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

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

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

13 Plaintiffs,

14 vs.

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

16 Defendants.

No.: 2:12-CV-00894-ROS-NVW-RRC

**REPLY IN SUPPORT OF MOTION FOR
PROTECTIVE ORDER**

(Assigned to three-judge panel)

17 The Commission and Commissioners in their official capacities (collectively “the
18 Commission”) hereby reply to Plaintiffs’ Response Opposing Motion for Protective
19 Order (Doc. 94). The Court should grant the protective order because Plaintiffs fail to
20 distinguish the precedent confirming that the privilege is absolute in this context. But
21 even if the privilege is qualified, Plaintiffs cannot overcome it because the
22 contemporaneous public record is more than sufficient to determine whether there was
23 improper motive. Indeed, Plaintiffs’ proposed discovery would have an extreme chilling
24 effect on the Commission and other legislative bodies.

25 **I. An Absolute Legislative Privilege Bars Plaintiffs’ Discovery Requests.**

26 As unpaid volunteers, the Commissioners have spent hundreds of hours
27 discharging their duties on the record in an open and transparent manner. They knew
28 serving would involve a substantial commitment of volunteer time, but they could not

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1 have anticipated being subject to the burden of compulsory evidentiary process, as the
 2 Arizona Court of Appeals held in 2003 that the Commissioners are legislators who enjoy
 3 an absolute legislative privilege grounded in the Arizona Constitution and federal
 4 common law. *Ariz. Indep. Redistricting Comm’n v. Fields (Legislative Immunity*
 5 *Opinion)*, 206 Ariz. 130, 139 ¶ 24, 75 P.3d 1088, 1097 (App. 2003).

6 Similarly, the Ninth Circuit and other federal courts apply an absolute privilege in
 7 the civil context. Without the privilege, there would be little to protect these and future
 8 Commission members from “wars of attrition” and other actions corrosive to
 9 representative democracy that the courts should guard against. *See E.E.O.C. v. Wash.*
 10 *Suburban Sanitary Comm’n (Wash. Suburban II)*, 631 F.3d 174, 181, 185 (4th Cir. 2011)
 11 (legislative privilege is absolute in the civil context and “reinforces representative
 12 democracy, fostering public decisionmaking by public servants for the right reasons”).

13 **A. Plaintiffs fail to distinguish the Ninth Circuit’s decision in *Jeff D. II***
 14 **applying an absolute legislative privilege in a civil case.**

15 In *Jeff D. v. Otter (Jeff D. II)*, the Ninth Circuit applied privilege to shield a
 16 legislative budget analyst from being deposed in a federal constitutional civil rights case.
 17 643 F.3d 278, 289-90 (9th Cir. 2011). The Court’s analysis began and ended with the
 18 determination that the aide was functioning in a legislative capacity. *Id.*¹ Plaintiffs have
 19 not cited one Ninth Circuit case to support their argument that the privilege is qualified
 20 and instead rely on decisions from the U.S. District Court in New York. In light of
 21 controlling Ninth Circuit law on point, Plaintiffs’ arguments fail.

22 Moreover, as noted in the Motion, the Fourth Circuit recently affirmed the rule
 23 that legislative privilege should be absolute in the civil context. *Wash. Suburban II*, 631
 24 F.3d at 180-81; *see also Marylanders for Fair Representation, Inc. v. Schaefer*, 144
 25 F.R.D. 292, 295, 297 & n.12 (D. Md. 1992). Plaintiffs downplay *Marylanders* based on

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 27 ¹ Plaintiffs’ argue that this case never decided whether the privilege is absolute versus
 28 qualified (Dkt. 94 at 7:20-8:24). Although the court did not use the term “absolute” when
 upholding the privilege, the authority it cited did. *Jeff D. II*, 643 F.3d at 289-90. And the
 court did not engage in the factor balancing analysis associated with a qualified privilege.
 Therefore, the only logical interpretation is that the court was applying absolute privilege.

