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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

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

v.

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

Case No. CV 12-0894-PHX-ROS

PLAINTIFFS' TRIAL BRIEF

Assigned to District Judges Silver and
Wake and Circuit Judge Clifton

Trial Date: March 25, 2013

1 Pursuant to the order of December 21, 2012, Plaintiffs submit the following Brief
2 for trial on the merits to be held March 25 - 29, 2013.

3 **I. INTRODUCTION**

4 Defendant Arizona Independent Redistricting Commission (“IRC”) diluted
5 Plaintiffs’ votes deliberately, intentionally, and in violation of the one-person/one-vote
6 principle of the Fourteenth Amendment in the legislative map (“Final Map”) the IRC
7 adopted on January 17, 2012, and Plaintiffs are entitled to judgment declaring the Final
8 Map to be unconstitutional and void from the inception, permanently enjoining the IRC
9 and Arizona Secretary of State from implementing or using the Final Map for any
10 Arizona legislative elections, and permanently enjoining the IRC from ever again
11 adopting a legislative map that dilutes the votes of any citizens of Arizona in violation
12 of the Fourteenth Amendment.

13 Plaintiffs have alleged that the IRC engaged in

14 systematically overpopulating Republican plurality districts and
15 systematically underpopulating Democrat plurality districts with no
16 lawful state interest justifying such deviations from equality of
17 population among Arizona legislative districts.

18 Second Amended Complaint (“SAC”) at ¶ 2. See also *id.* at ¶ 160. Thus, Plaintiffs are
19 bound to prove only that no legitimate and constitutional state policy drove the
20 population deviations. As with differential diagnosis in medicine, if Plaintiffs prove no
21 legitimate and constitutional state policy caused the population deviations, the
22 ineluctable conclusion is that an unconstitutional motive caused the population
23 deviations.

24 At trial, Plaintiffs will prove that a policy of increasing the Democratic Party’s
25 strength at the Legislature caused the population deviations, and that this is neither a
26 legitimate nor a constitutional state policy in this context. For this purpose, Plaintiffs

1 will focus primarily, though not exclusively, on Districts 8, 24, and 26. Plaintiffs will
2 further prove that the IRC majority (the voting bloc of Mathis-McNulty-Herrera) was
3 biased from the start, that it shut out the two Republican members from any meaningful
4 participation in substantive decision making, that it flouted state law procedural
5 requirements, that it failed to perform the analysis required by Section 2 of the Voting
6 Rights Act and *Thornburg v. Gingles*, 478 U.S. 30 (1986), to determine the number of
7 majority-minority districts Section 2 would have required it to create, and that a Section
8 2 analysis, under Arizona's demographic conditions, would have prevented the District
9 8, 24, and 26 artifice.

10 For its part, the IRC has argued, in various court filings, in deposition testimony,
11 and in the report submitted by Dr. Bruce Cain, that a desire to obtain preclearance from
12 the Department of Justice ("DOJ") caused the population deviations, and that it created
13 Districts 24 and 26 as crossover districts and District 8 as an opportunity district for
14 preclearance purposes. For example, the IRC set forth race as a justification for its
15 systematic underpopulation and overpopulation of districts in its motion to dismiss the
16 amended complaint (doc. 40), dated August 3, 2012, at 4:23-5:15, and in the proposed
17 Case Management Plan (doc. 61) at 9:1-11.

18 Plaintiffs will prove that this justification was an artifice used to cover the IRC's
19 efforts to strengthen Democratic Party representation at the Legislature, the precise
20 practice Congress warned against in the Senate Report accompanying the 2006
21 reauthorization of the Voting Rights Act, P.L. 109-246, 120 Stat. 577 (July 27, 2006):

22 Several House witnesses articulated the problem in clear terms: '[To] the
23 extent that [we] can imagine that measures would be used to determine
24 whether substantive representation or influence has been enhanced to
25 prevent retrogression, these measures amount to simply helping
26 Democratic Party candidates . . . Helping Democratic Party candidates
would be argued to be equivalent to increasing minority voter influence
and helping minority substantive representation. In other words,

1 influence districts, if seen as a replacement for opportunities for minority
2 voters to elect representatives of their choice, would become simply a
rationale for creating Democratic Party gerrymanders.’

3 S. Rep. 109-295 (July 26, 2006), at 19-20. *See also Texas v. United States*, 831
4 F.Supp.2d 234, 268 n. 31 (D.D.C. 2011) (“*Texas I*”) (“Indeed, a state’s attempt to create
5 future crossover districts may lead to the creation of ‘influence’ districts that *Georgia v.*
6 *Ashcroft* approved and Congress rejected in the 2006 Amendments.”)

7 This expressly is *not* a racial gerrymandering case. If the IRC drew racially-
8 gerrymandered districts, but did not violate the one-person/one-vote principle, Plaintiffs
9 never would have filed this lawsuit. Nonetheless, strict scrutiny should be applied to the
10 extent that the IRC claims that racial motivations drove its deviations from population
11 equality. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Miller v. Johnson*, 515 U.S. 900,
12 904 (1995); *Shaw v. Reno*, 509 U.S. 630, 642-43 (1993). But “compliance with federal
13 antidiscrimination laws cannot justify race-based districting where the challenged
14 district was not reasonably necessary under a constitutional reading and application of
15 those laws.” *Miller*, 515 U.S. at 921.

16 At any rate, the facts expose the IRC’s suggested racial justification as an
17 artifice. Comparing of the purposes of Section 5 to Section 2 shows how and why.

