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

Wesley W. Harris, *et al.*,

Plaintiffs,

vs.

Arizona Independent Redistricting
Commission,

Defendant.

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

**DEFENDANT ARIZONA INDEPENDENT
REDISTRICTING COMMISSION'S
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

(ASSIGNED TO THREE-JUDGE PANEL)

Pursuant to the Court's December 12, 2012 Order (Dkt. 73), Defendant Arizona Independent Redistricting Commission (the "Commission") hereby submits its Proposed Findings of Fact and Conclusions of Law.

PROPOSED FINDINGS OF FACT

I. THE COMMISSION'S FORMATION.

1. In 2000, Arizona voters passed Proposition 106, which created the Independent Redistricting Commission, thereby removing the task of congressional and legislative redistricting from the Arizona Legislature and placing it in the hands

1 of an independent, politically balanced Commission of five citizen-volunteers. *See*
2 Ariz. Const. art. IV, pt. 2, §§ 1(3)-(23).

3 2. No more than two Commissioners may be members of the same
4 political party, and, of the first four members appointed, no more than two may reside
5 in the same county. *See id.* § 1(5). All Commissioners must be registered voters in
6 Arizona who were continuously registered with the same political party or unaffiliated
7 with a political party for at least three years before their appointment. In addition,
8 within three years of the appointment, Commissioners could not have held another
9 public office (except for service as a school board member) and could not have served
10 “as an officer of a political party, or served as a registered paid lobbyist or as an
11 officer of a candidate’s campaign committee.” *See id.* § 1(3).

12 3. To begin the appointment process, Arizona’s Constitution requires that
13 the Commission on Appellate Court Appointments screen applications of those
14 wishing to serve as Commissioners and develop a list of ten Republicans, ten
15 Democrats, and five others who are registered with neither of the major political
16 parties. *See id.* § 1(5).

17 4. From this list, the legislative leadership of the Arizona House of
18 Representatives and Arizona State Senate select the first four Commissioners. *See id.*
19 § 1(6). In this redistricting cycle, litigation began with the Commission on Appellate
20 Court Appointments’ slate of candidates. The Speaker of the House and President of
21 the Senate challenged three members of the initial slates, and as a result of that
22 litigation, the slate of Republican candidates was modified before legislative
23 leadership made their appointments.

24 5. From the modified slate of applicants screened by the Commission on
25 Appellate Court Appointments, the Speaker of the House selected Phoenix
26 Republican Scott Day Freeman; the House Minority Leader selected Phoenix
27 Democrat Jose Herrera; the President of the Senate selected Tucson Republican
28

1 Richard Stertz; and the Senate Minority Leader selected Tucson Democrat Linda
2 McNulty.

3 6. The first four Commissioners then select the Commission's chair from
4 the slate of five applicants who were not members of either the Republican or
5 Democratic parties that had been forwarded by the Commission on Appellate Court
6 Appointments. *See id.* § 1(8). After interviewing all five candidates in a public
7 meeting, the four Commissioners unanimously selected Colleen Mathis, an
8 Independent, to serve as Chair of the Commission. *See* 3/1/11 Meeting Minutes (Ex.
9 302).

10 7. Arizona has thirty legislative districts, each of which elects two
11 members of the State House of Representatives and one State Senator. *See* Ariz.
12 Const. art. IV, pt. 2, § 1(1). Based on the 2010 census, the populations in the
13 legislative districts that were in place through the 2010 elections ranged from 155,897
14 to 378,298. The ideal legislative district population was 213,067 based on the 2010
15 census. The Commission needed to adopt new legislative and congressional districts
16 for use in the 2012 elections.

17 8. At the Commission's February 24, 2011 meeting, Karen Osborne, the
18 elections director from Maricopa County, recommended that the Commission
19 complete its work by October 1, 2011 to permit the districts to be precleared under
20 Section 5 of the Voting Rights Act before the county's December 1, 2011 deadline to
21 adopt new voting precincts. *See* 2/24/11 Meeting Minutes (Ex. 301).

22 **II. BEGINNING THE COMMISSION'S WORK.**

23 9. After all five Commissioners were selected, the Commission began
24 hiring staff, selecting office space, and selecting the attorneys and technical
25 consultants to complete its constitutional responsibilities. *See, e.g.,* 4/14/11 Tr. (Exs.
26 307-08).¹

27 ¹ Transcripts will be identified and cited using the abbreviation "Tr.," the date,
28 the exhibit number, and, where appropriate, the page and line number.

1 10. Although the Commission's procurement and hiring decisions are not
2 relevant to the federal claim in this lawsuit, these issues are addressed in Paragraphs
3 11 through 21 because Plaintiffs will attempt to raise them in this case.

4 11. The Commission selected Ray Bladine, an Independent who had been
5 one of the five finalists for the position of Commission chair, to serve as its executive
6 director. This was a unanimous decision.

7 12. The Commission next selected its legal counsel through a competitive
8 procurement process conducted with the assistance of the State Procurement Office.
9 *See, e.g.*, 3/24/11 & 3/31/11 Tr. (Exs. 304-05). The Commission selected the two law
10 firms that scored the highest in the procurement process, Osborn Maledon and Ballard
11 Spahr. *See* 5/13/11 Tr. (Ex. 313) at 10:2-6, 16:5-13. The lead counsel from Osborn
12 Maledon was a Democrat, Mary O'Grady, and the lead counsel from Ballard Spahr
13 was a Republican, Joe Kanefield. The Ballard Spahr contract included Bruce
14 Adelson, an attorney who worked in the Department of Justice's Voting Rights
15 Section during the last redistricting cycle and had extensive experience with Arizona
16 during his work for the Department.

17 13. Although Osborn Maledon and Ballard Spahr had scored the highest
18 through the procurement process, Commissioner Stertz moved that the Commission
19 retain Gammage and Burnham and the Mandell Law Firm. Lisa Hauser, a Republican
20 from Gammage and Burnham, had been the Commission's attorney during the past
21 decade and was favored by the Republican Commissioners. Michael Mandell, from
22 the Mandell Law Firm, was favored by at least one of the Democratic Commissioners.
23 Commissioner Freeman supported Commissioner Stertz's motion to retain Lisa
24 Hauser and Michael Mandell, but the other three Commissioners did not. On a 3-to-2
25 vote, with Commissioners Freeman and Stertz voting in opposition, the Commission
26 selected Osborn Maledon and Ballard Spahr at its meeting on May 13, 2011. *See id.*
27 at 16:9-13.

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1 14. The Chair supported the two law firms selected because she believed
2 their lead attorneys had more bipartisan experience and would best serve the
3 Commission as a whole. She perceived that the alternatives that Commissioner Stertz
4 proposed were more partisan than the firms selected and felt that deferring to the
5 partisan appointees to select favored Democratic or Republican attorneys would not
6 serve the interests of the Commission as a whole or serve her as the Commission's
7 sole Independent. *See* Deposition of Colleen Mathis at 247:9-250:4.

8 15. At its next meeting, members of the public began criticizing the
9 Commission for failing to select the Republican attorney favored by the Republican
10 Commissioners. *See* 5/31/11 (Ex. 314) at 4:10-6:7.

11 16. While working on the legal counsel procurement, the Commission also
12 began working on a request for proposals for a mapping consultant. Although the
13 Arizona Constitution gives the Commission independent procurement and contracting
14 authority, *see* Ariz. Const. art. IV., pt. 2, § 1(19), the Commission continued to work
15 with the State Procurement Office on the mapping consultant procurement.

16 17. Seven companies submitted proposals, and on June 15, 2010, the
17 Commission announced that it would interview four. The four finalists were Strategic
18 Telemetry, National Demographics Corporation, Research Advisory Services, and
19 Terra Systems Southwest. *See* 6/15/11 Tr. (Ex. 316) at 42:19-43:1.

20 18. While the Commission determined which mapping consultant to retain,
21 it heard public testimony criticizing the different finalists based on their partisan
22 connections. Research Advisory Services and Strategic Telemetry were criticized for
23 their connections with Democrats. National Demographics was criticized for its
24 connections with Republican interests.

25 19. After public interviews of the four finalists, the Commission selected
26 Strategic Telemetry, which had received the highest scores in the procurement
27 process. The Commission made this decision at its June 29, 2011 meeting on a 3-to-

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1 2 vote, with Commissioners Freeman and Stertz voting against the motion. *See*
2 6/29/11 Tr. (Ex. 318) at 47:6-16.

3 20. At its meeting the next day, the Commission received extensive public
4 comment criticizing the Commission for not selecting the legal counsel the
5 Republican Commissioners favored and for selecting a mapping consultant that had a
6 history of working for Democrats. *See* 6/30/11 Tr. (Ex. 319) at 5:1-87:11. This
7 criticism continued throughout the process.

8 21. Criticism also was directed toward Chairperson Mathis for alleged
9 misstatements on her application for Commissioner. *See, e.g.*, 7/8/11 Tr. (Ex. 320) at
10 171:17-173:16. Chairperson Mathis responded to and addressed that criticism at a
11 public meeting. *See id.* at 206:17-211:8. Commissioner Stertz received similar
12 criticism regarding alleged misstatements on his application. *See* 8/5/11 Tr. (Ex. 335)
13 at 25:10-28:8.

14 **III. THE COMMISSION'S FIRST ROUND OF PUBLIC HEARINGS AND**
15 **PREPARATIONS FOR THE MAPPING PROCESS.**

16 22. In early July, the Commission received training from its attorneys about
17 the redistricting process. *See* 7/8/11 Tr. (Ex. 320) at 31:6-46:24. Each Commissioner
18 received a laptop with the mapping software and received training on the software.

19 23. In the July 8 public meeting, one of the topics covered was the one-
20 person, one-vote requirement of the Fourteenth Amendment. *See id.* at 14:11-25,
21 15:1-17. Counsel noted that the courts generally allow for deviations up to ten
22 percent, but that the Commission should have legitimate reasons for the variations.
23 *See id.*

24 24. From July 21, 2011 through August 6, 2011, the Commission held 23
25 public hearings throughout the state. *See* Round One hearing schedule (Ex. 446); Exs.
26 321-36. These hearings were intended to educate the public about the redistricting
27 process and allow the Commission to receive input from the public before the
28 Commission began drawing new congressional and legislative districts.

1 25. In addition to the public hearings designed exclusively for public
2 education and input, the Commission provided the opportunity for additional public
3 comment at its business meetings and received written public input. *See* Exs. 321-36,
4 452-526. The Commission is required to give notice at least 48 hours before a
5 meeting and must conduct its business in public. *See* Ariz. Const. art. IV, pt. 1, §
6 1(12). Three or more votes are required for any Commission action. *See id.*

7 26. The Commission live-streamed its public hearings and meetings when
8 possible, kept transcripts and video of its public hearings and meetings, and had an
9 extensive website to assist the public in following the process. It also provided online
10 mapping software for the public's use. *See* meeting minutes and transcripts of all
11 Commission activity (Exs. 301-413).

12 27. Although it is not relevant to this lawsuit, on the day of its first hearing,
13 Attorney General Tom Horne announced that he was investigating alleged open
14 meeting law and procurement violations by the Commission. The open meeting case
15 was ultimately resolved by a judicial finding that there was no reasonable cause
16 supporting the investigation. *See State ex rel. Montgomery v. Mathis*, 231 Ariz. 103,
17 125 ¶ 88, 290 P.3d 1226, 1248 (App. 2012).

18 **IV. THE COMMISSION'S MAPPING PROCESS BEGINS.**

19 28. Arizona's Constitution establishes unique procedural and substantive
20 requirements that govern the Commission's work. The process has four phases: (1)
21 adopting a grid map of equal population; (2) adjusting the grid map to accommodate
22 the state constitutional goals; (3) advertising a draft map for thirty days; and (4)
23 certifying a final map to the Secretary of State. The constitutional criteria are: (1)
24 complying with the United States Constitution and the United States Voting Rights
25 Act; (2) having equal population to the extent practicable; (3) geographical
26 compactness and contiguity to the extent practicable; (4) respecting communities of
27 interest to the extent practicable; (5) using visible geographic features, city, town and
28 county boundaries, and undivided census tracts to the extent practicable; and (6)

1 favoring competitive districts to the extent practicable where it causes “no significant
2 detriment to the other goals.” Ariz. Const. art. IV., pt. 2, § 1(14). The Commission
3 also is prohibited from considering the residence locations of incumbents or
4 candidates. *See id.* § 1(15).

