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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, *et al.*,

Defendants.

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

DEFENDANT'S SUPPLEMENTAL POST-TRIAL BRIEF PURSUANT TO ORDER OF JULY 8, 2013

(ASSIGNED TO THREE-JUDGE PANEL)

Pursuant to the Court's July 8 order, Defendant Arizona Independent Redistricting Commission submits this brief on the effect of *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

Plaintiffs have from the beginning alleged that their case would show that the Commission created minor population deviations for impermissible partisan reasons. When Plaintiffs failed to establish evidence of partisan motivation, they shifted their theory to a referendum of the Commission's compliance with the Voting Rights Act, including the Commission's efforts to ensure that the redistricting plan obtained

preclearance from the Department of Justice. But Plaintiffs' claim fails on the facts and the law for the reasons set forth in Defendant's Post-Trial brief (Doc. 219).

Plaintiffs cannot rely on *Shelby County* to rescue their case. Plaintiffs never plead or argued that the constitutionality of Section 4(b) or 5 of the Voting Rights Act was an issue in this case, despite that *Shelby County* was pending and fully briefed at the time of trial. Instead Plaintiffs claimed that partisanship was the sole motivation for the minor population deviations and that every possible justification—including compliance with the Voting Rights Act—was a pretext.[1] Plaintiffs have not met their burden, and *Shelby County* provides them no help.

In any event, the Court's decision in *Shelby County* both supports the Commission's defense and confirms that, to the extent there is anything to dispute at all, the dispute belongs in Arizona's courts.[2]

First, *Shelby County* and its concern for state sovereignty confirm what the Supreme Court has already said: A plan with "a maximum population deviation under 10%" does not "require justification by the State." *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973)). Plaintiffs' theory of liability, what they describe as "differential diagnosis," offends the federalism principles embodied in *Shelby County* and the deferential "10% rule."

Second, *Shelby County* is not "retroactive" such that the Commission's past actions to comply with Section 5 are rendered ***irrational*** or ***arbitrary***. Because of this, the Commission may still assert compliance with Section 5 as a legitimate reason behind minor population deviations.

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[1] (*See, e.g.*, Doc. 174 at 13 (alleging that "compliance with the Voting Rights Act" is a legitimate state interest that can "justif[y]" minor population deviations); *id.* at 16-17 (arguing Commission's actions were pretext).)

[2] Perhaps recognizing that *Shelby County* provides no support to their case, Plaintiffs devote much of their brief to re-hashing arguments made in their earlier briefing. The Commission will not re-brief all the same issues and instead will focus on the import of *Shelby County*.

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Third, this Court should abstain because this case involves important issues of Arizona law, which are now magnified in light of the Supreme Court's reaffirmation of state sovereignty in *Shelby County*. Plaintiffs' arguments merely underscore their reliance on a particular (and narrow) reading of the Arizona Constitution in order to meet their burden. However, that is for Arizona courts to decide.

I. The Federalism Principles Motivating the Court in *Shelby County* Confirm The Need for Deference to State Redistricting Decisions When Population Deviations Are Minor.

Intervention of a federal court in state reapportionment is "a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Arizona had and has a legitimate state interest in implementing the legislative map drawn by the Commission and in defining and applying its own redistricting policies, which are embodied in the six state constitutional criteria in Article 4, Part 2, Section 1(14).

In striking down part of Section 4 (42 U.S.C. § 1973b), the Supreme Court in *Shelby County* affirmed and strengthened these principles of federalism that restrict federal-court oversight of local redistricting. *See* 133 S. Ct. at 2623 ("Drawing lines for congressional districts is likewise 'primarily the duty and responsibility of the State.'" (quoting *Perry v. Perez*, 132 S. Ct. 934, 940 (2012))). While *Shelby County* did not concern redistricting, it did involve federal voting law and related considerations of the prerogatives of the states.

The Supreme Court further reaffirmed the power of the States to determine various suffrage issues, unrelated to elections for federal offices, in *Arizona v. Inter Tribal Council of Arizona*, 133 S. Ct. 2247, 2253-2254 (2013). *Shelby County* and *Inter Tribal Council of Arizona* reaffirm the longstanding deference to state sovereignty on election-related matters, including redistricting. As the Court recognized in *Shelby County*: "States have 'broad powers to determine the conditions under which the right of suffrage may be exercised.'" *Shelby County*, 133 S. Ct. at 2623 (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965)).

