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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 THE SECOND MOTION FOR JUDGMENT ON THE PLEADINGS OF DEFENDANTS ARIZONA INDEPENDENT REDISTRICTING COMMISSION AND ITS INDIVIDUAL MEMBERS

ORAL ARGUMENT REQUESTED

Assigned to District Judges Silver and Wake and Circuit Judge Clifton

Plaintiffs hereby respond to, oppose, and request the Court to deny the second motion for judgment on the pleadings (doc. 95) filed on January 14, 2013, by Defendants Arizona Independent Redistricting Commission and its individual members ("IRC"). Therein the IRC requests an order establishing that its legislative map and the race-related reasons it has put forth for the systematic over-populations and under-population of districts be reviewed with deference and not with strict scrutiny. The motion should be denied for the following reasons:

1) To the extent that the IRC deliberately underpopulated and overpopulated legislative districts to create majority-minority districts beyond the number required by Section 2 of the Voting Rights Act, it acted on an improper and discriminatory intent and its districts deviating from population equality violate the equal protection clause of the Fourteenth Amendment, even if the deviations fall below ten percent, and a racially-based intent is reviewed with strict scrutiny. As developed below, the allegations of the First Claim for Relief, Second Amended Complaint, are broad enough to capture this theory as an alternative to Plaintiffs' principal theory of partisanship, and Plaintiffs preserved the breadth of the First Claim for relief in the proposed Case Management Plan, dated November 26, 2012, in their description of the nature of the case, 2:21 - 3:6, and in their listing of the elements to be proven, 4:5 - 5:9. They also specifically preserved race as a specific improper intent in the proposed Case Management Plan at 7:22-26:

> Whether the IRC's underpopulations were allowable to attain and protect representational diversity states a racial and ethnic motivation for the IRC's discriminatory patterns of deviation invoking strict scrutiny. *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993); *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Miller v. Johnson*, 515 U.S. 900, 904 (1995).

For its part, the IRC cannot claim surprise. In the proposed Case Management Plan, at 9:1-4, the IRC stated a position that in effect acknowledged the breadth of the

allegations of the First Claim for Relief, Second Amended Complaint, and recognized race as its justification for the population deviations:

> Whether Plaintiffs can carry their burden of proof that the legislative redistricting was arbitrary or discriminatory, and that any population deviation was caused solely by an arbitrary or discriminatory policy, in light of all other bases for deviations, including compliance with the Voting Rights Act?

2) The IRC's motion in essence requests a procedural ruling on the Court's standard of review, and its filing on January 14, 2013, comes too late and violates the Court's order of December 12, 2012, (doc. 73) at 2:9-14 requiring any party seeking a legal ruling before trial to identify such issue at the Case Management Conference along with a proposed briefing schedule. The IRC failed to identify the issue at the Case Management Conference, failed to indicate to the Court why the issue needed to be resolved before trial, and never proposed a briefing schedule.

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. WHAT PLAINTIFFS ALLEGED.

Plaintiffs have alleged that systematically overpopulated Republican districts and underpopulated Democrat districts, not as the mere byproduct of the neutral application of legitimate state policies, but as the result of discriminatory design and intent, violate the equal protection clause of the Fourteenth Amendment. The discriminatory intent need not be partisanship. It need only not be a legitimate state interest. Under the label, "Nature of the Case," Plaintiffs preserved the breadth of this concept:

> This action is brought by Plaintiff Arizona qualified electors to challenge the final map of Arizona legislative districts ("Final Legislative Map") approved by the IRC on or about January 17, 2012, on the grounds that the legislative districts created by the IRC violate the one-person/one-vote

> requirement of the equal protection clause of the Fourteenth Amendment to the United States Constitution, and violate the equal population requirement of ARIZ. CONST. art 4, pt. 2, § 1(14)(B), by systematically overpopulating Republican plurality districts and systematically under-populating Democrat plurality districts with no lawful state interest justifying such deviations from equality of population among Arizona legislative districts.

Second Amended Complaint at ¶ 2. Similarly, in the First Claim for Relief, Plaintiffs alleged:

> Not compelled or justified by any legitimate state interest, such as compliance with the Voting Rights Act, or the neutral districting criteria, the IRC's systematic overpopulating of Republican-plurality districts and systematic under-populating of Democratic-plurality districts was arbitrary and discriminatory, denied Plaintiffs, and each of them, their rights to equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution, and deprived them of "rights, privileges, or immunities secured by the Constitution and laws" of the United States, in violation of 28 U.S.C. § 1983. *Larios*, 300 F.Supp.2d at 1341.

Second Amended Complaint at ¶ 160.

