amended complaint, and **[21]** any of the issues framed by the second amended complaint. **[22]** In addition, for IRC chairperson Colleen Mathis, the issues with respect to material omissions framed by paragraphs 17-26 of the second amended complaint."

372; *Lake Country Estates v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 403 (1979); *Supreme Court of Va. v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 732 (1980); *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998). Moreover, this privilege extends not just to the Commissioners but also to their aides, who are "treated as one" with the legislators they serve. *Gravel v. United States*, 408 U.S. 606, 616 (1972) (internal quotation marks omitted); *see Jeff D. II*, 643 F.3d at 289-90. Therefore, the Commissioners, staff, and consultants cannot be compelled to offer evidence or testimony concerning a Commissioners' legislative acts; nor may they disclose non-public communications with a Commissioner without that Commissioner's consent. *Cano*, 193 F. Supp. 2d at 1180-81.

Moreover, the legislative privilege extends beyond just communications between Commissioners, staff, and consultants to communications with third parties. In *Miller v. Transamerica*, the Ninth Circuit held that the legislative privilege for a former congressman included the "informing function," which covers a legislator "informing itself about subjects susceptible to legislation." 709 F.2d at 531. The court recognized that "[o]btaining information pertinent to potential legislation or investigation is one of the 'things generally done in a session of the House,' concerning matters within the 'legitimate legislative sphere.'" *Id.* at 530 (citations omitted). And this information could come from constituents who may provide "data to document their views when urging the [legislator] to initiate or support some legislative action." *Id.*; *see also Trunk v. City of San Diego*, No. 06-cv-1597, 2007 WL 1110715, at *3 (S.D. Cal. Apr. 2, 2007) (applying *Miller*). Likewise, in *Jeff D. I*, the district court held that "even when [the legislative aide] is contacting individuals outside the legislator, her purpose is to gather information for a legislator." *Jeff D. v. Kempthorne* (*Jeff D. I*), No. 80-cv-4091, 2006 WL 2540090, at *3 (D. Idaho Sept. 1, 2006). The court therefore upheld the claim of legislative privilege, and the Ninth Circuit affirmed the district court's findings and conclusions. *Jeff D. II*, 643 F.3d at 290.

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A. Legislative Privilege is Absolute in the Civil Context.

In the civil context, state legislative privilege is absolute. This conclusion follows from the fact that the closely related protections of legislative immunity for state legislators and legislative privilege and immunity for federal legislators are absolute; and the Ninth Circuit as well as other jurisdictions apply absolute privilege.

1. The Commissioners' Legislative Privilege Should Track Their Legislative Immunity.

Legislative immunity and legislative privilege should be treated the same, and the protections for federal and state legislators should be congruent in the civil context.[2] The purpose behind these doctrines is to enable legislators, and those who assist them, to "focus on their public duties by removing the costs and distractions attending lawsuits," and to serve as a bulwark against "political wars of attrition in which [legislators'] opponents try to defeat them through litigation rather than at the ballot box." *Wash. Suburban*, 631 F.3d at 181. Since *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130-31 (1810), the general rule has been that inquiry into the motives of legislators was not in keeping with our scheme of government and, therefore, "placing a decisionmaker on the stand is usually to be avoided." *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977); *see also Miller*, 709 F.2d at 528 (extending the legislative privilege to a former congressman, even in the absence of any threat of personal liability).

Legislative privilege is closely related to – and indeed is a corollary to – legislative immunity, which permits a legislator to be dismissed as a party to a suit. *See, e.g.*, *Wash. Suburban*, 631 F.3d at 181 (legislative privilege protects "against compulsory evidentiary process *to safeguard . . . legislative immunity*" (emphasis added)); *United States v. Blaine*

[2] State legislators are not entitled to the same protections as federal legislators in *criminal* cases brought by the federal government. *United States v. Gillock*, 445 U.S. 360, 370, 372-73 (1980). However, it is well-established that state legislators are entitled to the same protections as federal legislators in *civil* cases. *See Supreme Court of Va.*, 446 U.S. at 732 ("[S]tate legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech of Debate Clause."); *Gillock*, 445 U.S. at 373 (noting that "*Tenney* and subsequent cases on official immunity have drawn the line [for state legislators] at civil actions"); *Tenney*, 341 U.S. at 372-75.

