No. 14-

IN THE

Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,

Appellants,

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF ARIZONA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the desire to gain partisan advantage for one political party justify intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle?

2. Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle? And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby County v. Holder*, 133 S.Ct. 2612 (2013)?

3. Was the Arizona redistricting commission correct to disregard the majority-minority rule and rely on race and political party affiliation to create Hispanic "influence" districts?

PARTIES TO THE PROCEEDING

The Appellants here and plaintiffs below are Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Karen M. McKean, and Sharese Steffans (*Harris* voters). These individuals are Arizona citizens and registered voters, and each resides in an over-populated Arizona legislative district.

Appellees and defendants are the Arizona Independent Redistricting Commission, Colleen Mathis, Linda C. McNulty, Scott D. Freeman, Richard Stertz, and Cid R. Kallen (replacing former Commissioner Jose M. Herrera pursuant to Fed.R.Civ.P. 25(d)), in their official capacity as members of the Arizona Independent Redistricting Commission, and Ken Bennett, in his official capacity as Arizona Secretary of State.

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JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANTS WESLEY HARRIS, et al.

Appellants Wesley Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Karen M. McKean, and Sharese Steffans, for themselves and all residents of Arizona whose votes have been diluted by the State's 2012 legislative redistricting plan, appeal to the Supreme Court of the United States from the final judgment, App. 81a, entered in the United States District Court for the District of Arizona.

OPINIONS BELOW

On April 29, 2014, the three-judge district court (Clifton, Silver, Wake, JJ.) entered a *per curiam* memorandum opinion and order that is the subject of this appeal. The *per curiam* opinion is at App. 3a-81a. Judge Silver's concurrence is at App. 82a-104a. Judge Wake's dissent is at App. 105a-145a.

JURISDICTION

The three-judge court entered its final judgment on April 29, 2014. Appellants filed their notice of appeal on June 25, 2014. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This appeal involves the Equal Protection Clause of the Fourteenth Amendment and Sections 2 and 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973c, all reproduced at App. 211a-215a.

STATEMENT OF THE CASE

When the unelected Independent Redistricting Commission (IRC) created Arizona's legislative districts, it violated the Equal Protection Clause by intentionally over-populating Republican districts and under-populating Democrat districts. These deviations violate the "one-person, one-vote" principle recognized in *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), and *Roman v. Sincock*, 377 U.S. 695, 710 (1964). Creating legislative districts with intentional population deviations from the one-person, one-vote zero-deviation ideal to advance one political party's interest or to gain the perceived favor of the Justice Department in preclearance review is contrary to this Court's holdings and the Arizona Constitution.

The three-judge court found the IRC created legislative districts with unequal population to achieve two ends: (1) giving Democrats a partisan advantage and, (2) making it more likely the Justice Department would approve its map under Section 5 of the Voting Rights Act (VRA).

STATEMENT OF THE FACTS

A. Factual Background

"Judge Clifton correctly finds that the IRC was actually motivated by both party advantage and hope for Voting Rights Act preclearance. So we have a majority for that finding of fact."[1]

1. *The IRC was created to take partisan politics out of redistricting and establish legislative districts of equal population that are fair and competitive.*

In 2000, the Arizona Constitution was amended by a citizen initiative intended to "take the redistricting power away from the Arizona Legislature and put it in the hands of a politically neutral commission of citizens who are not active in partisan politics…."[2] The proposition aimed to "end[] the practice of gerrymandering and improv[e] voter and candidate participation in elections by creating an independent commission of balanced appointments to oversee the mapping of fair and competitive congressional and legislative districts."[3]

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[1] App. 107a.

[2] Arizona Secretary of State, 2000 General Election: Ballot Measures, "Fair Districts, Fair Elections," <http://www.azsos.gov/election/2000/General/ballotmeasures.htm> (last visited August 21, 2014).

[3] Arizona Secretary of State, 2000 General Election, <www.azsos.gov/election/2000/info/pubpamphlet/prop2-C-2000.htm> (last visited August 21, 2014).

App. 57a; *see also* App. 146a-152a (ARIZ. CONST. art. 4, pt. 2, § 1(3)-(23)).[4]

Arizona's Constitution further provides: "[p]arty registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals." App. 151a.

The Arizona Constitution requires the IRC to begin the first stage of the redistricting process with "districts of equal population in a grid-like pattern across the state." App. 150a (ARIZ. CONST. art. 4, pt. 2, § 1(14).

The IRC did not follow this equal population requirement, but rather drew the grid map with a population deviation of 4.07%.[5] App. 19a. This deviation, though greater than the equal population required by the Arizona Constitution, was less than half of the nearly 9% deviation the IRC finally adopted. App. 108a.

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[4] The IRC's legitimacy is subject to a separate constitutional challenge brought by the Arizona State Legislature. *See Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, No. 13-1314 (U.S. Supreme Court).

[5] In election law terminology, "population deviation" is the degree to which election districts deviate from the ideal of equal distribution of population among all election districts. Ideally, the populations of all legislative districts within a state are equal. In redistricting, "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

2. *The IRC intentionally created more Hispanic "influence" districts because it believed this would increase the likelihood of the Justice Department approving the districts.*

The IRC performed no racial or ethnic bloc voting analysis of the draft legislative map. App. 154a-156a. Instead, it relied on an *ad hoc* measurement it called the "Cruz Index" which inferred minority voting preferences based on the results of an election between a Hispanic Democrat and a non-Hispanic, white Republican for the office of Mine Inspector. *Id.*

The IRC ultimately retained Dr. Gary King, to determine whether its proposed legislative plan would satisfy Section 5's non-retrogression requirement.[6] *Id.* It did not study whether any minority populations had not been accommodated under Section 2 of the VRA. *Id.* Dr. King's study first identified ten districts as "ability-to-elect" districts, but he later revised his study to remove districts 24 and 26, leaving eight minority "ability-to-elect" districts. These eight districts were numerically equal to or greater than the 2002

[6] "Retrogression" refers to a reduction in the minority voting strength. Whether there is any "retrogression" is evaluated by comparing the prior "baseline" districts with those created in a new redistricting. Section 5 prohibits "only those redistricting plans that would have the purpose or effect of worsening the position of minority groups." *Shelby County*, 133 S.Ct. at 2627. "Section 5 was intended to halt actual retrogression in minority voting strength…." *Riley v. Kennedy*, 553 U.S. 406, 432 (2008) (quoting *City of Lockhart v. United States*, 460 U.S. 125, 133 (1983)).

Benchmark Plan and purported to avoid any retrogression. App. 73a, 205a.

The IRC had, thus, drawn sufficient minority "ability-to-elect" districts to avoid retrogression and did not need to create any more minority "ability-to-elect" districts. But the IRC redrew three more "ability-to-elect" districts rationalizing that, by including more Hispanic residents in these districts, the Justice Department might be more likely to preclear the plan. App. 31a.

Dr. Thomas Hofeller opined that neither District 24 nor 26 – both centered in the northern part of Maricopa County – could be Hispanic ability-to-elect districts. App. 188a-189a. Hispanics are not a plurality of the population in District 24, and when analyzing the percentage of the district that actually makes up the district's electorate – citizens of voting age – Hispanic population drops to only 22.8%. App. 243a-244a. Likewise, Hispanics are only 38.5% of the population of District 26. App. 245a, 31a. And when considering citizens of voting age, Hispanics make up only 8.9% of District 26's potential electorate. App. 243a. Hispanic voting age population improved just 2.3% in District 24 and 1.6% in District 26. App. 200a.

The IRC's plan had nothing to do with any legitimate effort to increase Hispanic participation in Arizona's legislature. Instead, the IRC's plan intended to "pack" non-Hispanic-white Republican voters in over-populated districts to gain an advantage for the Democrats by overweighting the votes of Democrat voters in the under-populated

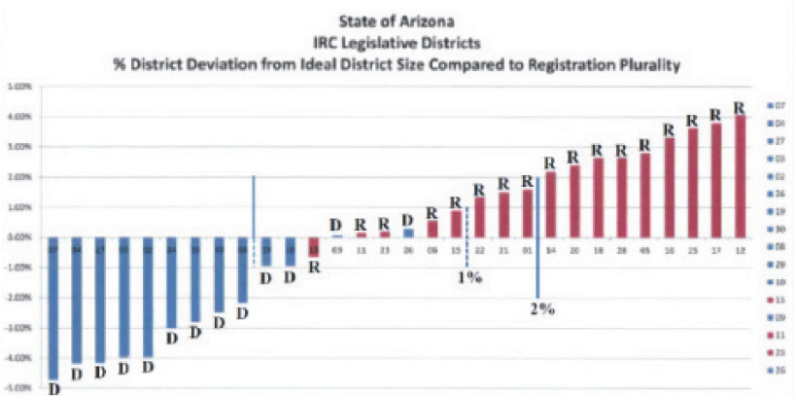
districts. Out of thirty districts, "the 18 with population deviation greater than ±2% from ideal population correlate *perfectly* with Democrat Party advantage." App. 108a (emphasis added).

3. *The IRC systematically diluted votes in Republican districts while amplifying the votes in Democrat districts to achieve a partisan advantage for Democrats.*

Nearly 71,000 Arizona voters have been relegated to over-populated, non-Hispanic-white, Republican-plurality districts. And Democrat-plurality "Hispanic influence" districts are under-populated by an equal amount. This intended outcome gives voters in the Democrat districts a greater say than their counterparts in non-Hispanic-white Republican-plurality districts.[7] The total deviation between these districts is close to 9%.

[7] The dilutive effects of the Commission's plan are exacerbated by Arizona's unique manner of conducting elections. Unlike many other states, Arizona "nests" its elections – one Senator and two Representatives – in single districts, and legislative elections for both houses are held every two years. The map's constitutional infirmities are thus trebled because they affect three elections instead of just one. *Cf. Chapman v. Meier*, 420 U.S. 1, 25-26 (1975) (holding that in states with small populations where individual votes are more important, "particular emphasis should be placed on establishing districts with as exact population equality as possible").

The following two charts in Judge Wake's dissent tell the story:



	District	Population	Deviation from Ideal Population	
			#	%
Democratic registration plurality	7	203,026	-10,041	-4.7
	4	204,143	-8924	-4.2
	27	204,195	-8872	-4.2
	3	204,613	-8454	-4.0
	2	204,615	-8452	-4.0
	24	206,659	-6408	-3.0
	19	207,088	-5979	-2.8
	30	207,763	-5304	-2.5
	8	208,422	-4645	-2.2
Republican registration plurality	14	217,693	+4625	+2.2
	20	218,167	+5099	+2.4
	18	218,677	+5609	+2.6
	28	218,713	+5645	+2.6
	5	219,040	+5972	+2.8
	16	220,157	+7089	+3.3
	25	220,795	+7727	+3.6
	17	221,174	+8106	+3.8
	12	221,735	+8667	+4.1

App. 112a-113a; *see also* App. 209a.

B. Procedural History

The *Harris* voters challenged the IRC's redistricting scheme because the IRC's map violates the Equal Protection Clause. Judges Clifton, Silver, and Wake convened a one-week trial in March 2013 to hear testimony about how the IRC created these districts.

A year later, in April 2014, the three-judge court issued a *per curiam* opinion upholding the IRC's redistricting scheme. Judge Wake dissented and said the IRC's redistricting was unconstitutional. The majority held the IRC's redistricting scheme constitutional because, the majority believed, the challengers had not proven "population deviations were not motivated by legitimate considerations, or possibly, if motivated in part by legitimate considerations, that illegitimate considerations predominated over legitimate considerations." App. 35a-36a.

Judges Clifton and Silver assumed, without finding, that gaining partisan advantage is *not* a legitimate justification for creating districts with unequal population. But they went on to hold a map with legislative districts drawn to advance partisan advantage was nonetheless constitutional because it was *also* drawn with these population deviations because the IRC subjectively believed the deviations were necessary to obtain Justice Department preclearance approval when the IRC first submitted the redistricting scheme to the Justice Department for Section 5 VRA review. App. 23a-24a.

The IRC adopted its map before this Court decided *Shelby County v. Holder*, 133 S.Ct. 2612 (2013). But *Shelby County* was decided before the lower court's decision and after the lower court ordered supplemental briefing regarding *Shelby County*.

Judges Clifton and Silver held that, while *Shelby County* invalidated Section 4(b)'s formula provision, Section 5 remained in force; and, Judges Clifton and Silver reasoned, the IRC's purported desire to obtain preclearance approval by the Justice Department on first submission nonetheless justified the IRC making the significant population deviations that were also made for partisan advantage. App. 69a.

Judge Silver wanted to go even further. She opined that population deviations below ten percent, even if motivated solely by partisanship, did not offend the Equal Protection Clause. App. 88a-93a. Holding that redistricting has "*always* been recognized as a profoundly partisan process," Judge Silver admitted that partisan considerations may go "too far," but she did not believe they had here. App. 88a, 90a (emphasis in original). According to Judge Silver, even if partisanship was the "*actual* and *sole* reason for the population deviations," the deviations still needed to be more than ten percent for voters to even raise a challenge. App. 94a (emphasis in original).

Judge Wake dissented because "[p]artisan advantage is not itself a justification for systematic population inequality in districting," and without some other justification, the IRC's plan must fail.

App. 106a. Judge Wake explained, "[p]arty discrimination in population punishes or favors people on account of their political views. It is discriminatory and invidious. It serves an unfair purpose at the price of a constitutional right that all voters have, regardless of how they plan to vote." App. 118a. He concluded, "[b]are party advantage in systematic population deviation carries no weight against the baseline constitutional imperative of equality of population." *Id.*

Relying on conclusive evidence demonstrating the IRC's systematic over-population of Republican-plurality districts and under-population of Democrat-plurality districts, Judge Wake reasoned the *Harris* voters had shown inequality that was "entirely obvious as a matter of statistics alone." App. 120a; *see also Village of Arlington Heights v. Metro. Housing Development Corp.*, 427 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."). Indeed, there was no other potential explanation because "the neutral principles of districting are politically random, and it is statistically impossible for them to yield this perfect correlation of population inequality…." App. 120a.

Judge Wake then considered whether the IRC's supposed Section 5 preclearance approval motive justified the plan. App. 122a. Judge Wake found obtaining Section 5 preclearance as a motive for creating districts with unequal population evaporated after this Court's decision in *Shelby*

County. Judge Wake then concluded that even if Section 5 was still a valid justification after *Shelby County*, the VRA cannot constitutionally justify systematic population inequality on the basis of race, ethnicity, or partisanship. "Nothing in the text of the [VRA] purports to require or authorize population inequality in legislative districting, directly or by implication." App. 131a.

Because systematic population inequality based on partisan advantage is unjustified, the IRC "could not do again what it did here." App. 139a. Arizona is no longer subject to Section 5 preclearance. And yet, the IRC's legislative districts will continue to govern Arizona's elections until at least 2022, unless this Court overturns the *per curiam* approval of the IRC's redistricting scheme.

REASONS FOR NOTING PROBABLE JURISDICTION

"Allegations of unconstitutional bias in apportionment are most serious claims for [this Court has] long believed that the right to vote is one of those political processes ordinarily to be relied upon to protect minorities."

Vieth v. Jubelirer,
541 U.S. 267, 311-12 (2004).[8]

The court below narrowed this matter to two issues. Either partisan motivations drove the significant population deviations, or the IRC made the population deviations because it believed doing so would curry Justice Department preclearance approval when the plan was first submitted. Since the court below concluded that one of these two motivations drove the deviations, trying to divine which was the "primary" factor is irrelevant because both motives are unconstitutional.

A majority of the three-judge court found the IRC's plan intentionally and systematically deviated from one-person, one-vote legislative districts. App. 34a.[9] The majority (Judges Clifton and Wake) found the IRC adopted these deviations to politically benefit

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[8] Kennedy, J., concurring (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153, n.4 (1938)) (internal quotations omitted).

[9] "The commission does not argue that the population deviations came about by accident but disputes that the motivation was partisanship…. The commission argues that its effort to comply with the [VRA] drove the population deviations." App. 5a.

the Democrat party and to increase the likelihood of first-round preclearance by the Justice Department.

This appeal asks whether these two motives are sufficient justification for creating legislative districts that do not satisfy this Court's one-person, one-vote principle.

The panel also found that political performance in Arizona correlates with minority population,[10] and that the IRC was aware of the correlation.[11] It held that this knowledge could be used for political advantage under the "guise," or pretext, of VRA compliance.[12] Therefore, separating political from racial or ethnic motivation would be difficult.[13]

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[10] "We acknowledge that it is difficult to separate out different motivations in this context. That is particularly true in this instance because the cited motivations [race and partisanship] pulled in exactly the same direction. As a practical matter, changes that strengthen minority ability to elect districts were also changes that improve the prospects of electing Democratic candidates. Those motivations were not cross purposes. They were entirely parallel." App. 36a-37a.

[11] "It is highly likely that the members of the [IRC] were aware of this correlation [between race and partisan political performance]." App. 38a.

[12] "That knowledge [the IRC's understanding of the correlation between race and political performance] could open the door to partisan motivations in both directions. If an individual member of the commission were motivated to favor Democrats, that could have been accomplished under the guise of trying to strengthen minority ability to elect districts." App. 38a.

[13] "Recognizing the difficulty of separating these two motivations, we find [the IRC] was predominately motivated by a legitimate consideration, in compliance with the [VRA]." App. 38a.

Nevertheless, a majority (Judges Clifton and Silver) found that "the primary factor driving the population deviation was the [IRC's] good faith effort to comply with the [VRA] and, in particular, to obtain preclearance from the Department of Justice on the first try." App. 6a.