18 “The question of retrogressive effect under Section 5 looks at gains that have
19 already been *realized* by minority voters and protects them from future loss.” *Texas I*,
20 831 F.Supp.2d at 262. “[W]hen the number of districts remains the same or increases
21 by one: there is no retrogression as long as the number of ability districts remains the
22 same.” *Texas v. United States*, 887 F.Supp.2d 133, 157 (D.D.C. 2012) (“*Texas II*”).
23 The number of Arizona legislative districts has remained constant at 30 for more than
24 40 years. Thus, as detailed below, Section 5 would have required the IRC to draw no
25 more than eight ability-to-elect districts to avoid retrogression from the Benchmark
26 Plan, the “last legally enforceable plan used by the jurisdiction[, which] serves as the

1 ‘benchmark,’ or baseline for comparison in a Section 5 retrogression analysis.” *Navajo*
2 *Nation v. Ariz. Indep’t Redistricting Comm’n*, 230 F.Supp.2d 998, 1004 (D. Ariz. 2002).

3 In contrast with Section 5, “Section 2 concerns itself with the possibility of a
4 minority group’s present, but *unrealized*, opportunity to elect.” *Texas I*, 831 F.Supp.2d
5 at 261. Thus, Section 2 would have focused on whether Arizona’s increase in minority,
6 and particularly Hispanic, population over the last decade would have required the
7 creation of more ability-to-elect districts than what existed in the Benchmark plan.

8 Anomalously, the IRC never performed a *Gingles* analysis to determine the
9 number of majority-minority districts Section 2 would have required it to create, if any,
10 based on the increase in the percentage of minority, and particularly Hispanic,
11 population experienced in Arizona over the last decade. Had the IRC done so, all
12 districts it created to satisfy Section 2 would have had to have had minority CVAP
13 exceeding 50% under *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009).

14 While as a theoretical matter, Section 2 would not prohibit the use of coalition or
15 crossover districts (defined below) for purposes of satisfying Section 5, *id.* at 25, as a
16 practical matter, in Arizona’s demographical circumstances, Section 5 and Section 2
17 would have overlapped, and all ability-to-elect districts would have required total
18 minority CVAP exceeding 50%. There were not enough concentrations of minority
19 voters to go around to allow crossover districts for Section 5 purposes while requiring
20 50% + 1 CVAP districts for Section 2. That would have stopped dead in its tracks the
21 artifice of offering Districts 8, 24, and 26 as Hispanic or minority ability-to-elect or
22 opportunity districts, when in fact they were created as Democrat ability-to-elect
23 districts. The failure to perform the *Gingles* Section 2 analysis allowed the artifice to
24 proceed, and presented the IRC with the means of dressing up Democratic districts in
25 the guise of Voting Rights Act districts. Thus, shabby partisanship masqueraded as
26 pure civil-rights efforts.

1 **II. JURISDICTION AND VENUE**

2 Jurisdiction is founded on 28 U.S.C. §§ 1331, 1367, 2201, 2202, 2284, and 42
3 U.S.C. § 1983. Venue is proper in the District of Arizona under 28 U.S.C. § 1391. A
4 three judge-panel has been properly convened pursuant to 28 U.S.C. § 2284(a).

5 **III. BURDEN OF PROOF**

6 Plaintiffs have the burden of showing that population deviations from equality
7 were arbitrary or discriminatory:

8 If the maximum population deviation in a legislative apportionment plan
9 is less than 10%, the burden shifts to the plaintiff to prove that the
10 apportionment was arbitrary or discriminatory. To meet that burden, a
11 plaintiff must show any deviation is an arbitrary or discriminatory policy.
Further, the plaintiff must prove that the asserted unconstitutional or
irrational state policy is the *actual reason* for the deviation.

12 *Harris v. Ariz. Indep't Redistricting Com'n*, 2012 WL 5835336, *3 (D.Ariz., Nov. 16,
13 2012) (Internal quotation marks and citations omitted, italics in original.) If the IRC
14 relies at trial on a defense that it drew the population deviations with a racial motive, the
15 burden shifts and its plan is reviewed with strict scrutiny. *Miller*, 515 U.S. at 904.

16 **IV. EVIDENCE TO BE OFFERED AT TRIAL**

17 The evidence will consist primarily of testimony from the IRC commissioners,
18 all of whom now have been deposed, Ken Strasma and Willie Desmond, the mapping
19 consultants, Dr. Hofeller and Dr. Cain, the parties' respective experts, and Bruce
20 Adelson, a lawyer-consultant to the IRC relative to Section 5 preclearance. The exhibits
21 will come primarily from the IRC's records and from the experts.

22 **V. PLAINTIFFS' CASE**

23 **A. The *Larios v. Cox* Framework**

24 The Fourteenth Amendment requires a State to make a good faith effort to
25 achieve population equality among legislative districts. *Roman v. Sincock*, 377 U.S.
26 695, 710 (1964). Once a State has done so, it can adjust district boundaries to attain

1 other legitimate state interests, such as respecting county, city, and town lines, and
2 communities of interest, or achieving compactness, contiguity or avoidance of contests
3 among incumbents. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (identifying
4 these as legitimate policies for deviation from equality in congressional plans);
5 *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022, 1031 (D.Md.
6 1994) (applying *Karcher* to state legislative plans). Deviations from equality of district
7 populations are permissible if they are the incidental results of State efforts to attain
8 such policies. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

9 A state redistricting plan violates the Fourteenth Amendment when it employs
10 population deviations for reasons other than to further a legitimate state interest. Such
11 was the case in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *sum. aff'd* by 124
12 S. Ct. 2806 (2004). In *Larios*, a three-judge panel overturned the State of Georgia's
13 legislative redistricting plan because it attempted to artificially strengthen rural
14 representation at the expense of urban voters. *Id.* at 1353. In so doing, the court
15 concluded that traditional redistricting criteria did not support the population deviations
16 among the two sets of districts. *Id.* 1347-53. Application of the *Larios* framework to
17 this case compels the same conclusion—that the population deviations in the IRC's
18 legislative redistricting plan are designed to artificially support Democratic
19 representation at the Arizona Legislature and *do not* further any legitimate state interest.