1 the district court opinion in *Washington Suburban*, but disregard the fact that on appeal of
 2 that very case, the Fourth Circuit clearly signaled that the privilege is absolute. *See* 631
 3 F.3d at 181 (“Consequently, if the EEOC or private plaintiffs sought to compel
 4 information from legislative actors about their legislative activities, they would not need
 5 to comply.”); *see also* *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996) (noting that
 6 privilege is law of the circuit and precludes compelling testimony of board members).

7 **B. Legislative Privilege Should Track Legislative Immunity.**

8 The privilege should also be absolute for the same reasons that legislative
 9 immunity is absolute. (*See* Dkt. 85 at 5-6 (collecting cases).) Although Plaintiffs
 10 acknowledge that public business would grind to a halt without legislative immunity
 11 (Dkt. 94 at 7:3-19), they nevertheless argue that compulsory discovery about legislators’
 12 motives for votes would not chill the deliberative process. (*Id.* at 7:8-19) This
 13 distinction makes no sense. *See* *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 530-
 14 31 (9th Cir. 1983) (applying privilege to *former* Congressman, even in the absence of
 15 potential personal liability). Subjecting a legislator to compulsory evidentiary process
 16 poses the same costs and distractions as subjecting a legislator to suit for official actions.
 17 After all, immunity is more “than a mere defense to liability”; it includes “an entitlement
 18 not to stand trial *or face the other burdens of litigation.*” *Mitchell v. Forsyth*, 472 U.S.
 19 511, 526 (1985) (describing purpose of § 1983 immunity) (emphasis added). It is likely
 20 for this reason that the most relevant opinion on the subject held, in applying privilege to
 21 the Commissioners, that legislative immunity “functions as a testimonial and evidentiary
 22 privilege.” *Legislative Immunity Opinion*, 206 Ariz. at 37 ¶ 17, 75 P.3d at 1075.

23 **C. State Privilege Law Applies to the Extent Plaintiffs are Permitted to**
 24 **Maintain Claims where State Law Provides the Rule of Decision.**

25 Plaintiffs’ argument regarding judicial estoppel (Dkt. 94 at 5 n.3) is misplaced
 26 because the motion for protective order and motions regarding the state-law issues are
 27 being heard together, and the Court will have to decide them. If the Court permits the
 28 state-law issues to go forward, then it must decide whether state law controls the

1 privilege. Plaintiffs concede it does under Rule 501. (Dkt. 94 at 5 n.3.). If, however, the
 2 Court grants the Commission’s Motion for Judgment on the Pleadings (Dkt. 66) and/or
 3 Motion for *Pullman* Abstention (Dkt. 76), and thus defers the interpretation of the
 4 Arizona Constitution to the Arizona courts, then federal law, and not state law, will
 5 govern the issue of privilege. But until the Court rules, Arizona law governs the issue of
 6 legislative privilege as it applies to the Commission, and the Arizona Court of Appeals
 7 has held that this privilege is absolute.

8 **II. If Privilege is Qualified, Plaintiffs Have Not Made the Necessary Showing.**

9 Even if the Court holds that the privilege is qualified, it should grant the
 10 Commission’s motion because (1) this case is not one of the rare and “extraordinary
 11 instances” alluded to in *Arlington Heights*; (2) Plaintiffs cannot show the factors for
 12 overcoming privilege, most significantly why this case cannot be decided on the
 13 extensive public record of the Commission’s actions; and (3) the out-of-circuit magistrate
 14 order Plaintiffs rely on is factually distinguishable and currently on appeal.