None of the judges could agree on the applicable standard for deciding plaintiffs' burden of proof under *Larios v. Cox,* 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

Judge Silver believed plaintiffs must show the "*actual* and *sole* reason" for the challenged population deviation was improper. App. 94a (emphasis in original).

Judge Clifton believed that political motivation, if predominant, could violate the one-person, one-vote principle,[14] but a good faith effort to comply with the VRA was sufficient. App. 60a.

And Judge Wake believed it necessary "to prove that the apportionment was an 'arbitrary or discriminatory policy.'" App. 116a (citing *Larios*, 300 F. Supp. 2d at 1338-39); *Daly v. Hunt*, 903 F.3d 1212, 1220 (4th Cir. 1996).

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[14] Judge Wake also stated that partisanship did not need to be the predominate motive for the map to be constitutionally invalid. App. 116a-117a; 130a. The neutral criteria governing Arizona redistricting, however, effectively eliminates all motivations except two: political and racial or ethnic; and, even if one does not predominate over the other, both are improper. Therefore, the degree of partisan political intent required is not crucial here.

To be clear, this is not a "partisan gerrymandering case." *See Larios*, 300 F. Supp. 2d at 1352 ("[W]e have no occasion to consider the limits of partisan gerrymandering, but rather the very different set of considerations invoked by a claim that the one-person, one-vote principle has been violated. The value at issue today is an individualized and personal one, and therefore the offense to Equal Protection that occurred in this case is more readily apparent than in a claim involving gerrymandering.").

This Court has expressed skepticism about whether partisan gerrymandering is justiciable and, if so, under what standard. *See Davis v. Bandemer*, 478 U.S. 109 (1986) (holding that claims of partisan gerrymandering are justiciable, but disagreeing on the applicable standard for adjudicating such claims); *Vieth*, 541 U.S. at 312 (dismissing challenge to partisan gerrymandering for lack of justiciable standards, but refusing to overrule *Bandemer* lest such a standard is developed).[15]

While the IRC's actions were based on illegitimate partisan motive, this Court need not abstractly decide what election results may be "fair." *See Vieth*, 541 U.S. at 291 ("'Fairness' does not seem

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[15] *See also Fletcher v. Lamone*, 831 F. Supp. 2d 887, 903-04 (D. Md. 2011) ("Absent a clear standard to apply, we must reject the plaintiffs' [partisan gerrymandering] arguments."); *Alabama Legislative Black Caucus v. Alabama*, 988 F. Supp. 2d 1285, 1295-96 (M.D. Ala. 2013) (rejecting standards used in racial gerrymandering claims as unsuitable for claims of political gerrymandering).

to us a judicially manageable standard.") (plurality op.). Nor do the *Harris* voters seek proportionality in Arizona's election results. *See Bandemer*, 478 U.S. at 159 ("Thus, the plurality opinion ultimately rests on a political preference for proportionality-not an outright claim that proportional results are required, but a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes. This preference for proportionality is in serious tension with essential features of state legislative elections.") (O'Connor, J., dissenting).

Instead, the *Harris* voters have alleged a harm – unconstitutional deviations from the one-person, one-vote standard – based on a justicially cognizable legal standard, *i.e.*, population equality, from which a straightforward judicial remedy can be applied. App. 51.[16]

It is one thing when legislative districts are drawn for partisan advantage and the districts are equal (or close to equal) in population. It is a different matter entirely when the districts are drawn to have significantly different populations and the reason for this deviation is an effort to gain advantage for the political party.

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[16] *See also Vieth*, 541 U.S. at 281; *Benisek v. Mack*, 2014 WL 1379098, *6-7 (D. Md. Apr. 8, 2014) (discussing *Vieth* and noting that "the Court distinguished political gerrymandering claims from claims involving districts of unequal population"); *Cunningham v. Mun. of Metro. Seattle*, 751 F. Supp. 885, 894 (W. D. Wash. 1990) (holding that ideal population "is computed by dividing the population of the electoral district by the number of representatives on the government body in question").

I. Partisan advantage does not justify violating the one-person, one-vote standard of the Equal Protection Clause.

"The right of all qualified citizens to vote…includes the right to have the vote counted at full value without dilution or discount."

"[T]he Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."

Reynolds v. Sims,
377 U.S. 533, 554-55, 577 (1964).

When it suited the IRC's purposes, it was able to draw districts with zero population deviation. It did so when it drew the congressional districts.[17] But when the IRC drew the legislative districts, it adopted a map with an overall population deviation of almost nine percent.

The charts included in Judge Wake's dissent makes the case. App. 112a-113a (*supra*, p. 9). On the whole, the purpose was to dilute Republican votes and amplify Democrat votes. As Judge Wake observed, "it does not take a Ph.D. to see this stark fact of intended party benefit." App. 120a.

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[17] *See* IRC website, congressional district population data table: <http://azredistricting.org/Maps/Final-Maps/Congressional/Reports/Final%20Congressional%20Districts%20-%20Population%20Data%20Table.pdf> (last visited August 21, 2014).

While some deviation from strict population equality may be justified in some cases, systematic state-wide population deviations motivated by partisan advantage serve no legitimate purpose and offend the principle of one-person, one-vote.

A. This Court did not create a "safe harbor" for legislative districts with population deviations of less than ten-percent.

The *Harris* voters agree that redistricting involves many considerations. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1084 (N.D. Fla. 1992) (describing permissive criteria in redistricting as contiguity, compactness, respect for traditional boundaries, maintaining communities of interest and party competitiveness); *Moon v. Meadows*, 952 F. Supp. 1141, 1145 (E.D. Va. 1997) (traditional race-neutral criteria for redistricting include compactness, contiguity, adherence to political subdivision boundaries, and the preservation of interest).

But none of these considerations are as fundamental as the "one person, one vote" principle. In *Gray v. Sanders*, 372 U.S. 368, 381 (1963), this Court held, "[t]he conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." And in *Reynolds*, 377 U.S. at 554-55, this Court held, "[t]he right of all qualified citizens to vote…includes the right to have the vote counted at full value without dilution or discount.").

The one-person, one-vote principle requires a court to:

> ascertain whether…there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Roman, 377 U.S. at 710; *see also* App. 107a-108a ("No precedent would require proof and a finding of subjective purpose of party advantage when it is already proven that the systematic numerical inequality has no justification that is legal and reasonable.") (Wake, J, dissenting).

This Court has held, "an apportionment plan with a maximum population deviation under 10%" is insufficient to "make out a *prima facie* case of invidious discrimination." *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). Nothing in this Court's rulings, however, bars plaintiffs from affirmatively proving invidious discrimination.

The ultimate inquiry is whether the redistricting scheme, as a whole, advances a rational state policy, and, if so, "whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." *Mahan v. Howell*, 410 U.S. 315, 328 (1973). Thus, "[a] State's policy urged in justification of disparity in district population, however rational,

cannot constitutionally be permitted to emasculate the goal of substantial equality." *Id.* at 326. Deviating from population equality is not a means to an end in itself, but must be "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579-80.

This Court has never established an absolute safe-harbor for arbitrary or discriminatory practices. App. 49a; *see also* App. 26a; *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (holding that range of deviation under ten-percent creates "rebuttable presumption" that a plan is constitutional). "Arbitrariness and discrimination disqualify even 'minor' population inequality within 10%." *Id.*; *see also Chapman*, 420 U.S. at 25-26 (noting that redistricting plan with 5.95% population variance may not "necessarily…be permissible in a court-ordered plan").[18]

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[18] *See also Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 364 (S.D.N.Y. 2004) ("We think that…the 'ten percent rule' is not meant to protect a state that is systematically disadvantaging groups of voters with no permissible rational justification for the disproportion."); *Marylanders v. Schaefer*, 849 F. Supp. 1022, 1033 (D. Md. 1994) ("[T]his Court holds that a plaintiff could, with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below ten percent.").

B. This Court's summary affirmance of *Larios* did not create a safe harbor allowing population deviations up to ten percent.

The court below disagreed on the appropriate standard to analyze the *Harris* voters' claim. The three-judge court was heavily influenced by *Larios*, a decision that was summarily affirmed by this Court. App. 61a; *see also Larios*, 300 F. Supp. 2d at 1338, *aff'd* 542 U.S. 947 (2004). But lower courts, like the one below, have struggled with its meaning.[19]

In *Larios*, a federal court overturned Georgia's legislative redistricting plans despite a deviation range of slightly under ten percent. 300 F. Supp. 2d at 1338. This Court affirmed the *Larios* court's judgment, with Justice Stevens rejecting the notion that population deviations of less than ten percent create a "safe harbor" for States to abuse the one-man-one-vote principle. *Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (Stevens, J., concurring).

The district court conceded that "the showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the state's interest, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.*

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[19] *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("Summary actions...*should not be understood as breaking new ground but as applying principles established by prior decisions* to the particular facts involved.") (emphasis added).

But it also noted that "[w]here population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny." *Id.* The district court ruled population deviations based on geography, partisanship, or incumbency could not justify a range of population deviations, even though the range was under ten percent. *Id.* at 1338-40, 1347. The court rejected the Georgia plans, holding that they "did not represent an 'effort to construct districts as nearly of equal population as is practicable.'" *Id.* (citing *Reynolds*, 377 U.S. at 577).

The *Larios* court proceeded to reject the notion that challengers could somehow separate out a map-drawer's legal and illegal motivations, recognizing that "partisan interests are bound up inextricably with the interests of regionalism and incumbent protection." *Id.* at 1352. In *Larios*, there were various motivations for the Georgia redistricting plan: partisan politics, regionalism, disparate growth patterns, race and ethnicity. While no district fell into every category, each challenged district fell into at least one. Had the *Larios* court attempted to review the map in the manner endorsed by the trial court, it would have been impossible to "draw out and isolate" any of the Georgia plan's unlawful motivations. *Id.*

The IRC's discriminatory practices are even more blatant here than in *Larios* because, while Georgia lacked specific constitutionally-mandated criteria, Arizona amended its constitution to explicity prohibit political gerrymandering and required districts to be equally populated. App. 146a-152a.

This Court – even before its summary affirmance in *Larios* – has recognized the interplay between political, geographic, racial and ethnic interests. In *Reynolds*, apart from geography, this Court recognized that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation." 377 U.S. at 579-80.[20] Similarly, in *Abate v. Mundt*, 403 U.S. 182, 185-86 (1971), this Court held, "viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs." But, this Court noted "the danger of apportionment structures that contain a built-in bias tending to favor *particular geographic areas or political interests* or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors." *Id.* (citing *Hadley v. Junior College Dist.*, 397 U.S. 50, 57-58 (1970) (emphasis added).

And so, ultimately, the IRC did precisely what this Court said it cannot do. The IRC crafted a legislative redistricting scheme that built in a bias favoring Democrat voters over voters in Republican districts. And the difference is not a small one. Dr. Hofeller calculated that, when measured using citizen voting-age population, the deviation was six

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[20] *See also Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001) (rejecting reapportionment scheme with under ten-percent deviation because it was done to maintain political power in a region where population shifts did not justify the result).

times greater, not 8.8%, but 54.81%. App. 243a-244a.

Present-day redistricting technology allows ever-more pinpoint precision, making it more and more likely map-drawers will continue to push the boundaries of this Court's prior rulings. *See Vieth*, 541 U.S. at 312 ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months. Technology is both a threat and a promise.") (citation omitted) (Kennedy, J., concurring).

The IRC had this technology and used it to draw congressional districts with a deviation of only one resident. But it chose not to do so when it drew the legislative districts.

As illustrated by Dr. Hofeller's chart, a citizen's vote in the most over-populated district is worth less than *half* a vote in the most under-populated district. App. 243a-244a. This disparity is a stunning violation of the one-person, one-vote principle.

Justice Thomas observed, "the one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population." *Chen v. City of Houston*, 532 U.S. 1046, 1046 (2001) (Thomas, J., dissenting). Justice Thomas's point is that "roughly equalizing district populations without regard to the *citizen voting age* population [will] dilute the value of

votes in districts with larger total populations…." *Id.* (emphasis in original).

The concerns that Justice Thomas raised in *Chen* are even more magnified here where the legislative districts are state-wide and will govern until 2022 at least.

II. The IRC's supposition the Justice Department would more likely approve its redistricting scheme does not justify creating legislative districts with significant population deviation.

> *"[W]e expressed our broader concerns about the constitutionality of the [VRA]. Congress[' failure to] update[] the coverage formula…leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance."*
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> *Shelby County v. Holder*, 133 S.Ct. 2612, 2631 (2013).

The IRC acknowledged it intentionally under-populated Hispanic "opportunity" districts. The IRC defended this departure from population equality by claiming that three of the five commissioners believed these population deviations were necessary for the Justice Department to preclear this map upon first submission. App. 6a. This contention is founded on the further supposition that the VRA's now-invalidated, coverage formula requires the Justice Department to deny approval of a legislative

district map unless it intentionally discriminates on the basis of race or ethnicity. That justification fails.

The IRC's explanation fails for at least three reasons. First, Section 5 is unenforceable in light of *Shelby County*. Second, even if Section 5 were enforceable, it could not justify the IRC's actions. If the VRA conflicts with the constitutional "one-person, one-vote" mandate, the VRA must give way, not the other way around. *See Miller v. Johnson*, 515 U.S. 900, 927 (1995) (noting that Justice Department's then-policy of requiring maximization of majority-minority districts was in constitutional "tension" with the Fourteenth Amendment). And third, the evidence demonstrated the IRC's attempt to invoke Section 5 preclearance was a pretext because districts 8, 24, and 26 were not minority, ability-to-elect districts. Indeed, the IRC itself recognized that district 8 was not an ability-to-elect district, though it claimed to have thought district 8's minority population would still curry favor from the Justice Department.

A. Section 5 of the VRA does not justify the IRC intentionally creating districts with population deviations.

The panel below divided on whether the IRC's professed desire to obtain Section 5 preclearance could justify creating legislative districts with substantial population inequality. This Court held the VRA's coverage formula "can no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County*, 133 S.Ct. at 2631. Yet Judges Clifton and Silver held *Shelby County* was meaningless because it was issued after the IRC finished its map.

App. 69a, 35a. Judges Clifton and Silver said this was so, even though the IRC's plan will govern election of the Arizona legislature through 2022. *See* App. 125a.

Judge Wake had the better view. He found that even if Section 5 once justified violations of the one-person, one-vote principle, it no longer does after *Shelby County*. App. 124a-128a. Judges Clifton and Silver's decision to ignore *Shelby County* is similar to a federal district court holding it would be constitutional to racially segregate a school if the segregation was imposed before *Brown v. Board of Education,* 347 U.S. 483 (1954).

Pending civil cases must be decided in accordance with current law. App. 124a.[21] Under the rule of retroactivity, decisions invalidating unconstitutional laws apply to prior government acts, even when those acts were legal under then-existing law. *See Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 97 (1993); *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803 (1989).

In *Davis*, the Supreme Court struck down a Michigan state tax scheme because it violated the constitutional doctrine of intergovernmental tax

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[21] *See also Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974) ("[A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice."); *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801) ("[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.").

immunity. *Id.* The *Harper* case then arose out of a similar tax exemption imposed on state and local employees by the State of Virginia. 509 U.S. at 90-91. Following the *Davis* ruling, Virginia repealed its exemption, whereupon federal employees sought a refund of the taxes imposed upon them before *Davis* was decided. The Virginia Supreme Court denied the taxpayers relief, but this Court reversed because Virginia improperly failed to give *Davis* full retroactive effect. *Id.* at 97 (holding that new rules apply to all events at issue "regardless of whether such events predate or postdate [the court's] announcement of the rule").

Judge Wake explained why a pre-*Shelby County* interpretation of the law could not justify the IRC's map:

> To allow the current map to govern successive election cycles until 2020 would give continuing force to Section 5 despite the unconstitutionality of applying it anywhere.

App. 125a.

Indeed, the IRC plan will "continue to dilute voters in Arizona for the next four election cycles of this decade, in disregard of the law that binds us and the rights of hundreds of thousands of voters." App. 127a. And that dilution will have no legal purpose, since preclearance is not a legal requirement for the State of Arizona.

Shelby County must apply here for two additional reasons.

First, each future election will create a new violation. *Shelby County*'s application in this context is not appropriately considered retroactive at all, but instead would bar Arizona from *prospectively* using an unconstitutional map to conduct its elections every two years.

Second, Section 5 operates in an unusual fashion because it does not preempt or invalidate state and local laws, regulations, or procedures. Instead, it only prevents implementation or enforcement of a law until preclearance has occurred. Section 5 thus operates like a statutory injunction. But as a result of *Shelby County*, any such injunctions against the State of Arizona – or even the threat of such injunctions – are no more. The result is not so much an application of retroactivity as it is a return to normalcy. Thus, to the extent Section 5 blocked application of Arizona's constitutional criteria, including its mandate of equally populated districts, that bar has been removed.

B. Systematic and intentional population deviations on the basis of race or ethnicity are not permitted to obtain Section 5 preclearance.

Without Section 5 to justify its actions, the IRC has nothing left on which to base the systematic population deviations the IRC made.[22] The *only*

[22] This Court has previously warned against "carving electorates into racial blocs," and has specifically forbidden the

premise upon which the lower court justified its approval of the IRC plan was its embrace of the IRC's claim that these systematic population deviations were necessary to win the Justice Department's favor in preclearance review.

Since *Reynolds*, this Court has held population equality must not be "submerged as the controlling consideration in the apportionment of seats in [a] particular legislative body," otherwise "the right of all the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." 377 U.S. at 581. Population equality comes first, not last, among the directives for map-makers.

The IRC's position that it was entitled to dilute or over-weight the voting rights of hundreds of thousands of Arizona voters on the basis of race or ethnicity because of a statute that defends voting rights is more than somewhat ironic.