The principal improper motivation argued by Plaintiffs has been partisanship on the part of the IRC, *i.e*. to strengthen the position of the Democratic Party at the Legislature. But in the second amended complaint Plaintiffs never limited their allegations of improper motive to partisanship. Though it did not need to go any further than paragraphs 2 and 160 under the notice pleading rules, even as construed in *Ashcroft v. Iqbal*, 556 U.S.662 (2009), it also made alternative allegations that alleged that race was an impermissible reason for drawing district lines. *See* Second Amended Complaint at 86-88, 92, 125-35, and particularly 135-38.

In its motion to dismiss the amended complaint (doc. 40), dated August 3, 2012, at 4:23 - 5:15, the IRC set forth race as a justification for its systematic underpopulation and overpopulation of districts. Plaintiffs argued in their response, dated September 7, 2013, (doc. 44) at 5:1 - 11:8, that a race motivation invited strict scrutiny.

The IRC preserved the justification in the proposed Case Management Plan (doc. 61) at 9:1-11. What is more, the report the IRC obtained from Bruce Cain identifies race as the most significant if not only factor in the drafting of the underpopulated districts. Thus the IRC itself relies on race as its reason for underpopulating and overpopulating the legislative districts. As noted above, Plaintiffs similarly specifically preserved race as a discriminatory motive in the proposed Case Management Plan.

II. RACE MOTIVATIONS BEYOND THE VOTING RIGHTS ACT STATE AN EQUAL PROTECTION CLAIM FOR RELIEF AND INVITE STRICT SCRUTINY.

There are few principles more solidly rooted in the law since 1954 than the principle that government action based on race is reviewed with strict scrutiny:

> We have held that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny." *Ibid.* This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. "Absent searching judicial inquiry into the justification for such race-based measures," we have no way to determine what "classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). We apply strict scrutiny to all racial classifications to " 'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool." *Ibid.*

Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

This principle holds in non-redistricting cases. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223 (1995) (public contracting) ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination. [A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect. [R]acial classifications [are] constitutionally suspect. Distinctions between citizens solely because of their ancestry are by their very nature odious to a

free people.") (Internal citations and quotation marks omitted.); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 720 (2007) (public schools) ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.") This principle holds equally in redistricting cases. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Miller v. Johnson*, 515 U.S. 900, 904 (1995); *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993).

This is not a racial-gerrymandering case in which Plaintiffs either allege or need to have alleged that race was the predominant factor in the drawing of district lines as in *Shaw* and *Miller*. It is a one-person/one-vote case. If the IRC drew racially-gerrymandered districts, but did not violate the one-person/one-vote principle, Plaintiffs never would have filed this lawsuit. Plaintiffs allege that the IRC diluted their votes, not as the mere byproduct of the application of neutral and legitimate state policies, but for reasons that were not legitimate state policies. That states a claim for relief under equal protection under *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Roman v. Sincock*, 377 U.S. 695, 710 (1964); and *Larios v. Cox*, 300 F. Supp. 2d 1320, 1326 (N.D. Ga. 2004) (three-judge court), *aff'd*, 542 U.S. 947 (2004).

The main theory is that partisanship was the IRC's reason. The IRC suggested compliance with the Voting Rights Act was its reason, and, as set forth above, we have captured that theory as an alternative in the Second Amended Complaint and in the proposed Case Management Plan. The Supreme Court has never explicitly held that compliance with Section 2 can be a compelling state interest justifying the use of racial classifications, but in several cases both the Supreme Court and the Ninth Circuit have assumed without deciding that Section 2 serves that function on proper evidence. *See, e.g., Bush v. Vera*, 517 U.S. 952, 977 (1996); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 559 (9th Cir. 1998). Even if this Court makes the same assumption, it is not enough.

Compliance "with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not reasonably necessary under a constitutional reading and application of those laws." *Miller*, 515 U.S. at 921. As shown below, the IRC fails on its face to show that Districts 8, 24, and 26 were majority-minority districts and therefore cannot invoke Section 2. For the remaining districts it claims to be ability-to-elect districts, compliance with Section 2 is chock full of fact questions, which preclude judgment on the pleadings.

III. WHERE BEYOND ANY DOUBT THE IRC WENT BEYOND THE VOTING RIGHTS ACT: DISTRICTS 8, 24, AND 26.

The IRC suggests that it has legal authority to maximize the number of what it has termed "ability to elect districts," and that to do so it can underpopulate or overpopulate districts as necessary to achieve this goal so long as it remains within the ten-percent deviation. *See* Proposed Case Management Plan (doc. 61) at 9:1-11. What is more, the report the IRC obtained from Bruce Cain identifies race as the most significant if not only factor in the drafting of the underpopulated districts. The IRC recently supplied the Cain report to the Court.