5 29. On August 3, 2011, the Commission began discussing the creation of
6 the grid map. *See* 8/3/11 Tr. (Ex. 332). It directed the mapping consultant to prepare
7 two grid maps for its consideration and provided the mapping consultant with
8 instructions regarding how to construct the grid maps. *See id.* at 77:2-84:22, 95:7-
9 105:17.

10 30. Following a public presentation and testimony, the Commission adopted
11 a grid map at its August 18, 2011 meeting. *See* 8/18/11 Tr. (Ex. 339) at 51:11-21.
12 The population in the legislative grid map ranged from -2.51 percent to +1.56 percent
13 of the ideal legislative district population, which was 213,067 based on the 2010
14 census. Although the grid map districts were not precisely equal, as Commissioner
15 McNulty explained, the grid maps served their purpose of beginning the process from
16 a blank slate, rather than from the old legislative districts. *See* Deposition of Linda
17 McNulty at 109:4-13.

18 31. At the same meeting at which it adopted the grid map, the Commission
19 immediately began considering how to adjust the grid map to work toward a draft
20 legislative map. *See* 8/18/11 Tr. (Ex. 339).

21 32. The Commission was aware that during the redistricting cycle following
22 the 2000 census, the prior Commission had failed to obtain preclearance from the
23 Department of Justice with its initial submission. *See* May 20, 2002 letter from
24 Department of Justice (Ex. 582). In fact, Arizona had failed to achieve preclearance
25 on all prior legislative submissions. *See* March 8, 1982; June 10, 1992; and August
26 12, 1992 letters from Department of Justice (Exs. 527-29). From the outset,
27 developing a map that the Department of Justice would preclear on the initial
28 submission was a priority for the Commission.

1 33. Between August 18, 2011 and October 10, 2011, the Commission held
2 25 public meetings to discuss the creation of a draft map and hear related public
3 testimony. *See* Exs. 339-63. These meetings supplemented the public testimony
4 received in the series of statewide hearings in July and early August of that year.

5 34. At the August 18 meeting, the Commission began learning about the
6 demographics of the existing legislative districts, which were the benchmark districts
7 for the Section 5 analysis, and about the locations of minority populations throughout
8 the state based on the 2010 census. *See* 8/18/11 Tr. (Ex. 339) at 75:16-76:20. At this
9 meeting, the mapping consultant and attorneys identified the benchmark legislative
10 districts that had majority voting age minority populations based on the 2010 census.
11 *See id.* Benchmark Districts 13, 14, 16, and 24 had a majority voting age Hispanic
12 population, and Benchmark Districts 27 and 29 were very close to majority voting age
13 Hispanic population at 49.89 and 49.81 percent, respectively. In addition, Benchmark
14 District 2 was a majority Native American District with 59.6-percent Native
15 American voting age population. There was also one benchmark district –
16 Benchmark District 15 – with a combined majority voting age minority population
17 and another – Benchmark District 25 – that was very close to a combined majority
18 voting age minority population at 49.71 percent.

19 35. When it began considering adjustments to the grid map, the
20 Commission did not have the election data available for a comprehensive analysis of
21 the benchmark districts, but focused on the information available based on data from
22 the 2010 census. *See* 8/18/11 Tr. (Ex. 339) at 91:6-13.

23 36. The discussion of the initial adjustments to the grid focused on
24 identifying potential minority districts to comply with the Voting Rights Act. *See,*
25 *e.g., id.* at 151:18-23 (Commissioner Stertz noting that criterion after adoption of grid
26 map is adjusting for compliance with Voting Rights Act); *id.* at 152:15-23
27 (Commissioner McNulty requesting map showing concentrations of Hispanics, Native
28 Americans, and African Americans to be able to establish Voting Rights districts).

1 37. At the Commission’s August 22 meeting, Bruce Adelson, the former
2 Department of Justice attorney under contract with Ballard Spahr, provided more
3 information about the Section 5 analysis and the Department of Justice’s process for
4 reviewing state redistricting plans. *See* 8/22/11 Tr. (Ex. 340) at 4:14-87:24. Mr.
5 Adelson had led the Department of Justice’s team that reviewed the submission from
6 the last decade’s commission. During that decade, the Department of Justice had
7 objected to the State’s first legislative plan, concluding that the Commission failed to
8 satisfy its burden of proof under Section 5 and finding intentional discrimination. *See*
9 May 20, 2002 letter from Department of Justice (Ex. 582).

10 38. The Commission made it a goal to satisfy its burden of proof under
11 Section 5 on its initial submission to the Department of Justice.

12 a. Commissioner Freeman explained: “I think the Commission
13 should certainly eliminate any potential risk of an objection or
14 challenge by the DOJ . . . [O]ur goal is to, to have the – and it’s
15 our duty really to construct maps that comply with federal law,
16 federal constitution, and the Voting Rights Act, and we want to
17 get this right the first time.” *See* 9/8/11 Tr. (Ex. 345) at 33:6-11.

18 39. Mr. Adelson advised the Commission that there were nine benchmark
19 ability-to-elect districts and thus this Commission needed to establish nine such
20 districts to receive preclearance. He also described the complex analysis that
21 determines whether a district provides minorities the ability to elect their candidate of
22 choice, which considers many factors, including registration, turnout, and election
23 results. He explained that the Section 5 analysis did not turn simply on the percentage
24 of minority voters in a particular district, and a different number could be required in
25 different parts of the state. *See* 8/22/11 Tr. (Ex. 340) at 27:21-30:11, 32:13-33:14.
26 Mr. Adelson also had studied the proceedings in *Texas v. United States*, 831 F. Supp.
27 2d 244, 262-64 (D.D.C. 2011), in which the District Court had affirmed the
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1 Department of Justice's functional approach when determining whether Texas's
2 legislative map satisfied Section 5. *See* Deposition of Bruce Adelson at 34:23-41:21.

3 40. The Commission also was aware that the Department of Justice, in
4 2011, had published new guidance regarding how to satisfy Section 5 of the Voting
5 Rights Act.

- 6 a. That guidance explains the importance of relying on more than
7 demographic data: "In determining whether the ability to elect
8 exists in the benchmark plan and whether it continues in the
9 proposed plan, the Attorney General does not rely on any
10 predetermined or fixed demographic percentages at any point in
11 the assessment. Rather, in the Department's view, this
12 determination requires a functional analysis of the electoral
13 behavior within the particular jurisdiction or election district. As
14 noted above, census data alone may not provide sufficient indicia
15 of electoral behavior to make the requisite determination.
16 Circumstances, such as differing rates of electoral participation
17 within discrete portions of a population, may impact on the
18 ability of voters to elect candidates of choice, even if the overall
19 demographic data show no significant change. Although
20 comparison of the census population of districts in the
21 benchmark and proposed plans is the important starting point of
22 any Section 5 analysis, additional demographic and election data
23 in the submission is often helpful in making the requisite Section
24 5 determination. 28 CFR 51.28(a). For example, census
25 population data may not reflect significant differences in group
26 voting behavior. Therefore, election history and voting patterns
27 within the jurisdiction, voter registration and turnout information,
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1 and other similar information are very important to an assessment
2 of the actual effect of a redistricting plan.” Ex. 583 at 7471.

3 41. To begin its adjustments to the grid, the Commission used what it
4 referred to as “what if” maps to explore various options. Commissioners would
5 provide direction to the mapping consultant at public meetings regarding adjustments
6 that they would like to explore or might provide information to the mapping
7 consultant outside of a public meeting. The Commissioners directed the work of the
8 mapping consultant on any proposed changes. *See* Deposition of William Desmond
9 at 215:10-216:2. The Commissioners also had the mapping software so that they
10 could explore changes independently. Willie Desmond was the Strategic Telemetry
11 employee who was primarily responsible for preparing the maps that the
12 Commissioners requested and presenting them at the public meetings.

13 42. The early instructions for “what if” maps focused on attempting to
14 create nine ability-to-elect districts. *See* 9/2/11 Tr. (Ex. 343) at 80:12-19, 93:12-19,
15 95:5-12; 9/8/11 Tr. (Ex. 345) at 139:9-16 (also noting that a purpose of different
16 options for legislative draft maps was to show that ability-to-elect districts could be
17 created in different ways); *see also* 9/2/11 Tr. (Ex. 343) at 93:17-19 (noting that
18 Commissioner Freeman requested two versions of initial maps to illustrate that
19 different ways existed to draw ability-to-elect districts). The Commission considered
20 other criteria as well, including respecting county lines, making districts more
21 compact, and respecting city and municipal boundaries. *See, e.g.*, 8/25/11 Tr. (Ex.
22 341) at 167:10-15; 9/3/11 Tr. (Ex. 344) at 71:1-16, 73:5-16. The mapping consultant
23 also tried not to split counties or census tracts when possible. *See* 9/2/11 Tr. (Ex. 343)
24 at 94:3-6.

25 43. Through September 2011, the Commission continued to explore
26 different versions of “what if” scenarios based on the constitutional criteria. For
27 example, one alternative moved the Tohono O’odham Nation into District 3 and the
28 Havasupai tribe into District 7 with the Navajo Nation. *See* 9/9/11 Tr. (Ex. 346) at

1 116:25-117:18. The same proposal explored moving the cities of Holbrook and
2 Winslow into District 6 from District 7, *see id.* at 117:23-118:7, and tried to keep
3 Prescott and the Prescott Valley areas together but include Flagstaff in a different
4 district. *See id.* at 120:9-16.

5 44. The Commissioners focused on satisfying various constitutional criteria
6 in making changes to the proposals. For example, Commissioners McNulty and
7 Stertz described how they worked to keep communities of interest whole. *See* 9/12/11
8 Tr. (Ex. 347) at 90:13-91:5, 100:16-101:19; 10/3/11 Tr. (Ex. 357) at 222:5-11.
9 Commissioner Freeman discussed trying to use county boundaries where practicable
10 and also sought to preserve majority-minority districts. *See id.* at 200:4-214:7.
11 Commissioner McNulty discussed using a presentation by the Arizona Minority
12 Coalition as a starting point and basing the proposal on communities of interest and
13 preserving majority-minority districts. *See* 9/26/11 Tr. (Ex. 353) at 117:16-18, 120:4-
14 11; 10/3/11 Tr. (Ex. 357) at 194:13-23. Commissioners also attempted to make
15 districts more competitive without harming the other goals. *See, e.g.*, 9/12/11 Tr. (Ex.
16 347) at 68:6-7.

17 45. Maps and census data for each map were posted on the Commission's
18 website, and the Commission explored the "what if" scenarios in more detail at its
19 public meetings. The Commission added criteria, such as not splitting Indian
20 Reservations, as it continued to evaluate "what if" changes to the grid. *See, e.g.*, Ex.
21 420, Tab 2B. When the Commission discussed the districts it was attempting to
22 create to satisfy Section 5, it often referred to them as "Voting Rights Districts."

23 46. The census data provided with each "what if" alternative always
24 included the total population, the deviation from the ideal district population, and the
25 percent deviation from the ideal district population, in addition to information about
26 the racial and ethnic composition of the various districts. *See id.*, Tabs 2A-2G.

