OSBORN MALEDON
A PROFESSIONAL ASSOCIATION ATTORNEYS AT LAW

The Phoenix Plaza
21st Floor
2929 North Central Avenue
Phoenix, Arizona 85012-2793

P.O. Box 36379
Phoenix, Arizona 85067-6379

Telephone 602.640.9000
Facsimile 602.640.9050

Mary R. O'Grady, 011434
Kristin L. Windtberg, 024804
Joseph N. Roth, 025725
OSBORN MALEDON, P.A.
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9000
mogrady@omlaw.com
kwindtberg@omlaw.com
jroth@omlaw.com

Joseph A. Kanefield, 015838
Brunn W. Roysden, 028698
BALLARD SPAHR, LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555
kanefieldj@ballardspahr.com
roysdenb@ballardspahr.com

Attorneys for Defendant Arizona Independent Redistricting Commission

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

VINCE LEACH, KAREN GLENNON and LYNNE ST. ANGELO, qualified electors and residents of Congressional District 1; et al., Plaintiffs, v. ARIZONA INDEPENDENT REDISTRICTING COMMISSION, a legislative body of the State of Arizona; et al., Defendants.	No. CV2012-007344 **ARIZONA INDEPENDENT REDISTRICTING COMMISSION'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT** (Assigned to the Hon. Mark Brain) (Oral Argument Scheduled)

Plaintiffs have failed to refute any of Defendants' arguments as to why the Amended Complaint fails to state claims against them. Accordingly, the Court should grant the Commission's Motion to Dismiss in its entirety.

I. Claims 1-4 Fail to Allege Violations of the Procedural Requirements Set Forth in the Constitution, Thereby Warranting Dismissal.

Although Plaintiffs would like this Court to believe that the law is "unsettled" with respect to the Constitution's procedural redistricting requirements (Response at 6),

the issue is well settled; Plaintiffs have simply failed to allege violations of those procedural requirements. In Claims 1-4, Plaintiffs draft new procedural requirements not included in the constitutional mandate that governs the Commission's redistricting activities. But, the Commission is only required to meet the obligations imposed by the constitution itself, not those that Plaintiffs seek to write in. *Ariz. Minority Coal. For Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 598 ¶ 37, 208 P.3d 676, 687 (2009) (*Minority Coalition II*). Plaintiffs do not allege, because they cannot, that the Commission failed to follow the procedural steps included in the Constitution itself, nor do they allege a single substantive violation of the United States or Arizona Constitutions. Because Claims 1-4 do not allege any violation of the constitutional procedures that govern the Commission and instead attempt to impose new requirements that are not included in the constitution and that would inappropriately limit the substantial discretion that the Commission has to determine how best to accomplish its constitutional responsibilities, these claims fail under Rule 12(b)(6) and must be dismissed.

A. The Commission Must Comply With the Constitution's Procedural Requirements, but Has Discretion Regarding How it Does So.

The Commission does not, as Plaintiffs suggest, contend that it answers to no one; rather, the Commission simply asks that its decisions be given the respect that the Arizona Supreme Court has said that they deserve. Plaintiffs acknowledge, as they must, that as a legislative body, the Commission is afforded deference in its redistricting efforts similar to that afforded to other legislative action. (Resp. at 6-7.) In *Minority Coalition II*, the court was clear that while the Commission must follow the procedure mandated by the Constitution, the Commission may use its discretion in determining how best to accomplish each procedural step. 220 Ariz. at 596-97 ¶ 28, 208 P.3d at 685-86 ("In reaching their decisions, the commissioners perform legislative tasks of the sort we make every effort not to preempt. The Commission adopts its final map only after engaging in several levels of discretionary decision-making."). Courts "cannot use the

constitutional requirement that the Commission follow a specified procedure . . . as a basis for intruding into the discretionary aspects of the legislative process." *Id*. at 596 ¶ 27, 208 P.3d at 685. Similarly, Plaintiffs cannot ask this Court to intrude upon the legislative process in an effort to compel the Commission to follow their preferred methods for satisfying the constitutional requirements.