1 The same federalism concerns have shaped the standard of review in cases like
2 this one. Federal courts may review state legislative plans under the Equal Protection
3 Clause to ensure that the districts are apportioned "on a population basis." *Reynolds v.*
4 *Sims*, 377 U.S. 533, 568 (1964). But no one disputes that the population deviations in
5 this case qualify as "minor." *Brown*, 462 U.S. at 842-43. Thus the standard governing
6 the case is a highly deferential one that presumes the reapportionment plan is
7 constitutional. *See id.* To overcome the presumption, a plaintiff must prove that the
8 deviations are the product of an arbitrary or discriminatory policy and that the
9 reapportionment "plan results *solely* from the promotion of an unconstitutional or
10 irrational state policy." *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004),
11 *aff'd* 543 U.S. 997 (2004) (quoting *Marylanders for Fair Representation v. Schaefer*,
12 849 F. Supp. 1022, 1032 (D. Md. 1994)).
13 As explained in the Commission's Post-Trial Brief, Plaintiffs advocate for a
14 standard of review that flips this deferential standard upside down. (Doc. 219 at 4.)
15 Plaintiffs describe the standard as being like "differential diagnosis in medicine,"
16 meaning that if Plaintiffs prove an absence of "legitimate and constitutional state
17 policy," then the Court is required to infer that "an unconstitutional motive caused the
18 population deviations." (Doc. 176 at 2.) Plaintiffs' signature proof is grounded in their
19 allegation that the overpopulated districts have Republican plurality populations based
20 on voter registration and the underpopulated districts have Democratic plurality
21 populations.[3] (See *Id.* at 7; Second Am. Compl., Doc. 55, at ¶¶ 2, 160.)
22 Plaintiffs' theory offends the federalism principles that are the foundation of
23 *Shelby County*. As the Court states:
24
25 [3] Plaintiffs' phrases "Democratic-dominated districts" and "Republican-dominated districts" (*e.g.*, Doc 223 at 15) are inaccurate because their analysis focused solely on voter registration, not on actual election results. District 8, one of the districts
26 Plaintiffs want to change through this lawsuit, is only underpopulated by 2.2% and, based on all indicators – other than solely Democratic and Republican registration – it
27 is a competitive district that slightly favors Republicans. (Doc. 219 at 17-18; Tr. Ex. 420 at tab 5(A)(7)(A) (competitiveness and compactness report for adopted map; Tr.
28 Ex. at 547 ¶ 18, 39 (Bruce Cain report).)

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> Outside of the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Indeed, the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or citizens. Amdt. 10. This "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States." . . . But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

133 S. Ct. at 2623 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)). Further, "the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-62 (1991)). Redistricting is at the heart of this power.

Whether the Commission misinterpreted the Voting Rights Act, or whether it is obligated to seek preclearance, does nothing to show that the Commission was putting up pretexts to hide partisan ends (assuming partisan ends are of constitutional concern in political redistricting). Plaintiffs ask for nothing short of an invasive second-guessing of the Commission's legislative action, a result that encourages federal court actions challenging state redistricting plans and does nothing to preserve districting as "primarily the duty and responsibility of the State." *Id.* (quoting *Perry*, 132 S. Ct. at 940); *Cox v. Larios*, 542 U.S. 947, 951-52 (2004) (Scalia, J., dissenting) (observing that challenges to legislative maps with deviations under 10% based on "impermissible *political* bias" are "more likely to encourage politically motivated litigation than to vindicate political rights" (emphasis in original)).

Particularly given the deference due to State policy makers in redistricting, Plaintiffs have not met their burden of proof and shown why this court should strike down Arizona's map for legislative districts (where issues of federalism are even more pronounced than in Congressional maps). There is no state (or federal) constitutional requirement that each district be exactly the same size. The Arizona Constitution requires that the districts be the same size "to the extent practicable." Ariz. Const. art. IV, pt. 2, § 1(14). Indeed, there are a variety of specific factors for the IRC to consider "to the extent practicable," and equal population is just one. *Id.* That being the

1 case, the Court cannot find these legislative districts unconstitutional without first
2 creating a new Federal constitutional rule that contradicts the well-established
3 deferential standard of review for deviations within ten percent, and then also
4 substituting its judgment for the Commission's regarding how to balance the six goals
5 outlined in the Arizona Constitution. Both actions fly in the face of *Shelby County*'s
6 federalism principles.

7 **II. *Shelby County* Does Not Retroactively Make Previously Rational Legislative**
8 **Action Irrational.**

9 *Shelby County* does not retroactively make the Commission's reliance on
10 Section 5 an unlawful justification for its redistricting decisions.