The VRA declares that nothing in it "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision." 42 U.S.C § 1973n. And the Justice Department itself explains, "[p]reventing

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Justice Department from interpreting Section 5 to require racial gerrymandering. In *Miller*, 515 U.S. at 927-28, this Court said, "[I]t takes a shortsighted and unauthorized view of the [VRA] to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids."

retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." App. 134a (quoting 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011)).

As Judge Wake noted, "[c]ompliance with the [VRA] requires line-drawing with an eye to expected voting behavior, *but only within equal population*." App. 107a (emphasis added). The Justice Department's decision to preclear the Arizona plan is always subordinate to the constitutional imperative on population equality: "The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person, one-vote principle…." App. 140a (citing Fed. Reg. 7470, 7470 (Feb. 9, 2011)).

C. In any event, the redistricting scheme did not satisfy the VRA's requirements.

The IRC offered no evidence that its redistricting scheme, including changes that doubled the population deviation from the initial four-percent grid map to the almost-nine-percent deviation in the final map, were necessary – or even helpful – for obtaining preclearance.

In the context of VRA compliance, this Court has long held that "in order to tailor the use of race narrowly to its purpose of complying with the Act, a State cannot use racial considerations to achieve results beyond those that are required to comply with the statute." *Johnson*, 515 U.S. at 926. Likewise, in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 519 (2006), this Court held that:

> [t]o support its use of § 5 compliance as a compelling interest with respect to a particular redistricting decision, the State must demonstrate that such compliance was its actual purpose, and that it had a strong basis for believing that the redistricting decision at issue was reasonably necessary under a constitutional reading and application of the [VRA]."[23]

In short, it is not enough to simply invoke the VRA when using race as the predominant criteria for district composition. App. 131a-132a. There must also be a "strong basis" for believing that the adopted course of action was "reasonably necessary," and that there was a reasonable result that is arguably consistent with the statute.

The IRC did not choose to merely avoid retrogression. Instead, it believed it could enhance its opportunity for preclearance by increasing the number of supposed "Hispanic influence" districts, and perhaps crossover districts, describing them as Hispanic "opportunity" districts.

The IRC's decision to draw the additional crossover and influence districts implicates the exact same concerns that this Court identified in *Bartlett v. Strickland*, 556 U.S. 1 (2009). While this Court may have reserved the majority-minority question under Section 5, this Court said, "[i]f § 2 were interpreted to protect this kind of influence, it would unnecessarily

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[23] Citations and quotation marks omitted.

infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S. at 446; *see also Thornburg v. Gingles*, 478 U.S. 30 (1986); *Bartlett*, 556 U.S. at 19 ("In majority-minority districts, a minority group composes a numerical, working majority of the voting age population.").

This Court has emphatically rejected the argument that the VRA requires the creation of so-called "coalition" districts, combining a hodge-podge of racial/ethnic minority voters on the sole basis of their racial/ethnic status. *Id.*; *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1391 (6th Cir. 1996) ("Coalition suits provide minority groups with a political advantage not recognized by our form of government, and not authorized by the constitutional and statutory underpinnings of that structure.").

The IRC identified eight minority ability-to-elect districts in its draft plan, a number equal to the number of similar districts in the Benchmark Plan, thus claiming to satisfy Section 5's retrogression requirement. The IRC, however, admits that even after it settled on those districts, it used racial and ethnic considerations to redraw three additional districts—districts 8, 24, and 26. Of these, it claimed that two (districts 24 and 26) were "ability-to-elect" districts. The IRC itself recognized that District 8 was not an ability-to-elect district, but purportedly thought redrawing it still might do some good in the preclearance process.

But there was no valid basis for the IRC's beliefs, as the districts it drew had no valid VRA purpose. In District 8, for example, Hispanics made

up only 30.5% of the voting-age population. App. 243a. Non-Hispanic-whites, on the other hand, made up 53.4%. App. 246a. Taking the IRC's claim at face value, that it truly drew this district based on race or ethnicity, the question remains: For what purpose? Certainly none that satisfies strict scrutiny.

Districts 24 and 26 were similarly flawed. In District 24, 41.3% of the population is Hispanic, short of a majority. App. 246a. And the contention that District 24 is some kind of "opportunity" district is even less credible when citizen voting-age population is considered.[24] By that crucial metric, Hispanics populate only 22.8% of the district. *See Campos*, 113 F.3d at 548 ("[O]nly voting-age persons who are United States citizens can vote.") District 24 simply could not be considered an ability-to-elect district, and, in fact, District 24 elected no minority candidates during the 2012 election. App. 163a-164a.

District 26 has similar demographics as District 24. The Hispanic percentage of total population is 38.5%. App. 246a. But when citizens of voting age are counted, the district's Hispanic percentage drops to only 18.7%. App. 243a-244a.

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[24] *See Negron v. City of Miami Beach, Fla.*, 113 F.3d 1563, 1571 (11th Cir. 1997) ("[W]e conclude that the first *Gingles* precondition requires the consideration of citizenship information…when that information is reasonably accurate and demonstrates a significant difference between minority and majority citizenship rates."); *Campos v. City of Houston*, 113 F.3d 544, 547-48 (5th Cir. 1997) (holding that citizen voting-age population was proper factor by which to determine satisfaction of the first *Gingles* precondition).

This is the critical point that the *per curiam* opinion missed. Unless the plan reflected an actual effort at VRA compliance, then the IRC engaged in the kind of racially-charged gerrymandering this Court disfavors. *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) (holding that racial and ethnic gerrymandering as a pretext districting scheme is constitutionally suspect even where the purpose of the racial classification is "benign or the purpose remedial."). Here, the IRC used racial and ethnic gerrymandering to justify the systematic population deviations in its plan. That is inimical to foundational constitutional principles.

The IRC was in the same "somewhat unusual posture" as the "[s]tate authorities who created a district [and] now invoke the VRA as a defense." *Bartlett*, 556 U.S. at 6. The IRC's justification for the additional "Hispanic-influence" districts derived from an election for Mine Inspector, puts courts in exactly the place this Court said they should not be. In *Bartlett*, this Court said a redistricting scheme should not be premised upon justification:

> requir[ing] courts to make predictive political judgments…[that] would be speculative at best given that, especially in the context of local elections, voters' personal affiliations with candidates and views on particular issues can play a large role.
>
> 556 U.S. at 18.

The only defense to this contention the IRC offered was that it received legal advice that its predominant consideration of race and ethnicity was justified. But advice of counsel has long been rejected as a method of insulating map-makers from the effects of their illegal motives. *See Larios*, 300 F. Supp. 2d at 1353, n.16 (holding that reliance on faulty legal advice will not remedy constitutional infirmities (citing *Raske v. Martinez*, 876 F.2d 1496, 1502 (11th Cir. 1989)).

At the end of the day, the IRC's reliance on Section 5 proves too much. The challengers had the burden of showing the IRC's "unconstitutional or irrational state policy" was the "actual reason" for the population deviations in the plan. *Marylanders*, 849 F. Supp. at 1032-33 (citing *Karcher v. Daggett*, 462 U.S. 725, 740-44 (1983)). But the IRC admits that it adopted systematic population deviations, if not for reasons of purely partisan advantage, then (at best) to achieve unnecessary and constitutionally-infirm racial gerrymandering. Either way, the IRC's legislative redistricting scheme is invalid.

III. Because the new Hispanic "influence" districts did not satisfy the requirements of Section 2 of the VRA, the use of race or ethnicity as a predominant factor in their creation was impermissible.

"Disregarding the majority-minority rule and relying on a combination of race and party to presume an effective majority would involve the law and courts in a perilous enterprise."

Bartlett v. Strickland,
556 U.S. 1, 22 (2009).

The IRC could not justify its redistricting scheme under either Section 5 or Section 2 of the VRA. Because it admits that it used race as a predominant motive for drawing the map, the map is invalid.

In *Bartlett*, the Court considered whether a state could use Section 2 of the VRA to defend its creation of minority "influence" districts, as distinct from the creation of majority-minority districts. 556 U.S. at 6. The Court's plurality said "no." *Id.* at 25-26. Only districts with 50% or more minority citizen voting-age population satisfy Section 2. *Id.*

North Carolina election officials claimed Section 2 required map-drawers to create opportunity districts, even though doing so violated a state constitutional command. *Bartlett*, 556 U.S. at 6-7, 26-27 ("The question in this case is whether a minority with under 50% of the voting population of a proposed voting district can ever qualify under § 2 of

the VRA as residents of a putative district whose minority voters would have an opportunity to elect representatives of their choice.") (Souter, J., dissenting). So-called "influence" districts contain less than 50% minority citizen voting-age population. *Id.* at 3. The Court ruled North Carolina could not shield its violation of a state constitutional command behind the VRA. Instead, the Court concluded that Section 2 requires that only majority-minority citizens-voting-age population districts be drawn. Stated differently, a government cannot create "opportunity" districts by invoking Section 2. *Id.* at 19, 24-25, 27 ("In the plurality's view, only a district with a minority population making up 50% or more of the citizen voting age population can provide a remedy to minority voters lacking an opportunity to elect representatives of their choice.") (Souter, J., dissenting).

Here, the IRC *admits* the map contains no district with 50% or more Hispanic citizen voting-age population.[25] They merely contend that *Bartlett* was only concerned with voting age population. 556 U.S. at 32, n.6. Justice Souter's dissent, however, makes it clear that the *Bartlett* plurality was, in fact, discussing citizen voting-age population. *Id.* at 27.

Furthermore, the *Harris* voters are not here contending that Arizona's adopted map violates Section 2. The point is that the IRC cannot justify its map under either Section 2 or Section 5 of the VRA. *Shelby County* confirms that Arizona cannot rely upon Section 5. And it cannot rely upon Section 2

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[25] Def. Post-trial Br., 2013 WL 1727989, p. 32 (§ 3(B)(1)(a)).

because, as the IRC readily admits, "[t]he map adopted in 2012 had no districts with [Hispanic-citizen-voting-age-population] over 50%."[26]

CONCLUSION

The IRC did not redistrict Arizona's legislature in conformity with the Equal Protection Clause ideal of one-person, one-vote. Rather the IRC drew districts that deviated from this ideal by almost nine-percent and did so for two illegitimate reasons. First to gain a partisan advantage for one political party and, second, in the belief that doing so would curry favor with the Justice Department allowing the redistricting scheme to be precleared. Neither of these objectives justifies violating the Equal Protection Clause mandate of one-person, one-vote.

The Arizona voters bringing this appeal ask this Court to assert jurisdiction, hear argument, reverse the lower court's judgment, and direct that Arizona's legislative districts be established in conformity with the Equal Protection Clause of the United States Constitution and Arizona's enumerated constitutional criteria.

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[26] *Supra*, note 25, at 32.

Respectfully submitted,

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APPENDIX

APPENDIX A — PLAINTIFFS' NOTICE OF APPEAL FROM FINAL JUDGMENT TO THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, FILED JUNE 25, 2014

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Case No. CV 12-0894-PHX-ROS

Wesley W. Harris, *et al.*,

Plaintiffs,

v.

Arizona Independent Redistricting Commission, *et al.*,

Defendants.

PLAINTIFFS' NOTICE OF APPEAL FROM FINAL JUDGMENT

Assigned to District Judges Silver and
Wake and Circuit Judge Clifton

Notice is given that plaintiffs Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Paula J. Linker, Karen M. MacKean, and Sherese L. Steffens appeal to the Supreme Court of the United States from the final judgment entered in this action on April 29, 2014. This appeal is taken pursuant to 28 U.S.C. § 1253 and 28 U.S.C. § 2101(b).

Respectfully submitted on June 25, 2014.

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APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED APRIL 29, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-894-PHX-ROS-NVW-RRC

WESLEY W. HARRIS, *et al.*,

Plaintiffs,

vs.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

April 29, 2014, Filed

OPINION

Before: CLIFTON, Circuit Judge, and SILVER and WAKE, District Judges.

PER CURIAM:

Plaintiffs, individual voters registered in the State of Arizona, challenge the map drawn for state legislative districts by the Arizona Independent Redistricting Commission for use starting in 2012, based on the 2010

census. They argue that the Commission underpopulated Democrat-leaning districts and overpopulated Republican-leaning districts for partisan reasons, in violation of the Fourteenth Amendment's one-person, one-vote principle. The Commission denies that it was driven by partisanship, explaining that the population deviations were driven by its efforts to comply with Section 5 of the Voting Rights Act. We conclude that the population deviations were primarily a result of good-faith efforts to comply with the Voting Rights Act, and that even though partisanship played some role in the design of the map, the Fourteenth Amendment challenge fails.[1]

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1. This per curiam opinion speaks for a majority of the court in all but one respect. On the issue of the burden of proof that plaintiffs must bear, there is not a majority opinion. See the specific discussion on that subject below, at 42-43 n. 10.

Judge Silver concurs in the result and joins this opinion in all but three respects. One is the burden of proof requirement just mentioned. There is no majority conclusion on that subject. Her second difference is with the factual finding that partisanship played some part in the drafting of the legislative district maps, primarily discussed below in section II.I, at 23-28, and to some extent in section IV.C, at 53-54. She finds that partisanship did not play a role. The finding on that subject expressed in this opinion represents a majority consisting of Judge Clifton and Judge Wake. The third disagreement, previously announced, was from the majority's denial prior to trial of defendants' motion for abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), discussed below in section III.B, at 33-36. That motion was denied by a majority consisting of Judge Clifton and Judge Wake. Judge Silver's separate views are expressed in a separate opinion, concurring in part, dissenting in part, and concurring in the judgment, filed together with this per curiam opinion.

Appendix B

The one-person, one-vote requirement of the Equal Protection Clause of the Fourteenth Amendment does not require that legislative districts have precisely equal population, but provides that divergences must be "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The majority of the overpopulated districts in the map drawn by the Commission were Republican-leaning, while the majority of the underpopulated districts leaned Democratic. Plaintiffs' complaint alleged that this correlation was no accident, that partisanship drove it, and that partisanship is not a permissible reason to deviate from population equality in redistricting.

The Commission does not argue that the population deviations came about by accident, but it disputes that the motivation was partisanship. Most of the underpopulated districts have significant minority populations, and the Commission presented them to the Department of Justice as districts in which minority groups would have the opportunity to elect candidates of their choice. Section 5 of the Voting Rights Act required that the Commission obtain preclearance from the Department before its plan went into effect. To obtain preclearance, the Commission

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Judge Wake dissents from the result reached in this opinion, though he joins portions of it. In addition to the finding that partisanship played some role, identified in the preceding paragraph, he specifically joins in section III of this opinion, at 28-40, discussing our resolution of pretrial motions. His views are expressed in his separate opinion, concurring in part, dissenting in part, and dissenting from the judgment, also filed together with this opinion.

had to show that any proposed changes would not diminish the ability of minority groups to elect the candidates of their choice. The Commission argues that its effort to comply with the Voting Rights Act drove the population deviations.

For the purpose of this opinion, we assume without deciding that partisanship is not a legitimate reason to deviate from population equality. We find that the primary factor driving the population deviation was the Commission's good-faith effort to comply with the Voting Rights Act and, in particular, to obtain preclearance from the Department of Justice on the first try. The commissioners were aware of the political consequences of redistricting, however, and we find that some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects in the affected districts. Nonetheless, the Fourteenth Amendment gives states some degree of leeway in drawing their own legislative districts and, because compliance with federal voting rights law was the predominant reason for the deviations, we conclude that no federal constitutional violation occurred.

We do not decide whether any violations of state law occurred. Though plaintiffs have alleged violations of state law and the Arizona Constitution, we decided early in the proceedings and announced in a prior order that Arizona's courts are the proper forum for such claims. We discuss that subject further below, at 32-33. We express no opinion on whether the redistricting plan violated the equal population clause of the Arizona Constitution, whether the Commission violated state law in adopting

the grid map with population variations rather than strict population equality, or whether state law prohibits adjusting legislative districts for partisan reasons. All that we consider is whether a federal constitutional violation occurred.

At trial, plaintiffs focused on three districts that they argued were not true Voting Rights Districts and therefore could not justify population deviations: Districts 8, 24, and 26. Accordingly, this opinion largely focuses on the population shifts associated with the creation of these three districts.

I. Course of Proceedings

Plaintiffs filed this action on April 27, 2012, and subsequently filed a First Amended Complaint. This three-judge district court was convened pursuant to 28 U.S.C. § 2284(a). Plaintiffs sought a declaration that the final legislative map violated both the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the equal population requirement of the Arizona Constitution, an injunction against enforcing the map, and a mandate that the Commission draw a new map for legislative elections following the 2012 elections. Originally, not only was the Commission a defendant in this action, but so too were each of the five commissioners in their official capacities.[2]

2. Arizona Secretary of State Ken Bennett, sued in his official capacity, is also a nominal defendant in the action. When we refer to "defendants" in this opinion, however, we refer collectively to the Commission and commissioners.

Defendants moved to dismiss the complaint for failure to state a claim. In a reasoned order, we denied the motion. Plaintiffs then filed a Second Amended Complaint.

Prior to trial, the parties filed several motions that the court summarily disposed of on February 22, 2013. First, defendants moved to stay the case pending the resolution of state-law claims in state court, which we denied. Defendants also moved for a protective order on the basis of legislative privilege, which we denied. Finally, defendants moved for judgment on the pleadings, asking for dismissal of the individual commissioners as defendants and for dismissal of plaintiffs' claim for relief under the equal population requirement of the Arizona Constitution. We granted this motion, dismissing the individual commissioners from the suit and dismissing plaintiffs' second claim for relief. We explain the bases for our rulings on these motions later in this opinion, at 28-40.

Starting March 25, 2013, we presided over a five-day bench trial. Among other witnesses, all five commissioners testified.

