Judith M. Dworkin (SBN 010849)
Judith.Dworkin@SacksTierney.com
Patty A. Ferguson-Bohnee (SBN 020996)
Patty.Ferguson@SacksTierney.com
SACKS TIERNEY P.A.
4250 N. Drinkwater Blvd., 4th Floor
Scottsdale, AZ 85251-3693
Telephone: 480.425.2600

Dana L. Bobroff (No. 019682)
dbobroff@nndoj.org
THE NAVAJO NATION, DEPT. OF JUSTICE
P.O. Drawer 2010
Window Rock, Arizona 86515
Telephone: (928) 871-6275

Attorneys for The Navajo Nation and Leonard Gorman

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Ted Carpenter, Beth K. Hallgren, James C. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Paula J. Linker, Karen M. MacKean, Sherese L. Steffens, all qualified electors of the State of Arizona,

Plaintiffs,

v.

Arizona Independent Redistricting Commission, and Colleen Mathis, Linda C. McNulty, Jose M. Herrera, Scott D. Freeman, and Richard Stertz, members thereof, in their official capacities; and Ken Bennett, Arizona Secretary of State, in his official capacity,

Defendants.

No. 2:12-CV-00894-ROS

SUPPLEMENTAL TRIAL BRIEF OF *AMICI CURIAE* THE NAVAJO NATION AND LEONARD GORMAN

(Assigned to District Judges Silver and Wake and Circuit Judge Clifton)

Amici Curiae the Navajo Nation and Leonard Gorman submit this brief in response to the Court's order dated July 8, 2013 (Dkt. 222) requesting supplemental briefing on the effects of *Shelby County v. Holder*, 570 U.S. ____ (2013), in this

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

case.[1] As explained below, *Shelby County* does not affect the issues presented by the Plaintiffs in this case. Plaintiffs claim that the Legislative Plan violates the one person, one vote principle set forth in the Fourteenth Amendment and ask this Court to interpret the meaning of the equal population requirement in the Arizona Constitution. Dkt. 55 at 38-41. Plaintiffs did not, however, bring a claim under the Voting Rights Act, 42 U.S.C. § 1973, specifically they did not bring a declaratory action claiming that either Section 4 or Section 5 is unconstitutional; therefore, *Shelby County* has no impact on this Court's decision. In addition, this Court should abstain from interpreting Arizona's constitutional equal population provision.

I. THE RULE OF RETROACTIVE APPLICATION DOES NOT APPLY HERE

A. RETROACTIVITY APPLIES ONLY TO CASES INVOLVING THE RULE OF LAW ANNOUNCED BY THE COURT

Retroactivity means that when the Court decides a case and applies a new legal rule to the parties before it, then the new rule must be applied "to all pending cases," including those involving pre-decision events. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995). When the Court does not expressly state whether the decision applies prospectively only, as in this case, "an opinion announcing a rule of federal law 'is properly understood to have followed the normal rule of retroactive application.'" *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97-98 (1993) (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538 (1991)); *see also Nunez-Reyes v. Holder*, 646 F.3d 684, 690 (9th Cir. 2011). In *Beam*, the Court held "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so." 501 U.S. at 540. Thus, where a decision of unconstitutionality has been applied to the parties before it, ordinarily, full retroactivity applies.

[1] This Court granted the Navajo Nation and Leonard Gorman permission to participate in this case as *amicus curiae* on November 16, 2012. Dkt. 54.

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

The Rule Of Law Announced In *Shelby County* Is Not At Issue Here

In *Shelby County*, Plaintiff Shelby County, Alabama filed suit in the United States District Court for the District of Columbia seeking declaratory relief that Section 4(b) and Section 5 of the Voting Rights Act ("VRA") are unconstitutional and sought to enjoin the enforcement of these sections of the VRA. *See Shelby County v. Holder*, 470 U.S. _____ (2013). The Court expressly upheld the constitutionality of Section 5 under the Fifteenth Amendment. *Shelby County*, slip op. at 24. The Supreme Court did however find that the coverage formula needs to be updated. In finding Section 4b unconstitutional, the Court stated that "[t]he formula in that section *can no longer be used as a basis* for subjecting jurisdictions to preclearance." *Id*. (emphasis added).

According to *Shelby County*, jurisdictions listed under the 2006 Section 4(b) coverage formula are no longer subject to Section 5's preclearance obligation. *Id*. Thus, in the event that full retroactivity applies, in any case now pending seeking a declaration that Section 4(b) is unconstitutional, or even enjoining a future application of Section 4(b), *Shelby County* applies, and courts in those cases must enjoin application of Section 4(b) or declare that 4(b) is invalid. In addition, the practical effect of the decision is that jurisdictions listed as covered jurisdictions under Section 4(b) no longer need to seek preclearance under Section 5.