11 **A. The Constitutionality of Sections 4 and 5 of the VRA Are Not Issues**
12 **in This Case.**

13 Plaintiffs never plead a challenge to the constitutionality of Section 4 of the
14 VRA in the First Amended Complaint or listed it as an issue in the pretrial order
15 entered by the Court. Moreover, Plaintiffs never plead or listed as an issue the
16 argument that Section 5 is unconstitutional and compliance with it cannot be a
17 rational state policy for purposes of evaluating the constitutionality of minor
18 population deviations. Therefore, *Shelby County*'s holding that Section 4(b) is
19 unconstitutional is not an issue in this case. Indeed, Plaintiffs' theory has always been
20 that partisanship was the motivation for the population deviations and every other
21 reason advanced by the Commission was pretext. (*E.g.*, Doc. 223 at 2:8-9.)

22 **B. Even if *Shelby County* Applies Retroactively to the Extent That**
23 **State Laws Which Had Not Precleared Are Now Effective, It Does**
24 **Not Mean a Previously Legitimate State Purpose is Now**
Retroactively Illegitimate.

25 Plaintiffs now argue that *Shelby County* applies retroactively to make the
26 Commission's "reliance on Section 5" unlawful. (Doc. 223 at 4-5, 10.) Plaintiffs
27 mistakenly believe that the principle of retroactivity somehow repudiates, invalidates, or
28 casts doubt upon all previously enacted voting changes subject to Section 5. But *Shelby*

County did not decide the legality of previously precleared voting changes, and the cases Plaintiffs cite do not render the Commission's otherwise rational actions irrational after the fact. Nothing in *Shelby County* made previous efforts to comply with the Voting Rights Act an irrational state policy. *See Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 200-01 (1990) (Scalia, J., concurring in judgment) (State "should not be held to have violated the Constitution in imposing a" tax "before [the Supreme Court]" decided on the constitutionality of such taxes). The *Shelby County* Court was careful to explain that its "decision in no way affects . . . § 2" and does not address "§ 5 itself, only on the coverage formula." 133 S. Ct. at 2631. *Shelby County* only strikes down Section 4(b), and it leaves the rest of the VRA intact.[4] In other words, the Court has held only that Congress cannot ***force*** Arizona to obtain preclearance until Congress passes a new formula (that may or may not include Arizona). If Congress were to revise the coverage formula in Section 4 to include Arizona, then that decision could apply retroactively to the Commission's map as did the 1975 amendment to the coverage formula, which made Arizona a covered jurisdiction retroactive to 1972. *Shelby County*, 133 S. Ct. at 2620.

The fact that Arizona is not required to receive preclearance today when it was required to do so in order to have new districts in place for the 2012 elections does not make it unlawful, irrational, or otherwise problematic for the Commission to have taken steps to ensure compliance with all sections of the Voting Rights Act and avoid retrogression. The question in this case is whether Plaintiffs can prove that the Commission relied solely on ***impermissible*** purposes when creating minor deviations in the population. *Shelby County* simply does not stand for the proposition that avoiding

[4] One such provision is Section 3(c), which allows individuals to ask a court to impose a preclearance requirement if a state has engaged in intentional discrimination. This so-called "bail-in" section empowers federal courts, upon a sufficient showing of voting discrimination violating the Fourteenth and Fifteenth Amendments, to require jurisdictions, without the geographical limitations, to submit their voting changes for preclearance. Section 5, therefore, remains in play through Section 3. The Commission's decision to exercise care in ensuring that the legislative map is not retrogressive helps avoid being subject to preclearance under Section 3(c).

1 retrogression and discriminatory intent in redistricting, which are the State's obligation
2 under Section 5, are now retroactively impermissible purposes.

3 **C. If This Court Announces that Compliance with Section 5 is Not A**
4 **Legitimate State Interest, It Should Apply that Rule Prospectively Only.**

5 Because *Shelby County* does not hold that compliance with Section 5 is now an
6 illegitimate state interest, Plaintiffs must convince this Court to announce such a rule.
7 Even if this Court were inclined to go down that path, it should limit the application of
8 its holding to "pure prospectivity" under *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir.
9 2011) (en banc). In *Nunez-Reyes*, the Ninth Circuit held that the three-factor test for
10 retroactivity in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971), remains good
11 law in civil cases where the court announces a new rule of law not affecting its
12 jurisdiction. *Nunez-Reyes*, 646 F.3d at 690. The three factors are: (1) whether the
13 decision establishes a new principle of law, either by overruling clear past precedent on
14 which litigants may have relied or by deciding an issue of first impression whose
15 resolution was not clearly foreshadowed, (2) whether retroactive application will further
16 or inhibit the purposes of the rule in question, and (3) whether applying the new decision
17 will produce substantial inequitable results. *See Chevron Oil*, 404 U.S. at 106-07. Here
18 all three factors weigh in favor of prospective application.

