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*Attorneys for Defendant Arizona Independent  
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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

**RESPONSE TO COMMISSIONER  
STERTZ’S OPPOSITION TO  
COMMISSION’S MOTION FOR  
JUDGMENT ON THE  
PLEADINGS**

(Assigned to the Hon. Mark Brain)

**(Oral argument, August 13, 2013 at  
10:00)**

The Arizona Independent Redistricting Commission (“Commission”) submits this  
response to Commissioner Stertz’s Opposition to the Motion for Judgment on the  
Pleadings (“Commissioner Stertz’s Opposition”), which was filed through separate

1 counsel for Commissioner Stertz on August 8, 2013. Commissioner Stertz’s Opposition  
2 should be denied for the following reasons.

3 **First**, the record shows that the Commission’s counsel had authority to file the  
4 Motion for Judgment on the Pleadings (the “Motion”) when it was filed.

5 **Second**, notwithstanding Commissioner Stertz’s Opposition, he should be  
6 dismissed as a defendant in his official capacity, which is how he is named in this suit.

7 **Third**, dismissing Commissioner Stertz (along with the other Commissioners)  
8 will not limit the discovery that Plaintiffs may properly seek, or in any way prevent  
9 Commissioner Stertz from providing information to Plaintiffs.

### 10 **Factual Background**

#### 11 **A. Retaining Separate Counsel for Commissioners.**

12 All Commissioners who are also potential fact witnesses in the legal challenges to  
13 the maps that the Commission adopted have had separate counsel to assist them on  
14 issues relating to legislative privilege and discovery at various times since late-January.<sup>1</sup>  
15 (Exhibit A, Declaration of Ray Bladine (“Bladine Decl.”) ¶ 2.) The Commission initially  
16 retained separate counsel for the five Commissioners at the recommendation of the  
17 federal three-judge panel in *Harris v. AIRC*, so the Commissioners could each be  
18 separately advised on the issue of whether to waive or assert legislative privilege. (*Id.*  
19 ¶ 3.)<sup>2</sup> Upon request by the individual Commissioner, separate counsel also assisted with  
20 discovery issues and trial preparation. (*Id.* ¶ 4.) Through this process, the Commission  
21 retained Munger Chadwick, P.L.C. for this limited scope representation of  
22 Commissioner Stertz. (*Id.* ¶ 5.) Because this case (*Leach*) potentially raises similar  
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25 <sup>1</sup> The only Commissioner who is not a potential fact witness is Commissioner  
26 Kallen who was appointed to the Commission in June 2013, following the resignation  
of former Commissioner Jose Herrera.

27 <sup>2</sup> In December 2012, the Commission had already authorized separate counsel  
28 for the individual Commissioners in the event that a Commissioner requested counsel,  
and such counsel was deemed appropriate by Commission counsel, but no  
Commissioner requested separate counsel. (Bladine Decl. ¶ 3.)

1 issues as *Harris* regarding the individual Commissioners, the limited scope  
2 representation was established for both cases. (*Id.* ¶ 6.)

3 In *Harris*, Plaintiffs initially named the Commission and all five Commissioners  
4 in their official capacity as defendants, but the court dismissed all of the Commissioners  
5 based on legislative immunity. (Exhibit B, *Harris v. AIRC*, No. CV-12-00894-PHX-  
6 ROS-NVW-RRC, 2/22/13 Order (Doc. 134) at 1.) Even after the Commissioners were  
7 dismissed as parties, they retained access to separate counsel throughout the remainder  
8 of the case to assist them in their role as fact witnesses on all privilege issues other than  
9 the Commission’s attorney-client privilege. (Bladine Decl. ¶ 4.) The role of the  
10 Commission counsel remained defending the maps the Commission approved.