As we have noted before, the Fourteenth Amendment is not at war with itself. The Voting Rights Act nowhere requires or justifies deviations from population equality. The Act allows race to be considered for purposes of avoiding retrogression (Section 5) and of avoiding diluting minority voting rights (Section 2.) But the Act does not make race a justification for violating the one-person/one-vote principle. Indeed, the published position of the Justice Department on Section 5 of the Voting Rights Act is to the contrary:

> Similarly, in the redistricting context, there may be instances occasioned by demographic changes in which reductions of minority percentages in single-member districts are unavoidable even though "retrogressive" *i.e.*,

> districts where compliance with the one person one vote standard necessitates the reduction of minority voting strength.

Comments, DEPARTMENT OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, 28 CFR part 51, published at 52 F.R. 486, 488 (January 6, 1987). What the IRC advances as a justification for deviating from population equality harks back to *Georgia v. Ashcroft*, 539 U.S. 461, 480-81 (2003). There the Court suggested that

> spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group.

Id. In 2006, Congress rejected the Supreme Court's *Ashcroft* analysis when it renewed the Voting Rights Act. *See Shelby County, Ala. v. Holder*, 679 F. 3d 848, 856 (D.C. Cir. 2012) ("Congress also amended section 5 to overrule the Supreme Court's decisions in *Georgia v. Ashcroft* . . . .")

Nor can the IRC's position be squared with the Section 2 of the Voting Rights Act. The Supreme Court detailed a state's obligations under section 2 in *Bartlett v. Strickland*, 556 U.S. 1 (2009).

The number of required majority-minority districts is determined by application of the three-part test set forth in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). In this respect, the Supreme Court has held that even to be considered as satisfying the first prong of the *Gingles* test, minorities must "make up more than 50 percent of the voting-age population in the relevant geographic area." *Bartlett*, 556 U.S. at 18. Thus the first step is to determine whether in

> majority-minority districts, a minority group composes a numerical, working majority of the voting-age population. Under present doctrine, § 2 can require the creation of these districts.

Id. at 13. In contrast, Section 2 of the Voting Rights Act does not require creation of influence districts:

> At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected. This Court has held that § 2 does not require the creation of influence districts. *LULAC, supra*, at 445, 126 S.Ct. 2594 (opinion of KENNEDY, J.).

Bartlett, 556 U.S. at 13.

The third possibility is a cross-over district, defined as follows:

> The present case involves an intermediate type of district—a so-called crossover district. Like an influence district, a crossover district is one in which minority voters make up less than a majority of the voting-age population. But in a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate.

Id. The Supreme Court rejected it as well:

> They cannot, however, elect that candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters a right to preserve their strength for the purposes of forging an advantageous political alliance. . . Nothing in § 2 grants special protection to a minority group's right to form political coalitions. [M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground.

Id. (Internal quotation marks and citations omitted.)

The IRC claims that districts 2-4, 7-8, 19, 24, 26, 27, 29, and 30 are ability to elect districts. *See* IRC response to Interrogatory 1, Plaintiffs' Non-Uniform Interrogatories (Copy attached as Exhibit 1). The most obvious defect in this position is that Districts 8, 24, and 26 do not have 50% + 1 minority voting-age populations. The voting age populations in these three districts are all more than 50% non-Hispanic White: District 8 at 53.4%, District 24 at 52.4%, and District 26 at 52.3%. *See* Final Legislative Districts – Approved 1/17/12 – Voting Age Population Breakdown, found

at http://azredistricting.org/Maps/Final-Maps/Legislative/Reports/Final%20Legislative%20Districts%20-%20Population%20Data%20Table.pdf.

As a result, on their face, these three districts cannot be considered majority-minority districts, and, to the extent that the IRC offers these three districts as justifications under Section 2 for its deviations from one-person/one-vote, the argument fails on its face. The requirement in *Miller*, 515 U.S. at 921, that the IRC be right on the law is not satisfied.

The performance of these districts at the 2012 election bears out this conclusion. In Arizona, a legislative district sends one Senator and two Representatives to the Legislature. The Secretary of State's official canvass shows that these three districts sent three Latinos to the Arizona House of Representatives and none to the Senate. http://www.azsos.gov/election/2012/General/Canvass2012GE.pdf. Thus, of nine possible seats, these three districts sent three Latinos to the Legislature or merely a third of the possible number.

To the extent that the IRC offers Districts 2-4, 8, 19, 27, and 30 as majority-minority districts, it still would need to prove that it satisfied the other elements of the *Gingles* test, and that analysis is freighted with fact questions that preclude judgment on the pleadings.