15 **A. At Most, Testimony by Legislators is Called for Only in Rare and
 16 Extraordinary Instances, Determined Based on Competent Evidence.**

17 Despite Plaintiffs’ argument that “absolute privilege cannot be squared with”
 18 *Arlington Heights* (Dkt. 94 at 6:15), that case suggests, at most, that to the extent the
 19 privilege can be pierced, it can only happen in rare and extraordinary situations. *See Vill.*
 20 *of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). The Court
 21 never explicitly allowed depositions in that case (nor has it ever addressed whether state
 22 legislative privilege is absolute or qualified). Instead, in discussing evidence in the
 23 context of a race-based discriminatory intent case, it stated that there *might be*
 24 “extraordinary instances” where a legislators’ testimony is called for, citing the landmark
 25 decision of *United States v. Nixon*, 418 U.S. 683 (1974), as one such example.² But even

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 27 ² At best, the Court’s language shows it was reluctant to completely close the door to
 28 such testimony, but there is nothing to suggest it intended to open it as widely as
 requested by Plaintiffs. *See Texas v. Holder*, (Dkt. 85-1, Ex. D) at 4 (“This Court has
 already found that the state legislative privilege is not abrogated in all [Voting Rights
 Act] actions”). In fact, during its review of the district court’s record in *Arlington*

(continued...)

1 then, such testimony will “frequently” be barred. *Id.* Therefore, if *Arlington Heights*
 2 applies, it stands for the idea that legislative privilege should rarely, if ever, be abrogated.

3 The Supreme Court has also stated that “[t]he privilege of absolute immunity
 4 ‘would be of little value if [legislators] could be subjected to the cost and inconvenience
 5 and distractions of a trial upon a conclusion of the pleader.’” *Bogan v. Scott-Harris*, 523
 6 U.S. 44, 54-55 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)).
 7 Therefore, if this Court concludes that the privilege is qualified, Plaintiffs must show that
 8 privilege is overcome based upon more than “a conclusion of the pleader.” Indeed,
 9 Plaintiffs concede that the determination of privilege must be based on “competent
 10 evidence.” (Dkt. 94 at 2:26-3:4.) Within this framework, Plaintiffs have failed to
 11 overcome even a qualified privilege.

12 **B. The Factors for Overcoming Qualified Privilege are not Established.**

13 **1. The relevance of much of the discovery is limited, and Plaintiffs**
 14 **have not shown need.**

15 Plaintiffs argue that discriminatory intent is the critical issue in the case (Dkt. 94 at
 16 9:15-16), but fail to show why the evidence they seek to discover is relevant or likely to
 17 lead to such evidence, let alone critical enough to support piercing the privilege.
 18 Moreover, Plaintiffs have not shown why the public record is not sufficient to try this
 19 case. (*See* Dkt. 94 at 9:23-13:13.) The Commission painstakingly developed the
 20 legislative map in public session, holding hundreds of hours of business meetings and
 21 public hearings. (Dkt. 85 at 11-12.)

22 As support, Plaintiffs point to communications between Commissioners, between
 23 Commissioners and third parties, and with the mapping consultant. (Dkt. 94 at 11:3-22.)
 24 Notwithstanding the fact that all of these communications are permitted, Plaintiffs fail to

25

 (...continued)

26 *Heights*, the Court referred to one board member’s trial testimony and the district court’s
 27 decision to forbid the questioning of board members about their motivation at the time
 28 they cast their votes. *Arlington Heights*, 429 U.S. at 270 n.20. There is no indication that
 legislative privilege was invoked in that case, and despite the Court’s earlier reference to
 “extraordinary instances” where a legislator might be called to testify, the Court held the
 district court did not abuse its discretion in forbidding any questions about the board
 members’ motives. *Id.* Plaintiffs’ argument is thus inconsistent with this case.

1 explain how discovery into them will provide critical information. Moreover, whether
2 applying absolute or qualified privilege, courts in this circuit have precluded identical
3 discovery. *Miller*, 709 F.2d at 530-31; *see also Jeff D. II*, 643 F.3d at 289-90; *Kay v. City*
4 *of Ranchos Palos Verdes*, No. 02-cv-3992, 2003 WL 25294710, at *21 (C.D. Cal. 2003).
5 Plaintiffs would abrogate legislative privilege simply because the Commissioners spoke
6 to others about their work. Plaintiffs' cite no case to support their position.