27 47. The Commission also received information relevant to other
28 constitutional criteria from its mapping consultant. For example, after a presentation

1 on compactness, the mapping consultant began providing the Commission with a
2 report with three different compactness scores, known as Reock, Perimeter, and
3 Polsby-Popper. *See id.*, Tab 2G. The mapping consultant also made a presentation
4 about competitiveness and began providing the Commission with data to evaluate the
5 relative competitiveness of the districts in the “what if” scenarios. *See* 8/31/11 Tr.
6 (Ex. 342) at 42:5-55:9; Ex. 420, Tabs 2A-2G. The data regarding competitiveness
7 became more complex as the Commission’s work proceeded, and by the end of the
8 process the mapping consultant was providing the Commissioners with nine different
9 indices regarding competitiveness based on election results, voter registration, and
10 various combinations of that information. *See, e.g.*, Ex. 420, Tab 4C. The mapping
11 consultant also developed a “splits report” that gave the Commission information on
12 whether an alternative plan split counties, census places (which include cities and
13 towns), Indian reservations, or census tracts. *See, e.g., id.*, Tab 4A. In addition, it
14 provided a “components report” that identified which census places were in which
15 districts and how much of a census place was in a particular district. *See, e.g., id.*,
16 Tab 4S.

17 48. The Commission discussed whether to adopt definitions of the terms
18 used in the Arizona Constitution, such as “competiveness” and “communities of
19 interest,” but instead gathered public testimony on the concepts and, when possible,
20 received data from the mapping consultant to assist in their analysis. The
21 Commissioners debated the meanings of these concepts and how they applied to any
22 particular fact situation while they deliberated concerning proposed map changes.

23 49. When possible, the Commission or the mapping consultant would
24 provide a description of the changes in a particular “what if” alternative that was
25 available on the Commission’s website with the map. *See, e.g., id.*, Tabs 2A-2B. The
26 “what if” scenarios were also discussed at public meetings. *See, e.g.*, 9/8/11 Tr. (Ex.
27 345) at 139:9-140:1.

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1 50. While they worked toward a draft map, the Commission directed legal
2 counsel to identify a Voting Rights Act expert who could provide an independent
3 analysis of its maps before they were approved. The Commission’s counsel
4 recommended Gary King, a professor from Harvard University, and he was retained
5 to do the analysis that is necessary to determine whether districts provide minority
6 voters the ability to elect their candidates of choice and to do other types of analysis
7 that may assist the Commission. *See* 9/2/11 Tr. (Ex. 343) at 114:5-115:15.

8 51. As they worked toward a draft map that could be forwarded for a more
9 thorough Voting Rights Act analysis, the Commission began using the 2010 race for
10 Mine Inspector – the most recent statewide contest in which a non-Hispanic white
11 candidate ran against a Hispanic candidate – as a rough indicator of whether voters in
12 an area might support a Hispanic candidate. The Commission routinely applied the
13 resulting “Cruz Index,” named for candidate Manuel Cruz, in evaluating the changes
14 they were considering. *See, e.g.,* 9/29/11 Tr. (Ex. 355) at 67:5-15. This enabled the
15 Commission to consider electoral performance when assessing changes to the
16 potential Voting Rights Districts.

17 52. While the Commission worked toward a draft map, it continued to
18 discuss the number of ability-to-elect benchmark districts. In September 2011, on the
19 advice of counsel, the Commission began considering the possibility that the
20 benchmark plan may contain ten ability-to-elect districts, not all of which were
21 majority-minority districts. *See* 9/9/11 Tr. (Ex. 346) at 132:10-135:6; 10/3/11 Tr. (Ex.
22 357) at 239:11-15; 10/5/11 Tr. (Ex. 358) at 51:9-52:9; 10/6/11 Tr. (Ex. 359) at 65:21-
23 66:12, 73:7-75:16, 109:4-110:17; 11/29/11 Tr. (Ex. 395) at 104:15-105:18, 107:16-
24 110:4, 120:16-122:16; 12/8/11 Tr. (Ex. 400) at 109:15-111:10; 12/16/11 Tr. (Ex. 404)
25 at 166:2-16; *see also* Ex. 456 at 021-025 (letter from Plaintiffs’ counsel urging
26 Commission to create nine “Latino-majority” districts, apart from the one majority-
27 Native American district).

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1 53. A benchmark district that might provide minority voters the ability-to-
2 elect even though it was not a majority-minority district was Benchmark District 23,
3 which was primarily in Pinal County. Benchmark District 23 had been a critical part
4 of the Department of Justice’s objection last decade. *See* May 20, 2002 letter from
5 Department of Justice (Ex. 582); 12/16/11 Tr. (Ex. 404) at 165:18-167:8. The other
6 benchmark districts that were identified for the Section 5 analysis included
7 Benchmark Districts 13, 14, 15, 16, 24, 25, 27, and 29, as well as Benchmark District
8 2, which was the majority Native American district. *See* 10/5/11 Tr. (Ex. 358) at
9 44:5-52:9.

10 54. Many groups and individuals provided the Commission with mapping
11 proposals. These included the Navajo Nation, the Pinal County Alliance, and the
12 Minority Coalition. *See* Exs. 421-23.

13 55. The Navajo Nation, for example, proposed creating a majority-Native
14 American district that included the tribes in Northern Arizona as well as the White
15 Mountain and San Carlos Apache. This proposal was not supported by people from
16 eastern Arizona, who advocated keeping the legislative district in eastern Arizona,
17 much like Benchmark District 5, and favored keeping the Apache tribes within that
18 predominantly white non-Hispanic district. *See* Friends of LD 5 Map (Ex. 422 at 079-
19 86). An official of the White Mountain Apache had previously sent a letter notifying
20 the Commission that it favored “preserving the status quo” (and the tribe later sent
21 another letter in support), but the San Carlos Apache had not expressed a position
22 regarding the mapping proposals early in the process. *See* Ex. 428.

23 56. In southern Arizona, there was debate about splitting Yuma County,
24 primarily to build an effective minority district. This proposal had support from
25 Hispanic areas in southern Yuma, but was opposed by others. *See, e.g.* 10/3/11 Tr.
26 (Ex. 357) at 220:17-23 (discussing decision to split Yuma County to improve
27 minority voters’ ability to elect in southwestern Arizona).

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1 57. The Arizona Minority Coalition, led by incumbent minority legislators,
2 presented an alternative that initially proposed three majority-Hispanic districts in
3 Maricopa County. It continued to develop its map as the Commission worked. *See*
4 Ex. 422 at 058-63.

5 58. The potential differences in the rural districts were reflected in the
6 different “what if” scenarios that emerged during the Commission’s work.
7 Commissioner Freeman’s “Option 1” included Flagstaff with the Navajo, but did not
8 include the White Mountain or San Carlos Apache tribes in that district. *See* 9/26/11
9 Tr. (Ex. 353) at 109:3-112:2 (discussion of Commissioner Freeman’s proposal);
10 10/3/11 Tr. (Ex. 357) at 199:24-214:7 (Commissioner Freeman discussing “what if”
11 map). On the other hand, Commissioner McNulty’s “Option 2” included the Apache
12 tribes with the majority-Native American district, but did not include Flagstaff in that
13 district. *See* 10/3/11 Tr. (Ex. 357) at 179:1-194:6 (Commissioner McNulty discussing
14 her “what if” map). Commissioner McNulty’s Option 2 split Yuma County, but
15 Commissioner Freeman’s Option 1 did not. *See id.* at 190:22-191:19 (Commissioner
16 McNulty’s description of the map); Ex. 420, Tabs 2G(1) & (2).

17 59. Both Commissioner Freeman and Commissioner McNulty attempted to
18 incorporate districts proposed by the Arizona Minority Coalition. Yet because the
19 Arizona Minority Coalition only offered a few Maricopa County districts, its proposal
20 did not allow the Commission to reach the target number of benchmarks.

21 **V. WORKING TOWARD A DRAFT MAP.**

22 60. Commissioner Freeman’s Option 1 and Commissioner McNulty’s
23 Option 2 emerged as the primary alternatives before the Commission while it worked
24 toward a draft map. *See* 10/3/11 Tr. (Ex. 357) at 179:1-214:7. To agree upon a draft
25 map, the Commissioners recognized that they needed to move toward a single map.
26 They did so in a series of lengthy public meetings from October 5 through October 9.
27 *See* Exs. 358-62.
28

1 61. They began by examining the potential Voting Rights Districts in
2 Option 1 version 8A (Commissioner Freeman’s latest map) and Option 2 version 8A
3 (Commissioner McNulty’s latest map). Both had what appeared to be eight potential
4 Voting Rights Districts, both had a majority-Native American District, and both had
5 six majority-Hispanic districts. But Commissioner McNulty’s map had three Voting
6 Rights Districts in Southern Arizona and three in Maricopa County, and
7 Commissioner Freeman’s had two in Southern Arizona and four in Maricopa County.
8 *See* Ex. 420, Tabs 2G(1) & (2).

9 62. As a starting point to developing a single draft map, the Commission
10 attempted to take some districts from both Option 1 and Option 2, focusing initially
11 on incorporating Voting Rights Districts. *See* 10/5/11 Tr. (Ex. 358) at 74:7-16
12 (Commissioner Mathis and mapping consultant discussing merging of maps to ensure
13 sufficient number of Voting Rights Districts), 81:18 (Commissioner Herrera noting
14 that “the Voting Rights Act is crucial”), 124:1-7 (mapping consultant discussing need
15 to create ability-to-elect districts in Maricopa County to achieve statewide target);
16 10/6/11 Tr. (Ex. 359) at 41:1-10 (discussing establishing Voting Rights Districts as
17 the starting point); 10/7/11 Tr. (Ex. 360) at 209:7-11 (discussing directives to
18 mapping consultant regarding map).

19 63. Because Commissioner McNulty’s alternative had more majority-
20 minority districts in southern Arizona than Commissioner Freeman’s (three rather
21 than two), the Commission incorporated her Voting Rights Districts in southern
22 Arizona into the grid. *See* 10/5/11 Tr. (Ex. 358) at 95:13-17. Likewise, the
23 Commission incorporated Commissioner Freeman’s four Voting Rights Districts in
24 Maricopa County, rather than starting from Commissioner McNulty’s three Voting
25 Rights Districts. Commissioner Freeman explained that he had incorporated three
26 districts from the Arizona Minority Coalition’s map in Maricopa County and added
27 another district in west Phoenix. *See id.* at 128:19-23.

28

1 64. This created seven majority-Hispanic districts in Maricopa County and
2 southern Arizona, and with the addition of a majority-Native American District, the
3 map appeared to have eight potential Voting Rights Districts. *See* 10/6/11 Tr. (Ex.
4 359) at 43:25-44:8; 10/7/11 Tr. (Ex. 360) at 47:6-21.

5 65. At the October 6, 2011 meeting, the Commission discussed creating
6 additional ability-to-elect districts in order to meet the target of ten Voting Rights
7 Districts. *See, e.g.*, 10/6/11 Tr. (Ex. 359) at 107:25-109:1.

8 66. By that time, the Commission also understood that the benchmark plan
9 might contain as many as ten ability-to-elect districts, creating a high bar for
10 preclearance of the new plan. *See id.* at 73:7-75:16, 109:5-110:17, 191:1-192:25;
11 10/7/11 Tr. (Ex. 360) at 38:20-40:23 (discussing preference to create ten ability-to-
12 elect districts given uncertainty regarding whether nine or ten such benchmark
13 districts existed), 50:11-51:12 (discussing difficulty in confirming whether ten
14 benchmark districts existed), 52:8-53:13 (discussing increased chance for
15 preclearance with ten ability-to-elect districts).

16 67. To reach the ten benchmarks, the Commission attempted to create
17 coalition districts that would provide minority voters the ability to elect their
18 candidate of choice in Districts 24 and 26 in Maricopa County. *See, e.g.*, 10/8/11 Tr.
19 (Ex. 361) at 66:6-11, 71:8-72:11, 76:9-77:7, 78:23-79:1, 81:2-15, 85:18-86:2, 88:9-
20 10, 92:7-22.