19 First, Plaintiffs suggest that the Supreme Court's 2009 decision *Northwest*
20 *Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), put the
21 Commission (and the world) on notice that the Court in the future could overturn,
22 curtail, or freeze Section 5. The Commission, according to Plaintiffs, should have
23 "factored . . . into its decision-making process" the possibility of a Supreme Court
24 ruling adverse to Section 5. (Doc. 223 at 10.) Plaintiffs ignore that Arizona needed
25 new legislative districts in place for the 2012 elections, well before the Court issued
26 its decision in *Shelby County*. The Commission could not have fulfilled its
27 constitutional responsibility to create a map for 2012-2020 without complying with
28 Section 5. The State of Arizona, like all covered jurisdictions, was bound to comply

with Section 5 while it remained obligated to do so through the Section 4(b) coverage formula. The Commission reasonably relied on the fact that preclearance was required when drafting the legislative redistricting plan. Nothing in *Northwest Austin* or *Shelby County* undermines the Commission's decision to comply with the law that governed at the time it had to complete its redistricting work.

Second, the purpose of Section 5's "strong medicine" of preclearance was to stop the cat-and-mouse game whereby states would enact new discriminatory laws after old laws were struck down. *Shelby County*, 133 S. Ct. at 2618; *accord id.* at 2615. In many ways Section 4 was a victim of Section 5's success, as the Court relied heavily on the massive progress that had been made in covered jurisdictions. The Court therefore held there was an insufficient basis to continue to treat the jurisdictions falling under the existing coverage formula differently. But this does not mean that avoiding retrogression and discrimination are now illegitimate state purposes. Carried to its logical extension, Plaintiffs' mistaken view of retroactivity would open to challenges a broad swath of laws across the various covered jurisdictions that brought about the progress which the Court concluded necessitated updating Section 4(b). Thus, any holding that compliance with Section 5 is now an illegitimate state purpose should only have prospective application; it should not apply to a State's decisions before *Shelby County*. Otherwise, *Shelby County* becomes a tool to attack laws that helped bring about the progress on voting rights that led to the decision in the first place.

Finally, it would produce substantially inequitable results to strike down a precleared redistricting plan (or other voting change) that had already been used in one election on the grounds that obtaining preclearance is retroactively an illegitimate purpose. Section 5 was the law at the time that the maps were adopted and there would have been no maps in place for the 2012 elections absent emergency relief from a federal court if they had not been precleared in accordance with Section 5. The Commission was required to have maps in place for the August 2012 primary election. *Shelby County* was not decided until June 2013. The Court recognized that states have a

strong interest in having their own redistricting policies in place, rather than court-imposed emergency plans. *E.g.*, *Perry*, 132 S. Ct. 934; *Growe v. Emison*, 507 U.S. 25 (1993). Given that Section 5 preclearance applied to Arizona at the time the Commission had a legal responsibility to draw new maps for 2012-2020, this Court should not place the State in a Catch-22 by now saying that it could not legitimately consider compliance with Section 5 when it had to do so at the time it had to complete its redistricting work.

Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993), is inapposite. There, the Supreme Court held that the State of Virginia had to provide some relief to taxpayers who paid taxes under a law that was later held to be unconstitutional. *Id*. at 97-99. The Court set down a rule that when it "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court's] announcement of the rule." *Id*. at 97. The "rule of federal law" set forth in *Shelby County* is that the Congressional formula for determining which states are subject to Section 5 preclearance is unconstitutional. *Shelby County* did not hold that a State's compliance with preclearance or Section 5 was unconstitutional or even that Section 5 itself is unconstitutional. Therefore, *Harper*'s retroactivity requirement is simply inapposite.

For all of these reasons, even if *Shelby County* is retroactive, at most that simply means that the plan could now take effect if it was not precleared previously. It does not mean that complying with Section 5 when developing a map in time for the 2012 elections is retroactively an illegitimate or unconstitutional purpose.

III. To the Extent Plaintiffs Contend that the Creation or Strengthening of Crossover Districts Cannot Justify Population Deviations After *Shelby County*, the Court Should Reject this as a Matter of Federal Law and Abstain from Deciding This Based on the Arizona Constitution.[5]

Plaintiffs contend (at 2-3, 14-15) that three of the districts (8, 24, and 26) are "crossover" districts that cannot be used to satisfy Section 2. Furthermore, Plaintiffs argue that "[a]fter *Shelby County*, Section 2 is the only basis for constructing any minority district which deviates from the Arizona neutral redistricting criteria." (Doc. 223 at 2.) And, according to Plaintiffs, the Commission could not use crossover districts as part of its compliance with the Voting Rights Act. Thus, Plaintiffs' conclude, the creation or strengthening of crossover districts could not justify population deviations. This argument is flawed for several reasons and – at most – calls for State Court adjudication.

