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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-007344 03/13/2017

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

VINCE LEACH, et al.

BRETT W JOHNSON

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, et al.

KARA MARIE KARLSON

BRIAN M BERGIN
COLIN F CAMPBELL
JOSHUA CARDEN
ADRIANE J HOFMEYR
JOSEPH KANEFIELD

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The Court reviewed the competing cross-motions for summary judgment, the responses and replies. The Court was provided with the official record of the Commission's proceedings.[1] The Court held oral argument on February 10, 2017.

Plaintiffs' instant challenge is narrow. Plaintiffs **do not** challenge the substantive outcome of the congressional district maps. Rather, plaintiffs challenge the **process** the Commission used in formulating the congressional districts.

1. The Commission provided the Court with a copy of the record, including 44 transcripts of the 44 public meetings. In this ruling, these transcripts are referenced as DExh. 3-46.

The motions fall into three categories. The first category addresses the Commission's compliance with constitutional requirements. The second category addresses the Commission's compliance with the Open Meeting Laws. The third category addresses equitable defenses and standing. Each of these categories will be addressed below.

I. CHALLENGES TO THE COMMISSION'S COMPLIANCE WITH THE CONSTITUTION

Plaintiffs allege that the Commission failed to comply with the procedures mandated by the Arizona Constitution.

The starting point, of course, for the Court's analysis is *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Com'n*, 220 Ariz. 587 (2009) (*Minority Coalition II*). In that case, the Arizona Supreme Court provided broad legal principles that may be easier to state in the abstract than apply to specifics.

In *Minority Coalition II*, the supreme court held that the acts of the Commission are legislative acts and, as a result, are given "substantial deference." *Id*. at ¶ 20. This Court must operate under the expectation that "the legislature acts constitutionally." *Id*. at ¶ 21. And a redistricting plan receives the same deference as this Court would afford other legislation. *Id*. at ¶ 22.

This Court is to give the Commission deference, but not too much deference. Although the Commission acts in a legislative capacity, this Court must nevertheless engage in an analysis to determine whether the Commission followed the "mandated procedure" set forth in the constitutional amendment. *Id*. at ¶ 24. The supreme court noted an important distinction between the acts of the legislature and acts of the Commission: in typical legislation, this Court must look only at the final legislation. In evaluating acts of the Commission, however, this Court must look at the **process** to determine whether the Commission followed the "**mandated procedure**." *Id*. at ¶ 25 (emphasis added).

This Court's review is limited to procedure, not discretionary or judgmental decisions. The supreme court stated: "We cannot use the constitutional requirement that the Commission follow a specified procedure, however, as a basis for intruding into the discretionary aspects of the legislative process and then, having intruded, base our review on whether we conclude that the courts or another entity could offer a 'better' redistricting plan; doing so would impermissibly enlarge our role." *Id*. at ¶ 27. In reaching their decisions, "the commissioners perform legislative tasks of the sort we make every effort not to pre-empt." *Id*. at ¶ 28. Specifically, "[d]eciding the extent to which various accommodations are 'practicable' also requires the commissioners to make judgments that the voters have assigned to the Commission,

not to the courts. We therefore **restrict this portion of our inquiry** to determining whether the Commission followed the constitutionally required procedure in adopting its final redistricting plan." *Id*. (emphasis added).

In conclusion, this Court must review the procedure used by the Commission to determine if it met constitutional requirements. But deciding the extent to which the plan makes accommodations for the various constitutional goals requires the commissioners to make discretionary judgments. These judgments are those "that the voters assigned to the Commission, not to the courts." *Id*. at ¶ 28.

To comply with the mandatory constitutional procedure, the Commission must complete several steps. These four steps or "phases" of the redistricting process were identified in *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Com'n*, 211 Ariz. 337, 352 ¶ 53 (App. 2005) and affirmed by the supreme court in *Minority Coalition II.* 220 Ariz. at 597.

A. Phase 1: The Creation of Districts of Equal Population in a Grid-like Pattern Across the State

The first phase involves the creation of "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. 4, pt. 2, §1 (14). Plaintiffs do not challenge the Commission's approach to this phase of its duties. Plaintiffs acknowledge that the Commission correctly created an initial grid map. Plaintiffs' Response at 4:3.

B. Phase 2: Adjustments to the Grid As Necessary to Accommodate the Six Constitutional Goals

In the second phase, the Commission must make adjustments to the grid "as necessary to accommodate" the six constitutional goals. *Minority Coalition II*, 220 Ariz. at 597, ¶ 31.

Plaintiffs allege that the Commission abandoned the Grid Map, failed to make appropriate adjustments to the Grid Map and completed the so-called Everything Bagel Map without record or foundation.

Here, undisputed evidence indicates that the Commission had multiple public meetings and discussions concerning adjustments to the Grid Map. In fact, the parties agree that between adoption of the Grid Map and the adoption of the Draft Map on October 3, 2011, the Commission held 18 public meetings to deliberate about changes to the Grid Map. DSOF at ¶ 35. The Commission utilized What-if maps to explore possible adjustments before committing to any particular change. *Id*. at ¶ 45.

