SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-004380
CV 2002-004882

01/16/2004

HONORABLE KENNETH L. FIELDS

CLERK OF THE COURT
D. Whitford
Deputy

FILED: 01/19/2004

ARIZONA MINORITY COALITION FOR FAIR RED, et al.

PAUL F ECKSTEIN

v.

ARIZONA INDEPENDENT REDISTRICTING COMMI, et al.

LISA T HAUSER

KENNETH A ANGLE
A DAVID BRAUN
RUSSELL H BURDICK JR.
DAVID J CANTELME
BRADLEY W CARLYON
MICHAEL A CARVIN PRO HAC VICE
JONES DAY REAVIS & POGUE
51 LOUISIANA AVE NW
WASHINGTON DISTRICT OF
COLUMBIA 20001-2113
BRYAN B CHAMBERS
MARK W DRUTZ
JUDITH M DWORKIN
WILLIAM J EKSTROM JR.
JESSICA G FUNKHOUSER
MAUREEN R GEORGE
JOSHUA GRABEL
RICHARD A HALLORAN
JOSEPH KANEFIELD
J IVAN LEGLER
RONALD M LEHMAN
MICHAEL S MANDELL
RICHARD M MARTINEZ
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RULING

Having heard, considered and weighed all of the testimony, admitted exhibits, arguments of counsel and written submissions of the parties, the Court makes the following Findings of Fact and Conclusions of Law pursuant to **Ariz. R. Civ. P. 52(a)**, which findings of fact shall constitute Conclusions of Law and which Conclusions of Law shall constitute Findings of Fact as may be appropriate.

This Court recognizes the extraordinarily complex task placed before the Commissioners of the Arizona Independent Redistricting Commission in creating Congressional and Legislative voting districts. These duties are made more difficult

when one considers that this is the first time Commissioners have been called upon to perform this duty in the State of Arizona.

FINDINGS OF FACT

Introduction

1. The primary issue presented to this Court is whether the Arizona Independent Redistricting Commission (the "Commission") complied with **Article IV, part 2, § 1(14)** of the Arizona Constitution when it adopted its congressional and state legislative district plans on Nov 9, 2001 and August 14, 2002 respectively and in particular whether the Commission complied with **Article IV, part 2, § 1(14)(F)**, which provides:

> "To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals."

2. For the reasons stated below, the Court finds that the Commission did not comply with **Article IV, part 2, § 1(14)** of the Arizona Constitution when it adopted its state legislative district plan on August 14, 2002 and that the adoption of that plan also violated **Article II § 13** and **Article IV, part 2, § 1(15)** of the Arizona Constitution.

The Parties

3. These actions were filed by Plaintiffs Arizona Minority Coalition for Fair Redistricting (the "Coalition"), Ramon Valadez, Peter Rios, Carlos Avelar, James Sedillo, Mary Rose Garrido Wilcox, Esther Lumm, Virginia Rivera and Los Abogados (the Legislative Plaintiffs); the Navajo Nation and Leonard Gorman; Mary Ann Arvizu, Rachael Longknife and Jennifer M. McClarty (the "Congressional Plaintiffs"); the Hopi Tribe; the San Carlos Apache Tribe and Velasquez W. Sneely, Sr.; and, City of Flagstaff.

4. The Plaintiffs all have a significant interest in the redistricting process and all have suffered palpable injury because of the Commission's actions in failing to favor the creation of competitive legislative districts for the following reasons:

a. The Coalition is an organization of individuals and Hispanic community groups from across the state of Arizona. **12/15/03 Trans. pp. 59:5 - 60:22 (Ramon Valadez); Ex. 3951; Ex. 5714 pp. 80 - 84.** The Coalition's members share the goal of creating the maximum number of state legislative districts that: (1) are politically competitive; and (2) protect the voting rights of minorities. **12/15/03 Trans. p. 60:9 - 22 (Ramon Valadez).** Having a large number of competitive legislative districts was and is very important to the Coalition because it creates "the opportunity to elect the highest number of legislators possible that represent minority interests, rather than having only a few districts that guarantee the election of a few minority legislators who lack the numerical voice in the Legislature to effectuate public policy that serves the interests of . . . minority communities." **Ex. 6043 p. 2; 12/15/03 Trans. pp. 60:23 - 61:6 (Ramon Valadez).**

b. Plaintiff Ramon Valadez is a qualified elector in Arizona, a resident of Pima County, a former State Senator representing legislative district 29 in Tucson, Arizona, and currently serves on the Pima County Board of Supervisors. **12/15/03 Trans. pp. 55:15 - 57:7 (Ramon Valadez); 12/15/03 Trans. p. 54:3 - 5 (Stipulation).**

c. Plaintiff Peter Rios is a qualified elector in Arizona and a State Senator representing current legislative district 23, which encompasses parts of Maricopa, Pinal and Gila Counties. ***E.g.*, 12/15/03 Trans. p. 54:3 - 5 (Stipulation); Ex. 245 p. 5.**

d. Plaintiff Carlos Avelar is a qualified elector in Arizona and a former State Representative who represented areas encompassed in the current legislative district 16 in Phoenix, Arizona. ***E.g.*, 12/15/03 Trans. p. 54:3 - 5 (Stipulation). Ex. 5714 p. 82.**

e. Plaintiff James Sedillo is a qualified elector in Arizona, a resident of Coconino County and a former State Representative of former legislative district 2, which encompassed parts of Coconino, Navajo, Yavapai, and Mohave Counties. ***E.g.*, 12/15/03 Trans. p. 54:3 - 5 (Stipulation).**

f. Plaintiff Mary Rose Garrido Wilcox is a qualified elector in Arizona and a County Supervisor in Maricopa County. ***E.g.*, 12/15/03 Trans. p. 54:3 - 5 (Stipulation).**

g. Plaintiff Esther Lumm is a qualified elector in Arizona, a resident of Maricopa County and she represents the Arizona Hispanic Community Forum. ***E.g.*, 12/15/03 Trans. p. 54:3 - 5 (Stipulation).**

h. Plaintiff Virginia Rivera is a qualified elector in Arizona, a resident of Pinal County and she represents the Pinal County Hispanic Community Forum. ***E.g.*, 12/15/03 Trans. p. 54:3 - 5 (Stipulation).**

i. Plaintiff Los Abogados is an Arizona corporation representing the interests of Hispanic attorneys, judges, law professors, law students and the general Hispanic community throughout Arizona.

j. The Coalition also includes numerous other individuals and members of organizations residing in numerous districts from across the State, including, but not limited to, legislative districts 2, 13, 14, 15, 16, 23, and 29. **Ex. 3951; 5714 pp. 81 - 85; 521; 12/15/03 Trans. pp. 59:12 - 60:2 (Ramon Valadez)**.

k. Mary Ann Arvizu is a resident of the city of Phoenix in Maricopa County. Rachel Longknife is a resident of the city of Peridot in Graham County. Jennifer M. McClarty is a resident of the city of Phoenix in Maricopa County. Each is a citizen of Arizona and a registered voter therein.

l. Plaintiffs Intervenors Hopi Tribe, San Carlos Apache Tribe and the Navajo Nation are federally recognized Indian tribes. Plaintiff intervenor Leonard Gorman is a resident of Window Rock, AZ, an Arizona elector and a member of the Navajo Nation. Plaintiff intervenor Velasquez W. Sneezy is a resident of San Carlos, AZ, an Arizona elector and a member of the San Carlos Apache tribe.

m. Plaintiff City of Flagstaff is an Arizona municipal corporation located within Coconino County. Arizona.

5. The defendant Commission is a public body of this State created by the passage of **Proposition 106** in the 2000 general election. Defendants Steven Lynn, Andrea Minkoff, Joshua Hall, Daniel Elder and James Huntwork are public officers of this State and are named in their official capacities as Commissioners of the Independent Redistricting Commission. The Commissioners and the Commission are hereinafter collectively referred to as (the "Commission"). The office of the Commission is located at 1400 West Washington, Suite B10, in Maricopa County, Arizona.

6. Defendant Arizona Secretary of State (the "Secretary of State") is a public officer of this State and is named as a Defendant in this action in her official capacity. The office of the Secretary of State is located at 1700 West Washington, in Maricopa County, Arizona. The Secretary of State is the public officer responsible for the conduct of legislative elections in Arizona.

7. The following parties have intervened as defendants in these actions: Arizonans for Fair and Legal Redistricting ("AFLR"), Dr. Jose Burell, Francis Ann Burell, Ephram Cordova, Craig Echeveste, Armando Gaypan, Jesse Hernandez, Gina Marcela, Al Pena, Al Rodriguez, Raul B. Romero, Raul R. Romero, Sr., Martin Sepulveda and Ilia Terrazas; the City of Prescott; the Town of Prescott Valley; the Town of Chino Valley; the City of Kingman; Lake Havasu City; Mohave County; Apache County; Graham County; Greenlee County; Gila County; Santa Cruz County; the Eastern Arizona Counties Organization; Jaime Abeytia, Tom Morales, Alonzo Morado, Francisca Montoya, and Richard G. Fimbres (the Abeytia intervenors) .

Proposition 106 and Its Adoption

8. In November 2000, Arizona voters approved an initiative known as **Proposition 106**, which amended Article IV, Part 2, Section 1 of the Arizona Constitution by adding **subsections 3 through 23**.

9. Proposition 106 established the Commission, which was given the responsibility for establishing new congressional and legislative districts every ten years.

10. Section 14 of Proposition 106 ("§ 14") requires the Commission to begin the mapping process for both congressional and legislative districts by creating "districts of equal population in a grid-like pattern across the state." *See* **ARIZ. CONST. art. IV, pt. 2, § 1(14).**

11. After creating districts of equal population in a grid-like pattern across the state, § 14 requires the Commission to adjust the grid to achieve ***all*** of the following goals:

a. Districts shall comply with the United States Constitution and the United States Voting Rights Act;

b. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

c. Districts shall be geographically compact and contiguous to the extent practicable;

d. District boundaries shall respect communities of interest to the extent practicable;

e. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;

f. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

ARIZ. CONST. art. IV, pt. 2 § 1(14).

12. The printed arguments in favor of **Proposition 106** in the 2000 Voter Publicity Pamphlet emphasized that a primary purpose of Proposition 106 was to insure the creation of competitive congressional and legislative districts. **Ex. 437.**

13. To prevent the Commission from constructing legislative or congressional districts to benefit particular incumbent office holders, Proposition 106 also specifically prohibits the Commission, which includes its agents and attorneys, from identifying or considering the places of residences of incumbents or potential candidates at any time during the redistricting process. *See* **ARIZ. CONST. art. IV, pt. 2, § 1(15).**

The Initial Phase of the Mapping Process

14. The Commission began its mapping process for legislative districts by creating "districts of equal population in a grid-like pattern across the state," which the Commission adopted as its first draft map and made public on June 7, 2001 (the "Grid

Map"). The Grid Map was created using Arizona's township, range, and section public land survey system and did not consider any of the redistricting criteria in **Article IV, part 2, § 1(14)**, except for equal population. **Ex. 142 p. 4 n.3; 11/25/03 Trans. p. 34:19 - 23 (Alan Heslop)**.

Adjustments to the Grid Map

15. After creating the Grid Map, the Commission was required to adjust the districts contained in that map in accordance with ***all*** of the redistricting goals set forth in Proposition 106. *See* **ARIZ. CONST. art. IV, pt. 2, § 1(14) (A - F).** This was the legal advice provided to the Commission by its counsel, Mr. Jose Rivera, in one of its initial organizational sessions. **Exhibit 5030, p. 17**.