IV. PLAINTIFFS HAVE STANDING.

At the risk of repetitiveness, this is not a racial-gerrymandering case. This is a one-person/one-vote case. The racial-gerrymandering cases cited by the IRC have no application. Having alleged dilution of their votes under the one-person/one-vote principle, Plaintiffs have Article III standing:

> In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992), the Supreme Court set forth the test for Article III standing. First, the plaintiff must have suffered an "injury in

> fact," or "an invasion of a legally protected interest which is ... concrete and particularized." *Id.* at 560, 112 S.Ct. at 2136. Second, the plaintiff must demonstrate the existence of a causal connection between the injury and the conduct complained of, *see id.*, and finally, it is necessary to establish that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561, 112 S.Ct. at 2136 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976)).
>
> . . . .
>
> As this test is applied here, the caselaw makes clear that a plaintiff living in an underrepresented district suffers a discrete representational harm from the disproportionate weakness of his vote as compared to the vote possessed by a resident of an overrepresented district. Moreover, this injury is caused by the apportionment scheme that generated the boundaries of the district in which the plaintiff lives and, equally clearly, is remediable by the invalidation of that scheme. This is all that is needed for Article III standing

Larios v. Perdue, 306 F.Supp.2d 1190, 1210-11 (N.D. Ga. 2003) (three-judge court). *See also Baker v. Carr*, 369 U.S. 186, 205-06 (1962) (observing that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue"); *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("[A]n individual's right to vote ... is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living [i]n other parts...."); *Fairley v. Patterson*, 493 F.2d 598, 603 (5th Cir. 1974) (noting that "sufficient damage through under[-] representation to obtain standing will be inflicted if population equality among voting units is not present").

V. THE MOTION IS LATE AND IS NOT PROPER UNDER RULE 12(C).

When it is boiled down to its essence, the IRC's motion asks for an advance ruling on the applicable standard of review. That is not a proper motion under Rule 12(c). Standard of review is an issue that should abide presentation of the evidence. Regarding timing, the Court's order of December 12, 2012, (doc. 73) at 2:9-14 required all parties to lay their cards on the table at the Case Management Conference, identify

the procedural issues on which they wanted a ruling, and suggest a proposed briefing schedule. The IRC wholly failed to abide by this order with respect to its second motion for judgment on the pleadings. For that reason alone, the Court should reject it.

VI. CONCLUSION.

Plaintiffs have alleged a violation of the equal protection clause's one-person/one-vote principle. To prevail on the claim, they must show that the deviations from population equality were not the by-product of a neutral application of legitimate state policies. They have made these allegations in the Second Amended Complaint. Their primary theory is partisanship. Yet they have adopted as an alternative the IRC's argument that the IRC underpopulated and overpopulated the districts in question for racial reasons. Such a course does not supply a legitimate basis for violating the one-person/one-vote rule, and it invites strict scrutiny. Compliance with Section 2 can justify taking race into consideration, but it cannot justify a violation of the equal protection clause. At any rate, on the face of it, the IRC cannot invoke the Voting Rights Act for Districts 8, 24, and 26. These districts do not have more than 50% minority voting-age population. Thus, Plaintiffs have standing under the equal protection clause to bring this one-person/one-vote claim for relief.

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RESPECTFULLY SUBMITTED ON January 31, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 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

Admit ____ Deny __X__

REQUEST FOR ADMISSION NO. 11:

Admit that the Final Plan has more splits of boundaries of towns than the predecessor Commission created in the final legislative map it adopted for the last decade.

Admit ____ Deny __X__

NON-UNIFORM INTERROGATORIES

NON-UNIFORM INTERROGATORY NO. 1:

State by district number all legislative districts that the IRC claims are majority-minority districts in the Final Map.

ANSWER:

The Commission incorporates its previous objection that the term "majority-minority" is vague and ambiguous. Plaintiffs define "majority-minority districts" as districts in which the minority population exceeds 50 percent and in which the minority citizen voting age population is sufficiently large for minorities to elect their candidates of choice. Based on the public records available on the Commission's website, districts 2-4, 7-8, 19, 24, 26, 27, and 29-30 all have minority populations at or above 50 percent. The Commission's rebuttal report is not due until January 15, 2012, and this interrogatory calls for an answer that is the subject of expert testimony. The Commission reserves the right to supplement its discovery. Further, this information can be derived from the preclearance submission made to the Department of Justice that has been produced.

NON-UNIFORM INTERROGATORY NO. 2:

State by district number all legislative districts that the IRC claims are majority-minority districts in the Draft Map.