7 The fact that the information Plaintiffs seek through discovery is not critical is
8 underscored by the open and transparent manner in which the Commission adjusted the
9 map from grid to final in public sessions. Plaintiffs have not provided competent
10 evidence that the population deviations cannot be evaluated based on the public record.
11 A three-judge panel in this circuit specifically prohibited inquiring into the motives of
12 legislators who claimed privilege in a redistricting case. *Cano v. Davis*, 193 F. Supp. 2d
13 1177, 1180-81 (C.D. Cal. 2002).

14 Plaintiffs also cite contemporaneous statements from Commissioners Stertz and
15 Freeman indicating their belief that certain changes were made to the map with the
16 purpose of packing Republican voters into LD 11 to make LD 8 more competitive for
17 Democrats. (Dkt. 94 at 12:8-13:13.) Plaintiffs therefore want to ask the Commissioners
18 to explain their motives after the fact, even though the Commission held extensive on-
19 the-record discussion concerning these issues. But Courts routinely hold that
20 contemporaneous and pre-passage legislative history is far more persuasive than a
21 legislator's after-the-fact statements. *See, e.g., Hunt v. Cromartie*, 526 U.S. 541, 549-50
22 (1999) (in discriminatory intent case, finding expert affidavit to be "more important" than
23 such after-the-fact testimony); *see also Cook Inlet Native Ass'n v. Bowen*, 810 F.2d 1471,
24 1475 (9th Cir. 1987) (giving no weight to former legislator's statements regarding
25 legislative intent after bill's passage); *Am. Constitutional Party v. Munro*, 650 F.2d 184,
26 188 (9th Cir. 1981) (giving some weight to legislator's statement made
27 contemporaneously with bill's passage but no weight to statement coming one year later).

28

1 The contemporaneous record and corresponding change orders regarding LD 8 and LD
2 11 are sufficient to explain the Commission’s motive.

3 Finally, Plaintiffs fail to show the relevance of communications about the selection
4 of the mapping consultant. (Dkt. 94 at 11:22-12:3.) Indeed, this is the fourth suit where
5 partisan opponents of the Commission have made the same allegations and thus appear to
6 be waging the kind of well-orchestrated “war of attrition” rejected by the courts.³ *See*
7 *Wash. Suburban II*, 631 F.3d at 181.

8 Plaintiffs’ argue that there is a need for discovery because the population
9 deviations are purportedly based on a “clear pattern, *unexplainable on grounds other than*
10 [*improper motive*].” (Dkt. 94 at 3:16-26 (citing *Arlington Heights*, 429 U.S. at 266)
11 (emphasis added).) But Plaintiffs largely ignore the Commission’s public record in
12 reaching this conclusion. Both parties have experts. The Commission’s expert, Dr.
13 Bruce Cain, has reviewed the map and public record and concludes that the population
14 deviations result from a good-faith effort to comply with the Voting Rights Act and
15 secure preclearance. (Ex. A (Cain 1/15/2013 Opening Expert Report.) Plaintiffs’ expert
16 obviously disagrees. (Dkt. 44 at 27.) The contemporaneous record and the expert
17 analysis are more than enough for the Court to decide this case. *See Hunt*, 526 U.S. at
18 549-50.

19 **2. Plaintiffs have not shown “seriousness.”**

20 Multiple facts show a lack of “seriousness.” The size of the population deviations
21 must be considered in determining seriousness (*see id.* at 3:12-14 (citing *Brown v.*
22 *Thomson*, 462 U.S. 835, 845-46 (1983)), and Plaintiffs admit that the population
23 deviations at issue here are less than ten percent and thus minor. Also, *Arlington Heights*
24 involved an allegation of racial discrimination in violation of the Fourteenth Amendment.
25 *Id.* at 258. The Court has held that strict scrutiny, which applies to racial classifications,
26 does not apply to partisan motives. *Easley v. Cromartie*, 532 U.S. 234, 241-42 (2001).