21 68. To create a draft map with sufficient Voting Rights Districts, the
22 Commission also had to decide how to structure District 7, the majority-Native
23 American district. Commissioner Freeman's proposed Native American district did
24 not include the White Mountain and San Carlos Apache tribes and had a majority
25 voting age population of 52.05 percent. *See* Ex. 420, Tab 2G(1). Commissioner
26 McNulty's option that included the Apache Tribes with the Navajo and other northern
27 Arizona tribes had a Native American voting age population of 59.98 percent. *See id.*,
28 Tab 2G(2). The benchmark district was at 59.6%, but was significantly

1 underpopulated (35,163 below the ideal population). After waiting for additional
2 input from the Apache tribes, the Commission incorporated Commissioner McNulty's
3 version of District 7. *See* 10/10/11 Tr. (Ex. 363) at 46:23-48:5, 204:19-24. On
4 October 10, the date the Commission approved the draft map, the San Carlos Apache
5 tribe sent a letter supporting the proposed District 7. *See* 10/10/11 letter from San
6 Carlos Apache Tribe (Ex. 428 at 003). A few weeks later, the White Mountain
7 Apache sent a similar letter of support. *See* 10/21/11 letter from White Mountain
8 Apache Tribe (*Id.* at 019).

9 69. Through this process during its public meetings, the Commission
10 created six majority-minority or potential coalition districts in Maricopa County, three
11 majority-minority districts in southern Arizona, and one majority-Native American
12 district in northern Arizona. *See* 10/8/11 Tr. (Ex. 361) at 90:13-91:22, 93:14-94:1,
13 205:9-206:5.

14 70. During public sessions leading to the adoption of the draft map, the
15 Commission explained how the districts were created and described their
16 characteristics. *See* 10/9/11 Tr. (Ex. 362) at 7:2-11:18, 14:2-15:23; 10/10/11 Tr. (Ex.
17 363) at 7:4-86:7.

18 71. After placing the ten potential Voting Rights Districts, the Commission
19 worked together to adjust the grid map to complete the legislative map. For southern
20 Arizona, the draft incorporated much of Commissioner McNulty's proposal. For the
21 balance of the state, Commissioners Freeman and McNulty worked together in the
22 public session to complete the map. *See, e.g.*, 10/7/11 Tr. (Ex. 360) at 188:12-216:9;
23 10/10/11 Tr. (Ex. 363) at 3:19-4:12.

24 72. In working on the map, the Commissioners considered the various
25 constitutional criteria. For example, when describing District 28 in the proposed draft
26 map, Commissioner Freeman explained how, in his view, it respected communities of
27 interest:

28

1 a. “So this district includes the Arcadia area – and strictly
2 speaking, Arcadia is a very small neighborhood that sits at the
3 base of Camelback Mountain, but I think most people refer to it,
4 they sort of refer to Greater Arcadia, which is the area of the
5 Scottsdale school district that sort of overlaps into Phoenix here
6 and feeds into Arcadia High school. That sort of is a unique
7 community that has strong ties to Paradise Valley and the
8 Biltmore area and sort of North Central Phoenix and the Madison
9 – part of Madison school district here. The southern boundary
10 ended up being what’s called a coalition district, one of the
11 districts we need to construct to comply with the Voting Rights
12 Act, and I’m sure we’ll be talking about this district later. And to
13 get more population, the natural place to go is north. These
14 communities to the north of Paradise Valley sort of tie in.
15 There’s the 51 that ties these two communities together as well.
16 And then east boundary is the Scottsdale municipal line.”
17 10/10/11 Tr. (Ex. 363) at 68:21-69:18.

18 73. The Commission balanced population in the districts as it worked to
19 complete the legislative map in its public sessions. *See, e.g.*, 10/3/11 Tr. (Ex. 357) at
20 209:4-8, 211:19-20; 10/6/11 Tr. (Ex. 359) at 71:21-24.

21 74. On October 10, 2011, the Commission approved the draft legislative
22 map by a 4-to-1 vote. Commissioners Mathis, Freeman, Herrera and McNulty voted
23 to approve the draft map, and Commissioner Stertz voted against it. *See* 10/10/11 Tr.
24 (Ex. 363) at 209:12-210:5.

25 75. Although it is not relevant to this case, the Commission finished its
26 work on the draft legislative map after adopting the congressional map on October 3.
27 Criticism of the Commission over the selection of the mapping consultant and
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1 litigation concerning the Attorney General's investigation continued while the
2 Commission proceeded with its work.

3 **VI. THE SECOND ROUND OF PUBLIC HEARINGS AND**
4 **DEVELOPMENT OF FINAL LEGISLATIVE MAP.**

5 76. As required by the Arizona Constitution, a thirty-day comment period
6 followed the adoption of the draft legislative map. *See* Ariz. Const. art. IV, pt. 2,
7 § 1(16).

8 77. During this period, from October 11, 2011 through November 5, 2011,
9 the Commission conducted a second round of public hearings, participating in 30 such
10 hearings at locations throughout the state. *See* Round Two hearing schedule (Ex.
11 446); Exs. 364-94.

12 78. Also during this period, the Governor with the concurrence of two-
13 thirds of the Senate, attempted to remove the Commission's chair based on allegations
14 of gross misconduct and substantial neglect, but the Arizona Supreme Court
15 overturned that action and reinstated the chair on November 16, 2011. This event is
16 not relevant to the issues in this case and is mentioned only to explain why the
17 Commission did not commence its mapping work promptly after the close of the
18 thirty-day comment period.

19 79. Following the comment period, the Commission worked from
20 November 29, 2011 through January 17, 2012 to modify the draft legislative map.
21 *See* Exs. 395-410.

22 80. At the beginning of this phase, Karen Osborne, the Director of Elections
23 for Maricopa County, and Helen Purcell, the Maricopa County Recorder, explained
24 the deadlines and time constraints facing county election administrators and the need
25 for the Commission to complete its work within a reasonably short time. *See*
26 11/29/11 Tr. (Ex. 395) at 5:5-9:3.

27 81. Continuing to focus on compliance with the Voting Rights Act as its top
28 priority, the Commission began this phase of the map-drawing by hearing from its

1 mapping consultant and counsel regarding understanding the analysis required to
2 evaluate minority voting strength and maximizing the chances of preclearance. *See*
3 *id.* at 72:19-122:16.

4 82. On November 29, 2011, the Commission received a draft report from
5 Dr. King and Ken Strasma regarding minority voting strength in the draft map and the
6 benchmarks. This report used racially polarized voting analysis and other data to
7 provide preliminary findings on the proposed ability-to-elect districts. *See* Ex. 538.
8 As the Commission was informed, however, the draft necessarily was not conclusive
9 and additional analysis was needed. *See* 11/29/11 Tr. (Ex. 395) at 106:19-107:4.

10 83. The Commission also confirmed the belief that as many as ten ability-
11 to-elect benchmark districts existed. *See id.* at 104:25-105:8, 107:16-22, 108:16-20,
12 110:2-4.

13 84. In discussing how to ensure the requisite number and strength of ability-
14 to-elect districts, and thus preclearance, the mapping consultant noted that districts
15 below the ideal population could be used to help create effective Voting Rights
16 Districts and that, due to rapidly growing Hispanic population, such districts likely
17 would reach or exceed the ideal population during the course of the decade. *See id.* at
18 93:18-94:1, 115:24-116:16, 118:24-120:7; 11/30/11 Tr. (Ex. 396) at 16:13-17:3.

19 85. Throughout this phase, the Commission's mapping consultant prepared
20 reports and data so that the Commissioners could assess the impact of changes that
21 they were considering. When the Commission adopted one or more changes, these
22 were incorporated into the "working map." The change orders and their
23 accompanying reports included district-by-district demographic and election-
24 performance information that described the impact of each change on each district
25 affected. *See* Ex. 420, Tab 4. Initially all change orders compared the proposed
26 change to the draft map; when the December 8, 2011 working map was created, the
27 subsequent change orders were compared to the December 8 working map; the same
28

1 was true of change orders prepared after the December 9 working map. The final
2 working map was the December 20 working map.

3 86. Beyond the Cruz Index that the Commission had been using to evaluate
4 minority voting strength, the mapping consultant developed several other metrics that
5 it provided to the Commission, including information based on the 2008 presidential
6 race, the 2006 Secretary of State race, the 2004 presidential race, and a 2004 ballot
7 measure impacting minorities. *See, e.g., id.*, Tab 4L.

8 87. As detailed below, every adjustment that the Commission made to the
9 draft map was done to ensure compliance with the Voting Rights Act or satisfy the
10 other constitutional criteria. In addition, for every modification to the map, a new
11 map was created and new data was generated, illustrating the effects of the
12 modification.

13 88. Whether viewed chronologically as the changes occurred or by
14 analyzing the changes made to each district, the Commission's motives and actions
15 were well-documented and consistent with its constitutional obligations.

16 89. In working to improve the minority voting strength of certain districts,
17 the Commission was advised to focus on districts comprised of populations from
18 districts where minorities had shown the ability in the past to elect candidates of
19 choice. *See, e.g.*, 11/30/11 Tr. (Ex. 396) at 53:10-15.

20 90. One of the Commission's first directives to the mapping consultant in
21 this phase of the process was to identify opportunities to strengthen ability-to-elect
22 districts so that the Commissioners could discuss the impact of any proposed changes
23 and decide whether to implement them. *See* 11/29/11 Tr. (Ex. 395) at 177:7-23;
24 11/30/11 Tr. (Ex. 396) at 6:16-21. For example, the mapping consultant discussed the
25 fact that Districts 24 and 26 appeared to be ones that could be strengthened given the
26 population breakdowns in those districts in the draft map and because those faced
27 likely scrutiny by the Department of Justice. *See* 11/30/11 Tr. (Ex. 396) at 7:6-10,
28 23:11-24:2.

1 91. All of the Commissioners were able to propose changes to the map,
2 most of which were made without objection. See Deposition of Willie Desmond at
3 233:8-14.

4 92. As explained below through numerous examples, the record illustrates
5 the changes made to the various districts and the reasons that the Commission
6 implemented those changes.

7 a. Legislative District 2:

8 i. The changes to District 2, located in southern Arizona, are
9 reflected in the maps and reports created during this phase. See
10 Change - Cochise County and Green Valley 12/5/11 (Ex. 420,
11 Tab 4D); Change report: Change Keep Cochise County Whole
12 and Move Green Valley into LD-2 (*Id.*); Legislative Working
13 Map 12/9/11 (*Id.*, Tab 4S).

14 ii. After hearing testimony from community members, the
15 Commission modified draft District 2 to include Green Valley
16 with Sahuarita in that district and to remove the “tail” that had
17 extended into Cochise County. Although the added portions are
18 not minority areas, the Commission included them in response to
19 public comment regarding preserving communities of interest
20 and to satisfy other constitutional criteria. See 11/5/11 Tr. (Ex.
21 393) at 40:23-41:2, 44:17-22, 96:3-7; 11/30/11 Tr. (Ex. 396) at
22 81:1-3; 12/5/11 Tr. (Ex. 398) at 38:21-24, 55:6-15, 154:23-
23 157:17; 12/12/11 Tr. (Ex. 402) at 146:4-11; Change - Cochise
24 County and Green Valley 12/5/11 (Ex. 420, Tab 4D); Change
25 report: Change Keep Cochise County Whole and Move Green
26 Valley into LD-2 (*Id.*).