Although Plaintiffs maintain that they "do not ask the court to find that the goals could have been accommodated differently or somehow better" (Resp. at 8), this is precisely what the Amended Complaint does. In Claims 1-4, Plaintiffs allege technical violations of procedural requirements that are found *nowhere* in the constitution. But Plaintiffs cannot unilaterally manufacture additional procedural requirements that the voters did not impose through Proposition 106, and then cry foul when those invented requirements are not followed. The Commission must follow the mandatory constitutional procedure, but it has broad discretion to determine *how* it does so. *Minority Coalition II*, 220 Ariz. at 596 ¶ 27, 208 P.3d at 685.

B. Claim 1 Must be Dismissed Because Plaintiffs Do Not Allege That the Commission Failed to Begin the Redistricting Process from Districts of Equal Population in a Grid-Like Pattern Across the State.

The *only* obligations that the constitution imposes with respect to the grid map are that the Commission's mapping process must begin with the "creation of districts of equal population in a grid-like pattern across the state" and that the Commission cannot consider "[p]arty registration and voting history data" during this initial phase of the process. Ariz. Const. art. IV, pt. 2, §§ 1(14), (15). Plaintiffs do not contest that the Commission began its mapping process by creating "districts of equal population in a grid-like pattern across the state" and do not assert that the Commission inappropriately used political data at this phase of the process. (Am. Compl. ¶¶ 94-97.) Instead, they simply complain about how the Commission exercised its discretion to develop the grid map, which is not sufficient to state a claim that the Commission violated its constitutional responsibility to create a grid map.

Having conceded that the Commission started with "districts of equal population in a grid-like pattern," Plaintiffs are left to argue that the Commission nevertheless violated the constitution by considering additional factors (compactness and contiguity) when selecting a map. (Resp. at 9; Am. Compl. ¶ 139.) However, the constitution does not merely require that the Commission begin from districts of equal population; it also requires that these districts be in a grid-like pattern. The Commission has the discretion to determine how best to create the grid-like pattern. *See Minority Coalition II*, 220 Ariz. at 596 ¶¶ 25-27, 208 P.3d at 685. The Constitution does not preclude the Commission from attempting to make the districts in the grid map compact and contiguous or from asking the mapping consultant to create two alternate grid maps from which it could select one. (*See* Resp. at 9; Am. Compl. ¶¶ 96, 94.) As long as the Commission begins the redistricting process by creating districts of equal population in a grid-like pattern, and ignores party registration and voting history data, it has satisfied its constitutional responsibility regarding this requirement.

Moreover, the Commission had a reasonable basis for creating the grid in the manner that it did. A grid is, by definition, compact and contiguous. WEBSTER'S UNABRIDGED DICTIONARY 840 (2d ed. 2003) (defining "grid" as "a network of horizontal and perpendicular lines, uniformly spaced, for locating points on a map"). These considerations are rationally related to creating a "grid-like pattern." *See* Ariz. Const. art. IV, pt. 2, § 1(14). Additionally, the Commission is not required to follow the same process that last decade's Commission used to create the grid map, as Plaintiffs suggest. (*See* Resp. at 9.) It was free to examine two alternative constitutionally-compliant grid maps and select between them. Notably, Plaintiffs do not allege that either of the alternatives that the Commission considered failed to comply with the constitution's requirements. Because Plaintiffs' Amended Complaint does not allege that the Commission failed to begin the redistricting process from a grid-like pattern of districts with equal population, Claim 1 fails as a matter of law.

C. Claim 2 Must be Dismissed Because its Allegations Do Not Establish That the Commission Failed to Make Adjustments to the Grid as Necessary to Accommodate the Constitutional Goals.

