

1 Mary R. O'Grady, 011434
2 Kristin L. Windtberg, 024804
3 Joseph N. Roth, 025725
4 OSBORN MALEDON, P.A.
5 2929 N. Central Avenue, Suite 2100
6 Phoenix, Arizona 85012-2793
(602) 640-9000
mogrady@omlaw.com
kwindtberg@omlaw.com
jroth@omlaw.com

7 Joseph A. Kanefield, 015838
8 Brunn W. Roysden, 028698
9 BALLARD SPAHR, LLP
10 1 East Washington Street, Suite 2300
11 Phoenix, Arizona 85004-2555
12 kanefieldj@ballardspahr.com
13 roysdenb@ballardspahr.com
14 *Attorneys for Defendant Arizona Independent
15 Redistricting Commission*

16 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

17 IN AND FOR THE COUNTY OF MARICOPA

18 VINCE LEACH, KAREN GLENNON and
19 LYNNE ST. ANGELO, qualified electors
20 and residents of Congressional District 1; et
21 al.,

22 Plaintiffs,

23 v.

24 ARIZONA INDEPENDENT
25 REDISTRICTING COMMISSION, a
26 legislative body of the State of Arizona; et
27 al.,

28 Defendants.

No. CV2012-007344

**AIRC DEFENDANTS' REPLY TO
THEIR MOTION TO DISMISS
CLAIMS THREE AND SIX OF
THE SECOND AMENDED
COMPLAINT**

(Assigned to the Hon. Mark Brain)

29 The AIRC Defendants hereby respectfully submit their reply brief in further
30 support of their Motion to Dismiss Claims Three and Six of the Second Amended
31 Complaint (the "Motion to Dismiss").
32

1 **I. Claim Three Warrants Dismissal Because Plaintiffs’ Claims of Pretext Are**
2 **Unsupported by Even Their Own Allegations.**

3 Plaintiffs assert that Claim Three of the Second Amended Complaint “clarifies
4 the nature of [their] allegations” about the Commission’s deliberations regarding the
5 Voting Rights Act and competitiveness criteria. (Response at 3.) This claim, however,
6 does nothing more than repackage the same allegations that this Court has already
7 deemed deficient with the added label that the Commission’s conduct was “pretextual.”
8 Simply declaring conduct to be pretextual does not remedy the flaws in Plaintiffs’ claim.
9 Plaintiffs offer no new factual allegations to support the claim of pretext, and the
10 allegations made in the Second Amended Complaint (like those in the First Amended
11 Complaint) refute any suggestion that the Commission’s deliberations were pretextual.

12 Plaintiffs contend that the Commission’s consideration of the Voting Rights Act
13 and competitiveness criteria were “pretextual,” and therefore in violation of the Arizona
14 Constitution, solely because the Commission did not conduct the types of analyses that
15 Plaintiffs have unilaterally determined were “essential” in advance of the advertising of
16 the draft map. (*See* Response at 3; Second Amended Complaint ¶¶ 57-59.) But as the
17 Court in *Minority Coalition II* made clear, as long as the Commission made a
18 deliberative effort to accommodate the redistricting goals, courts cannot review the
19 method chosen by the Commission for measuring those goals. *Arizona Minority Coal.*
20 *for Fair Redistricting v. Arizona Indep. Redistricting Comm’n* (“*Minority Coalition I*”),
21 220 Ariz. 587, 599 n.14, 208 P.3d 676, 688 (2009); *see also id.* at 597-98 ¶ 34, 208 P.3d
22 at 686-87. The constitution does not require that racial bloc voting analysis be
23 completed or that any particular data be used to evaluate competitiveness. *See* Ariz.
24 Const. art. IV, pt. 2, §§ 1(14)-(16). Therefore, the Commission’s decision not to conduct
25 these specific analyses before advertising the draft map does not render the
26 Commission’s deliberations with respect to the Voting Rights Act and competitiveness
27 criteria pretextual.

1 The basis of Plaintiffs’ pretext argument is language in a footnote of the *Minority*
2 *Coalition II* opinion, in which the Arizona Supreme Court stated that “mere pretextual
3 deliberation about any of the [constitutional] goals would not satisfy the constitution.”
4 220 Ariz. at 599 n.14, 208 P.3d at 688. Plaintiffs fail to acknowledge the rest of the
5 language in footnote 14. In that footnote, the Court *rejects* the argument that “the
6 Commission had available and should have used a better methodology for determining”
7 the map’s compliance with a constitutional goal. *Id.* In rejecting the argument, the
8 Court does not assess the evidence the Commission considered or critique what sorts of
9 data analyses the Commission conducted. Instead, the Court clarifies that the scope of
10 judicial review over the Commission’s mapping decisions is extremely narrow:
11 “[i]nquiries into the . . . chosen method for measuring” the various mapping criteria “fall
12 outside the scope of judicial review,” as does “an evaluation of the adequacy of the
13 Commission’s efforts to accommodate [a constitutional goal] and the reasoning behind
14 the Commission’s rejections of additional changes in the map.” *Id.*

