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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Arizona State Legislature,  
  
Plaintiff,

vs.

Arizona Independent Redistricting  
Commission, et al.,  
  
Defendants.

No. CV-12-01211-PHX-PGR

**PLAINTIFF’S RESPONSE IN  
OPPOSITION TO AIRC  
DEFENDANTS’ MOTION FOR  
RECONSIDERATION**

Pursuant to the Court’s Order and Local Rule 7.2(g), Plaintiff Arizona State Legislature hereby responds to AIRC Defendants’ Motion for Reconsideration of the Court’s June 13, 2012 Order Granting Plaintiff’s Motion to Convene a Three-Judge Statutory Court. (Doc. 9.) The Court correctly concluded that 28 U.S.C. § 2284(a) requires convening a three-judge court to hear Plaintiff’s constitutional challenge to the

1 appportionment of congressional districts. (Doc. 7.) Plaintiff has additionally filed  
2 contemporaneously herewith a First Amended Complaint to make the nature of the  
3 challenge even more clear. Plaintiff therefore respectfully requests that this Court deny  
4 Defendants’ Motion for Reconsideration (Doc 9.) and continue the process of notifying  
5 the Chief Judge of the United States Court of Appeals for the Ninth Circuit, who shall  
6 designate two other judges to hear this action pursuant to 28 U.S.C. § 2284(b)(1).

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **PROCEDURAL BACKGROUND**

9 On June 8, 2012, Plaintiff filed a Motion to Convene a Three-Judge Statutory  
10 Court to hear this action pursuant to Section 2284(a), based on a constitutional  
11 challenge to the apportionment of congressional districts in Arizona. (Doc. 3 at 1.) On  
12 June 13, 2012, this Court granted that motion, finding “that the convening of a district  
13 court of three judges to hear this action is appropriate pursuant to 28 U.S.C. § 2284(a)  
14 inasmuch as the plaintiff is challenging the constitutionality of the apportionment of  
15 congressional districts.” (Doc 7 at 1.) On June 27, 2012, Defendants filed a Motion for  
16 Reconsideration of the Court’s June 13, 2012 Order Granting Plaintiff’s Motion to  
17 Convene a Three-Judge Statutory Court. (Doc. 9.) On July 3, 2012, this Court ordered  
18 Plaintiff to respond to Defendants’ Motion for Reconsideration by July 20, 2012. (Doc.  
19 10.) Plaintiff is filing contemporaneously with this Response an Amended Complaint  
20 pursuant to Fed. R. Civ. P. 15(a)(1)(B).<sup>1</sup>

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25 <sup>1</sup> As no responsive pleading has yet been filed, it is proper to consider the Plaintiff’s  
26 First Amended Complaint to determine whether a three-judge court was properly  
invoked. *See, e.g., Patterson v. Hardin*, 145 F. Supp. 299, 301 (D. Ind. 1956)  
(reviewing amended complaint in discussing applicability of Section 2284).

**ARGUMENT**

**I. A THREE-JUDGE COURT IS REQUIRED TO DECIDE PLAINTIFF’S CONSTITUTIONAL CHALLENGE TO THE APPORTIONMENT OF CONGRESSIONAL DISTRICTS.**

This Court should uphold its previous ruling because Plaintiff has indeed brought a constitutional challenge to the AIRC’s apportionment of congressional redistricting. Proposition 106 unconstitutionally removed congressional redistricting authority from the Arizona Legislature. The Plaintiff Legislature therefore seeks to enjoin permanently the enforcement of Proposition 106, and enjoin Defendants from enforcing or implementing any congressional redistricting plan from the Independent Redistricting Committee (“IRC”) beginning the day after the 2012 congressional election. The Plaintiff also seeks a declaration that Proposition 106 violates the Elections Clause as to congressional redistricting and that the congressional maps should be declared void. Under this framework, a three-judge court should be convened to hear this challenge for three principal reasons. First, the Plaintiff’s claim falls squarely within the plain meaning of the three-judge court statute. Second, legislative history supports convening a three-judge court in this instance. Third, while the erroneous usage of a three-judge court would not necessarily require reversal and remand of any substantive decision, a failure to appoint a three-judge court could cause unnecessary appellate steps to final resolution.

