OSBORN MALEDON
A PROFESSIONAL ASSOCIATION ATTORNEYS AT LAW

Mary R. O'Grady, 011034
Kristin L. Windtberg, 024804
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
mogrady@omlaw.com
kwindtberg@omlaw.com

he Phoenix Plaza
1st Floor
929 North Central Avenue
hoenix, Arizona 85012-2793

.O. Box 36379
hoenix, Arizona 85067-6379

elephone 602.640.9000
acsimile 602.640.9050

Joseph A. Kanefield, 015838
Brunn W. Roysden III, 028698
BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555
Telephone: (602) 798-5400
Facsimile: (602) 798-5595
kanefieldj@ballardspahr.com
roysdenb@ballardspahr.com

Attorneys for Arizona Independent Redistricting Commission and Commissioners named in their official capacities

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Arizona State Legislature, Plaintiff, 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.	No. 2:12-cv-01211-PGR **AIRC DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION OF THE COURT'S JUNE 13, 2012 ORDER GRANTING PLAINTIFF'S MOTION TO CONVENE A THREE-JUDGE STATUTORY COURT**

Despite having filed an Amended Complaint "to make the nature of [its] challenge even more clear" (Plaintiff's Response in Opposition to AIRC Defendants' Motion for Reconsideration ("Resp.") at 2), Plaintiff's challenge remains unchanged: it is a challenge to the constitutionality of Proposition 106, *not* a challenge to the specific apportionment of the districts of this State. Accordingly, this Court is not required under 28 U.S.C. § 2284(a) to convene a three-judge court to hear this matter.

I. A THREE-JUDGE COURT IS NOT REQUIRED TO HEAR PLAINTIFF'S CLAIM.

A. Plaintiff's Claim Does Not Challenge the Apportionment of Arizona's Congressional Districts.

Plaintiff asserts that its claim falls "squarely" within the meaning of Section 2284 (Resp. at 3), and that this action "involves precisely the type of claim that Section 2284(a) is meant to encompass" (*id.* at 5); however this is simply not the case. Section 2284(a) requires the convening of a three-judge court "when an action is filed challenging the constitutionality of the apportionment of congressional districts."[1] In the context of redistricting, the term "apportionment" refers to the distribution of elective seats among electoral districts. (*See* Black's Law Dictionary (9th ed. 2009), apportionment ("Distribution of legislative seats among districts; esp., the allocation of congressional representatives among the states based on population, as required by the 14th Amendment.").) Unlike the typical case in which Section 2284(a) requires the convening of a three-judge court, Plaintiff does not raise a constitutional challenge to the specific distribution of elective seats among Arizona's elective districts.

Plaintiff concedes it is only challenging "how" congressional districts are apportioned in Arizona rather than any specific apportionment. (Resp. at 4.) Although Plaintiff's Amended Complaint asks this Court to declare "that the congressional district maps adopted by the IRC are unconstitutional and therefore null and void" (Am. Compl. at 9), the sole basis for this request is Plaintiff's contention that "Proposition 106 violates the Elections Clause of the United States Constitution" and therefore any congressional districts drawn pursuant to the redistricting scheme established by Proposition 106 must also be unconstitutional. (*See* Resp. at 4.)

---

[1] Section 2284(a) also requires the convening of a three-judge court "when otherwise required by Act of Congress," and when "an action is filed challenging the constitutionality of the apportionment of . . . any statewide legislative body." *Id.* Neither of these provisions is relevant to this action, and Plaintiff does not claim otherwise.

Plaintiff does not ask this Court to declare that the congressional districts are unconstitutional because of the way in which they apportion the congressional seats throughout the State. It only challenges the authority of the body that established Arizona's congressional districts – the Arizona Independent Redistricting Commission. Indeed, if this same claim had been filed before the AIRC completed its redistricting work, the relief would have been to enjoin the Commission from adopting congressional districts, relief that is plainly outside Section 2284. Plaintiff's unjustifiable delay in bringing this action after the Commission finished its work does not transform it into a claim within Section 2284.

Thus, despite Plaintiff's amendment to the original complaint, Plaintiff's action is not within Section 2284(a) because is not an action "challenging the constitutionality of the apportionment of congressional districts." As a result, Section 2284(a) is inapplicable, and a three-judge court is not required to hear this matter.

