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CASE NAME: **STATE et al. v. MATHIS et al.**	CASE NUMBER: CV-12-0068
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney, Petitioner - Appellant, vs. COMMISSIONER COLLEEN MATHIS, COMMISSIONER LINDA McNULTY, COMMISSIONER JOSE HERRERA, Respondents - Appellees, ARIZONA INDEPENDENT REDISTRICTING COMMISSION, an Independent Constitutional Body, Plaintiff/Petitioner - Appellee, vs. THOMAS C. HORNE, in his official capacity as Attorney General of the State of Arizona, Defendant/Respondent - Appellant.	)	Court of Appeals Division One No. 1 CA-CV 12-0068 Maricopa County Superior Court No. CV2011-016442 No. CV2011-017914 (Consolidated)

ANSWERING BRIEF OF APPELLEE ARIZONA INDEPENDENT REDISTRICTING COMMISSION

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INTRODUCTION AND OVERVIEW*

Approximately every ten years, Arizona must create new legislative and congressional districts for use in state and national elections. In 2000, voters amended the Constitution to create the Arizona Independent Redistricting Commission (the "Commission" or "AIRC"), bringing transparency and accountability to a redistricting process weighed down by the self-interest of incumbent politicians.

This case arises out of efforts by politicians to challenge the constitutional foundation of the redistricting process. The court below correctly ruled that the Constitution trumps the interests of politicians and any law contrary to its clear language. From top to bottom, the Commission's constitutional charter ("Proposition 106") is drafted to insulate the redistricting process from the improper influence of politicians – not from Republicans, Democrats, or Libertarians but from incumbent politicians who have a personal stake in the outcome of redistricting.

At issue in this case is the Constitution's mandate that "[w]here a quorum is present, the independent redistricting commission shall conduct business in

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* Documents from the Clerk's Record are cited by "**CR**" and page number. Unless noted, all CR references are to the index for case no. CV2011-016442. Many documents cited are included in the Commission's Separate Appendix and are cited by "**App.**"

meetings open to the public, with 48 or more hours public notice provided." Ariz. Const. art. IV, pt. 2, § 1(12) (referred to as the constitutional "Open Meeting Clause"). This provision and other sections of Proposition 106 are incompatible with the generally applicable statutory scheme known as the Open Meeting Law, A.R.S. §§ 38-431 to -431.09 (the "OML"). Most notably, the OML gives the Attorney General, an elected incumbent, special statutory powers to investigate alleged OML violations using compulsory investigative demands. *See* A.R.S. § 38-431.06. And the wide-ranging penalties for violations of the statutory OML clash with the extremely limited for-cause removal provision in Proposition 106. *Compare* A.R.S. § 38-431.07 *with* Ariz. Const. art. IV, pt. 2, § 1(10).

This is only the second redistricting cycle under the new constitutional system. Although Proposition 106 enjoyed broad bipartisan support, the current Commission has been subject to interference from the highest levels of government, culminating in Governor Brewer's unlawful effort to remove the Commission's Chair in November 2011 – a removal premised on some of the very same allegations the Attorney General made in the investigation underlying this case. [1]

[1] *See* App. 12 (11/23/2011 Order in *Arizona Redistricting Comm'n v. Brewer*, CV-11-0313-A (opinion forthcoming)) (holding that Governor's removal effort failed to allege any "non-public meeting" that would violate either the OML or the Open Meeting Clause). The Supreme Court granted special action relief nullifying the removal after briefing and argument had concluded in this matter.

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Before the Governor's groundless removal, and prompted by a small but vocal group of partisan activists, Attorney General Thomas Horne conducted an investigation of the Commission using the OML's statutory powers to compel testimony and documents. That investigation, and the peculiarly public manner in which the Attorney General conducted it, threatened the independence of the Commission, impeded its work, and thwarted the will of the voters.

The Commission therefore went to the courts for relief, asserting that Proposition 106 and separation of powers principles barred application of the OML to the Commission. If the Attorney General believed that commissioners were not complying with the constitution's open meeting requirement, he could – like any citizen – bring a civil action for special action relief.

The trial court (Judge Fink) agreed with the Commission, confirming that application of the OML would subject the Commission to interference from the very people Proposition 106 intended to insulate against: the legislature and the executive. Moreover, in nullifying the Governor's removal of the Chair, the Arizona Supreme Court further confirmed that the Constitution's limits on government officials are real and enforceable. This Court should do likewise and affirm.

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STATEMENT OF FACTS AND CASE

I. Arizona Voters Created the Independent Redistricting Commission To End Incumbent Self-Interest in Redistricting and Bring Independence to the Redistricting Process.

For most of Arizona's history redistricting was handled like other legislation subject to the governor's veto. *See Goddard v. Babbitt*, 536 F. Supp. 538, 541 (D. Ariz. 1982) (describing governor's veto of redistricting bills).

In 2000, Arizona voters exercised their power to amend the Constitution and passed Proposition 106, creating the Commission to remove the legislative task of redistricting from the control of the political branches and to place it into the hands of an independent group of citizen-volunteers. The provisions creating and governing the Commission were added to the same article governing the House and Senate. *See* Ariz. Const. art. IV, pt. 2, §§ 1(3) – (23).

There was strong bipartisan support for Proposition 106, which passed by more than twelve percentage points.[2] Prominent supporters emphasized the extent to which ***independence*** was the driving purpose of the new commission.[3] The then-sitting Attorney General Janet Napolitano, for example, explained:

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[2] *See* Ariz. Sec'y of State, *State of Arizona Official Canvas: 2000 General Election – November 7, 2000* at 16 (Nov. 27, 2000), *available at* http://www.azsos.gov/election/2000/General/Canvass2000GE.pdf.

[3] *See generally* App. 1 (Proposition 106 Publicity Pamphlet) at 003-5 (listing arguments favoring the amendment).

> This initiative takes redistricting out of the hands of incumbents who too often draw district lines to protect their seats . . . . This initiative is fair to all Arizonans because it opens up the system to public scrutiny; it eliminates conflicts of interest by taking the process of redistricting out of incumbents' hands . . . .[4]

Others supporting the amendment echoed the importance of solving the "conflict of interest" that existed when incumbent politicians were in charge of drawing new voting lines.[5]

An overview of the provisions governing the Commission underscores the extent to which independence is the Commission's reason for existence. The qualifications for applicants, the application screening process through the Commission on Appellate Court Appointments, the prohibitions on commissioners' political involvement before and after their terms, the limited role of other State officials in Commission operations, and the prohibition against considering incumbent candidate residences during the redistricting process all protect the Commission's independence from politicians. Ariz. Const. art. IV, pt. 2, §§ 1(3) – (5), (10), (13), (15) – (20).

Although Proposition 106 goes to great lengths to insulate the Commission from improper influence, the Constitution also includes uniquely tailored checks on the commissioners. As a protection against serious misconduct, the

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[4] *Id*. at 004.

[5] *Id*. at 003.

Constitution includes a limited removal provision authorizing the Governor to remove a commissioner for specific legal cause, with the concurrence of two-thirds of the Senate. *Id*. § 1(10).

And to ensure honesty, integrity, and transparency in the redistricting process, the Constitution includes a tailored, constitutional mandate of openness applicable to the Commission only:

> Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting commission shall conduct business in meetings open to the public, with 48 or more hours public notice provided.

Id. § 1(12).

II. The Commission Is Independent and Open to the Public.

The present commission is made up of citizen-volunteers who have set aside literally hundreds of hours for the complex and contentious task of redistricting. They are not paid. They are dedicated citizens who have taken their obligation of independence and transparency seriously.

Before and after promulgating draft maps, the Commission received input from elected officials, the Legislature, business leaders, and ordinary citizens at public meetings throughout the state. The Commission has referenced the OML on its meeting agendas and observed certain procedures often followed by bodies subject to judicial enforcement of the OML.

During the redistricting process, the Commission held 123 meetings open to the public in cities and towns big and small, from Phoenix to Tuba City. The Commission makes live and archived video and/or a transcript available for every meeting available via its comprehensive website, www.azredistricting.org. At meetings related to mapping, the Commission's agenda generally included time for any member of the public to address the Commission on the record, including making personal presentations of mapping proposals.

III. Unprecedented Attacks on This Commission and Its Work Illustrate the Need for Independence from Partisan Incumbents.

As of this appeal, the Commission has concluded its most significant work and has submitted final maps for approval at the Department of Justice.[6] That this occurred at all is remarkable given the intense opposition the Commission faced. Although the issues on appeal are substantially questions of law, they cannot be considered outside the context of what actually occurred. The Commission could not have completed its work if the trial court and the Arizona Supreme Court had not acted to affirm the independence of the Commission and the rule of law. Abstract principles like separation of powers do not exist in a vacuum; the events of this redistricting cycle show why.

[6] *See* www.azredistricting.org/default.asp (last accessed April 12, 2012). The Congressional map received approval on April 9, 2012.

A. The Commission's Choice of a Mapping Consultant Ignites a Political Firestorm.

To perform the complicated work of drawing districts in conformity with state and federal requirements, the Commission hired staff and consultants – including a mapping consultant. *See* Ariz. Const. art. IV, pt. 2, § 1(19).

Before selecting a consultant, the Commission solicited proposals, conducted interviews, and held numerous public meetings.[7] The names and interviews of the mapping consultants were public and the Commission received extensive public feedback.[8] During the public interviews, the Commissioners questioned applicants on a number of issues, including political bias and the protections they would employ to ensure a transparent mapping process.[9]

On June 29, 2011, the Commission voted 3-2 to hire Strategic Telemetry as the mapping consultant.[10] The very next day, organized opposition began a campaign of attacks on Strategic Telemetry, the Commission, and Chair Colleen

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[7] App. 10 (AIRC's Separate Statement of Facts ("AIRC SSOF")) at ¶¶ 19, 23.