16. In June 2001, the Commission held a number of public hearings throughout Arizona for the purposes of gathering ideas from the public regarding adjustments to the Grid Map. The Commission's Chairman, Mr. Lynn, on June 11, 2001, defined for the public "competitiveness" for redistricting purposes as, " …competitive, which means that either party or other parties would have an opportunity to prevail in such an election." **Ex. 447, p.33**. This is essentially the same definition used by the Commission's competitive expert, Dr. Michael McDonald, when he developed the measure used by the commission to evaluate competitiveness. Dr. McDonald during his testimony at trial defined "competitive district " as one in which each major party has an equal chance of winning and in which we don't know before the election who will win.

17. During the summer of 2001, the Commission also solicited views of the public through the use of a Citizen Input Form ("CIF") that was designed by the Commission's consultants, National Demographics Corporation ("NDC"), which asked citizens to "rank order" the importance of all of the non-federal constitutional

redistricting criteria, **except for competitiveness**. **Ex. 388 p. 2**; **11/25/03 Trans. p. 147:20 - 23 (Alan Heslop).** Competitiveness -- the redistricting criteria that Proposition 106 specifically provided was to be favored -- was specifically excluded from the CIF. **Ex. 388 (Citizen Input Form); Ex. 159 pp. 34:12 - 35:14.**

18. Based on the rankings stated on approximately 310 CIFs submitted to the Commission, NDC prepared charts showing how those citizens ranked the criteria listed on the CIF. **11/25/03 Trans. p. 192:13 - 24 (Alan Heslop); Ex. 5114**. Relying upon those charts, NDC informed the Commission that citizens ranked "communities of interest" as the most important redistricting criteria, and "city, town, and county boundaries" as the second most important redistricting criteria. **Ex. 100 pp. 7, 11.**

19. Based on the citizen criteria ranking information received from NDC, the Commission adopted three major "Arizona Units of Representation" ("AUR"), comprised of Native American reservations, Hispanic concentrated areas and keeping rural and urban areas separated. **11/25/03 Trans. p. 39:21 - 23; 219:21 - 24 (Alan Heslop).** The Commission also adopted the Cities of Scottsdale and Green Valley and the I-19 Corridor as AURs. NDC also recommended that the Commission consider 26 other AUR's based on public testimony from those areas. **Ex. 84; Ex. 162 pp. 17 - 28.** No other AUR's were adopted or even identified after August 2, 2001. **04/09/03 Commission 30(b)(6) Depo. p. 26:6 - 13.** Although AURs had many of the same characteristics of "communities of interest," the Commission argued that AURs were not communities of interest. **11/25/03 Trans. pp. 41:18 – 42:12 (Alan Heslop).**

20. In a report dated July 17, 2001, NDC recommended that the Commission make adjustments to the Grid Map in three stages. **Ex. 389**. NDC recommended that the Commission first engage in a "rough mapping stage." ***Id.* at 16.** After completion of this

stage, NDC recommended that the Commission engage in a "district development stage," during which the Grid Map would be adjusted to accommodate the criteria specified in § 14(A)-(E) of Proposition 106. ***Id.* at 17**. Finally, NDC recommended that the Commission engage in an "Adjustment and First Fine Tuning Stage," during which the Grid Map was to be adjusted "to achieve improved party competitiveness as required under Proposition 106." ***Id.* at 17**. NDC recommended that each of these three stages – including adjustments for competitiveness – occur *before* the Commission adopted and released for public comment its Final Draft Map. **11/25/03 Trans. p. 224:22 - 25 (Alan Heslop); 11/13/03 Trans. pp. 97:5 – 98:6 (Doug Johnson)**. NDC further recommended that following the Commission's adoption of a Final Draft Map, the Commission hold a second round of public comment on the new map. **Ex. 389 p. 18; 11/25/03 Trans. p. 224:5 - 25 (Alan Heslop).** The Commission refused to follow NDC's recommendations that it make adjustments for competitiveness before it adopted the Final Draft Map and released it for public comment.

21. On August 9, 2001, a majority of the Commissioners stated that the Grid Map should be adjusted to favor competitiveness before adoption of the Final Draft Maps. For example, as stated by Commissioner Hall on August 9, 2001, "We have to consider [competitiveness] at this phase or how else are others going to be able to provide to us intelligent, relevant feedback related to those issues?" **Ex. 163 p. 83:16 - 20 (Commr. Hall); *see* also Ex. 163 p. 85:1 - 9 (Commr. Minkoff); Ex. 163 p. 81:1 - 12 (Commr. Huntwork); Ex. 354**.

22. Members of the public also requested that the Commission adjust the Grid Map to favor competitiveness before adopting a Final Draft Map. **11/25/03 Trans. pp. 194:1 - 195:3; 223:1 - 6 (Alan Heslop).**

23. NDC contracted with Election Data Services ("EDS") to provide registration and election history data for use in making adjustments to the Grid Map. ***Id. at* 20:22 - 22:10 (Alan Heslop)**. Under the agreement, EDS was to provide the data to the Commission by the end of June 2001. ***Id. at* 161:15 - 164:6 (Alan Heslop); Ex. 4166**. However, EDS did not provide the competitiveness data to the Commission until on or about August 9, 2001, when the Commission received and reviewed voter registration data. **Ex. 163 p. 79:3 - 5 (Commr. Minkoff).**

24. On August 17, 2001, despite three Commissioners' previous statements recognizing that the Commission was required to consider competitiveness in adjusting district boundaries before releasing its Final Draft Map, Commission adopted its Final Draft Map without even considering, let alone favoring, competitiveness. **Ex. 142 at pp. 6, 13; Ex. 190 at p. 6:3 - 25; 9:3 - 25; Ex. 435 at pp. 147 - 152; 11/13/03 Trans. pp. 78:22 - 79:8 (Doug Johnson).**

The 2001 Adopted Plans

25. After adopting its 2001 Final Draft Maps, the Commission held its second - and final - round of statewide public outreach hearings in August and September of 2001.

26. Because the Commission did not consider competitiveness when it created the Final Draft Maps, the Commission never presented a plan that favored the creation of competitive districts at any of its public outreach hearings around Arizona. **Article IV, part 2, § 1(16)**.

27. On September 12, 2001, the Coalition submitted to the Commission a map known as the Coalition II map. **12/15/03 Trans. p. 66:20 - 25 (Ramon Valadez)**. According to Dr. McDonald, the Commission's competitiveness expert, the Coalition II

map contained ten (10) competitive districts using the Judge It analysis. **Ex. 53 p. 8 (Competitiveness Chart for the Coalition II map)**.

28. Although the Commission tested the Coalition II map and took some ideas for competitiveness from it, the Commission did not adopt the Coalition II map. Instead, on October 8, 2001, Commissioner Elder stated that the Coalition II map was "dead on arrival." **Ex. 169 p. 153:1 - 3.**

29. The Commission also held additional business meetings on September 24, 2001 and from October 8 through October 14, 2001. **Ex. 302.** In these meetings, the Commission considered a number of revisions to its Final Draft Map before adopting revised maps on October 14, 2001. **Ex. 168, 169, 170, 171, 172, 173, 174, 175.** After a few more minor changes on November 3, 2001, the Commission adopted what it intended as its final maps and submitted them to the Secretary of State on November 9, 2001. **Ex. 405 pp. 21 - 23.**

30. Before the Commission adopted the 2001 Adopted Legislative Plan, the Coalition urged the Commission to remove San Manuel and Oracle (mostly Hispanic communities) from District 26 in North Tucson and place those towns into District 23 for the purpose of increasing the Hispanic Voting Age Population of District 23. **12/15/03 Trans. pp. 82:19 - 83:17 (Ramon Valadez)**. The Commission refused to make this requested change.

The 2002 Federal Court Action

31. In January 2002, the Commission submitted the Congressional and Legislative maps to the United States Department of Justice ("DOJ") for preclearance under the Voting Rights Act of 1965, as it was required to do.

32. In May 2002, the Commission filed a lawsuit in the United States District Court for the District of Arizona entitled *Arizona Indep. Redistricting Comm'n v. Bayless* (CIV 02-807 PHX ROS May 2, 2002), seeking to establish legislative district lines only for the 2002 election. At that time, the DOJ had not finalized its preclearance review of the Commission's 2001 Adopted Legislative Plan.

33. On May 20, 2002, during the federal court proceedings, the DOJ objected to the Commission's 2001 Adopted Legislative Plan as having a retrogressive effect on Hispanic voting strength in at least three of five legislative districts (13, 14, 15, 23, and 29). **Ex. 4123**. In explaining its refusal to preclear District 23, the DOJ cited the Commission's removal of San Manuel and Oracle from District 23. ***Id.* at 4.** The DOJ reserved its harshest language for the Commission's treatment of District 23 when it said that "the removal of these two towns [San Manuel and Oracle] and the resulting drop in the Hispanic voting age population percentage, has raised concerns regarding the ability of the AIRC to establish that this action, which had a retrogressive effect, may have also been taken, at least in part, with a retrogressive intent." ***Id.* at 5**.

34. In response to the DOJ's objections, the Commission met on four consecutive days (May 20 - May 23, 2002) to craft an Interim Legislative Plan that was designed to increase the Hispanic Voting Age Population in at least three of the five districts specified by the DOJ in the 2001 Adopted Legislative Plan. In the 2002 Interim Legislative Plan, the Commission specifically increased the Hispanic Voting Age Population of Legislative Districts 13 (from 51.19% to 55.25%), 14 (from 50.59% to 55.16%) and 23 (from 25.72% to 30.63%). **Ex. 148, 149, 150, 151, 244**.

35. During these hearings, the Commission did not consider competitiveness when it amended the district boundaries of the 2001 Adopted Legislative Plan. **11/13/03 Trans. p. 116:15 - 22 (Stipulation)**.

36. On May 29, 2002, after a hearing at which both the Coalition and the Commission presented evidence demonstrating that the newly configured Districts 13, 14, and 23 would allow Hispanics to elect their candidates of choice, the three-judge federal court sitting in the United States District Court for the District of Arizona ordered the implementation of a remedial map as the Interim Legislative Plan under which the 2002 legislative elections (but only those elections) were to be conducted. **Ex. 483 p. 3:21 - 26.**

37. The Interim Legislative Plan approved by the three-judge federal court established legislative districts that met the DOJ benchmark requirements for Hispanic voting strength, though no effectiveness determination was made as to whether Hispanics could have elected representatives of their choice with lower percentages or whether the Interim Legislative Plan complied with Proposition 106.

The Final 2002 Adopted Legislative Plan

38. Having an Interim Legislative Plan in place that the three judge federal court determined complied with the Voting Rights Act for the 2002 elections, the Commission, in June and August 2002, again met to revise the Interim Legislative Plan, and establish legislative districts for use in the 2004 - 2010 elections. **Ex. 152, 153, 154, 155, 156, 157, 158, 485.**

39. The Commission used the three-judge federal court approved Interim Legislative Plan as its starting point. **Ex. 156.**

40. The Commission held business meetings on June 13, June 14, June 18, June 19, June 25, August 13, and August 14, 2002. **Ex. 302.** In these meetings, the Commission considered a number of revisions to its interim map before adopting on August 14, 2002 its final legislative plan for use in the 2004 through 2010 election (the "Final 2002 Adopted Legislative Map"). **Ex. 152, 153, 154, 155, 156, 157, 158, 485.**

The Commission's Competitive Analyses

41. Throughout its proceedings, the Commission consistently used three primary and objective methods for measuring the competitiveness of various districts: Judge It, Arizona Quick and Dirty ("AQD"), and voter registration.

42. On August 14, 2002 -- the last day it met to consider map changes -- the Commission also reviewed a chart that had additional information relating to a 3-race average, a 4-race average and third-party registration, but as Commissioner Hall candidly stated that the chart "is one of the first reports I've seen that itemizes those numbers [regarding the registration]." **Ex. 158 p. 109:8 - 12.** This type of chart was never used by the Commission to evaluate earlier districting plans considered by the Commission.