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County Montana, 363 F.3d 897, 908 (9th Cir. 2004) (noting that legislators are protected from "testifying about their motives by legislative immunity"); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992) ("Legislative immunity not only protects state legislators from civil liability, it also functions as an evidentiary and testimonial privilege."). And it is clear that legislative immunity is absolute when it applies. *Schmidt v. Contra Costa County*, 693 F.3d 1122, 1132 (9th Cir. 2012) ("Legislators are entitled to absolute common-law immunity against civil suits for their legislative acts, which is parallel to the immunity provided by the Speech or Debate Clause."). Moreover, the policies behind legislative privilege for federal legislators apply equally to state legislators in the civil context, and federal legislative privilege is absolute. *Texas v. Holder*, No. 1:12-cv-00128, Slip. Op. (Ex. D) at *2-*3 (D.D.C. June 5, 2012).

2. The Ninth Circuit and Other Jurisdictions Apply Absolute Privilege in this Context.

The Ninth Circuit recently upheld a finding of legislative privilege in a case involving a violation of constitutional rights asserted by a class of indigent Idaho children. *Jeff D. II*, 643 F.3d at 289-90. Plaintiffs sought to depose a legislative budget analyst, and the court held that the analyst could invoke the privilege because she was functioning in a legislative capacity. *Id.*, *aff'g Jeff D. I*, 2006 WL 2540090, at *3.

Importantly, the Ninth Circuit in *Jeff D. II* (and the district court below) cited *Marylanders*, 144 F.R.D. at 297-98, which involved a one-person, one-vote claim similar to the claim at issue here. *Id.* at 294 n.4; *see Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1034 (D. Md. 1994). In that case, the court ruled that legislative immunity precluded depositions of legislative leaders, "as well as any inquiry into legislative 'motive' concerning the introduction of the redistricting plan," because legislative immunity "functions as an evidentiary and testimonial privilege," which is an "*absolute*" ban against testimony "regarding conduct in their legislative capacity."

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Marylanders, 144 F.R.D. at 295, 297 & n.12 (emphasis added).[3] "'[I]t is not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Bogan*, 523 U.S. at 55 (quoting *Tenney*, 341 U.S. at 377). Moreover, in *Jeff D. I*, the District Court held in effect that the privilege is absolute for legislators by recognizing that for legislative aides it is "less absolute." *See Jeff D. I*, 2006 WL 2540090, at *3; *accord Marylanders*, 144 F.R.D. at 298.

Under *Jeff D. II*, this Court's analysis should begin and end with a determination of whether the act is an integral part of the deliberative and communicative processes by which Commissioners participate in redistricting, and whether the activity in question addresses proposed redistricting. *Miller*, 709 F.2d at 529. These elements are satisfied for Plaintiffs' discovery requests (Dkt. 66 at 3-4), and absolute privilege therefore prevents compelling the Commissioners or their agents to offer testimony or evidence. Moreover, the claim of improper motive does not destroy legislative privilege. *See, e.g.*, *Bogan*, 523 U.S. at 54; *Tenney*, 341 U.S. at 377.

Consistent with these principles, many courts in redistricting and other Voting Rights cases have routinely denied plaintiffs' efforts to seek testimonial or documentary discovery of legislators or their agents. As noted above, the *Marylanders* three-judge federal court considered a one-person, one-vote claim similar to the claim at issue here, and ruled that legislative immunity precluded depositions of legislative leaders, "as well as any inquiry into legislative 'motive' concerning the introduction of the redistricting plan." 144 F.R.D. at 294-95 & n.4.

In *Backus v. South Carolina*, No. 3:11–cv–03120 (D.S.C. Feb. 8, 2012), a case where plaintiffs alleged Equal Protection and Voting Rights Act claims against state legislative and Congressional redistricting plans, the court granted defendants a

[3] Two judges in the *Marylanders* panel suggested that members of a gubernatorial advisory committee would not enjoy absolute immunity. *Id.* at 304-05. However, unlike the advisory committee members, the Commissioners here are the actual legislators in Arizona for the specific task of legislative redistricting. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n* (*Minority Coal. II*), 220 Ariz. 587, 594-95 ¶¶ 18-19, 208 P.3d 676, 683-84 (2009).

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protective order prohibiting "Plaintiffs from inquiring into any matters protected by legislative privilege," which "means Plaintiffs are prohibited from asking any questions concerning communications or deliberations involving legislators or their agents regarding their motives in enacting legislation." Ex. C (2/8/12 Slip. Op.) at 2.