11 **B. Commissioner Stertz’s Request for Separate Counsel and the**  
12 **Commission’s Resolution of His Request.**

13 On April 3, 2013, the week after the trial in *Harris* ended, Commissioner Stertz  
14 wrote to the Commission’s Executive Director Ray Bladine asserting a “right to separate  
15 legal counsel, at state expense, for all purposes in [his] defense of the *Leach* case.”  
16 (Stertz Opposition, Ex. A.) In this April 3 letter, Commissioner Stertz “demand[ed] that  
17 [Mr. Bladine] immediately notify [him] and [his] current attorneys, Munger Chadwick,  
18 PLC, that the state will retain them to represent [him] in the *Leach* matter separately  
19 from the Commission.” (*Id.*) Munger Chadwick followed up with a letter dated April  
20 10 on the subject requesting files from the Commission and directing Commission  
21 counsel not to file anything on Commission Stertz’s behalf in *Leach* because of a  
22 conflict of interest. (*Id.* at Ex. C.) These communications were prompted by  
23 Commission counsel’s cross-examination of Commissioner Stertz during the *Harris*  
24 trial. (*Id.* at Ex. A.)

25 Commission counsel responded by letter dated April 15, explaining that the  
26 Commissioners are named in their official capacity only as “‘another way of pleading an  
27 action against’ the Commission.” (*Id.*, Ex. D at 1 (citation omitted).) As explained in  
28 the letter, both *Harris* and *Leach* challenge decisions of the Commission as a body and

1 seek relief only against the body. (*Id.* at 2.) In this circumstance, no individual  
2 Commissioner named solely in his or her official capacity has a personal stake in the  
3 litigation. (*Id.*)

4 Although Commission counsel did not believe Commissioner Stertz, as an  
5 individual Commissioner, had the authority to insist on separate counsel and decline  
6 representation by Commission counsel, the attorneys stated they would refer the issue to  
7 the full Commission for consideration. (*Id.*) They also informed Commissioner Stertz  
8 that they would advise the court of the issue if any court filings were required before the  
9 representation issue was resolved. (*Id.*)

10 The Commission addressed this issue at meetings held on April 25, 2013 and  
11 May 2, 2013. (Bladine Decl. ¶ 7.) The agendas for these meetings included “[l]egal  
12 advice, direction to counsel, discussion and possible action regarding . . . counsel for  
13 individual commissioners in ongoing lawsuits and Commissioner Stertz’s request for  
14 separate counsel.” (*Id.* ¶ 8; Exhibit C.) All five Commissioners participated in the April  
15 25, and May 2 meetings. (*See* Exhibit D, Transcript of 4/25/13 Commission meeting  
16 (“4/25/13 Tr.”) at 2; Exhibit E, Transcript of 5/2/13 Commission meeting (“5/2/13 Tr.”)  
17 at 2.) At the April 25 meeting, in open session, the five commissioners discussed  
18 Commissioner Stertz’s concerns but did not resolve the issue. (4/25/13 Tr. at 5-66.) On  
19 April 29, 2013, the Commission served its First Supplemental Disclosure Statement,  
20 which Mr. Bladine verified on behalf of the Commissioners other than Commissioner  
21 Stertz, and which included a footnote disclosing that “Commissioner Stertz has indicated  
22 that he would like separate representation, however, this issue has not yet been resolved  
23 by the Commission.” (Bladine Decl. ¶ 11; Exhibit F.)

24 At its May 2 meeting, the Commission again addressed the representation issue.  
25 The agenda also permitted the Commission to provide counsel direction regarding the  
26 *Leach* litigation. (Bladine Decl. ¶ 8; Exhibit C.) Following an Executive Session during  
27 which the Commission received legal advice about the items on the agenda, the  
28 Commission voted unanimously to proceed as directed in executive session. (5/2/13 Tr.

1 at 47-48.) Although not all of the direction provided in the executive session is public,  
2 the fact that the motion included a direction regarding the scope of outside counsel is  
3 part of the public record at that meeting.<sup>3</sup> The Commission decided to maintain the  
4 structure for separate counsel that the Commission had used in *Harris* and rejected a  
5 broader role for separate commissioner counsel. (*Id.* at 54, 61, 64-65.) Following the  
6 May 2 meeting, the Commission’s Executive Director worked on contracts and budgets  
7 for separate counsel for the Commissioners for *Leach*. (Bladine Decl. ¶ 12.)