A. AQD

43. The AQD measure was first presented to the Commission on August 17, 2001 immediately after the Commission adopted the Final Draft Map. AQD was comprised of data extrapolated from the election results of three Corporation Commission races from the 1998 and 2000 general elections. **Ex. 435 pp. 206 - 08; 11/24/03 Trans. pp. 25:15 - 26:4 (Doug Johnson).**

44. Using the AQD measure, the Commission determined that a competitive district was one where the Democratic AQD score and the Republican AQD score were within seven percentage points (7%) of each other. **Ex. 96 p. 5** (defining "AQD spreads

of less than 7% (our current operating definition of 'competitive')."); **Ex. 380 pp. 9 - 10**; **Ex. 224** (example of consistently used demographic chart).

45. The AQD measure was designed to provide only preliminary competitiveness information. The Commission was advised by its legal counsel that AQD "does not give enough assistance to make determinations" of whether a district is competitive. **Ex. 435 pp. 191:18 - 192:9, 194:13 - 23, 195:10 - 17; 04/24/02 Depo. of Florence Adams p. 50:4 - 24.** However, using the 2002 elections, the AQD under seven percent (7%) measure of competitiveness had an accuracy rate of nearly 99%. **Ex. 480**; **11/17/03 Trans. pp. 115:7 - 118:8 (Tony Sissons).**

B. Judge It

46. Recognizing that neither the Commission itself, nor its consultant NDC, had the expertise to analyze the competitiveness of maps, the Commission hired a competitiveness expert, Dr. Michael McDonald to analyze and advise the Commission as to competitiveness. **Adams Depo. pp. 47:18 - 48:13; 11/13/03 Trans. p. 5:13 - 16; 60:2 - 9 (Doug Johnson).**

47. Dr. McDonald was hired to assess the competitiveness of the maps that were under consideration for the Commission. **05/03/03 Depo. of Michael McDonald pp. 25:5 - 26:9; Ex. 56; 12/03/03 Trans. pp. 15:4 - 7, 15:17 - 22; 16:9 - 13 (Dr. McDonald).**

48. In determining whether a legislative district is competitive, Dr. McDonald used a methodology called Judge It, which was developed by Drs. Andrew Gelman and Gary King. According to Dr. McDonald, Judge It is the most reliable method available to predict competitiveness. **Ex. 56; 12/03/03 Trans. pp. 207:7 - 10; 210:13 - 23; 211:9 - 12; 218:5 - 12 (Dr. McDonald).**

49. Judge It uses an advanced statistical analysis based upon election results in previous elections to enable the user to predict the potential outcome of an election in a certain area. Using this methodology, Dr. McDonald is able to predict the percentage of vote shares that a candidate from one of the two major parties will receive in a particular district, with a certain degree of statistical accuracy. Dr. McDonald calculated that in order to be competitive, the differential between the predicted share of votes of the Republican and Democratic candidates in a district must be within 3.5% of the 50% median. A district with a predicted differential between the major political parties of 7% or less falls in the competitive range. **Ex. 56, 12/03/03 Trans. pp. 24:10 - 24; 26:10 - 18 (Dr. McDonald)**. Using the 7% range, Dr. McDonald testified that his statistical analysis had a 95% confidence level. **12/03/03 Trans. pp. 24:10 - 18; 229:20 - 22 (Dr. McDonald).** Judge It had an accuracy rate of approximately 98% in predicting the results of the 2002 election. **Ex. 480**.

50. Once Dr. McDonald created his statistical model, he was able to automate the process and quickly perform Judge It tests on proposed districting plans. ***Id.* at 60:19 - 61:17.**

51. Although required by the Arizona Constitution to "favor competitiveness," where doing so would create no "significant detriment" to the other redistricting criteria, the Commission did not do so throughout the redistricting process. The Commission not only interpreted the Arizona Constitution to say that competitiveness was the "least important" of the redistricting criteria and subordinate to the other redistricting criteria, but also Commission members believed that creating "competitive" districts was not among the mandatory criteria that they must follow. **Ex. 142 pp. 11 - 12; Ex. 435 at p. 234:2 - 7 (Commr. Huntwork); Ex. 180 p. 40:16 - 23 (Commr. Lynn)** (stating that

Proposition 106 establishes a hierarchy and competitiveness "enjoy[s] a lesser position in terms of the hierarchy").

52. The Commission's failure to favor competitiveness can be seen in many ways, but was illustrated most clearly through the Commission's use, or more accurately lack of use, of the resources it had available to improve competitiveness. For example, even though the Commission had an expert in competitiveness on retainer, who it used extensively for the trial, the Commission did not ask for Dr. McDonald's assistance in drawing legislative district boundaries. **12/08/03 Trans. pp. 24:6 - 25:7 (Dr. McDonald).**

53. Before the Commission's adoption of its 2001 Adopted Plans in November 2001, Dr. McDonald never attended any Commission meetings and was never asked by the Commission or NDC to make any recommendations to improve competitiveness. **12/08/03 Trans. pp. 24:6 - 25:7; 26:1 - 28:8 (Dr. McDonald); 04/29/02 Commission 30(b)(6) Depo. p. 260:12 - 15.**

54. The Commission did not provide any draft maps to Dr. McDonald for his review and comment on district line changes as those changes were being made by the Commission. Instead, the Commission provided Dr. McDonald computer equivalency files that did not enable Dr. McDonald to view the proposed districts, but rather enabled Dr. McDonald to create simple numerical charts such as those listed in **Ex. 254**. **12/04/03 Trans. pp. 70:1 - 71:13 (Doug Johnson).** Even in this limited manner, the Commission did not have Dr. McDonald analyze all of the Commission's maps. ***Id.* at 72:18 - 23.**

55. Dr. McDonald attempted to include suggested competitiveness changes in one of his written reports to the Commission for one of the early draft maps, but the Commission ordered Dr. McDonald to remove those recommendations from his report.

Ex. 368; 12/08/03 Trans. p. 58:20 - 25; 59:11 - 25; 60:11 - 23 (Dr. McDonald); Ex. 367. Dr. McDonald testified that he understood this to be a directive from the Commission not to make recommendations to the Commission as to how to improve the competitiveness of any map. **12/08/03 Trans. pp. 108:24 - 109:7 (Dr. McDonald).**

56. In 2002, Dr. McDonald attended one or more meetings between May 20 and May 23, 2002 when an interim map was being created in response to the DOJ objections. The only other meetings Dr. McDonald attended were on June 13 and 14, 2002. ***Id.* at 26:10 - 21 (Dr. McDonald)**.

57. Throughout the redistricting process, Dr. McDonald made only one presentation to the Commission, which occurred at the June 13, 2002 meeting. ***Id.* at 21:15 - 19; 26:10 - 21 (Dr. McDonald).** As he was previously instructed to do in 2001, Dr. McDonald was again specifically instructed, "not [to] speak to specific line changes" during his June 13, 2002 presentation to the Commission. **Ex. 384.**

58. The Commission never asked Dr. McDonald how they could establish the most competitive map possible. **12/03/03 Trans. p. 261:12 - 14 (Dr. McDonald)**.

59. Dr. McDonald could have assisted the Commission in drawing legislative districts that favored competitiveness, but the Commission never asked him to do so. **12/08/03 Trans. pp. 24:6 - 25:7 (Dr. McDonald).**

60. Dr. McDonald testified that "competitiveness requires a diversity of opinion that may be found in the heterogeneous districts." **12/03/03 Trans. pp. 243:10 - 13 (Dr. McDonald)**. Dr. McDonald further testified that for the Commission to comply with its constitutional mandate to favor the creation of competitive districts in Arizona, it would have to create heterogeneous districts, and it would have to look at the whole State to create them. ***Id.* at p. 243:14 - 17, 259:13 - 19.**

61. The Commission failed to include dissimilar communities of interest in the same district to create heterogeneous, and consequently competitive, legislative districts. Rather, the Commission established legislative districts in Phoenix and other areas of the State with the purpose of creating homogeneous districts, which consequently, are not competitive. **Ex. 175 p. 42:3 - 8.** The Commission did so even though the Commissioners acknowledged during Commission meetings that heterogeneous districts could be created, and were necessary to favor competitiveness. **Ex. 156 p. 137:4-7** ("if homogeneous districts are drawn, they'll never be competitive"); **Ex. 175 p. 39:20 – p. 40:10** (if heterogeneous districts are drawn "you create competitive districts all over the state").

62. Throughout the redistricting process, the maps adopted by the Commission became successively less competitive than the previously adopted maps, whether measured by the AQD under 7% standard or Dr. McDonald's Judge It standard as demonstrated by the following table:

Map	***# Competitive Dists. Under Judge It***		***# Competitive Dists. Under AQD<7%***	
1994 Legislative Plan	7	**(Ex. 54)**	5	**(Ex. 94)**
IRC Draft Plan	7	**(Ex. 53)**	5	**(Ex. 94)**
Adopted 2001 Plan	7	**(Ex. 56)**	4	**(Ex. 95)**
Interim Fed. Ct. Plan	5	**(Ex. 439)**	4	**(Ex. 244)**
Adopted 2002 Plan	5	**(Ex. 309)**	3	**(Ex. 224)**

As the above table makes clear, the Commission's Final 2002 Adopted Legislative Plan is far less competitive under both the Judge It and AQD measurements than both the Commission's August 2001 Final Draft Map and the legislative districts in existence at the time the voters of Arizona enacted Proposition 106.

63. At trial, the Commission along with the AFLR intervenors contended that an alternate measure of competitiveness is shown by the number of uncontested races. Under this standard, the Commission's Final 2002 Adopted Legislative Plan is again far less competitive than the legislative districts in existence at the time the voters of Arizona enacted Proposition 106. In the 2000 elections, there were 13 uncontested Senate races. **Ex. 492**. Dr. McDonald informed the Commission that due to the number of uncontested races under the 1990s plan (the legislative districts in existence at the time the voters of Arizona enacted Proposition 106), he was "absolutely stunned at how uncompetitive the state legislative districts are." **Ex. 365**; **12/08/03 Trans. p. 167:6 - 9 (Dr. McDonald)**. However, under the 2002 elections conducted under the Commission's Interim Legislative Plan, there were 18 uncontested Senate races -- *five more* than in 2000. **Ex. 245.**

64. The Commission considered multiple maps that would have increased the competitiveness of Arizona's legislative districts, some of which were presented to the Commission by the public, and others that were created by the Commission itself, but the Commission rejected every map that would have increased competitiveness.

65. For example, in 2001, the Commission considered and rejected at least 3 maps (Coalition II, F2, and G2) that were each more competitive than the Commission's 2001 Adopted Legislative Plan as the table below makes clear:

Map	***# Competitive Dists. Under***	***# Competitive Dists. Under AQD<7%***

		Judge It		
Coalition II	10	**(Ex. 53)**	6	**(Ex. 94)**
F2	9	**(Ex. 53)**		
G2	8	**(Ex. 53)**		
Adopted 2001 Plan	7	**(Ex. 56)**	4	**(Ex. 95)**

66. Likewise, in 2002, the Commission created, then rejected, multiple maps which were each more competitive than the Commission's Final 2002 Adopted Legislative Map as the following table makes clear:

Map	***# Competitive Dists. Under Judge It***		***# Competitive Dists. Under AQD<7%***	
June 14, Tests			5	(**Ex. 5704**)
June 18, Test 1	6	(**Ex. 253**)	6	(**Ex. 313**)
June 18 Test 2	6	(**Ex. 220**)	6	(**Ex. 222**)
June 19 Hall-Minkoff	8	(**Ex. 221**)	7	(**Ex. 223**)
Adopted August 14, 2002 Plan	5	(**Ex. 309**)	3	(**Ex. 224**)

67. The best proof that the Commission did not favor competitive districts is found in Dr. McDonald's analysis of the Interim Legislative Plan, the Final 2002 Adopted Legislative Plan, the Hall-Minkoff Plan and the Hall Modified Plan using Judge It 2002 Corrected Legislative Data. In this analysis, Dr. McDonald determined as follows:

Judge It Analyses
Using 2002 Election Data
(Source: **Ex. 254**)

Plan	**# Comp.**
Interim Plan	6

Coalition II Revised	7
Hall-Minkoff	7
Hall Modified	7
Adopted August 14, 2002	4

Ex. 484

68. In addition to the four districts Dr. McDonald found to be competitive in the Final 2002 Adopted Legislative Plan, Dr. McDonald determined that no other district in that plan was under 8% and the next most competitive district was District 28 which had a Judge It spread of 8.8%, 1.8% over Dr. McDonald's 7% measure of a competitive district. **Ex. 254 p. 8.**

69. NDC advised the Commission that uniform redistricting principles needed to be established at the outset of the grid adjustment process to enable the Commission to resolve conflicts in a nonarbitrary manner. **Ex. 83 p. 6.** Dr. Heslop testified that uniform standards were necessary to avoid arbitrary actions and to create a redistricting process that could be replicated and would be transparent. **11/25/03 Trans. p. 172:2-5**.