[8] *See, e.g.*, 6/24/2011 Meeting Minutes, *available at* http://azredistricting.org/docs/Meeting-Info/Minutes-062411.pdf (las accessed on April 12, 2012).

[9] *See* 6/24/2011 Meeting Transcript, *available at* http://azredistricting.org/docs/Meeting-Info/Transcript-062411.pdf (las accessed on April 12, 2012).

[10] App. 10 (AIRC SSOF) at ¶ 24.

Mathis.[11] The transcript of the Commission's public meeting on June 30, 2011 reflects roughly 90 pages of public comments criticizing the selection of Strategic Telemetry and the conduct of Chair Mathis.[12] Despite efforts to address concerns, the public attacks only intensified in the days and weeks that followed.

B. The Attorney General Launches an Investigation That Threatens The Independence and Work of the Commission.

On July 21, 2011, Attorney General Horne issued a press release announcing an investigation of the Commission for alleged violations of Arizona's procurement rules and the statutory OML.[13] The launch of the investigation coincided with the beginning of the Commission's most intense period of work involving dozens of public meetings throughout the State.[14]

Commission counsel requested information supporting the investigation.[15] The Attorney General responded with numerous documents and asserted that the

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[11] *Id*. ¶ 25. This opposition built upon existing disapproval of the Commission's selection of counsel.

[12] Transcript available at http://azredistricting.org/docs/Meeting-Info/Transcript-063011.pdf (last accessed on April 12, 2012).

[13] App. 2 (7/21/11 Attorney General press release). Attorney General Horne later announced that his investigation would not focus on the procurement code. *See* App. 7(Excerpt of 10/3/2011 Transcript of OSC hearing) at 24:7-9.

[14] App. 4 (8/15/2011 O'Grady letter to Attorney General) at 2-3 (describing timing of investigation and efforts to cooperate).

[15] App. 6 (AIRC Compl.) ¶ 54.

investigation was being conducted "on his own initiative" pursuant to statutory authority under the OML.[16] The documents were news/gossip clips from *The Yellow Sheet Report*, blog posts, and e-mails and letters from citizens raising frustrations with the Commission, Strategic Telemetry, and complaints (often intensely personal) about Chair Mathis.[17]

The e-mails are nakedly partisan appeals to an audience the writers see as sympathetic to their efforts to oppose the hiring of Strategic Telemetry and to remove Chair Mathis. Among the materials disclosed were the following messages, all dated between June 30 and July 9, 2011:

- "It is vital that your office look into the make-up of the redistricting commission. The so called 'independent' commission chairwoman is anything but independent . . . . She must be replaced . . . . And it would be nice if you could do something about this radical, progressive democrat mapping company this democrat commission hired . . . ."

- "REMOVE COLLEEN MATHIS NOW PLEASE!"

- "Please file an injunction under Article 4, of the AZ. State Constitution for [Colleen Mathis's] removal as chair of this commission immediately. It is critical an injunction for her removal be filed before the contract with the Washington, D.C. mapping firm is signed."

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[16] *See* A.R.S. § 38-431.06(A) (authorizing Attorney General or County Attorney to initiate OML investigation "on their own initiative"). App. 3 (8/9/2011 AG letter and enclosures).

[17] App. 3.

- "We need to take this lady out and replace her."

- "I urgently request that an injunction be issued preventing the contract to Strategic Telemetry and that Colleen Mathis be dismissed from the Commission and an individual be appointed who actually is an INDEPENDENT and also meets ethical standards."

- "Colleen Mathis needs to be removed as chair of the Independent Redistricting Commission . . . . Please use your influence or office to investigate and remove her as soon as possible."

- "Thank you for looking into the situation involving . . . Chairman Colleen Mathis and for getting back to me so quickly. I appreciate your sentiment on the issue and understand the limits of your office . . . . Attorney General Horne, you are aware as much if not more than anyone of the damage that can be done by having redistricting in the hands of individuals as well as contractors that have political agendas. I am sure you will do what you can to expose the lies of Ms. Mathis and correct the situation as much as you can."[18]

This supporting material contains not a single complaint supporting an allegation of an actual violation of the Open Meeting Law.[19]

[18] *Id*. at 025, 026, 029, 034, 042, 056, 067.

[19] *See id*. The sole references to open meeting requirements are two e-mails alleging generally that there were meetings "behind closed doors." *See Id*. at 070-75 (7/11/2011 e-mails from S. Bartlett and J. Merrill). And the only reference to the OML was in an e-mail sent ***after*** the Attorney General announced his investigation, and that message merely states that the writer is "deeply concerned . . . that the open meetings statutory requirements were not followed. *Id*. at 077 (7/27/2011 e-mail from C. Foster).

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C. The Attorney General Uses the Statutory Investigative Powers Granted in the OML to Wage a Public Campaign Against the AIRC.

Despite the absence of a complaint alleging an actual OML violation, the Attorney General issued Civil Investigative Demands ("CIDs") to all five commissioners.[20] The CIDs purported to require the production of documents and testimony under oath from all commissioners. *See* A.R.S. § 38-431.06(B)(3) (OML provision granting power to issue "written investigative demands" and to "[e]xamine under oath any person in connection with the investigation").

The statutory OML powers thus flip standard law enforcement rules, allowing the prosecutor power to issue compulsory demands without first having to make a showing to a neutral judge for a warrant or the like. Instead, the target of an OML investigation must defensively go to court to justify a refusal to comply with the investigation. *See* A.R.S. § 38-431.06(D).

The Commission objected to the CIDs because, among other reasons, the Attorney General's "statutory authority under the open meeting law does not extend to the Commission."[21] The Commission's position was ***not*** that it was unaccountable; rather, it was subject to the "constitutional open meeting

[20]CR 1 (Petition for enforcement) at Ex. 4.

[21] App. 5 (8/29/2011 O'Grady letter to AG) at 1.

requirements" which were enforceable like any other constitutional obligation via civil action for special action relief.[22]

The Commission also explained that its "overarching interest has always been that any legitimate concerns of [the AG's] Office be addressed fairly and efficiently and in a manner that respects the Commission's constitutional authority and responsibilities."[23] Two commissioners – Stertz and Freeman – volunteered testimony under oath on the condition that the Commission preserved any objections on grounds of legislative privilege.[24] Attorney General Horne attended Commissioner Stertz's interview in person. And in an August 29 letter detailing its objections, the Commission repeated its desire to "resolve any legitimate concerns about the openness of the Commission's processes."[25]

Attorney General Horne's response was to escalate the dispute in a very public manner. In a September 4 article, the New York Times quoted Attorney General Horne saying that the commissioners who had not yet testified under oath because of their concerns with the investigation's constitutionality were

[22] *Id*. at 2.

[23] App. 4 (8/15/2011 O'Grady letter) at 2.

[24] App. 6 (Compl.) ¶ 64.

[25] App. 5 (8/29/2011 O'Grady letter) at 5.

"stonewalling" and that "it didn't work in Watergate and it won't work now."[26] On September 7, his office sued in superior court to enforce the CIDs against commissioners Mathis, McNulty, and Herrera.[27] Attorney General Horne personally signed the petition.

The day after filing suit, Attorney General Horne asked supporters at a partisan gathering how many had read about him "going after the redistricting commission."[28] At the same meeting, he mischaracterized the testimony of commissioners Stertz and Freeman so that he could tell the crowd that he had discovered "a blatant violation of the Open Meeting Law."[29] He also boasted that his findings could be used as a basis to remove a commissioner.[30]

D. The Commission, Forced to Protect Its Independence, Sues for Declaratory and Injunctive Relief.

After it was clear that cooperation would not happen, on September 27 the Commission went to court. The Commission sought confirmation that it was

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[26] App. 6 (Compl.) at ¶¶ 6-7 and Ex. A at 2.

[27] CR 1.

[28] App. 6 (Compl.) at ¶¶ 66-67 and Ex. F.

[29] *Id.* ¶¶ 69-73. For example, Attorney General Horne stated that there was "testimony . . . that the Chairwoman had called them and said that she wanted a unanimous vote for Strategic Telemetry . . . She wanted to buy a vote." *See id.* ¶ 69. The testimony does not support this interpretation.

[30] *Id.* ¶ 74.

subject to the constitutional Open Meeting Clause, and that the Attorney General could not, consistent with separation of powers, use the compulsory investigative powers found in the statutory OML. The Commission also sought relief because the use of CIDs to compel testimony concerning commissioners' deliberations and legislative choices intruded on the legislative privilege, a privilege this Court recognized in *Arizona Independent Redistricting Commission v. Fields*, 206 Ariz. 130, 75 P.3d 1088 (App. 2003).[31]

The trial court later granted a motion to consolidate the Commission's complaint with the Attorney General's enforcement petition. The Attorney General moved for dismissal of the Commission's Complaint and both parties filed motions for summary judgment.[32]

E. The Court Disqualifies Attorney General Horne Under Ethical Rule 1.9.

Before consolidation, the court granted a motion to disqualify Attorney General Horne because he could not be adverse to the commissioners without violating Ethical Rule 1.9. The office had previously represented the Commission and advised the commissioners on the subject of open meeting and procurement

[31] *Id.* at ¶¶ 80-93.

[32] *See* CR 38 - 44.

requirements, and was taking legal action to enforce an investigation against the commissioners on the same subjects.[33] The disqualification is not on appeal.

F. Meanwhile, The Commission Continues Its Work Producing Draft Maps.

Notwithstanding the political firestorm over the hiring of Strategic Telemetry and the increasingly hostile investigation from the Attorney General, the Commission continued working diligently, in dozens of public meetings, to adopt draft maps on October 3 (congressional) and 10 (legislative), 2011.[34] As required in Proposition 106, after the Commission adopted the draft maps, it began a public-comment period involving meetings statewide at which the commissioners received substantial public comment. The draft maps – particularly the draft congressional map – further enraged the Commission's critics.

