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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").

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 IP*”),  
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.<sup>1</sup> 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.<sup>2</sup> 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

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24 <sup>1</sup> 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 <sup>2</sup> 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.

7 Upon information and belief,  
8 the selection of Strategic  
9 Telemetry was negotiated and  
10 agreed upon *by a quorum* of  
11 Commissioners outside of  
12 meetings open to the public  
13 with 48 hours or more public  
14 notice provided in violation of  
15 Article 4, Part 2, § 1(12) of the  
16 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.<sup>3</sup>

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  
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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  
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