8 When the Commission filed its June 5, 2013 Motion for Judgment on the  
9 Pleadings (“Motion”), Commission counsel did not include a notice concerning the  
10 representation issue Commissioner Stertz raised in his April 3, 2013 letter, because the  
11 Commission had resolved the issue at its May 2, 2013 meeting with a unanimous vote of  
12 the Commission that included Commissioner Stertz.

### 13 Argument

#### 14 **I. The Commission Attorneys Had the Authority to File the Motion on Behalf** 15 **of All Commissioners in Their Official Capacity.**

16 At its May 2 meeting, the Commission reaffirmed the role of Commission  
17 counsel and separate counsel in this case. (5/2/13 Tr. at 54, 61, 64-65.) With unanimous  
18 approval, the Commission also provided Commission counsel further direction in its  
19 May 2 Executive Session. Thus, the Commission rejected Commissioner Stertz’s  
20 demands for his separate, Commission-paid counsel, Munger Chadwick, to have an  
21 expanded role in this case. The Commission counsel’s responsibility is clear: defend  
22 the work of the Commission against Plaintiffs’ challenges. After the May 2 meeting,  
23 Commission counsel proceeded with its work based on the direction the Commission  
24 had provided, and filing the Motion is consistent with its responsibilities.

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27 <sup>3</sup> If the Executive Session transcript is necessary for the Court to review the  
28 scope of the Commission’s authority, the Commission will make the transcript  
available in camera to the Court.

1 **II. Commissioner Stertz Should Be Dismissed Despite His Desire to Remain a**  
2 **Named Defendant.**

3 The Commission itself can seek dismissal of all of the commissioners named in  
4 their official capacity, despite Commissioner Stertz’s Opposition. The reasoning in the  
5 Motion applies regardless of whether Commissioner Stertz agrees with it.

6 As an initial matter, it is important to note what it means when an official is  
7 named as a defendant in his or her official capacity in a suit for prospective relief. As  
8 explained in the Motion (at 2), such suits are generally just another way to plead an  
9 action against the entity that the named official leads. *See, e.g., Scheehle v. Justices of*  
10 *the Sup. Ct.*, 211 Ariz. 282, 293 n.1, 120 P.3d 1092, 1103 n.1 (2005) (“[S]uits brought  
11 against individual officers for injunctive relief are for all practical purposes suits against  
12 the State itself.” (citation omitted)). Commissioner Stertz is not exposed to personal  
13 liability; this suit is simply a challenge to enjoin use of the Congressional map.  
14 Therefore, the interest of Commissioner Stertz as a defendant in his official capacity is a  
15 “different legal personage[.]” than Commissioner Stertz’s individual interest. *Bender v.*  
16 *Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n.6 (1986); *accord Karcher v. May*, 484  
17 U.S. 72, 78 (1987).<sup>4</sup> Moreover, because the Commissioners are named solely as proxies  
18 for the Commission itself, and because Plaintiffs seek relief solely against the  
19 Commission, an individual Commissioner cannot remain in the case if the others are  
20 dismissed. The Commissioners either all remain in the case in their official capacity as

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23 <sup>4</sup> *See also, e.g., Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Mich. Dep’t of*  
24 *State Police*, 491 U.S. 58, 71 (1989) (noting that a suit against a state official in his or  
25 her official capacity is a suit against the official’s office); *Kentucky v. Graham*, 473  
26 U.S. 159, 165-66 (1985); *Monell v. Dep’t of Social Servs. of City of N.Y.*, 436 U.S.  
27 658, 690 n.55 (1978).

28 Indeed, the presence of members of a continuing board as parties is  
“immaterial” to the relief Plaintiffs seek. Ariz. R. Civ. P. 25(e) cmt. to 1961  
Amendment (citing *Ethington, v. Wright*, 66 Ariz. 382, 388-89, 189 P.2d 209, 214  
(1948)); *see also* Fed. R. Civ. P. 25 at cmt. to 1961 Amendment (no need to name  
members where action is brought against board with continuity of existence).

1 parties, or they do not. Plaintiffs cannot receive the relief that they seek against a single  
2 Commissioner.