The Commission adopted the Grid Map on August 18, 2011. DSOF at ¶ 34. Through the What-if Maps developed by the commissioners, the Commission considered various adjustments to the Grid Map. Over the next month and throughout many public meetings, the Commission explored various different mapping scenarios. *Id*. at ¶¶ 40-44. This was not easy work. By September 22, several different What-if maps were being considered. *Id*. at ¶ 73. The problem was the commissioners kept arguing for their own special maps. A review of the transcript reveals an unfortunately high level of testiness between certain commissioners. *See, e.g*., DExh 27, pp. 179, 183-84, 186. During the September 22 meeting, four of the five Commissioners expressed frustration at the slow pace of their progress and indicated a desire to combine elements from the several maps into one compromise map that would serve as the Commission's draft map. DSOF at ¶ 74.

In an effort to move to a single map that the commissioners could collectively work from, on September 26, 2011, Chairperson Mathis proposed a single map. In support of her effort, she stated:

> But I think -- you know, I think all of the commissioners will agree that we've been hearing a lot of the same themes. And all of the what-if scenarios, the different maps that we've been creating, I think have been really great at exploring some of those public input while also trying to keep tribal lands whole and keeping two majority-minority districts and just some of the standard things that we all agree we have to do. So what I thought I would do is try to bring it all together into one map, which is a challenge, but there were great aspects in all of the maps that we've created, I think. And so I tried to take the best that I thought from those maps and try to put them into one, because my primary goal, really, is so that we can begin to work off of one map. And I'm hoping that I've captured most of -- I hope actually I've captured everything that we have talked about.
>
> But you'll notice there is a spot in the middle that's blank. That's the unassigned area, which would ultimately have four districts drawn into it. So that's the hole, so to speak.
>
> And we've been talking about the donut hole, but I was thinking since this is an everything map, this is everything bagel. If we could start affectionately referring to it as that, that's my thinking.

DSOF Exh. 29, p. 56:18-57:20. Chairperson Mathis went on to explain how she created her new map. *Id*. at 57:21-60:23.

Chairperson Mathis proposed the Everything Bagel Map (or the Donut Hole Map), which was informed by and based on the work done on the What-if Maps. DSOF at ¶ 76. The Commission voted to adopt the Everything Bagel Map as a basis for moving forward. *Id*. at ¶ 85. Commissioner Freeman made the motion to adopt the Everything Bagel Map and the vote was unanimous. DExh. 30, p. 106-07.

Over the next week, the commissioners worked to make further adjustments based on the competing constitutional criteria. The Commission had many, many discussions on filling in the bagel hole and discussions about the bagel's edges. By the end of the day on September 29, the Commission had modified the Everything Bagel Map so that it included nine districts of roughly equal population. DSOF at ¶ 95.

The Commission met all day on September 30 from 9 am to 6:36 pm. The map continued to evolve. The Commission took public comments at the end of the meeting, including comments from the Hispanic Coalition regarding concerns about Voting Rights Act compliance. DSOF at ¶ 104. By the end of the September 30 meeting, the commissioners decided not to approve of a draft map yet. The Chair urged commissioners to review the maps over the weekend, before their meeting on Monday, October 3, at which she hoped the Commission would approve its draft map. *Id*. at ¶ 101. The mapping consultant was directed to make changes over the weekend. *Id.*

At the October 3 meeting, Chairperson Mathis presented a map with revisions that she had worked on over the weekend. *Id*. at ¶ 104. The commissioners discussed changes. *Id*. at ¶105. To garner support for her latest efforts, Chairperson Mathis made the following statement about the latest revision:

> I think that this map incorporates much of what came out of the whole counties and river district in a way that allowed also to have three border districts. And so it's not like it just came out of nowhere. From the beginning, which -- about a week ago today is when it first appeared on the scene. And we talked all week about different changes that we all felt needed to be accommodated. We also took in a lot of public input all week and over the weekend, and I think that this map accomplishes most of the goals and we're still meeting all of constitutional criteria.
>
> It's still a compromised map, no doubt. There are things that I know people will have things to talk about, and Cochise I'm sure will be one of those counties that probably will have a lot to say about it because they are now split.
>
> But again, not everybody -- no one got everything they wanted in this. I guess that's the point. So I realize it's down the middle of the road kind of map. But that's me. That's the Independent.

DExh. 33, 37:21-38:17. Afterwards, the Commission heard additional public comments. DSOF at ¶ 106.

On October 3, 2011, the Commission adopted the Draft Map by a 3-1 vote. *Id*. at ¶ 111.

This Court believes that the decision to adopt the Everything Bagel Map as a basis for moving forward and the adoption of the Draft Map are the type of discretionary judgments the voters have assigned to the Commission.

Plaintiffs argue that the Commission failed to "show its work." The Court rejects this argument. As noted in *Minority Coalition II*, in order to prevail on this point plaintiffs must "show that the Commission failed to engage in a deliberative effort to accommodate [the six goals]. If the record demonstrates that the Commission took the goal[s] into account during its deliberative process, [this Court's] procedural inquiry ends." *Id*. at 597-98, ¶ 34. The supreme court specifically rejected the notion that the Commission must make objective findings. *Id*. at ¶ 37. Although developing a detailed record is certainly a good idea, *see, e.g.*, footnote 13, the failure to do so is not a constitutional violation: "the constitution does not require the Commission to record any specific information as evidence of its deliberation." *Id*. at 598, ¶ 37.