**A. Plaintiff’s Claim Is Squarely Within the Plain Meaning of Section 2284.**

The plain language of Section 2284(a) compels this Court to convene a three-judge court to hear this action: “A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts . . . .” 28 U.S.C. § 2284(a). *See also Page v. Bartels*, 248 F.3d 175, 190 (2001) (“[C]hallenges to apportionment are the kinds of claims requiring . . . the ‘special and extraordinary procedure’ represented by the

1 convening of a three-judge district court”) (quoting *Kennedy v. Mendoza-Martinez*, 372  
2 U.S. 144, 155 (1963)).

3 Here, Plaintiff does precisely what Section 2284(a) contemplates will require  
4 convening a three-judge court—it brings a constitutional challenge to the apportionment  
5 of congressional districts established by the IRC. (Pl’s First Amended Complaint at 9 ¶¶  
6 40-42.) Specifically, Plaintiff complains that Proposition 106 violates the Elections  
7 Clause of the United States Constitution insofar as it removes the authority to prescribe  
8 the times, places, and manner of congressional elections from the Arizona Legislature.  
9 (*Id.*) Plaintiff seeks a declaratory judgment that the existing process is unconstitutional  
10 and that the fruits of that process are likewise unconstitutional – along with permanent  
11 injunctive relief restraining enforcement of the process and the maps. (*Id.*) The First  
12 Amended Complaint obviously presents a constitutional challenge to how congressional  
13 districts are being apportioned. Defendants’ claim that “Plaintiff’s Complaint *does not*  
14 challenge the constitutionality of the apportionment of Arizona’s congressional  
15 districts” (Doc. 9 at 3–4) is a paltry attempt to elevate form over substance.

16 Furthermore, the three-judge court question in the case at bar is far removed from  
17 the Defendants’ example of *City of Philadelphia v. Klutznick*, 503 F. Supp. 657 (E.D.  
18 Pa. 1980). In that case, the court held that convening a three-judge court was not  
19 required because the case “involv[ed] a challenge only to the constitutionality of the  
20 conduct of the census and involve[ed] no challenge to any existing apportionment  
21 statute . . . .” *Id.* at 658. The *Klutznick* court reasoned that it was insufficient for  
22 purposes of convening a three-judge court that the challenged census could result in  
23 some reapportionment effect in the future. *Id.* at 658. The Plaintiff here is not  
24 challenging the conduct and results of a census. Rather, it challenges the  
25 unconstitutional stripping of authority from the Arizona State Legislature to decide the  
26 times, places, and manner of congressional elections in Arizona. (Pl’s First Amended

1 Complaint at 9 at ¶¶ 40-42.) The Amended Complaint is in every aspect a constitutional  
2 challenge to the specific apportionment of Arizona’s congressional districts that are  
3 already in effect, and will continue to be, until a three-judge court finds the  
4 apportionment unconstitutional.

5 The Defendants further assert that a three-judge panel is not required because  
6 Plaintiff’s claims are “insubstantial.” (Doc. 9 at 4.) Defendants are mistaken on this  
7 point. A claim is insubstantial only when it is “obviously without merit or clearly  
8 concluded by [the Supreme Court’s] previous decisions.” *McLucas v. DeChamplain*,  
9 421 U.S. 21, 28 (1975); *see also Goosby v. Osser*, 409 U.S. 512, 518 (1973)  
10 (“Constitutional insubstantiality for [three-judge court] purpose[s] has been equated  
11 with such concepts as ‘essentially fictitious,’ ‘wholly insubstantial,’ ‘obviously  
12 frivolous,’ and ‘obviously without merit.’”) (citations omitted). Defendants fail to cite a  
13 single prior decision or example that would render Plaintiff’s Complaint “insubstantial”  
14 on these grounds. Clearly, this Court has jurisdiction to hear Plaintiff’s substantial  
15 constitutional claims, and such claim entitles the Legislature to the declaratory and  
16 injunctive relief sought. Additionally, the Plaintiff’s allegations must be deemed true  
17 for purposes of deciding the three-judge court issue. *Goosby v. Osser*, 409 U.S. 512, 521  
18 & n.7 (1973).