3         Additionally, it is clear that a member of a government board who disagrees with  
4 the action taken by the board, cannot use the fact that the member is named as a  
5 defendant to try to undo the action with which he disagrees. In *Madison County v.*  
6 *Hopkins*, the Mississippi Supreme Court ruled that “[a] person sued in his official  
7 capacity has no stake, as an individual, in the outcome of the litigation.” 857 So. 2d 43,  
8 48 ¶ 13 (Miss. 2003) (quoting *Johnson v. Bd. of Cnty. Comm’rs for Cnty. of Fremont*,  
9 85 F.3d 489, 493 (10th Cir. 1996)). The court approved of the federal district court’s  
10 finding that the same attorney could represent the Board of Supervisors and Sheriff in  
11 his official capacity, notwithstanding the fact that the Sheriff personally agreed with  
12 opposing party. *Id.* at 48-49 ¶¶ 15-16. The district court struck the Sheriff’s original  
13 answer in which he admitted the allegations in the complaint, and it allowed the  
14 attorneys for the Board to submit a new answer where the Sheriff denied the plaintiffs’  
15 allegations. *Id.*

16         The New Jersey Supreme Court likewise held that “in view of the fact that in  
17 certain § 1983 actions no conflict of interest problems will ever exist, or that in others  
18 the cause may be summarily disposed without factual controversy as to the respective  
19 roles of the defendants, an absolute rule requiring separate counsel at the initial pleading  
20 stages is not required to adhere to traditional ethical precepts.” *Petition for Review of*  
21 *Opinion 552 of Advisory Comm. On Prof’l Ethics*, 507 A.2d 233, 235 (N.J. 1986). The  
22 court stated that “[t]he overinclusiveness of the restriction is most apparent in those  
23 circumstances where a governmental officer or employee is charged by the complaint  
24 solely in an ‘official capacity.’” *Id.* As long as the government entity receives notice of  
25 an opportunity to respond, an official capacity suit is, in all respects other than name, to  
26 be treated as a suit against the entity. *Id.* (citing *Brandon v. Holt*, 469 U.S. 464, 469-70  
27 (1985)). No conflict of interest exists, and the defendant is not the “real” defendant in  
28 terms of actual responsibility and ultimate liability. *Id.* at 236.

1 Further, the role that Commissioner Stertz would like to play as a party to the  
2 litigation runs counter to the Commission’s constitutional responsibility. The  
3 Commission is responsible for the “legal defense of [the] redistricting plan.” Ariz.  
4 Const. art. IV, pt. 2 § 1(20). Commissioner Stertz opposed the Commission’s maps and  
5 candidly acknowledges that “if Plaintiffs bring a motion to void the existing redistricting  
6 maps . . . , Mr. Stertz will likely support such a motion.” (Stertz Objection at 3.) He  
7 does not want to remain in the lawsuit to defend the redistricting plan that the majority  
8 of the Commission approved, and which he opposed. He wants to remain as a named  
9 party – and have the Commission and taxpayers pay the legal bills – to oppose the  
10 Commission-approved congressional districts. This simply is not what is involved in  
11 being named as a defendant in one’s official capacity, or what is permitted by the  
12 Arizona Constitution as a use of Commission funds.

13 The defendant role Commissioner Stertz appears to envision is improper for yet  
14 another reason: there would be no adversity between Commissioner Stertz and Plaintiffs,  
15 a key requirement for the courts to exercise jurisdiction. *Planned Parenthood Ctr. of*  
16 *Tucson, Inc. v. Marks*, 17 Ariz. App. 308, 310, 497 P.2d 534, 536 (1972) (A “justiciable  
17 controversy” arises where *adverse claims* are asserted upon present existing facts, which  
18 have ripened for judicial determination); *see also MedImmune v. Genentech*, 549 U.S.  
19 118, 127 (2007) (The question is “whether the facts alleged, under all the circumstances,  
20 show that there is a substantial controversy, between *parties having adverse legal*  
21 *interests*, of sufficient immediacy and reality to warrant the issuance of a declaratory  
22 judgment.” (emphasis added and internal quotation marks and citation omitted)).<sup>5</sup>