A. Plaintiffs Are Wrong As a Matter of Federal Law.

Plaintiffs have not pled a Section 2 cause of action. No Plaintiff claims to be a member of a racial or language minority, the groups protected by Section 2. Plaintiffs further have no standing to raise Section 2 allegations about Districts 8, 24, and 26 because no Plaintiff resides in any of those districts. (Doc. 95 at 6-7.) In addition, no suit alleging that the legislative redistricting plan violates Section 2 has been filed by anyone.

Moreover, Plaintiffs simply get it wrong when they contend (or imply) that creating or strengthening a crossover district cannot justify minor population deviations – *i.e.*, that such a state policy is irrational or illegitimate. Plaintiffs rely on *Bartlett v. Strickland*, 556 U.S. 1 (2009), but that case only holds that Section 2 does not ***mandate*** crossover districts. As *Bartlett* states clearly, the intentional creation of crossover districts is perfectly legitimate under federal law, including as part of a state's compliance with Section 2. *Id.* at 23 ("Much like § 5, § 2 allows States to choose their

[5] The Commission incorporates its Motion for Pullman Abstention (Doc. 76) and Reply In Support of Motion for Pullman Abstention (Doc. 97).

own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts.”). Indeed, the Supreme Court recognizes that states have “the flexibility to choose one theory of effective representation over the other.” *Georgia v. Ashcroft*, 539 U.S. 461, 481-82 (2003), *superseded by statute on other grounds*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, 120 Stat. 577.[6]

Minor deviations may be unlawful only if Plaintiffs show that the deviations resulted solely from an unconstitutional or irrational state policy. *Rodriguez*, 308 F. Supp. 2d at 365. Plainly, because *Bartlett* tells us, a legislative body may rationally choose to make a crossover district.

1. The Constitutionality of Coalition and Crossover Districts in General Is Well-Established.

Plaintiffs continue to center their case around Districts 24 and 26 and the incorrect argument that these districts are somehow not viable or are illegal because they are coalition or crossover districts. The overwhelming weight of authority, however, clearly reveals Plaintiffs’ continuing error regarding a State’s discretion with regard to legislative redistricting. Before *Shelby County*, courts concluded that Section 5 permits States to create coalition and crossover districts and did not hold that creating these types of districts is impermissible in the context of Section 5 or otherwise. *See Texas v. United States*, 887 F. Supp. 2d 133, 147-48 (D.D.C. 2012) (*Texas II*) (concluding Section 5 protects crossover districts), *vacated as moot*, 133 S.

[6] Although Plaintiffs continue to insist on a 50% CVAP threshold, *Bartlett* discusses majority VAP (not CVAP) as the requirement. 556 U.S. at 13. Plaintiffs also focus exclusively on the threshold population requirement for a viable Section 2 claim, but they ignore another threshold Section 2 requirement: racially polarized voting must prevent minority voters from electing their candidate of choice. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). Because crossover and coalition districts provide minority voters these opportunities, their theory that Section 2 requires that the ability-to-elect legislative districts be redrawn with a higher minority percentage is wrong. (*See* Doc. 223 at 15:8-17.)

Ct. 2885 (2013);[7] *LaRoque v. Holder*, 831 F. Supp. 2d. 183, 222-24, 227 (D.D.C.) (holding that Section 5 permits crossover districts and tradeoffs between crossover and majority-minority districts), *vacated as moot*, 679 F.3d 905 (D.C. Cir.) (DOJ withdrew objection based on new evidence as appeal was pending), *cert. denied*, 133 S. Ct. 610 (2012); *see also Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (describing "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district *in order to elect candidates of their choice* " (emphasis added)); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (describing a district in which a minority group was not large enough to elect its preferred candidate operating alone but could do so if it "attract[ed] sufficient cross-over votes from white voters").

The Supreme Court has never directly addressed whether Section 5 protects coalition or crossover districts. *Georgia v. Ashcroft*, however, suggests that it does. The Court described districts with "coalitions of voters who together will help to achieve the electoral aspirations of the minority group," 539 U.S. at 481, concluding that such districts count as "effective representation" for purposes of Section 5, just like "safe majority-minority districts." *Id*. at 480-82.[8] Although the 2006

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[7] Wendy Davis, an intervenor in *Texas v. Holder*, filed a motion to dismiss Texas's appeal as moot *prior* to *Shelby County* because Texas had already adopted new maps. Motion of Appellee-Intervenors to Dismiss Appeal as Moot at 4-5, *Texas v. United States*, 133 S. Ct. 2885 (2013) (No. 12-496), *available at* http://redistricting.lls.edu/files/TX/20130624%20MTD%20as%20moot.pdf. In addition, *Shelby County*'s holding eliminates the need for preclearance. Nonetheless, as discussed at note 4, *supra*, Texas now is facing a "bail-in" counterclaim under Section 3 of the VRA on remand. *See, e.g.*, Statement of Interest of the United States with respect to Section 3(C) of the Voting Rights Act, *Perez v. Texas*, 891 F. Supp. 2d 808 (W.D. Tex. 2012) (No. 5:11-cv-360-OLG-JES-XR), *available at* http://redistricting.lls.edu/files/TX/20130725%20DOJ%20bailin.pdf.

