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14 UNITED STATES DISTRICT COURT  
15 DISTRICT OF ARIZONA

16 Arizona State Legislature, )  
17 )  
18 Plaintiff, )  
19 vs. )  
20 Arizona Independent Redistricting )  
21 Commission, and Colleen Mathis, Linda C. )  
22 McNulty, José M. Herrera, Scott D. )  
23 Freeman, and Richard Stertz, members )  
24 thereof, in their official capacities; Ken )  
25 Bennett, Arizona Secretary of State, in his )  
26 official capacity, )  
27 Defendants. )

No. 2:12-cv-01211-PGR

**AIRC DEFENDANTS’ MOTION  
FOR RECONSIDERATION  
OF THE COURT’S JUNE 13, 2012  
ORDER GRANTING  
PLAINTIFF’S MOTION TO  
CONVENE A THREE-JUDGE  
STATUTORY COURT**

24 Pursuant to LRCiv 7.2(g), Defendants Arizona Independent Redistricting  
25 Commission (the “Commission”), Colleen Mathis, Linda C. McNulty, José M. Herrera,  
26 Scott D. Freeman, and Richard Stertz (collectively the “AIRC Defendants”) request that  
27 this Court reconsider its June 13, 2012 Order (Doc. 7) in which it granted Plaintiff’s  
28 Motion to Convene a Three-Judge Statutory Court. It is not necessary to convene a

1 three-judge court in this matter because (1) this is a constitutional challenge to a  
2 provision in the Arizona Constitution and not to a specific apportionment plan as  
3 required by 28 U.S.C. § 2284(a); and (2) Plaintiff’s claim is “insubstantial” in that  
4 injunctive relief is not available, *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980).

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. Procedural Background**

7 On June 8, 2012, Plaintiff filed a motion to convene a three-judge court to hear  
8 this action pursuant to 28 U.S.C. § 2284(a), on the grounds that the action “challenges  
9 the ‘the [sic] constitutionality of the apportionment of congressional districts.’” (Doc. 3  
10 at 1.) On June 13, 2012, before the AIRC Defendants responded to Plaintiff’s motion,  
11 this Court granted the motion, finding “that the convening of a district court of three  
12 judges to hear this action is appropriate pursuant to 28 U.S.C. § 2284(a) inasmuch as the  
13 plaintiff is challenging the constitutionality of the apportionment of congressional  
14 districts.” (Doc. 7 at 1.) Having had no prior opportunity to respond to Plaintiff’s  
15 motion, the AIRC Defendants file this Motion for Reconsideration, to set forth why 28  
16 U.S.C. § 2284(a) is inapplicable to Plaintiff’s claim.<sup>1</sup>

17 **II. Legal Argument**

18 **A. 28 U.S.C. § 2284(a) is Inapplicable to Plaintiff’s Claim.**

19 Pursuant to 28 U.S.C. § 2284(a), “[a] district court of three judges shall be  
20 convened when otherwise required by Act of Congress, or when an action is filed  
21 challenging the constitutionality of the apportionment of congressional districts or the  
22 apportionment of any statewide legislative body.” In substantially amending Section

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23 <sup>1</sup> The determination of whether a three-judge court is necessary and appropriate in  
24 any particular case is important, in part, because the use of a three-judge court alters the  
25 appellate procedure. Pursuant to 28 U.S.C. § 1253, “any party may appeal to the  
26 Supreme Court from an order granting or denying, after notice and hearing, an  
27 interlocutory or permanent injunction in any civil action, suit or proceeding required by  
28 any Act of Congress to be heard and determined by a district court of three judges.”  
Direct appeal to the Supreme Court is not permitted of an order granting or denying a  
civil injunction from a single judge court.

1 2284 in 1976, “Congress intended to reduce sharply the class of cases requiring the  
2 convening of a three-judge court.” *City of Phil. v. Klutznick*, 503 F.Supp. 657, 658 (E.D.  
3 Pa. 1980) (citing legislative history of Three-Judge Court Act.) The Senate Report  
4 makes clear that three-judge courts were disfavored. S. Rep. No. 94-204 (1976),  
5 *reprinted in* 1976 U.S.C.C.A.N. 1988, at 1988-89 (“Three-judge court procedure has  
6 recently been termed by one scholar, ‘the single worst feature in the Federal judicial  
7 system as we have it today.’”). Congress repealed 28 U.S.C. § 2281, which prohibited  
8 granting an injunction restraining the enforcement, operation, or execution of a State  
9 statute on grounds of unconstitutionality except by a three-judge court, and made clear  
10 that the use of three-judge courts is required only in the limited circumstances set forth  
11 in Section 2284(a). *Id.* (“This bill eliminates the requirement for three-judge courts in  
12 cases seeking to enjoin the enforcement of State or Federal laws on the grounds that they  
13 are unconstitutional, *except in reapportionment cases.*”) (emphasis added).