II. Findings of Fact

Most of the factual findings below, based in large part on transcripts of public hearings and other documents in the public record, were not disputed at trial. Rather, what was most controverted was what inferences about the Commission's motivation we should draw from the largely undisputed facts. We discuss that issue, whether and to what extent partisanship motivated the Commission, at the end of this section, at 23-28.

Appendix B

To the extent any finding of fact should more properly be designated a conclusion of law, it should be treated as a conclusion of law. Similarly, to the extent any conclusion of law should more properly be designated a finding of fact, it should be treated as a finding of fact.

A. The Approved Legislative Redistricting Plan

The first election cycle using the legislative map drawn by the Commission took place in 2012. Arizona has thirty legislative districts, each of which elects two representatives and one senator. Ariz. Const. art. IV, pt. 2, § 1. The following chart summarizes pertinent electoral results and population statistics for the Commission's 2012 legislative map, which we explain in greater detail below.

District	Percentage Deviation from Ideal Population	Presented to DOJ as Ability to-Elect District	Party Affiliation of Senator Elected in 2012	Party Affiliation of Representatives Elected in 2012
1	1.6%		Republican	Two Republicans
2	-4.0%	Yes	Democrat	Two Democrats
3	-4.0%	Yes	Democrat	Two Democrats
4	-4.2%	Yes	Democrat	Two Democrats
5	2.8%		Republican	Two Republicans
6	0.6%		Republican	Two Republicans
7	-4.7%	Yes	Democrat	Two Democrats
8	-2.2%		Democrat	Two Republicans

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9	0.1%		Democrat	One Democrat, One Republican
10	-0.9%		Democrat	Two Democrats
11	0.1%		Republican	Two Republicans
12	4.1%		Republican	Two Republicans
13	-0.6%		Republican	Two Republicans
14	2.2%		Republican	Two Republicans
15	0.9%		Republican	Two Republicans
16	3.3%		Republican	Two Republicans
17	3.8%		Republican	Two Republicans
18	2.6%		Republican	Two Republicans
19	-2.8%	Yes	Democrat	Two Democrats
20	2.4%		Republican	Two Republicans
21	1.5%		Republican	Two Republicans
22	1.3%		Republican	Two Republicans
23	0.2%		Republican	Two Republicans
24	-3.0%	Yes	Democrat	Two Democrats
25	3.6%		Republican	Two Republicans
26	0.3%	Yes	Democrat	Two Democrats
27	-4.2%	Yes	Democrat	Two Democrats
28	2.6%		Republican	One Democrat, One Republican
29	-0.9%	Yes	Democrat	Two Democrats
30	-2.5%	Yes	Democrat	Two Democrats

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Figure 1. *2012 Legislative Map Statistics.*

In the 2012 elections, Republicans won a total of 36 out of the 60 house seats, winning both seats in 17 districts and 1 seat in 2 districts. Democrats won the remaining 24 house seats, winning 2 seats in 11 districts and 1 seat in 2 districts. Republicans won 17 out of 30 senate seats, and Democrats won the remaining 13. The Democratic senate candidate narrowly won in District 8, but the Republican candidate might have won if not for the presence of a Libertarian candidate in the race.[3] In all, 16 districts elected only Republicans to the state legislative houses, 11 districts elected only Democrats, and 3 districts elected a combination of Republicans and Democrats.

Ideal population is the average per-district population, or the population each district would have if population was evenly distributed across all districts. Of the 16 districts that elected only Republicans to the state legislature, 15 were above the ideal population and 1 was below. Of the 11 districts that elected only Democrats to the state legislature, 2 were above the ideal population and 11 were below. District 8 was below ideal population, and the other 2 districts that elected legislators from both parties were above ideal population.

Of the 10 districts the Commission presented to the Department of Justice as districts in which minority

3. The Democratic candidate in District 8 won with 49 percent of the vote; the Republican received 46 percent of the vote, and the Libertarian candidate received the remaining 5 percent. Republicans won both of the state house races in District 8.

candidates could elect candidates of their choice, or "ability-to-elect districts," all 10 only elected Democrats to the state legislature in 2012. Nine out of ten of these ability-to-elect districts were below the ideal population, and one was above.

Of the 9 districts presented to the Department of Justice as districts in which Hispanics could elect a candidate of their choice, all but District 24 elected at least one Hispanic candidate to the state legislature in the 2012 elections. In District 26, only one of the three legislators elected in 2012 was of Hispanic descent. Of the 27 state legislators elected in the purported ability-to-elect districts, 16 were of Hispanic descent.

District 7 was presented to the Department of Justice as a district in which Native Americans could elect candidates of their choice, and it elected Native American candidates in all three of its state legislative races.

Maximum population deviation refers to the difference, in terms of percentage deviation from the ideal population, between the most populated district and the least populated district in the map. In the approved legislative map, maximum population deviation was 8.8 percent; District 12 had the largest population, at 4.1 percent over the ideal population, and District 7 had the smallest population, at 4.7 percent under the ideal.

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B. Formation of the Commission

In 2000, Arizona voters amended the state constitution by passing Proposition 106, an initiative removing responsibility for congressional and legislative redistricting from the state legislature and placing it in the newly established Independent Redistricting Commission. *See* Ariz. Const. art. IV, pt. 2, § 1(3). Five citizens serve on the Commission, consisting of two Republicans, two Democrats, and one unaffiliated with either major party. *See id.* § 1(3)-(5). Selection of the commissioners begins with the Arizona Commission on Appellate Court Appointments, which interviews applicants and creates a slate of ten Republican candidates, ten Democratic candidates, and five independent or unaffiliated candidates. *See id.* § 1(4)-(5). Four commissioners are appointed from the party slates, one by each of the party leaders from the two chambers of the legislature. *See id.* § 1(6). Once appointed, those four commissioners select the fifth commissioner from the slate of unaffiliated candidates, and the fifth commissioner also serves as the commission chair. *Id.* § 1(8).

Pursuant to these requirements, Republican commissioners Scott Freeman and Richard Stertz were appointed by the Speaker of the House and the President of the Senate, respectively, and Democratic commissioners Jose Herrera and Linda McNulty were appointed by the House Minority Leader and Senate Minority Leader, respectively. Commissioners Freeman, Stertz, Herrera, and McNulty then interviewed all five candidates on the unaffiliated slate.

In his interview notes, Commissioner Stertz noted his concerns with the liberal leanings of most of the candidates on the unaffiliated list. For example, he wrote that Kimber Lanning's fundraising efforts were almost all for Democrats, and that her Facebook page indicated a fondness for Van Jones.[4] Paul Bender, another candidate, served on the board of the ACLU. Margaret Silva identified Cesar Chavez as her hero, and her Facebook profile picture featured her alongside Nancy Pelosi, the Democratic leader in the U.S. House of Representatives. Ray Bladine was his first choice for the position, whom Stertz described as balanced despite Bladine's former tenure as chief of staff for a Democratic mayor.

In a public meeting, the four commissioners unanimously selected Colleen Mathis as the fifth commissioner and chairwoman. In his interview notes Commissioner Stertz described her as balanced, though noting that she and her husband had supported Democratic candidates. Mathis and her husband had also made contributions to Republican candidates.

C. Selection of Counsel and Mapping Consultant

The Commission has authority to hire legal counsel to "represent the people of Arizona in the legal defense of a redistricting plan," as well as staff and consultants to assist with the mapping process. Ariz. Const. art. IV, pt.

4. Van Jones served as a special advisor to President Obama in 2009. He resigned that position after criticism from conservatives and Republicans.

2, §§ 1(19), (20). The selection of the Commission's counsel and mapping consultant sparked public controversy, and plaintiffs argue that the process reflected a partisan bias on the part of Chairwoman Mathis.

The previous Commission, after the 2000 census, had retained a Democratic attorney and a Republican attorney. Chairwoman Mathis expressed interest in hiring one attorney instead of two, as the counsel hired would represent the entire Commission. The other four commissioners preferred to hire two attorneys with different party affiliations, however. That is what the Commission decided to do.

The Commission used the State Procurement Office to help retain counsel and interviewed attorneys from six law firms. Among the interviewees were the two attorneys who had worked for the previous Commission: Lisa Hauser, an attorney with the firm of Gammage & Burnham and a Republican, and Michael Mandell, an attorney with the Mandell Law Firm and a Democrat. Other attorneys interviewed by the Commission included Mary O'Grady, a Democrat with Osborn Maledon, and Joe Kanefield, a Republican with Ballard Spahr. Osborn Maledon and Ballard Spahr received the highest scores from the Commission based on forms provided by the State Procurement Office for use in the selection process. Nonetheless, Commissioner Herrera expressed a preference for retaining Mandell as Democratic counsel, and Commissioners Stertz and Freeman preferred Hauser and Gammage & Burnham as Republican counsel.

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In a public meeting, Commissioner Herrera moved to retain Osborn Maledon and Ballard Spahr at Chairwoman Mathis's suggestion. Commissioner Herrera later explained that while Mandell was his first choice, Osborn Maledon and Ballard Spahr received the highest evaluation scores. Commissioner Freeman expressed his preference for Gammage & Burnham, and said he would give deference to the Democratic commissioners' preference for Democratic counsel if they would do the same for the Republican commissioners. Commissioner Stertz then made a motion to amend, to instead retain the Mandell Law Firm and Gammage & Burnham. The amendment was defeated on a 2-3 vote, with Commissioners Stertz and Freeman voting for it and Commissioners Mathis, Herrera, and McNulty voting against. The motion to retain Osborn Maledon and Ballard Spahr carried with a 3-2 vote, with Commissioners Mathis, Herrera, and McNulty voting for the motion and Commissioners Stertz and Freeman voting against. The Commission thus selected a Republican attorney for whom neither of the Republican commissioners voted.

In selecting a mapping consultant, the Commission initially worked with the State Procurement Office. An applicant for the position had to submit, among other things, an explanation of its capabilities to perform the work, any previous redistricting experience, any partisan connections, and a cost sheet. In the initial round of scoring, each applicant was scored on a 1000-point scale. Each commissioner independently filled out a scoring sheet, which considered capability to do the work but not cost, rating each applicant on a 700-point scale. The State

Procurement Office rated each applicant on a 300-point scale, 200 points of which evaluated the relative cost of the bid.

The Commission considered the first round of scoring, and then announced a short list of four firms that it would interview for the mapping consultant position. Those firms were Strategic Telemetry, National Demographics, Research Advisory Services, and Terra Systems Southwest. National Demographics, which had served as mapping consultant for the previous Commission, had received the highest score in the first round of evaluations.

The Commission interviewed the four selected firms in a public meeting. During the interview of the head of National Demographics, Commissioner Herrera expressed concern that there was a perception that the firm was affiliated with Republican interests. National Demographics had worked for both Democratic and Republican clients, though more Republicans than Democrats. In interviewing Strategic Telemetry, Commissioners Freeman and Stertz asked whether, because Strategic Telemetry had worked for a number of Democratic clients but no Republican clients, the firm would be perceived as biased.

After these interviews, the commissioners conducted a second round of scoring before selecting a firm. In this round of scoring, Commissioners Mathis, Herrera, and McNulty all gave Strategic Telemetry a perfect score. Strategic Telemetry came out of this round with the highest overall score. Prior to the public meeting in which

the Commission voted to retain a mapping consultant, Chairwoman Mathis made a phone call to Commissioner Stertz and asked him to support the choice of Strategic Telemetry.

The Commission selected Strategic Telemetry as the mapping consultant on a 3-2 vote, with Commissioners McNulty, Herrera, and Mathis voting in favor, and Commissioners Freeman and Stertz voting against. Before the vote, Commissioners Freeman and Stertz had expressed a preference for National Demographics.

At subsequent meetings, the Commission heard extensive criticism from members of the public about the selection of Strategic Telemetry. Much of the criticism related to the Democratic affiliations of the firm and to the fact that it was based out of Washington, D.C., rather than Arizona. Strategic Telemetry was founded primarily as a microtargeting firm, which uses statistical analyses of voter opinions to assist political campaigns. Ken Strasma, president and founder of Strategic Telemetry, considered himself a Democrat, as did most of the other employees of the firm. The firm had worked for Democratic, independent, and nonpartisan campaigns, but no Republican campaigns. While Strasma had redistricting experience in more than thirty states before he founded the firm in 2003, the firm itself had no statewide redistricting experience at the time of its bid, nor any redistricting experience in Arizona. Also making Strategic Telemetry a controversial choice was that it had submitted the most expensive bid to the Commission. All of this was known to the Commission when Strategic

Telemetry was selected as the mapping consultant for the Commission and when Commissioners Mathis, Herrera, and McNulty each gave Strategic Telemetry a perfect score of 700 points during the second round of scoring.

D. The Grid Map

The Commission was required to begin the mapping process by creating "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. IV, pt. 2, § 1(14). The Commission directed its mapping consultant to prepare two alternative grid maps. Believing that the Arizona Constitution intended the Commission to begin with a clean slate, several commissioners expressed interest in having an element of randomness in the generation of the grid map. The Commission decided, after a series of coin flips, that the consultant would generate two alternative grid maps, one beginning in the center of the state and moving out counterclockwise, and the other with districts starting in the southeast corner of the state, moving inwards clockwise.

After the two maps were presented, the Commission voted to adopt the second alternative. The grid map selected had a maximum population deviation—the difference between the most populated and least populated district—of 4.07 percent of the average district population.

E. Voting Rights Act Preclearance Requirement

During the redistricting cycle at issue, Arizona was subject to the requirements of Section 5 of the Voting

Rights Act.[5] Before a state covered by Section 5 can implement a redistricting plan, the state must prove that its proposed plan "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a).[6] The state must either institute an action with the U.S. District Court for the District of Columbia for a declaratory judgment that the plan has no such purpose or effect, or, as the Commission did here, submit the plan to the U.S. Department of Justice. If the Justice Department does not object within sixty days, the plan has been precleared and the state may implement it. *See id.*

A plan has an impermissible effect under Section 5 if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997). A redistricting plan leads to retrogression when, compared to the plan currently in effect, the new plan diminishes

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5. In a case decided after the implementation of the Commission's new redistricting plan, the Supreme Court held unconstitutional the coverage formula used to determine which states are subject to the Section 5 preclearance requirement. *See Shelby County v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013). We discuss the impact of *Shelby County* on this case in our conclusions of law, at 47-49.

6. In order to better understand the factual findings that follow, some understanding of the requirements of the Voting Rights Act is useful. We include this discussion as background, acknowledging that it incorporates conclusions of law, albeit for the most part conclusions that do not appear to us to be controversial.

the ability of minority groups to "elect their preferred candidates of choice." *See id.*; 42 U.S.C. § 1973c(b). There is no retrogression so long as the number of ability-to-elect districts does not decrease from the benchmark to the proposed plan. *Texas v. United States*, 887 F. Supp. 2d 133, 157 (D.D.C. 2012) (citing *Abrams v. Johnson*, 521 U.S. 74, 97-98, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997)), *vacated and remanded*, 133 S. Ct. 2885, 186 L. Ed. 2d 930 (2013) (remanding for further consideration in light of *Shelby County v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013)).

A district gives a minority group the opportunity to elect the candidate of its choice not only when the minority group makes up a majority of the district's population (a majority-minority district), but also when it can elect its preferred candidate with the help of another minority group (a coalition district) or white voters (crossover districts). *Texas*, 887 F. Supp. 2d at 147-49. A minority group's preferred candidate need not be a member of the racial minority. *Cf. Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998) (discussing minority candidates of choice for the purposes of Section 2 of the Voting Rights Act). "Ability to elect" properly refers to the ability to elect the preferred candidate of Hispanic voters from the given district, which is not necessarily the same thing as the ability to elect a Hispanic candidate from that district, though there is obvious overlap between those two concepts.

In determining the ability to elect in districts in the proposed and benchmark plan, the Department of Justice

begins its review of a plan submitted for preclearance by analyzing the districts with current census data. 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). The analysis is a complex one relying on more than just census numbers, however, and does not turn on reaching a fixed percentage of minority population. Rather, the Department looks at additional demographic data such as group voting patterns, electoral participation, election history, and voter turnout. *Id.* at 7471; *see also Texas*, 887 F. Supp. 2d at 150 ("There is no single, clearly defined metric to determine when a minority group has an ability to elect, so we use a multi-factored approach to determine when a coalition or crossover district achieves that ability.").

Several aspects of the preclearance process encourage states to do more than the bare minimum to avoid retrogression. First, state officials do not know exactly what is required to achieve preclearance. As explained above, the Department of Justice relies on a variety of data in assessing retrogression, rather than assessing a fixed goal that states can easily ascertain. Bruce Cain, an expert in Voting Rights Act compliance in redistricting who served as a consultant to the Commission following the 2000 census and was retained for this lawsuit by the current Commission, testified at trial that the lack of clear rules creates "regulatory uncertainty" that forces states "to be cautious and to take extra steps."

Moreover, the preclearance process with respect to any particular plan is generally an opaque one. When the Department of Justice objects to a plan, the state receives an explanation of the basis for the objection. When the

Department does not object, by contrast, the state receives no such information. In other words, the state does not know how many benchmark districts the Department believed there were nor how many ability-to-elect districts the Department concluded were in the proposed plan. Nor does it know whether the new plan barely precleared or could have done with fewer ability-to-elect districts.

Consultants and attorneys hired by a state to assist with the preclearance process may also tend to encourage taking additional steps to achieve preclearance. The professional reputation of a consultant gives him a strong incentive to ensure that the jurisdictions he advises obtain preclearance. The Commission, for example, asked applicants to serve as its mapping consultant whether they had previously worked with states in redistricting and whether those jurisdictions had succeeded in gaining preclearance on the first try.