G. With the Attorney General's Investigation Stalled in Court, and Dissatisfied with the Draft Maps, the Governor Removes Chair Mathis, an Action the Supreme Court Nullifies.

While the cross-motions were pending and the public meetings about the draft maps were ongoing, Governor Brewer joined those criticizing the draft maps

[33] CR 48 (10/27/2011 Minute Entry).

[34] App. 10 (AIRC SSOF) at ¶¶ 43-47.

and the commissioners.[35] And on October 26, the Governor took the extraordinary step of giving "notice" of removal proceedings, alleging vaguely that the commissioners wrongfully conducted non-public deliberations and that the draft congressional maps did not, in her view, meet constitutional requirements.[36] On November 1, the Governor's office called for a Special Session to confirm the removal of Chair Mathis. The Senate convened the session, suspended its rules, and confirmed the removal in a party-line vote in just over an hour.[37]

The Commission again turned to the courts for protection from the political branches. After an accelerated briefing schedule and oral argument, the Arizona Supreme Court nullified the removal of Ms. Mathis as unconstitutional and ordered her reinstatement.[38] Although a full opinion is forthcoming, in a November 23 order, the Court explained that the Governor had not, "as a matter of law,

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[35] *See id.* at ¶ 47 and *see* http://azgovernor.gov/dms/upload/PR_100511_IRC.pdf (last accessed Apr. 12, 2012) (threatening to initiate removal proceedings if the Commission did not adjust the draft congressional map as Governor Brewer desired).

[36] 10/26/2011 Brewer letter available at http://azgovernor.gov/dms/upload/PR_102611_LetterCommissionersIRC.pdf (last accessed on April 12, 2012).

[37] App. 9 (Senate Vote report). Video is available at http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=9535 (suspending rules) and http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=9537 (voting).

[38] App. 11 (11/16/2011 Order).

identif[ied] conduct that provides a constitutional basis for removal."[39] Among other things, there was no allegation or finding of a "non-public meeting of a quorum" which would violate either the Open Meeting Clause or the OML.[40] The Court expressly refrained from deciding "whether the constitutional provision preempts any statutory Open Meeting requirements."[41]

H. The Trial Court Grants Summary Judgment in Favor of the AIRC.

Shortly after the Supreme Court nullified the removal effort, the trial court issued its ruling in this matter, granting summary judgment in favor of the Commission and enjoining any investigation against the Commission under the auspices of the statutory OML.[42] As to the State's Motion to Dismiss, Judge Fink ruled that any standing arguments were irrelevant because the issues presented were of "critical public importance," were "likely to recur," and were "sharply presented to the Court."[43]

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[39] App. 12 (11/23/2011 Order) at 2.

[40] *Id*. at 3.

[41] *Id*.

[42] App. 14 (2/16/2011 Final Judgment) and App. 13 (12/9/2011 Minute Entry).

[43] App. 13 at 2.

On the merits, the court concluded that "while openness was important [to the voters approving Proposition 106] as reflected by the inclusion of the Open Meetings Clause, more important was insulating the IRC from interference by the political branches."[44] Allowing application of the OML would subject the Commission to interference from the legislature and the executive, "specifically prosecutors such as the Attorney General and the various county attorneys, all of whom are empowered to investigate alleged Open Meeting Law violations. ***The threat of prosecution, even a baseless one, can be reasonably expected to intimidate its target***."[45] Beyond that, legislative immunity applied to the deliberation and communications concerning the choice of a mapping consultant – a choice that was a protected legislative act.[46]

The trial court therefore held that **(1)** the OML "does not apply to the IRC, which is governed instead by the open meetings language in Article IV," **(2)** the current investigation and CIDs were void, and **(3)** the "prosecutorial authority of the State" did not extend "beyond the authority possessed by any citizen of

[44] *Id*. at 4.

[45] *Id*. at 5 (emphasis added).

[46] *Id*.

Arizona to compel compliance by filing a special action."[47] The court entered a final judgment consistent with its ruling and the State appealed.[48]

[47] *Id*. at 5 and 6.

[48] App. 14 (12/16/2011 Final Judgment); CR 71(1/17/2012 Notice of Appeal).

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ISSUES PRESENTED

1. The "self-executing" constitutional provisions governing the Commission mandate a specific open meeting requirement applicable only to the Commission, do not expressly authorize legislative regulation of the Commission, and provide a limited gubernatorial removal power for serious commissioner misconduct. Ariz. Const. art. IV, pt. 2, §§ 1(10), (12), and (17). Did the trial court properly conclude that the Constitution prohibits application of the statutory Open Meeting Law, a scheme which has different requirements, threatens a wider range a penalties, and permits law enforcement to issue compulsory investigative demands?

2. In *Fields*, this Court held that the AIRC "commissioners . . . are cloaked with legislative privilege for actions that are an integral part of the deliberative and communicative processes utilized in developing and finalizing a redistricting plan," including actions involving consultants in some circumstances. 206 Ariz. at 139-140 ¶¶ 24, 30, 75 P.3d at 1097-98 (internal quotation marks and citation omitted). Attorney General Horne issued civil investigative demands inquiring into deliberations regarding the selection of a mapping consultant, a consultant critical to the ability to create a redistricting plan. Did the trial court properly conclude that enforcement

of the OML using CIDs would violate the commissioners' legislative immunity?

3. Does the Commission have capacity to seek a judicial declaration and related relief regarding its rights and obligations under the Constitution and the rights of other state officers in relation to the Constitution?

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STANDARD OF REVIEW

The Court should review *de novo* the trial court's legal conclusions and interpretation of pertinent statutes and constitutional provisions. *Heath v. Kiger*, 217 Ariz. 492, 494 ¶ 6, 176 P.3d 690, 692 (2008). The Court should also review *de novo* whether the trial court's entry of summary judgment was proper. *Espinoza v. Schulenburg*, 212 Ariz. 215, 216-17 ¶ 6, 129 P.3d 937, 938-39 (2006).

Although the Court should construe the facts in favor of the party against whom summary judgment was entered, *id*., the State did not provide any controverting statement of facts disputing the facts set forth in the Commission's Separate Statement of Facts. Consequently, the Court should deem the Commission's Separate Statement of Facts as undisputed and as admitted by the State. *See, e.g., Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. La. Hydrolec*, 854 F.2d 1538, 1545 (9th Cir. 1988) (holding that rule similar to Arizona's Rule 56(c) "serves as adequate notice . . . that if a genuine issue exists for trial, they must identify that issue and support it with evidentiary materials, without" relying on the judge to scour the record for factual disputes); *State v. Mecham*, 173 Ariz. 474, 478-79, 844 P.2d 641, 645-46 (App. 1992) (affirming summary judgment in part because defendant "did not produce admissible evidence, by affidavit or any other means, that controverted" the facts supporting summary judgment).

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ARGUMENT

I. The State's Elected Law Enforcement Officials May Not Use Statutory OML Powers to Investigate the AIRC Because the AIRC Is Governed By a Unique Constitutional Open Meeting Requirement.

Through Proposition 106, the voters of Arizona created an independent constitutional entity whose purpose is drawing Arizona's congressional and legislative districts. The resulting constitutional amendment demonstrates a desire for independence and insulation from improper interference from the political branches. *See* Ariz. Const. art. IV, pt. 2, §§ 1(3)-(23). Among the unique provisions in Proposition 106 is the Open Meeting Clause, which applies solely to the Commission. *Id*. § 1(12). The clause uses different words to impose different requirements than the generally applicable OML.

The unique text of the Open Meetings Clause, the structure and purpose of Proposition 106, and bedrock principles of separation of powers make clear that neither the Attorney General nor County Attorney may interfere with the commissioners' work by pursuing an investigation using the special statutory powers granted in the OML. *See* A.R.S. § 38-431.06. The Attorney General or County Attorney may, like any citizen, seek to enforce the constitutional Open Meeting Clause by bringing a civil action.

A. The Primary Purpose of Proposition 106 Was To Create an Independent, Co-Equal Constitutional Entity That Would Insulate Redistricting from the Political Branches.

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When interpreting the Arizona Constitution, the court's goal is "to effectuate the intent of those who framed the provision and, in the case of an amendment, the intent of the electorate that adopted it." *Heath*, 217 Ariz. at 495 ¶ 9, 176 P.3d at 693 (internal quotation marks and citation omitted). Although the text is always the best guide, to the extent there is any ambiguity in a provision, courts "may consider the history behind the provision, the purpose sought to be accomplished and the evil sought to be remedied." *Id*. (Internal quotation marks and citation omitted.) The text, structure, and history surrounding its enactment all demonstrate that the voters created the Commission to remove the task of redistricting from incumbent politicians and put it in the hands of an independent group of citizen-volunteers.

Nearly every provision is designed to limit the influence of incumbent politicians and to protect the Commission from interference. To list just a few:

- Applicants for the Commission cannot have held or run for public office for three years and, if selected, are ineligible to hold Arizona public office for three years after their service has concluded. Ariz. Const. art. IV pt. 2, §§ 1(3), (13).

- After leaders of the House and Senate select four of the five commissioners, the legislature's role in the mapping process is limited to making "recommendations to the independent redistricting commission by memorial or by minority report." *Id*. § 1(16).

- "The places of residence of incumbents or candidates shall not be identified or considered" in the mapping process. *Id*. § 1(15).

- To dispense with the need for the governor's signature, when the maps are completed the Commission is to "certify to the secretary of state the establishment of" the new districts. *Id*. § 1(17).