There is no shortage of record in this case. The Court's citation to Chairperson Mathis' comments concerning the Everything Bagel Map and the Draft Map in the preceding pages was not to suggest that her statements are undisputed, but to illustrate the practical difficulty plaintiffs' position would present to the Court. This Court has no principled basis for determining whether Chairperson Mathis was sincere or accurate when she stated at a public meeting that the Draft Map was an evolution of previous maps and that it met "all constitutional criteria." This was a matter of her judgment. Nor can the Court inquire into the logic or motives of the three commissioners who voted in favor of the Draft Map. The Draft Map is a product of compromise required by a 5-person voting commission. Balancing constitutional criteria and determining whether the compromise map is appropriate "requires the commissioners to make judgments that the voters have assigned to the Commission, not to the courts." *Minority Coalition II* at 597, ¶ 28.

The constitution does not dictate the mechanics of how the Commission is to adjust the Grid Map. The constitution does not prohibit the use of What-if Maps to explore multiple possible adjustments before committing to a particular change. The constitution does not mandate discrete, iterative steps. The Commission has considerable latitude in how it goes about adjusting the Grid Map to accommodate the goals.

The record demonstrates that the Commission engaged in the required deliberative process in meetings open to the public. The Commission held numerous public meetings and considered multiple alternative maps. The Commission regularly discussed ways to meet the various (and sometimes conflicting) constitutional goals. The commissioners debated with one another and, at times, attempted to compromise. When confronted with a lack of a clear solution, the Commission voted to adopt the Everything Bagel Map as a compromise and as a basis to move forward. After 18 public meetings, the Commission adopted the Draft Map and advertised it to the public. To require a court to analyze the evolutionary process by which the Grid Map turned into the Draft Map would be the very type of legislative micromanagement, judicial activism and second-guessing that *Minority Coalition II* forbids.

The record is sufficient to establish as a matter of law that the Commission followed the mandatory constitutional procedure by adjusting the original Grid Map to accommodate the competing constitutional goals when it prepared the Draft Map.

C. Phase 3: The Commission Must Advertise a Draft Map of Legislative Districts to the Public for Comment for at Least 30 days and Shall Consider Legislative Input

Phase 3 requires the Commission to advertise a draft map to the public for comment for at least 30 days. The constitution states:

> The independent redistricting commission shall advertise a draft map of congressional districts and a draft map of legislative districts to the public for comment, which comment shall be taken for at least 30 days. Either or both bodies of the legislature may act within this period to make recommendations to the independent redistricting commission by memorial or by minority report, which recommendations shall be considered by the independent redistricting commission. The independent redistricting commission shall then establish final district boundaries.

Ariz. Const., Art. 4, pt. 2, § 1(16).

The Draft Map was approved by the Commission on October 3, 2011.

Plaintiffs do not argue that the Commission failed to advertise a draft map. Rather, plaintiffs have two criticisms. First, plaintiffs allege that the Draft Map was advertised before the Commission engaged in a deliberative effort to accommodate all constitutional goals. Second, once the Draft Map was advertised, plaintiffs allege that the Commission failed to "consider" the recommendations of the legislature. Each of these issues will be addressed below.

1. The official record establishes that the Commission considered all constitutional goals before advertising the Draft Map

In *Minority Coalition II*, the supreme court stated that the draft map must attempt to accommodate all the constitutional goals. *Id*. at 600-01, ¶ 43. The issue is whether the Commission engaged in a deliberative process concerning the goals, not whether the Commission addressed the goals to plaintiffs' or a court's satisfaction.

Plaintiffs allege that the Commission "adopted its Draft Map without first examining racial bloc voting or competitiveness data." Plaintiffs' Motion at 5:3-4. In support of this statement, plaintiffs allege that the Commission "adopted the draft map before it had available to it racial bloc voting or competitiveness data." PSOF ¶ 60. But plaintiffs don't deny that the Commission deliberated over Voting Rights Act and competitiveness criteria; rather, plaintiffs allege that such consideration was "pretextual." Motion at 5:5. But at most the evidence cited by plaintiffs stands for the proposition that the Draft Map was based on incomplete information; not that the Commission failed to examine all of the constitutional goals.[2]

More importantly, a review of the record indicates that the Commission did deliberate concerning both Voting Rights issues and competitiveness before it issued the Draft Map. The Commission's Statement of Facts paragraphs 62 through 70 documents instances from the official record where the Commission discussed these issues prior to issuing the Draft Map. For example, the Commission considered issues relating to the Voting Rights Act, including the Hispanic Voting Age Population, the comparison of the alternatives with the two benchmark voting rights districts, and configuration of proposed majority-minority districts. DSOF at ¶ 62. On August 31, 2011, Strategic Telemetry gave a presentation on competitiveness. *Id*. at ¶ 64.[3] Before adopting the Draft Map, the Commission deliberated about several competitiveness issues and the best way to measure competitiveness data. *Id*. at ¶ 67 (documenting competitiveness discussions on 9/2, 9/8, 9/12, 9/14 and 9/16). In fact, Strategic Telemetry gave a second presentation on competitiveness on September 22, 2011, a week and a half before the Commission adopted the Draft Map. *Id*. at ¶ 68, DExh. 27 at 127:19-22 ("we're covering a