[8] The Court's statements in *Georgia v. Ashcroft* are reinforced by the House Report accompanying the 2006 amendments, which spoke of coalition districts as a type of ability district: "Voting changes that leave a minority group less able to elect a preferred candidate of choice, either directly *or when coalesced with other voters,* cannot be precleared under Section 5." H.R. REP. NO. 109–478, at 71, 2006 U.S.C.C.A.N. 618, 672 (emphasis added). Although Senator Kyl wrote separately

(continued...)

amendments rejected the portion of *Georgia v. Ashcroft* that directed courts to consider factors other than ability to elect in their retrogression analyses, this passage is from the opinion's earlier section describing ability to elect that was not altered by the 2006 amendments. *Texas II*, 887 F. Supp. 2d at 147-48.

Furthermore, the Supreme Court has supported coalition districts, suggesting that such districts will become more common over time, replacing majority-minority districts as waning racial polarization makes it easier for minority voters to elect their preferred candidates even when they do not make up the majority of a district's voters. *See De Grandy,* 512 U.S. at 1019–20. In other words, ability-to-elect districts may look different now than they did when the VRA was first enacted. The Commission exercised its legislative redistricting responsibility in a manner that was sensitive to these new, but real, forms of minority voting power. *Texas II*, 887 F. Supp. 2d at 148.

Plaintiffs' argument (Doc. 223 at 12 & n.6) that Section 5 cannot be a basis for minor population deviations in a legislative map simply rehashes arguments in the post-trial briefing, and is wrong for the reasons described in the Commission's post-trial brief. (Doc. 219 at 23-24.)

The benchmark legislative plan had four districts, Districts 15, 23, 27, and 29, where the largest minority group, Hispanics, had less than 50% voting age population (VAP) and had the ability to elect candidates of choice by forming coalitions with other groups. In the 2012 enacted, precleared legislative plan, the Commission chose to **reduce** the number of coalition districts from four to two, Districts 24 and 26,

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(...continued)
"to explain why [he] believe[d] that Congress *cannot* require that state or local governments create or retain influence or coalition districts," S. REP. NO. 109–295, at 22 (additional views of Senator Kyl), his views were filed a week after the VRA had passed both houses of Congress, were not considered by Congress prior to the vote, and were neither adopted nor affirmed by Congress in its findings accompanying the 2006 amendments. *Texas II*, 887 F. Supp. 2d at 147-48.

although pursuant to Section 5, the Commission could have created the same number of coalition districts in its 2012 map. The choice was clearly within the Commission's legislative discretion, as the State of Arizona selected its "own method of complying with the Voting Rights Act," *Bartlett*, 556 U.S. at 23. States have, and indeed must have pursuant to the Constitution and *Shelby County*, "the flexibility to choose one theory of effective representation over the other." *Georgia*, 539 U.S. at 482.

B. This Court Should Abstain from Deciding this Case Based on State Law.

The Commission previously laid out how Plaintiffs' constitutional claim undoubtedly implicates a sensitive area of state policy, which is an important element in the abstention analysis. (Doc. 76 at 6-7.) *Shelby County* reinforces the issues of state sovereignty regarding the drawing of legislative lines and elections. *See* Part I, *supra*. It makes clear the importance of preserving and protecting state sovereignty, especially when related to voting and elections.

As previously briefed, to the extent any decisions in this case require a resolution of State law, the Court should abstain and defer to a state court. Plaintiffs wrongly ask this Court to resolve a federal constitutional claim that need never be reached if their theory about the state's equal-population requirement is correct. In this sensitive area of state public policy, the Court should abstain until that state-law issue is resolved. In addition, it should abstain from passing any judgment on the Commission's exercise of discretion regarding how to balance the competing state constitutional requirements because that too is an issue for the state courts to resolve.