- To prevent the legislature from "hamper[ing] or shackl[ing]" the Commission's work, "[t]he provisions regarding [Proposition 106] are self-executing." *Id*. § 1(17); *see Crozier v. Frohmiller*, 65 Ariz. 296, 298-300, 179 P.2d 445, 447-48 (1947).

- To limit the power of the purse, the legislature is to "make the necessary appropriations" for the operations of the Commission and the Commission "shall have standing in legal actions regarding . . . the adequacy of resources." Ariz. Const. art. IV, pt. 2, §§ 1(18), (20).

- Although given limited fiscal oversight duties, employees of the Department of Administration are prohibited from influencing the district-mapping decisions of the Commission. *Id*. §§ 1(19), (22).

- Limiting the traditional powers of the Attorney General, the Constitution gives the Commission "sole authority" to decide who acts as counsel for the "people of Arizona in the legal defense of a redistricting plan." *Id*. § 1(20).

These features make the Commission significantly different from other constitutionally created bodies. Indeed, unlike almost every other constitutional entity, the Commission is not made expressly subject to legislative regulation and its provisions are self-executing. *Cf., e.g.*, Ariz. Const. art. XV, § 6 (Corporation Commission created by constitution but legislature "may prescribe rules and regulations to govern proceedings"); *Crozier*, 65 Ariz. at 298-300, 179 P.2d at 447-48 (holding that constitution's combination of specific rules for operation and

inclusion of "self-executing" clause indicated intent to avoid legislative interference).

Proposition 106's publicity pamphlet confirms that voters saw insulating redistricting from incumbents as the most significant purpose of the amendment. *See Heath*, 217 Ariz. at 496 ¶ 13, 176 P.3d at 694 (in the case of a voter-approved constitutional amendment, "courts may also look to the publicity pamphlet distributed at the time of the election" to help "determine the intent of the electorate").

In addition to the supporting argument from then-Attorney General Napolitano quoted above, numerous other dignitaries from across the political spectrum voiced support for the amendment. Ms. Napolitano's predecessor Grant Woods, joined by other prominent Republicans, said that "[b]y transferring redistricting responsibility from self-interested politicians to an independent citizen's panel, [Proposition 106] will generate more competition, more accountability and better government for all Arizonans."[49] Another prominent supporter wrote that "[a]llowing legislators [to] draw the lines is the ultimate conflict of interest."[50]

[49] App. 1 (Publicity Pamphlet) at 004.

[50] *Id*. at 003.

To be sure, transparency and openness were important; the amendment after all includes the Open Meetings Clause. But the text, structure, and history, make plain that the Commission's reason for being is its independence.

B. The Commission's Independence Does Not Render It Above the Law.

A consistent theme in the State's argument is that the Commission's assertions of independence are really a claim that it is "beyond the law" or "exempt from state law."[51] Not true.

Proposition 106 provides specific constitutional checks on the authority of the commissioners. The most significant check is that in cases of "substantial neglect of duty [or] gross misconduct in office," the Governor may remove a commissioner with approval of two-thirds of the Senate. Ariz. Const. art. IV, pt. 2, § 1(10). Although the removal provision is the only *penalty* prescribed in the Constitution, compliance with the Open Meetings Clause, or any other law governing the Commission, can be enforced via a civil action. In other words, the Commission has never asserted that it is immune or exempt from law.

The Commission's position (and Judge Fink's ruling) is a narrow one: the statutory OML does not apply because the voters opted to provide a different open meeting requirement for the Commission. The Open Meeting Clause is enforced

[51] *See, e.g.*, Opening Brief ("O.B.") at 11, 14, 16.

in a different way and violations bring different consequences than in the OML – differences that are designed to protect the independence of the Commission.

Thus, the State's slippery slope argument (at 16) that commissioners would "undoubtedly argue" that they are immune from the "Public Records Act and the conflict of interest statutes" goes nowhere. First, those provisions are not at issue. Second, if the Attorney General, or any other affected citizen for that matter, believed that the "conflict of interest statutes" were not being followed, that person could "commence a civil suit in the superior court." A.R.S. § 38-506(B). Within that neutral forum, the parties could litigate how the law applied to the Commission.

For the same reason, the State's contention (at 21) that the Commission must be subject to the OML because the Commission referenced the OML when going into executive session is not relevant. The Commission did not seek declaratory relief to litigate whether every one of its actions at more than one hundred public meetings have technically complied in every respect with the Open Meeting Clause, or whether it is wise for the Commission to refer to the detailed OML for certain of its procedures.[52] If the Attorney General (or the County Attorney)

[52] Judge Fink correctly noted that "[n]othing prevents the IRC from using the [OML] as persuasive authority for interpreting the Open Meetings Clause, as it apparently has done on occasion. It is not obligated to accept its guidance, however." App. 13 (12/9/2012 Minute Entry) at 5 n.7.

believes that the executive session on June 29 was not authorized under the Open Meeting Clause, then he could have brought a civil action to compel compliance through the courts.

The Commission has repeatedly stated its desire to follow the law. What the Commission will not do is submit to the strong-arm investigative tactics of incumbent, partisan law-enforcement officials.

C. The Open Meetings Clause and the OML Are Incompatible and Therefore the Constitutional Provision Alone Controls the Commission's Conduct.

The text and structure of the Constitution expressly and implicitly limit legislative power to enact laws governing the open meeting requirements applicable to the Commission. Although the State concedes that the terms of the statute and the Constitution are different, it nevertheless argues (at 12) that the Constitution and the OML can simultaneously apply to the Commission because the terms are "consistent and complementary." The State also circuitously argues that the statute can apply because the legislature intended for it to apply. The State's arguments are wrong.

1. Contrary to the State's Assertion, the Texts of the OML and the Constitution Are Not "Complementary."

When there is a conflict between a statute and the constitution, and the "language of the constitutional provision is plain . . . [a court] may look no further." *State v. Roscoe*, 185 Ariz. 68, 71, 912 P.2d 1297, 1300 (1996). Far from

being "complementary" as the State argues (at 12-13), Proposition 106 clashes with the OML in ways that make application of both unworkable.

In this case, Attorney General Horne purportedly launched his investigation to determine whether Chair Mathis violated the OML when she allegedly made a series of one-on-one telephone calls to other commissioners. Although no Arizona case has adopted it, previous attorneys general have opined that the OML's definition of "meeting" has expanded to embrace some form of this so-called "serial communications" theory. *See Ariz. Agency Handbook* § 7.5.2 (Ariz. Att'y Gen. 2011); *see also* A.R.S. § 38-431(4) (defining "meeting" to mean a "gathering, in person or through technological devices"); *but see Beck v. Shelton*, 593 S.E.2d 195, 198-200 (Va. 2004) (holding that a series of e-mails was not a "meeting" because a meeting requires "virtually simultaneous interaction").

The Open Meeting Clause, however, is narrower, requiring a public meeting only "[w]here a quorum is ***present***." Ariz. Const. art. IV, pt. 2, § 1(12) (emphasis added). The question whether three people could be "present" in a series of bilateral telephone calls is plainly different than deciding whether the same calls were a "gathering, in person or through technological devices" under the OML. A.R.S. § 38-431(4).

In addition, the two provisions differ markedly with respect to the scope of conduct that must occur at public meetings. The Constitution directs that a quorum

"shall ***conduct business*** in meetings open to the public." Ariz. Const. art. IV, pt. 2, § 1(12) (emphasis added). The OML in contrast, requires that "***[a]ll meetings*** of any public body shall be public meetings." A.R.S. § 38-431.01(A) (emphasis added). And a "meeting" includes much more than conducting business. In addition to "tak[ing] legal action," a "meeting" means "the gathering, in person or through technological devices, of a quorum . . . at which they discuss, propose or take legal action, including any deliberations." A.R.S. § 38-431(4).

Both cannot apply and the Constitution therefore controls. If both provisions applied, commissioners who scrupulously follow the Constitution's requirements could nevertheless be accused of failing to comply with distinct legislative requirements covering the same subject matter. Such a result is illogical, especially in light of the overriding purpose of Proposition 106 to prevent meddling from the political branches.

Beyond the Open Meetings Clause, Proposition 106 provides only one penalty for serious misconduct: removal for legal cause by the Governor with consent of the Senate. *See* Ariz. Const. art. IV, pt. 2, § 1(10). In contrast, the OML gives the Attorney General vast powers to seek penalties to punish violations of the OML, ranging from monetary fines to removal from office. A.R.S. § 38-431.07(A). The State's argument fails to even mention this conflict, much less explain how the sharply different provisions are "consistent and complimentary."

The § 1(10) removal sets high bars to removal to protect the Commission from undue influence from the political branches. And, although the drafters included the Open Meeting Clause, they did not make a violation of the clause by itself cause for removal. To allow the legislature to second-guess that choice by making commissioners subject to civil fines, attorneys' fees, and removal for OML violations would upset the balance struck in Proposition 106 between promoting transparency and ensuring independence. Unlike the generally applicable Article VIII impeachment, Proposition 106 is designed to be the exclusive means for removing a sitting commissioner for misconduct related to their work as a commissioner. *See Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 411 ¶ 13, 132 P.3d 1187, 1191 (2006) (stating that legislature has power to impose additional methods of removal of officers "unless [the] power is expressly or by implication precluded").[53]

Most concerning, Section 38-431.06 gives the Attorney General broad statutory enforcement powers that he would not possess otherwise. Proposition 106 sharply curtails the traditional authority of the office by giving the

[53] As discussed below, Proposition 106 restricts legislative power expressly and by implication. *Smith v. Arizona Citizens Clean Elections Commission* is also inapplicable because the legislator challenging a statutory removal had "agreed to abide by [the] terms" of the clean elections law, including the statutory removal provision, when he accepted public campaign financing. 212 Ariz. 407, 411 ¶ 14, 132 P.3d 1187 1191 (2006). No such thing occurred here.