2. The portions of the depositions of Commissioners Stertz and Freeman cited by plaintiffs state that not all of the information was known at the time of the Draft Map and the Commission got certain data sets late in the process. *See* Stertz Dep., PExh. F at 22:25-23:2; Freeman Dep., PExh. D at 48:16-17. This is a far cry from establishing that the Commission refused to address the constitutional goals. There is no constitutional requirement that the Commission have all information before issuing a Draft Map.

3. After the adoption of the Draft Map, data from 2004 and 2006 elections were added to further analyze Voting Rights Act and competitiveness. *Id*. at ¶ 66.

number of different questions that have arisen since the time we did the initial presentation on competitiveness a couple of weeks ago").

This Court is not tasked with the role of determining whether the Commission's "chosen method of measuring competitiveness" was proper. *See Minority Coalition II*, 220 Ariz. at 599, n. 14 ("Inquiries into the Commission's chosen method for measuring competitiveness, however, fall outside the scope of judicial review"). Once presented with information that the Commission deliberated over the constitutional criteria, this Court cannot evaluate whether the Commission's actions were sincere. To do so would involve evaluating discretionary judgments of commissioners, which is something the Arizona Supreme Court says this Court cannot do.

In short, the official record conclusively demonstrates that the Commission engaged in a deliberative effort for all of the constitutional goals before advertising the Draft Map. There is no constitutional violation.

2. The official record establishes that the Commission considered the Legislature's recommendations

Plaintiffs next allege that the Commission failed to consider the legislature's recommendations. But the evidence submitted by plaintiffs does not support this conclusion.

From the outset, the record demonstrates that the legislature issued reports and that those reports were submitted to the Commission. All commissioners received a copy. DSOF at ¶ 121. The record demonstrates that Senate President Andy Biggs and House Minority Leader Chad Campbell addressed the Commission and answered questions on December 7, 2011. DSOF at ¶ 128. The record further demonstrates that, between the time of the legislature's submissions and the adoption of the final map, the Commission deliberated concerning some of the specific issues raised by the Legislature's Memorial. DSOF at ¶ 132. Among other issues, on December 5, 2011, Commissioner Stertz presented a map to the Commission that incorporated some of the changes that were the subject of the Memorial's criticisms. DSOF at ¶ 135.

Plaintiffs allege that commissioners suggested "at public hearings that they did not need to consider the legislative recommendations per the AIRC's understanding of counsel's advice." Response at 8:9-10. This Court reviewed the transcript of the Commission meeting on November 29, 2011 when the Legislature's Memorial was discussed. *See* DExh. 35, pages 144:18-152:8. The Court does not believe that plaintiffs provide a fair characterization of that proceeding. Initially, Commission counsel Ms. O'Grady "highlights" that the constitution says that "both bodies of the legislature may act within that [30 day] period to make recommendations to the Commission by memorial or minority report. And those recommendations shall be considered by the Independent Redistricting Commission. And then we can, you know, establish the final

boundaries." *Id*. at 144:25-145:8. Ms. O'Grady confirmed that two documents were received: the Report of the Arizona Joint Legislative Redistricting Committee, and the minority report. At no time does Ms. O'Grady -- or anyone else on the record -- suggest that the Commission ignore the reports. Vice-Chair Herrera summed up the issue when he stated: "I think as Ms. O'Grady said, we're free to read this information and take it into account when we are making changes to the draft map. So I think she was pretty clear." *Id*. at 148:12-15. Mr. Kanefield added that the legislative reports were backed by several hearings and that commissioners could review those hearings: "Madam Chair, members of the Commission, just to add to that point, the legislature conducted several hearings over several days. And those, as Ms. O'Grady just mentioned, those are available on their website to be watched. They're web streamed, so they were -- you can watch the testimony live, and jump to any part of the testimony you wish to review. So it's all available on the AZleg.gov." *Id*. at 150:25-151:4.

Chairperson Mathis recognized that the Commission would consider the legislative reports. She concluded the November 29, 2011 discussion with the following comment: "Okay. We'll be taking all of them into consideration when we start to address the draft maps." *Id*. at 152:6-8.

Thereafter, on December 7, 2011, the Commission heard presentations "on the draft congressional and legislative maps by members of the State legislature." DExh. 39 at 3:25-4:1. Senator Andy Biggs presented the majority report, and Representative Chad Campbell presented the minority report. *Id.* at 5:14-100:17.

