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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Wesley W. Harris, *et al*.,

Plaintiffs,

v.

Arizona Independent Redistricting Commission, *et al*.,

Defendants.

Case No. CV 12-0894-PHX-ROS

PLAINTIFFS' RESPONSE OPPOSING MOTION FOR PROTECTIVE ORDER OF DEFENDANTS ARIZONA INDEPENDENT REDISTRICTING COMMISSION AND ITS MEMBERS

Hearing Date: January 25, 2013
Time: 10:00 A.M.

Plaintiffs hereby respond to, oppose, and request the Court to deny the motion for protective order based on a claim of legislative privilege filed by Defendants Arizona Independent Redistricting Commission and its individual members (collectively "IRC"). The motion should be denied for the following reasons: (1) the information sought is highly relevant to Plaintiffs' claims of improper intent; (2) such evidence bearing on intent and motive is not available from any other source; (3) the evidence sought is critically important, involving the right to vote; (4) the role of the IRC was central to this litigation; (5) no chilling effect will result from such discovery, and in fact discovery into the motives of the IRC members is consistent with the intent of the voters when they amended the Arizona Constitution to create the IRC in making the work of the IRC transparent, neutral, and above partisan politics; (6) the IRC has waived any claim of privilege by its assertion of good faith and reliance on the public record in proof of its claimed good faith, while trying to block Plaintiffs' access to evidence that would disprove the alleged good faith; and (7) the privilege is limited in any event to legislative decisions, and would not extend to administrative or other tasks, such as the hiring of the mapping consultant. *State of Arizona v. Mathis*, __ P.3d __, 2012 WL 6134868, *18, ¶ 76 (Ariz. App., Dec. 11, 2012). This response is based on and supported by the accompanying memorandum of points and authorities, which is adopted herein by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

The IRC bears a "heavy burden" in establishing the existence of a legislative privilege. *Favors v. Cuomo*, 285 F.R.D. 187, 199 (E.D.N.Y. 2012). *See also Manzi v. DiCarlo*, 982 F.Supp. 125, 128 (E.D.N.Y.1997) (Noting in analysis of legislative privilege that "[t]he burden of justifying application of any privilege falls upon the party seeking to invoke it."). John Kimpflen, et al., *Burden of Proof*, 10 FED. PROC., L. ED. §

26:107 (2012) ("The party objecting to discovery has the burden of establishing the existence of a privilege by establishing all elements of the privilege. The objecting party's burden can be met only by an evidentiary showing based on competent evidence, and cannot be discharged by mere conclusory assertions.")

Intent and motive are critical issues in this case. If the IRC's deviations from population equality were not the mere by-product of the application of neutral and legitimate state policies, but were the result of arbitrary or discriminatory intent of the IRC majority, the IRC violated the equal protection clause of the Fourteenth Amendment. *Roman v. Sincock*, 377 U.S. 695, 710 (1964); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1326 (N.D. Ga. 2004) (three-judge court), *aff'd*, 542 U.S. 947 (2004). In the words of the Supreme Court,

> The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the Equal Protection Clause.

Brown v. Thomson, 462 U.S. 835, 845-46 (1983).

It appears an unnatural oddity that 16 of 17 Republican plurality-districts turned out to be overpopulated and 11 of 13 Democrat-plurality districts turned out to be underpopulated. It is possible that these results were the mere by-product of neutral forces, but experience suggests it is not likely. If a coin comes up heads 16 of 17 times, one would be prudent to check the coin before betting on the next flip. Thus, it is reasonable to inquire into the motives of the IRC majority that produced such a skewed and unnatural result. The odds alone suggest that its motivations were partisan. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.")

For its part, the IRC has suggested that the overpopulations and underpopulations resulted from attempts to comply with the Voting Rights Act:

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

IRC motion to dismiss the amended complaint (doc. 40), dated 08/03/12, at 9:21 – 10:5. Having stated a motive for the population deviations, the IRC itself has opened the door to inquiry into its motives, and as developed below, it thereby has waived the privilege, if any, blocking the inquiry. If the IRC wanted to avoid a waiver, it should have stood silent and defended on the results alone. It cannot make privilege a shield against inquiry into motivation, and at the same time use evidence of intent as a sword.

A further oddity is that not all of the districts the IRC represented to this Court to be "voting rights districts" in fact qualified as such. To be eligible for consideration as a voting rights district, a district must have at least a majority of minority population, *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009). A 50%-plus-one Latino population, however, is merely a threshold, and says nothing of the percentage of minority citizen voting age population required to satisfy a full application of the voting-rights district criteria set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

According to the IRC's own statistics, Districts 24 and 26 do not cross the threshold of 50% Latino population even to be considered as candidates for further

analysis under *Gingles*.[1] Thus, they could not be considered voting rights districts in any event. Whether the districts that do cross the threshold of 50% Latino population qualify as voting rights districts must depend on an application of the *Gingles* test.

At any rate, the results of the 2012 general election are telling and what they say does not support the IRC.[2] District 24 did not elect any Latinos to the state House or Senate. Districts 26 and 27 did not elect any Latinos to the state Senate, District 30 did not elect any Latinos to the House, and District 26 elected a white Democrat to one of its two House seats. Thus, Districts 24, 26, and 30, sent white Democrats to take five of six seats in the House, and non-Latinos to two of three seats in the Senate. Those are hardly the results of Latino voting rights districts.