27 iii. While this change decreased the minority percentage in the
28 district, the district still had a Hispanic voting-age population of

- 1 52.8 percent and a minority voting-age population of 59.5
2 percent after the change. *See* report on Legislative Working Map
3 12/9/11 (*Id.*, Tab 4S).
- 4 iv. The Commission ensured, before adopting the change, that draft
5 District 2 would maintain its ability to elect. *See, e.g.*, 12/5/11
6 Tr. (Ex. 398) at 155:19-157:17.
- 7 v. Dr. King's analyses also confirmed that proposed District 2
8 would allow Hispanic voters to elect candidates of choice. *See*
9 2/24/12 Report by Gary King and Benjamin Schneer (Ex. 425
10 (024-078)), pp. 7-8; *see also* 11/28/11 Draft Report by Gary King
11 and Ken Strasma (Ex. 538), pp. 43-44.
- 12 vi. The Cochise County/Green Valley change was incorporated into
13 the December 9 working map without objection from any
14 Commissioner. It lowered the population of District 2 to -8,999
15 (-4.1%) below the ideal population. Other changes had a minor
16 effect on the district's population, which was -8452 (-4.0%) in
17 the final map. Changes not documented by a change order were
18 made during public meetings.
- 19 vii. The Commission's changes to District 2 lowered its population,
20 but the changes were made to accommodate legitimate state
21 interests while maintaining its status as an ability-to-elect district.
- 22 viii. The change necessarily increased the population in neighboring
23 District 14 (which was labeled District 1 until the final map). Its
24 population increased to 3,329 (1.6%) over the ideal population by
25 this change order.
- 26 b. Legislative Districts 3 and 4:
- 27 i. The modifications to Districts 3 and 4, in southern Arizona, are
28 reflected in the maps and reports created during this phase. *See*

- 1 Change - Improve VRA of LD 4 v2 12/8/11 (*Id.*, Tab 4L);
2 Change Report: LD4v2 (*Id.*); Legislative Working Map 12/8/11
3 (*Id.*, Tab 4O).
- 4 ii. Because draft District 4 “showed strong racial polarization,” it
5 was important to strengthen it so that the Commission could meet
6 its burden of proof of showing that it was an ability to elect
7 district. *See* 11/28/11 Draft Report by Gary King and Ken
8 Strasma (Ex. 538) at 47. To improve District 4, the Commission
9 first analyzed how moving non-Hispanic population to District
10 13 improved minority voting strength. *See* 12/1/11 Tr. (Ex. 397)
11 at 21:22-25:12; Change - Improve VRA of LD-4 12/2/11 (Ex.
12 420, Tab 4A); Change Report: Improve the Minority % of LD-4
13 (*Id.*).
- 14 iii. The Commission adjusted the district boundary within the City of
15 Yuma and around Tucson to improve the performance of
16 minority candidates of choice in draft District 4. *See* 12/8/11 Tr.
17 (Ex. 400) at 106:8-126:4; Change - Improve VRA of LD 4 v2
18 12/8/11 (Ex. 420, Tab 4L); Change Report: LD4v2 (*Id.*);
19 12/12/11 Tr. (Ex. 402) at 138:10-141:7; 1/10/12 Tr. (Ex. 408) at
20 60:15-17 (describing earlier change of moving draft District 4
21 line from just above Tohono O’odham Reservation to include
22 strong performing areas from draft District 3).
- 23 iv. The changes in the Tucson area that were made to improve draft
24 District 4 required additional changes to draft District 3, a Voting
25 Rights District in the Tucson area, but those changes did not
26 impair the ability to elect candidates of choice in either of those
27 districts. *See* 12/8/11 Tr. (Ex. 400) at 114:7-9; 12/12/11 Tr. (Ex.
28 402) at 141:8-13; 12/15/11 Tr. (Ex. 403) at 55:17-56:7; Change

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Report: LD4v2 (Ex. 420, Tab 4L); Legislative Working Map 12/8/11 (*Id.*, Tab 4O).

- v. None of the Commissioners expressed opposition to the changes to District 4 or District 3 proposed in the change order to improve District 4’s Voting Rights performance.
- vi. Dr. King’s analyses confirmed that District 4 and District 3 would allow Hispanic voters to elect candidates of choice. *See* 2/24/12 Report by Gary King and Benjamin Schneer (Ex. 425(024-078)), pp. 7-8; *see also* 11/28/11 Draft Report by Gary King and Ken Strasma (Ex. 538), pp. 47-48.
- vii. The Commission’s changes to proposed District 4 increased the percentage of Hispanic population in that district from 58.6 percent in the draft map to 60.5 percent in the final map and the percentage of Hispanic voting age population from 53.7 percent in the draft map to 55.7 percent in the final map. *Compare* Commission Approved Legislative Draft Map Population Breakdown and Voting Age Population Breakdown (Ex. 420, Tab 3), *with* Proposed Legislative Plan Demographic Data (Ex. 415).
- viii. The changes to both Districts 3 and 4 lowered the population in those districts. The change lowered District 3’s population to -8,966 (-4.2%). *See* Ex. 420, Tab 4L. In the final map, the district’s population was -8454 (-4.0%) below the ideal district population. Similarly, District 4 dropped to -8,562 (-4.0%) because, although it picked up population from District 3, it lost population to District 13 in the Yuma area. There were no other substantive changes to District 4, and its final population was -8,924 (-4.2%).

1 ix. Commissioner McNulty noted that the changes to District 4
2 increased the population in adjacent District 13 and wanted the
3 record to reflect that this was done to help ensure compliance
4 with Section 5. *See* 12/1/11 Tr. (Ex 397) at 25:16-27: 4.

5 c. Legislative District 6:

6 i. Many of the Commission's revisions to District 6, located in
7 north-central Arizona, were designed to adopt changes requested
8 by the public, including those involving the Schultz flood area,
9 and all changes are reflected in the maps and reports created at
10 the time of those changes. *See, e.g.*, Navajo Nation LD-7 Map
11 12/9/11 (Ex. 420, Tab 4Q); Change report: Navajo Nation
12 Change 120911 (*Id.*); Legislative Working Map 12/9/11 (*Id.*, Tab
13 4S).

14 ii. Based on public input, the Commission sought to include the
15 Schultz flood area with Flagstaff in District 6, removing it from
16 District 7 in the draft map. The mapping consultant prepared two
17 versions of maps and reports for the Commission's review, one
18 only incorporating census blocks entirely within the Schultz
19 flood area and one incorporating all census blocks that contained
20 any of the Schultz flood area. *See* 12/5/11 Tr. (Ex. 398) at 158:7-
21 163:16; Change - Schultz Flood Area Narrow 12/5/11 (Ex. 420,
22 Tab 4F); Change report: Include all block wholly included in the
23 Schultz flood area with Flagstaff (LD-6) (*Id.*); Change - Schultz
24 Flood Area Wide 12/5/11 (*Id.*, Tab 4G); Change report: Include
25 all of the Schultz flood area with Flagstaff (LD-6) (*Id.*); 12/7/11
26 Tr. (Ex. 399) at 118:18-119:11.

27 iii. The Commission also considered moving portions of Verde
28 Valley from District 7 to District 6, to keep Verde Valley whole

- 1 and to keep those areas with Flagstaff. *See* 12/7/11 Tr. (Ex. 399)
2 at 119:12-21; Change - Herrera Northern AZ Leg 12/7/11 (Ex.
3 420, Tab 4K); Change report: Adopt the changes suggested by
4 Commissioner Herrera (*Id.*).
- 5 iv. District 6 was affected by other changes to District 7, discussed
6 further below.
- 7 v. The Commission also explored moving the city of Payson from
8 District 6 into District 14 (labeled District 1 in the final map),
9 consistent with public testimony suggesting that Payson shared
10 more of a community of interest with Prescott than with
11 Flagstaff. *See* 12/7/11 Tr. (Ex. 399) at 119:22-120:4; Change -
12 Herrera Northern AZ Leg 12/7/11 (Ex. 420, Tab 4K); Change
13 report: Adopt the changes suggested by Commissioner Herrera
14 (*Id.*).
- 15 vi. District 6 fell to -9,912 (-4.7%) below the ideal population as a
16 result of the changes incorporated into the 12/9/11 working map
17 through the 12/9/11 Navajo Nation LD 7 change order. This
18 added the “Schultz Fire area” north of Flagstaff to District 6, but
19 shifted Show Low from District 6 to District 7, where it was with
20 adjacent communities of Pinetop and Lakeside.
- 21 vii. District 6 later increased in population through a change order
22 labeled “Legislative Pop Balance Map,” which placed it at 1,072
23 (.5%) over the ideal population.
- 24 viii. Ultimately, District 6’s population changed little from draft to
25 final map. It was 1,762 (.8%) over the ideal population in the
26 draft map and 1,167 (.6%) over the ideal population in the final
27 map. It was also a Republican district in the draft map, based on
28 registration and performance, and a Republican district in the

1 final map, although there was discussion of attempting to make
2 this a competitive district.

3 d. Legislative District 7:

4 i. The modifications to District 7, the majority-Native American
5 district in northeast Arizona, are reflected in the maps and reports
6 created during this phase. *See* Navajo Nation LD-7 Map 12/9/11
7 (Ex. 420, Tab 4Q); Legislative Working Map 12/9/11 (*Id.*, Tab
8 4S).

9 ii. The Commission heard public comment regarding how to
10 improve ability to elect in draft District 7, as well as comment
11 opposing the draft district. *See* 12/5/11 Tr. (Ex. 403) at 117:17-
12 138:22; 12/9/11 Tr. (Ex. 401) at 21:12-55:6, 104:24-105:14,
13 140:24-146:9.

14 iii. The Commission also considered extensive testimony from
15 various tribes and bordering communities regarding boundaries,
16 sacred sites, and non-reservation lands owned by tribal members.
17 *See, e.g.*, 10/21/11 Tr. (Ex. 376) at 28:17-30:4, 30:9-33:16, 45:7-
18 49:10.

19 iv. The Navajo Nation explained to the Commission why barriers to
20 electoral participation required a substantial voting age
21 population for Native American voters to have the ability to elect
22 candidates of choice. *See id.* at 119:4-123:11.

23 v. The Navajo Nation, Hopi, White Mountain Apache, and San
24 Carlos Apache tribes all expressed support for draft District 7.
25 *See* October 14, 2011 letter from Navajo Nation (Ex. 428 at 007-
26 009); October 21, 2011 letter from White Mountain Apache
27 Tribe (*Id.* at 019); October 21, 2011 letter from San Carlos
28

1 Apache Tribe (*Id.* at 015-018); December 8, 2011 letter from
2 Hopi Tribe (*Id.* at 029).

3 vi. Representatives of the White Mountain Apache and San Carlos
4 Apache tribes testified in support of their inclusion in a
5 predominantly Native American district with the Navajo Nation.
6 *See* 10/21/11 Tr. (Ex. 376) at 8:6-11:14, 80:10-81:10.
7 Representatives of the San Carlos Apache Tribe also testified that
8 they lacked representation under the benchmark districts and thus
9 supported proposed District 7. *See id.* at 28:17-30:4, 40:6-41:2,
10 56:1-58:25, 62:11-63:9, 76:14-77:8.

11 vii. The Commission also analyzed changes suggested by
12 Commissioner McNulty. One such change moved Winslow from
13 District 7 to District 6 and moved Show Low from District 6 to
14 District 7. *See* 12/1/11 Tr. (Ex. 397) at 80:9-14. Another change
15 shifted a portion of Mohave County from District 7 to District 5
16 to improve District 7's minority voting strength and connect
17 some isolated non-reservation population in northern Mohave
18 County with the rest of the County. *See* 12/5/11 Tr. (Ex. 398) at
19 166:9-168:12; Change - Show Low and Winslow 12/5/11 (Ex.
20 420, Tab 4H); Change report: Switch Show Low and Winslow's
21 districts (*Id.*).

22 viii. Commissioner Herrera also proposed moving the non-tribal areas
23 of Mohave County from District 7 to District 5 to improve Native
24 American voting strength. *See* 12/7/11 Tr. (Ex. 399) at 120:13-
25 20; Change - Herrera Northern AZ Leg 12/7/11 (Ex. 420, Tab
26 4K); Change report: Adopt the changes suggested by
27 Commissioner Herrera (*Id.*).