20 **B. The Arlington Heights Lens**

21 *Roman v. Sincock* holds that a redistricting plan tainted with arbitrariness or
22 discrimination violates the one-person/one-vote rule. 377 U.S. 695, 710 (1964). The
23 disparate impact of the Final Plan on Republican-plurality and Democratic-plurality
24 districts is obvious. As we noted in an earlier filing, when a quarter is flipped 17 times
25 and comes up heads 16 of the 17 times, it is possible the pattern results from chance but
26 it is not likely and one should check the quarter. That analogy harks back to *Village of*

1 *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).
2 *Arlington Heights* was a race case, and this is not, but its analysis of pattern and intent is
3 instructive:

4 Sometimes a clear pattern, unexplainable on grounds other than race,
5 emerges from the effect of the state action even when the governing
6 legislation appears neutral on its face.

7 *Id.* at 266. Thus, under *Roman*, 377 U.S. at 710, the clear pattern leaves only whether it
8 was the product of arbitrariness or discrimination. To this end, the *Arlington Heights*
9 sets forth factors bearing on intent. *Id.* at 266. Relating them to this case, the IRC's
10 biased selection of counsel and the mapping consultant, the freezing out of the
11 Republican members from these and other decisions, the irregular departures from the
12 State Procurement Code, which the IRC had elected to follow, the failure to follow the
13 state public records laws, the failure to draw the grid map in accordance with
14 ARIZ.CONST. art 4, pt. 2, § 1(14), the failure to perform a VRA Section 2 analysis, the
15 pretextual use of Section 5, and the receipt of "guidance" from the Arizona Democratic
16 Party's Elections Director in the map drawing all suggest string evidence of
17 discriminatory intent. There will be other factors offered in evidence at trial. These
18 show the wall of evidence being built of arbitrariness and discriminatory intent.

19 **C. The Voting Rights Stratagem**

20 The Voting Rights stratagem in which putative voting rights districts serve as
21 artifices for creation of Democratic districts is not new and is described in detail in the
22 Senate Report accompanying Congress's 2006 reauthorization of the Voting Rights Act,
23 P.L. 109-246, 120 Stat. 577 (July 27, 2006):

24 If covered jurisdictions are permitted to break up districts where
25 minorities form a clear majority of voters and replace them with vague
26 concepts such as influence, coalition, and opportunity—a standard under
 which no one factor or specific combination of factors is determinative—
 this may actually facilitate racial discrimination against minority voters.

1 Particularly disconcerting is the prospect that the Georgia opinion
2 [*Georgia v. Ashcroft*, 539 U.S. 461 (2003)] potentially opens the door to
3 increased substitution of preferred candidate of choice. Several House
4 witnesses articulated the problem in clear terms: “[To] the extent that [we]
5 can imagine that measures would be used to determine whether
6 substantive representation or influence has been enhanced to prevent
7 retrogression, these measures amount to simply helping Democratic Party
8 candidates . . . Helping Democratic Party candidates would be argued to
9 be equivalent to increasing minority voter influence and helping minority
10 substantive representation. In other words, influence districts, if seen as a
11 replacement for opportunities for minority voters to elect representatives
12 of their choice, would become simply a rationale for creating Democratic
13 Party gerrymanders. “Prepared Statement of Theodore S. Arrington, Hrg.
14 before the Subcommittee on the Constitution of the House Judiciary
15 Committee 84 (Nov. 9, 2005).

11 However, as we learned from witnesses, this is not an acceptable result.
12 Congressman Brooks made this point when he stated that “. . .
13 retrogression would be something I could never accept. I would not ever
14 sacrifice the full protections of section 5 . . . simply to promote a
15 particular candidate or a political party. And I think that’s basically what
16 it came down to in 2001 in Georgia. We were putting political decisions
17 ahead of what the Voting Rights Act really is all about, and I think we
18 made a mistake.” Testimony of Rep. Tyrone Brooks, Hrg. before the
19 Subcommittee on the Constitution of the House Judiciary Committee 76
20 (Nov. 5, 2005). One House Member commented that the Georgia
21 legislature “had made a partisan decision to basically protect Democratic
22 districts, or the Democratic Party,” and asked, “do you believe that that’s
23 an appropriate use of the Voting Rights Act?” Rep. Brooks responded,
24 “No, I do not,” and urged the Committee to accept the “preferred
25 candidate of choice” language in order to prevent this result in the future.

21 S. Rep. 109-295 (July 26, 2006), at 19-20.

22 **D. The Benchmark Plan**

23 Recent Arizona redistricting history is instructive in defining the number of
24 ability-to-elect districts in the Benchmark Plan. In 2002, the predecessor IRC made an
25 initial submission to DOJ that DOJ declined to preclear. *Navajo Nation*, 230 F.Supp.2d
26 at 1010. In that initial submission, the predecessor IRC noted that what then was the

1 Benchmark Plan, the “last legally enforceable plan used by the jurisdiction,” *id.* at 1004
2 n. 8, had only eight ability-to-elect districts: seven Hispanic and one Native American.
3 *Id.* at 1010. In its initial submission, the predecessor IRC identified ten ability-to-elect
4 districts, but DOJ objected to five of them, asserting that the IRC had not met its burden
5 with respect to them. *Id.*

6 DOJ’s objection to the 2002 IRC’s initial submission did not leave enough time
7 for the predecessor IRC to draft and resubmit a replacement plan responding to DOJ’s
8 objections. As a result, the IRC and other parties asked this Court to draft an interim
9 plan for the 2002 election, which this Court did. *Id.* at 1015-16. The Court’s 2002
10 interim plan identified eight ability-to-elect districts, and the 2002 legislative election
11 was conducted on that basis. *Id.* at 1015.