Plaintiffs attempt to write their own requirements into the Constitution in Claim 2 as well. The Constitution requires that the Commission make "[a]djustments to the grid . . . as necessary to accommodate the goals set forth below." Ariz. Const. art. IV, pt. 2, § 1(14) (referring to the six constitutional redistricting goals). By requiring a grid, the constitution ensures that the redistricting process begins anew, rather than from the prior districts. Nowhere does the constitution define the term "adjustments" or require that the Commission make a "series of adjustments" as Plaintiffs contend. (Resp. at 10; Am. Comp. ¶ 144.) It simply requires that the Commission make the necessary adjustments to accommodate the redistricting goals specified in the constitution.

During the grid-adjustment phase of redistricting, the Commission must make significant discretionary decisions as it balances the competing goals. *See Minority Coalition II*, 220 Ariz. at 596-97 ¶ 28, 208 P.3d at 686 (describing the accommodation of "specified goals" as the sort of "legislative task[]" the court "make[s] every effort not to pre-empt"). These legislative decisions are entitled to great deference, and the court's inquiry at this phase is restricted "to determining whether the Commission followed the constitutionally required procedure in its final redistricting plan." *Id*. Plaintiffs may take issue with the Commission's adjustments to the grid map, but as long as the Commission's adjustments that resulted in the draft map were based on constitutional criteria, it satisfied its constitutional responsibility. Whether any particular adjustment is "necessary" to accommodate the constitutional goals is a discretionary legislative judgment for the Commission that should not be second-guessed by Plaintiffs.

Plaintiffs assert that the so-called Donut-Hole Map was not the product of grid adjustments. (Resp. at 10; Am. Compl. ¶¶ 103, 145.) However, Plaintiffs' Amended Complaint acknowledges that the Donut-Hole Map was the product of adjustments to the grid. Plaintiffs allege that after creating the grid map, the Commission considered

various "what if" maps that "accommodate[d] one or more of the six constitutional redistricting goals." (Am. Compl. ¶ 98.) They also allege that Commissioner Mathis developed the Donut-Hole Map by taking "concepts from both the 'whole counties' map and the 'River District' map" (*id.* ¶ 100); two alternative "what if" maps that were the product of weeks of adjustments to the original grid map based on the constitutional criteria (*see id.* ¶¶ 98-99). The "blank space" that remained on the map was therefore also the product of adjusting the grid. Importantly, Plaintiffs do not allege that the Commission ignored the constitutional criteria while further adjusting the grid to complete the draft map.

Plaintiffs' argument that "[f]illing in this space could not have been the end result of grid adjustments – because no grid lines or the lines of any grid adjustments were present to work from" (Resp. at 10), unduly restricts the Commission's discretion regarding how to adjust the grid map to accommodate the constitutional goals. The Constitution does not preclude the Commission from adjusting the grid as it did in Maricopa County after weeks of work adjusting the grid map and creating multiple versions of "what if" maps. The fact that the Commission initially adopted the Donut-Hole Map without gridlines in much of Maricopa County does not mean that the Commission failed to adjust the grid map based on the constitutional criteria. It just means that the Commission chose not to show completed district lines in Maricopa County when it worked toward a compromise draft map that considered all constitutional criteria. Because Plaintiffs fail to establish that the Commission did not adjust the grid based on constitutional criteria, the allegations fail to state a claim, and Plaintiffs' second claim should be dismissed.

D. Claim 3 Must be Dismissed Because Plaintiffs Do Not Allege That the Commission Failed to Advertise a Draft Map to the Public for Comment.

In Claim 3, Plaintiffs yet again seek to undo the Commission's work because of a failure to comply with non-existent procedural "requirements." The Constitution requires that the Commission "advertise a draft map . . . to the public for comment,

which comment shall be taken for at least thirty days." Ariz. Const. art. IV, pt. 2, § 1(16). The draft map that is advertised must result from a deliberative effort to accommodate the constitutional redistricting goals. *See Minority Coalition II*, 220 Ariz. at 599 ¶ 41, 208 P.3d at 688. "If the record demonstrates that the Commission took th[e] goal[s] into account during its deliberative process," no further inquiry by the court is appropriate. *Id*. at 597-98 ¶ 34, 208 P.3d at 686-87.