28

- 1 ix. Commissioner Freeman proposed an “Apache Cloud” district
2 that would connect the Apache Tribes to the Navajo Nation by a
3 narrow line, excluding most of the non-reservation communities
4 in eastern Arizona from the majority-Native American district.
5 *See* 12/16/11 Tr. (Ex. 404) at 148:6-163:2; Leg Change- Improve
6 VRA of LD-7-Freeman – 12/15/11 (Ex. 420, Tab 4W); Change
7 report: IMPROVE_VRA_LD7-FREEMANV (*Id.*).
- 8 x. The Commission’s major change to District 7 was the Navajo
9 Nation LD 7 change order, which incorporated various ideas that
10 had been explored in the change orders. It moved several areas
11 out of District 7, including the non-reservation portion of
12 northern Mohave County, the Schultz Fire area, and Greenlee
13 County. As was true in many non-Native American
14 communities, public testimony from Greenlee County advocated
15 removing it from the Native American district and placing it in a
16 district with other rural counties, such as its neighbor Graham
17 County, with which it had a strong historic link. *See* 10/27/11
18 Tr. (Ex. 382) at 24:6-10, 29:22-30:2. The only significant
19 population added to District 7 through the change order was
20 Show Low.
- 21 xi. Dr. King’s analyses confirmed that District 7 would allow Native
22 American voters to elect candidates of choice, as did Benchmark
23 District 2. *See* 11/28/11 Draft Report by Gary King and Ken
24 Strasma (Ex. 538), pp. 49-50. It remained an ability-to-elect
25 district after the modifications.
- 26 xii. As a result of moving areas out of District 7 in the change order,
27 District 7 dropped to -10,019 (-4.7%) below the ideal population.
28 In the final map, it was -10,041 below the ideal population.

1 xiii. These changes were made for legitimate redistricting purposes.
2 They also had no partisan purpose or effect. The adjacent
3 districts were Republican districts based on registration and
4 performance and remained so after these changes.

5 e. Legislative Districts 8 and 11:

6 i. The modifications to District 8, located in the central portion of
7 the state, are reflected in the maps and reports created during this
8 phase. *See* Change report: Create_VRA_LD8v2-McNulty (Ex.
9 420, Tab 4AA); Legislative Working Map 12/20/11 (*Id.*, Tab
10 4CC).

11 ii. Commissioner McNulty first explored making District 8 more
12 competitive. *See* 12/5/11 Tr. (Ex. 398) at 170:5-173:23; Change
13 - Improve Competitiveness of LDs 8 and 11 12/5/11 (Ex. 420,
14 Tab 4E); Change report: Try and make LD-8 and LD-11 more
15 competitive (*Id.*); 12/12/11 Tr. (Ex. 402) at 159:12-23, 160:16-
16 161:8; Leg Change – Improve Competitiveness of LDs 8 & 11 v3
17 – 12/15/11 (*Id.*, Tab 4U); Change report:
18 Improve_Competitive_8_11_v3 (*Id.*); Leg Change – Improve
19 Competitiveness of LDs 8 & 11 v4 – 12/15/11 (*Id.*, Tab 4V);
20 Change report: Improve_Competitive_8_11_v4 (*Id.*); 12/16/11
21 Tr. (Ex. 404) at 173:18-175:5.

22 iii. The changes to improve competitiveness affected only Districts 8
23 and 11. *See* Change – Improve Competitiveness of LDs 8 & 11
24 12/5/11 (Ex. 420, Tab 4E); Change report: Try and make LD-8
25 and LD-11 more competitive (*Id.*); Leg Change – Improve
26 Competitiveness of LDs 8 & 11 v.3 – 12/15/11 (*Id.*, Tab 4U);
27 Change report: Improve_Competitive_8_11_v3 (*Id.*); Leg
28 Change – Improve Competitiveness of LDs 8 & 11 v4 – 12/15/11

1 (Id., Tab 4V); Change report: Improve_Competitive_8_11_v4
2 (Id.). Both were Republican districts based on performance and
3 registration in the draft map.

4 iv. The proposals to make District 8 more competitive were not
5 incorporated into the map, but as the Commission explored these
6 change orders, counsel noted that the minority percentage in
7 District 8 also substantially increased. At the suggestion of
8 counsel, the Commission explored District 8 as a potential area in
9 which minority voters could be provided the ability to elect their
10 candidate of choice. Mr. Adelson advised that this could be very
11 important to preclearance. He noted this was an area that was
12 important to the Department of Justice last decade and had a
13 history of electing minority candidates. See 12/16/11 Tr. (Ex.
14 404) at 144:9-145:8, 165:11-167:8, 179:21-181:8.

15 v. Based on this advice, the Commission began exploring ways to
16 increase the minority voting strength in District 8. The
17 Commission explored in a public meeting an option prepared by
18 the mapping consultant and an option that Commissioner
19 McNulty provided. This was the only change from draft map to
20 final map that resulted in a divided Commission vote. The
21 Commission adopted the proposal to improve the
22 competitiveness and the Voting Rights strength in District 8 on a
23 3-to-2 vote, with Commissioners Freeman and Stertz opposing
24 the change. See 12/19/11 Tr. (Ex. 405) at 50:19-51:4.

25 vi. In January 2012, the Commission considered further changes to
26 improve minority voters' ability to elect in District 8, moving
27 some minority population in the southwestern part of the Phoenix
28 metropolitan area into draft District 8, but rejected that approach

1 because of the effect it would have on the Maricopa County
2 districts. *See* 1/10/12 Tr. (Ex. 408) at 26:15-58:21.

3 vii. Although the Commission sought to make District 8 an ability-
4 to-elect district toward the end of this phase, it found that it could
5 not do so without adversely affecting the majority-minority
6 districts in Maricopa County. *See id.* at 22:11-32:6, 41:9-47:14;
7 Change - Improve VRA LD-8 1/10/12 (Ex. 420, Tab 4DD);
8 Change report: Tentative_LD_to_VRALD8_011012 (*Id.*). As a
9 result of its work, the Commission concluded that a minority
10 district in the Pinal County area likely would not be effective
11 because of continued suburban growth. *See* 1/10/11 Tr. (Ex.
12 408) at 31:6-32:6, 41:9-43:12.

13 viii. The Commission's changes to proposed District 8 increased the
14 percentage of Hispanic population in that district from 25.9
15 percent in the draft map to 34.8 percent in the final map and the
16 percentage of Hispanic voting-age population from 22.8 percent
17 in the draft map to 31.3 percent in the final map. *Compare*
18 Commission Approved Legislative Draft Map Population
19 Breakdown and Voting Age Population Breakdown (Ex. 420,
20 Tab 3), *with* Proposed Legislative Plan Demographic Data (Ex.
21 415).

22 ix. Some of the changes affected communities of interest. For
23 example, the draft map had been criticized for dividing
24 Saddlebrook from Marana and other growth areas northeast of
25 Tucson. It had also been criticized for including Saddlebrook
26 with the old mining communities in the area known as the copper
27 corridor. By moving Saddlebrook to District 11, those concerns
28 were addressed. Although the proposal split Casa Grande and

1 Eloy, Commissioner McNulty expressed the view that bringing
2 the Hispanic areas in Pinal County together into District 8
3 respected a community of interest. *See* 12/19/11 (Ex. 405) at
4 26:3-11.

5 x. The change to improve the competitiveness of District 8 that the
6 Commission adopted also affected Districts 12 and 16, districts
7 that straddled eastern Maricopa County and parts of Pinal
8 County. *See* Change report: Create_VRA_LD8v2-McNulty (Ex.
9 420, Tab 4AA). In the changes, population from these districts
10 increased, but the partisan make-up of these districts did not.
11 They were Republican districts before the change and after the
12 change.

13 xi. The changes to District 8 made District 11, which began as a
14 Republican district in registration and performance, more
15 Republican. *Compare id.*, Tab 3, *with id.*, Tab 7A. The changes
16 also brought District 11 closer to the ideal population. The draft
17 map was 2,286 (1.1%) overpopulated, and the final was only 309
18 (.1%) overpopulated.

19 xii. The changes to District 8 also lowered that district's population.
20 From draft map to final map, it changed from 3,262 (1.5%)
21 overpopulated to -4,645 (-2.2%) under the ideal population.
22 While District 8 favored Democrats, it was a competitive district
23 that leaned Republican based on the Commission's analysis of
24 electoral performance, and it elected 2 Republicans to the state
25 House in 2012. It elected a Democrat to the state Senate in a
26 very close race that was likely influenced by the presence of a
27 Libertarian, *see* Deposition of Thomas Hofeller at 237:2-15,
28 confirming that it is a Republican-leaning competitive district.

1 xiii. The changes were a reasonable exercise of the Commission's
2 discretion.

3 f. Legislative District 24:

4 i. The strengthening of District 24, in Maricopa County, is reflected
5 in the maps and reports created during this phase. *See* Change –
6 Improve VRA of LD-24 12/2/11 (Ex. 420, Tab 4B); Change
7 Report: Improve the Minority % of LD-24 (*Id.*); Legislative
8 Working Map 12/8/11 (*Id.*, Tab 4O); Change – Remove Ft.
9 McDowell Reservation 12/9/11 (*Id.*, Tab 4R); Change report:
10 Remove Ft. McDowell Reservation 120911 (*Id.*); Legislative
11 Working Map 12/9/11 (*Id.*, Tab 4S); Change report:
12 IMPROVE_VRA_LD26V4v3-1216111 (*Id.*, Tab 4BB);
13 Legislative Working Map 12/20/11 (*Id.*, Tab 4CC).

14 ii. The Commission first analyzed moving some of the non-
15 Hispanic population from District 24 to Districts 23 and 28. *See*
16 12/1/11 Tr. (Ex. 397) at 17:20-21:3; Change – Improve VRA of
17 LD-24 12/2/11 (Ex. 420, Tab 4B); Change Report: Improve the
18 Minority % of LD-24 (*Id.*).

19 iii. The Commission's removal of areas from District 24 and
20 addition of those areas to Districts 23 and 28 are reflected in
21 discussions on December 8, 2011. *See* 12/8/11 Tr. (Ex. 400) at
22 62:15-65:1.

23 iv. To improve minority voting strength, the Commission removed
24 certain sections from the draft district – such as a portion of south
25 Scottsdale and an area near 32nd Street and Indian School Road
26 in Phoenix – that contained fewer minority voters. *See* Change –
27 Improve VRA of LD-24 12/2/11 (Ex. 420, Tab 4B); Change
28

- 1 Report: Improve the Minority % of LD-24 (*Id.*); 12/12/11 Tr.
2 (Ex. 402) at 148:25-149:9.
- 3 v. Following the public-comment period, the Commission also
4 moved both the Fort McDowell Reservation and the Salt River
5 Pima-Maricopa Indian Community from draft District 24 to other
6 districts. At the request of the Fort McDowell Reservation, the
7 Community moved it from draft District 24 to draft District 23,
8 which includes Scottsdale and Fountain Hills. *See* November 1,
9 2011 letter from Fort McDowell Yavapai Nation (Ex. 428 at 021-
10 023); 12/5/11 Tr. (Ex. 398) at 187:24-188:3; 12/8/11 Tr. (Ex.
11 400) at 70:12-15. As discussed below, the Commission moved
12 the Salt River Pima-Maricopa Indian Community from draft
13 District 24 to draft District 26 to strengthen minorities' ability to
14 elect in draft District 26.
- 15 vi. Although the draft analysis indicated that District 24 might be an
16 effective ability-to-elect district, its Hispanic population figures
17 were lower than in other districts. *See* 11/28/11 Draft Report by
18 Gary King and Ken Strasma (Ex. 538), pp. 53-54.
- 19 vii. As a result, the Commission made changes to proposed District
20 24 that increased the percentage of Hispanic population in that
21 district from 38.6 percent in the draft map to 41.3 percent in the
22 final map and the percentage of Hispanic voting-age population
23 from 31.8 percent in the draft map to 34.1 percent in the final
24 map. *Compare* Commission Approved Legislative Draft Map
25 Population Breakdown and Voting Age Population Breakdown
26 (Ex. 420, Tab 3), *with* Proposed Legislative Plan Demographic
27 Data (Ex. 415). At the same time, total minority population in
28 the district increased from 53.6 percent to 55.1 percent, and

1 minority voting-age population increased from 46.2 percent to
2 47.6 percent. *Id.*

3 viii. The changes to District 24 lowered District 24's population from
4 614 (.2%) in the draft to -6,408 (-3.0) in the final. The change
5 orders that removed population to Districts 23 and 28 (Change –
6 Improve VRA of LD-24 12/2/11 (Ex. 420, Tab 4B)) had no
7 partisan effect on those districts. Both were Republican districts
8 in the draft map and remained Republican districts in the final
9 map.