12 Against this backdrop, the predecessor IRC revised its plan and resubmitted
13 under date of August 23, 2002. Therein the IRC identified seven Hispanic ability-to-
14 elect districts (Districts 13, 14, 16, 23, 24, 25, and 27) and one Native-American ability-
15 to-elect district (District 2). Under the DOJ’s guidelines, 74 Fed.Reg.7470 (Feb. 9,
16 2011), the 2002 plan became the Benchmark Plan when loaded with 2010 census
17 population figures. In its February 28, 2012, submission to DOJ, at p. 83, the current
18 IRC identified seven Benchmark ability-to-elect districts: District 2 as a Native-
19 American ability-to-elect district, and Districts 13, 14, 15, 16, 27, and 29 as Hispanic
20 ability-to-elect districts. The divergence between the 2002 submission and the 2011
21 submission is explained by actual election results.

22 Regarding retrogression, the number of districts in a jurisdiction did not increase,
23 and in this case the number has remained constant at 30 for more than 40 years, “there is
24 no retrogression as long as the number of ability districts remains the same.” *Texas II*,
25 887 F.Supp.2d at 157. In contrast, the function of Section 2 is to determine whether
26 population changes required the creation of additional ability-to-elect districts. *Id.* This

1 leads to a further significant distinction. While as a theoretical matter, Section 2 would
2 not prohibit the use of coalition or crossover districts (defined below) for purposes of
3 satisfying Section 5, *id.* at 25, as a practical matter, in Arizona's demographical
4 circumstances, Section 5 and Section 2 would have overlapped, and all ability-to-elect
5 districts would have required total minority CVAP exceeding 50%.

6 This result would have prevented the creation of Districts 24 and 26 as putative
7 crossover districts and District 8 as an "opportunity" district. Their creation goes
8 beyond compliance "with federal antidiscrimination laws" and is not justified by the
9 Voting Rights Act because these districts were not "reasonably necessary under a
10 constitutional reading and application of those laws." *Miller*, 515 U.S. at 921.

11 In truth, Districts 24 and 26 are at best influence districts, and therefore do not
12 count towards satisfying Sections 2 or 5, and District 8 counts towards nothing so far as
13 satisfying any section of the Voting Rights Act is concerned. An "influence district" is
14 one in which "a minority group is merely large enough to influence the election of
15 candidates but too small to determine the outcome." *Pender County v. Bartlett*, 649
16 S.E.2d 364, 371 (N.C. 2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009).

17 Yet to dress up Districts 24 and 26 as putative ability-to-elect districts and
18 District 8 as an opportunity district, the IRC needed to rob minority populations from
19 the true Section 5 ability-to-elect districts (Districts 2, 3, 4, 7, 29, 27, 29, and 30) and
20 from other Districts (not necessarily ability-to-elect districts) to send such populations
21 through a ripple effect to Districts 24 and 26 and to District 8. Districts 24 and 26 in
22 reality are Democrat districts.

23 A late trade-off occurred between District 8 and District 11. The late switch
24 between District 8 and District 11 flipped party registrations in District 8, with
25 Republican Party registration dropping from 36.2% to 28.5% of total registration, and
26 Democratic Party registration increasing from 32% to 38%. It also underpopulated

1 District 8, going from 3,262 over ideal to 4,873 under ideal. The ostensible reason of
2 making District 8 a Voting Rights Act district makes little sense. In its preclearance
3 submission to DOJ, the IRC identified ten ability-to-elect benchmark districts (in truth
4 there never were more than eight), in the proposed plan and seven in the Benchmark
5 Plan , and it already had created what it claimed to be ten ability-to-elect districts in its
6 evolving plan apart from District 8. Thus, even if District 8 turned into a voting rights
7 district (which never happened), it could do nothing for Section 5 purposes. It was
8 gilding the lily.

9 **E. Bias of the Commissioners**

10 The IRC consists of four partisan-appointed members and a fifth commissioner,
11 who is selected by the four legislative appointments from the Appointment
12 Commission's third slate of candidates. The third slate contains no Democrats or
13 Republicans. The fifth commissioner serves as the chair of the IRC. In this case, the
14 fifth commissioner was Colleen Mathis.

15 Colleen Mathis learned about the position of IRC chair at a convention for
16 Arizona L.I.S.T. that she and her husband Christopher Mathis attended in August 2010.
17 Arizona L.I.S.T. exists for the purpose of electing progressive and pro-choice
18 Democratic women to public office.

19 In response to the rules or practices of the Appointment Commission, Ms. Mathis
20 submitted an application to the Appointment Commission, dated October 12, 2010.
21 Therein Ms. Mathis omitted critical information, which, had it been known, would have
22 identified her as biased to the Democratic Party and not impartial, and would have
23 precluded her under article 4, part 2, § 1(3) of the Arizona Constitution from being
24 nominated to the IRC as an Independent or and from being selected to serve as the
25 Independent chairperson of the IRC.

26 Specifically, she failed to reveal the following:

1 a. Christopher Mathis, her husband, served in the 2010 election as treasurer
2 for the campaign of Nancy Young Wright, a Democratic candidate for a seat in the
3 Arizona House of Representatives from legislative district 26 in Pima County;

4 b. on May 16, 2010, she donated \$100 to the campaign of Andrei Cherny,
5 then a democratic candidate for Arizona State Treasurer in the 2010 election;

6 c. on May 4, 2010, Christopher Mathis donated \$250 to the Cherny state-
7 treasurer campaign;

8 d. on October 27, 2010, Christopher Mathis donated \$100 to the Nancy
9 Wright legislative campaign;

10 e. on August 10, 2010, she donated \$10 to the Arizona List P.A.C., a
11 committee for pro-choice Democratic women in Arizona; and

12 f. on March 3, 2010, Christopher Mathis donated \$75 to Arizona List
13 P.A.C., and on August 10, 2010, donated another \$10 to Arizona List P.A.C.