II. LEGISLATIVE PRIVILEGE IN FEDERAL COURT.

"Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." *Herbert v. Lando*, 441 U.S. 153, 175 (1979). Evidentiary privilege is the exception and not the rule. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). Federal courts are not bound by a legislative privilege existing under state law. *Favors*, 285 F.R.D. at 208. Rather, at the federal level, state legislative privilege is a creature of federal common law. *Id.*[3] *See also Jaffee*, 518 U.S. at 8

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[1]The IRC statistics are found at http://azredistricting.org/Maps/Final-Maps/Legislative/Reports/Final%20Legislative%20Districts%20-%20Population%20Data%20Table.pdf.

[2] The official canvass of the 2012 election results is found at the Secretary of State's website: http://www.azsos.gov/election/2012/General/Canvass2012GE.pdf.

[3] Ironically, the IRC claims that legislative immunity depends on federal common law, IRC Reply in Support of Motion for Judgment on the Pleadings (doc. 92, dated 01/08/13, at 5:16-17, but claims that Federal Evidence Rule 501 incorporates Arizona state law on legislative privilege. *Id.* at 3:16-17. By its own terms, Rule 501 incorporates state law on privilege only when state law supplies the rule of decision. Arizona law does not supply the rule of decision for the claim based on the equal protection clause. It does submit the rule of decision for the claim based on the Arizona Constitution's equal population clause (ARIZ.CONST. art. 4, pt. 2, § 1(14)(B)), but the

("Rule 501 of the Federal Rules of Evidence authorizes federal courts to define new privileges by interpreting "common law principles . . . in the light of reason and experience.") The privilege is limited:

> The privilege must be strictly construed and accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.

Id. (internal quotation marks omitted).

The better rule is that the privilege is qualified, not absolute. *Id.* at 209.[4] Three reasons compel this conclusion. First, the Supreme Court rejected an absolute privilege in favor of a balancing test in *United States v. Gillock*, 445 U.S. 360, 374 (1980). *Gillock* was a criminal case, but logic draws no significant distinction between criminal and civil cases in this context. *See Manzi v. DiCarlo*, 982 F.Supp. 125, 129 (E.D.N.Y. 1997) ("The Supreme Court in *Gillock* rejected the notion that the common law immunity of state legislators gives rise to a general evidentiary privilege. . . . Instead, the court engaged in a balancing of interests . . . .")

Second, an absolute privilege cannot be squared with *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 268 (1977),

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IRC wants to ship this claim off to state court under the Eleventh Amendment. Thus, to the extent that the IRC contends state law supplies the rule of decision in this case, it would have to keep the state law claim in the case and it would be judicially estopped to assert its Eleventh Amendment rights. It cannot have its cake and eat it too. *See Milton H. Greene Archives, Inc. v. Marilyn Monroe, LLC*, 692 F.3d 983, 993 (9th Cir. 2012) (Judicial estoppel "is an equitable doctrine invoked not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings, and to protect against a litigant playing fast and loose with the courts.") (Internal quotation marks omitted).

[4] Federal courts have been split on whether the privilege is qualified or absolute, and the history of the conflicting decisions in the redistricting context is traced in *Favors*, 285 F.R.D. at 213-17. In this context, a balancing test is the majority rule. *Id.*

in which the Court declined to rule out in all instances the possibility that members of a legislative body could be compelled to testify.

Third, though related, legislative immunity and legislative privilege are distinct concepts and serve different ends:

> Legislative privilege is related to, but distinct from, the concept of legislative immunity. Specifically, as further discussed *infra* pp. 213–17, while common law legislative immunity for state legislators is absolute, the legislative privilege for state lawmakers is, at best, one which is qualified.

Favors, 285 F.R.D. at 209 (internal citations and quotation marks omitted). Legislative immunity shields legislators from liability for votes they cast in the legislative body, and a lack of immunity would grind the business of legislative bodies to a halt. Thus, anything short of absolute immunity would cause significant if not crippling disruption to the legislative process. The same is not true of legislative privilege. The theory behind legislative privilege is that subjecting legislators to later inquiries about their motivations in casting votes would chill the deliberative process, but there are cases in which discriminatory intent is the decisive issue, as recognized by the Supreme Court in *Arlington Heights*. Thus, a balancing test (*see infra*), in which the possibility of a chilling effect is weighed against other factors to determine privilege is the sounder analytic position. *Favors*, 285 F.R.D. at 213-17. In this context, a balancing test is also the majority rule. *Id.*

For its part, the IRC would equate legislative privilege with legislative immunity from process, Motion at 5:1 - 8:20, and deem legislative privilege absolute, but it overstates its case. The IRC represented to this Court that the Ninth Circuit treated the privilege as absolute, citing *Jeff D. v. Otter*, 643 F.3d 278, 289-90 (9th Cir. 2011). Motion at 6:15 - 8:20. The trouble with the IRC's representation is that the Ninth Circuit never even considered the question of absolute vs. qualified privilege in *Jeff D.*

In that case, the Ninth Circuit took up legislative privilege in a single paragraph at the end of a 12-page opinion, and this is all it had to say about the topic:

> The Plaintiffs further contend that the district court "improperly applied the analysis for the legislative privilege" to non-party Kathy Holland–Smith, a legislative budget analyst. The protections of the privilege extend, however, not only to legislators but to legislative aides and assistants, "the day-to-day work of [whom] is so critical to [a legislator's] performance that they must be treated as the latter's alter egos." *Gravel v. United States*, 408 U.S. 606, 616–17, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972); *see also Marylanders*, 144 F.R.D. at 298 ("It is the *function* of the government official that determines whether or not he is entitled to legislative immunity, not his title."). The factual findings of the court with respect to Holland–Smith's activities as a budget analyst amply support the conclusion that she was entitled to the legislative privilege by reason of her function in the legislature. Accordingly, the district court did not err in upholding Holland–Smith's assertion of legislative privilege.