14 Here, Plaintiff seeks to invoke Section 2284(a)’s requirement of a three-judge  
15 court on the grounds that its legal claim raises a constitutional challenge to the  
16 apportionment of Arizona’s congressional districts. However, Plaintiff’s Complaint  
17 *does not* challenge the constitutionality of the apportionment of Arizona’s congressional  
18 districts.

19 Instead, Plaintiff’s Complaint challenges the constitutionality of Proposition 106,  
20 the ballot initiative that amended Arizona’s Constitution to create an independent  
21 redistricting commission to perform the task of drawing the State’s congressional and  
22 legislative districts. This challenge could have been brought shortly after Proposition  
23 106 was enacted by the voters in 2000 and before any apportionment took place under  
24 that provision. Specifically, the Complaint alleges that Proposition 106 violates the  
25 Elections Clause of the United States Constitution because it removes the task of  
26 redistricting from the legislature and places it in the hands of the Commission. (Doc. 1  
27 ¶¶ 34-39.) The Complaint does not, however, include a constitutional challenge to the  
28 apportionment of the districts themselves. Nowhere in the Complaint does Plaintiff

1 allege that the congressional districts drawn by the Commission are unconstitutional.

2 A challenge to the ballot measure that created the Commission and vested it with  
3 the authority to engage in redistricting is *not* a challenge to the apportionment of the  
4 State's districts. The plain language of Section 2284(a) is clear that unless otherwise  
5 required by an act of Congress, a three-judge court is only to be convened when a  
6 constitutional challenge is raised to "the apportionment of congressional districts or the  
7 apportionment of any statewide legislative body." In the context of an apportionment  
8 challenge, the use of a three-judge court is only required when a challenge is made to an  
9 existing apportionment; the fact that a legal challenge may result in some  
10 reapportionment effect is insufficient to trigger the requirement. *City of Phil.*, 503  
11 F.Supp. at 658.

12 Plaintiff's claim is not the type of claim that Section 2284(a) is meant to  
13 encompass. Accordingly, Section 2284(a) does not apply to this case, and a three-judge  
14 court is not required to hear this matter.

15 **B. Plaintiff is Not Entitled to the Injunctive Relief it Seeks, Rendering its**  
16 **Claim Insubstantial, and the Use of a Three-Judge Court Unnecessary.**

17 In addition to the specific limitations set forth in Section 2284(a) for when a  
18 three-judge court must be convened, Section 2284(b)(1) provides the further instruction  
19 that a three-judge court need not be convened if the judge to whom the request for a  
20 three-judge court is made "determines that three judges are not required."

21 A three-judge court is not required when the constitutional challenge to the  
22 apportionment of districts is "insubstantial." *See Ariz. Minority Coal. v. Ariz. Indep.*  
23 *Redistricting Comm'n*, 366 F. Supp. 2d 887, 894 (D. Ariz. 2005) (finding a three-judge  
24 court not required because the constitutional challenge to reapportionment was  
25 insubstantial); *see also Simkins*, 631 F.2d at 295 (holding that "plaintiffs have not  
26 alleged sufficient facts to raise a substantial claim requiring the convening of a three-  
27 judge court."). "Insubstantiality of a claim . . . can be based upon the absence of federal  
28 jurisdiction, lack of substantive merit on the constitutional claim, or because injunctive

1 relief is otherwise not available.” *Simkins*, 631 F.2d at 295. Plaintiff’s claim against  
2 Defendants is insubstantial on this last ground – Plaintiff is not entitled to the injunctive  
3 relief it seeks because it unreasonably delayed in filing suit. *Id.* at 295-96.

4 In *Simkins*, the Fourth Circuit found that injunctive relief was unavailable to the  
5 plaintiffs as a result of their delay in filing suit, and therefore, a three-judge court was  
6 not required to hear the case. *Id.* In that case, the plaintiffs waited until sixteen days  
7 before the filing deadline for candidates seeking election to file their lawsuit, despite the  
8 fact that the last election, the results of which formed the basis of their claims, took  
9 place three years prior. *Id.* at 296. The Fourth Circuit found that plaintiffs offered no  
10 good reason for their delay and that the delay in filing “would clearly cause a major  
11 disruption in the election.” *Id.* The *Simkins* decision was based on the holding in  
12 *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, in  
13 which the court found injunctive relief unavailable because the plaintiffs in that case  
14 waited until thirteen weeks before the filing deadline to file suit. 429 F.2d 606, 610 (4th  
15 Cir. 1970).

