CANTELME & BROWN, P.L.C.

A Professional Liability Company
3003 N. Central Avenue, Suite 600
Phoenix, Arizona 85012-2902
Tel (602) 200-0104 Fax (602) 200-0106
E-mail: djc@cb-attorneys.com / dbrown@cb-attorneys.com
David J. Cantelme, Bar No. 006313
D. Aaron Brown, Bar No. 022133
Samuel Saks, Bar no. 024260
Attorneys for Plaintiffs

SNELL & WILMER L.L.P.
One Arizona Center
400 E. Van Buren Street
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
E-Mail: mliburdi@swlaw.com
Michael T. Liburdi, Bar No. 021894
Attorneys for Plaintiffs

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' SUPPLEMENTAL REPLY BRIEF** Assigned to District Judges Silver and Wake and Circuit Judge Clifton

I. THE IRC'S THUMB ON THE SCALE.

The IRC overpopulated 16 out of 17 Republican-plurality districts and underpopulated 11 out of 13 Democrat-plurality districts. Dr. Hofeller testified that this pattern of overpopulating Republican-plurality districts and underpopulating Democrat-plurality districts could not have resulted from chance or application of Proposition 106's neutral criteria. No one rebutted that testimony. Thus, the IRC put its thumb on

the scale. The only real question is why. To this end, Dr. Hofeller opined that,

> Had the IRC properly followed the criteria for drawing districts mandated by ARIZ. CONST. art. 4, pt. 2, § 1(14), it could not have made all but one Republican district over-populated and all but two Democrat districts under-populated. That such results occurred by chance defies all logic and probability. [TE 39, at ¶ 26]

He further opined that,

> In my expert opinion the only logical explanation for the systematic overpopulation of Republican-leaning districts and systematic under-population of Democrat-leaning districts is to maximize the number of Democrat-leaning districts, and to pack excess population into Republican-leaning districts. [*Id.* at ¶ 17.]

At the outset of the case, the IRC rejected the charge of partisanship. In its first motion to dismiss (doc. no. 23), dated May 23, 2012, at 10:19-20, it explained this striking pattern of overpopulation and underpopulation as follows: "The record establishes that the Commission received advice to underpopulate Voting Rights Districts, and the statistics show that it followed that advice." While Plaintiffs never believed that rationale, they amended their complaint to deal with it, and later pointed out that, even if proven true, a racial motivation in this context only made things worse and invited strict scrutiny. Thus, it was the IRC that first inserted race in this case, and it did so as early as its first motion to dismiss. The testimony given by the Commissioners at trial confirmed this argument. On November 29, 2011, Mr. Adelson advised the IRC that it could underpopulate districts with the intent of complying with the Voting Rights. TE 395, at 118:19-119:17. The IRC followed that advice. RT, Day 1, at 178:19-24 (Stertz); RT, Day 3 at 776:22-771:9 (McNulty); RT, Day 4, at 873:10-21 (Freeman) and 1071:24-1072:5 (Mathis). The IRC repeated the theme in its Response at 5:10-13:

> 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 redistricting.)

Plaintiffs rebutted the argument, to wit: Section 5 had nothing to do, and could not have anything to do, with the construction of Districts 8, 24, and 26, other than perhaps serving as a pretext to conceal partisanship. The reason is that the IRC's construction of Districts 2, 3, 4, 7, 19, 27, 29, and 30 already equaled or exceeded the number of ability-to-elect districts found in the Benchmark Plan, depending on whether the Benchmark is determined by the IRC's August 23, 2002, submission to the IRC, or whether it is determined by actual results experienced in the decade of elections conducted under the Benchmark Plan. The original submission (TE 1) identified seven Hispanic ability-to-elect districts and one Native American. Actual experience proved out only six purported Hispanic ability-to-elect districts and one Native American. (TE 530-83.) Section 5's object is to protect gains already made; stated otherwise, to avoid retrogression. As Plaintiffs indicated in their supplemental brief, when the IRC satisfied Section 5 with Districts 2, 3, 4, 7, 19, 27, 29, and 30, that ended the Section 5 exercise. Section 5 does not require supererogation, Congress never asked for it in the VRA reauthorization, the Justice Department never recommended it, and the one-person/one-vote principle derived from the Equal Protection Clause would not permit it.