10 ix. No Commissioner objected to the effort to strengthen District 24
11 as a Voting Rights District.

12 g. Legislative District 26:

13 i. The strengthening of District 26, located in Maricopa County, is
14 reflected in the maps and reports created during this phase. *See*
15 Change - Improve VRA LD-26v3 12/9/11 (Ex. 420, Tab 4P);
16 Change report: Improve VRA LD26v3 (*Id.*); Legislative
17 Working Map 12/9/11 (*Id.*, Tab 4S); Change report:
18 IMPROVE_VRA_LD26V4v3-1216111 (*Id.*, Tab 4BB);
19 Legislative Working Map 12/20/11 (*Id.*, Tab 4CC).

20 ii. The Commission first analyzed the removal of white non-
21 Hispanics who appeared not to support the minority candidate of
22 choice from District 26 and placement of such people into
23 District 18, and moving of some additional population from
24 District 18 to District 17 to create more balance and compactness
25 in the districts. *See* 12/1/11 Tr. (Ex. 397) at 6:2-10:22, 17:6-17;
26 12/8/11 Tr. (Ex. 400) at 97:7-106:5.

27 iii. The Commission moved the Salt River Pima-Maricopa Indian
28 Community from draft District 24 to draft District 26 to

- 1 strengthen minorities' ability to elect in draft District 26. *See*
2 12/19/11 Tr. (Ex. 405) at 64:5-11.
- 3 iv. To further improve ability to elect for minorities, the
4 Commission removed the predominantly white Non-Hispanic
5 area of Dobson Ranch in Mesa from draft District 26, consistent
6 with testimony supporting keeping Dobson Ranch together as a
7 community of interest. *See, e.g.*, 10/18/11 Tr. (Ex. 372) at 19:10-
8 14, 78:2-25. The Commission substituted for that area part of
9 south Phoenix that had a high-minority population. *See* Change
10 report: IMPROVE_VRA_LD26V4v3-1216111 (Ex. 420, Tab
11 4BB); 12/19/11 Tr. (Ex. 405) at 62:11-67:15.
- 12 v. The Commission also considered including in draft District 26
13 the Town of Guadalupe, which has a high Hispanic and Native
14 American population and a history of supporting minority voters'
15 legislative candidates of choice. *See* 12/20/11 Tr. (Ex. 406) at
16 155:2-165:15. The Commission, however, heard considerable
17 testimony from community leaders opposing the proposed
18 change. *See, e.g.*, 12/9/11 Tr. (Ex. 401) at 26:25-29:8; 12/15/11
19 Tr. (Ex. 403) at 107:5-109:6; 12/19/11 Tr. (Ex. 405) at 67:17-
20 68:23. Respecting that public input, the Commission decided not
21 to include Guadalupe within the district, but continued to explore
22 options for strengthening it in other ways. *See* 12/15/11 Tr. (Ex.
23 403) at 26:5-7; 12/16/11 Tr. (Ex. 404) at 78:14-82:16, 94:15-
24 109:8; 12/19/11 Tr. (Ex. 405) at 19:24-21:2.
- 25 vi. Dr. King's analyses confirmed that District 26 would allow
26 minority voters to elect candidates of choice. *See* 11/28/11 Draft
27 Report by Gary King and Ken Strasma (Ex. 538), pp. 55-56;
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1 2/24/12 Report by Gary King and Benjamin Schneer (Ex. 425
2 (024-078)), pp. 20-21.

3 vii. The Commission's changes to proposed District 26 increased the
4 percentage of Hispanic population in that district from 36.8
5 percent in the draft map to 38.5 percent in the final map and the
6 percentage of Hispanic voting age population from 30.4 percent
7 in the draft map to 32.0 percent in the final map. *Compare*
8 *Commission Approved Legislative Draft Map Population*
9 *Breakdown and Voting Age Population Breakdown* (Ex. 420,
10 *Tab 3*), *with Proposed Legislative Plan Demographic Data* (Ex.
11 *415*). At the same time, total minority population in the district
12 increased from 51.3 percent to 54.6 percent, and minority voting
13 age population increased from 44.7 percent to 47.7 percent. *Id.*

14 viii. The changes to District 26's population from draft to final were
15 minimal; the draft map was 179 (.1%) overpopulated, and the
16 final was 591 (.3%) over the ideal population. None of the
17 change orders altered the partisan make-up of any district
18 affected.

19 h. Legislative District 27:

20 i. The Commission's creation of District 27, in central Arizona,
21 was part of its effort to maintain two strong majority-minority
22 districts in South Phoenix, and the modifications to that district
23 are reflected in the maps and reports generated during this phase.
24 *See Improve VRA LD-26v3 12/9/11* (Ex. 420, *Tab 4P*); *Change*
25 *report: Improve VRA LD26v3 (Id.)*; *Legislative Working Map*
26 *12/9/11 (Id., Tab 4S)*; *Change report:*
27 *IMPROVE_VRA_LD26V4v3-1216111 (Id., Tab 4BB)*;
28 *Legislative Working Map 12/20/11 (Id., Tab 4CC)*.

- 1 ii. At the request of the Gila River Indian Community to be
2 included in a Maricopa County district, the Commission included
3 most of it in District 27. *See* 12/8/11 Tr. (Ex. 400) at 98:6-9.
- 4 iii. Dr. King’s analyses confirmed that District 27 would allow
5 Hispanic voters to elect candidates of choice. *See* 11/28/11 Draft
6 Report by Gary King and Ken Strasma (Ex. 538), pp. 57-58.
- 7 iv. As a result of the changes to improve District 26, District 27 lost
8 population from draft map to final map, dropping from -4,654
9 (-2.2%) to -9,091 (-4.3%) below the ideal population. None of
10 the change orders impacting District 27 affected the partisan
11 make-up of the district.

12 93. Commissioner McNulty requested one change order that specifically
13 focused on reducing population deviations in several districts after changes had been
14 incorporated into the map. *See* Population Balance Map 12/16/11 (Ex. 420, Tab 4Y);
15 Change report: Pop_balance_121611 (*Id.*). It was incorporated into the map.

16 94. She presented another change that attempted to rework some of western
17 Arizona to link La Paz with Yuma County, and made a number of changes that were
18 intended to reduce deviations and eliminate some splits in Maricopa County. *See* Leg
19 Change-McNulty Change - 12/15/11 (*Id.*, Tab 4X); Change report: Leg-
20 MCNULTY_CHANGES-121511 (*Id.*). Aside from the effort to make District 13
21 more rural than it was in the earlier draft, she characterized much of this change order
22 as “clean up.” *See* 12/16/11 Tr. (Ex. 404) at 135:24-136:20. This proposal was
23 incorporated into the 12/20/11 Working Map, but modified in subsequent maps.
24 Nothing in this change order or the discussions describing it reflects any effort to
25 overpopulate districts for partisan gain.

26 95. The Commission also attempted to reduce population deviations while
27 working on its maps during its public meetings. *See, e.g.*, 12/20/11 Tr. (Ex. 406) at
28 163:6-164:24, 211:7-218:24, 224:20-225:6.

1 96. While it continued to work on the maps, given uncertainty over how
2 many benchmark ability-to-elect districts the Department of Justice would determine
3 existed, the Commissioners discussed repeatedly how to ensure the strongest case for
4 preclearance. *See, e.g.*, 12/19/11 Tr. (Ex. 405) at 10:3-16, 11:6-21, 39:20-40:13;
5 46:19-48:17.

6 97. While focusing on compliance with the Voting Rights Act, the
7 Commission continued to work to satisfy the other constitutional criteria.

8 a. For example, Commissioner Stertz discussed his views regarding
9 communities of interest in connection with the decision regarding
10 Guadalupe: “I would like to comment on my vote with the
11 affirmative, Guadalupe being moved back in with this
12 community of interest from 26, current contemplated 26 into 27.
13 With the idea that communities of interest are important, and
14 even if it requires additional analysis, that bringing that
15 community of Guadalupe back in with its community of interest
16 is paramount. It’s clear that the Commission as a whole agreed
17 with that analysis as well. So I appreciate the consistency in the
18 Commission, seeing that we are going to be respecting and
19 understanding that communities of interest are important, and
20 therefore willing to even go so far as to continue further analysis
21 to be able to move that ball along the field. So thank you to the
22 rest of the Commissioners.” 12/19/11 Tr. (Ex. 405) at 70:2-17;
23 *see also id.* at 131:6-22 (Commissioner Freeman’s discussion of
24 importance of not splitting Arcadia, Paradise Valley, and
25 Biltmore community of interest), 141:24-142:14 (discussing
26 inability to make competition strongest priority, while ensuring it
27 still was important factor).

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- b. Commissioner Stertz also led the Commission’s work to avoid splitting the “Rita Ranch” area south of Tucson, and the Commission worked together on this issue during a public meeting. *See id.* at 86:16-110:16.
- c. The Commission also refined the boundaries around south Tucson to follow major roadways to the extent possible. Although this affected the Tucson Voting Rights Districts, the changes were made to accommodate other redistricting considerations without adversely affecting the minority voting strength in these districts. *See* 12/20/11 Tr. (Ex. 406) at 73:20-84:12.
- d. Commissioner Herrera attempted to make District 28 in Maricopa County more competitive, but this was opposed by other Commissioners, particularly Commissioner Freeman, and was not adopted. *See id.* at 170:4-171:9, 250:9-19, 251:22-252:2.

98. Toward the end of the process, even Commissioner Stertz, who ultimately voted against the final map, was encouraged regarding the Commission’s successful accommodation of various criteria and progress in drawing a proper map.

- a. For example, Commission Stertz praised Commissioner McNulty’s work on the Maricopa County portion of the map: “I think that the – at the end of the day yesterday, after a very long day, in regarding the majority of the legislative districts that are in – that are contained in Maricopa County, I thought that the recommendations that had been given and outlined by Commissioner McNulty solved a lot of issues. The reason why at the end of the day I had made a suggestion to bring pause to draw together a analysis report was based on really the core work that was done around in the general Maricopa County area. We

1 had communities of interest that were being compacted. We
2 cleaned up lines between districts. We cleaned up splits. I
3 thought our work product in the general Maricopa County area
4 was quite strong. And I think that we – from this commissioner’s
5 point of view, the general Maricopa County area that was
6 designed by Commissioner McNulty had great merit, and I was
7 extremely pleased where it all went. It solved a lot of problems
8 that had been hanging out there from the previous maps.” *Id.* at
9 177:15-178:11.

10 99. While the Commission completed its review of changes to the draft
11 map, the chair repeatedly asked Commissioners if they had any changes they would
12 like the Commission to consider. *See, e.g., id.* at 178:16-18, 195:3-4, 233:5-6, 239:2.

13 100. The Commission approved the tentative final legislative map on
14 December 20, 2011, with Commissioners Mathis, McNulty, and Stertz voting in favor
15 of the map and Commissioners Freeman and Herrera voting against it. *See id.* at
16 262:18-23; Tentative Final Legislative Map (Ex. 420, Tab 5).

17 101. With the adoption of the Tentative Final Map, the Commission
18 instructed its mapping consultant to make technical changes that involved working
19 with the counties to adjust boundaries to accommodate new voting precincts to the
20 extent possible. *See* 12/20/11 Tr. (Ex. 406) at 271:3-8.

21 102. The Tentative Final Map was also referred to counsel and experts for
22 further Voting Rights analysis of the changes. The Commission heard a presentation
23 from Dr. King on January 9, 2012 about the analysis of the Tentative Final Map. *See*
24 1/9/12 Tr. (Ex. 407) at 20:25-54:16 (discussing legislative map).