643 F.3d at 289-90. Since the plain language of the opinion says nothing pro or con about absolute or qualified privilege, the IRC focused instead on *Jeff D*'s citation of *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D.Md. 1992), which the IRC claims held legislative privilege to be absolute. The trouble with the IRC's argument is that the District Court in *Marylanders* ordered production of documents despite the privilege, 144 F.R.D. at 302 n. 20, which is inconsistent with an absolute privilege, and the District of Maryland, the source of the *Marylanders* opinion, itself did not treat the *Marylanders* opinion as holding the legislative privilege absolute. *U.S. E.E.O.C. v. Washington Suburban Sanitary Comm'n*, 666 F.Supp.2d 526, 532 (D.Md. 2009). The court in *U.S. E.E.O.C.* quoted with approval the following holding from *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 95-96 (S.D.N.Y. 2003): "Thus, courts have indicated that, notwithstanding their immunity from suit, legislators may, at times, be called upon to produce documents or testify at depositions."

Having shown that a balancing test should be employed for determining whether to recognize a legislative privilege, Plaintiffs turn to what test federal courts have used how it applies to this case, and why it compels a denial of a privilege.

III. THE IRC FAILS THE TEST FOR APPLICATION OF A LEGISLATIVE PRIVILEGE.

Whether a claim of privilege should be honored in federal court is determined by a five-prong test. *Favors*, 285 F.R.D at 209-10; *Rodriguez v. Pataki*, 280 F.Supp.2d 89, 96 (S.D.N.Y. 2003). The test is stated as follows:

> (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 (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

Favors, 285 F.R.D. at 209-10. When weighed in the balance, the IRC's claim of privilege is found wanting under this test.

A. Discovery and Testimony from the Individual Commissioners Is Highly Relevant.

As developed in section I *supra*, discriminatory intent is the critical issue in this case. When population deviations are intended and are not the incidental by-product of the application of neutral and legitimate state policies, the equal protection clause is violated. *Roman*, 377 U.S. at 710; *Larios*, 300 F. Supp. 2d at 1326; *Rodriguez*, 280 F.Supp.2d at 102; *Favors*, 285 F.Supp.2d at 218. Thus, the Commissioners' reasons for overpopulating 16 of 17 Republican-plurality districts and underpopulating 11 of 13 Democrat-plurality districts become the central issues in the case. This factor weighs in favor of disclosure. *Favors*, 285 F.Supp.2d at 218-19.

B. Evidence of Intent Is Not Available Elsewhere.

The IRC claims evidence of intent is available in the public record. Motion at 11:7 - 12:15. The New York Senate and Assembly majorities made the same argument in *Favors*, and the court rejected it:

> The second balancing factor also supports disclosure in this case. The defendants, hanging their hats on the purported irrelevance of legislative intent in relation to the plaintiffs' claims, argue that any information needed to prove the VRA and Equal Protection claims here is already located in the public record, and that therefore this second factor tips in favor of honoring the privilege and granting them protective orders. *See* 6/18/12 Senate Majority Mem. at 26–27; 7/9/12 Assembly Majority Reply at 3–4, 8. As stated above, however, the internal legislative process is highly relevant to all of the plaintiffs' claims. *See supra* pp. 217–19. And, while LATFOR has indeed produced substantial material on its website—including maps, analyses, data, and memoranda—such evidence may provide only part of the story. **To the extent that the information sought by the plaintiffs relates to non-public, confidential deliberations that occurred within LATFOR or one of the partisan LATFOR redistricting offices, or between legislators, their staffs, and retained experts, such information likely cannot be obtained by other means.** *See Rodriguez*, 280 F.Supp.2d at 102. Therefore, this factor militates in favor of disclosure.

285 F.R.D. at 219 (emphasis added).

In this case, seven of 17 Republican-plurality districts in the draft map were underpopulated, and four of the remaining districts were overpopulated by fewer than 900 votes. Of these, District 21 was overpopulated by a mere 18 votes.[5] All that changed in the final map, with 16 of 17 Republican-plurality districts being overpopulated. Yet, no significant improvement in minority VAP occurred in the VRA districts between the draft map and the final map. District 2 HVAP dropped by 9.6%. HVAP in Districts 3 and 27 marginally declined. HVAP marginally improved in Districts 4, 19, and 29. Native American VAP increased marginally in District 7. Yet the IRC's under-population of all these districts significantly worsened. These facts cast a dark shadow over the IRC's final legislative map, and the public record is unlikely to reveal the non-public, confidential deliberations that occurred within the

[5] The statistics are found on the IRC website at http://azredistricting.org/Maps/Draft-Maps/LD/Commission%20Approved%20Legislative%20Draft%20Map%20-%20Population%20Data%20Table.pdf.

IRC or among commission members, their staffs, retained experts, and members of the Democratic Party leadership. *Favors*, 285 F.R.D. at 219.