As explained below, while this is sufficient proof to invoke relief from the Court, *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013), removes even the slimmest doubt and destroys whatever remains of the IRC's Section 5 rationale. It applies retroactively, because the Supreme Court did not limit it to prospective application only, and it removes Section 5 as any justification for the IRC's dilution of Plaintiffs' votes.

II. ABSTENTION AND *SHELBY COUNTY*.

After this Court dismissed Plaintiffs' state-law claim (Count II of the Second Amended Complaint) on the IRC's Eleventh Amendment motion, all that remains here is the Equal Protection claim, and that claim does not depend in any way on unsettled

questions of state law. Thus, no state-court state-law determinations are necessary for this Court to decide the Equal Protection claim.

Plaintiffs based their now-dismissed state-law claim on Proposition 106's equal population clause found at ARIZ. CONST. art. 4, pt. 2, §1(14)(B), asserting that Proposition 106's equal population clause was more stringent than the federal one-person/one-vote rule in legislative cases. The IRC opposed it, claiming the Proposition 106 equal population standard mimicked the federal legislative standard. Thus, if we take the IRC's position, going to state court is a pure waste of time, because the state standard mirrors the federal standard, and state court will only make a long, winding, time-consuming, and expensive road to arrive where trial in this case has already led us.

In fact, if the IRC is sincere about *Pullman*-abstention, its duty of candor to the Court requires it to concede that Proposition 106's equal-population clause will end this case in Plaintiffs' favor in state court. Otherwise, abstention makes a long road to state court that ultimately will lead right back here, and that does not make a case for *Pullman*-abstention. *Badham v. U.S. Dist. Court for the N. Dist. of Cal.*, 721 F.2d 1170, 1171 (9th Cir. 1983). At any rate, *Shelby County* itself has no effect on abstention.

III. WHY *SHELBY COUNTY* MATTERS.

A. *Shelby County* Demolishes the Section 5-Made-Me-Do-It Defense.

Shelby County matters because it neuters the IRC's Section 5 defense. Contrary to the Response, at 6:11-21, there was no need to plead Section 4's unconstitutionality. The IRC raised Section 5-compliance as a defense. The defense fails for a number of reasons, and *Shelby County* is now one of them. Rule 7(a) does not require a plaintiff to plead defenses to defenses. *United States v. McGee*, 993 F.2d 184, 187 (9th Cir. 1993).

The practical effect of *Shelby County* was to remove Arizona from Section 5's coverage. For its part, the IRC argues that it does not matter. Resp. at 6:22-8:2. In one sense, but not the one the IRC intended, this is true, because the dilution of Plaintiffs'

votes violated the Fourteenth Amendment with or without *Shelby County*. It is not true in another sense, because *Shelby County* demolished an already failed defense. To draw an analogy, it is as though a watch, which already had stopped running, was then shattered to pieces by a sledge hammer. Thus, *Shelby County* adds unassailable finality.

B. The Deviations Involved in this Case Are Not Minor.

This is not a case involving only a few outliers, as in *Brown v. Thomson*, 462 U.S. 835 (1983). *Brown* involved Wyoming's policy of apportioning at least one representative to each county, a policy it had followed since 1890, and a policy that the Supreme Court described as "an unusually strong example of an apportionment plan the population variations of which are entirely the result of the consistent and nondiscriminatory application of a legitimate state policy." *Id.* at 844. In contrast, this case involves a pattern of deviation which was clearly intentional. TE 39, at ¶ 26.

Plaintiffs asserted in their initial complaint that this pattern was partisan. Defendants did not deny that the pattern was intentional but instead attempted to defend it on the basis of race. Either way it clearly constitutes invidious discriminatory intent to dilute the strength of votes on an unconstitutional basis. As Dr. Hofeller testified at trial, correction of this illegal pattern would have dramatically altered at least three districts. However, after *Shelby County*, the effect of this illegal pattern of discrimination is now even greater. This is because the IRC did not follow the state criteria, embodied in Proposition 106, in numerous places around the map, as Dr. Hofeller testified to during the trial. While Plaintiffs asserted that the IRC was improperly applying Section 5, Plaintiffs' assertions and the IRC's defense on this point will be completely immaterial when the maps are redrawn by the IRC, if ordered by this Court. At that time, the IRC will be obliged to use the Section 2 standard, and only the Section 2 standard. Despite the misleading reference in the IRC's Response (at 11-12), a fair reading of *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009), and *Pender County v.*

Bartlett, 649 S.E.2d 364, 371 (N.C. 2007), the North Carolina Supreme Court case that *Bartlett* affirmed, makes it exceedingly clear that, if a jurisdiction violates its own redistricting criteria claiming that it had to do so to comply with Section 5, its districts must be 50% + 1 minority CVAP. None of the IRC's purported Hispanic ability-to-elect districts meet this standard, and they violate the state criteria embodied in Proposition 106, as do many other districts which border on or are affected by the manner in which the purported Hispanic districts are drawn. The IRC will be faced with a Hobson's choice: either adhere to the state criteria or draw 50% + 1 minority CVAP districts. Either way, a new map will be dramatically different from the current map and will necessarily vindicate Plaintiffs' basic voting rights.