This Court reviewed the transcript of Senator Biggs' and Representative Campbell's presentations. Both spoke to substantive criticisms of the Draft Map. The Court will not address all the comments made by the legislators, but a couple of examples demonstrate the point. For example, Senator Biggs said the following:

> Just one example that I'll point out to you is the Congressional District 9. It seems to unnecessarily aggregate parts of several disparate communities of interest within Maricopa County. And to be frank with you, as we, as we took our testimony coming in, I would say that that was the largest issue that we heard about was communities of interest. People came from all over the state saying, well, you know, we shouldn't be here, we should be with them. And, again, we recognize that that is a difficult task to respect communities of interest always. But that certainly was what most of the complaint were that, that I heard sitting there for -- on that joint legislative committee.

Id. at 9:16-10:4. Later, Senator Biggs discussed "the overriding factor, at least that we heard about, is the need for competitive districts." *Id*. at 11:18-20. He expressed concerns that some

districts on the Draft Map were "less competitive." *Id*. at 13:17-18. Senator Biggs responded to questions from commissioners. *Id*. at 17-30.

> Representative Campbell was more complimentary of the Commission's work:
>
> And I want to say from the outset that I think you've done a very good job to this point. I think you have followed the constitution and the intent of Proposition 106. And when I'm around the state talking to people across the state, Republicans, Democrats, and Independents alike, I can assure you there are many people out there who support what you've done and commend you for your efforts.

Id. at 32:12-16. Representative Campbell indicated:

> So I'm going to briefly talk about the minority report that we submitted. You all have a copy of it, I assume; correct? Okay. And I'm also going to talk a little bit about the majority report and some of the comments that my colleague, Senator Biggs, made today.

Id. at 32:22-33:3. Among other issues, he asked the Commission "to take a look at the legislative districts and make sure that they are meeting all the requirements set forth in the constitution, as well as instilling, to the greatest degree possible, competition while meeting the other requirements." *Id*. at 37:1-5. Representative Campbell also responded to questions. *Id*.

In conclusion, the official record indicates that all commissioners were provided with the legislative reports and were instructed that the Commission shall consider those reports in addressing the draft maps. Because of their busy agenda, the commissioners did not discuss the legislative reports on November 29, 2011. But the constitution does not require the Commission to discuss reports as they are received. The commissioners were clearly informed that they needed to consider the reports and the Chair confirmed that the Commission would take the reports into account when addressing the final maps. Legislative leaders then spoke to the Commission, answered questions from the commissioners and issues raised by the legislature were discussed at later meetings.

The essence of plaintiffs' argument is that the Commission did not give sufficient consideration to the legislature's concerns. Plaintiffs allege that the Commission did not "consider the legislative recommendations fully and completely." PSOF at at ¶ 81. Of course, the Majority Report wanted the Commission to start over, stating that "the process used to arrive at the draft congressional and legislative maps is so fundamentally flawed that the remedy is to start the process over." PSOF at ¶ 69; DExh. 109, p. 1. Not surprisingly, the Minority Report disagreed. The Minority Report was critical of the Majority Report, calling it "a witch hunt and a bare attempt to protect the Majority's self-interest, rather than allowing you to do the job that

Arizona voters entrusted you to do." DExh. 113, p. 3. In short, the fullness and completeness that the Commission should give to the legislative reports appears to be largely based on whether one is a Republican or a Democrat. This is a partisan political issue, not a judicial issue.

To paraphrase footnote 14 in *Minority Coalition II*: "At most, the record shows that the [plaintiffs] and the Commission differed as to the use the Commission made of the [Majority Report] and the weight the Commission should have attached to that information." 220 Ariz. at 599 n. 14. This Court believes that assessing the sufficiency or "completeness" of the individual commissioner's consideration of the legislature's reports involves interpretation of a commissioner's decision-making and is therefore precisely the type of judicial activism that *Minority Coalition II* prohibits. Discretionary judgment calls -- such as the weight to be given to the views of the state's politicians -- are what the "voters assigned to the Commission, not to the courts." *Id*. at 597, ¶ 28. Attempting to discern the Commission's motivation for making its decision exceeds the judiciary's proper constitutional role.

The record clearly demonstrates that the legislature submitted reports, expressed concerns and offered encouragement to the Commission. The reports were submitted to the individual commissioners. Topics set forth in the reports were subsequently discussed by the Commission. The Court finds as a matter of undisputed fact that the Commission did engage in the required deliberative process in receiving and considering the legislature's recommendations. Whether the Commission considered the legislative reports to plaintiffs' satisfaction is not for the courts to decide.

D. Phase 4: Establishment of Final District Boundaries

In the fourth and final phase of the mapping process, after the public comment period is ended, the Commission must "establish final district boundaries" and certify the new districts to the Secretary of State. *Minority Coalition II, 220 Ariz.* at 600, ¶ 44. The plaintiffs do not challenge the Commission's approach to this phase of its duties.

E. Conclusion

The Court determines that the record demonstrates that the Commission complied with the procedural requirements of the Arizona Constitution. Plaintiffs have not argued that the final district map does not comply with substantive constitutional requirements. *See, e.g,*. Plaintiffs' Reply 1:17-18 ("[t]his case was never about Plaintiffs' disagreement with the substantive outcome of redistricting").