19 Thus, a three-judge court should be convened to hear this action because it  
20 involves precisely the type of claim that Section 2284(a) is meant to encompass, namely  
21 a constitutional challenge to the apportionment of congressional districts.

22 **B. Legislative History Supports Convening a Three-Judge Court to Hear**  
23 **Plaintiff’s Constitutional Challenge.**

24 Appointing a three-judge court in this case is entirely consistent with the  
25 legislative history of Section 2284. Although Congress has indeed limited the use of  
26 three-judge courts generally, it simultaneously “preserve[d] three-judge courts for cases

1 involving congressional reapportionment. . . because it is the judgment of the committee  
2 that these issues are of such importance that they ought to be heard by a three-judge  
3 court and, in any event, they have never constituted a large number of cases.” S. REP.  
4 NO. 94-204 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988, 1996. Regardless of other  
5 amendments irrelevant to the instant dispute, apportionment cases are not ones for  
6 which Congress has acted to decrease the burden imposed by three-judge courts. In fact,  
7 “[t]he Senate Report, for example, consistently states that ‘three-judge courts would be  
8 retained . . . in any case involving congressional reapportionment or the reapportionment  
9 of any statewide legislative body.’” *Page*, 248 F.3d at 190.

10 Thus, convening a three-judge court to hear this challenge is both appropriate  
11 and consistent with Congress’s intent in both enacting Section 2284 and largely  
12 preserving it after amending the law to eliminate three-judge courts for other types of  
13 cases.

14 **C. Failure to Convene a Three-Judge Court Could Delay Final Resolution of this**  
15 **Case.**

16 If the Court is concerned that the use of a three-judge court is a close question in  
17 this case, the impact of this decision can be easily measured. On the one hand, the use  
18 of a three-judge court (even if erroneous) would not automatically require reversal of  
19 the ultimate decision merely because two additional judges participated in the decision  
20 process. *See* 17A CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. JURIS. § 4235,  
21 at 611 (3d ed. 1978) (“Even if a single judge can hear a case in the absence of request, a  
22 decision by three judges would be valid . . .”). On the other hand, the failure to  
23 convene a three-judge court where one is required could warrant reversal of the ultimate  
24 decision. *See id.* at § 4234, n. 2 (citing *Carlsbad Union School Dist. v. Rafferty*, 300 F.  
25 Supp. 434 (S.D. Cal. 1969) for the proposition that a single-judge district court is  
26 without power to act in a case requiring three judges, but a three-judge panel may act in  
any instance); *and see Goosby*, 409 U.S. at 513 (restraining order heard by district

1 judge, dismissed as unsubstantial by Third Circuit, reversed for consideration by three-  
2 judge court). Failure to convene a three-judge court now could thus result in  
3 unnecessary delay should it later be determined that Section 2284 applies. Any doubt  
4 about the applicability of Section 2284 to this apportionment challenge should therefore  
5 be resolved in favor of appointing a three-judge court.

6 **CONCLUSION**

7 Plaintiff has challenged the constitutionality of the apportionment of  
8 congressional districts, and a three-judge court is therefore required to hear it pursuant  
9 Section 2284(a). For the foregoing reasons, Plaintiff respectfully requests that this Court  
10 deny the Defendants' Motion for Reconsideration and continue the process outlined in  
11 Section 2284(b)(1).

12 RESPECTFULLY SUBMITTED on July 20, 2012.

13 **ARIZONA STATE LEGISLATURE**

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**CERTIFICATE OF SERVICE**

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I hereby certify that on July 20, 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 to the following:

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