Plaintiffs admit that the Commission advertised a draft map to the public for comment over thirty days (Am. Compl. ¶ 111), but claim that the comment period was invalid because "the Commission could not have really engaged in efforts to comply with the Voting Rights Act or the creation of competitive districts prior to advertising its draft map due, in part, to the absence of data needed to do so." (Resp. at 12.) Specifically, Plaintiffs assert that before advertising the draft map, the Commission was required to complete a racial bloc voting analysis in order to demonstrate compliance with the Voting Rights Act (Am. Compl. ¶¶ 112-14) and to obtain certain unidentified data to evaluate the competitiveness of the districts (*id*. ¶ 115).

Though Plaintiffs may have preferred that the Commission proceed in this fashion, the Constitution does not require that racial bloc voting analysis be completed or that any particular data be used to evaluate competitiveness. *See* Ariz. Const. art. IV, pt. 2, §§ 1(14)-(16). Thus, the Commission had no obligation under the state constitution to take these steps – either before advertising the draft map or after. *Minority Coalition II*, 220 Ariz. at 599 ¶ 40, 208 P.3d at 688 (the Commission is not required to follow any specific procedure other than that set forth in the Constitution.) Moreover, the Amended Complaint recognizes that the Commission considered both the Voting Rights Act and competitiveness before the draft map was completed. (*See* Am. Compl. ¶ 114 (the Commission made an effort to comply with the Voting Rights Act); *id*. ¶¶ 104-05, 107 (discussing the Commission's efforts to create a competitive district in Maricopa County).)

Rather than address the deficiencies in their Amended Complaint, Plaintiffs

suggest that their lawsuit must proceed to discovery so the Commission can establish where its record shows that it considered the constitutional criteria when adjusting the grid. (Resp. at 12-13.) But even the limited transcript excerpts that Plaintiffs chose to incorporate into their Amended Complaint reflect the Commission's consideration of both the Voting Rights Act and competitiveness. The excerpt from the August 22, 2011 transcript referenced in Paragraph 98 of the Amended Complaint describes initial efforts to adjust the grid to maintain two majority-Hispanic districts. Efforts to adjust the map to comply with the Voting Rights Act and competitiveness are further discussed in the September 26, 2011 transcript cited in Paragraph 100.[1] Because Plaintiffs do not, and cannot, allege that the Commission failed to take into account the Voting Rights Act, competitiveness, or any other constitutional factor before it adopted a draft map, Plaintiffs' third claim should be dismissed.

E. Claim 4 Must be Dismissed Because the Commission Considered the Legislative Recommendations.

In their fourth claim, Plaintiffs again premise their complaint on non-existent constitutional criteria. The Constitution directs the Commission to "consider" the recommendations of the Legislature before establishing final district boundaries. *See* Ariz. Const. art. IV, pt. 2, § 1(16). It does not specify *how* the Commission must engage in this consideration. As set forth in the Motion to Dismiss, the Commission complied with the requirement to "consider" in various ways, including by putting the recommendations on meeting agenda, hearing presentation of the majority and minority reports from members of the Legislature, and asking questions of the legislators. (*See* Mot. at 12-13.)