C. Pre-Clearance Does Not Justify Districts 8, 24, and 26.

When the Justice Department pre-cleared the IRC's legislative plan, it did not pass on, and had no jurisdiction to pass on, whether the IRC's overpopulation of 16 out of 17 Republican-plurality districts and underpopulation of 11 out of 13 Democrat-plurality districts violated the one-person/one-vote principle. The Justice Department's role and jurisdiction ran only to determining whether the IRC plan retrogressed from the Benchmark plan. What does retrogression mean in this context? It means when "the number of districts remains the same or increases by one: there is no retrogression as long as the number of ability districts remains the same." *Texas v. United States*, 887 F.Supp.2d 133, 157 (D.D.C. 2012), *judgment vacated on other grounds and remanded*, 133 S.Ct. 2885 (2013). In this case, the IRC went beyond retrogression avoidance, and represented to the Justice Department that it increased

> the number of majority-minority districts in which minority voters have the ability to elect the candidate of their choice from seven to ten. This improved performance benefits Hispanic voters who have the ability to elect candidates of their choice in nine districts under the Proposed Plan (Proposed LDs 2, 3, 4, 19, 24, 26, 27, 29 and 30) compared to only six

> districts in the Benchmark Plan (Benchmark LDs 13, 14, 15, 16, 27, and 29). [TE 530:083-84.]

The creation of new ability-to-elect districts, however, is the business of Section 2, and Districts 8, 24, and 26 count for nothing under Section 2, because they were not constructed with 50% + 1 minority CVAP. *Pender County*, 649 S.E.2d. at 371.

The IRC challenges the notion that only 50% + 1 minority CVAP districts satisfy Section 2, and suggests that Plaintiffs misread *Bartlett* in so contending. Resp. at 12, n. 6. It is the IRC that misreads *Bartlett*. *Bartlett* affirmed *Pender County*, which in turn upheld the notion that "minority population must constitute a numerical majority of citizens of voting age in order to satisfy the first *Gingles* precondition." 649 S.E.2d 364, 371 (N.C. 2007). Section 2's 50% +1 minority CVAP requirement cannot be plainer.

The IRC also argues that Plaintiffs erred in asserting that "these districts are somehow not viable because they are coalition or crossover districts." Resp. at 12:13-14. The IRC misses the point. It has defended its pattern of overpopulating 16 of 17 Republican-plurality districts and underpopulating 11 of 13 Democrat-plurality districts on the basis that Section 5 made it do it. Plaintiffs have responded that, no, Section 5 did not make it do it. Section 5 required at most eight minority ability-to-elect districts, one Native American and seven Hispanic ability-to-elect districts. The IRC met preclearance with Districts 2, 3, 4, 7, 19, 27, 29, and 30, and Districts 8, 24, and 26 added nothing more to achieve preclearance. Resorting again to the baseball analogy used in the past, the home team does not take the field for the bottom half of the ninth inning when it is ahead. It already won the game, and extra runs mean nothing.

As a final point on preclearance-made-me-do-it, Section 5 does not always require districts to be constructed of 50% + 1 minority CVAP to count towards preclearance, and the IRC has cited several cases to that effect. Resp. at 12:20 – 14:13. The exception occurs in Arizona's case where the districts are newly created and

therefore must be constructed at 50% + 1 minority CVAP to count towards preclearance:

> By contrast, a state creating a "new" crossover or coalition district simply anticipates, or hopes, that the minority population in the new district will align politically and coalesce with other groups of voters to elect its candidates of choice. It would be extremely difficult to confirm that minority voters would indeed have the ability to elect in the newly formed district. Since potential new crossover-coalition districts are "subject to [this] high degree of speculation and prediction," *Bartlett*, 129 S.Ct. at 1245, they can rarely be deemed ability districts in a proposed plan.