70. Contrary to NDC's advice, the Commission never voted to adopt an objective definition or measure of a "community of interest" as that term is used in the Arizona Constitution. **Ex. 144, Admission Nos. 5, 7.**

71. The Commission also never voted to adopt a specific area as a "community of interest." **04/09/03 Commission 30(b)(6) Depo., p. 23:15 - 21.** This was done despite statements from Commissioners recognizing the Commission's need to "identify all communities of interest and document them." **Ex. 5034 p. 88:14 - 22**.

72. The Commission never voted to adopt any objective criteria to determine the existence of a "community of interest." **Ex. 144, Admission No. 7; 04/09/03 Commission 30(b)(6) Depo., pp. 15:7 - 16:11.**

73. Instead, each Commissioner individually and subjectively determined, based on public testimony or an individual Commissioner's personal knowledge, whether a "community of interest" existed in a particular area. **04/09/03 Commission 30(b)(6) Depo., pp. 16:21 – 17:2; 31 - 33; 162 - 64.**

74. This was done despite Commissioner Lynn's stated concern that "in some cases, the representatives of communities of interest may be very formal and very clear. In other cases, they may be people who purport to represent a community of interest who have no more standing in that community than anyone else in that community. I am not sure we're going to be able to discern that. When we're all making individual judgments, it becomes, I think, more troublesome." **Ex. 5032 pp. 42:16 - 43:11.**

75. By not defining any particular "communities of interest," the Commission could not, and did not, create a map showing where the "identified communities of interest" were located. **Ex. 161 p. 48:10 - 16**.

76. Without a map delineating the boundaries of a "community of interest," the Commission, other than being able to view city and county boundaries, arbitrarily determined based on comments from individual Commissioners in general terms where an "identified" "community of interest" existed. **04/09/03 Commission 30(b)(6) Depo., pp. 162 - 64.**

77. For example, reviewing various Commission test maps, individual Commissioners stated that a particular "community of interest" existed in a particular area. Two such examples are Casas Adobes in the Tucson area and Moon Valley in

Phoenix. No boundaries were ever adopted for these purported "communities of interest," leaving it to the imagination of NDC to determine the actual boundaries of such communities when it was revising the maps and reporting to the Commission. **Ex. 156 pp. 127 - 140.**

78. As it failed to do with "communities of interest," the Commission never adopted an objective definition or measure of "significant detriment" as that term is used in the Arizona Constitution. **Ex. 144, Admission No. 4**. Instead, as stated by Chairman Lynn, "the determination of significant detriment in the statute reads, the constitution now reads, it is left to the Commission, in the initial phase of the process, that it is obviously subject to review by whoever wishes to challenge the judgment, the significant detriment issue is achievement of an ultimate goal in the act which is something we are doing as a process and gathering, as we continue to gather today, opinion as to what constitutes significant detriment and what doesn't." **Ex. 171 p. 33:8 - 20.**

79. Nor did the Commission, throughout the redistricting process, adopt objective criteria or measures to determine whether a specific legislative district change to increase the competitiveness of a legislative district caused "significant detriment" to any of the other redistricting criteria set forth in **Article IV, part 2, § 1(14)** of the Arizona Constitution. **Ex. 144, Admission No. 6.**

80. The Commission also never voted to adopt an objective definition of what constituted a "competitive" district as that term is used in the Arizona Constitution. **Ex. 144, Admission No. 3.**

81. Rather, as stated by Commissioner Elder, each Commissioner can make his or her "own choice whether 3.5, 3.6, 3.4 is competitive, you know, on some other subjective rationale, whatever reason we have. But to come up with another arbitrary

number, these being arbitrary, also, I don't see the advantage." **Ex. 152 p. 88:17 - 25**. The Commission did not define what a competitive district was, but instead each Commissioner individually took a "we know it when we see it" approach to redistricting. **Ex. 430**.

82. During the period between the adoption of the 2002 Interim Legislative Plan and the adoption of the Final 2002 Adopted Legislative Plan, the Commission looked only at making minor changes to "fine-tune" the map. In making these adjustments, the Commission, on an ad-hoc basis, rejected maps that would have increased the competitiveness of the map. Most often, the Commission rejected these more competitive maps based on a statement from a single Commissioner who stated that he/she believed the competitive changes would "harm" a purported "community of interest" without making any findings to that effect. **Ex. 53, 54, 56, 220, 254 (comparing plans).**

83. The Commission's desire to only make "fine-tuning" adjustments became apparent in June 2002 when NDC presented the Commission with test maps on June 18, 2002, known as the June 18 Test 1 and June 18 Test 2 maps, and a modified version on June 19, 2002, known as the Hall Test or Hall-Minkoff Test (hereinafter referred to as the "Hall-Minkoff Plan"). Each of these plans contained significantly more competitive districts than the Final 2002 Adopted Legislative Plan under the AQD, voter registration or Judge It measures. **Ex. 53, 54, 56, 94, 95, 135, 220, 222, 223, 224, 254, 313**.

84. Under the Commission's AQD measurement, the Hall-Minkoff Plan contains seven competitive districts, while the August 14, Final 2002 Adopted Legislative Plan contains only three. **Exs. 223, 224.** Under the Judge It methodology, the Hall-Minkoff Plan contains eight competitive districts, three more than the Final 2002

Adopted Legislative Plan. **Exs. 221, 309; 12/03/03 Trans. pp. 96:8 - 14; 97:3 - 7 (Dr. McDonald); 12/08/03 Trans. p. 18:22 - 25.** Similarly, using voter registration advantages, the Hall-Minkoff Plan contains more districts with closer Democratic and Republican registration differentials, than the Final 2002 Adopted Legislative Plan. **Exs. 223, 224**.

85. The Hall-Modified Plan, developed by Anthony Sissons after the Commission had adopted its Final 2002 Adopted Legislative Plan, is based substantially on the Hall-Minkoff Plan with some minor revisions. It was presented to the Court, as an illustrative source for the Court to demonstrate how easy it would have been for the Commission to adopt a substantially more competitive map that satisfied all of the Proposition 106 criteria set forth in § 14. **Ex. 125 at Ex. A (01/31/03 Sissons' Report).**

86. The Hall-Minkoff Plan did not cause "significant detriment" to the other redistricting criteria. **Ex. 156 pp. 127 - 140.**

(a) Both the Hall-Minkoff Plan and the Final 2002 Adopted Legislative Plan contain the same number of voting-age minority-majority districts and retain nearly identical levels of minority voting age populations within the districts;

(b) Both the Hall-Minkoff Plan and the Final 2002 Adopted Legislative Plan divide an equal number of incorporated cities and towns. **Ex. 125 at Ex. A (01/31/03 Sissons' Report at p. 3).**

(c) Both the Hall-Minkoff Plan and the Final 2002 Adopted Legislative Plan equally respect the boundaries of geographically recognized "communities of interest."

(d) Both the Hall-Minkoff Plan and the Final 2002 Adopted Legislative Plan are equal in compactness as measured by the 30-district average Polsby-Popper Test. Using the Perimeter Test, the Hall-Minkoff Plan is slightly more compact than the Final 2002 Adopted Legislative Plan. Specifically, Districts 6 & 7, to which some Commissioners complained significant detriment in compactness had occurred (without conducting any objective compactness tests), are actually more compact under these standard compactness measures in the Hall-Minkoff Plan than in the Final 2002 Adopted Legislative Plan. **Ex. 125 at Ex. A (01/31/03 Sissons' Report at Ex. 4).**

87. Thus, comparing both the Hall-Minkoff Plan and the Final 2002 Adopted Legislative Plan, each equally respects minority voting rights under the Voting Rights Act of 1965, communities of interest, geographical features and respect for boundaries of cities and towns. **Ex. 125 at Ex. A (01/31/03 Sissons' Report at p. 3).** Unlike the Final 2002 Adopted Legislative Plan, the Hall-Minkoff Plan complies with the constitutional provision requiring the favoring of competitiveness. The same is also true of the Hall-Modified plan, a plan that slightly modifies the Hall-Minkoff Plan and also brings the plan within population parity with the Final 2002 Adopted Legislative Plan while maintaining the competitiveness of the districts and without causing "significant detriment" to any of the other redistricting criteria. **Ex. 125 at Ex. A (01/31/03 Sissons' Report at 3 - 4).**

88. Anthony Sissons demonstrated in court that the Hall-Minkoff Plan could easily be modified to satisfy all of the criteria of § 14(A) - (E) at least to the same extent

as was done by the Final 2002 Adopted Legislative Plan, and at the same time favor the creation of competitive districts without causing significant detriment to the other criteria.

89. Both the Hall-Minkoff Plan and the Hall Modified Plan required the Commission to make minor adjustments in less than one-third of the districts in the map, and only to districts located in Maricopa and Pima Counties. **Ex. 125 at Ex. A (01/31/03 Sissons' Report).**

90. Rather than testing the Hall-Minkoff Plan to determine if it could be refined to comport with all of the redistricting goals on June 19, 2002, the Commission voted to completely reject all of its June tests and return to a district configuration similar to those the Commission had adopted in November 2001 and May 2002. **Exs. 155**, **156.** The Commission rejected further testing of the Hall-Minkoff Plan without requesting that Dr. McDonald perform his Judge It analysis on the plan. **12/08/03 Trans. p. 17:3 - 20 (Dr. McDonald).**

91. In rejecting further testing of the Hall-Minkoff Plan, the Commission never made credible findings of significant detriment to the other redistricting goals. The Commission rejected maps that were clearly more competitive under the Commission's own analysis on the basis of personal statements from individual Commissioners of their opinions that the Hall-Minkoff test would cause significant detriment to purported "communities of interest." These "communities of interest" were not ones that had previously been adopted or even identified by the Commission and were not ones that were supported by any empirical data or public testimony. They were at most, purported "communities of interest" that existed based exclusively on the personal knowledge or personal observations of various Commissioners. **Exs. 155**, **156.**

92. In analyzing the Hall-Minkoff Plan, Commissioner Huntwork summarized the Commission's methodology for determining "significant detriment" by stating that each Commissioner must "make a judgment in our own minds whether we created this district using valid criteria and whether the district, now that it's created, stands up to the [sic] to analysis under the criteria of Proposition 106." **Ex. 155 p. 112:14 - 19.** Concurring, Chairman Lynn states "Whether or not that cost creates significant detriment ultimately will be in the minds of each of the five of us and it may be a number of votes only squeak by one vote one way or the other." **Ex. 155 p. 120:6-10.** The Commissioners believed that they could find significant detriment, the existence of a community of interest, or a lack of competitiveness based on their own personal opinions or knowledge, regardless of the facts before them. **Ex. 155 pp. 119:15 - 120:10.**

93. At one point Commissioner Elder stated that he believed the changes in Tucson that were made in the Hall-Minkoff Plan would detrimentally cause districts to include portions of both the City of Tucson and Pima County. However, the Commission did not make a formal finding that communities of interest existed for either area. **Ex. 155.**

94. Similarly, Commissioner Huntwork said that in the City of Phoenix, the change required that District 7 pick-up the growth areas of District 6, causing it to be less compact, that District 6 was long and narrow from north to south, that the mountain divides the population groups on either side from "identifying with each other or thinking of themselves as part of a logical, electable district" and that there is nothing in the record linking these two different communities.