14 This consistent pattern of service to Democratic causes and patronage to
15 Democratic candidates reveals that Chairperson Mathis is an Independent in name only,
16 and in reality, sides with Democratic-oriented candidates and causes.

17 On February 24, 2011, in a meeting called by the Arizona Secretary of State, the
18 first four appointed Commissioners, constituting a quorum, met to select a chairperson
19 from among the five candidates who are not registered with either of Arizona's two
20 largest parties.

21 During the February 24, 2011, interviews, Commissioner Freeman indicated to
22 Ms. Mathis that the IRC's political appointee members were looking for a chairperson
23 who would bring balance and fairness to the IRC and asked Ms. Mathis whether
24 anything in her background would call into question her ability to be fair. According to
25 the minutes of this meeting, Ms. Mathis answered that "there is nothing in her
26 background that would limit her ability to be fair and as long as she did not have to

1 make decisions about buying heavy equipment she would be okay.” In response to
2 questioning from Commissioner McNulty about her management style, the meeting
3 minutes report that Ms. Mathis responded that she liked “to create an environment
4 where people feel they can trust her and are comfortable with what she is trying to do”
5 and that it was “important to be open and impartial and achieve the end result by
6 consensus.”

7 This was an opportunity for Ms. Mathis to correct the material omissions she had
8 made on her application. Instead, as disclosed by her interview answers, she doubled
9 down and continued to maintain a façade of impartiality. Ms. Mathis later explained in
10 her deposition in this matter that she did not provide these details because she was not
11 asked about them directly and specifically.

12 Although they interviewed the five candidates and then met in closed session, the
13 Commissioners did not select a chairperson that day. To allow time for further
14 reflection, the Commissioners decided to meet again on March 1, 2011.

15 On March 1, 2011, after meeting in closed session for a little over an hour,
16 Commissioners Freeman, Herrera, Stertz, and McNulty selected Ms. Mathis, a
17 registered Independent from Pima County, to serve as IRC Chair.

18 **F. Selection of Counsel**

19 The alliance among Commissioners Mathis, McNulty, and Herrera first emerged
20 with the selection of the IRC’s legal counsel. After discussion about the IRC’s
21 procurement authority and consultation with the State Procurement Office (“SPO”) of
22 the Arizona Department of Administration, the IRC decided to follow the state
23 procurement code to retain legal services from one or more law firms.

24 On or about April 8, 2011, SPO issued a request for proposals (“RFP”) for IRC
25 legal services. Responses to the legal services RFP were due April 28, 2011. On May
26 12, 2011, the IRC met in public session and interviewed six of the law firms that

1 responded to the legal services RFP with the goal of procuring the services of a
2 Republican and a Democratic attorney.

3 At a public meeting on May 13, 2011, Commissioner Herrera indicated his
4 preference for Democratic lawyer Michael Mandell. In addition, Commissioners
5 Freeman and Stertz indicated their preference for Republican lawyer Lisa Hauser.
6 Accordingly, Commissioner Stertz moved that the IRC hire Mr. Mandell and Ms.
7 Hauser as their counsel. This motion was defeated by the voting bloc of Mathis-
8 McNulty-Herrera, even though Commissioner Herrera had indicated his preference for
9 Mr. Mandell just minutes before the vote was taken.

10 Following the defeat of Commissioner Stertz's motion, the Democratic
11 Commissioners, McNulty and Herrera, and Chairperson Mathis, selected Republican
12 counsel over the objections of the Republican Commissioners, Defendants Freeman and
13 Stertz. On this decision, the Mathis-Herrera-McNulty majority essentially isolated and
14 shut out the Republican commissioners from the decision-making process and selected
15 Osborn Maledon, P.A. (Democrat Mary O'Grady) and Ballard Spahr LLP (Republican
16 Joseph Kanefield) as legal counsel.

17 The selection of Republican counsel against the wishes of the Republican
18 members of the IRC set off a firestorm of controversy during public comment in
19 subsequent meeting after meeting. In summary, this first glimpse of the coalition of
20 Mathis, McNulty, and Herrera raised concerns that the selection of counsel would
21 foreshadow this coalition's commitment to something other than the application of the
22 constitutional provisions in an honest, independent, and impartial fashion and other than
23 upholding public confidence in the integrity of the redistricting process.

24 **G. Selection of the Mapping Consultant**

25 Further concerns emerged concerning the outcome-oriented nature of the scoring
26 of the responses to the RFP engaged in by at least one Commissioner who gave perfect

1 scores to the Democratic Commissioners' preferred candidates and an unjustifiably low
2 score to the candidate preferred by the Republican Commissioners. One other
3 Commissioner's written comments during the procurement process raised concerns
4 about the possibility that the scoring had been rigged.

5 Commissioners Mathis, McNulty, and Herrera discussed matters involving the
6 selection of legal counsel for the IRC, including having discussions that led to or were
7 the equivalent of legal action, outside of properly noticed public meetings.

8 Despite its stated intention of following the Arizona Procurement Code ("APC"),
9 the IRC failed to do so. By letter dated June 29, 2011, Jean Clark at SPO withdrew
10 from further assistance to the IRC, and cited the following as instances in which the IRC
11 either failed to follow the APC or engaged in poor procurement practices:

12 1. The IRC voted on the legal firm shortlist for interviews without
13 involvement by the Procurement Officer. The Procurement Officer was excluded from
14 attendance and was not afforded an opportunity to provide supporting evaluation
15 documentation for the shortlist decision. Further, the IRC failed to provide the
16 Procurement Officer the opportunity to review the interview questions or prescribe the
17 guidelines for the interviews. (R2-7 -C316B, Evaluation of Offers) .