II. OPEN MEETING LAW ALLEGATIONS

Plaintiffs allege that the Commission violated Arizona Open Meeting Laws by not conducting all of its business in meetings open to the public. *See* Ariz. Const. art. 4, pt. 2, §1(12) ("Three commissioners, including the chair or vice-chair, constitute a quorum. Three or more affirmative votes are required for any official action. Where a quorum is present, the independent redistricting commission shall conduct business in meetings open to the public, with 48 or more hours public notice provided.")

The burden of proving an OML violation falls on the party making the accusation. *City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 486 (1990).

Under the OML, a "meeting" occurs only when (1) there is a "gathering, in person or through technological devices, of a quorum" of the public body; (2) during which the members of the public body "discuss, propose or take legal action, including any deliberations by a quorum with respect to such action." A.R.S. § 38-431(4). The Arizona Supreme Court has ruled that the OML "statutes also require a quorum." *Arizona Independent Redistricting Commission v. Brewer*, 229 Ariz. 347, 357, ¶ 44 (2012).

Plaintiffs allege that OML violations occurred primarily in two respects. First, plaintiffs contend OML violations occurred during the selection of Strategic Telemetry, the Commission's mapping consultant. Second, plaintiffs allege that the Commission violated OML during the creation of the Everything Bagel Map (a.k.a. Donut Hole Map).

The Court reviewed the record and was unable to find sufficient evidence to create a triable issue of fact on either of these points. Evidence does not support a claim that an OML violation occurred during the selection of Strategic Telemetry. Strategic Telemetry was selected by a 3-2 vote on June 29, 2011 after the Commission received public comments and discussed advantages and disadvantages of potential consultants. DSOF at ¶ 16.

Plaintiffs argue that a series of serial communications between the commissioners constitute a "quorum" or "meeting" under the OML. The Court can imagine instances where serial communications between commissioners could result in an OML violation. But the evidence does not support a claim that such communications occurred in the instant case. The public record and testimony of the commissioners demonstrate that no agreement was reached outside of a properly noticed public meeting.

Commissioner Stertz testified that Chairperson Mathis called him on June 28, 2011, urging him to vote for Strategic Telemetry because she wanted a unanimous vote for a mapping consultant. DSOF at ¶ 148. He testified that Chairperson Mathis stated that he [Stertz] would

"need something from [her] down the line, a vote from [her]." PSOF ¶ 90. He testified that Chairperson Mathis called him on the next day to discuss the importance of a unanimous vote on the mapping consultant selection process. They discussed Commissioner Stertz's concerns about Strategic Telemetry. Chairperson Mathis indicated she had spoken to Commissioner Freeman, but said she did not have an answer on how Commissioner Freeman would vote. *Id*. at ¶ 149.

Commissioner Freeman also testified about a conversation with Chairperson Mathis on June 29 before the Commission's public meeting. According to Commissioner Freeman, Chairperson Mathis expressed her support for Strategic Telemetry and commented that a unanimous vote would show a united front. There was no deliberation or agreement to vote during this conversation. Commissioner Freeman did not tell Chairperson Mathis how he would vote, and she told him that she did not know how Commissioners Herrera or McNulty would vote. Commissioner Freeman indicated that nothing Chairperson Mathis said to him during this telephone call differed from what she had stated during the previous public meetings on the matter. *Id*. at ¶ 150.

Neither Commissioner Stertz nor Commissioner Freeman participated in or was aware of a nonpublic meeting of a quorum of the Commission to discuss Commission business, other than during properly noticed executive sessions. DSOF at ¶ 161.

Commissioners Mathis and McNulty acknowledge having an individual conversation about the mapping consultant selection and the importance of a consensus with Chairperson Mathis. But Commissioner McNulty does not recall discussing Strategic Telemetry. *Id*. at ¶ 151. There is no evidence that Commissioners Mathis, McNulty and Herrera ever participated in a three-way telephone call or discussion involving Strategic Telemetry or any other issue.

In support of their argument for an OML violation, plaintiffs claim that Commissioner Herrera stated that Strategic Telemetry was not his first choice. Commissioner Herrera stated that he believed Research Advisory Services was the best selection, but he also stated "in a spirit of cooperation and negotiation, I'm willing to support Strategic Telemetry." DExh. 8 at 41:20-21. This comment does not support a claimed OML violation.

Plaintiffs also suggest that Commissioner McNulty's first choice was Research Advisory Services. PSOF at ¶ 93. Even if true, the Court does not see how such a statement would support an OML violation. More fundamentally, the record offers little support to plaintiffs' claim. In fact, Commissioner McNulty made the motion to approve of Strategic Telemetry in the first place. To be sure, in an open meeting discussion, Commissioner McNulty complimented Research Advisory Services and "agreed" with Commissioner Herrera that Research Advisory Services "did an extremely thoughtful and detailed proposal." DExh. 8 at 42:1-3. Her comments on Research Advisory Services are limited to six lines. *Id*. at 42:1-42-6. She made **brief**

supportive and critical comments on each of the other candidates. *See, e.g.*, pp. 42:7-43:17. Yet Commissioner McNulty's effusive and complimentary comments on Strategic Telemetry run from page 43:18 to page 45:11. She said Strategic Telemetry's proposal "was very responsive to what we had asked them to do. It was to the point, it was meticulously thorough." She added that

> They had excellent methodology for collecting, compiling and categorizing the public input. They talked about how they would go about responding to public comments, not just gathering them. They stressed the importance of the public here and insuring that the public had input and felt their concerns were being heard and addressed.
>
> She complimented Strategic Telemetry on "a very precise and detailed methodology for documenting the development of the map, including pros and cons for each decision. And how the six constitutional factors would be addressed with each decision."
>
> She concluded: "So their proposal didn't just say they would do it, they talked about exactly how they would do it. And they have very specific explanation of the security systems they would use. They had six experienced hands-on team members presented in their proposal, and they gave us a complete menu of technology options."