Commission the "sole authority to determine whether the Arizona attorney general" will represent the state in redistricting matters. Ariz. Const. art. IV, pt. 2, § 1(20).[54]

And the State's argument (at 11-12) that the drafters of Proposition 106 should have expressly exempted the Commission from the OML and its investigatory powers fails: Section 38-431.06 ***did not exist*** when the proponents of Proposition 106 filed with the Secretary of State's Office. *Compare* App. 15 (printout of Secretary of State website showing 9/13/1999 as date of application) *with* 2000 Ariz. Sess. Laws 2nd Reg. Sess. Ch. 358 (stating governor approval of Section 38-431.06 on Apr. 24, 2000). By design, the independence-first text of Proposition 106 cannot coexist peaceably with the OML.

2. The Constitution Prohibits the Political Branches from Altering or Expanding the Commission's Duties Beyond the Specific Constitutional Mandate of Openness.

In addition to the incompatible textual provisions, the Constitution powerfully implies that the voters have divested the political branches of power to apply and enforce the OML against the Commission. "[A]ny exercise of legislative power is subject to the limitations imposed by the constitution. And just

[54] Attorney General Horne sought to represent the Commission but the Commission chose to hire outside counsel. (AIRC Meeting Transcript, May 10, 2011, at 21:13 – 37:21, available at www.azredistricting.org/docs/Meeting-Info/Transcript-051011.pdf.)

as no express grant of authority is required, there is no requirement that a limitation be express . . . . A limitation may be implied by the text of the constitution or its structure taken as a whole." *Citizens Clean Elections Comm'n v. Myers*, 196 Ariz. 516, 520-21 ¶ 14, 1 P.3d 706, 710-11 (2000) (citation omitted).

In *Myers*, the Supreme Court applied the long-established doctrine of implied limitations to invalidate a statute's expansion of "the duties of the Commission on Appellate Court Appointments" beyond what the Constitution explicitly and implicitly permitted. *Id*. at 522 ¶ 22, 1 P.3d at 712. The Constitution gave the appointments commission "but one function[,] the authority to screen and nominate" candidates for judgeships. *Id*. at 519 ¶ 8, 1 P.3d at 709. By adding statutory duties unrelated to the nomination of judges, the statute "violate[d] limitations implied by the constitution itself." *Id*. at 522 ¶ 20, 1 P.3d at 712.

Notably, the Court focused on the fact that the governing provisions "contain no express grant of power to the legislature to enlarge the function or scope of the Commission." *Id*. at 519 ¶ 8, 522 ¶ 21, 1 P.3d at 709, 712. This fact

was telling because the Constitution frequently provides that other constitutional entities may be regulated as "provided by law." *Id*. at 519 ¶¶ 8-9, 1 P.3d at 709.[55]

The Commission presents an even stronger case for application of the doctrine of implied limitations. First, it is the ***only*** constitutional body with its own, uniquely tailored constitutional Open Meetings Clause. That is, "[t]his is not a case of legislative enactment in the face of a silent constitution . . . the constitution is quite express." *Id*. at 522 ¶ 20, 1 P.3d at 712. The clause does not reference, parrot, or incorporate the OML. Instead, Proposition 106 is "self-executing," establishing that the voters intended to prevent the legislature from hampering or shackling the Commission's work. *Crozier*, 65 Ariz. at 298-300, 179 P.2d at 447-48.

Just as the legislature is not free to impose additional duties on the appointments commission, the legislature lacks authority to impose additional or conflicting open-meeting requirements beyond what is already specifically provided in Article IV's Open Meetings Clause. *Myers*, 196 Ariz. At 521 ¶ 16, 1

[55] And even when the Constitution does invite legislative regulation of a state entity, the power remains subject to the implied limitations in the Constitution. *See, e.g.*, *Tucson v. State*, __ Ariz. __, No. CV-11-150 (Ariz. April 6, 2012), Slip Op. at 11 ¶ 19 (Apr. 6, 2012) (holding that requirement that city charters be "consistent with, and subject to . . . the laws of the state" did not render cities subject to plenary control of legislature; cities retain autonomy with respect to matters of "local concern") (internal quotation marks and citation omitted).

P.3d at 711. ("Positive directions in a constitution contain an implication against anything contrary to them" (internal quotation marks and citation omitted).)

Second, the AIRC joins the appointments commission as one of the very few constitutional entities over which the Constitution does not expressly grant the legislature any law-making authority. *Compare* Ariz. Const. art. IV, pt. 2, §§ 1(3)-(23) (setting forth detailed procedures for the AIRC and making its provisions "self-executing") *with* Ariz. Const. art. XV, § 6 (Corporation Commission created by constitution but legislature "may prescribe rules and regulations to govern proceedings"), Ariz. Const. art. XI, § 3 (State Board of Education created, but must be conducted as "prescribed by law").

Third, as more fully described above, the political branches have an unusually limited role in the Commission's work – limitations put in place to curb the influence of incumbent politicians. In fact, the only mention of the Attorney General in Proposition 106 is one which specifically divests him of responsibilities he otherwise holds. *See* Ariz. Const. art. IV, pt. 2, § 1(20).

Viewed together, these features demonstrate that it would be wholly incongruous with the Constitution to subject the Commission to the broader OML or allow elected, partisan law-enforcement to use invasive statutory powers to investigate violations of that statute.

The State's response (at 10-11) reduces to a mere recitation of a general rule that a "commission or board mentioned in the Constitution is not granted implied or inherent powers apart from those expressly enumerated." The State's argument goes nowhere. First, the State relies exclusively on cases concerning the scope of powers of the Arizona Corporation Commission and the State Board of Education, two entities that the Constitution specifically makes subject to statutes. Second, the State fails to explain why it matters that the Constitution does not give the corporation commission or Board of Education "implied or inherent powers." This case does not ask the Court to determine what powers the Commission possesses. This case asks whether the text, structure, and purpose of Proposition 106 expressly and impliedly curtail the power of the political branches to interfere with the Commission's work by enacting and enforcing additional open-meeting requirements. The answer from *Myers* is emphatically ***yes***.

By enacting a specific, exclusive mandate of openness and by providing for enforcement of that mandate through a narrowly tailored removal provision, the voters specifically chose to keep the vast power of the partisan, incumbent Attorney General far away from the Commission. The facts of this case illustrate the wisdom of that choice.

3. Whether the Commission Falls Under the *Legislature's* Definition of a "Public Body" Subject to the OML Is Not Relevant.

The State's argument (at 7-9) that the terms of the statutory OML cover the Commission is also irrelevant. The Commission is, as the Opening Brief labors over, a "public body" as that term is defined in the OML. *See* A.R.S. § 38-431(6) (defining "public body" to include "all boards and commissions of this state"). If the legislature's voice were the only relevant one, then the Commission would plainly be subject to the OML. The legislature has in the last several days amended the OML to make this point explicit. *See* 2012 Ariz. Legis. Serv. Ch. 131 (H.B. 2807) (amending definition of "public body" to expressly include AIRC "except and only to the extent that specific constitutional provisions supersede this article").[56]

But the legislature's enactments are not the supreme law of Arizona. The Constitution is, and the "people reserve the power to propose . . . amendments to the constitution and to enact or reject such . . . amendments at the polls, independently of the legislature." Ariz. Const. art. IV, pt. 1, § 1(1). The people exercised their reserved powers when they passed Proposition 106, and the voters chose to give the Commission its own, distinct Open Meetings Clause that is not compatible with the OML. Finally, unlike with most every other constitutional

[56] Although this amendment is of questionable constitutional validity, its import is for another day as it is not yet in force and not applicable to this case. *See Cronin v. Sheldon*, 195 Ariz. 531, 538 ¶¶ 31-32, 991 P.2d 231, 238 (1999) (calling statutory preamble that sought to limit the judiciary's power "patently unconstitutional").

body, the framers did not include a provision that the Commission (like the corporation commission) would be subject to "other law." This Court should decline the State's invitation to write in such a provision.

4. That the Commission Has Referenced Provisions of the OML Does Not Change the Meaning of the Constitution.

Finally, the State urges the Court to consider the Commission's past references to OML provisions as "persuasive" evidence that the OML applies with full force to the Commission.[57] To support its position, the State notes (at 20) the general rule that an agency's "long-standing interpretation of its implementing authority is persuasive." The State then goes on to list several times when the Commission has referred to certain provisions in the OML to support going into executive session, for example.[58]

But the Commission cannot change the text, structure, and purpose of the Constitution. The Constitution may not be amended through a course of dealing.

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[57] *See* O.B. at 19-21.

[58] Most commonly, public bodies go into executive session to protect the attorney-client privilege. Although the OML provides for this, courts in other states without such an express authorization have held that open meeting statutes do not prohibit public bodies from having confidential attorney-client communications. *See, e.g., Okla. Ass'n of Mun. Attorneys v. State*, 577 P.2d 1310, 1315 (Okla. 1978); (*see also* App. 13 (12/9/2011 Minute Entry) at 3 n.4.) As Judge Fink noted, "[i]t would be incongruous for the voters to have given the IRC the right to hire counsel . . . but not the concomitant right to receive confidential advice from that counsel." (*Id*.)

Cf. Ariz. Water Co. v. Ariz. Dep't of Water Res., 208 Ariz. 147, 154 ¶ 30, 91 P.3d 990, 997 (2004) (deference to agency interpretation only appropriate when language is unclear). More importantly, the cases the State cites concern interpretation of statutes, not the constitution, a task which falls to the courts. *See Forty-Seventh Legislature v. Napolitano*, 213 Ariz. 482, 485 ¶ 8, 143 P.3d 1023, 1026 (2006) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). For all the reasons discussed above, the voters amended the Constitution with the clear purpose to establish an independent commission subject to its own, distinct constitutional mandate of openness.