In *Texas v. Holder*, No. 1:12-cv-00128 (D.D.C. June 5, 2012), a three-judge panel recognized that "[l]ike the Constitution's Speech or Debate Clause, the legislative privilege provides a [state] legislator not only immunity from suit . . . but also a testimony and evidentiary privilege." Ex. D (6/5/2012 Slip Op.) at 2-3 & n.1 (citing *Jeff D. II*, 643 F.3d at 288-90; *Wash. Suburban*, 631 F.3d at 180-81, and fifteen other cases from nine different jurisdictions). The court also cited *Village of Arlington Heights*, 429 U.S. at 268, for the proposition that even if there are some "extraordinary instances" where a legislator could be called to testify, "even then such testimony will frequently be barred by privilege." Slip. Op. at 3. Even recognizing that there may be exceptions to legislative privilege, the Court did not find that legislative privilege is abrogated in all Voting Rights Actions and rejected the argument that the case was "extraordinary" so as to support abrogating the legislative privilege. *Id.* at 4. The court therefore granted Texas's motion for protective order, and prevented the U.S. Attorney General from questioning legislators about their communications with third parties. *Id.* at 11. The Court also limited the requests for production to exclude public documents in the legislators' personal files that would disclose their thought processes. *Id.* at 7-8[4]

3. Arizona Law Also Applies Absolute Privilege.

When presented with the issue raised here, the Arizona Court of Appeals in 2003 reached the same conclusion as the Ninth Circuit and District Court in *Jeff D*, largely following the same analysis. *See Arizona Independent Redistricting Commission v. Fields* (*Legislative Immunity Opinion*), 206 Ariz. 130, 137 ¶ 17, 75 P.3d 1088, 1095 (App. 2003) ("The legislative immunity doctrine also functions as a testimonial and

[4] While the court did require disclosure of documents about communications with third parties, *id.* at 6, Ninth Circuit law differs on this point. *See Miller*, 709 F.2d at 530-31; *Trunk*, 2007 WL 1110715, at *3; *Jeff D. I*, , 2006 WL 2540090, at *3.

evidentiary privilege.") (citing *Marylanders*, 144 F.R.D. at 297). Thus, the overwhelming federal and state authority establishes that the Commissioners enjoy an absolute legislative privilege and therefore Plaintiffs' discovery requests should be denied.

The Plaintiffs assert a federal law claim in the first claim for relief and a state law claim in the second claim. This raises the issue whether, under Federal Rule of Evidence 501, federal or state law governs the privilege question. The rule provides that, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." The Commission has asked this Court to dismiss the state-law claim and to hold that the federal equal protection claim is based on federal not state law. (Dkt. 66.) But if the Court holds that state law applies to either claim, then it should look to state law regarding the privilege issue. State law establishes that the Commissioners, staff, and consultants enjoy an absolute legislative privilege. *Legislative Immunity Opinion*, 206 Ariz. at 137 ¶ 17, 75 P.3d at 1095. The court's holding is rooted in both federal common law and the Arizona Constitution. *See id.* Thus, both federal and state law establishes that legislative privilege, as it applies to the Commission, is absolute.

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B. Even if Legislative Privilege is Qualified, Plaintiffs have not Overcome the Privilege with a Showing of Need.

While there are "extraordinary instances," in which Courts have found the legislative privilege to be qualified and ordered state legislators to submit to compulsory evidentiary process, these situations are rare and the courts require a showing of need and apply a rigorous balancing test. Moreover, the courts generally limit the topics legislators are required to respond to in order to protect non-disclosure of non-public communications and thought processes regarding legislative acts. If this Court concludes that the legislative privilege is qualified rather than absolute (which it should not do), it should nonetheless find that Plaintiffs have not demonstrated, under the facts of this case, a need that justifies overcoming the privilege.