DExh. 8 at 43:18-45:11. In short, Commissioner McNulty moved to approve of Strategic Telemetry and made strong comments in support of Strategic Telemetry. The record does not support a claim that Commissioner McNulty voted for Strategic Telemetry because of a deal made in violation of open meeting laws or any other OML violation.

The public policy supporting OML is to require public access to all discussions, deliberations, considerations or consultations among a majority of members of a public body regarding matters that foreseeably require final action. It is designed to prevent the public body's members from deciding among themselves privately how to vote, convening the meeting and then voting without discussion, which deprives the public from being able to hear the deliberation or the reason for the action.

During the telephone calls, no agreements were reached about the final vote, and the decision to retain a mapping consultant was fully discussed and decided at a proper open meeting. At most, the record establishes only one-on-one calls from the Chair to individual commissioners to lobby for Strategic Telemetry. There is no evidence to support a claim that the commissioners were deliberating with a commonly understood purpose. *See Stockton Newspapers, Inc. v. Members of Redevelopment Agency*, 171 Cal.App.3d 95, 103 (1985) (requiring an "agreement to agree"). There is no evidence that a quorum was ever present for any communications about the Commission's business of selecting a mapping consultant outside of a properly noticed Commission meeting. The Chair's one-on-one calls to individual

commissioners in an attempt to obtain a unanimous decision on the selection of Strategic Telemetry were not the type of serial communications that OML was intended to prevent. As noted by Judge Brain in his October 15, 2012 Ruling, the OML "does not purport to make the commissioners off-limits to each other" or "prohibit them from exchanging information and ideas so they can prepare for and have fruitful meetings."

The Court finds as a matter of undisputed fact that the selection and hiring of a mapping consultant occurred during a properly noticed public meeting of the Commission. The transcripts of the Commission's properly noticed public meetings show that on June 29, 2011 -- the third public meeting at which the Commission considered the responses to the mapping consultant procurement -- the Commission received public comment, discussed the advantages and disadvantages of potential consultants, and voted 3-2 to engage Strategic Telemetry as the Commission's mapping consultant. DSOF ¶¶ 15-16. This decision was later reaffirmed by a 4-0 vote of the Commission (with one commissioner abstaining). *Id*. at ¶ 20. The selection of Strategic Telemetry was legal and did not violate OML.

Nor does the evidence support an OML violation concerning the Everything Bagel Map. The Everything Bagel Map was presented by Chairperson Mathis on September 26, 2011. *See* DExh. 29 at 56:18-57:20. Commissioners Freeman and Stertz had no knowledge of the Everything Bagel Map before it was presented at the September 26 public meeting. DSOF ¶¶ 153-54. Commissioner Freeman had no personal knowledge that Chairperson Mathis met with two other commissioners about the donut hole map outside of a public hearing of the Commission. DExh. 76 at 29:14-19. Vice-Chair Herrera denied any knowledge of the Everything Bagel Map before it was created. DSOF at ¶ 155, DExh. 30 at 208:1-3 (on September 27, Commissioner Herrera said, "I think it was yesterday was the first day we have seen [the Everything Bagel Map]. This map took me by surprise. I was not aware of this map"). Commissioner McNulty expressed skepticism about the Map at the beginning of the next hearing, expressing a preference for the River District Map. DSOF ¶ 82.

Thus, no evidence supports the claim that more than two members of the Commission gathered, either in person or through technological devices, to create the Everything Bagel Map or to fill in the hole. Indeed, the undisputed evidence indicates that only Chairperson Mathis had a hand in creating the Everything Bagel Map. Plaintiffs have produced no admissible evidence that would lead a reasonable factfinder to conclude that Commissioner McNulty and Chairperson Mathis (or, for that matter, any other commissioner) met outside a public meeting to draft any district or any of the so-called Donut Hole Districts. There is no evidence that two -- much less three -- commissioners conspired to create the Everything Bagel Map or created the Donut Hole Districts outside of public meetings.