The IRC claims that the public record "meticulously documents" the IRC's mapping process. Motion at 13:4. Yet several statements by the Commissioners indicated that the mapping process was not fully documented in the public record. For example, Commissioner McNulty admitted that she had traded phone calls with the DOJ to get a sense of the process and timing of events. Tr. 04/20/11 at 124:19-125:7, *available at* http://azredistricting.org/Meeting-Info/default.asp.[6] On September 22, 2011, a discussion was held on whether the Commissioners should log contacts with outsiders regarding commission business. Mr. Stertz asked how that would be possible as a practical matter: "for example, I just had a conversation with Mr. Gilman during the break. How would you see that -- and we were discussing a variety of different things, but how would you see that being logged?" Tr. 09/22/11 at 96:21-25.

Commissioner Herrera admitted to working with Strategic Telemetry's William Desmond over the weekend to hash out changes to the maps. Tr. 12/07/11 at 102:15-17. He also admitted that he had discussions with others regarding Commission business outside of public meetings. *See, e.g.*, 09/22/11 at 97:9-14. In his letter responding to Governor Brewer's allegations in October 2011, Commissioner Herrera wrote: "It should therefore not be surprising that at some point in my service on the Commission, I have had one-on-one conversations about some topic with each of my fellow commissioners, including Commissioners Stertz and Freeman." Herrera letter to Gov. Brewer, 10/31/11, at 1, attached as Exhibit 1. In responding to the same allegations, Commissioner Stertz stated in no uncertain terms that there were discussions outside of open meetings "to pre-arrange voting for and awarding the IRC mapping consultant"

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[6] The transcripts cited in this response are available at http://azredistricting.org/Meeting-Info/default.asp.

and that Chairman Mathis attempted to influence his vote on the consultant outside of the normal deliberative process. Stertz letter to Gov. Brewer, 10/31/11 at 2, attached as Exhibit 2.

The IRC claims that the public record "meticulously documents" the IRC's mapping process. Motion at 13:4. Statements of at least some of the Commissioners undermine this contention. Commissioner Freeman and Commissioner Stertz both indicated that they could not understand why certain changes to the maps were made—other than to pack Republicans into districts and favor Democrats. Commissioner Freeman explained with respect to LD 11:

> So it seems like the bottom line to me is that the district lines are being manipulated in a significant way to split communities, to create a barbell district, to pack as many Republicans as possible into the proposed 11, all for the effect of creating this supposed voting rights district in an area that doesn't, in my recollection of that area of the state, is not a viable voting rights district area. That they are not able to elect a candidate of their choice, at least significantly or regularly in that area of the state.
>
> So it's -- I don't know what the point is, other than to pack the Republicans in 11, and perhaps get a Democratic district out of 11, excuse me, my math is backwards, 8, although it would not be a candidate, I don't think, based on past voter performance, that would be a candidate of choice of the minority population.

Tr. 12/19/11 at 30:18-31:8. Commissioner Stertz elaborated:

> So I just want to make sure that we go on record and say that we are compressing significant population of -- as a percentage of the voting age population into one single district. We're breaking communities of interest. We're breaking municipal lines. We are moving, by doing so, in my thought of this, it is totally disingenuous to say that we're doing it just to create something that exceeds what our original benchmark and target was, in an effort to clip off all of the Republicans to put them all into one district, and to leave an ability to elect someone else that probably may or may not have been able to be elected in the district as it was designed in the draft.

> So, that's -- we are breaking several of our constitutional criteria in an effort to do something that we are not -- is not under our original design or function to do, which was to add an 11th district.

Id. at 32:17-33:7.

Commissioner Freeman summarized his view of the actual mapping process:

> I did not see an effort to neutrally apply adjustments to the grid map in a fair and evenhanded way and in an objective way such that the public would have confidence in how the maps were developed.
> Unfortunately what I -- I just saw games like we saw tonight. I saw, you know, an effort to predesign districts without regard to the constitutional criteria.

Tr. 12/20/11 at 263:25-264:7. Commissioner Stertz agreed. *See, e.g.*, Tr. 12/19/11 at 50:9-12. He also noted that they managed to stop the process at the point where the maps are "not going to become any more contrived and we're not going to have to hear any more stories from Commissioner Herrera about how we negotiated and compromised to get to an affirmative agreement." *Id.* at 266:25-267:3.

C. A Voting Rights Case Is of the Highest Seriousness.

> The right to vote is "fundamental 'because [it is] preservative of all rights,' " *Harman v. Forssenius*, 380 U.S. 528, 537, 85 S.Ct. 1177, 1183, 14 L.Ed.2d 50 (1965), *quoting Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 535, 11 L.Ed.2d 481 (1964).

Badham v. U.S. Dist. Court for the N. Dist. of California, 721 F.2d 1170, 1173 (9th Cir. 1983). Regarding the seriousness of an equal protection claim in a redistricting case the *Favors* court wrote:

> As for the third balancing factor, it is indisputable that racial and malapportionment claims in redistricting cases raise serious charges about the fairness and impartiality of some of the central institutions of our state government, and thus counsel in favor of allowing discovery.