25 103. The mapping consultant presented a change order and related
26 documentation of the technical changes at the January 13, 2012 meeting. *See*
27 Legislative Technical Adjustment Change Log (Ex. 420, Tab 6); Legislative –
28 Tentative Final Map – with Technical Adjustments (*Id.*); 1/13/12 Tr. (Ex. 409) at

1 29:16-34:24; 44:11-45:12. The Commission considered the impact of the technical
2 changes on population at its meeting. *See* 1/13/12 Tr. (Ex. 409) at 30:12-32:4.

3 104. The Commission approved the final legislative map on January 17,
4 2012. *See* 1/17/12 Tr. (Ex. 410) at 79:6-80:2; Proposed Legislative Districts (Ex. 420,
5 Tab 7). Commissioners McNulty, Mathis, and Herrera voted for the map, and
6 Commissioners Freeman and Stertz voted against it. *See* 1/17/12 Tr. (Ex. 410) at
7 79:6-80:2.

8 105. The Commission certified the final legislative map to the Arizona
9 Secretary of State on the same day. *See id.*; January 17, 2012 Certification of
10 Establishment of Legislative Districts (Ex. 414).

11 **VII. SUBMISSION TO DEPARTMENT OF JUSTICE AND**
12 **PRECLEARANCE.**

13 106. On February 28, 2012, the Commission submitted its legislative
14 redistricting plan to the Department of Justice seeking preclearance under Section 5 of
15 the Voting Rights Act. *See* DOJ Submission (Exs. 414-526, 530).

16 107. On April 26, 2012, the Department of Justice approved the legislative
17 map without objection, the first time the Department had precleared legislative
18 districts in Arizona on the first attempt. (Ex. 531).

19 **VIII. SUMMARY OF APPROVED DISTRICTS.**

20 108. Exhibits 415 and 416, as well as other tables and data within the
21 Department of Justice submission, contain the demographic information for the
22 Benchmark Districts and the final, approved Legislative Districts using 2010 Census
23 data.

24 109. The final plan contains eleven majority-minority districts, the same
25 number as the Benchmark Plan. Those current districts are Districts 2, 3, 4, 7, 8, 19,
26 24, 26, 27, 29, and 30. *See* Exs. 415-416.

27 110. As explained above, the final plan created ten districts in which
28 minority voters could have the ability to elect candidates of their choice. Based both

1 on demographic data and analysis of electoral performance, the Commission created
2 the following ability-to-elect districts: Districts 2, 3, 4, 7, 19, 24, 26, 27, 29, and 30.
3 *See* DOJ Submission; 2/24/12 Report by Gary King and Benjamin Schneer (Ex. 425
4 (024-078)). None of the Commissioners criticized the final map for attempting to
5 create ten ability-to-elect districts.

6 111. As the Commission's expert, Dr. Bruce Cain, has explained in his
7 reports and in deposition testimony, the deviations in the legislative districts resulted
8 from the Commission's compliance with the various constitutional criteria. *See*
9 Expert Report of Bruce E. Cain ("Cain Report") (Ex. 547), ¶ 8; *see also* documents
10 and information relied on by Dr. Cain (Exs. 549-77).

11 112. The average deviation in the legislative district is 2.26 percent. *See*
12 Cain Report, ¶ 13.

13 113. Of the 35 states for which the National Conference of State Legislatures
14 has collected data on legislative population deviations, more than one-third of such
15 states had variations above 9 percent, compared to Arizona's 8.8-percent deviation.
16 *See id.* ¶¶ 14-15.

17 114. Based on numerous indices of competitiveness established during the
18 redistricting process, three districts appear clearly to satisfy the constitutional criterion
19 of competitiveness. Districts 8, 9, and 10 consistently yielded single-digit scores
20 across all nine indices used, making clear their status as competitive districts. *See id.*
21 ¶ 18. The population deviations in Districts 8, 9, and 10 are -2.2 percent, 0.1 percent,
22 and -0.9 percent, respectively, undermining any possible finding of partisan bias. *See*
23 *id.* Also, while the Commission adjusted District 8's population in part to make it
24 more competitive, that district remained Republican-leaning. The Commission did
25 not adjust District 28 to make it more competitive. The Commission's adjustments
26 for competitiveness were thus measured and proper given its need to balance various
27 criteria.

28

1 115. A clear lack of bias exists not only in the indisputably competitive
2 districts – Districts 8, 9, and 10 – but also in those districts with population deviations
3 of less than one percent – Districts 6, 11, 13, 15, 23, 26, and 29. *See id.* ¶ 19.

4 116. The only districts remaining in such an analysis are twelve Republican
5 districts and eight Democratic districts, as confirmed by the nine competitiveness
6 indices. *See id.* All such Democratic districts, despite falling below the ideal
7 population, are ability to elect districts, ensuring the Commission’s compliance with
8 Section 5 of the Voting Rights Act. *See id.* Those districts are Districts 2, 3, 4, 7, 19
9 (of which a plurality of voters is registered as other than Democratic or Republican),
10 24, 27, and 30.

11 117. Under the approved map, Republicans could count on seventeen safe
12 districts and Democrats could count on 10 safe districts. In light of the three
13 competitive districts, Republicans were assured of controlling 56.6 percent of the
14 districts, but potentially could control 66.7 percent of the districts, while Democratic
15 control could range between 33.3 and 43.4 percent. Statewide two-party registration
16 data as of June 2012 showed that Republican share of the population was only 54.4
17 percent. *See id.* ¶ 37. *See also* Deposition of Richard Stertz at 295:11-296:6
18 (Commissioner Stertz stating that legislative map will result in Republican control of
19 Arizona House and Senate through 2020).

20 118. The transcripts of the Commission’s public sessions and maps created
21 reveal all of the changes made to the legislative districts and the reasons for such
22 changes. Nothing in the record suggests, let alone establishes, that *any* of the districts
23 was created based solely on improper partisan intent. *See* Cain Report, ¶¶ 8-9, 40.

24 **PROPOSED CONCLUSIONS OF LAW**

25 1. Courts generally should not interfere with the redistricting process and
26 the decisions made within the discretion of the legislative body. “[R]edistricting . . .
27 legislative bodies is a legislative task which the federal courts should make every
28 effort not to pre-empt.” *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978); *see also Miller*

1 *v. Johnson*, 515 U.S. 900, 915 (1995) (Redistricting “is a most difficult subject for
2 legislatures, and so the States must have discretion to exercise the political judgment
3 necessary to balance competing interests.”).

4 2. Federal law allows Arizona flexibility in constructing legislative
5 districts. *See Voinovich v. Quilter*, 507 U.S. 146, 161 (1993).

6 3. Strict population equality never has been required in legislative districts.
7 *See Mahan v. Howell*, 410 U.S. 315, 321 (1973). Instead, the proper standard has
8 been referred to as the “goal of substantial equality,” *Brown v. Thompson*, 462 U.S.
9 835, 845 (1983) (citation omitted), and the understood aim has been creating districts
10 “nearly of equal population as is practicable.” *Connor v. Finch*, 431 U.S. 407, 419
11 (1977) (citation omitted).

12 4. “So long as the divergences from a strict population standard are based
13 on legitimate considerations incident to the effectuation of a rational state policy,
14 some deviations from the equal-population principle are constitutionally permissible
15” *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). “The ultimate inquiry, therefore,
16 is whether the legislature’s plan ‘may reasonably be said to advance [a] rational state
17 policy’ and, if so, ‘whether the population disparities among the districts that have
18 resulted from the pursuit of this plan exceed constitutional limits.’” *Brown*, 462 U.S.
19 at 843 (quoting *Mahan*, 410 U.S. at 328).

20 5. Legislative plans with population deviations within ten percent of ideal
21 population are presumptively constitutional. *See* Court’s November 16, 2012 Order
22 (Dkt. 54), p.4; *Voinovich*, 507 U.S. at 161 (plans “with a maximum deviation under
23 10% fall within this category of minor deviations”) (quoting *Brown*, 462 U.S. at 842-
24 43); *see also Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004),
25 *summarily aff’d*, 543 U.S. 997 (2004); *Cecere v. Cnty. of Nassau*, 274 F. Supp. 2d
26 308, 311 (E.D.N.Y. 2003) (“Given that the deviation rate is under 10%, the plan is
27 presumptively constitutional.”).

28

1 6. The presumption of constitutionality can be rebutted only if Plaintiffs
2 “show[] that the deviation in the plan results *solely* from the promotion of an
3 unconstitutional or irrational state policy.” *Rodriguez*, 308 F. Supp. 2d at 365
4 (quoting *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032
5 (D. Md. 1994)). When the deviation rate is within ten percent, “the plaintiffs must
6 prove that ‘the asserted unconstitutional or irrational state policy is the *actual reason*
7 for the deviation.’” November 16, 2012 Order (Dkt. 54), p. 5; *Rodriguez*, 308 F.
8 Supp. 2d at 365. As a result, where population deviations can be explained, even in
9 part, by legitimate, rational interests, a challenge on Equal Protection grounds fails.

10 7. Plaintiffs must prove that population deviations are based on an
11 arbitrary or discriminatory policy, rather than the result of legitimate considerations
12 incident to the effectuation of a rational state policy. *Rodriguez*, 308 F. Supp. 2d at
13 365.

14 8. Partisanship alone cannot constitute a basis for finding a violation of the
15 federal Equal Protection Clause. *See Cecere*, 274 F. Supp. 2d at 315 (dismissing
16 complaint and finding that “the alleged political motivation . . . does not, standing
17 alone, implicate the equal protection clause”); *see also Kidd v. Cox*, No. 1:06-cv-997,
18 2006 WL 1341302, at *11 (N.D. Ga. May 16, 2006) (recognizing that politics are
19 permissible basis for minor deviations); *Rodriguez*, 308 F. Supp. 2d at 353 (granting
20 summary judgment on one-person, one-vote claim and recognizing permissible role of
21 politics).

22 9. Where partisanship is alleged as the sole reason for diverging from
23 population equality, Plaintiffs must establish that the population deviations result in
24 an actual partisan effect. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy,
25 J., concurring).

26 10. A legislative map that reflects the political strength of the parties can
27 support a finding of constitutionality. *See Gaffney v. Cummings*, 412 U.S. 735, 752
28

1 (1973) (upholding a map drawn to “achieve a rough approximation of the statewide
2 political strengths” of Democrats and Republicans).

3 11. Plaintiffs’ burden is not met by showing that the Commission could
4 have created a legislative map with smaller population deviations. *See id.* at 750-51.

5 12. Minor populations within ten percent to accommodate any goal
6 identified in Arizona’s constitution, including compliance with the Voting Rights Act,
7 do not violate equal protection.

8 13. The Commission has discretion to determine how to comply with the
9 Voting Rights Act, within the limits of the Fourteenth Amendment. As long as the
10 Commission in good faith attempts to fulfill its obligation under the Voting Rights
11 Act, population deviations related to its effort to comply with the Voting Rights Act
12 are permissible within the ten-percent range.

13 14. It is unnecessary for this Court to reevaluate the Commission’s decision
14 to establish ten benchmark districts or assess which districts provide minority voters
15 the ability to elect the candidate of their choice to decide this one-person, one-vote
16 case that is based on allegations of partisan bias.

17 15. It is unnecessary to evaluate the legislative districts under Section 2 of
18 the Voting Rights Act to decide this one-person, one-vote case that is based on
19 allegations of partisan bias. Plaintiffs’ evidence fails to rebut the presumption that
20 Arizona’s legislative map satisfies the one-person, one-vote requirement.

21 16. Even if there were evidence of partisan bias, it would not be a basis for
22 rebutting the presumption that Arizona’s legislative maps satisfy the one-person, one-
23 vote requirement.

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RESPECTFULLY SUBMITTED this 18th day of March, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2013, the attached document was electronically transmitted to the Clerk of the Court using the CM/ECF System which will send notification of such filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

s/ Dawn M. Dybdahl
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