95. However, the Commission did not apply this "growth area" rationale in any other determinations that it made in establishing any other districts which contained faster

growing areas. **Exs. 155 pp. 79 - 85; 156 pp. 137 - 138; 299.** For example, the Commission combined the fastest growing areas of the State in District 12 of the Final 2002 Adopted Legislative Plan. That District contains the whole or parts of the Cities of El Mirage (having a 2-year growth rate of 171.32%), Surprise (having a 2-year growth rate of 46.28%), Goodyear (having a 2-year growth rate of 41.27%), Buckeye (having a 2-year growth rate of 40.70%) and Avondale (having a 2-year growth rate of 32.68%). **Exs. 208, 299**. In any event, anticipated population growth is not one of the **Article IV, part 2, § 1(14)** criteria.

96. Nor did the Commission use the objective Polsby Popper or Perimeter measures of compactness to determine whether the proposed changes in the Hall-Minkoff Plan caused significant detriment to the compactness of districts. As shown by Doug Johnson in his testimony, compactness tests can be run on Maptitude in just a few seconds, but that was never done because no one asked him to run those tests. **12/09/03 Trans. pp. 145:23 - 148:7; pp. 172:3 - 175:5 (Doug Johnson).** Instead, as Doug Johnson testified, the Commission used the arbitrary "I know it when I see it measure." **12/09/03 Trans. pp. 172:6 - 175:19 (Doug Johnson).**

97. Referring to the detriments caused to geographical features of creating a competitive District 6, Commissioner Hall stated, "when I walk out of my hotel room and look out at the mountains Mr. Huntwork was referring to, I think there's some legitimacy to his point." **Ex. 155 p. 162:20 - 23.** Neither Commissioner identified any recognized community of interest that must be protected in either area. In the 2001 Adopted Legislative Plan, the Commission adopted a district (District 10) that was split by the very same mountain without making any reference to the difficulties encountered by any community of interest.

98. In rejecting the Hall-Minkoff Plan, a plan that favors competitiveness over the Final 2002 Adopted Legislative Plan, Commissioner Hall argued that he did not approve of it because it was too dissimilar from the map that had already been adopted by the Commission and that "the public would not recognize it" despite the fact that: (a) this is not a criteria upon which the Commission should be making a decision that disfavors competitiveness; and (2) public recognition was not a factor considered in adopting the 2002 Plan in the first place. **Ex. 155 pp. 122 - 123.**

99. The Commission also cited the treatment of the Isaac School District, the only school district that NDC recommended to be an AUR, which in the Hall-Minkoff Plan, removed approximately 2,900 of the approximately 46,000 people from the borders of that school district. **11/17/03 Trans. pp. 187:4 – 189:16 (Anthony Sissons).** Not only was a similar configuration of the Isaac School District created and accepted by the Commission in the Interim Legislative Plan, but also the Commission failed to equally respect the borders of more than fifty other school districts with less population than the Isaac School District. **Ex. 481.**

100. Commissioner Huntwork also stated that he was rejecting the Hall-Minkoff Plan because it combined the communities of Moon Valley and Sunnyslope, and separated the communities of Moon Valley and Anthem. **Ex. 155 p. 83:6-18**. However, in the 1990s Plan, the communities of Moon Valley and Sunnyslope were included in the same legislative district, District 18. The Commission received public input asking that Moon Valley and Sunnyslope continue to be included in the same legislative district. *E.g.*, **Ex. 1537**. The Commission received no public input seeking to separate Moon Valley and Sunnyslope or to combine Moon Valley in the same legislative district as Anthem. **Ex. 420; 12/9/03 Trans. p. 177:13-17 (Doug Johnson)**.

101. In response to the objections to the Hall-Minkoff Plan, Commissioner Minkoff stated that she believed the Commission's failure to consider a competitive district 6 "was not only a serious error but violated our mandate under the Arizona Constitution." Ms. Minkoff noted that there was initially a 3-2 vote for testing, but after a break there was "an unexplained reversal" and a 4-1 vote not to even test the plan. Ms. Minkoff outlined the Commission's failures to favor the creation of competitive legislative districts in the Commission's June 25, 2002 meeting, which are summarized as follows:

(a) There was an "unexplainable reluctance to do anything but tinker with the map. It appears that future changes to increase competitiveness can only be done by creating changes along the margins of districts previously developed." "District line changes should not have been a reason to deny consideration of Competitive [District] 6."

(b) The mountain that purportedly cut the northern and southern district from each other is the same mountain that the original and proposed District 10 contains, which splits its eastern and western halves and that the mountain only became a visible issue for some Commissioners only when it was contained within a potentially competitive district.

(c) Although some Commissioners mentioned compactness as a detriment, the Commission never requested the use of objective tests (Polsby-Popper and Roeick) adopted by the Commission to measure it. Ms. Minkoff stated that she did her own test using Mapquest and found no driving impediments and similar travel times from one end of the district to the other between competitive District 6 and adopted District 7.

(d) While the Commission has used the words "significant detriment," but "has never determined how to define it." Ms. Minkoff analogized the Commission's determinations of "significant detriment" to how the Supreme Court has defined pornography: "We can't define it, but we know it when we see it."

(e) The Commission failed to adhere to its own principles regarding communities of interest. Ms. Minkoff stated that Moon Valley is an established area and despite the fact that no resident from Moon Valley testified in support of combining Moon Valley with Anthem, the Commission had no problem in putting this community with dissimilar communities like New River and Anthem, rather than placing it in a competitive District 6 with Central Phoenix.

(f) It is not too late for the Commission to return in August "with a real effort to create more competitive districts." **Ex. 156 pp. 127 - 140.**

102. Despite the Arizona Constitutional requirement that the Commission favor the creation of competitive districts, the Court finds that it failed to do so. After the adoption of the Commission's 2001 Final Draft Maps, which contained five AQD competitive legislative districts without any consideration of competitiveness, each subsequently adopted map contained *at least* one fewer AQD competitive district (five competitive districts in the 2001 Final Draft Map; four competitive districts in the 2001 Adopted Legislative Plan; and three competitive districts in the Final 2002 Adopted Legislative Plan). **Ex. 125 at Ex. A (01/31/03 Sissons' Report at Ex. 2); Exs. 94, 95, 224.** The same is also true under the Judge It measure of competitiveness (seven competitive districts in the Final Draft Map; seven competitive districts in the 2001

Adopted Legislative Plan; six competitive districts in the Interim Legislative Plan adopted by the three-judge federal court; and five competitive districts in the Final 2002 Adopted Legislative Plan). **Exs. 53, 56, 254, 309.**

103. The Commission's failure to favor the creation of competitive legislative districts and particularly its failure to favor its own Hall-Minkoff Plan was arbitrary and capricious and a violation of § 14(F) of Proposition 106.

104. The reasons cited by Commissioners for not favoring the creation of competitive districts and particularly the Hall-Minkoff Plan were pretextual and did not amount to a finding of significant detriment.

105. There is no evidence that demonstrates that the 2002 Final Adopted Plan was more competitive than other legislative plans before the Commission, including the Hall-Minkoff Plan, under any measurement of competitiveness used by the Commission.

106. The Commission contended that its compliance with the Voting Rights Act of 1965 prevented it from creating any more competitive legislative districts than it did. The Court rejects this contention on the grounds that the Coalition clearly demonstrated that the Commission could have created a significantly more competitive map than the Final 2002 Adopted Legislative Plan. When the Commission adopted the Final 2002 Legislative Plan, it increased the Hispanic Voting Age Population of Legislative District 14 from 55.16% in the three judge federal court approved 2002 Interim Legislative Plan to 58.11% in the Final 2002 Adopted Legislative Plan. This increase was not necessary to comply with Section 5 of the Voting Rights Act, and has the effect of packing both Hispanic citizens and Democratic voters into District 14, making the creation of a more competitive map even more difficult. **Ex. 157 p. 168:2-8 (Commr. Hall quoting from *Bush v. Vera*).**

107. The Court finds that the effect of these and other changes made by the Commission subsequent to the adoption of the Interim Legislative Plan (a plan that fully complied with the Voting Rights Act of 1965) was to further reduce the number of competitive districts from six in the Interim Legislative Plan to four in the Final 2002 Adopted Legislative Plan. **Ex. 254 pp. 4, 8**.

108. Proposition 106 specifically prohibits the Commission from identifying or considering the places or residences of incumbents or potential candidates during the redistricting process. This prohibition extends to its agents such as attorneys, consultants and map-drawers. *See* **ARIZ. CONST. art. IV, pt. 2, § 1(15).**

109. Despite this clear prohibition set forth in § 15, on or around September 4, 2001, shortly after adopting the Final Draft Map, the Commission's attorneys admittedly provided information to members of NDC and Dr. McDonald indicating the locations of all of the legislative and congressional incumbents in the proposed districts of the Final Draft Map in violation of Proposition 106. **Exs. 298, 361, 362, 363, 383.**

110. In April 2002, three months after the Commission completed its initial submission to the DOJ, the Commission, including its map-drawing consultant, Doug Johnson, again obtained information regarding the location of incumbents. **Exs. 383, 415**.

111. In the information provided in April 2002, not only was the district location of each incumbent identified for the 2001 Adopted Legislative Plan, but also the Commission obtained information regarding the location of incumbents in the Coalition II Revised Plan, a plan that was not submitted to the Commission during its 2001 hearings and for which no public information showing the location of incumbent legislators in proposed districts existed. **Exs. 383, 415**. Thus, contrary to the

Commission's assertion, the only way the Commission could have identified the location of the incumbent legislators in the Coalition II Revised Plan was through identification and consideration of the residential address of each incumbent—information that is clearly prohibited by **Article IV, part 2, § 1(15)** and which the Commission possessed when it revised the 2001 Adopted Legislative Plan in May, June and August of 2002.

112. The Commission argued at trial that the incumbency information it gathered was necessary for Dr. McDonald to complete his competitive analysis. However, Dr. McDonald testified that although his analysis used incumbency information for the 1996, 1998, and 2000 elections, his analysis purposely excluded incumbency information for any subsequent elections or any draft redistricting plans. **12/8/03 Trans. pp. 49:2-51:7 (Dr. McDonald).** Moreover, the evidence shows that Dr. McDonald specifically informed the Commission on October 7, 2001 that he "will remove incumbency effects in the analysis" and the Commission's lawyers agreed that that would be a "[g]ood idea." **Ex. 372.**

113. The Commission also argued at trial that the incumbency information it gathered was required for submission to the DOJ. While it is true that in early 2002 the DOJ requested information regarding the impact of the 2001 Adopted Legislative Plan on incumbents, that information was not requested until months after the Commission first gathered and considered information regarding incumbent residences. Moreover, the DOJ's request does not explain the Commission's subsequent consideration of the impact of the Coalition II Revised Plan on incumbents.

114. The Court finds that the Commission violated **Article IV, pt. 2 § 1(15)** through its identification and consideration of the residences of incumbents.

City of Flagstaff

115. The City of Flagstaff in its Second Amended Complaint in Intervention complains that the Commission violated the provisions of Art.4, Pt. 2, Sec. 1 (14), Ariz. Const. when it was placed in a legislative district with portions of the Hopi reservation and Navajo Nation. The City of Flagstaff alleges that the Commission did not respect it as a community of interest to the extent practicable under the circumstances.