In their Response, Plaintiffs do not explain why these actions fall short of the requirement to "consider." Plaintiffs instead list other ways they would have preferred

[1] *See* Tr. 9/26/11 (Ex. C to Motion) at 58:24-59:13, 61:23-62:14, 74:1-4, 83:16-84:12; 84:23-85:15; 106:2-5 (discussing majority-minority districts), id. at 60:1-21, 62:22-65:22, 66:11-67:15, 74:5-75:12, 80:8-81:8; 90:10-97:14, 100:7-104:12 (discussing competitiveness) .

the Commission to "consider" the legislative recommendations, such as by "motion, debate, and vote," or by putting the Legislature's recommendations on the agenda for "a possible vote." (Resp. at 14.) This is precisely the type of excessively formal, micro-managing claim that the Supreme Court foreclosed in *Minority Coalition II*. *See* 220 Ariz. at 599 ¶ 40, 208 P.3d at 688 (rejecting argument that constitutional requirement had to be satisfied in the manner "preferred by the" plaintiff). Although Plaintiffs would pack the constitution with as many procedural hoops as possible, the single word "consider" simply does not mandate any precise type of formal action as Plaintiffs assume. Because it depends on procedural criteria that do not exist, the Amended Complaint fails to allege a violation of the constitutional requirement to "consider." Therefore, Plaintiffs' fourth claim should be dismissed for failure to state a claim.

II. Claim 5 Fails to Adequately Allege a Constitutional Violation and Therefore Should Be Dismissed.

When evaluating whether a complaint can survive a motion to dismiss, Arizona courts consider and accept as true the "well-pled facts." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7, 189 P.3d 344, 346 (2008). Conclusions of law and "unwarranted deductions of fact" are not accepted as true, *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989), and conclusory statements that lack factual support "are insufficient to state a claim upon which relief can be granted," *Cullen*, 218 Ariz. at 419 ¶ 7, 189 P.3d at 346. Throughout the Response, Plaintiffs repeatedly declare that Claim 5 sets forth well-pled facts regarding purported violations of the open meeting clause of the constitution, but just because Plaintiffs say the allegations contain well-pled facts does not make it so.

Plaintiffs tell the court that four allegations from the Amended Complaint "set forth precisely those facts" showing that a non-public meeting of a quorum occurred: "paragraphs 87, 100, 102 and 106 state well-pleaded facts that must be accepted as true when considering the Commission's motion to dismiss." (Resp. at 16.) The Response goes no further; it does not quote from those allegations or give any explanation as to

how those four paragraphs are anything close to sufficient. Upon examination, it is abundantly clear that these allegations consist of nothing more than "bald assertions [and] unsupportable conclusions." (Resp. at 16 n.59 (citing *LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 508 (1st Cir. 1998).)

As an initial matter, Paragraph 100 contains no allegation relevant to an open-meeting claim. That paragraph alleges that Commissioner Mathis "worked with Strategic Telemetry at her home over the weekend of September 24-25, 2011, to draw a congressional map." (Am. Compl. ¶ 100.) It does not allege that a quorum of the Commission met or conducted business; it does not even allege that Commissioner Mathis spoke to another commissioner. (*Id.*) Although Plaintiffs and their counsel have repeatedly implied that a single commissioner "working at home" is somehow inappropriate, unlawful, or even discouraged, there is absolutely nothing in the Constitution that prohibits a commissioner from working with the mapping consultant, or working on a draft map at home. *Cf. Boyd v. Mary E. Dill Sch. Dist. No. 51*, 129 Ariz. 422, 425, 631 P.2d 577, 580 (App. 1981) (finding no violation when board president "formulated the intention" to vote a certain way outside of public meetings because "[i]t is the board's formulation of an intention . . . that would be at issue . . . not an individual board member's. . . ."). Paragraph 100 does not contain a factual allegation that would support an open-meeting violation. It is irrelevant.