Here, however, Plaintiffs neither sought a declaration that Section 4(b) is invalid, nor sought an injunction against application of Section 4(b). Rather, Plaintiffs seek a declaration that the legislative map violates the one person, one vote requirement of the Fourteenth Amendment and the equal population requirement of the Arizona Constitution and seek to enjoin use of the map. Dkt. 55, ¶¶ 163, 169. The holding in *Shelby County* is not in any way implicated here. *Shelby County* did not, as Plaintiffs suggest, hold that compliance with Section 5 renders the redistricting process per se unconstitutional. Dkt. 223 at 13. Nothing in Shelby County, or elsewhere in the Court's jurisprudence, holds that the mere fact that a map

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

was precleared renders a legislative map unconstitutional or otherwise invalid.

B. PRECLEARANCE DECISIONS CANNOT BE CHALLENGED

Plaintiffs allege that because Section 4(b) was struck down, the Commission's compliance with Section 5 somehow impacts this court's review of their equal population challenge. Dkt. 223 at 3. As the Supreme Court noted over fifty years ago, the preclearance process "merely gives the covered State a rapid method of rendering a new state election law enforceable." *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969). Moreover, even in the absence of a coverage formula under Section 4(b), jurisdictions may be ordered to undergo preclearance under Section 3 of the Voting Rights Act. 42 U.S.C. § 1973a(3); *see Jeffers v. Clinton*, 740 F. Supp. 585, 587 (E.D. Ark. 1990) (as remedy for violations of Voting Rights Act, jurisdictions may be ordered to undergo preclearance under Section 3). Thus, Plaintiffs cannot challenge the Department of Justice's decision to preclear the Legislative Plan. *Morris v. Gressette*, 432 U.S. 491 (1977) (decision not to object to a submitted change cannot be challenged in court.). Once a jurisdiction complies with its preclearance obligation, "private parties may enjoin the enforcement of [a] new enactment only in traditional suits attacking its constitutionality." *Allen v. State Bd. of Elections*, 393 U.S. at 549-50.

In this case, the Commission obtained preclearance; once that occurred, Plaintiffs only option was to sue to invalidate the maps. This is exactly the action taken by the Plaintiffs. In so doing, however, Plaintiffs could not then challenge the preclearance decision; to the extent Plaintiffs sought to do so or imply so now, the appropriate defendant would have been the Department of Justice -- not the Commission. *See Shelby County v. Holder*, 811 F. Supp. 2d 424, 427 (D.D.C. 2011) *aff'd*, 679 F.3d 848 (D.C. Cir. 2012) *cert. granted in part*, 133 S. Ct. 594 (U.S. 2012) and *rev'd*, 570 U.S. ___ (2013). *Shelby County* involved a direct attack on the constitutionality of the statute in a lawsuit against the Attorney General of the United States. There, the Alabama county sought a declaration that it was not required to

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

undergo preclearance. In pending suits where jurisdictions seek declarations that they are not required to undergo preclearance, the decision in *Shelby County* controls. In contrast, where the preclearance process has been completed, as is the case here, the holding of *Shelby County* is inapplicable. Plaintiffs would have needed to challenge the constitutionality of Section 5 for retroactivity to apply, and they failed to do so.

II. THE COMMISSION MUST CONSIDER STATE AND FEDERAL LAWS WHEN DRAFTING LEGISLATIVE DISTRICTS

A. SECTION 5 IS AN ENFORCEMENT MECHANISM OF THE FIFTEENTH AMENDMENT

Congress passed the Voting Rights Act in order to enforce the Fifteenth Amendment. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6. The Fifteenth Amendment provides that:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend XV. Section 5's preclearance provision requires a covered jurisdiction to demonstrate that a proposed voting change does not have the purpose and will not have the effect of discriminating based on race or color. Under Section 5, the burden of proof is on the covered jurisdiction to establish that the proposed change does not have a retrogressive purpose.

Even if a jurisdiction is not required to comply with Section 5, the jurisdiction must still comply with the Fifteenth Amendment. Thus, the Commission must still ensure that it does not dilute or deny the vote of Native Americans or other minorities and that it does not discriminate against minority voters when drawing redistricting plans.

B. SECTION 5 WAS ONE OF MANY FACTORS CONSIDERED DURING THE REDISTRICTING PROCESS

Although the Department of Justice precleared the Legislative Plan, Section 5

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

was only one factor that the Commission considered during the redistricting process. The Commission was still required to comply with the Voting Rights Act and the state constitutional criteria.