27 _____
28 ³ The Governor’s removal was overturned, *AIRC v. Brewer*, 229 Ariz. 347, 275 P.3d
1267 (2012), and the Attorney General’s investigation was shut down for lack of reason-
able cause, *State v. Mathis*, 2012 WL 6134868, at *20 ¶ 87 (Ariz. App. Dec. 11, 2012).

1 Therefore, by definition, a case based on impermissible racial motive invites more
2 probing judicial review than one alleging impermissible political motive. And the cases
3 Plaintiffs cite all allege claims involving racial bias in addition to improper population
4 deviation.⁴

5 **3. The role of the government is limited.**

6 Plaintiffs do not dispute that the Government's role is more limited because this
7 case involves a citizen's commission. (*See* Dkt. 94 at 14:15-21.)

8 **4. Plaintiffs have not shown an absence of a chilling effect.**

9 Plaintiffs' argument that there is likely no chilling effect because this case
10 involves a citizen commission rather than the Legislature (Dkt. 94 at 14:23-16:10) is
11 contradicted by cases discussing immunity for local officials. "[T]he time and energy
12 required to defend against a lawsuit are *of particular concern* at the local level, *where the*
13 *part-time citizen-legislator remains commonplace.*" *Bogan*, 523 U.S. at 52 (emphasis
14 added); *see also Kay*, 2003 WL 25294710, at *4, 14, 21 (concluding legislative privilege
15 barred questions at depositions regarding nonpublic discussions between members of the
16 city planning commission). "The public must be able to make its electoral selection from
17 a wealth of qualified candidates, not simply the few undeterred or unaffected by the
18 threat of financial liability" *Wash. Suburban II*, 631 F.3d at 185.

19 These policies apply with equal force to the Commissioners. They are not full-
20 time legislators, but citizens who volunteer hundreds of hours of their time. The fact that
21 the Arizona Constitution calls for volunteers and places limits on their prior political
22 experience, shows that suits like Plaintiffs' would deter the exact candidates desired for
23 the Commission from applying to serve. Moreover, there is no guarantee that if
24 Commissioners are subjected to depositions in this case, that their testimony will not be
25 used to spawn future litigation, which may seek to impose liability. Indeed, given that

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27 ⁴ *See Favors v. Cuomo*, 285 F.R.D 187, 195 (E.D.N.Y. 2012); *Baldus v. Brennan*, No.
28 11-cv-562, 2011 WL 6122542, at *1 (E.D. Wis. Dec. 8 2011); *Comm. for a Fair and*
Balanced Map v. Ill. State Bd. of Elections, No. 11-cv-5065, 2011 WL 4837508, at *1
(N.D. Ill. Oct. 12, 2011); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 352 (S.D.N.Y. 2004).

1 Plaintiffs' disclosure statement lists twelve categories of information that are irrelevant to
2 the actual map adjustments (Dkt. 85 at 2 & n.1), it is difficult to see how this suit is not
3 being used as a vehicle to obtain the discovery that the Commission's partisan critics
4 have long sought but failed to acquire elsewhere. *See, e.g., Mathis*, 2012 WL 6134868, at
5 *1 ¶ 2 (Attorney General's investigation was shut down for lack of reasonable cause).

6 In addition, many of the cases that find qualified privilege involve document
7 requests and not depositions, which pose greater costs and distractions for legislators.
8 *E.g. Comm. for a Fair and Balanced Map*, 2011 WL 4837508, at *3; *Rodriguez v. Pataki*,
9 280 F. Supp. 89, 96 (S.D.N.Y. 2003); *Favors*, 285 F.R.D. at 195.

10 Finally, Plaintiffs mock the Commissioners for not subjecting themselves to
11 questioning on "what they did and why they did it." (Dkt. 94 at 16: 3-8.) Plaintiffs'
12 argument is refuted by the *Legislative Immunity Opinion*, which held the Commissioners
13 enjoy an absolute legislative privilege. 206 Ariz. at 130 ¶ 24, 75 P.3d 1088, 1097. And
14 the court rejected the argument that the privilege should not apply because the
15 Commissioners are appointed rather than elected. *Id.* at 129 ¶ 20, 75 P.3d at 1096. In the
16 last redistricting cycle, despite numerous federal and state lawsuits, no challenger was
17 permitted to depose a Commissioner. *See, e.g., id.* at 126 ¶ 7, 75 P.3d at 1093. This
18 Commission should be treated no differently.