Furthermore, the Commission's references to the OML are not from a formal opinion that the OML is enforceable against the Commission. The Commission never had occasion to formally consider whether the OML could constitutionally apply and be enforced against it. *See Blevins v. Gov't Emps. Ins. Co.*, 227 Ariz. 456, 462 ¶ 24, 258 P.3d 274, 280 (App. 2011) (refusing to defer to agency interpretation because the agency had merely issued "advisory" policy statements).

Finally, the Commission "is not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation." *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). An "agency is not disqualified from changing its mind." *Id*. (internal quotation marks and citation omitted). Quite

simply, the OML provides a useful and permissible reference in certain respects. In referring to the OML, the Commission never evinced an intent to subject itself to the harassing, interfering investigations that have occurred here.

D. Separation of Powers Principles Preclude Application of the OML's Prosecutorial Investigative Powers and Penalties Against the Commission.

Even if some of the regulatory measures in the OML could apply to the Commission consistently with Proposition 106, basic principles of separation of powers prohibit the use of the enforcement and penalty provisions against the Commission – the statutory provisions which purportedly authorized the Attorney General's aggressive, public investigation in this case.

1. The Commission Is a Uniquely Independent Constitutional Entity That Is Entitled to Judicial Protection from Encroachment by the Executive.

Article III of the Arizona Constitution provides that "[t]he powers of the government of the state of Arizona shall be divided into three separate departments . . . and, except as provided in this constitution . . . no one of such departments shall exercise the powers properly belonging to either of the others." In the context of redistricting, the Commission ***is*** the legislative branch. The Commission's charter is in Article IV, the same article establishing the House and Senate. Consequently, the Commission is due the same respect for the boundaries of its powers as is any other branch of government.

The Arizona Supreme Court already held as much in *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*. There, the Court held that the Commission "acts as a legislative body" whose "redistricting plan receives the same deference as [the Court] afford[s] to other legislation." 220 Ariz. 587, 594-95 ¶¶ 19-22, 208 P.3d 676, 683-84 (2009). In fact, the Court itself was careful to limit its own review of redistricting work, noting that "the commissioners perform legislative tasks of the sort [the Court] make[s] every effort not to pre-empt." *Id*. at 596 ¶ 28, 208 P.3d at 685. The Attorney General did not discharge his duties with the same caution, putting the power the Constitution reserves to the Commission at risk.

2. The Attorney General's Investigation and the Threat of the Penalties Available under the OML Violated the Separation of Powers.

Allowing the Attorney General – a partisan elected incumbent – to use the OML's investigative powers would invite the executive branch to interfere with the legitimate functions of the Commission. If permitted to use the OML as a sword, the Attorney General could, as he did in this case, seek to compel testimony and production of documents whenever he disagreed with the Commission's decision or sought to please politically active supporters bent on influencing the Commission's work.

The commissioners are not professional politicians; they are unpaid, citizen-volunteers who must navigate the contentious redistricting process. The initiation of a compulsory investigation along with threats of removal and other penalties creates an improper "coercive influence" over the volunteer commissioner's conduct in the redistricting process. *See Woods v. Block*, 189 Ariz. 269, 277, 942 P.2d 428, 436 (1997) (describing the level of "coercive influence" as a factor in determining whether one branch has unconstitutionally usurped the powers of another).

Although no case is directly on point, several courts have applied separation of powers principles to limit enforcement of open meeting statutes. *Hughes v. Speaker of the N. H. House of Representatives* is particularly instructive. 876 A.2d 736 (N.H. 2005). There, the plaintiff complained that members of the legislature had violated New Hampshire's statutory open meeting law ***and*** the state's constitutional openness requirement. *Id*. at 739.

After surveying cases nationwide, the court held that whether the legislature violated the statute was not a justiciable question. *Id*. at 744. Although the terms of the open meeting law applied to the legislature, the court could not enforce them without impermissibly encroaching on the legislature's prerogative to "adopt its own rules of proceedings." *Id*. at 746. *See also Abood v. League of Women Voters of Alaska*, 743 P.2d 333, 338 (Alaska 1987) (refusing, on separation of

powers grounds, to enjoin a violation of statutory open meeting law because to do so would put judiciary "in direct conflict with the legislature's constitutionally authorized rulemaking prerogative"); *Ozanne v. Fitzgerald*, 798 N.W.2d 436, 440 (Wis. 2011) (citing separation of powers concerns and declining to "review the validity" of legislative procedure under open meeting statute "in the absence of constitutional directives to the contrary").

The New Hampshire Supreme Court did not, however, shy away from considering the constitutional openness provision. *Hughes*, 876 A.2d at 747. Although enforcement of the statute was non-justiciable, it was the court's "duty to interpret constitutional provisions and to determine whether the legislature has complied with them." *Id*. *Hughes* thus supports the Commission's claim that separation of powers principles protects it from the OML's enforcement and penalty provisions even though the Commission remains fully accountable for compliance with the constitutional Open Meetings Clause.

The State mischaracterizes *Hughes* to minimize its significance. The State asserts (at 17) that *Hughes* merely held that when a statute is under constitutional review, a court will not consider "constitutional defect in the proceedings leading to its final passage." (*Id*.) That is not what *Hughes* stands for. The Court in *Hughes* was asked to decide whether the actions of certain legislators in pushing through a bill were lawful under a statutory open meeting law or a constitutional

"right to know" provision. 876 A.2d at 742 (describing claims). The Court would not consider the statutory claim for separation of powers reasons, but the Court ***did consider*** the constitutional claim on its merits. *Id*. at 751-52. The judgment below strikes precisely the same balance as *Hughes*. The Commission is subject to its constitutional mandate of openness and any citizen with standing could compel compliance through the courts.[59] But the investigation and enforcement provisions of the OML cannot apply without risking encroachment of the Commission's power and necessity to be free from influence from incumbent elected officials.

Furthermore, the State's discussion (at 15-16) of *Star Tribune Co. v. University of Minnesota Board of Regents*, 683 N.W.2d 274 (Minn. 2004), is distinguishable on several grounds. The case did not involve a constitutional mandate of openness like the Commission's – the claim was for wholesale exemption from ***any*** open meeting law. *Id*. at 284-85. The separation of powers claim here is much narrower: the IRC "cannot be investigated [or punished] by the Attorney General using his general OML authority."[60]

And, although the Board and University enjoyed a measure of constitutional "autonomy" over university issues, it was equally clear that a statute would apply so long as it was "not an intrusion into the internal control and management of the

[59] App. 14 (12/16/2011 Final Judgment) at ¶ 1.b.

[60] CR 40 (10/19/2011 AIRC MSJ at 11.)

University." *Id*. at 291 (internal quotation marks and citation omitted). The Court held that the openness requirements did not so intrude because they merely impacted how the Regents "interfaced" with the outside world. *Id*. at 286. The intrusion in this case is quite plain: when the Attorney General used the OML's investigation powers to threaten penalties, including removal, the Attorney General chilled the independence of the commissioners who were under attack and compromised the ability of the Commission to complete its constitutional work drafting maps free from partisan influence.

3. The State's Remaining Arguments Regarding Separation of Powers Lack Merit.

The State contends (at 17-18) that the court erred by ruling that "compliance with Arizona Open Meeting Law is political interference." The State's argument both misreads the trial court's order and ignores the reality of this case.

The trial court did not conclude that compliance with the technical provisions of the OML would be political interference. The court did rule, and quite rightly, that application of the OML would mean that (1) the legislature could interfere by simply passing amendments directed at the Commission; and (2) the Attorney General could interfere by initiating unchecked, compulsory investigations under the OML.[61]

[61] App. 13 (12/9/2011 minute entry) at 4-5.

The Commission's constitutional integrity is threatened when, without neutral oversight, an incumbent, elected law enforcement official can on his "own initiative" issue compulsory investigative demands, as happened in this case. *See* A.R.S. § 38-431.06(A). Unlike in other law enforcement circumstances, the OML provides a judicial check only ***after*** the Attorney General or other official has already demanded testimony and the target refuses to comply. *See* A.R.S. § 38-431.06(D). Thus, although Section 38-431.06(D) gives courts power to, as the State admits (at 18), "dismiss actions undertaken for purely political motives," reliance on this after-the-fact protection is insufficient to vindicate the rights of the Commission and its members after the damage resulting to the redistricting process has been done through an illegal investigation. The mere fact of the investigation risks delegitimizing the Commission's redistricting work.

That a commissioner could refuse to comply, be forced into court to defend the refusal, and perhaps prevail does not undo the intimidation and harassment created by the very fact of the investigation. As Judge Fink readily recognized, even a baseless investigation will often intimidate its target.[62] *See also Polaris Int'l Metals Corp. v. Ariz. Corp. Comm'n*, 133 Ariz. 500, 507, 652 P.2d 1023, 1030 (1982) ("[I]f an administrative agency's investigation becomes a tool of harassment and intimidation rather than a means to gather appropriate information,

[62] *Id.* at 5.

the appropriate court may intrude and stop the incursion into the constitutional liberties of the parties under investigation."); *see also, e.g.*, *Carrington v. Ariz. Corp. Comm'n*, 199 Ariz. 303, 305 ¶ 9, 18 P.3d 97, 99 (App. 2000) ("[t]he [Arizona Corporation] Commission may not act unreasonably and may not use its investigatory powers to 'harass, intimidate, or defame' a business.").

II. The Superior Court Correctly Held that Even if the OML Applies to the Commission, the Investigative Demands Issued by the Attorney General Invade the Commissioner's Legislative Privilege.