These factors may work together to tilt the board somewhat because they encourage a state that wants to obtain preclearance to overshoot the mark, particularly if it wants its first submission to be approved. Because it is not clear where the Justice Department will draw the line, there is a natural incentive to provide a margin of error or to aim higher than might actually be necessary. Attorneys and consultants, aware that their professional reputations may be affected, can be motivated to push in that direction.

The Arizona Commission early in the process identified obtaining preclearance on its first attempt as a priority.

All of the commissioners, Democrats and Republicans alike, shared this goal. In prior decades, Arizona had never obtained preclearance from the Department of Justice for its legislative redistricting plan based upon its first submission. The Commission was aware that, among other consequences, failure to preclear would make Arizona ineligible to bail out as a Section 5 jurisdiction for another ten years. *See* 42 U.S.C. § 1973b(a)(1). Although the Commission considered and often adjusted lines to meet other goals, it put a priority on compliance with the Voting Rights Act and, in particular, on obtaining preclearance on the first attempt.

F. The Draft Map

After adopting a grid map, the Commission was directed by the Arizona Constitution to adjust the map to comply with the United States Constitution and the federal Voting Rights Act. Ariz. Const. art. IV, pt. 2, § 1(14). It was also instructed to adjust the map, "to the extent practicable," to comply with five other enumerated criteria: (1) equality of population between districts; (2) geographic compactness and contiguity; (3) respect for communities of interest; (4) respect for visible geographic features, city, town and county boundaries, and undivided census tracts; and (5) competitiveness, if it would "create no significant detriment to the other goals." *Id.* The map approved by the Commission after the first round of these adjustments was only a draft map, which was required to undergo public comment and a further round of revisions before final approval. *Id.* § 1(16).

Appendix B

Before beginning to adjust the grid map, the Commission received presentations on the Voting Rights Act from its attorneys, its mapping consultant, and its Voting Rights Act consultant Bruce Adelson. Adelson previously worked for the Department of Justice, where he led the team that had reviewed and objected to the first legislative map submitted by Arizona for preclearance in 2002. Adelson gave the Commission an overview of the preclearance process. He explained that determining whether a minority population had the ability to elect was a complex analysis that turned on more than just the percentage of minorities in a district. He explained, for example, that in reviewing Arizona's submission from the prior decade, the Department had found a district where it concluded that minorities had an ability to elect even though they made up only between 30 and 40 percent of the population. Adelson informed the Commission at that time that he believed the 2002 map that was ultimately approved had nine districts in which minorities had an ability to elect their preferred candidates. Because the preclearance process focused on making sure there was no retrogression, that number was the benchmark, meaning that the new plan had to achieve at least the same number of ability-to-elect districts.

One of the most important factors the Department of Justice considers in determining the ability to elect in a district is its level of racial polarization, which is a measure of the voting tendencies of whites and minorities in elections pitting a white candidate against a minority candidate. A racial polarization study is a statistical analysis of past election results to determine the level

of racial polarization in a district. When it first started considering potential benchmark districts, the Commission did not have any formal racial polarization analysis at its disposal and relied primarily on demographic data from the 2010 census. The Commission eventually retained Professor Gary King, a social scientist at Harvard University recommended by the Commission's counsel, to conduct a racial polarization analysis.

Until the Commission had a formal racial polarization analysis, it often used what it called the "Cruz Index" to assess whether voters in an area might support a Hispanic candidate. Devised by Commissioners McNulty and Stertz, the Cruz Index used data from the 2010 election for Mine Inspector, a statewide race pitting Joe Hart, a Republican, non-Hispanic white (or Anglo) candidate, against Manuel Cruz, a Democrat, Hispanic candidate. The Cruz Index, sometimes described by commissioners and staff as a "down and dirty" measure, was not intended to be the Commission's only analysis of cohesion in minority voting in proposed districts, but rather a rough proxy until the Commission had formal racial polarization analysis. In the end, however, the voting pattern estimates derived from the Cruz Index wound up corresponding closely to the voting pattern estimates King derived from his formal statistical analysis.

To explore possible adjustments to the grid map, the commissioners could either direct the mapping consultant to create a map with a certain change or use mapping software to make changes themselves. They referred to these maps as "what if" maps because the maps simply

showed possible line changes that the Commission might choose to incorporate into the draft map. Willie Desmond was the Strategic Telemetry employee with primary responsibility for assisting commissioners with the mapping software or creating "what if" maps at their direction.

The Commission originally operated on the assumption that it had to create nine ability-to-elect districts, based on Adelson's report that there were nine benchmark districts. As a result, the earliest "what if" maps focused on creating nine minority ability-to-elect districts. Commissioner Freeman, for example, directed Desmond to create several maps that would create nine ability-to-elect districts.

Soon, however, the Commission began considering the possibility that there might be ten benchmark districts. Counsel advised that there were some districts without a majority-minority population that had a history of electing minority candidates, such as District 23 from the 2002 legislative map. Counsel further explained that, even though there were seven majority-minority benchmark districts and two to three other districts where minorities did not make up the majority, they nonetheless might be viewed as having the ability to elect. Because it was uncertain how many benchmark and ability-to-elect districts the Department of Justice would determine existed, counsel advised that creating ten districts would increase the odds of getting precleared on the first attempt.

The Commission worked to make Districts 24 and 26 ones in which, despite lacking a majority of the population, Hispanics could elect candidates of their choice. At this point, the Commission was still relying on the Cruz Index to predict minority voting patterns in proposed districts. As the Commission explored shifting boundaries to create ability-to-elect districts, their mapping consultant apprised the Commission of the effects of the shifts on various statistics, such as minority voting population, the Cruz Index, and the deviation from average district population. Counsel advised the Commission that some population disparity was permissible if it was a result of compliance with the Voting Rights Act.

On October 10, 2011, the Commission approved a draft legislative map on a 4-1 vote, with all but Commissioner Stertz voting in favor of the map. That map had ten districts identified by the Commission as minority ability-to-elect districts.

G. The Effort to Remove Chairwoman Mathis

The Arizona Constitution prescribes at least a thirty-day comment period after the adoption of the draft map. Ariz. Const. art. IV, pt. 2, § 1(16). The Commission did not begin working on the final map until late November, however, because of a delay resulting from an effort to remove Chairwoman Mathis from the Commission.

On October 26, Governor Janice Brewer sent a letter to the Commission alleging it had committed "substantial neglect of duty and gross misconduct in office" for, among

other things, the manner in which it selected the mapping consultant. On November 1, the Governor's office informed Chairwoman Mathis that it would remove her from the Commission for committing gross misconduct in office, conditioned upon the concurrence of two-thirds of the Arizona Senate. The Arizona Constitution permits the governor to remove a member of the Commission, with concurrence of two-thirds of the Senate, for "substantial neglect of duty" or "gross misconduct in office." Ariz. Const. art. IV, pt. 2, § 1(10). After the Senate concurred in the removal of Chairwoman Mathis in a special session, the Commission petitioned the Arizona Supreme Court for the reinstatement of Chairwoman Mathis on the basis that the Governor had exceeded her authority under the Arizona Constitution. *Ariz. Indep. Redistricting Comm'n v. Brewer*, 229 Ariz. 347, 275 P.3d 1267, 1270 (Ariz. 2012). On November 17, that court ordered the reinstatement of Chairwoman Mathis, concluding that the Governor did not have legal cause to remove her. *Id.* at 1268, 1276-78.

H. The Final Map

On November 29, the Commission began working to modify the draft map to create the final map it would submit to the Department of Justice. Because of the delay caused by the effort to remove Chairwoman Mathis, the Commission felt under pressure to finalize its work in time to permit election officials and prospective candidates to prepare for the 2012 elections, knowing that the preclearance process would also take time.

Appendix B

The Commission received a draft racial polarization voting analysis prepared by King and Strasma. According to the draft analysis, minorities would be able to elect candidates of their choice in all ten proposed ability-to-elect districts in the draft map.

The Commission received advice from its attorneys and consultants as to the importance of presenting the Department of Justice with at least ten ability-to-elect districts. Adelson said that, based on the information he had received since his earlier assessment, he believed the Department would conclude that there were ten benchmark districts. He also emphasized that, due to the uncertainty in determining what constitutes a benchmark district, the Department might determine there were more benchmark districts than what the Commission had concluded. Counsel advised the Commission that it would be "prudent to stay the course in terms of the ten districts that are in the draft map and look to . . . strengthen them if there is a way to strengthen them."

The Commission also received advice that it could use population shifts, within certain limits, to strengthen these districts. Adelson advised the Commission that underpopulating minority districts was an acceptable tool for complying with the Voting Rights Act, so long as the maximum deviation remained within ten percent. According to Adelson, underpopulating districts to increase the proportion of minorities was an "accepted redistricting tool" and something that the Department of Justice looked at favorably when assessing compliance with Section 5. According to Strasma, underpopulation

could strengthen the districts in several ways. First, it could increase the percentage of minority voters in a district. Second, it could account for expected growth in the Hispanic districts, which might otherwise become overpopulated in the decade following the implementation of a new map.

The Commission directed Strasma and Adelson to look for ways to strengthen the ability-to-elect districts and report back. At a subsequent meeting, Strasma, Adelson, and Desmond presented a number of options for improving the districts along with the trade-offs associated with those changes. Strasma identified Districts 24 and 26 in particular as districts that might warrant further efforts to strengthen the minority ability to elect. Doing so would increase the likelihood that the Department of Justice would recognize those districts as ability-to-elect districts and thus the likelihood that the plan would obtain preclearance.

The Commission adopted a number of changes to Districts 24 and 26, including many purportedly aimed at strengthening the minority population's ability to elect. Between the draft map and final map, the Hispanic population in District 24 increased from 38.6 percent to 41.3 percent, and the Hispanic voting-age population increased from 31.8 percent to 34.1 percent. In District 26, the Hispanic population increased from 36.8 percent to 38.5 percent, and the Hispanic voting-age population increased from 30.4 percent to 32 percent.

A consequence of these changes was an increase in population inequality. District 24's population decreased from 0.2 percent above the ideal population to 3 percent below. District 26's population increased from 0.1 percent above the ideal population to 0.3 percent above.

Commissioner McNulty asked Desmond to explore possibilities for making either District 8 or 11 more competitive. Desmond presented an option to the Commission that would have made District 8 more competitive. The Republican commissioners expressed opposition to the proposed change. Commissioner Stertz argued that the change favored Democrats in District 8 while "hyperpacking" Republicans into District 11. Commissioner Freeman argued that competitiveness should be applied "fairly and evenhandedly" across the state rather than just advantaging one party in a particular district. The Republican commissioners were correct that the change would necessarily favor Democratic electoral prospects given that the voter registration in the existing versions of both Districts 8 and 11 favored Republicans and that Commissioner McNulty did not propose any corresponding effort to make any Democratic-leaning districts more competitive. Commissioner McNulty was absent from the meetings in which these initial discussions occurred, but Commissioner Herrera noted that competitiveness was one of the criteria the Commission was required to consider and expressed support for the change.

Commissioner McNulty asked Desmond to try a few other ways of shifting the lines between Districts 8 and

11, one of which would have kept several communities with high minority populations together in District 8. Commissioner McNulty, noting that the area had a history of having an opportunity to elect, raised the possibility that the change might also preserve that opportunity. Adelson opined that, if the minority population of District 8 were increased slightly, the Commission might be able to present it to the Department of Justice as an eleventh opportunity-to-elect district, which would "unquestionably enhance the submission and enhance chances for preclearance." Counsel suggested that having another possible ability-to-elect district could be helpful because District 26 was not as strong of an ability-to-elect district as the other districts.

District 8 contained many of the same concentrations of minority populations as the district identified as District 23 in the previous decade's plan. The comparable district in that region of the state had a history of electing minority candidates prior to the 2002 redistricting cycle. In 2002, the Department of Justice identified that district as one of the reasons why the Commission did not obtain preclearance of its first proposed plan in that cycle. Although the Commission later argued to the Department of Justice in its 2012 submission that the minorities could not consistently elect their candidate of choice in that district between 2002 and 2012, several minority candidates had been elected to the state legislature from the district in that time period.

The Commission voted 3-2 to implement Commissioner McNulty's proposed change into the working map and send

it to Dr. King for further analysis, with the Republican commissioners voting against. This was the only change order that resulted in a divided vote.

This change order also affected the population count of Districts 11, 12, and 16. The order changed the deviation from ideal population from 1.5 percent to -2.3 percent in District 8, from 1.9 percent to 0.3 percent in District 11, from 1.7 percent to 4.3 percent in District 12, and from 1.9 percent to 4.8 percent in District 16. Because of subsequent changes, the population deviations in these districts in the final map was -2.2 percent for District 8, 0.1 percent for District 11, 4.1 percent for District 12, and 3.3 percent for District 16. Therefore, the change in population deviation for each district that is both attributable to Commissioner McNulty's change order and that actually remained in the final map was an increase in deviation of 0.7 percent for District 8, a decrease in deviation of 1.6 percent for District 11, an increase of 2.4 percent for District 12, and an increase in deviation of 1.4 percent for District 16.

These changes increased the percentage of Hispanic population in District 8 from 25.9 percent in the draft map to 34.8 percent in the final map, with Hispanic voting-age population from 22.8 percent to 31.3 percent. The Commission ultimately concluded, however, that while District 8 came closer to constituting a minority ability-to-elect district than the previous District 23, it did not ensure minority voters the ability to elect candidates of their choice. The changes were nonetheless retained in the final map.

Appendix B

The Commission approved the final legislative map on January 17, 2012, on a 3-2 vote, with the Republican commissioners voting against.

On February 28, 2012, the Commission submitted its plan to the Department of Justice for preclearance purposes. In its written submission, the Commission argued that the benchmark plan contained seven ability-to-elect districts, comprised of one Native American district and six Hispanic districts. The Commission argued that the new map was an improvement over the benchmark plan, as the new map contained ten districts (one Native American district and nine Hispanic districts) in which a minority group had the opportunity to elect the candidate of its choice. The Commission also noted that while District 8 was not an ability-to-elect district, its performance by that measure was improved over its predecessor, Benchmark District 23.

On April 26, the Department of Justice approved the Commission's map.

I. The Motivation for the Deviations

As noted previously and explained in more detail below, at 41-44, we conclude as a matter of law that the burden of proof is on plaintiffs. To prevail, plaintiffs must prove that the population deviations were not motivated by legitimate considerations or, possibly, if motivated in part by legitimate considerations, that illegitimate considerations predominated over legitimate

considerations.[7] We assume that seeking partisan advantage is not a legitimate consideration, and we conclude, as discussed at 44-49, that compliance with the Voting Rights Act is a legitimate consideration.

We find that plaintiffs have not satisfied their burden of proof. In particular, we find that the deviations in the ten districts submitted to the Department of Justice as minority ability-to-elect districts were predominantly a result of the Commission's good-faith efforts to achieve preclearance under the Voting Rights Act. Partisanship may have played some role, but the primary motivation was legitimate.

With respect to the deviations resulting from Commissioner McNulty's change to District 8 between the draft map and the final map, we find that partisanship clearly played some role. We also find, however, that legitimate motivations to achieve preclearance also played a role in the Commission's decision to enact the change to District 8.

We acknowledge that it is difficult to separate out different motivations in this context. That is particularly

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7. As discussed below, at 42-43 n. 10, we have not reached agreement on the legal standard to be applied. A majority of the court has concluded that plaintiffs have failed to demonstrate that illegitimate considerations predominated over legitimate ones. Necessarily, therefore, plaintiffs have not proven that illegitimate considerations were the actual and sole reasons for the population deviations. By either test adopted by the two judges that make up a majority of the court, plaintiffs have failed to carry their burden.

true in this instance because the cited motivations pulled in exactly the same direction. As a practical matter, changes that strengthened minority ability-to-elect districts were also changes that improved the prospects for electing Democratic candidates. Those motivations were not at cross purposes. They were entirely parallel.

The Cruz Index, used by the commissioners in considering changes to the map aimed at strengthening minority districts, illustrates the overlap of these two motivations. It applied results from an election contest between a Hispanic Democrat and a white, non-Hispanic (Anglo) Republican. The commissioners used votes for candidate Cruz to reflect a willingness to vote for a Hispanic candidate—which was itself a proxy for the ability of the Hispanic population to elect its preferred candidate, regardless of that candidate's ethnicity—but the voters could have been motivated, as much or even more, to vote for a Democrat. Similarly, voters who voted for Cruz's opponent may have been willing to vote for a Hispanic candidate but were actually motivated to vote for a Republican. In using the Cruz Index to adjust district boundaries in order to strengthen the minority population's ability to elect its preferred candidate, the commissioners used a measure that equally reflected the ability to elect a Democratic candidate.

The practical correlation between these two motivations was confirmed by the results of the 2012 election, conducted under the map that is the subject of this lawsuit. The legislators elected from districts identified by the Commission as minority ability-to-elect

districts were all Democrats. As noted above, 19 of the 30 legislators elected from those districts were Hispanic or Native American.

It is highly likely that the members of the Commission were aware of this correlation. Individuals sufficiently interested in government and politics to volunteer to serve on the Commission and to contribute hundreds of hours of time to the assignment would be aware of historic voting patterns. If they weren't aware before, then they would necessarily have become aware of the strong correlation between minority ability-to-elect districts and Democratic-leaning districts in the course of their work.

That knowledge could open the door to partisan motivations in both directions. If an individual member of the Commission were motivated to favor Democrats, that could have been accomplished under the guise of trying to strengthen minority ability-to-elect districts. Similarly, a member motivated to favor Republicans could have taken advantage of the process to concentrate minority population into certain districts in such a way as to leave a larger proportion of Republicans in the remaining districts.

Recognizing the difficulty of separating these two motivations, we find that the Commission was predominantly motivated by a legitimate consideration, in compliance with the Voting Rights Act.