The remaining three paragraphs, Paragraphs 87, 102, and 106, each speculate "on information and belief" that various violations of the mandate of openness occurred, but provide no factual support for these conclusory statements:

- Paragraph 87 alleges "*[u]pon information and belief*, [that] Defendants Mathis, McNulty and Herrera engaged in a practice of serial, non-public communications or other methods by which a quorum of Commissioners could seek consensus or otherwise conduct commission business. . . ." (Emphasis added).
- Paragraph 102 alleges "*[u]pon information and belief*, and consistent with an established pattern of conduct, Defendant Mathis communicated about [the Donut-Hole] map with one or more of the

other AIRC Commissioners before it was presented . . . ." (Emphasis added).[2]

- Paragraph 106 alleges "*[o]n information and belief*, Defendant Mathis met with Strategic Telemetry and communicated with one or more other AIRC Commissioners during the development of this October 3 map." (Emphasis added).[3]

Plaintiffs cannot seriously contend that these allegations contain "well-pled" facts that are not conclusory or speculative. The court need not accept these allegations as true. Under Plaintiffs' view of the notice-pleading standard, it would be sufficient in a contract claim to allege that, upon information and belief, defendant made a set of promises to plaintiff and later breached those promises. That plainly is not the law. *See Dube v. Likins*, 216 Ariz. 406, 424 ¶ 14, 167 P.3d 93, 111 (App. 2007) ("a formulaic recitation of the elements of a cause of action will not do") (internal quotation marks and citations omitted). Because Plaintiffs' Amended Complaint contains no factual support for its open-meeting claims, Claim 5 should be dismissed.

III. The Relief Plaintiffs Seek in Claims 5 and 6 is Not Supported by Law.

Plaintiffs assert that the Supreme Court has "signaled" that the appropriate remedy for a violation of the open-meeting clause is a declaration that the redistricting plan is unconstitutional, unenforceable, and should be enjoined. (Resp. at 19-20.) Plaintiffs misread the court's case law. In *Minority Coalition II*, the Supreme Court

---

[2] As discussed in the Motion to Dismiss, Paragraph 102 is the paragraph in the original Complaint that contained the *only* factual allegation to support the open-meeting claim, but that mischaracterized a statement made by Chairperson Mathis during the September 26, 2011 meeting. (*See* Motion to Dismiss at 15 & n.4.) Rather than re-think their speculation (or assert other factual allegations), Plaintiffs instead were satisfied to delete the false factual allegation and to make the allegation on "information and belief." (*See id*. at 15-16.) *Cf. Standage v. Jaburg & Wilk, PC*, 177 Ariz. 221, 230, 866 P.2d 889, 898 (App. 1993) (attorney has "obligation . . . to review and reevaluate his client's position as the facts of the case developed").

[3] Even if Plaintiffs could allege facts to support their contention that Chairperson Mathis communicated with one other commissioner outside of a public meeting, this would not violate the constitutional mandate for openness. Ariz. Const. art. IV, pt. 2, § 1(12) (requiring three commissioners to constitute a quorum).

stated that if the Commission did not follow the procedures mandated by the constitution, "the Commission violated the constitution as clearly as if it had violated the Equal Protection Clause by adopting legislation that lacks a reasonable basis." 220 Ariz. at 596 ¶ 26, 208 P.3d at 685. But this statement was referring to the procedural requirements associated with the four phases of redistricting, ***not*** the mandate that Commission conduct business in open meetings. In the sentences immediately preceding the statement cited by Plaintiffs, the Court explained that the voters had imposed a "specific process" on the Commission through Proposition 106 and cited the constitutional provisions related to the four phases of redistricting: Ariz. Const. art. IV, pt. 2, § 1(14) to (16). *Minority Coalition II*, 220 Ariz. at 596 ¶ 26, 208 P.3d at 685. The open-meeting clause of the constitution is found in Section 1(12). The Court did not indicate that any violation of the open meeting clause should result in a declaration that the final maps are unconstitutional and unenforceable.

In addition, as discussed in the Motion to Dismiss, Arizona law related to violations of the open meeting clause of the constitution and the statutory open meeting law contemplate a much different remedy. The Commission substantially complied with the requirement for open meetings and even if an alleged violation of the open meeting clause occurred – which the Commission disputes – the Commission ratified the legal action resulting from the process in a public meeting. (*See* Motion to Dismiss at 16-17 (discussing case law related remedies for open-meeting violations).)