285 F.R.D. at 219 (internal quotation marks omitted.) *See also Rodriguez*, 280 F.Supp.2d at 102 ("Additionally, although this suit is not brought on behalf of the

United States, there can be no question that it raises serious charges about the fairness and impartiality of some of the central institutions of our state government. This, too, suggests that the qualified legislative or deliberative process privilege should be accorded only limited deference."); *Baldus v. Brennan*, 2011 WL 6122542, at *2 (E.D. Wis. 2011) ("Additionally, given the serious nature of the issues in this case and the government's role in crafting the challenged redistricting plans, the Court finds that legislative privilege simply does not apply to the documents and other items the plaintiffs seek in the subpoenas they have issued.") *Comm'n For a Fair & Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508, at * 6 (N.D.Ill. 2011) ("Voting rights cases, although brought by private parties, seek to vindicate public rights. In this respect, they are akin to criminal prosecutions. Thus, much as in *Gillock*, "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal government.")

D. The Role of Government in the Litigation.

The fourth prong of the balancing test is met as well. The IRC's role in the case is direct and central, and its "motives and considerations . . . to a large degree, [are] the case." *Favors*, 285 F.R.D. at 219. *See also Comm'n For a Fair & Balanced Map*, 2011 WL 4837508, at * 8 (The "decisionmaking process ... [itself] *is* the case, at least to the extent that plaintiffs allege that the General Assembly intentionally discriminated against Latino and/or Republican voters . . . The seriousness of the litigation and the role of Non–Parties militate in favor of disclosure.") (Internal quotation marks omitted).

E. Disclosure and Discovery Will Not Have a Chilling Effect.

What distinguishes this case from others involving legislative privilege is the nature of the IRC and the intent of the drafters as gleaned from the text of the constitutional amendment and from the arguments made by supporters of the initiative as published in the Secretary of State's publicity pamphlet. The IRC was intended to be

different from the Legislature. Its work was supposed to be transparent, neutral, and without partisanship. The text reveals the intent when it discusses qualifications of members of the IRC:

> Each member shall be a registered Arizona voter . . . who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process.

ARIZ.CONST. art. 4, pt. 2, § 1(3).

As then Attorney General Napolitano plainly wrote in the publicity pamphlet, "We need a politically neutral commission to handle redistricting." 2000 Arizona Secretary of State Publicity Pamphlet, Arguments "for" Proposition 106, comments of Janet Napolitano, found at http://www.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.htm#pgfId-1.

What's more, the Arizona Supreme Court made plain that, after the IRC drafts the grid Map, its authority to make adjustments to the map is limited to furthering the six goals stated in ARIZ.CONST. art. 4, pt. 2, § 1(14). *Arizona Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 597, ¶ 31, 208 P.3d 676, 686 (2009).

The IRC Commissioners repeatedly stated that IRC's work would be fully documented and open to the public. *See, e.g.*, Tr., 04/08/11 at 22:23-23:1 (Regarding selection of executive director "for the sake of openness and transparency it's incumbent upon us to -- as commissioners to hold these interviews in as open a session as possible.") Indeed, at least some point during the IRC meetings every Commissioner commented on the importance of transparency and openness in the redistricting process. *See* comments of Chairman Mathis, Tr. 06/29/11 at 27:12-23, and Tr. 08/31/11 at 23:3-5; Commissioner Herera, Minutes 02/24/11 at 10; Commissioner Freeman, Tr. 08/22/11 at 138:14-22, and Tr. 08/22/11 at 144:10-16; Commissioner Herrera and Commissioner

Stertz, Tr. 08/03/11 at 80:10-17 and 95:2; and Commissioner McNulty, Tr. 12/15/11 at 44:12-45:9.

In is apparent from the commitment to transparency, neutrality, and non-partisanship that the usual reasons why disclosure and discovery might chill discussions and debate have no application to the IRC. On the contrary, it would defeat the voters' intent to grant a legislative privilege. These commissioners, who do not face the corrective of an election, should be proud and willing to testify as to what they did and why they did it. Anything less betrays the intent of the voters in passing Proposition 106 at the 2000 election and makes a mockery and pretense out of all of the Commissioners' stated commitments to transparency.

F. Conclusion on Balancing.

Under these unique circumstances, the balance tips in favor of disclosure and discovery, and the motion should be denied under the balancing test, at least to the extent of inquiry into motives in adjusting the grid map that went beyond the legitimate criteria set forth in ARIZ.CONST., art. 4, pt. 2, § 1(14), bearing in mind that the members of the IRC had no lawful authority to make adjustments to the grid map for any other purpose. *Arizona Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 597, ¶ 31, 208 P.3d 676, 686 (2009).

IV. THE IRC WAIVED ANY CLAIM OF LEGISLATIVE PRIVILEGE.

The IRC has waived any claim of privilege by its assertion of good faith and reliance on the public record in proof of its claimed good faith, while trying to block Plaintiffs' access to evidence that would disprove the alleged good faith. The IRC cannot have it both ways, and the Court adverted to the peril in which the IRC placed itself if it tried to do so. *See* Transcript of Hearing of Dec. 19, 2012, at 35:10-13 (My observation is that the parties and counsel understand that privilege – if you're going to

sign a privilege as a shield, you're not going to be able to use that testimony as a sword.") (Remarks of Judge Clifton).

Essentially, the IRC cannot refer to the alleged motivations of its members as disclosed in the public records while blocking discovery regarding the very same motivations:

> [C]ourts have held that the privilege may implicitly be waived or forfeited, on a subject-matter basis, when [a] defendant asserts a claim that in fairness requires examination of protected communications. For example, a forfeiture may result when a party, in pressing an element of its claim or defense, places in issue the advice of counsel or, more broadly, when a party uses an assertion of fact to influence the decisionmaker while denying its adversary access to privileged material potentially capable of rebutting the assertion.