18 2. The IRC agreed and signed a legal services summary evaluation report,
19 but then publicly discussed and some members voted contradictory to the agreed upon
20 evaluation report. (R2-7 -C316B, Evaluation of Offers).

21 3. The IRC directed SPO to "harmonize" the rates between the two firms,
22 which required a non-susceptible award determination after the public vote so the rates
23 could be negotiated. This did not follow the customary process or requirements in the
24 APC for negotiations and final proposal revisions. (A.R.S. §41-2534F; R2-7- C311A,
25 Determination of Not Susceptible for Award).

26

1 4. The IRC disregarded a recommendation by SPO that the composition of
2 the evaluation committee for the mapping RFP include independent subject matter
3 experts and not be solely comprised of Commissioners. (R2-7-C316B, Evaluation of
4 Offers).

5 5. The IRC disregarded the Procurement Officer's instruction to submit their
6 preliminary interview questions for review prior to the mapping consultant interviews.
7 (R2-7-C313C, Clarifications of Offerors).

8 6. The IRC disregarded the Procurement Officer's instructions to evaluate
9 strictly upon the evaluation factors in the RFP and to be consistent; however,
10 inconsistencies were evident in the evaluator comments and scoring for the mapping
11 consultant. (R2-7 -C316B, Evaluation of Offers).

12 7. The IRC failed to comply with the APC in the evaluation of the proposals.
13 In particular in the determination of susceptibility/competitive range and ultimate
14 contract award. (A.R.S. § 41-2534F; R2-7 -C314C, Negotiations with Responsible
15 Offerors and Revisions of Offers). As discussions also transpired in Executive Session,
16 other aspects of the Arizona Procurement Code may be in question.

17 On or about June 15, 2011, the IRC met in public session to select four
18 candidates to interview for the position of mapping consultant: Strategic Telemetry,
19 National Demographics, Research Advisory Services, and Terra Systems. Before
20 making their selection, the IRC held one or more closed sessions to discuss the selection
21 of a mapping consultant, including an almost five-hour closed session on June 15, 2011.

22 The mapping consultant RFP evaluation form criteria included two categories
23 that were scored by the commissioners: methodology for performance of work (400
24 points) and capacity of offeror (300 points). The other two categories, cost (200 points)
25 and conformance with T's and C's (100 points), were completed by the State
26 Procurement Office.

1 Following presentations by the candidates for mapping consultant on June 24,
2 2011, the IRC met in closed session to discuss the selection of the mapping consultant
3 and Chairperson Mathis and Commissioners McNulty and Herrera all gave Strategic
4 Telemetry perfect scores for the methodology and performance of work and capacity of
5 offeror (700 points).

6 Commissioners Mathis, McNulty, and Herrera all gave Strategic Telemetry
7 perfect scores despite its relative lack of redistricting experience, its lack of even
8 rudimentary knowledge of Arizona demographics and geography, its submission of the
9 most expensive proposal, its being headquartered at the District of Columbia, and its
10 deep ties to Democratic candidates and organizations.

11 By a vote of 3-2, on June 29, 2011, the Commission selected Strategic Telemetry
12 as its mapping consultant. Chairperson Mathis again joined with the Democratic
13 commissioners who favored retention of the Democratic-aligned consultant against
14 Commissioners Stertz and Freeman.

15 On this decision as well, the Mathis-Herrera-McNulty majority again isolated
16 and shut out the Republican commissioners from the decision-making process.

17 Throughout this selection process, concerns were voiced by the public and
18 Commissioners Stertz and Freeman about Strategic Telemetry's highly partisan, pro-
19 Democratic resume. Strategic Telemetry advertised itself as a statistics and data
20 analysis firm that caters to Democratic clients.

21 As a Democratic campaign strategist, Strategic Telemetry's President, Ken
22 Strasma, specialized in microtargeting and is considered to be a pioneer in the use of
23 high-tech statistical modeling in Democratic campaigns. Mr. Strasma, served as the
24 national target director for the 2008 Obama presidential campaign. His work for the
25 2008 Obama campaign included micro-targeting, a technique for identifying narrow
26 niches of voters and targeting campaign communications to them. He also worked with

1 the 2004 John Kerry presidential campaign and directed its micro-targeting efforts.
2 Most recently, he worked on efforts to recall Republican officials in Wisconsin. Mr.
3 Strasma also has a long history of making substantial monetary contributions to
4 Democratic candidates.

5 The fact that Strategic Telemetry is not a mapping firm was highlighted during
6 an IRC meeting in July 2011 when Strategic Telemetry indicated that its staff would
7 need time to learn the Maptitude software that is standard in the mapping industry.

8 **H. Failing to Follow the State Constitution Regarding the Grid Map**

9 On August 18, 2011, the IRC approved its option 2 legislative grid map (the
10 “Grid Map”), thereby completing Phase 1 of its constitutionally mandated work. The
11 grid map had a maximum overpopulation deviation of 1.56% and a maximum
12 underpopulation deviation of 2.51%. In that respect, the Grid Map failed to comply
13 with ARIZ. CONST. art. 4, pt. 2, § 1(14), which required the Grid Map to consist of
14 districts of equal population as the start point of the map drawing process. Thus, the
15 IRC was already off on the wrong foot.

16 **I. Failing to Turn Square Corners**

17 The IRC did not adopt a definition of community of interest as that term is used
18 in article 4, part 2, § 1(14) of the Arizona Constitution. The IRC did not adopt a
19 definition of compactness or contiguity as those terms are used in article 4, part 2, §
20 1(14) of the Arizona Constitution. The IRC did not adopt a definition of
21 competitiveness as that term is used in article 4, part 2, § 1(14) of the Arizona
22 Constitution.