Thus, contrary to Plaintiffs' assertions otherwise, the Supreme Court has never indicated that a violation of the open-meeting clause should result in the nullification of the mapping process. The relief Plaintiffs seek in Claims 5 and 6 are neither rationally related to the alleged harm, nor supported by the law. The fifth and sixth claims for relief should be dismissed.

/ / /

/ / /

/ / /

IV. Plaintiffs Unreasonably Delayed in Bringing Claims 1, 5, and 6, Resulting in Prejudice to the Commission and Arizona Voters; the Doctrine of Laches Bars These Claims.

Plaintiffs' Claims 1, 5, and 6 are barred by the doctrine of laches because Plaintiffs unreasonably delayed in raising these claims, and as a result, the Commission and Arizona's electoral system have been prejudiced. *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 6, 201 P.3d 517, 519 (2009). These claims involve allegations that were known to Plaintiffs months ago, well before the Commission completed its work. Plaintiffs surmise that it would have been futile to bring these claims before the congressional districts were adopted and precleared because "the Commission surely would have claimed that the separation of powers deprives courts of the jurisdiction to interfere with the exercise of its legislative function," (Resp. at 25), but this is pure supposition, and does not constitute a defense to their unreasonable delay.[4] Even if Claims 1, 5, and 6 substantively managed to withstand scrutiny – which they do not – Plaintiffs' failure to raise these claims at a time when they could have been properly addressed by the Commission precludes their assertion now.

Additionally, when a constitutional challenge is raised to a statutory enactment without any substantive objection to that enactment, and the "procedures used to enact [the statute] . . . were published . . . and available to the public," laches will bar the claim. *Stilp v. Hafer*, 718 A.2d 290, 294 (Pa. 1998) (collecting cases); *see also Schaeffer v. Anne Arundel Cnty.*, 656 A.2d 751, 753 (Md. 1995) (rejecting plaintiffs' "wait and see" tactics and holding that "[l]aches remains applicable when a challenge to

[4] The issues of the Commission's independence and the appropriate separation of powers that arose in connection with the Attorney General's open-meeting investigation and the Governor's attempted removal of Chairperson Mathis are not present in a challenge brought by individual citizens. Indeed, defending itself against executive interference from the Attorney General, the Commission urged that the proper method to address compliance with open meeting requirements during the mapping process was to bring a complaint for special action relief, policed by the neutral judiciary. (*See* Am. Compl. ¶ 84.) Plaintiffs failed to do so.

enactment procedures is involved with no substantive objection"). Claims 1, 5, and 6 all involve procedural objections to the congressional districts without any substantive objection thereto. Plaintiffs' first, fifth, and sixth claims should therefore be dismissed for the additional reason that they are barred by laches.

V. The Motion to Dismiss Permissibly Relies on Public Record Transcripts Material to the Amended Complaint.

The Commission's Motion to Dismiss in no way "rests on a fundamental attempt to circumvent the Rules of Civil Procedure," as Plaintiffs contend. (Resp. at 20.) The vast majority of the exhibits attached to the Motion to Dismiss are transcripts of the Commission's public hearings that are specifically cited in the Amended Complaint.[5] The Motion's exhibits also include three meeting agendas, one of which was referenced in the Amended Complaint (*see* Am. Compl. ¶ 127), and the House Concurrent Memorial, which was also referenced in the Amended Complaint (*id.* ¶ 125).

The inclusion of transcripts and documents referenced in the Amended Complaint clearly does not trigger the conversion of a motion to dismiss under Rule 12(b)(6) to a motion for summary judgment under Rule 56. "A Rule 12(b)(6) motion that refers to a contract or other document attached to the complaint does not trigger Rule 56 treatment pursuant to Rule 12(b) because the referenced matter is not 'outside the pleading' within the meaning of the rule." *Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 63 ¶ 10, 226 P.3d 1046, 1049 (App. 2010) (citation omitted).