In addition, the Court agrees with defendant that the OML claims are barred by laches. The doctrine of laches "will generally bar a claim when the delay in filing suit is unreasonable and results in prejudice to the opposing party." *League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558, ¶ 6 (2009). The fights over Strategic Telemetry and the Everything Bagel Map were well known early in the process. Plaintiffs failed to bring their claims alleging pre-Draft Map harm at or sufficiently near the time of the alleged violations, despite knowing or having reason to know of the facts giving rise to the alleged harm. If plaintiffs wanted to undo the pre-Draft Maps because of the mapping consultant or concerns about how the Draft Map was derived, they should have brought the claim much sooner. To void election maps years after the alleged OML violations occurred would result in prejudice and does not comport with equity. In this sense, the situation is similar to procedural challenges to ballot issues. Procedural issues regarding initiatives are moot once the election has occurred. *See Kerby v. Griffin*, 48 Ariz. 434, 444-46 (1936) (procedures leading up to an election cannot be questioned after the people have voted, but instead the procedures must be challenged before the election is held). If plaintiffs thought the Draft Map was invalid, they should have taken steps sooner to challenge it – not wait until the Final Map was approved and then attempt to invalidate the Final Map.

III. OTHER DEFENSES RAISED BY THE COMMISSION

The Commission moves for summary judgment on Claims 7 and 8 of Plaintiffs' Third Amended Complaint, in which plaintiffs seek mandamus and injunctive relief. This motion is moot given the Court's ruling granting the Commission's motions for summary judgment on Counts 2, 3, 4, 5 and 6.

The Commission also moves for summary judgment based on standing. Generally speaking, an injury is not sufficiently particularized if it is one shared by the public at large. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (a person seeking relief who has no direct or tangible interest more than the public at large does not state an Article III case or controversy). The harm alleged here, however, seems to be one shared by Republican voters in Arizona. *See* Complaint at 2 ("[t]hese violations were foreshadowed by, and the result of, an alliance between the Commission's two Democrats and its so-called Independent Chair to form a voting block to achieve a desired result"). In addition, the Arizona Constitution sets forth a specific process to be followed by the Commission. An alleged failure to follow the process or Open Meeting Laws affects the creation of Arizona's congressional and legislative districts, and ultimately, plaintiffs' voting rights. As a result, the Court believes that plaintiffs have standing to raise these claims. However, the standing issue is moot in light of this Court's decision to grant the Commission's motions on Counts 2, 3, 4, 5 and 6.

IV. ORDERS

IT IS ORDERED that plaintiffs' motion for summary judgment is denied.

IT IS ORDERED that the Commission's motions for summary judgment on Counts 2, 3, 4, 5, 6, 7 and 8 are granted.[4]

IT IS FURTHER ORDERED that, within 20 days from the filed date of this ruling, the Commission shall submit a proposed form of judgment containing Rule 54(c) language.

IV. FINAL OBSERVATIONS

As noted in earlier discussions with the parties, this Court has serious concerns about the practical realities of this expensive, largely taxpayer-funded litigation. By ruling on these motions for summary judgment, the Court both expedites this case and eliminates the need for an expensive trial in late-October.[5] The official record from the Commission's proceedings gives this Court (and any appellate court) all the information it needs.

In concurring in *Minority Coalition II*, Justice Hurwitz expressed his concern about the practical realities of litigation in 2009 over the redistricting performed in 2001. He wrote:

> Only one cycle of legislative elections remains under the plan now at issue. As a practical matter, it makes no sense to require a lame-duck Commission to begin the process anew for only one set of elections. I doubt that the constitutional procedures could be completed -- and review by the Department of Justice finished -- in time for the 2010 elections. Even ignoring time pressures, the product of such a process would necessarily be based on now well-outdated census data, resulting in districts malapportioned at birth.

Minority Coalition II, 220 Ariz. at 602, ¶ 56 (Hurwitz, J., concurring).

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4. Judge Brain already granted the Commission's motion to dismiss Count 1. The Court understands that issues relating to Count 1 have been preserved for appeal.

5. The trial was set for October 23, 2017. If the Court allowed post-trial briefing, this Court would not enter a final appealable judgment before the late spring of 2018. But this Court's final judgment will not end the dispute, because any judgment likely will be appealed by the losing party, first to the Arizona Court of Appeals and then to the Arizona Supreme Court. This Court suspects that the final resolution of this case will not occur for years.

This Court shares Justice Hurwitz's concerns. A delay was imposed in this case as the parties waited for the United States Supreme Court's decision on whether independent redistricting commissions are constitutional. *See Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. ___, 135 S.Ct. 2652 (2015) (answer: yes). It is now 2017. No matter who prevails at the trial court, the aggrieved party likely will take an appeal. This Court sees little chance that the appeal process will be completed before 2018, probably later. Even if the appeal could be completed and the Commission ordered to redo the process, the Court cannot imagine that the process would be finished in time for the 2018 elections.[6] Indeed, the Court doubts that the process could be finished in time for the 2020 elections. And even if the appeal and redistricting could proceed at record pace, the "product of such a process would necessarily be based on now well-outdated census data, resulting in districts malapportioned at birth." In this Court's view, it makes "no sense" to begin the redistricting process anew.

To the extent the appellate courts wish to give the 2021 Commission guidance on compliance with the constitutional requirements based on actions taken by the 2011 Commission, better the process starts now.

6. Neither plaintiffs nor the Secretary of State seems to be clamoring for a new map to be drawn. And how many of the State's elected politicians would want their districts -- from which they have now been successfully elected – redrawn for one election?