Legislative immunity exists "to prevent intimidation by the executive." *United States v. Johnson*, 383 U.S. 169, 181 (1966). The doctrine recognizes that our scheme of government depends upon the independent functioning of the branches of government, and that courts should not generally "inquire into the motives of legislators." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (internal quotation marks and citation omitted); *see also Gravel v. United States*, 408 U.S. 606, 624 (1972). Thus, legislative immunity bars both criminal and civil liability for legislative acts and the immunity includes a testimonial and evidentiary privilege. *Fields*, 206 Ariz. at 138-39 ¶¶ 20-24, 75 P.3d at 1096-97. The legislative privilege extends beyond the witness stand and courtroom to protect generally against disclosure of documents and testimony. *See id*. at 140-41 ¶ 31 & n.10, 75 P.3d at 1098-99 & n.10 (citing *Marylanders For Fair Representation, Inc v. Schaefer*, 144 F.R.D. 292, 297 (D. Md. 1992)).

The State concedes (at 22) that the commissioners hold legislative privilege when performing legislative functions. Indeed, this Court held that the commissioners "are cloaked with legislative privilege for actions that are 'an integral part of the deliberative and communicative processes' utilized in developing and finalizing a redistricting plan, and 'when necessary to prevent indirect impairment of such deliberations.'" *Id*. at 139 ¶ 24, 75 P.3d at 1097 (citing *Gravel*, 408 U.S. at 625).[63]

The Attorney General's CIDs therefore implicated the commissioners' legislative privilege to the extent the CIDs sought to compel testimony regarding the commissioners' "legislative acts" and the "deliberative and communicative processes" integral to those acts. *See id*.

A. The Commission's Choice of a Mapping Consultant Is Legislative, not Administrative, and Is Therefore Covered by Legislative Immunity.

The Superior Court correctly held that "the choice of a consultant is a legislative, not an administrative act," and "[t]he 'deliberative and communicative processes' involved in choosing the consultant are therefore necessarily

[63] *See also Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 594 ¶ 18, 208 P.3d 676, 683 (2009) (approving the *Fields* court's functional approach to whether the Commission is a legislative body).

privileged."[64] The ultimate purpose of the Commission is to draw congressional and legislative maps for Arizona's elections. *See* Ariz. Const. art. IV, pt. 2, § 1(14). But the voters recognized that the citizen-volunteer commissioners likely cannot perform this technical, complex, and diverse work alone.[65] The voters specifically empowered the Commission to hire staff, consultants, and attorneys. Ariz. Const. art. IV, pt. 2, § 1(19). Given the importance of the consultants to the Commission's legislative work, it is not surprising that this Court has already established that the "acts of independent contractors retained by that legislator that would be privileged legislative conduct if personally performed by the legislator" are also privileged when performed by the contractors. *Fields*, 206 Ariz. at 140 ¶ 30, 75 P.3d at 1098.

By the State's own admission, this investigation seeks to inquire into considerations and deliberations integral to the mapping work of the Commission under the auspices of an OML investigation. The Attorney General's original Petition for Enforcement ("Petition") sets forth at length the Attorney General's theory about how the commissioners deliberated or negotiated over one of the first decisions of significance in the mapping process – the decision to retain Strategic

[64] App. 13 (12/9/2011 Minute Entry) at 5.

[65] App. 10 (AIRC's SSOF) at ¶ 18.

Telemetry as the Commission's mapping consultant.[66] The State's investigation demands documents and testimony from commissioners about these deliberations – deliberations requiring the commissioners to consider and decide upon the merits of various approaches to map-drawing presented by the mapping consultant candidates.[67] The purpose for which the Commission exists is to draw and defend Arizona's redistricting plan. The Commission could not fulfill its constitutional duties without its mapping consultant – a consultant who, while controlled and directed by the commissioners, clearly has "meaningful input" into the mapping process.[68] Therefore, the State's inquiry is not into an administrative decision akin to the hiring or firing of a single employee, but a policy determination having prospective consequences. The potential significance of the decision, after all, spurred the complaints prompting the Attorney General's investigation.

Moreover, the CIDs specifically contemplate inquiry into "the motivation" for legislative acts. *Id.* at 137 ¶ 17, 75 P.3d at 1095. For example, Attorney General Horne wanted to inquire about how the commissioners decided to rate Strategic Telemetry and how Chair Mathis developed the prepared remarks she made on the record after the Commission awarded the mapping contract to

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[66] *See* CR 1 (Petition) at 9-11.

[67] App. 10 (AIRC SSOF) at ¶ 19.

[68] App. 6 (Compl.) at ¶ 36.

Strategic Telemetry.[69] Indeed, the Attorney General's theory that commissioners were "lin[ing] up votes" logically requires inquiry into the thoughts and deliberations of the commissioners and whether certain communications formed the basis of an ultimate legislative action.[70] This theory thus strikes at the core of what legislative immunity is intended to protect. *See Fields*, 206 Ariz. at 139 ¶ 24, 75 P.3d at 1097 (protecting "actions that are an 'integral part of the deliberative and communicative processes' leading to legislative action"); *see also Bogan*, 523 U.S. at 55 (noting that courts should not generally "inquire into the motives of legislators" (internal quotation marks and citation omitted)).

The selection of the consultant and the deliberations surrounding that consultant, are legislative acts and are within the legislative privilege. Thus, the enforcement provisions under A.R.S. § 38-431.06(B), are unconstitutional to the extent they empower the Attorney General or County Attorney to compel testimony of individual commissioners as related to a discretionary matter involving the Commission's selection of a mapping consultant.

B. Applying Legislative Immunity in the Context of the OML Does Not Make the Commissioners "Above the Law"; It Protects Their Ability to Deliberate and Decide Legislative Action.

[69] CR 1 (Petition) at 3-7.

[70] *Id*. at 4 (internal quotation marks omitted).

Without citation, the State argues (at 26) that legislative immunity does not place "boards and commissions . . . above the law. They must abide by the OML, just as they must abide by laws pertaining to bribery, public monies and conflict of interest statutes." As discussed above, this argument is a mere distraction. Only the OML is at issue, and the Commission has not asserted (and could not) that the commissioners are immune from all law.[71]

The State's argument fails to grasp the purpose and significance of legislative immunity in at least two ways. First, the State equates immunity from prosecution for alleged OML violations with immunity from the law itself. Legislative immunity does not render the law ***inapplicable***; it renders the government incapable of prosecuting a violation or compelling "testi[mony] about those activities, including the motivation for his or her decisions." *Fields*, 206 Ariz. at 137 ¶¶ 16-17, 75 P.3d at 1095.

Second, by lumping the OML with other laws, the State fails to consider the unusual nature of the OML in the context of legislative immunity. The OML is a

[71] The State's repeated references to bribery and other public corruption laws continues an unfortunate trend that began when the Attorney General publicly compared the actions of the commissioners to the criminal actors in the Watergate scandal. Obviously the Commission has no intention of asking this or any other court to overrule longstanding United States Supreme Court precedent regarding the Speech or Debate Clause. *See United States v. Brewster*, 408 U.S. 501, 528 (1972) (holding that Speech or Debate Clause did not immunize former Senator from bribery prosecution).

statutory scheme that regulates the process public bodies follow when making decisions. *See, e.g.*, A.R.S. § 38-431(4) (including discussing, proposing, deliberating, and taking legal action in definition of "meeting"). And the law authorizes investigation and punishment of noncompliance. A.R.S. § 38-431.06. In other words, the OML regulates and punishes conduct that is at the heart of legislative immunity and its constitutional source, the Speech or Debate Clause.

It is therefore not surprising that an investigation into OML violations would clash with legislative immunity. Both the OML and legislative immunity share a purpose of "preserv[ing] . . . the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 524 (1972). They pursue that goal, however, with dramatically different means: the OML enforces compliance through threats of civil fines and removal from office, A.R.S. § 38-431.06(D); legislative immunity represents a constitutional and historical judgment that "insuring the independence of individual legislators" will "protect the integrity of the legislative process." *Brewster*, 408 U.S. at 507.

In this case, legislative immunity applies and it therefore must control over the enforcement mechanisms of the OML, no matter how lofty the goals of that law. *See Mayhew v. Wilder*, 46 S.W.3d 760, 776 (Tenn. Ct. App. 2001) (holding that legislative immunity barred "courts from making the Legislature justify its decision to hold closed sessions"); *Wilkins v. Gagliardi*, 556 N.W.2d 171, 177

(Mich. Ct. App. 1996) (committee chairman immune from liability under state's open meeting law).

C. The State's Effort To Limit The Application of Legislative Immunity To the Commission Fails.

As this Court confirmed in *Fields*, application of legislative immunity depends on a "functional" analysis that turns on whether an official "acts in a legislative capacity." 206 Ariz. at 138 ¶ 20, 75 P.3d at 1096 (*citing Lake Cnty. Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 405 and n. 30 (1979)). The analysis does not "depend[] on the manner of selection of office" or the official's "particular location within government." *Id*. Apparently rejecting this long-standing law, the State cobbles together various cases to argue, among other things, that the immunity somehow applies in a more limited way because the Commission is not the Legislature. None of the cases the State cites support or even suggest a departure from the settled law, nor do they change that the legislative immunity prohibits punishment under the OML for actions related to the commissioners' choice of a mapping consultant.

The State cites (at 26) *Galati v. Lake Havasu City* for the proposition that non-legislature public bodies "have limited protection under the legislative immunity rubric." 186 Ariz. 131, 134, 920 P.2d 11, 14 (App. 1996). But that case concerns the scope of governmental entity immunity from tort liability under A.R.S. § 12-820.01; it has nothing to do with the constitutional "legislative

immunity rubric," nor does it involve any of the separation of powers issues in play here. (O.B. at 26.)