> The rationale underlying the conversion rule is that a plaintiff must be given an opportunity to respond when a motion to dismiss for failure to state a claim includes material extraneous to the complaint. That purpose is not served, however, by applying the rule to a motion that cites a document that is central to the complaint. "When a complaint

[5] Plaintiffs incorrectly assert that the exhibits to the Motion include transcripts from five meetings not mentioned in the Amended Complaint. (Resp. at 21.) The exhibits include portions of three public meeting transcripts that were not cited in the Amended Complaint; though, each of these transcripts constitute public records that the court can properly consider without converting the Motion to Dismiss into a Motion for Summary Judgment.

> relies on a document, ... the plaintiff obviously is on notice of the contents of the document, and the need for a chance to refute evidence is greatly diminished."

Id. at 64 ¶ 14, 226 P.3d at 1050 (citation omitted). Similarly, the inclusion of the limited number of additional public records does not convert the motion to dismiss to one for summary judgment. *Id*. at 64 ¶ 13, 226 P.3d at 1050 (citations omitted). "[A] Rule 12(b)(6) motion that presents a document that is a matter of public record need not be treated as a motion for summary judgment." *Id*.

The court may therefore properly consider all of the exhibits attached to the Motion to Dismiss without converting it to a motion for summary judgment. However, to the extent that the Court is concerned about any of the exhibits, it may simply ignore those exhibits and decide the Motion without them. "Rule 56 treatment is not required when the court does not rely on the proffered extraneous materials." *Id*. at 63 ¶ 8, 226 P.3d at 1049.

VI. Plaintiffs' Complaint Does Not Comply With Rule 8.

For the reasons set forth above, this Court should dismiss the Amended Complaint with prejudice for failure to state a claim under Rule 12(b)(6). In addition, the Amended Complaint warrants dismissal without prejudice because it does not comply with the requirement in Arizona Rule of Civil Procedure 8 for a short and plain statement for relief. The Amended Complaint is argumentative and "consists largely of immaterial background information" that Plaintiffs fail to connect to their claims for relief, thereby warranting dismissal. *McHenry v. Renne*, 84 F.3d 1172, 1177-78 (9th Cir. 1996) (discussing parallel federal rule).

CONCLUSION

For the foregoing reasons, and those set forth in the Commission's Motion to Dismiss, the Commission respectfully requests that its motion be granted and the Amended Complaint dismissed in its entirety.

/ / /

RESPECTFULLY SUBMITTED this 15th day of August, 2012.

OSBORN MALEDON, P.A.

By /s/ Kristin L. Windtberg
Mary R. O'Grady
Kristin Windtberg
Joseph N. Roth
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2794

BALLARD SPAHR, LLP
Joseph A. Kanefield, 015838
Brunn W. Roysden, 028698
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555

Attorneys for Arizona Independent Redistricting Commission

ORIGINAL of the foregoing e-filed and a COPY e-delivered this 15th day of August, 2012, to:

The Honorable Mark Brain
Maricopa County Superior Court
101 W. Jefferson, ECB 413
Phoenix, AZ 85003

COPY of the foregoing mailed this 15th day of August, 2012, to:

Lisa T. Hauser
GAMMAGE & BURNHAM
Two North Central Avenue, 15th Floor
Phoenix, Arizona 85004

Michael T. Liburdi
SNELL & WILMER, LLP
One Arizona Center
400 East Van Buren
Phoenix, Arizona 85004

Attorneys for the Plaintiffs

Michele Forney
Arizona Attorney General's Office
1275 West Washington
Phoenix, Arizona 85007
Attorney for Defendant Arizona Secretary of State Ken Bennett

/s/ Jessica A. Lopez
4354491