1. Resolution of State-Law Issues Will Eliminate or Narrow the Need to Decide the Federal Question.

"Differential diagnosis," as framed by Plaintiffs, fundamentally requires interpreting state law. Therefore, if the Court were inclined to adopt the "differential diagnosis" rule, then it would be necessary to first resolve several underlying issues of

state law. The first is whether the Arizona Constitution simply imposes a bright-line population rule that is stricter than the federal 10% rule. If this is the case, and the Commission has exceeded it, then the map is unconstitutional as a matter of state law; no legitimate state policy could justify any of the deviations over the state-imposed bright line limit, so each such deviation would fail under differential diagnosis.[9]

Putting aside the bright-line rule, if state law requires the Commission to justify each minor population deviation based on one of the other five constitutional goals – as Plaintiffs argue – then the state court, not the federal court, should decide in the first instance the novel legal question of the scope of each goal and what adjustments do and do not fall within those goals. As shown below, there are several such issues, the resolution of which will either eliminate the need for federal court review entirely or narrow the issues.

The Commission applied and balanced multiple state constitutional criteria, which incorporated federal law under the Fourteenth Amendment and the VRA. Plaintiffs' principle argument seems to be that the only conceivable legitimate reason why the Commission could create a crossover district is to comply with Section 5 and because *Shelby County* "cuts" Arizona from Section 5, there can now be no legitimate reason under state law for their creation. (Doc. 223 at 12.) Plaintiffs focus on Districts 8, 24, and 26. This is inconsistent with the facts and the law.

The facts show that the Commission created these districts for multiple purposes, including compliance with the VRA, respecting communities of interest, and, in the case of District 8, competitiveness. (Doc. 219 at 17-20.) At a minimum,

[9] This presents a factual situation remarkably similar to one where the Ninth Circuit has affirmed abstention. *Badham v. U.S. District Ct. for N. Dist. of Cal.*, 721 F.2d 1170, 1177 (9th Cir. 1983) (reproducing three-judge opinion). In *Badham*, the state-law question was the legality of technical changes by the California Secretary of State, which had the effect of reducing the population deviations. Here, if there is a bright-line rule that has been violated, then the Commission or Superior Court will necessarily have to reduce the deviations, and this Court, like the *Badham* Court, will be presented with a map with smaller deviations that may eliminate the need to decide the federal constitutional question entirely or materially alter it. (*See* Doc. 76 at 8.)

1 Plaintiffs' theory that creation of "cross-over" districts is inconsistent with a "strict[]
2 adhere[nce] to the city and county line and other neutral provisions of Arizona law"
3 (Doc. 223 at 15) requires an interpretation of State Constitutional law that this Court
4 is simply not best suited to make – indeed, it should not make – under principles of
5 federalism.

6 After *Shelby County*, abstention is now even more appropriate because the
7 question of how the Arizona voters intended the VRA to apply in Arizona through the
8 Arizona constitutional goals is a question of state law. The voters understood and
9 accepted that Arizona is a covered jurisdiction, and complying with the VRA (and all
10 the case law interpreting it) was incorporated as a state constitutional responsibility.
11 *Shelby County* does not erase the voters' intent and this state constitutional
12 responsibility. Action taken to comply with the VRA's substantive standards in
13 Section 2 and Section 5, irrespective of whether Arizona was required to obtain
14 preclearance, is plainly a rational purpose for state action. And this court should
15 abstain until the state courts have had the opportunity to address this issue.

16 Plaintiffs ignore state constitutional factors such as competitiveness and
17 communities of interest and argue that after *Shelby County*, the Commission can only
18 "strictly adhere to the city and county line and other neutral provisions of Arizona
19 law." (Doc. 223 at 15.) Essentially, Plaintiffs' want this Court to undo the
20 Commission's policy judgments regarding how to balance the various state
21 constitutional criteria because even though the final map favored Republicans, it did
22 not favor Republicans enough to satisfy these Plaintiffs. Plaintiffs' argument of seven
23 more Democratic seats (Doc. 223 at 2) is not credible and is unsupported by the
24 evidence.[10] So they hope to eliminate the competitive District 8 or the racially diverse

25 [10] Indeed, Plaintiffs' counsel conceded that "[t]he most obvious practical result" of
26 their lawsuit, if successful is to flip District 8. (March 29 Trial Tr. at 1204-05.) "In
that district, you have a situation that but-for the change, you would probably, more
27 likely than not, have an 18 to 12 situation in the Senate." (*Id.*) But District 8 is
competitive, having elected two Republicans to the state house. Plaintiffs' claims
28 clearly implicate the state-law competitiveness goal, which supports abstention.

(continued...)

Districts 24 and 26.[11] *Shelby County* provides support for none of this. *Shelby County* freed Arizona and other jurisdictions from federal oversight, but it did not limit Arizona's discretion with regard to legislative districting.

2. Timing Is Not a Barrier to Abstention in this Case.

All that is required in the specific context of *Pullman* abstention and voting rights is that Plaintiffs' rights not be infringed by the delay from abstention. Here, that means that the maps must be resolved in time for the next election. To be used in the election cycle, the map does not need to be finalized until late-May 2014, the deadline for filing nominating petitions. (Doc. 76 at 4 & n.2.) This is approximately ten months away. Moreover, now that Shelby County has invalidated Section 4(b), no time need be reserved for preclearance.