15 Plaintiffs’ third claim for relief is exactly the kind of claim the Supreme Court
16 rejected in *Minority Coalition II*. Plaintiffs contend that the Commission must have
17 failed to satisfy the Voting Rights Act and competitiveness criteria because the
18 Commission did not use the “methodology for determining” those criteria that Plaintiffs
19 think is necessary. Having had this claim rejected once, they now invite the Court to
20 ignore the Supreme Court’s admonishment that judicial review does not reach as far as
21 Plaintiffs want all because they have put a new label of “pretextual” on the exact same
22 claim. The only pretext apparent is Plaintiffs’ use of new labels to reintroduce invalid
23 claims. The Court should decline the invitation and should dismiss Claim Three with
24 prejudice.

25 Moreover, although the Second Amended Complaint asserts in conclusory
26 fashion that the Commission’s voting rights and competitiveness deliberations were
27 pretextual because the Commission did not follow the same path that Plaintiffs would
28 have followed (¶¶ 57-58, 109-10), the allegations included therein demonstrate just the

1 opposite. The Second Amended Complaint acknowledges that the Commission engaged
2 in a deliberative effort to accommodate both the Voting Rights Act and competitiveness
3 criteria before advertising the draft map. (See Second Am. Compl. ¶¶ 57-58, 109-110
4 (the Commission engaged in deliberations regarding the Voting Rights Act and
5 competitiveness criteria). *Minority Coalition II* prohibits any further inquiry. 220 Ariz.
6 at 599 n.14, 208 P.3d at 688; see also *id.* at 597-98 ¶ 34, 208 P.3d at 686-87.

7 Plaintiffs also suggest that discovery is needed to determine the nature and extent
8 of the pre-draft map deliberations regarding the Voting Rights Act and competitiveness
9 criteria. (Response at 4.) No such discovery is needed. The transcripts of the
10 Commission's public meetings demonstrate clearly and unequivocally that the
11 Commission engaged in the necessary deliberative effort to accommodate all of the
12 constitutional redistricting goals. Indeed, even the limited transcript excerpts that
13 Plaintiffs incorporate into their Second Amended Complaint reflect the Commission's
14 consideration of both the Voting Rights Act and competitiveness.¹ The excerpt from the
15 August 22, 2011 transcript referenced in Paragraph 42 of the Second Amended
16 Complaint describes initial efforts to adjust the grid to maintain two majority-Hispanic
17 districts. Efforts to adjust the map to comply with the Voting Rights Act and
18 competitiveness are further discussed in the September 26, 2011 transcript cited in
19 Paragraph 44.² In light of such deliberations, Plaintiffs' claims of pretext do not ring
20 true.

21 In dismissing Claim Three of the First Amended Complaint, this Court correctly
22 applied the directive given in *Minority Coalition II*, and ruled that a determination about
23

24 ¹ Further evidence of the Commission's careful consideration of both compliance
25 with the Voting Rights Act and the competitiveness criteria can be found in the complete
26 public record of the Commission's work, but for purposes of this Motion, the discussion
is limited to the allegations contained in the Second Amended Complaint.

27 ² See Tr. 9/26/11 (Ex. C to Motion to Dismiss First Amended Complaint) at 58:24-
28 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).

1 the sufficiency of the voting rights and competitiveness data available to the
2 Commission at the time the draft map was adopted is a matter within the discretion of
3 the Commission that is not reviewable by this Court. (10/15/12 Minute Entry Order at
4 3.) Claim Three of the Second Amended Complaint is substantively no different than
5 Claim Three of the First Amended Complaint and should similarly be dismissed.
6 Plaintiffs do not, and cannot, allege that the Commission failed to take into account the
7 Voting Rights Act, competitiveness, or any other constitutional factor before it adopted a
8 draft map. Plaintiffs’ third claim for relief must be dismissed.

9
10 **II. Claim Six Does Not Allege a Non-Public Meeting of a Quorum, and**
11 **Therefore Warrants Dismissal.**

12 Claim Six of the Second Amended Complaint fails to state a claim, because
13 Plaintiffs do not allege a *meeting* of a quorum of Commissioners to conduct the business
14 of selecting the Commission’s mapping consultant, apart from any meeting open to the
15 public with 48 or more hours public notice. Article 4, Part 2, Section 1(12) of the
16 Arizona Constitution requires that “[w]here a quorum is *present*, the independent
17 redistricting commission shall conduct business in *meetings* open to the public, with 48
18 or more hours public notice provided,” and establishes that a quorum consists of three
19 commissioners, including the chair or vice-chair. *Id.* (emphasis added). In dismissing
20 Claim Six of the First Amended Complaint, this Court noted that “the first amended
21 complaint does not allege that a quorum met regarding Strategic Telemetry.” (10/15/12
22 Minute Entry Order at 4.) Although Plaintiffs claim that they remedied this flaw in their
23 Second Amended Complaint (Response at 6), the reasserted Claim Six still fails to allege
24 a non-public meeting of a quorum regarding Strategic Telemetry.