116. The Record before the Commission however reflects that the Commission did in fact consider various proposed plans submitted by the City of Flagstaff (Flagstaff A-2 & B-2 submitted Aug 13, 2001) as well as entertained testimony and other evidence submitted in support of the City's position before it made its decision on where to place the city of Flagstaff.

117. While the Commission did not formally recognize the City of Flagstaff as a "Community of Interest", its actions during deliberations treated the City as a community.

Congressional Plaintiffs

118. The final congressional plan was adopted by the Commission in 2001 and pre-cleared by the U.S. Department of Justice under the Voting Rights Act in 2002. This was the plan used in the 2002 Arizona congressional elections.

119. Based on the evidence presented to the Court, the Commission used its most sophisticated competitive measure, Judge It, to determine the most competitive plan practicable in order to establish congressional voting districts. **Ex. 701**.

120. The Commission rejected plans that were more competitive using AQD and Party Registration than its adopted congressional plan**. Ex. 696, 697, 698, 699, 700 & 701**.

121. Although not formally adopted by the Commission, Judge It became its measure and method of favoring competitiveness for congressional districts.

122. Congressional plaintiffs submitted their own plans (the Downtown Competitive Plan & Competitive B3) to the Commission for consideration, which were considered and rejected by the Commission.

123. Congressional District 4 in the adopted plan is an effective Hispanic Majority district (52% Hispanic Voting Age population) and offers Hispanics an opportunity to elect candidates of their choice. **Ex. 558, 588 & 589**.

124. Congressional and legislative elections in the general area of Congressional District 4 have been racially polarized. **Ex. 586**.

125. Congressional district 4 is generally congressional district "D" in the plans submitted by the Congressional plaintiffs. The plans submitted by Congressional Plaintiffs would reduce the Hispanic Voting age population to 48% and 50.74% respectively. **Ex. 552, 553, 554 & 555**.

126. The Congressional plaintiffs ask this Court to find the Congressional Plan adopted by the Commission unconstitutional, appoint a special master to modify the Downtown Competitive Plan and issue an injunction requiring its use for the 2004 and subsequent elections. In the alternative the Congressional Plaintiffs suggest that the Commission can reconvene and adopt a new congressional plan consistent with this Court's ruling, then the new plan can be used for the 2002 and subsequent elections. **Proposed Post- trial Findings of Fact and Conclusions of Law Submitted by Arvizu, et al**.

CONCLUSIONS OF LAW

Interpretation of Proposition 106

1. This Court is empowered to interpret Proposition 106 to determine if the Commission complied with the constitutional mandate of Proposition 106. Proposition 106 amended the Arizona Constitution and the interpretation of the Arizona Constitution is a matter clearly within the Court's province. **11/07/03 Order at 2, Dkt. 019; 04/22/02 Order at 4, Dkt. 019**; *See* ***Ruiz v. Hull***, 191 Ariz. 441, 957 P.2d 984 (1998).

2. In interpreting the Arizona Constitution, the primary mission of the Court is to effectuate the intent of the framers, and in the case of an initiative, the intent of the electorate that adopted it. ***See* 04/22/02 Order at 4**; ***Jett v. City of Tucson***, 180 Ariz. 115, **119**, 882 P.2d 426, 430 (1994) (the primary purpose in determining the scope and meaning of a constitutional provision is to effectuate the intent of the framers); ***State v. Mangum***, 113 Ariz. 151, **152**, 548 P.2d 1148, 1149 (1976) (the fundamental principles of statutory construction state that "a sensible construction should be given which will accomplish the legislative intent and purpose and which will avoid an absurd conclusion or result."); ***Cohen v. State***, 121 Ariz. 6, **9**, 588 P.2d 299, 302 (1978) (examining the purpose of the legislature is not merely advisable when interpreting a statute, it is the very "cardinal rule of statutory construction.").

3. If the meaning of Proposition 106 is not clear, the Court must consider the history behind the provision, its purpose and the "evil" to be remedied. *See* ***Jett***, 180 Ariz. at **119**, 882 P.2d at **430**; **04/22/02 Order at 4, Dkt. 019**.

4. Because Proposition 106 was an initiative passed by the people its "legislative history" and record are found in the ballot publicity pamphlet and the arguments in favor of and against its passage contained therein. *See* ***Calik v. Kongable***, 195 Ariz. 496, **500**, 990 P.2d 1055, 1059 (1999) (publicity pamphlet stating the purpose

of a ballot proposition provides insight and should be used in lieu of "legislative history"); ***Laos v. Arnold***, 141 Ariz. 46, **48**, 685 P.2d 111, 113 (1984) (legislative counsel's analysis, contained in publicity pamphlet, provided intent of framers and electorate). None of these cases, however, state that the Court should look to advertisements, outside the publicity pamphlet, in construing the intent of the initiative.

5. The public was entitled to rely upon representations contained in the publicity pamphlet that the stated purpose of Proposition 106 was to increase competitiveness and create fair legislative districts and the Court must consider these arguments in interpreting the statute. *See* ***Calik***, 195 Ariz. at **500-501**, 990 P.2d at **1059** (the electorate is entitled to rely on the ballot descriptions of the intent or effect of the initiative proposal); ***Fairness & Accountability in Ins. Reform v. Greene***, 180 Ariz. 582, **590**, 886 P.2d 1338, 1346 (1994) (same).

6. Because the "legislative history" of Proposition 106 centered on its ability to ensure and create competitive districts in Arizona, the Court interprets the statute in light of this intent. ***Calik***, 195 Ariz. at **500-501**, 990 P.2d at **1059**; ***Fairness***, 180 Ariz. at **590**, 886 P.2d at **1346**; *see also* Arguments for Proposition 106, 2000 Voter Publicity Pamphlet (stating that passage of Proposition 106 would increase the competitiveness of legislative districts). **Ex. 437.**

7. Proposition 106 requires that "To the extent practicable competitive districts should be favored where to do so would create no significant detriment to the other goals."

8. As this Court noted earlier in this proceeding, the Commission does not have unfettered discretion to establish voting districts however it deems appropriate. This open ended legislative function was removed from the Arizona Legislature by the

electorate and vested in the Commission with mandatory procedures and criteria to be followed and satisfied. The record before the Commission must demonstrate that it followed the very specific dictates of **Article IV, part 2, § 1(14)** - (16).

9. Creating competitive districts is no less important than meeting any of the other goals of **Article IV, part 2, § 1(14)(B) - (E)** and, in fact, is mandatory. **04/22/02 Order at 4, Dkt. 019.**

10. **Article IV, part 2, § 1(14)(B) - (F)** ***must*** be considered to the "extent practicable" with the competitiveness goal being favored ***unless*** there would be a significant detriment to the other goals.

11. **Article IV, part 2, § 1(14)(D)** states "District boundaries shall respect communities of interest to the extent practicable." It does not say that legislative districts are to be constructed so as to respect the desires of self-described communities of interest, nor does it state that the Commission is to create homogeneous districts, placing all like-minded, yet distinct, communities of interest together in one district. Rather, the Commission is simply required to respect the boundaries of distinct communities of interest, attempting not to split the boundaries of each community.

12. **Article IV, part 2, § 1(14)(D)** does not state that "Communities of Interest" shall be favored which is what the record before the Commission demonstrates it did in creating voting districts.

13. The Commission was required to adjust the Grid Map created in its phase of mapping to accommodate **all** the goals in **Article IV, part 2, § 1(14)** including competitiveness. It failed to do so when it specifically excluded this adjustment from the plans and maps created and submitted to the public for comment.

14. The Commission equated the competitiveness adjustment with party registration and voting history data and used this as a reason not to consider and favor a competitive adjustment during the mapping process. **Article IV, part 2, § 1 (15)** allows party registration and voting history data to be used to test maps for compliance with all the goals in **Article IV, part 2, § 1(14)**. The Commission could have tested all maps and plans for competitiveness after the creation of the Grid maps had it chosen to do so.

15. The one item of information that the Commission was prohibiting from using for any purpose, including testing for compliance with the goal set forth in **Article IV, part 2, § 1(14)(A),** was in fact used by the Commission. This prohibited information was "…places of residence of incumbents or candidates…."

Plaintiffs Have Standing to Bring and Prosecute This Action

16. "A party has standing under Arizona law if the party possesses an interest in the outcome of the litigation." ***Alliance Marana v. Groseclose***, 191 Ariz. 287, **289**, 955 P.2d 43, 45 (App. 1998); **11/07/03 Order at 4, Dkt. 019.** In Arizona, standing is "not a constitutional mandate" and judicial restraint is only exercised so as to "insure that our courts do not issue mere advisory opinions, that the case is not moot and that the issues will be fully developed by true adversaries." ***Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.***, 148 Ariz. 1, **6**, 712 P.2d 914, 919 (1985); *see* ***City of Tucson v. Pima County***, 199 Ariz. 509, **514**, 19 P.3d 650, 655 (App. 2001); ***City of Tucson v. Woods,*** 191 Ariz. 523, **526 n.2**, 959 P.2d 394, 397 n.2 (App. 1997); **11/07/03 Order at 4, Dkt. 019.**

17. The Plaintiffs have standing to bring and prosecute this action. The parties are true adversaries and have developed the contested issues. In addition, the Legislative and Congressional Plaintiffs have alleged an injury in fact by virtue of their status as

qualified voters whose voting rights have been impacted by the actions of the Commission, and therefore have standing to bring this claim. *See* ***McComb v. Super. Ct. in the County of Maricopa,*** 189 Ariz. 518, **522**, 943 P.2d 878, 882 (App. 1997) (holding that voters challenging a ward system for the election of a school board had alleged an injury in fact and therefore had standing due to the fact that they were electors in that district.)

18. The Arizona Supreme Court's most recent decision in ***Bennett v. Napolitano***, No. CV-03-0245-SA, 2003 WL 2286192 (Ariz. Dec. 4, 2003) does not change Arizona's standing requirements. In *Bennett*, a case unique to its facts involving inherent separation of powers issues that are not presented here, the Court found that legislators, challenging the constitutionality of certain line-item vetoes in their official capacity as legislators, did not have standing to sue the Governor because the four legislators did not show "injury to a private right or to themselves personally." ***Bennett, ¶ 28.***

19. *Bennett* is distinguishable on several grounds. First, unlike the legislators in *Bennett*, individual plaintiffs in this case have alleged an injury to one of their most fundamental private rights, the right to vote. Second, each of the individual Plaintiffs have been personally injured as qualified electors in this State because of the Commission's failure to favor the creation of a state legislative plan that was competitive. Third, *Bennett*, a suit between the legislative and executive branches of state government, involved political questions and inherent separation of powers issues that are not present in this case. ***Id*. at ¶¶ 31-34**.

The Commission Violated Article II § 13 of the Arizona Constitution by Failing to Define and Apply Constitutional Standards Uniformly Before Adopting the Final 2002 Legislative Plan

20. Throughout its redistricting process, the Commission never voted to define essential constitutional terms, such as "significant detriment," "communities of interest," "extent practicable" or "competitive districts."

21. The terms of **Article IV, part 2, § 1(14)** are not self-executing. If these terms were self-executing, there would have been no need for the Commission to hire experts to consider what constituted a competitive district, hold hearings to determine where communities of interest exist, or to make any determinations with regard to how to apply the other terms in **Article IV, part 2, § 1(14)**. The terms are subject to varying definitions and applications.

22. As a result of its failure to define these constitutionally significant terms, the Commission did not apply uniform standards to ensure uniform treatment of Arizona voters during the redistricting process. Having failed to establish any uniform standards, the Commission could not determine in a non-arbitrary manner whether a "community of interest" existed in a particular area, whether a district was competitive or whether a particular boundary adjustment to "favor competitiveness" would cause "significant detriment" to one of the other goals.