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In *Committee for a Fair and Balanced Map v. Illinois State Board of Elections*, the court identified five factors to consider in determining whether and to what extent a state lawmaker may invoke legislative privilege: (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation and the issues involved; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. No. 11-cv-5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011). The court upheld the privilege as to "information concerning the motives, objectives, plans, reports and/or procedures used by lawmakers" and "information concerning the identities of persons who participated in decisions regarding the 2011 Map." *Id.* at *10.[5] Likewise, in *Kay v City of Ranchos Palos Verdes*, the court applied qualified privilege, and concluded that the legislative privilege barred questions at depositions regarding nonpublic discussions between members of the city planning board (who functioned as legislators), city planners, and consultants. No. 02-cv-3922, 2003 WL 25294710, at *21 (C.D. Cal. 2003).[6]

Here, the Commissioners' claim of legislative privilege easily satisfies all five factors identified in *Committee for a Fair and Balanced Map*. Significantly, considerable other evidence is available: the Commission created a thorough public record of its proceedings. Consequently, this privilege applies to the Commissioners' activities regarding the legislative map, and it precludes the discovery Plaintiffs seek.

1. The relevance of the evidence sought to be protected

The relevance of much of the discovery Plaintiffs seek is non-existent or marginal at best. Plaintiffs are attempting to inquire into the Commission's motive, and largely

[5] The only evidence the court did order produced is the identity of the consultants and facts about the map – information that is publicly available in this case. *See id.* at *10.

[6] The court did not address whether the planning commissioners were required to attend depositions in the first place, because the planning commission waived that issue by failing to challenge it. *Id.* at *6. Also, although the district court in *Kay*, concluded that legislative privilege should be qualified, that ruling was not reviewed by the Ninth Circuit, and predates the Ninth Circuit's decision in *Jeff D. II*, which affirmed the lower court's determination that the privilege is absolute.

establish an improper motive through circumstantial evidence that has no connection to the Commission's actual map-drawing decisions. As discussed in the next subpart, the Commission painstakingly developed the map and there are voluminous transcripts, draft maps, and data that show the Commission's process. Because these documents and data are a matter of public record, this factor weighs against disclosure. *See Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8.

2. The availability of other evidence

Plaintiffs have available to them much better evidence than most plaintiffs seeking to challenge a redistricting plan. The Commission conducted public meetings where it debated and took public comment on changes to the lines as the Commission adjusted the grid and draft maps. The public record includes the Commission's maps and data, transcripts of meetings, and public comments submitted for the entire mapping process. The record also includes the Commission's voluminous submissions to the United States Department of Justice. As noted in the Commission's legislative preclearance submission, there are over 272 hours of business meetings and almost 89 hours of public hearings. (Ex. E at 140.) These transcripts show the contemporaneous statements of the Commissioners about their motives and they show the actual adjustments made to the map. In addition, the public record includes the iterations of the map (called "snapshots") that show the adjustments that were proposed for the legislative map. It also includes the "change orders" that describe the changes. The Commission made many of the snapshots available to the public at the time and has agreed to produce by January 7, 2013 every snapshot from grid to final that occurred in a public meeting. Thus, Plaintiffs will have the entire development of the map that occurred in public meetings at a very fine level of granularity. This evidence is the most reliable and accurate evidence for purposes of this case.

As an illustrative example, the Commission decided to remove a section of District 2 referred to as "the tail" as it was adjusting the map after the 30-day comment period (discussed in Paragraph 104 of the Complaint). Plaintiffs have the transcript of

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the discussion. (*See, e.g.*, Ex. F, 12/5/11 Tr. at 154:7-158:4.) They also have the maps related to this adjustment, and for many adjustments they have data about specific the demographic effects of the change. (Ex. G.) And they have the Commission's explanation in its preclearance submission to the Department of Justice as to why this change was made, with citations to the exact maps. (Ex. E at 67-71.) Each of the maps cited there is publicly available, and the entire submission including exhibits has been produced to Plaintiffs. As an additional example, on December 20, 2011, the Commission deliberated over the legislative map, and the transcript of the deliberation spans 112 pages.[7]

The Plaintiffs have all of this information at their fingertips and the availability of this evidence supports not overriding the privilege. *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *8. The burden is on Plaintiffs to demonstrate their need. They must come forward with specific arguments based on facts. Tired allegations about irrelevant matters and vague claims that the 272 hours of meetings were "pretextual" will not suffice.