25 Plaintiffs point to Paragraph 135 of the Second Amended Complaint and argue
26 that the language included in this Paragraph cured any pleading defect that may have
27 existed with respect to Claim Six of the First Amended Complaint. (*Id.*) But the
28 allegations in Paragraph 135 regarding the selection of Strategic Telemetry by a quorum

1 are functionally no different than the allegations contained in Paragraph 175 of the First
2 Amended Complaint, which this Court already ruled deficient. In fact, the allegations in
3 Paragraph 135 of the Second Amended Complaint are less specific than those in
4 Paragraph 175 of the First Amended Complaint, making it difficult to see how this
5 amended allegation could resolve any pleading deficiency:

6 **¶ 175 First Am. Complaint**

¶ 135 Second Am. Complaint

7 Upon information and belief, the
8 selection of Strategic Telemetry,
9 was negotiated and agreed upon
10 by a quorum of Commissioners
11 outside of meetings open to the
12 public with 48 hours or more
13 public notice provided. Such
14 negotiation and agreement
15 included the numerical score that
16 would be assigned to Strategic
17 Telemetry during the evaluation
18 process.

Upon information and belief,
the selection of Strategic
Telemetry was negotiated and
agreed upon *by a quorum* of
Commissioners outside of
meetings open to the public
with 48 hours or more public
notice provided in violation of
Article 4, Part 2, § 1(12) of the
Arizona Constitution.

15 (First Amended Complaint ¶ 175; Second Amended Complaint ¶ 135.) As this Court
16 previously ruled, in the absence of an allegation of a non-public *meeting* of a quorum,
17 Claim Six fails to state a claim upon which relief can be granted.

18 In further defense of their reasserted claim, Plaintiffs argue that the Second
19 Amended Complaint's focus on serial communications among commissioners, rather
20 than a non-public meeting of a quorum to conduct Commission business, does not render
21 Claim Six legally deficient because Claim Five similarly focuses on serial
22 communications, and this Court did not dismiss Claim Five of the First Amended
23 Complaint. (Response at 6.) The AIRC Defendants agree that like Claim Six, Claim
24 Five fails to allege a non-public meeting of a quorum, and for that reason, the AIRC
25 Defendants believe that Claim Five also fails as a matter of law. However, because this
26 Court already ruled in favor of Plaintiffs on Claim Five of the First Amended Complaint,
27
28

1 the AIRC Defendants do not revisit the issue in their present Motion to Dismiss and will
2 save such arguments for a future dispositive motion.³

3 Because the Second Amended Complaint does not allege a non-public meeting of
4 a quorum of Commissioners with respect to the selection of Strategic Telemetry as the
5 Commission's mapping consultant, Claim Six must be dismissed.

6 **CONCLUSION**

7 This Court correctly dismissed Claims Three and Six from the First Amended
8 Complaint. In reasserting these claims in the Second Amended Complaint, Plaintiffs
9 have not cured any of the legal deficiencies that caused their dismissal. Accordingly, the
10 AIRC Defendants respectfully request that their motion be granted and Counts Three
11 and Six of the Second Amended Complaint be dismissed with prejudice.

12 Respectfully submitted this 7th day of January, 2013.

13
14 OSBORN MALEDON, P.A.

15
16 By /s/ Kristin L. Windtberg
17 Mary R. O'Grady
18 Kristin L. Windtberg
19 Joseph N. Roth
20 2929 N. Central Avenue, Suite 2100
21 Phoenix, Arizona 85012-2794

22 BALLARD SPAHR, LLP
23 Joseph A. Kanefield, 015838
24 Brunn W. Roysden, 028698
25 1 East Washington Street, Suite 2300
26 Phoenix, Arizona 85004-2555

27 *Attorneys for Arizona Independent Redistricting*
28 *Commission*

3 The Motion to Dismiss the Second Amended Complaint focuses solely on claims
previously dismissed by this Court that Plaintiffs have reasserted without remedying the
deficiencies that plagued those claims.

1 ORIGINAL of the foregoing e-filed and a COPY
2 e-delivered this 7th day of January, 2013, to:

3 The Honorable Mark Brain
4 MARICOPA COUNTY SUPERIOR COURT
5 101 W. Jefferson, ECB 413
6 Phoenix, AZ 85003

7 COPY of the foregoing mailed this
8 7th day of January, 2013, to:

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

13 Michael T. Liburdi
14 SNELL & WILMER, LLP
15 One Arizona Center
16 400 East Van Buren
17 Phoenix, Arizona 85004
18 *Attorneys for Plaintiffs*

19 Michele L. Forney
20 ARIZONA ATTORNEY GENERAL'S OFFICE
21 1275 West Washington
22 Phoenix, Arizona 85007
23 *Attorney for Defendant Ken Bennett*

24 /s/Sara C. Sanchez
25 4625648

26
27
28