23. By failing to define these constitutional terms in a uniform manner and by failing to apply them uniformly, the Commission's application of each of these criteria was arbitrary and capricious in nature and violated Plaintiffs' rights to equal protection under **Article II § 13 of the Arizona Constitution**. *See* ***Brown v. City of Phoenix***, 77 Ariz. 368, **372**, 272 P.2d 358, 361 (1954). In ***Brown***, the Arizona Supreme Court held that the City of Phoenix had acted arbitrarily and capriciously in giving a public works contract and therefore that, even though the City had discretion, it had used that

discretion improperly by using things like the personal knowledge of the Council members in awarding the contract.

24. As explained by the United States Supreme Court in ***Bush v. Gore***, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." 531 U.S. 98, **104-05**, 121 S.Ct. 525, 530 (2000). To avoid such arbitrary and disparate treatment, the Commission was required to adopt and apply "uniform rules" that are "designed to ensure uniform treatment" of voters. ***Id.* at 106*;*** *see also* **ARIZ. CONST. art. II, § 13**.

The Commission Violated Article IV, part 2, § 1(14) of the Arizona Constitution by Failing to Favor Competitiveness in the Adoption of the Final 2002 Legislative Plan

25. The Commission did not favor competitiveness as required by the Arizona Constitution.

26. **Article IV, part 2, § 1(15)** of the Arizona Constitution did not preclude the Commission from using competitiveness data when creating its August 17, 2001 Final Draft Map - a map that factored in all of the other constitutional considerations except competitiveness.

27. As stated above, while the Constitution does preclude the use of party registration and voting history data during the "initial phase of the mapping process," that phase was completed once the Commission adopted the constitutionally required Grid Map on June 7, 2001. **ARIZ. CONST. art. IV, pt. 2 § 1(15)**. After adoption of the Grid Map, the Commission was required to equally consider **all**, **not some**, of the non-mandatory redistricting criteria set forth in the **Article IV, part 2, § 1(14)(B) - (F)**.

28. When the Commission finally decided to address competitiveness, it had no plan about how to do so and no consensus between the Commissioners, legal counsel,

and the consultants about how to consider or favor competitiveness. *See* **Ex. 435 pp. 227-237.**

29. By reserving the issue of competitiveness until after it considered all of the other criteria, the Commission relegated the creation of competitive districts to mere "fine tuning" adjustments around the edges of districts. ***See id.***; **Ex, 168 pp. 211:20 - 212:11.**

30. The Commission improperly treated competitiveness as a subordinate redistricting criteria. The Commission interpreted the Arizona Constitution to say that favoring the creation of competitive districts was the "least important" and third tier of redistricting criteria subordinated to the other redistricting criteria. **Ex. 142 pp. 11 - 12; Ex. 180 pp. 39-41; Ex. 435 p. 234:2-7.**

31. Based on its improper reading of the Constitution, the Commission did not favor the creation of competitive districts. *See* **Ex. 125 at Ex. A; Exs. 53, 56, 94, 95, 224, 254.** The Commission by its actions "favored" rather than "respected" communities of interests.

32. Where a provision may affect the outcome of an election, it will be construed as mandatory rather than discretionary. *See, e.g.*, ***Menssen v. Eureka Unit Dist. #140, Woodford County***, 388 N.E.2d 273, **275-276** (Ill. App. Ct. 1979) (mandatory-directory distinction between various provisions of election laws depends on legislative intent); ***Johnstone v. Robertson***, 8 Ariz. 361, **364**, 76 P. 465, 466 (1904) (laws effecting the outcome of an election must be strictly complied with); **3A Norman J. Singer, SUTHERLAND STATUTORY CONSTR. § 73:8** at **814-815** (6th ed. 2003).

33. In failing to favor the creation of competitive legislative districts, the Commission failed to comply with Proposition 106. **ARIZ. CONST. art. IV, pt. 2, § 1(14)**.

34. The Commission also misinterpreted the scope of its discretion with regard to communities of interest. Even had the Commission made formal determinations of what constituted a community of interest, the Commission's discretion to protect a community of interest was limited by Proposition 106 to include placing the entire community within the boundaries of a legislative district. The Commission was not entitled to create homogenous districts comprised of like-minded, yet distinct, communities of interest, at the expense of the creation of competitive districts which were to be favored.

35. Anticipated population growth is not one of the **Article IV, part 2, § 1(14)** criteria and even if uniformly applied throughout the State, anticipated growth cannot supercede the Commission's obligation to favor the creation of competitive districts under **Article IV, part 2, § 1(14)**.

36. The Commission also failed to favor competitiveness by creating majority-minority districts with Hispanic Voting populations in excess of the percentage necessary to meet the State's burden to demonstrate that its plan is non-retrogressive under Section 5 of the Voting Rights Act. *See* ***Georgia v. Ashcroft***, 123 S.Ct. 2498 (2003).

37. In ***Ashcroft***, the United States Supreme Court provided the states with two options for compliance with Section 5 of the Voting Rights Act of 1965: (1) "create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice; or (2) "create a greater number of districts in

which it is likely -- although perhaps not quite as likely as under the benchmark plan -- that minority voters will be able to elect candidates of their choice." ***Id.* at 2511**.

38. Although ***Ashcroft*** was decided after the Commission adopted the Final 2002 Adopted Legislative Plan, which contained majority-minority districts with Hispanic Voting Age percentages similar to those in the three-judge federal court ordered interim plan, ***Ashcroft*** nonetheless is instructive in determining whether the Commission's decisions complied with the Arizona Constitution in creating legislative districts.

39. The voters of Arizona, in enacting the requirement of **Article IV, part 2, § 1(14)(F)** that the Commission favor the creation of competitive districts "where to do so would create no significant detriment to the other goals," explicitly made the public policy determination allowed by the U.S. Supreme Court in ***Ashcroft*** -- the creation of "a greater number of districts in which it is likely -- although perhaps not quite as likely as under the benchmark plan -- that minority voters will be able to elect candidates of their choice." ***Ashcroft***, 123 S.Ct at **2511**.

40. Proposition 106 required the Commission to adopt a plan that allowed minority voters the ability to elect the candidates of their choice that also favored the creation of competitive districts. As minority voters are overwhelmingly registered Democrats, and Democrats are outnumbered by Republicans by more than 5% of the registered voter population, the Commission was required to create fewer "safe" or "benchmark" majority-minority districts that include overwhelming numbers of Hispanic voters. Instead, the Commission should have created majority-minority districts with Hispanic Voting Age percentages that made it *likely* that minority voters will be able to

elect candidates of their choice, while at the same time favoring the creation of competitive districts.

41. Proposition 106 allowed the Commission to disfavor competitiveness in creating legislative districts *only* if doing so would cause significant detriment to a community of interest within a district boundary. The Commission had no legal authority to disfavor competitiveness to create homogenous districts.

The Commission Violated Article IV, part 2, § 1(15) of the Arizona Constitution by Considering and Identifying the Location of Incumbents Before Adopting the Final 2002 Legislative Plan

42. **Article IV, part 2, § 1(15)** provides: "The places of residence of incumbents or candidates shall not be identified or considered." As stated above, this prohibition includes the Commission, its agents, experts and attorneys. It prohibits any consideration or identification of the location of any incumbents or challengers in the drafting of the Commission's maps.

43. During the 2001 mapping process, the Commission, through its attorneys and consultants, considered information identifying the location of incumbents in the Commission's August 17, 2001 Final Draft Map. In September 2001, contrary to the assertions of the Commission, incumbency information was not needed or used by Dr. McDonald in his competitive analysis, nor was it necessary in the preparation of the DOJ submission, which did not occur until January 2002, well after the creation of the 2001 Adopted Legislative Plan.

44. In April 2002, the Commission again possessed and considered information that identified the location of incumbents under the 2001 Adopted Legislative Plan (a plan amended by the Commission in May, June and August 2002) and the Coalition II Revised Plan (a plan that was not provided to the Commission or made public in 2001).

The Commission could not have been able to identify the location of incumbents in the Coalition II Revised Plan without the knowledge of the specific residential addresses of those incumbents.

45. By considering and identifying the location of incumbents, the Commission violated **Article IV, part 2, § 1(15)**.

The Commission Did Not Satisfy Its Burden of Coming Forward

46. The right to vote in congressional and legislative elections is a core constitutional right under Article II of the Arizona Constitution. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just a effectively as by wholly prohibiting the free exercise of the franchise." ***Reynolds v. Sims***, 377 U.S. 533, **555**, 84 S.Ct. 1362, 1378 (1964); *see also* ***Bush v. Gore***, 531 U.S. at **104**, 121 S.Ct. at 530; ***Charfauros v. Bd. of Elections***, 249 F.3d 941, **950-51** (9th Cir. 2001); **11/07/03 Order at 3, Dkt. 019**.

47. Because the Commission's actions in creating legislative and congressional districts impacts the Plaintiffs' fundamental rights, the Court must review those actions under the strict scrutiny standard. **11/07/03 Order at 3, Dkt. 019**.

48. Once Plaintiffs demonstrate that it is possible to increase the number of competitive legislative districts without significant detriment to the other goals of **Article IV, part 2, § 1(14)** of the Arizona Constitution, the burden of going forward shifts to the Defendants to prove significant detriment to the other goals. *See* ***Garcia v. City of South Tucson***, 135 Ariz. 604**,** **606**, 663 P.2d 596, 598 (App. 1983) (burden of proof shifts in mandamus action when plaintiff establishes underlying facts warranting mandamus

relief); ***Whitman v. Moore***, 59 Ariz. 211, **225**, 125 P.2d 445, 453 (1942) (effect of deviation from the constitutional requirements of an election statute destroys the presumption of validity under the statute and places upon the party desiring to sustain the validity of the action, the burden of proving that the action was constitutional); ***City of Tempe v. Dimitriou***, 175 Ariz. 237, **241**, 854 P.2d 1223, 1227 (App. 1993) (once plaintiff has met its burden of proof, the burden then shifts to the defendant "to show by a preponderance of the evidence" that the defendant is correct); **11/07/03 Order at 3, Dkt. 019**.

49. As applied to this case, the strict scrutiny standard means the Commission was required to demonstrate that:

1. It had a compelling interest in adopting the Final 2002 Adopted Legislative Plan over any other plan; and
2. The Final 2002 Adopted Legislative Plan impinged on Plaintiffs' right to competitive districts in the least restrictive manner.

50. The Court finds that the Commission failed to demonstrate that it satisfied either requirement as to legislative districts.

51. The Court also finds that the Commission abused its discretion by misinterpreting the constitutional provisions of Proposition 106, by arbitrarily applying the criteria of Proposition 106, by failing to adopt standards for uniform application of the Proposition 106 criteria and by failing to favor the creation of competitive districts as it was constitutionally required to do.

52. Plaintiffs have demonstrated that a number of alternative maps existed that allowed the Commission to create a greater number of competitive legislative districts

without causing significant detriment to the other goals of **Article IV, part 2, § 1(14)** of the Arizona Constitution. Those maps include the Commission's own Hall-Minkoff Plan, and the Hall-Modified Plan submitted by the Coalition. In each case, the Commission rejected maps that clearly created more competitive districts based on ad hoc determinations made by individual Commissioners, often explained by nothing more than an "I know it when I see it" rationale, and often based on factors other than the mandatory redistricting criteria set forth in **Article IV, part 2, § 1(14)**.

53. The Commission has failed to prove that its Hall-Minkoff Plan or other test maps containing increased numbers of competitive districts which were rejected by the Commission caused significant detriment to the other goals of **Article IV, part 2, § 1(14)** of the Arizona Constitution.

54. The Commission has argued that the Commissioners' own expertise was often the basis for its decision-making. Individual Commissioners applied the same facts in different ways and made findings in certain circumstances differently than they did in other similar circumstances.