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23  
24 <sup>5</sup> Commissioner Stertz could file a motion to intervene as a Plaintiff in his  
25 individual capacity, but it is unclear how this would assist the Court or Commissioner  
26 Stertz. As discussed in Part III, *infra*, Mr. Stertz is fully able to participate as a fact  
27 witness. Moreover, there are serious questions regarding whether Commissioner  
28 Stertz could even choose to become a Plaintiff, if he were so inclined. California, for  
example, prohibits members of boards from suing the board as taxpayers, recognizing  
the “immobilizing” effect of such suits and that they could render board’s actions  
“impotent and chaotic.” *See, e.g., Carsten v Psychology Examining Comm. of the Bd.*

1           The constitutional structure governing the Commission is unique because it  
2 entrusts the Commission itself, a legislative body, with the duty of defending the maps  
3 that it has approved. Typically, the executive branch, through the Attorney General,  
4 defends legislative enactments, although the Speaker and the President (but not the  
5 entire Legislature or the dissenting legislators) have a right to be heard on those issues.  
6 A.R.S. § 12-1841. As a legislative body responsible for difficult policy judgments that  
7 have significant political implications, it is not surprising that there is disagreement  
8 among the five commissioners. Indeed, when Commissioner Herrera recently resigned  
9 from the Commission, he lamented that the environment on the Commission had  
10 become “toxic.” (Bladine Decl. ¶ 13, Ex. G.) The constitutional structure does not  
11 permit an individual Commissioner, purportedly in his or her official capacity, to  
12 undermine the Commission’s defense of its work. Commissioner Stertz should be  
13 dismissed from this suit along with the others.

14 **III. The Motion Does Not Thwart Discovery.**

15           Regardless of whether the Motion is granted or denied, Plaintiffs will get the  
16 discovery they are entitled to receive. The Commission has served its initial written  
17 discovery responses, and in addition to the responses provided by the Commission itself,  
18 Commissioners Stertz and Freeman are preparing separate responses through their  
19 separate counsel. Regardless of whether they are parties in their official capacity, all  
20 Commissioners will consider whether to assert or waive legislative privilege with the  
21 advice of separate counsel. This is exactly the structure that was used in *Harris*. The  
22 Motion has no impact on that issue. And, the Commission has provided separate  
23 counsel to assist Commissioner Stertz with his role as a fact witness.<sup>6</sup> It is simply not

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24  
25 *of Med. Quality Assurance*, 614 P.2d 276, 284 (Cal. 1980). Such issues would have  
26 to be resolved if Commissioner Stertz sought to intervene, but they are not presented  
by the Opposition so they will not be addressed.

27 <sup>6</sup> The Commission questions the need for any Commissioner’s testimony on the  
28 issues in this case in light of the contemporaneous transcripts, audio and video  
recordings of all Commission meetings, and extensive collection of the maps and

1 true that Commissioner Stertz's continuing role as a defendant in his official capacity  
2 will have any effect whatsoever on Plaintiffs', Commissioner Stertz's, or the  
3 Commission's access to evidence in this case.

4 **Conclusion**

5 The Commission previously explained that granting the Motion will "streamline  
6 the litigation and avoid having to spend time and resources wading through the nuances  
7 of the role of the Commissioners if they remain parties." (Reply at 10.) Commissioner  
8 Stertz's Opposition shows why this is true. For the reasons set forth herein and in the  
9 previous briefing, the Motion should be granted.

10 All separate commissioner counsel for the current Commissioners are listed on  
11 the service list for this response, although only Commissioner Stertz's counsel has  
12 entered an appearance in this case.

13 DATED this 12th day of August, 2013.

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26 reports that the Commission considered. As is true in other constitutional challenges,  
27 the legislative record, not subsequent testimony from the legislators, should be the  
28 focus of the court's review. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz.*  
*Indep. Redistricting Comm'n*, 220 Ariz. 587, 596-98 ¶¶ 25-26, 34, 208 P.3d 676, 685-  
87 (2009) (*Minority Coal. II*). But this is an issue for another day.

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