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3. The "seriousness" of the litigation and the issues involved

As a general matter, a case alleging a violation of the Constitution is undoubtedly "serious," *id*., but not every case alleging a constitutional violation is "serious" enough to overcome legislative privilege. The courts rarely abrogate legislative privilege for state legislators and when they do it is primarily in criminal matters. *Gillock*, 445 U.S. at 373. In *Texas v. Holder*, the three-judge panel refused to abrogate the privilege in a Voting Rights Act case. Ex. D (6/5/12 Slip Op.) at 2 (D.D.C. June 5, 2012). The court cited *Arlington Heights*, 429 U.S. at 268, for the proposition that even if there are some "extraordinary instances" where a legislator could be called to testify, "such testimony will frequently be barred by privilege." *Id.* at 3. Although recognizing that there may be exceptions to legislative privilege, the Court refused to abrogate the privilege in all

[7] The entire transcript of this meeting is available at http://www.azredistricting.org/Meeting-Info/default.asp

Voting Rights cases, and the court rejected the argument that the case was "extraordinary" so as to support abrogating the legislative privilege. *Id.* at 4.[8]

The seriousness of this lawsuit is in actuality based on the facts supporting Plaintiffs' claims. As shown above, the public record meticulously documents the adjustments to the map from grid to final with maps and data, and contains verbatim transcripts of the Commissioners', staff's, and public's contemporaneous statements about those adjustments. Allegations of improper motive for a population deviation within the constitutionally permissible 10% range is not, without more, a serious lawsuit that should overcome legislative privilege in this context.

4. The role of the government in the litigation

Here the state government's role is direct as the legislative map was created by the Commission, which is a state constitutional body. However, unlike other redistricting cases involving state legislatures, the role of government is reduced here by virtue of the fact that the Commissioners are unpaid volunteers. In fact, the Commission was created by the people to remove the redistricting task from the Arizona Legislature. Thus, this factor militates in favor of upholding the privilege.

5. The possibility of future timidity by government employees

The need to encourage frank and honest discussion among lawmakers favors nondisclosure. It is indisputable that "the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable," *Comm. for a Fair & Balanced Map*, 2011 WL 4837508, at *7, weighs overwhelmingly in favor of upholding the privilege. *See Tenney*, 341 U.S. at 377. This factor applies with even more force here considering that the individual Commissioners are unpaid citizen volunteers. These volunteers have dedicated hundreds of hours to redistricting, and their work has been meticulously documented. The discovery Plaintiffs seek will chill the

[8] *Committee for a Fair and Balanced Map* extended the abrogation in a Voting Rights Act case, which the court found to be akin to a criminal prosecution. *See* 2011 WL 4837508, at *6. However, that court still prohibited inquiring about "pre-decisional, non-factual communications that contain opinions, recommendations or advice about public policies or possible legislation." *Id.* at *10.

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willingness of Commissioners, Commission staff, and consultants to deliberate freely about legislative matters for fear that, at some later date, each and every one of their internal thoughts and privately expressed comments and ideas could be subject to public disclosure by way of a federal lawsuit.

While the same is true for members of the Arizona Legislature who will also be subject to similar discovery requests in future lawsuits once this door is open, the potential chilling effect of denying legislative privilege here is more pronounced than for state legislators. Indeed, Justice Scalia's apt observation that "[f]erreting out political motives in minute population deviations seems to me more likely to encourage politically motivated litigation than to vindicate political rights," applies with even more force when considering the scope of Plaintiffs' wide-ranging discovery requests. *See Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting from summary affirmance).

Redistricting regularly spurs litigation by the disappointed political party or its representatives. Adopting a blanket rule that legislative privilege does not apply to redistricting cases will invite "political wars of attrition," *Wash. Suburban*, 631 F.3d at 180-81, and is inconsistent with the Court's limited role in reviewing the quintessentially legislative task that is redistricting. For these reasons, this factor militates in favor of upholding the privilege. Since none of the factors weighs in favor of disclosure, even a qualified legislative privilege is not overcome.

II. LEGISLATIVE PRIVILEGE PRECLUDES MOST OF PLAINTIFFS' PROPOSED DEPOSITIONS AND DISCOVERY REQUESTS.

Because legislative privilege applies to this case, the Court should (1) forbid depositions of the Commissioners, Commission staff, consultants, and Christopher Mathis; and (2) limit the scope of certain requests for production and interrogatories that seek information protected by legislative privilege.