55. As to the request for relief by Congressional Plaintiffs, the Court finds that while the Commission violated the Arizona Constitution as stated above, the Commission has convinced the Court that it cannot create any more competitive congressional districts without significant detriment to another constitutional goal, specifically the United States Voting Rights Act

56. As to the requested relief by the City of Flagstaff, the Court finds that the Commission did respect the City of Flagstaff as a community of interest but rejected its proposed legislative plan without violating any provision of the Arizona Constitution.

57. As to the requested relief by the Navajo Nation, the Court has previously ruled against the Navajo nation when it granted the Commission's motion for summary judgment. The relief requested was denied.

The Legislative Plaintiffs in CV 2002-004380 Are Entitled to a Writ of Mandamus

58. The Court has jurisdiction to order the Commission to perform its constitutionally mandated duty of complying with all of the Arizona Constitutional redistricting requirements. The Court also has the authority to enjoin the Secretary of State from performing an unconstitutional act, such as conducting an election under an unconstitutional map. *See e.g.*, ***Fairness and Accountability in Ins. Reform v. Greene***, 180 Ariz. 582, **589**, 886 P.2d 1338, 1345 (1994) (*citing* ***Kerby v. Griffin***, 48 Ariz. 434, 62 P.2d 1131 (1936)); ***White v. Kaibab Road Improvement Dist.***, 113 Ariz. 209, **210**, 550 P.2d 80, 81 (1976); **11/07/03 Order at 3, Dkt. 019**.

59. Mandamus relief is appropriate where the act to be compelled is either "a ministerial act which the law specially imposes as a duty resulting from an office" or one in which "the officer has acted arbitrarily and unjustly and in the abuse of discretion," and where there is no other plain, speedy, and adequate remedy at law. *See* ***Donaghey v. Attorney General***, 120 Ariz. 93, **94-95**, 584 P.2d 557, 558-59 (1978); ***Rhodes v. Clark***, 92 Ariz. 31, **35**, 373 P.2d 348, 350 (1962).

60. **Article IV, part 2, § 1(14)** of the Arizona Constitution states:

> The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. **Adjustments** to the grid ***shall then be made*** **as necessary to accommodate the goals as set forth [in subsections A-F]**.

(Emphasis added). Under this provision, the Commission must accommodate ***each and every*** goal set forth in **Article IV, part 2, § 1(14)**. The Arizona Constitution unequivocally mandates that the Commission comply with **Section 1(14)(F)**. There is ***no discretion*** about adjusting the grid lines to comply with this mandate. *See* ***Estes v. State***, 48 Ariz. 21, **24**, 58 P.2d 753, 754 (1936) ("The provisions of the Constitution are mandatory, unless otherwise therein stated.").

61. The Court has mandamus jurisdiction to compel the Commissioners to perform their constitutionally mandated non-discretionary duties in this matter. *See* **04/19/02 Order at 4, Dkt. 019**; ***Sears v. Hull***, 192 Ariz. 65, **68**, 961 P.2d 1013, 1016 (1998).

62. The Commission did not perform its constitutionally mandated non-discretionary duties. It did not favor competitive districts and in fact it decreased the number of competitive districts in the State. *See* Findings of Fact, *supra*, ¶¶ **33**, **44** & **47**.

63. By failing to favor competitiveness as mandated by Proposition 106, the Commission's actions were unconstitutional. *See* ***City of Phoenix v. Wittman Contracting Co.,*** 20 Ariz. App. 1, **5**, 509 P.2d 1038, 1042 (1973) (an action upholding mandamus relief, where a statute is constitutional the violation of that statute constitutes an abuse of discretion).

64. Plaintiffs have demonstrated that it was practicable to create competitive districts without causing significant detriment to the other redistricting goals.

65. The Commission's failure to favor competitive districts was an abuse of discretion, and mandamus relief is appropriate. *See* ***Miceli v. Indus. Comm'n of Ariz.***, 135 Ariz. 71, **73**, 659 P.2d 30, 32 (1983) ("[M]andamus may be used to compel an officer, board or commission to take action even though such action is discretionary," and

where "'it clearly appears that an officer has acted arbitrarily and unjustly and in the abuse of discretion,'" an action requiring that discretion be exercised in a particular manner "may still be brought") (citation omitted); *see also* ***Wittman*** 20 Ariz. App. at **5**, 509 P.2d at 1042 (an action upholding mandamus relief, where a statute is constitutional the violation of that statute constitutes an abuse of discretion); ***Brown v. City of Phoenix***, 77 Ariz. 368, **372**, 272 P.2d 358, 361 (1954); ***Collins v. Krucker***, 56 Ariz. 6, **13**, 104 P.2d 176, 179 (1940).

66. Plaintiffs have no other plain, speedy, and adequate remedy at law. Monetary (legal) damages in this case are insufficient; only a remedy at equity will suffice. The maps at issue are to be used in the current-year election cycle. In order to permit proper preparation for the current-year elections, this matter must be resolved in short order. All other remedies are neither sufficiently speedy nor adequate.

The Plaintiffs Are Entitled to Declaratory Relief

67. **Ariz. Rev. Stat. § 12-1832** provides for declaratory relief where a person "whose rights, status or other legal relations are affected by a statute" and allows for determination of "any question of construction or validity" arising under the statute and a "declaration of rights" thereunder.

68. Declaratory relief is appropriate where "'the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *See* ***Wickland Oil Terminals v. Asarco, Inc.***, 792 F.2d 887, **893** (9th Cir. 1986) (quoting ***Maryland Cas. Co. v. Pacific Coal & Oil Co.***, 312 U.S. 270, **273**, 85 L. Ed. 826, 61 S.Ct. 510 (1941)) (citations omitted); *see also* ***Planned Parenthood Center of Tucson, Inc. v. Marks,*** 17 Ariz. App. 308, **312**, 497 P.2d 534, 539

(1972) (justiciable controversy over a statute found); ***Pena v. Fullinwider***, 124 Ariz. 42, **44**, 601 P.2d 1326, 1328 (1979) (plaintiff must be a party in interest affected by the statute). A case is ripe where the essential facts establishing the right to declaratory relief have already occurred.

69. There is a substantial, actual justiciable controversy between parties with adverse legal interests of sufficient immediacy and actuality to warrant the issuance of a declaratory judgment in this case. Plaintiffs and the Commission disagree about the proper interpretation of the Arizona Constitution and the associated substantial effect it has on the mapping of legislative districts to be in effect for a decade. The legal interests of the Minority Coalition and other plaintiffs and the Commission are adverse, as each party believes their interpretation of the Constitution is correct, and the resulting maps they have produced are constitutional, and the maps produced by the other are unconstitutional. This controversy must be resolved in time for the 2004 primary and general elections.

70. The essential facts establishing the right to declaratory relief have been proved.

71. The facts bearing upon judgment are uniquely within the grasp of this Court and it is appropriate for this Court to grant declaratory relief. *See, e.g.*, ***Wilton v. Seven Falls Co.***, 515 U.S. 277, **289**, 115 S.Ct. 2137, 2144 (1995) ("We believe it more consistent with the statute to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp").

72. This Court declares that the Final 2002 Adopted Legislative Plan is in violation of the Commission's constitutionally required duties, that the plan cannot be

used for any legislative elections beginning in 2004 because it does not comply with Proposition 106. *See, e.g.*, ***Day v. Nelson***, 485 N.W.2d 583, **586** (Neb. 1992) (declaratory relief granted where redistricting efforts ignored statutory mandate where "practicable" and where "practicability" was clear). Accordingly:

73. The Court declares that the Final 2002 Adopted Legislative Plan is in violation of the Commission's constitutionally required duties.

74. The Court declares that the Final 2002 Adopted Legislative Plan cannot be certified by the Secretary of State as valid for any elections to the Arizona Legislature.

75. The Court declares that the Final 2002 Adopted Legislative Plan cannot be used for any legislative elections beginning in or after 2004 because the Commission adopted that Plan in violation of **Article II § 13** and **Article IV, part 2, §§ 1(14) and (15)** of the Arizona Constitution.

The Plaintiffs Are Entitled to Injunctive Relief

76. Injunctive relief is appropriate when there is no adequate remedy at law and when the plaintiff will suffer irreparable harm.

77. Plaintiffs would be irreparably injured by the unrecoverable loss of the opportunity to participate in elections with competitive districts, and no adequate remedies at law are available.

78. The Court finds that the Plaintiffs are entitled to the injunctive relief provided for in the Order that is part of these Findings of Fact and Conclusions of Law. *See, e.g.*, ***Wilson v. Eu***, 823 P.2d 545, **548**, **560** (Cal. 1992) (refusing to tolerate gerrymandering, the California Supreme Court appointed special masters to hear evidence and recommend new legislative maps and the Court ultimately chose a map that most fully met the statutory requirements). In particular, the Court determines that it

should (a) order the Commission to adopt a legislative plan that gives appropriate consideration to competitiveness, sets forth constitutional standards, and at a minimum contains the same number of competitive districts as the Hall-Minkoff Plan, and (b) enjoin the Secretary of State and all other officers of the State and its political subdivisions from conducting any legislative elections pursuant to or using the 2002 Final Adopted Legislative Plan. *See, e.g.*, ***Day***, 485 N.W.2d at **585-86** (remanding a map for failing to follow county lines wherever practicable and granting injunction accordingly).

The Plaintiffs Are Entitled to Attorneys' Fees and Costs

79. Although the Coalition is entitled to recover its attorneys' fees under **A.R.S. § 12-2030**, the Coalition is alternatively entitled to an award of its attorneys' fees under the private attorney general doctrine which "is an equitable rule that allows the court to award fees to a party who has vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance." ***Defenders of Wildlife v. Hull,*** 199 Ariz. 411, **428**, 18 P.3d 722, 739 (App. 2001) (citing ***Arnold v. Arizona Dep't of Health Servs.,*** 160 Ariz. 593, **609**, 775 P.2d 521, 537 (1989).

Order

Accordingly, having made the foregoing findings of fact and conclusions of law,

THE COURT HEREBY ORDERS:

Under the special action rules, equitable principles, **A.R.S. §§ 12-1801 through 12-1809**, **12-1831 through 12-1846** and **12-2021 through 12-2030**, the Commission's Final 2002 Adopted Legislative Plan is found and declared to be in violation of **Article IV, part 2, §§ 1(14) and (15)** and **Article II § 13 of the Arizona Constitution**;

The Commission, the Secretary of State and all other officers of the State and its political subdivisions are prohibited and enjoined from conducting any elections pursuant to or using the Commission's Final 2002 Adopted Legislative Plan;

Unless a stay is ordered by an appellate court, the Commission shall reconvene and adopt within forty-five (45) days from the date of this Order a legislative plan to be used for elections to the Arizona State Legislature in the State of Arizona for the years 2004 through 2010 consistent with these Findings of Fact and Conclusions of Law that favors competitiveness as required by the Arizona Constitution, which legislative plan shall be at least as competitive as the Hall-Minkoff Plan or the Hall Modified Plan, and in doing so shall create and apply uniform definitions and standards for constitutionally significant terms such as communities of interest, competitiveness and significant detriment;

If the Commission fails to comply with this Order within the time specified herein, the Court will appoint a special master, the costs of which shall be borne by the Commission, to oversee the creation of a legislative districting plan that fully complies with the Arizona Constitution.

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Plaintiffs are awarded their attorneys' fees and costs pursuant to **A.R.S. § 12-2030** and the Private Attorney General Doctrine and shall file their application in support thereof within thirty (30) days from the date of this Order.

A copy of this order is delivered by electronic mail this date to all counsel who provided the Court staff an electronic mail address.

DATED this 16th day of January 2004.

LET THE RECORD REFLECT that the original Findings of Fact and Conclusions of Law and Orde and filed (entered) by the clerk on January 16, 2004.