The Voting Rights Act seeks to ensure that protected minorities, including Native Americans, have an opportunity to elect candidates of their choice. Specifically, any legislative plan must comply with Section 2 of the Voting Rights Act. *Thornburg v. Gingles*, 478 U.S. 30 (1986); 42 U.S.C. § 1973. Preclearance of a legislative plan does not preclude a subsequent Section 2 challenge. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 485 (1997). A number of precleared plans have been found to violate Section 2. *See, e.g., Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983); *Buskey v. Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983). A jurisdiction violates Section 2

> if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b). A vote dilution claim under Section 2 can be established if the (1) minority group is sufficiently large and geographically concentrated to make up a majority in a single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes to defeat the minority's preferred candidate. *Johnson v. DeGrandy*, 512 U.S. 997, 1006-1007, (1994); *Thornburg*, 478 U.S. at 50-51; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425 (2006). Once these preconditions are established, the Court will look at the totality of circumstances to determine whether the minority group had less opportunity than other members of the electorate to participate in elections and to elect representatives of its choice. *Thornburg*, 478 U.S. at 47, *see also Johnson*, 512 U.S. at 997. Plaintiffs' concede that Arizona has the same responsibility under Section 2 of the VRA to create "ability-to-elect districts" for minority voters as it did under Section 5.

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

Dkt. 223 at 13.

The record reflects that the Navajo Nation (the "Nation") presented testimony to the Commission to support the creation of a Native American majority minority district. The Nation and other Tribes presented evidence under the (i) Fifteenth Amendment, (ii) Section 2 of the Voting Rights Act, (iii) Section 5 of the Voting Rights Act, and (iv) the respecting communities of interest criterion under the Arizona Constitution to support the creation of LD 7. *See generally* Dkt. 217 at 11-13, 17-21. The Commission created LD 7, the sole Native American majority-minority district in the 2012 Legislative Plan. It includes the portion of the Navajo Nation located within the State of Arizona and the Hopi, Havasupai, Hualapai, Kaibab-Paiute, San Carlos Apache, White Mountain Apache and Zuni Reservations. Ex.[2] 530-047. The total population of LD 7 is 203,026. LD 7, the most underpopulated district at 4.7% deviation from the ideal population, was drawn in order to meet the Voting Rights Act requirements and to satisfy to the extent practicable the communities of interest of both Native American and non-Native American voters. *See id.* ("The . . . District was adopted to strengthen the ability of Native Americans to elect their candidates of choice.") LD 7, largest in geographical area, smallest in population and the most sparsely populated is comprised of 66.9% non-Hispanic Native Americans and has a Native American voting age population of 63.7%. Ex. 530-013-14; Tr. 249:11-12; Ex. 420, Tab 5. In addition to the many constitutional reasons provided to the Commission to create LD 7, Plaintiffs' expert admitted that LD 7 was not underpopulated for a partisan purpose. Tr. 670:4-671:8.

C. THE COMMISSION HAS DISCRETION TO CREATE CROSSOVER DISTRICTS

Plaintiffs' reliance on *Bartlett v. Strickland*, 556 U.S. 1 (2009) is misplaced. Dkt. 223 at 15. At issue in *Bartlett* was whether the state was required to deviate

[2] "Ex." refers to Exhibits that were admitted during the trial. "Tr." refers to the Trial Transcript.

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

from the mandated state constitutional criterion of keeping counties whole in order to create crossover districts under Section 2 of the Voting Rights Act. A crossover district is a district in which minority voters make up less than a majority of the voting-age population, but the minority population is potentially large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate. *Id.* at 13. North Carolina deviated from the state constitutional criterion for the sole purpose of satisfying Section 2 of the Voting Rights Act.

North Carolina's Constitution included a "whole county provision" to prohibit the legislature from dividing counties when drawing legislative districts. After the 1990 census, the state legislature drew an African American majority minority district that included portions of four counties in order to satisfy Section 2 of the Voting Rights Act. At that time, the district met all of the *Gingles* factors. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). After the 2000 Census, the African American voting age population in this district fell below 50 percent. Instead of leaving Pender County whole with a 34% African American voting age population, the legislature split portions of two counties to increase the African American voting age population to 39% and created a crossover district. The legislature believed that leaving the county whole would have violated Section 2 of the Voting Rights Act. The Court struck down the 39% African American crossover district. *Bartlett*, 556 U.S. 1.