All five of the commissioners, including the Republicans, put a priority on achieving preclearance from

the Department of Justice on the first try. To maximize the chances of achieving that goal, the Commission's counsel and consultants recommended creating ten minority ability-to-elect districts. There was not a partisan divide on the question of whether ten districts was an appropriate target.

After working to create ten such districts in the draft map, including Districts 24 and 26, all but Commissioner Stertz voted for the draft map. Commissioner Stertz's reason for voting against the draft map, however, was not that he objected to the population deviations resulting from the creation of the ability-to-elect districts. Rather, he felt that the Commission had not paid sufficient attention to the other criteria that the Arizona Constitution requires the Commission to consider, such as keeping communities of interest together.

In short, the bipartisan support for the changes leading to the population deviations in the draft map undermines the notion that partisanship, rather than compliance with the Voting Rights Act, was what motivated those deviations.

We also find that the additional population deviation in these ten districts resulting from changes occurring between the passage of the draft map and the final map were primarily the result of efforts to obtain preclearance, some reservations by the Republican commissioners notwithstanding. After the draft map was completed, both Republican commissioners expressed concern about further depopulating minority ability-to-elect districts.

At the hearing in which the Commission began work on the final map, Commissioner Stertz said that it was his "understanding that the maps as they are currently drawn do meet [the Voting Rights Act] criteria," and that he didn't want to "overpack Republicans into Republican districts . . . all being done on the shoulders of strengthening [Voting Rights Districts]." Commissioner Freeman shared Commissioner Stertz's concerns.

But the Commission's counsel and consultants responded that there was uncertainty as to whether the map would preclear without strengthening those districts. And despite their initial reservations, the Republican commissioners did not vote against any of the change orders further strengthening the minority ability to elect in those districts. Commissioner Stertz even expressed support for these changes. In a public hearing that took place after the Commission made additional changes to the Voting Rights Act districts, Commissioner Stertz said that apart from a change order affecting Districts 8 and 11—which were not ability-to-elect districts and which we discuss next—he was "liking where the map has gone" and thought there was "a higher level of positive adjustments that have been made than the preponderance of the negative design of Districts 8 and 11." At trial, Commissioner Stertz testified that he relied on counsel's advice that ten benchmark districts were necessary, and that he thought those ten districts were "better today than when they were first developed in draft maps." The bipartisan support for the goal of preclearance, and the bipartisan support for the change orders strengthening these ten districts to meet that goal, support the finding that preclearance motivated the deviations.

We make this finding despite plaintiffs' contention that the selection of counsel and mapping consultant prove that Chairwoman Mathis was biased towards Democratic interests. We agree that giving Strategic Telemetry a perfect score is difficult to justify and reflects Mathis taking an ends-oriented approach to the process to select her preferred firm, Strategic Telemetry.

But even if Chairwoman Mathis preferred Strategic Telemetry for partisan reasons rather than the neutral reasons she expressed at the time, it would not prove that partisanship was the reason she supported the creation of ability-to-elect districts. As we have discussed, strong evidence shows that preclearing on the first attempt was a goal shared by all commissioners, not just Chairwoman Mathis.

With respect to the changes to District 8 occurring between the draft map and final map, the evidence shows that partisanship played some role. Though Commissioner McNulty first presented the possible changes to Districts 8 and 11 as an opportunity to make District 8 into a more competitive district, that simply meant making District 8 into a more Democratic district. Because Districts 8 and 11 both favored Republicans before the proposed change, any shift in population between the two districts to make one of them more "competitive" necessarily increased the chances that a Democrat would win in one of those districts. In fact, in a close senate race in the newly drawn District 8, the Democrat did win. We might view the issue differently had Commissioner McNulty proposed to create a series of competitive districts out

of both Democrat- and Republican-leaning districts, or applied some defined standards evenhandedly across the state. Instead, she sought to make one Republican-leaning district more amenable to Democratic interests. Moreover, the Commission was well aware of the partisan implications of the proposed change before adopting it. Both Republican commissioners made their opposition to the change, on the basis that it packed Republican voters into District 11 to aid Democratic prospects in District 8, known early on.

Nonetheless, while partisanship played a role in the increased population deviation associated with changing District 8, so too did the preclearance goal play a part in motivating the change. While Commissioner McNulty originally suggested altering Districts 8 and 11 for the sake of competitiveness, she subsequently suggested that District 8 could become an ability-to-elect district. Consultants and counsel endorsed this idea, in part because they had some doubts that District 26 would offer the ability to elect. It was not until after the consultants and counsel suggested pursuing these changes for the sake of preclearance that Chairwoman Mathis endorsed the idea. While the Commission ultimately concluded that it could not make a true ability-to-elect district out of District 8, the submission to the Department of Justice did cite the changes made to that district's boundaries in arguing that the plan deserved preclearance. Compliance with the Voting Rights Act was a substantial part of the motivation for the treatment of District 8.

III. Resolution of Pretrial Motions

The parties filed several motions prior to trial that this court disposed of summarily in its order dated February 22, 2013, with an opinion explaining the bases of the rulings to follow. Before we turn to our conclusions of law on the merits of the case, we explain our rulings on those motions.

A. First Motion for Judgment on the Pleadings

Defendants' first motion for judgment on the pleadings sought two forms of relief. First, defendants requested dismissal of the commissioners based on legislative immunity. Second, defendants requested dismissal of plaintiffs' state-law claim as barred by the Eleventh Amendment. We now explain why both forms of relief were granted.

1. Standard of Judgment on the Pleadings

Judgment on the pleadings is appropriate when there is "no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). In assessing defendants' motion, we "accept[ed] all factual allegations in the complaint as true and construe[d] them in the light most favorable to the non-moving party." *Id.*

2. The Commissioners Were Immune from Suit

It was not entirely clear from the complaint but plaintiffs' claims against the commissioners appeared to be based solely on the commissioners' official acts. That is, plaintiffs' claims rested on the commissioners' actions in connection with the adoption of a particular final legislative map. Plaintiffs' federal claim sought relief pursuant to 42 U.S.C. § 1983 based on their belief that the adoption of that map constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. The Commission argued legislative immunity forbade plaintiffs from pursuing this claim against the commissioners.

"The Supreme Court has long held that state and regional legislators are absolutely immune from liability under § 1983 for their legislative acts." *Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1219 (9th Cir. 2003). This immunity applies to suits for money damages as well as requests for injunctive relief. *See Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980). Litigants often disagree over whether legislative immunity applies to a particular individual or to particular acts performed by an individual occupying a legislative office. *Kaahumanu*, 315 F.3d at 1219 (legislative immunity applies only to "legislative rather than administrative or executive" actions). But plaintiffs effectively conceded the commissioners qualified as legislators performing legislative acts. So instead of the normal lines of attack, plaintiffs argued that *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908),

prevented legislative immunity from requiring dismissal of the commissioners. Plaintiffs also claimed their request for attorneys' fees permitted them to maintain suit against the commissioners. Neither argument was convincing.

Ex parte Young creates a legal fiction to avoid suits against state officials from being barred by the Eleventh Amendment. *See, e.g., Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1189 (9th Cir. 2003) (per curiam) ("[T]he doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit . . . ."). That fiction permits only "actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law." *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). Plaintiffs did not cite any case where a court employed the fiction of *Ex parte Young* to avoid the otherwise applicable bar of legislative immunity. And existing case law reaches the opposite conclusion. *See, e.g., Scott v. Taylor*, 405 F.3d 1251, 1257 (11th Cir. 2005) (finding legislative immunity barred claim for prospective injunctive relief). Thus, *Ex parte Young* was not sufficient to overcome the bar of legislative immunity.

Even if the court had agreed *Ex parte Young* might permit the naming of the commissioners in certain circumstances, it was particularly inapt here. Pursuant to *Ex parte Young*, the "state official sued 'must have some connection with the enforcement of the act.'" *Coal. to Defend Affirmative Action*, 674 F.3d at 1134 (quoting *Ex parte Young*, 209 U.S. at 157). That connection must be "fairly direct" and a "generalized duty to enforce state law

or general supervisory power over the persons responsible for enforcing the challenged provision" is not sufficient. *Los Angeles County Bar Ass'n v. March Fong Eu*, 979 F.2d 697, 704 (9th Cir. 1992). Accordingly, *Ex parte Young* does not allow a plaintiff to sue a state official who cannot provide the relief the plaintiff actually seeks. *See id.*

Under Arizona's redistricting process, the commissioners have no direct connection to implementing the final legislative map nor do they have any supervisory power over those state officials implementing the final legislative map. Rather, it is the Secretary of State who enforces the map. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 211 Ariz. 337, 121 P.3d 843, 857 (Ariz. Ct. App. 2005) (per curiam) ("Once the Commission certifies the maps, the secretary of state must use them in conducting the next election."). Plaintiffs named the Secretary of State as a defendant and the Secretary of State conceded he is responsible for enforcing the map. In light of this, assuming *Ex parte Young* allows suit against the commissioners in some circumstances, the present suit did not qualify.

Finally, plaintiffs argued the commissioners' "presence [was] essential to maintaining section 1983 relief, which includes an award of attorneys' fees under 42 U.S.C. § 1988." In other words, plaintiffs wanted to keep the commissioners as defendants to ensure the possibility of plaintiffs recovering their attorneys' fees. Plaintiffs did not cite, and the court could not find, any authority permitting the issue of fees to determine the propriety of keeping certain defendants in a suit. Moreover, plaintiffs'

issue regarding fees was a problem of their own creation in that the Secretary of State undoubtedly was an appropriate defendant and plaintiffs could have sought fees from him. At oral argument, however, plaintiffs' counsel conceded the complaint did not seek an award of fees from the Secretary of State.[8] The fact that plaintiffs made a choice not to seek fees against one party from whom they could clearly obtain fees was not a sufficient basis to allow plaintiffs to continue this suit against inappropriate parties.

Neither *Ex parte Young* nor the impossibility of plaintiffs collecting fees from the remaining defendants justified keeping the commissioners as defendants. Therefore, the commissioners were entitled to judgment on the pleadings.

3. Plaintiff's State-Law Claim Was Barred by the Eleventh Amendment

In addition to their § 1983 claim, plaintiffs also asserted a state-law claim that the final legislative map "violates the equal population requirement of Ariz. Const. art. 4, pt. 2, §1(14)(B)." Defendants moved to dismiss this state-law claim as barred by the Eleventh Amendment pursuant to *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Plaintiffs did not dispute that a straightforward application of

8. The portion of the complaint referenced during oral argument seeks fees "against the IRC only." In light of this language, it is unclear why plaintiffs believed they had requested fees from the individual commissioners.

Pennhurst established their state-law claim was barred by the Eleventh Amendment. Instead, plaintiffs argued defendants waived their Eleventh Amendment immunity. Plaintiffs were incorrect.

"For over a century now, [the Supreme Court] has consistently made clear that 'federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.'" *Sossamon v. Texas*, 131 S. Ct. 1651, 1657-58, 179 L. Ed. 2d 700 (2011) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)). A state may choose to waive its immunity, but the "test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* at 1658 (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)). That test consists of determining whether "the state's conduct during the litigation clearly manifest[ed] acceptance of the federal court's jurisdiction or [was] otherwise incompatible with an assertion of Eleventh Amendment immunity." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 759 (9th Cir. 1999). For example, the Ninth Circuit concluded waiver occurred when a state appeared, actively litigated a case, and waited until the first day of trial to claim immunity. *Id.* at 763. The situation in the present case was significantly different.

Plaintiffs filed their original complaint on April 27, 2012. The parties then engaged in protracted pre-answer maneuvers that ended on November 16, 2012,

when the court denied defendants' motion to dismiss. Approximately three weeks later, defendants filed their answer asserting Eleventh Amendment immunity as well as a formal motion seeking judgment on the pleadings based on that immunity. Thus, while the case had been pending for over nine months at the time immunity was first asserted, the vast majority of that time was consumed by briefing and deciding a motion to dismiss. There was no meaningful delay between issuance of the order on the motion to dismiss and defendants' assertion of the Eleventh Amendment. And while defendants might have raised immunity earlier, the actual sequence of events falls short of meeting the "stringent" test for establishing waiver. *Sossamon*, 131 S. Ct. at 1658. Therefore, defendants were entitled to judgment on the pleadings regarding plaintiffs' state-law claim.

B. Motion for Abstention

Citing *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), defendants moved to stay this case and defer hearing plaintiffs' federal claim until plaintiffs obtained resolution of state-law issues in state court or, in the alternative, to certify any state-law questions to the Arizona Supreme Court. A majority of the court summarily denied the motion, with Judge Silver dissenting.

Because "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims," *Pullman* abstention is

available only in narrowly limited, special circumstances. *Zwickler v. Koota*, 389 U.S. 241, 248, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967). At its core, it "reflect[s] a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." *Pullman*, 312 U.S. at 501. "It is better practice, in a case raising a federal constitutional or statutory claim, to retain jurisdiction, rather than to dismiss." *Zwickler*, 389 U.S. at 244 n.4. *Pullman* abstention generally is appropriate only if three conditions are met: (1) the complaint "requires resolution of a sensitive question of federal constitutional law; (2) the constitutional question could be mooted or narrowed by a definitive ruling on the state law issues; and (3) the possibly determinative issue of state law is unclear." *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 888-89 (9th Cir. 2011) (quoting *Spoklie v. Mont*, 411 F.3d 1051, 1055 (9th Cir. 2005)). Proper application of these conditions is meant to ensure federal courts defer "to state court interpretations of state law" while avoiding "'premature constitutional adjudication' that would arise from 'interpreting state law without the benefit of an authoritative construction by state courts.'" *Id.* (quoting *Gilbertson v. Albright*, 381 F.3d 965, 971 n.6 (9th Cir. 2004) (en banc)) (internal quotation marks omitted).

When deciding whether to exercise its discretionary equity powers to abstain, a court also must consider that "abstention operates to require piecemeal adjudication in many courts," possibly "delaying ultimate adjudication on

the merits for an undue length of time." *Baggett v. Bullitt*, 377 U.S. 360, 378-79, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964). That delay can work substantial injustice because forcing "the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler*, 389 U.S. at 252.

Delay caused by abstention is especially problematic in voting rights cases. *Harman v. Forssenius*, 380 U.S. 528, 537, 85 S. Ct. 1177, 14 L. Ed. 2d 50 (1965). The Ninth Circuit noted in a redistricting case that due to the "special dangers of delay, courts have been reluctant to rely solely on traditional abstention principles in voting cases." *Badham v. U.S. Dist. Court for the N. Dist. of Cal.*, 721 F.2d 1170, 1173 (9th Cir. 1983). Expressing specific concern about the possibility of a potentially defective redistricting plan being left in place for an additional election cycle, it held that "before abstaining in voting cases, a district court must independently consider the effect that delay resulting from the abstention order will have on the plaintiff's right to vote." *Id.*

Given the importance of prompt adjudication of voting rights disputes, we exercised our discretion and decided not to abstain. The three conditions precedent to applying *Pullman* abstention identified above might have been present here, but we concluded that we should deny the motion without having to make that determination because of the likely delay that would have resulted.

If we abstained as defendants requested, it was not likely that a resolution could be reached in time to put a new plan in place, if necessary, for the 2014 election cycle. Not only are voting rights disputes particularly important, they are also particularly complex. The last round of litigation over redistricting in Arizona, concerning Arizona's legislative redistricting maps following the 2000 census, commenced in March 2002. *See Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 208 P.3d 676, 682 (Ariz. 2009) (en banc). The state trial court did not issue its decision until January 2004, twenty-two months later. *See id.* The appellate process did not conclude until the Arizona Supreme Court's final decision in May 2009. *Id.* at 676. The Commission's motion for abstention came before us in December 2012. At the time of our decision on the motion, in February 2013, no state court action was pending. Thus, deferring ruling on the federal claim would have delayed adjudication on the merits until a state court action was initiated and concluded, which likely would have precluded relief in time for the 2014 election cycle.[9]

9. This case commenced in April 2012. We set a schedule with the intent that our decision would be filed in time for the 2014 election cycle, even leaving time for review by the Supreme Court. That is why trial was scheduled and held in March 2013, even though the parties requested a later trial date. The subsequent filing by the Supreme Court in June 2013 of its decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), put that goal in jeopardy. The parties were subsequently ordered to brief the impact of *Shelby County* and, as illustrated by the dialogue between this opinion and the dissenting opinion, it has taken us some time to determine that impact. When we denied the motion for abstention, however, we did not know that *Shelby*

Furthermore, we could not resolve the state-law issues as this case no longer included the state-law claim because the State of Arizona's Eleventh Amendment immunity under *Pennhurst* precluded relief on that claim in federal court. And, it was also unclear whether any state law issues were implicated in plaintiffs' remaining federal claim. In sum, this case is unlike the typical case warranting *Pullman* abstention, where the federal court will necessarily construe a state statute that the state courts themselves have not yet construed in order to decide the sensitive question of whether the state statute violates the federal Constitution. *See, e.g., Potrero Hills Landfill*, 657 F.3d at 889. Here, by contrast, we did not need to resolve any question of state law as a predicate to deciding the merits of the federal claim. Therefore, we concluded that the special circumstances necessary for exercising discretion to defer ruling on plaintiffs' federal claim did not exist.

County was coming. The denial of the motion for abstention was based on our belief that we would reach a conclusion in time for the 2014 election cycle and that it would be highly unlikely that a similarly timely result could be achieved if we abstained in favor of state court adjudication.

We note that even with the unanticipated delay to consider the impact of *Shelby County*, our decision is filed about twenty-four months after the commencement of this action, about on par with the twenty-two months that it took the Arizona trial court to resolve the challenge to the legislative redistricting maps drawn following the 2000 census. We remain of the view that abstaining in favor of state court litigation, which would likely have entailed an appeal following a state trial court decision, would have taken even more time.