Favors, 285 F.R.D. at 199 (internal citations and quotation marks omitted.).

V. THE SCOPE OF THE PRIVILEGE IF GRANTED.

The privilege is limited in any event to legislative decisions, and would not extend to administrative or other tasks. *State of Arizona v. Mathis*, __ P.3d __, 2012 WL 6134868, *18, ¶ 76 (Ariz. App. Dec. 11, 2012).

VI. CONCLUSION.

The Court should adopt the balancing test favored by a majority of other courts in this context. When applied to the facts of this case, the balance swings in favor of discovery and disclosure, at least to the extent of inquiry into motives in adjusting the grid map that went beyond the legitimate criteria set forth in the Arizona Constitution. Thus, the motion should be denied. At any rate, the IRC waived the privilege by cherry-picking the record to defend its motives. Having done so, it cannot block discovery or disclosure into such motives.

RESPECTFULLY SUBMITTED on January 9, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2013, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants appearing in this case.

s/ Samuel Saks

EXHIBIT 1

INDEPENDENT REDISTRICTING COMMISSION
1100 West Washington Street
Phoenix, Arizona 85007

October 31, 2011

The Honorable Janice K. Brewer
Governor of Arizona
1700 West Washington, Ninth Floor
Phoenix, Arizona 85007

Dear Governor Brewer:

This letter is in response to the allegations you have made against me, and my fellow Independent Redistricting Commissioners, in the unprecedented letter you delivered to us on the evening of October 26, 2011. I submit this response subject to my objection to the extraordinarily short time frame you have sought to impose for a response and to my right to supplement or amend this response as appropriate in light of the artificially short response time.

First, your serious allegations of "substantial neglect of duty" are entirely unsupported by either the record of this commission or even the allegations in your letter. To the contrary, as volunteer citizens, my colleagues and I have put in many hundreds of hours of time, attending scores of lengthy public meetings and hearing thousands of public comments in communities across the state. From Sierra Vista to Bullhead City, I have crisscrossed this state hearing the many varied views of a diverse electorate, and accumulated five thick notebooks of written public commentary, which I have reviewed dutifully.

Moreover, your allegations of "gross misconduct in office" are equally misplaced and unsubstantiated. They are based primarily on unsubstantiated allegations of open meeting violations based entirely on both unfounded speculation about what may or may not have occurred outside of the many public sessions of the commission, and disputed assumptions about applicable law and interpretations of that law. As set forth below, I emphatically deny each and every allegation of noncompliance with open meeting requirements. With the exception of matters that we were told by counsel could properly be considered in Executive Session under any applicable law, we have proceeded in an entirely transparent process, with more public meetings since the date of the IRC's formation than any other state government entity of which we are aware. I have never knowingly deliberated or acted on a commission matter in the presence of a quorum of commissioners, except in meetings open to the public.

I believe that nearly every member of nearly every public body, including the legislature, occasionally has one-on-one discussions with other members of that body. Such conversations are lawful under any applicable law. It should therefore not be surprising that at some point in my service on the Commission, I have had one-on-one conversations about some topic with each of my fellow commissioners, including Commissioners Stertz and Freeman. However, as set forth in my specific responses below, I am unaware of any conversation that could constitute what the Attorney General has called a "serial communication" – where, in the course of a conversation with one commissioner, information about commission business is disclosed from a conversation that either participant had previously with another commissioner.

What is especially disturbing about your October 26 letter, however, is that even if such a conversation mistakenly occurred among other commissioners, and even if such a conversation were ultimately determined to be a technical violation of open meeting requirements, they would not amount to "gross misconduct" under any reasonable standard.

This commission has fully studied and complied with each of the unique constitutional mandates applicable to the commission, and has prepared in good faith and put forth for public comment draft maps that are fully compliant with Constitutional requirements. This process is not yet complete, and consistent with our continuing transparency obligations and desires, you and the public at large have ample opportunity during the 30-day comment period required under law to propose revisions, as you have already done.

We will review with great care all public comment received before we finalize the maps that we will submit to the United States Department of Justice for preclearance. However, your premature and unsupported allegations of conduct that would trigger the extraordinary remedy of removal from office, when coupled with your contemporaneous letter to Chairperson Mathis setting forth your substantive comments on the maps, strongly suggest that you are pursuing a stick and carrot strategy of intimidation designed to inappropriately influence the work of what the voters intended to be an independent body of citizen volunteers free from political influence.

Despite my serious concerns with your approach to raising these allegations, and my objection to the unusually short time frame that you have unilaterally sought to impose for responding to them, I believe it is in the state's best interest to move forward without further interference from you or the legislature. With this in mind, I offer the following responses to your specific allegations as they relate to alleged conduct by individual commissioners:

1. **Allegation**: "IRC commissioners had conversations with other IRC commissioners, outside of a meeting open to the public, to pre-arrange voting for and awarding the IRC mapping consulting contract to Strategic Telemetry."