Any delay relating to abstention results from Plaintiffs' failure to pursue their state-law claims in state court. Plaintiffs chose not to pursue their claims in state court despite their heavy reliance on an interpretation of state law. This strategic choice should not undermine the federalism interests that abstention protects. The opinion Plaintiffs cite, *Marylanders v. for Fair Representation, Inc. v. Schaefer*, 795 F. Supp. 747 (D. Md. 1992) (*Marylanders Abstention Opinion*), provides no help. First, the majority's refusal to defer to the Maryland state court has *never* been cited by another court, and is simply bad law in light of *Growe v. Emison*, 507 U.S. at 37. Second, the majority only discusses *Colorado River* abstention (*i.e.* abstention to avoid duplicative litigation when a parallel state proceeding is underway), not *Pullman* abstention. The concurrence, which correctly foreshadows *Growe*, notes that *Pullman* abstention was inapplicable in that case for the simple reason that "[t]here

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(...continued)
Moreover, if there was a drop in Republican seats, it was attributable what Plaintiffs' counsel concedes was an unusually strong election for Republicans in 2010. Tr. Ex. 456 (Cantelme letter dated July 18, 2011, ARCH00003547-3551).

[11] (March 29 Trial Tr. at 1206 (Plaintiffs' counsel acknowledging in response to the Court that Hispanics can be a community of interest, but then incorrectly conflating communities of interest with Section 2 of the VRA).)

1 [was] no uncertain issue of state law." *Marylanders Abstention Opinion*, 795 F. Supp.
2 at 752 (Smalkin, J., concurring). *Compare* Part III(B)(1), *supra*. Finally, the state
3 proceedings would not be resolved until late-August of the election year itself. *Id.* at
4 748. Here, there are ten months until the deadline for filing petition sheets.
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3. Certification to the Arizona Supreme Court is Inadequate; Abstention and Filing in the Superior Court is Proper.

7 As previously noted, certification of Plaintiffs' state-law claim to the Arizona
8 Supreme Court is inadequate for at least two reasons. First, Plaintiffs' asserted an
9 independent state-law claim that the map violates the Arizona Equal Population goal
10 because that goal imposes a strict population equality requirement. If the final map
11 violates a bright-line rule of state law, then it is unconstitutional as a matter of state
12 law, and this case can be resolved without reaching the other questions. *See*
13 Part III(B)(1). However, if the Arizona Supreme Court reaches that conclusion, this
14 Court cannot simply grant relief on that basis, because it would be ordering state
15 officials to comply with state law in violation of *Pennhurst State School & Hospital v.*
16 *Halderman*, 465 U.S. 89, 121 (1984). (*See* Doc. 66 at 6-8.) Therefore, it is best that
17 the question is presented in a state court case, where relief can be granted.[12]
18 Second, Plaintiffs' "differential diagnosis" claim is fact intensive. Just as this
19 Court could not decide the merits of the claim as a matter of federal constitutional law
20 without a more developed factual record, (Doc. 54), it would be difficult for the
21 Arizona Supreme Court to simply give guidance in a vacuum without a factual record.
22
23

24 [12] If there is a bright-line rule, then the Commission needs to know about it before it
25 draws any more maps. Otherwise, the Commission could go through another mapping process and then have its maps struck down a second time. It would not be able to get a definitive resolution from the state courts until it finally adopted a new
26 plan. *See Winkle v. City of Tucson*, 190 Ariz. 413, 418, 949 P.2d 502, 507 (1997) (noting that courts do not give advisory opinions regarding proposals that may or may
27 not become law). This would be incredibly inefficient and waste precious time and resources. Only the state courts can definitively resolve this as a matter of state law;
28 even if this Court were to decide the question, it would only be persuasive authority.

Pullman abstention is the most practical way to resolve the unique claims that Plaintiffs are bringing in this case. It best respects federalism, allows state and federal courts to function in their areas of expertise, and avoids the situation of the map being struck down for violating state law, without a definitive statement from the state courts as to what state law permits and prohibits. *Shelby County* does not alter this abstention analysis, but it provides further support for the importance of a state's sovereign authority.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court uphold the constitutionality of the legislative map. If the Court needs to resolve any state-law issues prior to reaching its final determination, the Commission respectfully requests that it abstain under *Pullman*, so that the parties may promptly seek a state-law determination in state court.

RESPECTFULLY SUBMITTED this 2nd day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2013, I electronically transmitted the foregoing document and any attachments to the U.S. District Court Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

s/ Brunn W. Roysden III

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