As an alternative to their request for abstention, defendants requested the court certify any state-law questions to the Arizona Supreme Court. A basic prerequisite for a court to certify a question to the Arizona Supreme Court is the existence of a pending issue of Arizona law not addressed by relevant Arizona authorities. *See, e.g., Seltzer v. Paul Revere Life Ins. Co.*, 688 F.3d 966, 968 (9th Cir. 2012). In addition, Arizona's certification statute requires the presence of a state-law question that "may be determinative" of the case. A.R.S. § 12-1861. With the dismissal of plaintiffs' state-law claim, there was no pending issue of Arizona law in this case. Therefore, the request in the alternative for certification also was denied.

C. Motion for Protective Order

Prior to discovery, the Commission moved for a protective order on the basis of legislative privilege. The Commission requested that the panel prohibit the depositions of the commissioners, their staff, and their consultants, as well as limit the scope of documents and interrogatories during discovery. We ordered the commissioners, at the time defendants in this case, to inform the court through counsel whether they would exercise legislative privilege if asked questions covered by the privilege. Commissioners Mathis, Herrera, and McNulty informed the court that they would invoke legislative privilege, while Commissioners Freeman and Stertz indicated they would waive it. We later denied the motion for a protective order, and we now explain the basis for doing so.

Appendix B

Whether members of an independent redistricting commission can withhold relevant evidence or refuse to be deposed on the basis of legislative privilege is an issue of first impression. Neither the Ninth Circuit nor, as far as we can tell, any other court has decided whether members of an independent redistricting commission can assert legislative privilege in a challenge to the redistricting plan they produced. In the present litigation, we conclude that members of the Arizona Independent Redistricting Commission cannot assert a legislative evidentiary privilege.

State legislators do not have an absolute right to refuse deposition or discovery requests in connection with their legislative acts. In *United States v. Gillock*, 445 U.S. 360, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980), the Supreme Court held that a state senator could not bar the introduction of evidence of his legislative acts in a federal criminal prosecution. Although Gillock could have claimed protection under the federal Speech or Debate Clause had he been a Member of Congress, the Court refused "to recognize an evidentiary privilege similar in scope to the Federal Speech or Debate Clause" for state legislators. *Id.* at 366. The Court reasoned that "although principles of comity command careful consideration, . . . where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields." *Id.* at 373. The Court in *Gillock* held that no legislative privilege exists in federal criminal prosecutions. It did not opine on the existence or extent of legislative privilege for state legislators in the civil context.

Appendix B

The Ninth Circuit has recognized that state legislators and their aides may be protected by a legislative privilege. *See Jeff D. v. Otter*, 643 F.3d 278, 289-90 (9th Cir. 2011). That case did not consider legislative privilege in the redistricting context, however, let alone whether citizen commissioners could assert the privilege. Moreover, its discussion of legislative privilege was limited. The decision did not indicate whether state legislators might assert an absolute legislative privilege in all civil litigation, or whether any privilege state legislators held must yield when significant competing interests exist.

Whether or not state legislators might be able to assert in federal court an absolute legislative privilege in some circumstances, we do not think that the citizen commissioners here hold an absolute privilege. The Fourth Circuit has recognized, albeit not specifically in any redistricting cases, a seemingly absolute privilege against compulsory evidentiary process for state legislators and other officials acting in a legislative capacity. *See EEOC v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 180-81 (4th Cir. 2011). The purposes underlying an absolute privilege for state legislators are that it "allows them to focus on their public duties by removing the costs and distractions attending lawsuits [and] shields them from political wars of attrition in which their opponents try to defeat them through litigation rather than at the ballot box." *Id.* at 181. However, these are not persuasive reasons for extending the privilege to appointed citizen commissioners. Unlike legislators, the commissioners have no other public duties from which to be distracted. *See* Ariz. Const. art. IV, pt. 2, §§ 1(3), (13)

(providing that commissioners cannot hold elected office during or for the three years following their service on the Commission). They cannot be defeated at the ballot box because they don't stand for election. Indeed, the process is not supposed to be governed by what happens at the ballot box. The reason why Arizona transferred redistricting responsibilities from the legislature to the Commission was to separate the redistricting process from politics. *See* Ariz. Proposition 106 (2000), *available at* http://www.azsos.gov/election/2000/info /pubpamphlet/prop2-C-2000.htm (on the ballot title of the initiative creating the Commission, stating one purpose behind the law as "ending the practice of gerrymandering").

In addition, to the extent comity is a rationale underlying legislative privilege, the Supreme Court has held that comity can be trumped by "important federal interests." *Gillock*, 445 U.S. at 373. The federal government has a strong interest in securing the equal protection of voting rights guaranteed by the Constitution, an interest that can require the comity interests underlying legislative privilege to yield. *Cf. Badham*, 721 F.2d at 1173 (observing that federal courts are more reluctant to abstain in voting rights cases and noting that the "right to vote is fundamental because it is preservative of all rights" (internal quotations marks and alterations omitted)).

For similar reasons, we also refuse to extend a qualified legislative privilege to the commissioners in this case. Some courts have recognized a qualified privilege for state legislators in redistricting cases, in which a

balancing test determines whether particular evidence is barred by the privilege. *See, e.g., Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003). These cases did not involve an independent redistricting commission, however, and several of these cases even suggested that a legislative privilege would not apply to citizen commissioners. *See Favors v. Cuomo*, 285 F.R.D. 187, 220 (E.D.N.Y. 2012) (concluding that permitting discovery would have minimal chilling effect on future legislative redistricting deliberations because New York had recently passed a law creating an independent redistricting commission composed of non-legislators); *Rodriguez*, 280 F. Supp. 2d at 101 (distinguishing between discovery requests aimed at the legislature itself and those aimed at an advisory redistricting commission composed of legislators and non-legislators, because the latter was "more akin to a conversation between legislators and knowledgeable outsiders"); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 301 n.19, 304-05 (D. Md. 1992) (holding that legislators were protected by the privilege, but not citizens serving on a redistricting advisory committee).

In determining whether a qualified privilege applies to state legislators, the courts that recognize a qualified privilege often balance the following factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will

be forced to recognize that their secrets are violable." *Rodriguez*, 280 F. Supp. 2d at 101. These factors weigh heavily against recognizing a privilege for members of an independent redistricting commission. Because what motivated the Commission to deviate from equal district populations is at the heart of this litigation, evidence bearing on what justifies these deviations is highly relevant. In the event that plaintiffs' claims have merit, and that the commissioners were motivated by an impermissible purpose, the commissioners would likely have kept out of the public record evidence making that purpose apparent. *See Cano v. Davis*, 193 F. Supp. 2d 1177, 1181-82 (C.D. Cal. 2002) (Reinhardt, J., concurring in part and dissenting in part) ("Motive is often most easily discovered by examining the unguarded acts and statements of those who would otherwise attempt to conceal evidence of discriminatory intent."). The federal interest in protecting voting rights is a serious one, as discussed earlier, and can require comity concerns to yield.

Perhaps most importantly, the nature and purpose of the Commission undermines the claim that allowing discovery will chill future deliberations by the Commission or deter future commissioners from serving. *See Favors*, 285 F.R.D. at 220. The commissioners will not be distracted from other duties because they have no other duties, and their future actions will not be inhibited because they have no future responsibility. *See* Ariz. Const. art. IV, pt. 2, §§ 1(3), (13). And, as the majority in *Marylanders* observed: "We . . . deem it extremely unlikely that in the future private citizens would refuse to serve on a prestigious

gubernatorial committee because of a concern that they might subsequently be deposed in connection with actions taken by the committee." 144 F.R.D. at 305 n.23.

The parties dispute the relevance of some of plaintiffs' requested discovery. But to the extent that plaintiffs have requested information not relevant to the central disputes in this litigation, the Commission need not rely on legislative privilege for protection. As stated in our order dated February 22, 2013, the court will not permit "discovery that is not central to the federal claims or any other inappropriate burden under Federal Rule of Civil Procedure 26(c)."

In conclusion, the rationale supporting the legislative privilege does not support extending it to the members of the Arizona Independent Redistricting Commission in this case.

IV. Conclusions of Law

A. Burden of Proof

The Equal Protection Clause of the Fourteenth Amendment requires that state legislative districts "must be apportioned on a population basis," meaning that the state must "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Some deviation in the population of legislative districts is constitutionally permissible, so long as the disparities are based on

"legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 579. Compactness, contiguity, respecting lines of political subdivisions, preserving the core of prior districts, and avoiding contests between incumbents are examples of the legitimate criteria that can justify minor population deviations, so long as these criteria are "nondiscriminatory" and "consistently applied." *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983).

Before requiring the state to justify its deviations, plaintiffs must make a prima facie case of a one-person, one-vote violation. By itself, the existence of minor deviations is insufficient to make out a prima facie case of discrimination. *Brown v. Thomson*, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983). With respect to state legislative districts, the Supreme Court has said that, as a general matter, a "plan with a maximum population deviation under 10% falls within this category of minor deviations." *Id.* at 842. Although courts rarely strike down plans with a maximum deviation of less than ten percent, a maximum deviation below ten percent does not insulate the state from liability, but instead merely keeps the burden of proof on the plaintiff. *See Cox v. Larios*, 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004) (summarily affirming the invalidation of a plan with a 9.98 percent maximum population deviation).

Because the maximum deviation here is below ten percent, the burden is on plaintiffs to prove that the deviations did not result from the effectuation of legitimate redistricting policies. The primary way in

which plaintiffs seek to carry their burden is by showing that the Commission deviated from perfect population equality out of a desire to increase the electoral prospects of Democrats at the expense of Republicans. Plaintiffs argue that partisanship is not a legitimate redistricting policy that can justify population deviations.

The Supreme Court has not decided whether or not political gain is a legitimate state redistricting tool. *See Cox*, 542 U.S. at 951 (Scalia, J., dissenting) (noting that the Court has not addressed whether a redistricting plan with a maximum deviation under ten percent "may nevertheless be invalidated on the basis of circumstantial evidence of partisan political motivation"). Because we conclude that the redistricting plan here does not violate the Fourteenth Amendment whether or not partisanship is a legitimate redistricting policy, we need not resolve the question. For the purposes of this opinion, we assume, without deciding, that partisanship is not a valid justification for departing from perfect population equality.

Even assuming that small deviations motivated by partisanship might offend the Equal Protection Clause, plaintiffs will not necessarily sustain their burden simply by showing that partisanship played some role. The Supreme Court has not specifically addressed what a plaintiff must prove in a one-person, one-vote challenge when population deviations result from mixed motives, some legitimate and some illegitimate.

This panel has not reached a consensus on what the standard should be.[10] We conclude, for purposes of this

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10. As expressed in her separate concurring opinion, at 9-11, Judge Silver concludes that plaintiffs must show that the "actual and sole reason" for the challenged population deviation was improper. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 366 (S.D.N.Y. 2004) (holding that plaintiffs must show that the "deviation results *solely* from an unconstitutional or irrational state purpose" (emphasis added)).

Judge Clifton is not persuaded that the bar ought to be set that high. Some Supreme Court authority suggests that plaintiffs must show that illegitimate criteria at least predominated over legitimate considerations. For example, while government programs that draw classifications on the basis of race are typically subject to strict scrutiny, redistricting plans challenged for racial gerrymandering are not subject to strict scrutiny "if race-neutral, traditional districting considerations predominated over racial ones." *Bush v. Vera*, 517 U.S. 952, 964, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (plurality opinion). Requiring a showing that illegitimate criteria predominated over legitimate criteria appears appropriate to him in light of the deference courts afford states in constructing their legislative districts and because multiple motives will frequently arise in any deliberative body. *Cf. Miller v. Johnson*, 515 U.S. 900, 915-16, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995) (noting that courts must be "sensitive to the complex interplay of forces that enter a legislature's redistricting calculus" and afford states the "discretion to exercise the political judgment necessary to balance competing interests").

Judge Wake, as discussed in his separate opinion, at 24-25, concludes that both the "only motive" and the "predominant motive" standards are unsatisfactory.

For decision purposes, a majority of the panel, made up of Judge Clifton and Judge Silver, have concluded that plaintiffs have

decision, that plaintiffs must, at a minimum, demonstrate that illegitimate criteria predominated over legitimate criteria.

Finally, we reject plaintiffs' argument that strict scrutiny applies to the extent that the Commission claims that racial motivations drove the deviations from population equality. All of the cases cited in support of this argument involve racial gerrymandering claims. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997). As plaintiffs concede, this is not a racial gerrymandering case. Nor have plaintiffs specifically articulated how, in the absence of a claim of racial discrimination, strict scrutiny helps their case. Suppose that, applying strict scrutiny, we concluded that the Commission employed race as a redistricting factor in a manner not narrowly tailored to advance a compelling governmental interest. That may establish a racial gerrymandering violation, but it would not establish a one-person, one-vote violation. We decline to reduce plaintiffs' burden by importing strict scrutiny into the one-person, one-vote context, a context in which the Supreme Court has made clear we owe state legislators substantial deference. *See Gaffney v. Cummings*, 412 U.S. 735, 749, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973).

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not demonstrated that partisanship predominated over legitimate redistricting considerations, applying the lower standard favored by Judge Clifton. Though Judge Silver concludes that the standard should be higher, if the predominance standard is not met, the "actual and sole reason" standard cannot be met. For discussion purposes, therefore, this per curiam opinion will speak in terms of the predominance standard.

In sum, plaintiffs must prove that the deviations were not motivated by legitimate considerations or, if motivated in part by legitimate considerations, that illegitimate considerations predominated over legitimate considerations. Because we have found that the deviations in the Commission's plan were largely motivated by efforts to gain preclearance under the Voting Rights Act, we turn next to whether compliance with Section 5 of the Voting Rights Act is a permissible justification for minor population deviations.

B. Compliance with the Voting Rights Act as a Legitimate Redistricting Policy

The Supreme Court has not specifically spoken to whether compliance with the Voting Rights Act is a redistricting policy that can justify minor population deviations. The Court has not provided an exhaustive list of permissible criteria. Among the legitimate criteria it has approved are compactness, contiguity, respecting municipal lines, preserving the cores of prior districts, and avoiding contests between incumbents. *Karcher*, 462 U.S. at 740. In the context of racial gerrymandering cases, the Court has assumed, without deciding, that the Voting Rights Act is a compelling state interest. *Vera*, 517 U.S. at 977 (plurality opinion).

We conclude that compliance with the Voting Rights Act is among the legitimate redistricting criteria that can justify minor population deviations. If compliance with the Voting Rights Act is not a legitimate, rational state policy on par with compactness and contiguity, we doubt that the

Court would have assumed in *Vera* that it is a compelling state interest. Neither plaintiffs nor the dissenting opinion have offered a sensible explanation.

More importantly, we fail to see how compliance with a federal law concerning voting rights—compliance which is mandatory for a redistricting plan to take effect—cannot justify minor population deviations when, for example, protecting incumbent legislators can. This is, perhaps, our primary disagreement with the dissenting opinion. It too narrowly defines the reasons that may properly be relied upon by a state to draw state legislative districts with wider variations in population.

The dissenting opinion correctly notes, at 19-20, that states are required to establish congressional districts of essentially equal population. It acknowledges, as it must, that state legislative districts are not subject to as strict a standard. A state legislative plan may include some variation in district population in pursuit of legitimate interests.

The dissenting opinion also acknowledges, at 17 & 23, that obtaining preclearance under the Voting Rights Act was a legitimate objective in redistricting. But it contends that pursuit of that objective could not justify even minor variations in population among districts. In practical terms, the dissenting opinion would apparently permit the Commission to consider the preclearance objective only in drawing lines dividing districts of equal sizes.

The Supreme Court has made it clear, however, that states have greater latitude when it comes to state legislative districts. The Equal Protection Clause does not require exact equality. In drawing lines for state legislative districts, "[a]ny number of consistently applied legislative policies might justify some variance." *Karcher*, 462 U.S. at 740. Obtaining preclearance under the Voting Rights Act appears to us to be as legitimate a reason as other policies that have been recognized, such as avoiding contests between incumbents and respecting municipal lines.

Plaintiffs and the dissenting opinion, at 19, attempt to reframe the inquiry, arguing that the text of the Voting Rights Act itself does not specifically authorize population deviations. That is correct; there is no specific authorization for population deviations in the text of the legislation. But neither is there specific, textual authorization for population deviations in any of the other legitimate, often uncodified legislative policies that the Supreme Court has held can justify population deviations. For example, the Supreme Court's conclusion that compactness can justify population deviations does not turn on the existence of a Compactness Act that specifically authorizes population deviations for the sake of compact districts. The question is not whether the Voting Rights Act specifically authorizes population deviations, but whether seeking preclearance under the Voting Rights Act is a legitimate, rational state goal in the redistricting process. We are satisfied that it is.

The dissenting opinion, at 19, goes a step further and argues that the Voting Rights Act itself prohibits any

deviation in exact population equality for the purpose of complying with the Voting Rights Act. No court has so held, and we note that plaintiffs themselves have alleged that the Arizona redistricting plan violates the Equal Protection Clause, not that it violates the Voting Rights Act. We do not read the Act in the same way that the dissenting opinion does.[11]

Plaintiffs also argue that the Department of Justice does not purport to be able to force jurisdictions to depopulate districts to comply with Section 5. In a document entitled "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act," the Department advises: "Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle." 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). But the Guidance goes on to make clear that, in the Department's view, Section 5 might in some cases require minor population deviations in state legislative plans. When a jurisdiction asserts that it cannot avoid retrogression because of population shifts, the

11. Similarly, the dissenting opinion contends, at 20, that the Department of Justice "has never required unequal population for preclearance in the 48 years of administering Section 5." That assertion is not proven. More importantly, it is an irrelevant straw man. For preclearance purposes, any variation in population is a means, not an end. There would never be reason for the Department to "require[] unequal population." That is not the Department's goal. The question is whether a state might improve its chances of obtaining preclearance by presenting a plan that includes minor population variations. The evidence presented to us supported that proposition, and neither plaintiffs nor the dissenting opinion deny that fact.