23 The Arizona Constitution does not require the IRC to take such actions, but the
24 absence of them indicates that these neutral criteria could not have driven any of the
25 population deviations, except in an arbitrary fashion. If the IRC could not define any of
26

1 the neutral criteria, it is highly unlikely that they served to cause population deviations.
2 The lack of definitions afforded the cover of pretext.

3 **J. The McNulty Legislative Draft Map**

4 On October 10, 2011, the IRC approved a draft legislative map (the “Draft
5 Map”). The Draft Map was supposed to have been a “Merge Map,” meaning a
6 combination of the maps then preferred by Commissioner McNulty for Southern
7 Arizona and by Commissioner Freeman for Northern Arizona. In fact, it was essentially
8 a map drawn by Commissioner McNulty. The Republican members of the IRC again
9 were frozen out of the process.

10 Immediately after approving the Draft Map, the IRC put the map out for stage-
11 three public comment. The effect of the IRC’s publishing the draft map at the end of
12 stage 2 of the process was to represent to the people of Arizona that the Draft Map was
13 a good faith effort to satisfy the six criteria set forth in art. 4, pt. 2, § 1(14) of the
14 Arizona Constitution. Yet not having had any racial bloc voting analyses performed
15 either for Section 5 or Section 2, the IRC was at best guessing that its minority districts
16 in fact formed ability-to-elect districts.

17 **K. Ignoring the Legislature’s Comments**

18 On November 2, 2011, during the stage-three comment period, the Arizona
19 Legislature passed House Concurrent Memorial 2001, making comments on the
20 legislative draft map pursuant to art. 4, pt. 2, § 1(14), of the Arizona Constitution. The
21 IRC completely ignored these comments.

22 **L. Reconvening on November 29, 2011**

23 After the 30-day comment period elapsed, the Commission reconvened and met
24 on the following dates: November 29 and 30, and December 1, 5, 7, 8, 9, 12, 15, 16, 19,
25 20, 2011, and January 9, 10, 13, and 17, 2012.

26 At the first meetings concerning adjustments to the draft map, held on November

1 29 and 30, 2012, the IRC received advice from its voting rights consultant, Bruce
2 Adelson, that it could under-populate Voting Rights Districts relative to other districts
3 to help ensure that the map would not retrogress and would meet the Commission's
4 burden under Section 5 of the Voting Rights Act.

5 At the same meetings, a draft racial bloc voting analysis, prepared by Dr. Gary
6 King, was presented to the IRC. It identified Districts 2, 3, 4, 7, 19, 24, 26, 27, 29, and
7 30 as all ability-to-elect districts for Section 5 retrogression purposes. It also identified
8 ten ability-to-elect districts in the benchmark plan.

9 The latter point in Dr. King's report was error. The IRC later acknowledged in
10 its submission to DOJ that two of the putative ability-to-elect districts in the Benchmark
11 Plan in fact never elected the minority-preferred candidate and that two rarely did.

12 Dr. King provided no information to the IRC on any discrete improvements, if
13 any, the IRC needed to make to the ten identified ability-to-elect districts.

14 Thus, the IRC never knew how much, if at all, it needed to improve any of the
15 districts in the draft map labeled as ability-to-elect districts.

16 **M. The Draft Map and Preclearance**

17 By November 29, 2011, Dr. King's racial bloc voting analysis showed that the
18 IRC in fact had achieved eight ability-to-elect districts, even though it had been
19 proceeding anecdotally at best. These were Districts 2, 3, 4, 7, 19, 27, 29, and 30. At
20 that point, these eight districts were adequate to equal the Benchmark Plan. So far as
21 Section 5 was concerned, the IRC could have quit there and would have been ahead.

22 **N. Robbing Majority-Minority Districts**

23 Despite the fact that its legislative plan achieved the necessary eight ability-to-
24 elect districts to avoid retrogression, between November 29, 2011, and January 17,
25 2012, the IRC proceeded to convert Districts 24 and 26 into as strong Democratic-
26

1 plurality districts as it could. To do so it underpopulated other Democratic-plurality
 2 districts and overpopulated other Republican-plurality districts.

3 This chart shows how the Final Legislative Map made adjustments to the ability-
 4 to-elect districts as these districts were configured in the Draft Map:

5	Dist.	Population	Deviation from Ideal	Population Change	Draft HVAP %	Final HVAP %	HVAP Change
6	2	Draft 212,863 Final 204,615	Draft -204 Final -8452	↓8248	61.4%	52.8%	↓9.6%
7							
8	3	Draft 210,016 Final 204,613	Draft -3051 Final -8454	↓5403	51.2%	50.1%	↓1.1%
9							
10	4	Draft 214,082 Final 204,143	Draft +1014 Final -8924	↓9938	53.7%	55.7%	↑2.0%
11							
12	19	Draft 212,096 Final 207,088	Draft -971 Final -5979	↓5008	60.0%	60.4%	↑0.4%
13							
14	24	Draft 213,582 Final 206,659	Draft + 514 Final - 6,408	↓ 6,922	31.8%	34.1%	↑2.3%
15							
16	26	Draft 213,247 Final 213,659	Draft + 179 Final + 591	↑ 412	30.4%	32.0%	↑1.6%
17							
18	27	Draft 208,413 Final 204,195	Draft -4654 Final -8872	↓4218	53.7%	52.1%	↓1.6%
19							
20	29	Draft 212,258 Final 211,067	Draft -809 Final -2000	↓1191	61.7%	61.9%	↑0.2%
21							
22	30	Draft 207,918 Final 207,763	Draft -5149 Final -5304	↓155	50.7%	50.7%	---
23							
24	7 ¹	Draft 210,314 Final 203,026	Draft -2753 Final -10,041	↓7288	61.9%	63.1%	↑1.2%

25
 26 ¹ District 7's VAP percentages are Native American, rather than Hispanic.