   Response: Denied. This allegation is presently pending before the Superior Court of Maricopa County, which is best equipped to make findings of fact and conclusions of law related to its resolution. In the Superior Court proceedings, individual commissioners and the Commission have raised and briefed a number of important legal issues, including: 1) the not-insignificant differences between (on the one hand) the openness requirements imposed on the Commission by the constitution in a manner designed to preserve the Commission's independence and (on the other hand) the alternative language of the state open meetings laws, which were imposed by the legislature on other public bodies without regard to promoting the independence of those bodies; and 2) the commissioners' legislative immunity, which courts have made clear applies just as much to IRC commissioners as to the legislature itself, *see Ariz. Redistricting Comm'n v. Fields, 75 P.3d 1088 (2003).*

   Regardless of the outcome of those issues, however, certain facts are beyond dispute. These include that even if some aspects of the open meeting laws apply, those laws expressly permit certain non-public meetings, including those that occur in Executive Session and those involving less than a quorum of the commission's members. Without waiver of my legislative privilege, I deny that I participated in any conversations of the type described in this allegation and categorically deny participating in any conversations that were in knowing violation of any law.

2. **Allegation**: "IRC commissioners had conversations with other IRC commissioners, outside of a meeting open to the public, to discuss a unanimous IRC vote awarding the IRC mapping consulting contract to Strategic Telemetry."

   Response: Denied. This allegation is also presently pending before the Superior Court of Maricopa County, which is best equipped to make findings of fact and conclusions of law related to its resolution, and I incorporate by reference my response to Allegation one above. In addition, without waiver of my legislative privilege, I deny that I participated in any conversations of the type described in this allegation and categorically deny participating in any conversations that were in knowing violation of any law.

3. **Allegation**: "IRC Commissioners had conversations with other IRC commissioners about awarding a perfect evaluation score to Strategic Telemetry during the procurement process to guarantee the selection of a specific mapping consultant for the IRC and commissioners awarded a perfect evaluation score to Strategic Telemetry."

Response: Denied. This allegation is also presently pending before the Superior Court of Maricopa County, which is best equipped to make findings of fact and conclusions of law related to its resolution, and I incorporate by reference my response to Allegation one above. In addition, without waiver of my legislative privilege, I deny that I participated in any conversations of the type described in this allegation and categorically deny participating in any conversations that were in knowing violation of any law.

I awarded a perfect score to Strategic Telemetry because it was one of my top two preferred vendors and their written proposal and interview were flawless. My other preferred vendor was a local company, which I liked because it was an Arizona business, but the State Procurement Office told me both that the location of the vendor was not a valid basis for preferring one vendor over another and that it was in the State's interest to select a vendor for whom some degree of consensus could be achieved. I perceived that consensus could not be achieved in favor of the Arizona company, so I gave my full support to Strategic Telemetry. It was not uncommon within our Commission to award perfect scores to our preferred vendors and I understand that each Commissioner, including Commissioners Stertz and Freeman, has done so on at least one occasion.

4. **Allegation**: "IRC Commissioners have refused to cooperate with Attorney General Horne's investigations of the IRC."

Response: Certain commissioners, including me, raised proper objections to the Attorney General's investigation into the IRC because the Attorney General's Office had previously advised us as our attorneys on the very subject matter of the investigation, and it was an unethical conflict of interest for the Attorney General to then bring a lawsuit against us related to the same subject. Our objections were well founded, raised in good faith, and have since been vindicated by the Superior Court Judge assigned to hear the

> matter. As that court explained: "for the AGO to advise the commissioners, in privileged executive session, of their duties under the Open Meeting Law, then to conduct an official investigation of how well they complied with that advice, can be justly regarded as a changing of sides." [Minute Entry, dated October 27, 2011.]

As for allegations 5-7 of your letter, I deny each of them and incorporate by reference the responses of IRC counsel Mary O'Grady being submitted today related to each such accusation.

Governor, the people of Arizona reformed our state's constitution to create the IRC specifically to avoid political interference into the redistricting process. Your statements to the press that IRC Commissioners are "unelected and unaccountable" is only partially right. We clearly are unelected because the people were unhappy with redistricting being in the hands of elected politicians and wanted a new commission to be independent. But to suggest we are somehow unaccountable is to misapprehend the duties of being a volunteer commissioner. I can assure you that I do not travel without compensation to public meetings in every corner of this state and listen to public comments that can range from insightful and heartfelt to (on occasion) disrespectful or abusive without recognizing our significant responsibilities to the people of Arizona and to the state constitution. You may not agree with our decisions on specific components of the map drawing process, but you plainly have had and continue to have ample opportunity to comment and make a case for doing things differently. The possibility that qualified volunteer members of a constitutionally independent entity may ultimately reach different conclusions in good faith after substantial input is simply not grounds for invoking the powers of removal under the state constitution.

And clearly, for the reasons set forth above, such drastic remedies are not warranted here.

Sincerely,

José M. Herrera

José M. Herrera
Vice Chair

EXHIBIT 2

Richard Stertz

October 29th, 2011

Governor Janice K. Brewer
STATE OF ARIZONA EXECUTIVE OFFICE
1700 West Washington
Phoenix, Arizona 85007

Ref: Independent Redistricting Commission

Governor Brewer:

The people of Arizona are just that...people. They get up go to work, school, ranch or farm. They are the folks that live on their streets, in their neighborhoods and their towns.

They are the citizens of our great State of Arizona and these citizens decided over a decade ago to amend our constitution to have a group of their fellow citizens act on their behalf to oversee the mapping of the State's congressional and legislative districts.

The mechanisms of government are critical to provide representation to all the voters of Arizona and it is imperative that the redistricting of this state be performed with independence, conscience and the complete respect of the Arizona constitution.