A. Depositions of Commissioners, Staff, and Consultants

Many courts that hold legislative privilege applies to bar depositions completely. *See, e.g., Jeff D. II*, 643 F.3d at 289-90. In addition, the only topics that are relevant to

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Plaintiffs' claims are the Commissioners' actual adjustments to the legislative map. These actions are unquestionably legislative in nature. *See, e.g.*, *Miller*, 709 F.2d at 529; *Minority Coal. II*, 220 Ariz. at 594-95 ¶¶ 18-19, 208 P.3d at 683-84; *Legislative Immunity Opinion*, 206 Ariz. at 138 ¶ 22, 75 P.3d at 1096. Any other ancillary topics (i.e. selection of the mapping consultant and counsel) are of little to no relevance, and their purpose is simply to annoy, embarrass, oppress or unduly burden the Commissioners. Fed. R. Civ. P. 26(c)(1); 30(d)(3)(A).[9] Finally, the Commission's staff and consultants enjoy the same privilege as the Commissioners for the Commissioner's legislative acts. *Jeff D. II*, 643 F.3d at 289-90. For these reasons, this Court should forbid depositions in their entirety.

B. Deposition of Christopher Mathis

Any attempt to depose Christopher Mathis, the husband of Commissioner Mathis, is simply an attempted end-run around legislative privilege and an attempt to annoy, embarrass, and oppress the Mathises. It should not be permitted. Fed. R. Civ. P. 26(c)(1); 30(d)(3)(A). Even more, Mr. Mathis is protected by the marital privilege. The confidential marital communications privilege protects against disclosure of conversations or communications between spouses made in confidence during their marriage. *United States v. Montgomery*, 384 F.3d 1050, 1056 (9th Cir. 2004). A communication is protected if it meets the following requirements: (i) the marriage is recognized as valid by state law; (ii) the communication was conveyed by one spouse to the other; and (iii) the communication is in confidence. *Id.* Communications between spouses are presumed to be confidential and therefore protected by the privilege. *See United States v. Lea*, 249 F.3d 632, 641-42 (7th Cir. 2001) (statements excluded because defendant failed to establish that communication was intended to be communicated to third parties or that privilege was waived).

[9] Moreover, if a Commissioner does waive privilege, that Commissioner is limited to testifying to his or her own motivations, and may not introduce evidence the motivation of another Commissioner who is claiming privilege. *Cano*, 193 F. Supp. 2d at 1179-80.

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C. Plaintiffs' Document Requests and Interrogatories

Through requests for production and interrogatories, Plaintiffs seek to force the Commissioners to disclose non-public communications with the mapping consultant and others about adjustments to the map. Plaintiffs Request for Production Number 4 seeks "all documents relating to the placement of legislative district boundaries and population deviations in any draft of final legislative district map." (Ex. B at 43). And Plaintiffs' Request Number 5 seeks documents from Commission consultant Bruce Adelson. (*Id.* at 44.) Likewise, Plaintiffs' Interrogatory Number 24 asks the Commission and Commissioners to "[i]dentify all individuals with whom you have discussed any draft or final legislative district boundaries and population deviations among districts." (*Id.* at 38.) The Commission will produce all public documents regarding these topics. However, the Court should limit the scope of this request to exclude the Commissioners' nonpublic communications and their personal documents, even when those communications or documents reflect communications with third parties. This is compelled by binding Ninth Circuit precedent. *See Miller*, 709 F.2d at 530-31; *Trunk*, 2007 WL 1110715, at *3; *Jeff D. I*, 2006 WL 2540090, at *3. Likewise, this same principle holds for communications and documents in the Commission staff and consultants' possession that were done on behalf of commissioners. *Jeff D. I*, 2006 WL 2540090, at *3 (holding that "even when [the legislative aide] is contacting individuals outside the legislator, her purpose is to gather information for a legislator").

Plaintiffs' interrogatories nine through thirteen and eighteen inquire about the motives of the Commissioners. (Ex. B at 23-27, 32.) The Commission will respond based on the public record. However, the Court should limit the scope of these interrogatories to exclude information protected by legislative privilege.

CONCLUSION

For the reasons describe above, the Commission respectfully requests that this Court enter a protective order (1) forbidding depositions of the Commissioners, Commission staff, consultants, and Christopher Mathis; and (2) limiting the scope of

certain requests for production and interrogatories that seek information protected by legislative privilege.

RESPECTFULLY SUBMITTED this 21st day of December, 2012.

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RULE 26(c)(1) CERTIFICATION

Counsel for all parties met on November 5, 2012 to prepare a proposed case management plan, as ordered by the Court. At that meeting, Counsel for the Commission and Counsel for Plaintiffs conferred in good faith in an effort to resolve the dispute regarding legislative privilege without court action.

/s/ Joseph A. Kanefield

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 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/ Brunn W. Roysden III

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