Bartlett is a plurality opinion in which the majority held that in order to bring a Section 2 vote dilution claim, the minority group must be a majority (more than 50%) to satisfy the first *Gingles* factor. *Bartlett's* plurality stands for the proposition that you cannot force the state to create a crossover district to satisfy Section 2, but it did not hold that such districts are unconstitutional. Justices Thomas and Scalia concurred in the judgment only and asserted that Section 2 does not provide for any vote dilution challenge. However, this bright line 50% rule to satisfy the first

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

Gingles factor was rejected by Justices Souter, Stevens, Ginsburg, and Breyer.

Creating a crossover or influence district is a matter of legislative choice or discretion. *Bartlett*, 556 U.S. at 23 ("Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion."). The Supreme Court in *Bartlett* did not prohibit crossover districts. Both the plurality and the dissent in Bartlett recognized that a state can create crossover districts if it so chooses. *Bartlett*, 556 U.S. at 23-24, 34.

Plaintiffs claim that equal population was violated in order to bolster partisan advantage. *See* Dkt. 55, ¶¶1, 2. Plaintiffs claim that all of the underpopulated minority districts were created "for the sole purpose of maximizing the partisan interests of the Democratic Party." *See* Dkt. 55, ¶¶1, 2, 106, 168. They did not prove this claim and they now argue that crossover districts are impermissible under *Bartlett*. Dkt. 223 at 2, 14. Nothing in *Shelby County* prevents the Commission from creating crossover districts. Further, the Supreme Court has stated that the "the most effective way to maximize minority voting strength may be to create more influence or [crossover] districts." *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003). States are given discretion in how they choose to comply with the Voting Rights Act, and it may include drawing crossover districts. *See id*., at 480–483; *Bartlett*, 556 U.S. at 23. Therefore, the Commission has discretion to create crossover districts, and it certainly was not forbidden from doing so. *See* Dkt. 223 at 14.

III. THIS COURT SHOULD ABSTAIN FROM INTERPRETING THE ARIZONA CONSTITUTION

The Arizona Supreme Court has interpreted the Arizona equal population goals to mean that "congressional districts and state legislative districts 'have equal population to the extent practicable' . . . , which require[s] compliance with the Federal Constitution . . . , [and is] only as flexible as the federal requirements permit" and by implication, no less flexible than the federal requirements permit. *Ariz. Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*,

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

220 Ariz. 587, 597 ¶ 32, 208 P.3d 676, 686 (2009) (internal quotation marks and citations omitted) (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. at 425; *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). These goals "either expressly or implicitly mirror the requirements of the United States Constitution or federal statutory law." *Id*. at 220 Ariz. at 601 ¶ 48, 208 P.3d at 690 n. 16. (Hurwitz concurrence). Because the Arizona Supreme Court has interpreted the one person, one vote standard under the state constitutional provision, this Court should defer to the Arizona Supreme Court in interpretations of Arizona's constitution. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (when the state court has fixed the meaning of a state statute or state constitutional provision, the federal court will follow that definition). Thus, this Court should refrain from interpreting the equal population provision of the state constitution under the stricter congressional redistricting standard as requested by Plaintiffs. That standard does not apply here, and Plaintiffs' challenge must be evaluated under the ten percent standard set forth in *Brown*. *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983) (minor deviations of less than 10% are presumptively valid).

IV. CONCLUSION

The issue in this case is whether the Legislative Plan is constitutional. *Shelby County* does not impact this Court's analysis in that regard. The Commission was required to comply with the Fifteenth Amendment, which is enforced through the preclearance mechanism of Section 5. The facts demonstrate that the Commission considered numerous factors under state and federal law. Nothing in *Shelby County* bolsters Plaintiffs claims or impacts this Court's ability to review the federal constitutional question under the Fourteenth Amendment. The Legislative Plan is presumptively valid and Plaintiff's failed to rebut this presumption. Because the plan does not violate the federal constitution, this Court should follow Arizona's interpretation that the equal population requirement mirrors the federal requirement for legislative plans and deny Plaintiffs' request for relief.

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

DATED this 2nd day of August, 2013.

SACKS TIERNEY P.A.

BY:S/ JUDITH M. DWORKIN
Judith M. Dworkin
Patty A. Ferguson-Bohnee
Attorneys for Intervenors
The Navajo Nation and Leonard Gorman

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2013, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the EM/ECF registrants appearing in this case.

s/ Judith M. Dworkin

SACKS TIERNEY P.A., ATTORNEYS
4250 NORTH DRINKWATER BOULEVARD
FOURTH FLOOR
SCOTTSDALE, ARIZONA 85251-3693