19 **C. *Favors v. Cuomo* is Distinguishable.**

20 *Favors v. Cuomo*, 285 F.R.D. 187 (E.D.N.Y. 2012), the case primarily relied on
21 by Plaintiffs, is an opinion by a magistrate judge that is currently on appeal to the three-
22 judge panel. (Ex. C.) Indeed, the magistrate denied the request for protective order
23 without prejudice and is currently conducting an *in camera* review of the documents at
24 issue. *Favors*, 285 F.R.D. at 202. Moreover, unlike this case, the *Favors* order did not
25 involve requests to depose any legislator but only requests to respond to interrogatories
26 and compelled disclosure of documents. *See id.* at 225.

27 *Favors* is also unpersuasive because it concerns the development of a redistricting
28 plan under circumstances not even remotely close to this case. That case involves a

1 challenge to the redistricting plans adopted by the New York State Senate and Assembly.
 2 Although a legislative task force was created to assist in the map drawing, unlike the
 3 Commission, it did not deliberate with the same degree of openness that is required of the
 4 Commission. In fact, it is undisputed that the 2012 Senate Plan in *Favors* was developed
 5 exclusively within the Senate Majority redistricting office and that the task force staff
 6 members worked exclusively for the Senate Majority. *Id.* at 204. Thus, because *Favors*
 7 is not final and factually distinguishable from this case, its is of little help.

8 **III. Plaintiffs' Waiver Argument is Nonsensical.**

9 Plaintiffs argue that by defending the map as based on permissible motives, the
 10 Commission has opened the door to depositions of Commissioners. (Dkt. 94 at 4:11-15.)
 11 But the Commission has not offered "advice of counsel" or any evidence from
 12 Commissioners outside of those made in the legislative history. Plaintiffs' authority
 13 (Dkt. 94 at 17:3-11 (citing 285 F.R.D. at 199)) is discussing attorney-client privilege, and
 14 does not carry over to not legislative privilege; otherwise, legislative privilege would
 15 almost always be waived. *See Arlington Heights*, 429 U.S. at 268 (listing statements in
 16 the legislative history as a separate category of evidence from testimony from
 17 legislators).⁵ Plaintiffs cite Judge Clifton out of context. The remainder of his statement
 18 makes clear where the line should be drawn: "And in this case, if the commissioners
 19 cannot be asked about their thought process, then they won't be allowed *to testify* about
 20 their motivation." (Dkt. 86 12-19-12 Hr'g Tr. at 35:13-15 (emphasis added).)

21 **IV. The Privilege Covers All of Plaintiffs' Relevant Discovery Requests.**

22 Rather than backing down from the obviously overbroad discovery requests,
 23 Plaintiffs simply cite the recent Arizona Court of Appeals opinion regarding whether the
 24 Commission's hiring of a mapping consultant is a "legislative" versus "administrative"
 25 activity. *Mathis*, 2012 WL 6134868, at *18 ¶ 76. However, all of the relevant discovery
 26 here involves the actual map-drawing process, which is clearly legislative. (Dkt. 85 at
 27

28 ⁵ Also, this argument is contrary to the Ninth Circuit's use of legislative intent in
 statutory interpretation. *See* Part II(B)(1), *supra*.

1 14-16.) In any case, deliberative process protects discovery into non-legislative
2 activities. See, e.g., Kay, 2003 WL 25294710, at *22 (limiting inquiry, on deliberative
3 process grounds, into non-legislative activities).

4 **CONCLUSION**

5 For the foregoing reasons, the Commission respectfully requests that the Court
6 grant the requested protective order.

7 RESPECTFULLY SUBMITTED this 15th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2013, 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.

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