I believe that I have served with a clear and tempered understanding of the inherent conflicts that are intrinsic with this position as Commissioner. I have been and will continue to take on this task with conviction, clarity and honor.

With that being said and upon reflection of your letter dated October 26th to the Arizona Independent Redistricting Commission as well to each of the individual Commissioners, I have compiled answers on my own behalf.

The Selection of the Mapping Consultant (Questions 1 through 3)

The selection of the mapping consultant was extremely contentious. I have provided extensive testimony under oath to the Attorney General during his investigation. Nevertheless, it was disconcerting to me as a Commissioner when the scoring sheets were made public. It was then that I had the opportunity to read each of the Commissioners comments. Chairwoman Mathis, Commissioner McNulty and Commissioner Herrera each recorded perfect scores for Strategic Telemetry.

I was intimately involved in crafting the Request for Proposal as well as designing the criteria for the scoring sheets used for both the initial and final scoring of the submittals. The three perfect scores that were given by Chairwoman Mathis, Commissioner McNulty and Commissioner Herrera to select Strategic Telemetry were intellectually dishonest based on the RFP criteria.

I do not know, nor do I presume to know how they deliberated or whether it was purely coincidental that they each had identically perfect scores for a firm that certainly, by virtue of how the Request for Proposal was crafted should not have merited such perfection.

It is true that there were discussions outside of open meeting to the public to pre-arrange voting for and awarding the IRC mapping consultant contract to Strategic Telemetry. It is in this regard that there was an attempt by Chairwoman Mathis to garner my vote to obtain for a 5-0 vote to hire Strategic Telemetry outside of open meeting. This is a fact. Chairwoman Mathis contacted me the evening before the vote as well as the morning of the vote and asked me to vote with her as she wanted to achieve a unanimous vote for the selection of Strategic Telemetry. She confirmed with me that she had spoken with Commissioner Freeman. I asked Chairwoman Mathis if her request for my vote was designed as a quid pro quo. So that there would be no confusion as to my question, I asked it a second time.

Chairwoman Mathis confirmed that if I were to vote with her in regards to the selection of Strategic Telemetry, she would provide a favorable vote for me in the future.

I explained to Chairwoman Mathis that I did not believe that it was in the best interest of this Commission to engage the services of Strategic Telemetry as they were, among other things, highly partisan and over priced for the services that they were proposing.

The record will show that I voted against the selection of Strategic Telemetry.

Cooperation with the AG Investigation (Question 4)

I met my obligation as a citizen Commissioner when asked by the Attorney General to answer questions that he had regarding actions that may have occurred. I did so without personal legal representation, demonstrating respect and the belief that by providing testimony it would efficiently expedite the process.

The voters of the State of Arizona approved the creation of the Independent Redistricting Commission. Their expectation of fairness, of openness and transparency should be upheld.

This is why I felt it was incumbent for me to comply with the Attorney Generals' request.

Congressional Draft Map (Questions 5 & 6)

I have been unwavering in my conviction to the constitution as it was crafted, approved and affirmed and have relied upon its' design for the testimony that I have repeatedly placed on the record.

Thousands of citizen's comments from all corners of the state have been placed into the record. Each voter deserves our consideration as they define their communities of interest, their desire for competiveness and their strong desire for keeping their counties, cities and towns together.

I have been consistent with my fellow Commissioners that development of the draft maps needed line adjustments from the approved grid maps.

A map referred to as the "donut hole" map was presented by Chairwoman Mathis. The grid line adjustments for the majority of the state had already been defined when it was presented. The Commission was given a mandate by Chairwoman Mathis to develop district lines in a specific area and only in the blank space she had provided.

Chairwoman Mathis instructed the Commission that she wanted to merge the "River District" and the "Whole Counties" maps together and left Maricopa county to be filled in by the Commission.

Shortly after the "donut hole" was presented, Commissioner McNulty presented the current Congressional District 9 map that was placed into the donut hole. Chairwoman Mathis then instructed the rest of the Commission to design around this new map. After a day of moving some lines around, we adjourned for the weekend. On Monday morning the Chair arrived with a completed map with every district equally populated as well as the "donut hole" completed. To my dismay, almost every district throughout the state had been adjusted in some fashion.

I knew then that we were in danger of breaching the constitutional process due to the lack of Commission adjustment of the grid map lines. I protested this map as it was the first time that the Commission had seen this map.

The constitution is clear as to what we are to do. I do not believe that this draft map followed that process. Our first charge was that we comply with the Voting Rights Act. Currently, this Commission does not have sufficient data to determine whether or not this map complies.

Second, this map creates districts that do not respect communities of interest, visible geographic features, city, town or county boundaries.

This was an outcome based design and in my opinion it did not follow the mandated constitutional criteria.

The record will show that I voted against the approval of both the Congressional and Legislative draft maps.

Legal Representation (Question 7)

I have not requested legal council to represent me. I am a citizen first and I do not believe that retaining an attorney is the best and highest use of the resources of the State.

I have been and continue to be unwavering in my position that this commission must follow the constitutional requirements and must operate in an open, fair and transparent manner if it has any chance at establishing the confidence of the people of the great State of Arizona.

It has been my honor to serve the State of Arizona as a Commissioner for the Independent Redistricting Commission and I look forward to continuing my service.

Sincerely,

Commissioner Richard Stertz
Arizona Independent Redistricting Commission