Fairness & Accountability in Insurance Reform v. Greene does not help the State's argument. 180 Ariz. 582, 589, 886 P.2d 1338, 1345 (1994). There, the Court held that it had jurisdiction to review whether the Legislative Council had submitted "an impartial analysis of initiative proposal" as required by statute. *Id*. In so holding, the Court concluded that the council's task was administrative in nature; "drafting of the analysis facilitated no goal or act set or adopted by the legislature." *Id*. As the dissent makes clear, the issue was whether the impartiality of the council's analysis was an unreviewable political question committed to a legislative body. *Id*. at 594-95, 886 P.2d at 1350-51 (Moeller, J. dissenting). *Greene* is simply not relevant to the scope of legislative immunity,[72] and in any event, the mapping consultant's whole purpose is to "facilitate[a] goal or act" of the Commission. *Id*. at 589, 886 P.2d at 1345.

The remaining cases cited by the State likewise have little or nothing to do with legislative immunity or the Attorney General's authority to issue CIDs and enforce the OML against AIRC commissioners. *See Tilson v. Mofford*, 153 Ariz.

[72] Surely, for instance, the Court in *Fairness & Accountability in Insurance Reform v. Greene* would agree that legislative privilege would prohibit compelling testimony regarding the reasons and deliberations surrounding the appointment of legislators to the council by Senate and House leadership. *See* 156 Ariz. at 588, 751 P.2d at 1344 (describing membership of council).

468, 470-71, 737 P.2d 1367, 1369-70 (1987) (construing scope of court's authority to review constitutionality of proposed initiative); *Mecham v. Gordon*, 156 Ariz. 297, 751 P.2d 957 (1988) (construing scope of court's authority to review constitutionality of Senate's impeachment procedures).

III. The Commission Has Capacity to Obtain a Declaration of Its Constitutional Rights.

In Arizona, standing is not a constitutional requirement for courts to have jurisdiction. *Sears v. Hull*, 192 Ariz. 65, 71 ¶ 24, 961 P.2d 1013, 1019 (1998). The trial court concluded that the "prudential" concerns with standing could be disregarded here because the case presents issues of "critical public importance" that are "likely to recur."[73] The State does not challenge that finding and has therefore waived any challenge to standing.

And questions of standing or capacity are irrelevant. Commissioners Mathis, McNulty, and Herrera joined in the Commission's motion for summary judgment in the parties' consolidated action.[74] Because the State did not contest the individual Commissioners capacity to sue, any consideration regarding the Commission's capacity would be academic. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 499, 917 P.2d 222, 228 (1996) (declining to consider shareholder's

[73] App. 13(12/9/2011 Minute Entry) at 2. In any event, the Commission no doubt would suffer a particularized injury as a result of a finding that it was subject to investigation and punishment under the OML.

[74] CR 41.

capacity after concluding that corporation had capacity); *cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) (indicating that when one petitioner has standing, standing of other petitioners is irrelevant).

As to the merits, the State contends at (27-29) that the trial court erred because the Commission lacks "capacity" to sue other than in the circumstances in which Proposition 106 expressly grants standing: cases involving the adequacy of resources or the redistricting plan. *See* Ariz. Const. art. IV, pt. 2, § 1(20).[75] In other words, notwithstanding the self-executing constitutional provision specifically providing the Commission the ability to bring a suit in its own name, the State argues that the Commission lacks power to call on the courts to declare its rights in relation to other state officers. The State's argument fails.

"Generally, capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate and ***typically is determined without regard to the particular claim or defense being asserted***." 6A Charles Alan Wright et al., *Federal Practice & Procedure* § 1559 at 441-42 (2nd ed. 1990) (emphasis added); *accord. Health Care Equalization Comm. of the Iowa Chiropractic Soc'y v. Iowa Med. Soc'y*, 501 F. Supp. 970, 975 (D. Iowa 1980);

[75] The State's argument uses puzzling logic. The State first contends (at 28) that the trial court "erred in equating standing to sue with the capacity to sue." In the next paragraph, the State argues that the "Commission's capacity" is established by and equivalent to the Constitution's grant of "standing."

Summerhouse Condominium Ass'n, Inc. v. Majestic Savs. & Loan Ass'n, 615 P.2d 71, 74 (Colo. App. 1980). The State concedes (at 28-29) that the people granted the Commission standing in certain legal actions." Ariz. Const. art. IV, pt. 2, § 1(20). If the Commission has "standing" to bring these claims, then it must also have capacity because this provision would be meaningless if the Commission could not come to court and litigate. The grant of standing with regard to certain claims presumes the existence of capacity in general. *See* Wright, *supra*, § 1559 at 441-42.

More generally, the State misinterprets Subsection (20)'s grant of standing in certain scenarios as being a ***limitation*** on the Commission's capacity to litigate in other cases. Read properly, Subsection (20) ***expands*** the Commission's standing beyond what would normally apply to areas in which its involvement might otherwise be questioned, such as a challenge to legislative appropriations. *See, e.g.*, *Kromko v. Ariz. Bd. of Regents*, 213 Ariz. 607, 613 ¶ 22, 146 P.3d 1016, 1022 (App. 2006) (suggesting that the legislature is immune from a challenge to its appropriations decisions) *affirmed in part and vacated in part by* 216 Ariz. 190, 165 P.3d 168 (2007). In fact, Subsection (20) even gives the Commission control over who may "represent the people of Arizona" in litigation over redistricting.

But even applying the State's cramped view of capacity, the State incorrectly assumes that a legal action "regarding the redistricting plan" is limited

to challenges to the final maps. This case, for example, concerns the rules governing the process the Commission follows when it meets to create the redistricting plan, and the scope of the legislative immunity that applies to the decisions made at those meetings. Surely a legal action intended to sort out what rules must be followed in creating the redistricting plan is an action "regarding the redistricting plan." Ariz. Const. art. IV, pt. 2, § 1(20).

Even if the Commission's capacity is limited to certain claims or defenses, the Commission had capacity to bring the claims in this case. "[C]apacity may be expressly conferred ***or inferred as a necessary implication*** from [the agency's] power[s] and responsibilit[ies], provided, of course, that there is no clear legislative intent negating review." *Silver v. Pataki*, 755 N.E.2d 842, 846 (N.Y. 2001) (quoting *Cmty. Bd. 7 of Borough of Manhattan v. Schaffer*, 639 N.E.2d 1, 4 (N.Y. 1994)) (emphasis added and internal quotation marks omitted).[76] "The power to bring a particular claim may be inferred when the agency in question has functional responsibility within the zone of interest to be protected . . . . This test is related, but not identical to, the traditional 'zone of interest' analysis employed in

[76] This Court has likewise recognized that capacity to sue can be implied by statutory provisions. *See Marlar v. State*, 136 Ariz. 404, 408, 666 P.2d 504, 508 (App. 1983) (holding that the Department of Economic Security had capacity, where no statute stated that DES had the authority to sue and be sued, but the Administrative Review Act provided for naming an agency as a defendant).

determining standing." *Id.* (quoting *Cmty. Bd. 7*, 639 N.E.2d at 5) (internal quotation marks omitted).

The claims brought by the Commission implicate its constitutionally protected zone of interest in remaining independent from political influence when drafting the redistricting plans. If the State is right that the Commission is powerless to go to court for relief, then the Attorney General (or a county attorney) alone would decide whether and how the Constitution affects application of the OML. For all the reasons discussed above, including that Proposition 106 is "self-executing," denying the Commission a right to seek relief here would undermine the intent of the voters to curtail the influence of elected officials over the Commission's work.

By ignoring that "capacity" may be inferred, the State is wrong when it contends (at 27) that a state agency only possesses capacity when "the legislature has so provided" in an "authorizing statute." The State cites *Kimball v. Shofstall*, 17 Ariz. App. 11, 13, 494 P. 2d 1357, 1359 (1972), to support its argument that an Arizona governmental entity must be provided the express power in order to sue and be sued. That case involved a challenge by a school superintendent to the State Board of Education's decision to revoke his certification. The court held that the State Board of Education was not a necessary party and therefore it was not a fatal defect to fail to name it as a defendant. *Id.* That case, however, did not

involve a claim by an independent state agency that its constitutional powers were being infringed by another state officer. Moreover, the court's conclusion that the Board was not an "autonomous body with the right to sue and to be sued," was dicta unnecessary to its holding that the Board was not a necessary party. *Id*. Additionally, unlike the Commission, the State Board of Education's duties are "such as may be prescribed by law." Ariz. Const. art. XI, § 3. Thus, the Constitution specifically empowered the legislature to define the scope and authority of the Board of Education's duties, including its capacity to sue or be sued. The legislature was provided no such authority over the Commission. Stated differently, the Commission ***is*** "an autonomous body."

Notably, the State cites no Arizona case where the defendant challenged the capacity of a state agency to initiate a declaratory judgment action involving the scope of that agency's legal rights, status or relations. An agency's assertion of lack of capacity as a defense implicates different concerns than presented here, where an independent constitutional body has sought court intervention to define its rights and responsibilities, and the rights of other state officials seeking to interfere with the operation of the Commission. There is no entity better suited to bring those claims than the Commission itself. The Court should affirm the denial of the State's motion to dismiss.

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CONCLUSION

Proposition 106 is carefully designed to ensure that the Commission in charge of creating a redistricting plan is independent and insulated from improper influence from the incumbent elected officials who have a personal stake in redistricting. The Commission is governed by its own constitutional open-meeting requirement which displaces the OML, rendering the OML's prosecutorial powers and penalties inapplicable to the Commission. The Court should therefore affirm the trial court's judgment enjoining the Attorney General's aggressive, unfounded, and very public investigation of the Commission pursuant to the inapplicable OML. This Court should also affirm the judgment because legislative immunity shields the commissioners from investigation and liability related to their legislative acts.

Respectfully submitted this 12th day of April, 2012.

By /s/ Joseph N. Roth

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