B. Plaintiff's Claim is Insubstantial Because Injunctive Relief is Not Available.

In addition to the reason discussed above, a three-judge court is not required in this case because Plaintiff's claim is insubstantial. When a constitutional challenge to the apportionment of districts is "insubstantial," it is not necessary to convene a three-judge court. *See Ariz. Minority Coal. v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 894 (D. Ariz. 2005) (finding a three-judge court not required because the constitutional challenge to reapportionment was insubstantial); *see also Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980) (holding that "plaintiffs have not alleged sufficient facts to raise a substantial claim requiring the convening of a three-judge court."). Plaintiff asserts that a "claim is insubstantial only when it is obviously without merit or clearly concluded by the Supreme Court's previous decisions," citing two Supreme Court cases in which insubstantial claims were discussed. (Resp. at 5 (internal quotation marks omitted).) However, courts have also found that a claim can

be found insubstantial "because injunctive relief is otherwise not available." *Simkins*, 631 F.2d at 295.

As discussed more fully in AIRC Defendants' Motion for Reconsideration, Plaintiff is precluded from obtaining injunctive relief because it unreasonably delayed in filing its challenge to the ballot measure creating the Commission. "[T]he availability of injunctive relief depends on the same general equitable principles as laches." *Ariz. Minority Coal.*, 366 F. Supp. 2d at 909 (citation omitted). Thus, when a plaintiff unreasonably delays in filing suit, it is not entitled to injunctive relief. Here, Plaintiff seeks to enjoin "Defendants and each of them permanently from adopting, implementing or enforcing any congressional map created under Proposition 106 . . ." on the grounds that Proposition 106 is itself unconstitutional. (Am. Compl. at 9.) Yet, Plaintiff's twelve year delay in asserting a constitutional challenge to Proposition 106 renders injunctive relief against the congressional maps adopted by the Commission unavailable. *See id.*; *see also Simkins*, 631 F.2d at 295-96. Accordingly, a three-judge court is not required in this case.[2]

II. THERE IS NO RISK THAT THE FINAL RESOLUTION OF THIS CASE COULD BE DELAYED IF A THREE-JUDGE COURT IS NOT CONVENED.

Plaintiff contends that if this Court has concerns regarding the applicability of Section 2284 to its claim, or believes "that the use of a three-judge court is a close question," it should err on the side of appointing a three-judge court, because "the failure to convene a three-judge court where one is required could warrant reversal of the ultimate decision." (Resp. at 6-7.) As an initial matter, the Court should not grant the request for a three-judge court simply because the issue might be a close question. Plaintiff cites no authority to support this proposition. The Court should decide this

[2] Plaintiff's claim that the Election Clause prohibits a state constitution from establishing an independent commission responsible for congressional redistricting contradicts Supreme Court precedent in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916) and *Smiley v. Holm*, 285 U.S. 355 (1932), but the Commission will address that issue in its Motion to Dismiss.

issue as it decides any issue, by trying to reach the right conclusion based on the applicable law. Moreover, even if the Court declined to convene a three-judge court, and was mistaken in doing so, there would be no need to let the case proceed through a decision on the merits before the issue could be addressed.

It is well-settled that "[w]here a single judge refuses to request the convention of a three-judge court, but retains jurisdiction, review of his refusal may be had in the court of appeals, . . . either through petition for writ of mandamus or through a certified interlocutory appeal under 28 U.S.C. § 1292(b)." *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 100-101, n.19 (U.S. 1974) (internal citations omitted). Thus, if this Court denies Plaintiff's request for a three-judge court, and Plaintiff believes the decision to be in error, it can seek review of the decision from the Ninth Circuit Court of Appeals immediately, before the merits of Plaintiff's claims are ever addressed. No delay in the final resolution of the case need result.

CONCLUSION

The AIRC Defendants therefore respectfully request that this Court reconsider its June 13, 2012 Order (Doc. 7) and deny Plaintiff's request for a three-judge court.

RESPECTFULLY SUBMITTED this 30th day of July, 2012.

s/Mary R. O'Grady
Mary R. O'Grady
Kristin L. Windtberg
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793

Joseph A. Kanefield
Brunn W. Roysden III
BALLARD SPAHR LLP
1 East Washington Street, Suite 2300
Phoenix, Arizona 85004-2555

Attorneys for Defendants Arizona Independent Redistricting Commission, Colleen Mathis, Linda C. McNulty, José M. Herrera, Scott D. Freeman, and Richard Stertz solely in their official capacities

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

s/ A. Hughes