16 Here, Plaintiff’s delay in filing suit is even more egregious. As noted above,  
17 Plaintiff’s Complaint challenges the constitutionality of the Commission itself, not the  
18 actual congressional districts adopted by the Commission. Thus, the relevant timeframe  
19 for purposes of determining whether injunctive relief is available relates to the creation  
20 of the Commission, not the upcoming elections.

21 Recognizing that “the 2012 election cycle is already well underway” (Doc. 1 ¶ 1),  
22 Plaintiff seeks to enjoin the use of the congressional districts created by the Commission  
23 “beginning the day after the 2012 congressional election in Arizona” (*id.* at 9).  
24 However, pushing back the commencement date for the requested injunction does not  
25 remedy Plaintiff’s delay.

26 As set forth in the Complaint (at ¶¶ 16-17), the Commission was created in 2000,  
27 when Arizona’s voters passed Proposition 106. If Plaintiff believed that the creation of  
28 an independent commission to engage in the redistricting of Arizona’s congressional and

1 legislative districts violated the Elections Clause of the United States Constitution, it  
2 should have filed suit in 2000, shortly after Proposition 106 was enacted. It did not.  
3 Instead, Plaintiff waited *twelve years* before filing suit. Over the course of these twelve  
4 years, much has happened pursuant to Proposition 106: two separate Independent  
5 Redistricting Commissions have been appointed, members of the Legislature have  
6 participated in the selection of the members of those Commissions (*see id.* ¶ 22), both  
7 Commissions have engaged in the redistricting process, and elections have taken place  
8 pursuant to the initial Commission’s district lines. Yet during this time, Plaintiff never  
9 challenged the constitutionality of the Commission. Indeed, Plaintiff took no action to  
10 challenge the constitutionality of the authority vested in the current Commission before  
11 it adopted the final congressional district lines and certified them to Arizona’s Secretary  
12 of State in January 2012 (*id.* ¶ 27), or before the Department of Justice precleared those  
13 lines in April 2012 (*id.* ¶ 28). Instead, Plaintiff waited until after the work of the  
14 Commission was complete to raise its challenge.

15 “[T]he availability of injunctive relief depends on the same general equitable  
16 principles as laches.” *Ariz. Minority Coal.*, 366 F.Supp.2d at 909 (citation omitted).<sup>2</sup>  
17 Plaintiff’s extraordinary delay in raising its constitutional challenge to the creation of the  
18 Commission renders injunctive relief against the congressional maps adopted by the  
19 Commission unavailable. *See id.*; *see also Simkins*, 631 F.2d at 295-96. Thus,  
20 Plaintiff’s claim for injunctive relief against the congressional districts that have been  
21 adopted and precleared is insubstantial, and the convening of a three-judge court is not  
22 required in this case. *Ariz. Minority Coal.*, 366 F.Supp.2d at 895-95; *Simkins*, 631 F.2d  
23 at 295.

## 24 CONCLUSION

25 For the foregoing reasons, the AIRC Defendants respectfully request that this  
26 Court reconsider its June 13, 2012 Order (Doc. 7) and deny Plaintiff’s request for a

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27 <sup>2</sup> The AIRC Defendants reserve the right to raise a formal laches defense in its  
28 future filings before this Court.

1 three-judge court.

2 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of June, 2012.

3  
4 s/ Kristin L. Windtberg

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Kristin L. Windtberg

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11 *Attorneys for Defendants Arizona Independent*

12 *Redistricting Commission, Colleen Mathis, Linda C.*

13 *McNulty, José M. Herrera, Scott D. Freeman, and*

14 *Richard Stertz solely in their official capacities*

15 **CERTIFICATE OF SERVICE**

16 I hereby certify that on June 27<sup>th</sup>, 2012, I electronically transmitted the attached  
17 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
18 Notice of Electronic Filing to the CM/ECF registrants on record.

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20 s/ Jessica A. Lopez

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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

Arizona State Legislature,	)	No. 2:12-cv-01211-PGR
	)	
Plaintiff,	)	
	)	<b>ORDER</b>
vs.	)	
	)	
Arizona Independent Redistricting	)	
Commission, and Colleen Mathis, Linda C.	)	
McNulty, José M. Herrera, Scott D.	)	
Freeman, and Richard Stertz, members	)	
thereof, in their official capacities; Ken	)	
Bennett, Arizona Secretary of State, in his	)	
official capacity,	)	
	)	
Defendants.	)	

Having considered Defendants Arizona Independent Redistricting Commission, Colleen Mathis, Linda C. McNulty, José M. Herrera, Scott D. Freeman, and Richard Stertz’s (collectively “AIRC Defendants”) Motion for Reconsideration,

IT IS HEREBY ORDERED granting AIRC Defendants’ Motion and denying Plaintiff’s Motion to Convene a Three-Judge Statutory Court.