1 **O. The Final Map**

2 On January 17, 2012, the IRC adopted its Final Legislative Map. Commissioners
3 Mathis, McNulty, and Herrera voted in favor and Commissioners Stertz and Freeman
4 voted against. The IRC systematically under-populated Republican plurality districts
5 and over-populated Democratic plurality districts for the sole purpose of providing
6 Democratic candidates with a partisan advantage that would not otherwise be attainable
7 had the IRC tried to achieve population equality with deviations based solely on
8 traditional redistricting principals and legitimate state policies.

9 To the extent that the IRC claims that it systematically overpopulated Republican
10 plurality districts and systematically under-populated Democrat plurality districts for the
11 purpose of complying with Section 5 of the Voting Rights Act, such alleged compliance
12 is pretextual and masks the IRC's true purpose of maximizing the strength of the
13 Democratic Party at the Legislature.

14 The Final Legislative Map made the following adjustments in terms of party
15 registration to the following LDs from their configurations in the Draft Map:

16 **Changes in Party Registration Percentages in Selected Districts**
17 **Draft Map to Final Map**

District	Draft Republican Registration	Final Republican Registration	Draft Democratic Registration	Final Democratic Registration
2	20.7	24.5	46.0	42.3
3	18.2	17.7	49.9	50.1
4	26.4	24.5	38.6	40.4
6	38.4	37.8	29.0	29.0
7	19.0	19.3	53.6	53.8
8	36.2	28.5	32.0	38.1
9	33.1	33.2	36.9	37.0

District	Draft Republican Registration	Final Republican Registration	Draft Democratic Registration	Final Democratic Registration
10	33.0	33.5	37.5	37.0
19	19.6	19.8	40.1	39.9
24	25.3	24.8	38.4	39.1
26	27.6	25.8	32.4	33.0
27	14.8	14.6	47.6	47.8
29	21.5	21.5	39.4	39.5
30	24.0	24.0	38.6	38.6

The 2012 general elections showed the following results in the following districts:

**Arizona Legislative District Minority Performance
2012 General Election**

District	Senate	House
2	Lopez (D)	Dalessandro (D) Gabaldon (D)
3	Cajero Bedford (D)	Gonzalez (D) Saldate (D)
4	Pancrazi (D)	Escamilla (D) Otondo (D)
7	Jackson (D)	Hale (D) Peschlakai (D)
19	Tovar (D)	Cardenas (D) Contreras (D)
24	Hobbs (D)	Alston (D) Campbell (D)
26	Ableser (D)	Mendez (D) Sherwood (D)
27	Landrum (D)	Gallego (D) Miranda (D)
29	Gallardo (D)	Hernandez (D) Quezada (D)
30	Meza (D)	Larkin (D) McCune-Davis (D)

1 **P. The Neutral Criteria**

2 None of the neutral criteria of respecting county, city and town lines, respecting
3 communities of interest, compactness, or competitiveness drove any of the population
4 deviations. The 2012 legislative map split county, city, and town lines more than 400
5 times. Having never adopted a definition of communities of interest, the IRC was
6 unable to afford much respect for this constitutional criterion. The 2012 legislative map
7 created at most three competitive districts, three fewer than the predecessor IRC created.

8 The IRC selectively and arbitrarily applied the concept of communities of
9 interest to certain mapping decisions. For example, the IRC ignored several requests by
10 residents that the IRC apply the community of interest criteria to their region:

11 a. The IRC ignored the request of the residents of the Town of Show Low to
12 be kept in LD 6 with the community of Snowflake. The IRC instead placed this
13 community in LD 7, specifically against the Show Low residents' wishes. The Town of
14 Show Low is located on the boundary between LDs 6 and 7.

15 b. The IRC ignored the request of the residents in the Summerhaven
16 community on Mt. Lemmon. These residents asked the IRC to place them in a
17 legislative district with the City of Tucson. Instead, they were placed in LD 14, which
18 is predominantly Cochise, Graham, and Greenlee Counties. The Summerhaven
19 residents are located on the western edge of LD 14 and separated from the rest of the
20 district by the Coronado National Forest.

21 c. The IRC ignored the request of the City of Glendale to be placed in as few
22 legislative districts of possible. Instead, the City of Glendale was divided among five
23 legislative districts.

24 d. The IRC ignored the request of the Pinal County Association of
25 Governments to keep Pinal County in one or two legislative districts. Also, the City of
26

1 Casa Grande asked that they be preserved in one district. Instead, the IRC divided it
2 into four legislative districts and split the City of Casa Grande into two.

3 **VI. CONCLUSION**

4 Not compelled or justified by any legitimate state interest, such as compliance
5 with the Voting Rights Act, or the neutral districting criteria, the IRC's systematic
6 overpopulating of Republican-plurality districts and systematic under-populating of
7 Democratic-plurality districts was arbitrary and discriminatory, denied Plaintiffs, and
8 each of them, their rights to equal protection of the laws guaranteed by the Fourteenth
9 Amendment to the United States Constitution, and deprived them of "rights, privileges,
10 or immunities secured by the Constitution and laws" of the United States, in violation
11 of 28 U.S.C. § 1983 and *Larios v. Cox*, 300 F.Supp.2d 1320, 1341 (N.D. Ga. 2004).

12
13 **RESPECTFULLY SUBMITTED** on March 18, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2013, I electronically transmitted the foregoing document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a notice of electronic filing to the EM/ECF registrants appearing in this case.

s/ Samuel Saks

Samuel Saks