Texas v. United States, 831 F. Supp. 2d 244, 268 (D.D.C. 2011).

D. Federalism Does Not Sanction Intentional Vote Dilution.

In its Response at 3:6-6:6, the IRC misapprehends the application of federalism. Properly understood, federalism means that, where population deviations are the incidental but natural result of a State's pursuit of neutral and well-recognized state policy goals, such deviations will not violate the equal protection clause:

> In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Roman v. Sincock, 377 U.S. 695, 710 (1964). Federalism only protects incidental deviations resulting from good faith efforts to achieve legitimate state policies. *Roman*, 377 U.S. at 710. *Shelby County* does nothing to alter that rule.

III. *SHELBY COUNTY* APPLIES RETROACTIVELY.

A civil decision of the Supreme Court applies retroactively to all pending cases unless the decision itself announces that it applies prospectively. *Harper v. Va. Dept. of Taxation*, 506 U.S. 86. 97 (1993). The Supreme Court's decision in *Shelby County* did not state that its application is limited prospectively, and therefore this Court should apply its reasoning to invalidate the IRC's stated justification for its redistricting plan.

The IRC argues that this Court should follow the *Chevron Oil Co. v. Hudson*, 404 U.S. 97 (1971). *Chevron Oil* is the standard followed by a court to determine whether the case before it should be applied prospectively. Thus, in *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), the Ninth Circuit determined that its instant ruling affirming a lower court decision denying an immigration applicant's petition for cancellation of removal should be applied prospectively. *Id*. at 687.

Even if *Chevron Oil* applies here, the circumstances do not compel that *Shelby County* apply prospectively. The test for prospective-only application involves a three-part balancing test beginning with whether the "decision to be applied nonretroactively . . . establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Next, the court "weigh[s] the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrogressive operation will further or retard its operation." Third, the court weighs "the inequity imposed by retroactive application" to determine whether it would produce "substantial inequitable results" or "injustice or hardship." *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167, 179 (1990) (quoting *Chevron Oil*, 404 U.S. at 106-07).

Here, *Shelby County* was clearly foreshadowed by *Northwest Austin Municipal Utility District v. Holder*, 557 U.S. 193 (2009). For example, in *Northwest Austin*, the

Court observed how electoral conditions in covered jurisdictions had improved since the enactment of the Voting Rights Act, and noted the "Act imposes current burdens that must be justified by current needs." *Id*. at 203. The Court also stated, "The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for political conditions." *Id*. at 203.

Despite these signals, the IRC chose to go ***further*** than the minimum standards required by the VRA to achieve preclearance. The IRC's Response (at 9) suggests that retroactivity somehow casts into doubt historical preclearance decisions in other states. But that argument lacks perspective, because voting practices and procedures that have been submitted to the Department of Justice for preclearance in the past have either been accepted or rejected. The retroactivity question applies differently in the context of this case; specifically, whether the IRC can continue to rely on a now-discredited justification for what otherwise would be a constitutionally violative redistricting plan. Thus, this case involves a unique set of circumstances overlooked by the IRC.

Finally, *Shelby County* vindicates the constitutional rights of all residents in over-populated districts. One election has been held under the challenged legislative plan, but there are four more cycles until the next redistricting. The IRC has the authority to reconvene and create a new legislative plan that complies with the federal constitution. Now that it need not seek preclearance, the IRC's redistricting timeline is shorter and it can prepare a new legislative plan, with oversight from this Court, in time for 2014.

IV. CONCLUSION.

If there ever were any doubt as to whether Section 5 and preclearance justified vote dilution, and there never should have been, because Section 5 cannot stand in opposition to one-person/one vote, *Shelby County* removes the doubt and makes plain that the IRC had no lawful justification for its dilution of Plaintiffs' votes.

RESPECTFULLY SUBMITTED ON August 9, 2013.

CANTELME & BROWN, P.L.C.

By: /s/ David J. Cantelme, SBN 006313
3003 N. Central Avenue, Suite 600
Phoenix, AZ 85012
Tel (602) 200-0104
Fax (602) 200-0106
E-mail: djc@cb-attorneys.com

Attorneys for Plaintiffs

SNELL & WILMER L.L.P.

By: /s/ Michael T. Liburdi, SBN 021894
One Arizona Center
400 E. Van Buren Street
Phoenix, Arizona 85004-2202
Telephone: (602) 382-6000
Fax: (602) 382-6070
E-Mail: mliburdi@swlaw.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 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