Department looks to see whether there are reasonable, less retrogressive alternatives, as the existence of these alternatives could disprove the jurisdiction's assertion that retrogression is unavoidable. For state legislative redistricting, "a plan that would require *significantly* greater overall population deviations is not considered a reasonable alternative." *Id.* (emphasis added). The implication is that the Department would consider a plan with slightly greater population deviation to be a reasonable plan that would avoid retrogression—in other words, the Department might hold a state in violation of Section 5 if it could have avoided retrogression with the aid of minor population deviations. To be clear, we do not base our understanding of the law upon the Department's interpretation, but plaintiffs have cited the Department's Guidance as supporting its position, and we do not agree. In our view, the Department's Guidance expresses a conclusion that avoiding retrogression can justify minor population deviations. That is our conclusion, as well, based on our own view of the law, separate and apart from the Department's position.

This conclusion is not altered by the Supreme Court's recent decision in *Shelby County v. Holder*, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013), which was decided after the legislative map in question here was drawn and implemented.[12] In *Shelby County*, the Court held that Section 4(b) of the Voting Rights Act, which contained the formula determining which states were subject to

12. As noted above, the decision was announced after the trial of this case. We ordered and obtained supplemental briefing from the parties on the impact of the decision on this case.

the preclearance requirement, was unconstitutional. *Id.* at 2631. The Court did not hold that the preclearance requirement of Section 5 was unconstitutional, but its ruling rendered the preclearance requirement inapplicable to previously covered jurisdictions, at least until Congress enacts a new coverage formula that passes constitutional muster. *See id.*

Plaintiffs and the dissenting opinion, at 15-17, argue that this ruling applies retroactively to this case, such that the Commission was not required to obtain preclearance for the legislative map at issue, thereby nullifying the pursuit of preclearance as a justification for population deviations. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993) (requiring that a rule of federal law announced by the Court and applied to the parties in that controversy "be given full retroactive effect by all courts adjudicating federal law").

But that approach reads too much into *Shelby County.* The Court did not hold that Section 5 of the Voting Rights Act, the section that sets out the preclearance process, was unconstitutional. The Court's opinion stated explicitly to the contrary: "We issue no holding on § 5 itself, only on the coverage formula." *Shelby Cnty.*, 133 S. Ct. at 2631. The Court did not hold that Arizona or any other jurisdiction could not be required to comply with the preclearance process, if a proper formula was in place for determining which jurisdictions are properly subject to the preclearance process. To the contrary, the Court's opinion expressly faulted Congress for not updating the coverage formula, implying that a properly updated

coverage formula that "speaks to current conditions" would withstand challenge. *Id.*

If we had before us a challenge to the coverage formula set forth in Section 4 of the Voting Rights Act, we would unquestionably be expected to apply *Shelby County* "retroactively," and we would do so. That is, however, not the issue before us. Neither is the issue before us whether the legislative map violated or complied with the Voting Rights Act.

Rather, the issue is whether the Commission was motivated by compliance with that law in deviating from the ideal population. In other contexts, where the issue is not whether the actions of public officials actually complied with the law but instead whether they might have reasonably thought to have been in compliance, we do not expect those public officials to predict the future course of legal developments.

For example, in the qualified immunity context, the issue is whether the actions of public officials "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). There, we assess their actions based on law "clearly established" at the time their actions were taken. *Id.* at 639. Similarly, in the Fourth Amendment context, we decline to apply the exclusionary rule when a police officer conducts a search in reasonable reliance on a later invalidated statute. *Illinois v. Krull*, 480 U.S. 340, 348-49, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987). We

generally decline to require the officer to predict whether the statute will later be held unconstitutional, unless the statute is so clearly unconstitutional that a reasonable officer would have known so at the time. *Id.* at 355; *see also Davis v. United States*, 131 S. Ct. 2419, 2431-32, 180 L. Ed. 2d 285 (2011) (noting that even though a new Fourth Amendment rule applies retroactively, "the exclusion of evidence does not automatically follow" because of the good-faith exception).

Arizona was not the only state that drew new district lines following the 2010 census. The other states and jurisdictions subject to preclearance under the Voting Rights Act engaged in the same exercise. Nothing in *Shelby County* suggests that all those maps are now invalid, and we are aware of no court that has reached such a conclusion, despite the concern expressed in the dissenting opinion, at 15, that leaving the maps in place "would give continuing force to Section 5." To repeat, *Shelby County* did not hold Section 5 to be unconstitutional. Neither did it hold that any effort by a state to comply with Section 5 was improper.

In redistricting, we should expect states to comply with federal voting rights law as it stands at the time rather than attempt to predict future legal developments and selectively comply with voting rights law in accordance with their predictions. Accordingly, so long as the Commission was motivated by the requirements of the Voting Rights Act as it reasonably understood them at the time, compliance with the Voting Rights Act served as a legitimate justification for minor population deviations.

Appendix B

C. Application to 2012 Legislative Map

Plaintiffs argue that Districts 8, 24, and 26 could not have been motivated by compliance with the Voting Rights Act. They argue that only eight ability-to-elect districts existed in the benchmark plan. Because the Commission had created eight ability-to-elect districts even without Districts 8, 24, and 26, and avoiding retrogression only requires creating as many ability-to-elect districts as are in the benchmark plan, plaintiffs argue that the Voting Rights Act could not have motivated the creation of these three districts. In essence, plaintiffs urge us to determine how many ability-to-elect districts were strictly necessary to gain preclearance and to hold that deviations from the creation of purported ability-to-elect districts above that number cannot be justified by Voting Rights Act compliance.

This argument runs into several problems. First of all, plaintiffs have not given the court a basis to independently determine that there existed only eight ability-to-elect districts in the benchmark plan. Plaintiffs point to the fact that the Commission argued that there were eight benchmark districts in its submission to the Department of Justice. But the submission to the Department was an advocacy document. The Commission was motivated to make the strongest case for preclearance by arguing for a low number of benchmark ability-to-elect districts and a high number of new ability-to-elect districts. The Commission's consultants and counsel, in public meetings, had advised the Commission that their analysis suggested the existence of ten benchmark districts. The discrepancy

between the advice given in meetings and the arguments put forth in the submission to the Department of Justice is not a sufficient basis for the court to conclude that there were only eight ability-to-elect districts in the benchmark plan. Moreover, while plaintiffs criticize elements of the functional analysis performed by the Commission's consultants, plaintiffs have not provided the court with any functional analysis of their own or from any other source showing which districts provided minorities with the ability to elect in either the benchmark plan or the current plan that they challenge. In short, even if we were inclined to independently determine how many ability-to-elect districts existed in the benchmark plan, plaintiffs have not carried their burden to show that there were only eight.

In any event, we need not determine whether the minor population deviations were strictly necessary to gain preclearance. Plaintiffs presented testimony from an expert witness, Thomas Hofeller, to demonstrate that a plan could have been drawn with smaller population deviations. Dr. Hofeller prepared such a map, but he acknowledged that he had not taken other state interests into account, including interests clearly identified as legitimate, nor had he performed a racial polarization or functional analysis, so that map did not necessarily present a practical alternative. Because he concluded, contrary to the Commission and its counsel and consultants, that the benchmark number for minority ability-to-elect districts in the prior plan was only eight (seven Hispanic districts and one Native American district), his belief that his alternative map would have been precleared by

the Justice Department was disputed. More importantly, evidence that a map could have been drawn with smaller population deviations does not prove that illegitimate criteria motivated the deviations. *See Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1035 (D. Md. 1994).

Rather, it is enough that the minor population deviations are "based on legitimate considerations." *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). In other words, we will invalidate the plan only if the evidence demonstrates that the deviations were not the result of reasonable, good-faith efforts to comply with the Voting Rights Act. We will not invalidate the plan simply because the Commission might have been able to adopt a map that would have precleared with less population deviation if we determine that in adopting its map the Commission was genuinely motivated by compliance with the Voting Rights Act.

This approach is in accord both with the deference federal courts afford to states in creating their own legislative districts and the realities of the preclearance process. The Department of Justice does not inform jurisdictions of the number of districts necessary for preclearance ahead of time. Nor could the Commission be certain which districts in any tentative plan would be recognized by the Department as having an ability to elect. These determinations are complex and not subject to mathematical certainty. For us to determine the minimum number of ability-to-elect districts necessary to comply with the Voting Rights Act and then to strike down a plan

if minor population deviations resulted from efforts that we concluded were not strictly necessary for compliance would create a very narrow target for the state. It would also deprive states of the flexibility to which the Supreme Court's one-person, one-vote jurisprudence entitles them in legislative redistricting. *See Gaffney v. Cummings*, 412 U.S. 735, 749, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973) ("Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts").

That deviations from perfect population equality in this case resulted in substantial part because of the Commission's pursuit of preclearance is evidenced both by its deliberations and by advice given to the Commission by its counsel and consultants. Plaintiffs cite *Larios v. Cox* for the proposition that advice of counsel is not a defense to constitutional infirmities in a redistricting plan. 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004). In *Larios*, state legislators mistakenly believed that any plan with a maximum deviation below ten percent was immune from a one-person, one-vote challenge and then created a plan with a maximum deviation of 9.98 percent deviations in the pursuit of illegitimate objectives. *See id.* at 1328. In holding that the plan violated the one-person, one-vote principle, the court held that reliance on faulty legal advice did not remedy the constitutional infirmity in the plan. *Id.* at 1352 n.16. But in *Larios*, there was no question that the legislature had pursued illegitimate policies.

The legislature had taken counsel's advice to mean that it did not need to have legitimate reasons for deviating. The court held that they did need legitimate reasons for deviating, and the Supreme Court affirmed.

Here, by contrast, what motivated the Commission is at issue. Counsel's advice does not insulate the Commission from liability, but it is probative of the Commission's intent. That is not to say that reliance on the advice of counsel will in all cases demonstrate the good-faith pursuit of a legitimate objective. The advice might be so unreasonable that the Commission could not reasonably have believed it, or other evidence may show that the Commission was not acting pursuant to the advice. But the Commission's attorneys gave reasonable advice as to how to pursue what they identified as a legitimate objective, and the Commission appeared to act in accordance with that advice. That is strong evidence that the Commission's actions were indeed in the pursuit of that objective, one that we have concluded for ourselves was legitimate.

With respect to the ten districts presented to the Department of Justice as ability-to-elect districts, including Districts 24 and 26, the evidence before us shows that the population deviations were predominantly based on legitimate considerations. The Commission was advised by its consultants and counsel that it needed to create at least ten districts. Given the uncertainty in determining the number of districts, and that one of the Commission's highest priorities was to preclear the first time, the Commission was not unreasonable in acting pursuant to this advice. As noted in our findings of fact, the target

of ten districts was not controversial and had bipartisan support. All commissioners, including the Republican appointees, believed that ten districts were appropriate.

A somewhat closer question is presented by the changes to the district boundaries, including Districts 24 and 26, made between the draft map and the final map. The draft racial polarization analysis prepared by King and Strasma indicated that minorities would be able to elect candidates of their choice in all ten proposed ability-to-elect districts in the draft map. Plaintiffs argue that no further changes could be justified by the Commission's desire to obtain preclearance because the draft map met that goal. The preclearance decision was not going to be made by King and Strasma, however, and the Commission could not be sure what it would take to satisfy the Department of Justice. The Commission was advised to try to strengthen the minority ability-to-elect districts even further, and it was not unreasonable under the circumstances for the Commission to undertake that effort. With regard to the ten ability-to-elect districts, we conclude that plaintiffs have not carried their burden of demonstrating that no legitimate motive caused the deviations or that partisanship predominated. Creation of these districts was primarily a consequence of the Commission's good-faith efforts to comply with the Voting Rights Act and to obtain preclearance.

District 8 presents an even closer question, because the evidence clearly shows that partisanship played some role in its creation. Commissioner McNulty presented the possible change to Districts 8 and 11 as an opportunity

to make District 8 into a more competitive district. We do not doubt that the creation of competitive districts is a rational, legitimate state interest. But to justify population deviations, legitimate state criteria must be "nondiscriminatory" and "consistently applied." *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983). Commissioner McNulty's competitiveness proposal was neither applied consistently nor in a nondiscriminatory fashion. It was applied to improve Democratic prospects in one single district. It was not applied to districts favoring Democrats as well as to those favoring Republicans, so competitiveness cannot justify the deviation. We have found that partisanship motivated the Democratic commissioners to support this change, since both expressed support for it before there was any mention of presenting District 8 to the Department of Justice for the sake of preclearance.

But while partisanship played some role, plaintiffs have not carried their burden to demonstrate that partisanship predominated over legitimate factors. Because Commissioner McNulty's change only slightly increased the level of population inequality in District 8 and the other affected districts, let alone the plan as a whole, plaintiffs must make a particularly strong showing to carry their burden. *Cf. Karcher*, 462 U.S. at 741 ("The showing required to justify population deviations is flexible, depending on the size of the deviations, [etc.]"). As noted in our findings, the changes in population inequality from draft map to final map that can be attributed to the vote on Commissioner McNulty's proposed change is an increase of 0.7 percent deviation in District 8, a decrease

of 1.6 percent in District 11, an increase of 2.4 percent in District 12, and an increase of 1.4 percent in District 16. Altogether, the change resulted in a small decrease in deviation in one district and small increases in deviation in three districts. While there is some increase in deviation that can be attributed in part to partisanship, it is not a particularly large increase.

We have also found that the preclearance goal played a role in the change to District 8. Consultants and counsel suggested pursuing it for the sake of preclearance, and only then did Chairwoman Mathis endorse the idea. Without her vote, there would not have been a majority to adopt that change. In light of the small deviations resulting from this change order and because legitimate efforts to achieve preclearance also drove the decision, plaintiffs have not proved that partisanship predominated over legitimate reasons for the Commission as a whole.

We have concluded that compliance with the Voting Rights Act is a legitimate state policy that can justify minor population deviations, that the deviations in the map in large part resulted from this goal, and that plaintiffs have failed to show that other, illegitimate motivations predominated over the preclearance motivation. Therefore, plaintiffs' challenge to the map under the one-person, one-vote principle fails.

V. Conclusion

We find in favor of the Commission on plaintiffs' claim that the Commission's legislative redistricting plan violated the one-person, one-vote principle of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. We order the entry of judgment for the Commission.

APPENDIX C — ROSLYN O. SILVER OPINION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED APRIL 29, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-894-PHX-ROS-NVW-RRC

WESLEY W. HARRIS, *et al.*,

Plaintiffs,

vs.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

ROSLYN O. SILVER, District Judge, concurring in part, dissenting in part, and concurring in the judgment:

I agree plaintiffs have not proven a violation of Equal Protection and, therefore, I concur in the judgment against them. I also join the rulings in connection with the motion for judgment on the pleadings. I disagree, however, on the issue of abstention. Also, I have my own view of the standard applicable to plaintiffs' claim and whether plaintiffs proved partisanship was involved in crafting the final map.[1]

1. As noted in the February 22, 2013 Order, I disagreed with the resolution of the motion for protective order. The case has now

Appendix C

1. *Pullman* Abstention

In December 2012, defendants requested we stay this case and defer hearing plaintiffs' federal claim until plaintiffs' state-law claim could be resolved by the Arizona courts. At that specific time, I believed abstention was appropriate. The following explains why I reached that conclusion and why, if the motion were being decided today, abstention likely would not be appropriate.

As outlined in the per curiam opinion, *Pullman* abstention may be appropriate when three conditions are met. "First, the complaint must touch on a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." *Cano v. Davis*, 191 F. Supp. 2d 1140, 1142 (C.D. Cal. 2002) (quotation omitted). Second, it must be clear that the federal constitutional claim presented in the complaint "could be mooted or narrowed by a definitive ruling on the state law issues" raised by the complaint. *Potrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 888 (9th Cir. 2011) (quotation omitted). And third, "the possibly determinative issue of state law is unclear." *Id.* (quotation omitted). In my view, all three conditions were met.

On the first condition, as observed by another three-judge panel hearing a redistricting suit, "[r]edistricting is undoubtedly a sensitive area of state policy." *Cano*, 191

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proceeded to trial and the commissioners testified at length. In these circumstances, I do not believe it necessary to set forth why I would have granted the protective order in part.

F. Supp. 2d at 1142. Neither plaintiffs nor the per curiam opinion disputes this condition was satisfied.

On the second condition, resolution of the state-law claim raised by plaintiffs might have removed the need to address their federal constitutional claim. In opposing the request for abstention, plaintiffs seemed to be claiming the second condition was not satisfied because it was not *certain* that resolving their state-law claim would end the case. But certainty is not required. As explained by the Ninth Circuit, it need not be "absolutely certain" that the state-law issue will "obviate the need for considering the federal constitutional issues." *Sinclair Oil Corp. v. Cnty. of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996). It is sufficient that the state-law issue "may" have some impact on the federal claim. *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 379 (9th Cir. 1983). More importantly, however, plaintiffs' own statements indicated that they believed resolution of their state-law claim *would* end this case. That is, plaintiffs argued they were certain to prevail on their state-law claim. If plaintiffs were correct, the federal claim need not have ever been addressed, meaning the second condition for abstention was satisfied.

Finally, on the third condition, and despite plaintiffs' arguments that their state-law claim was a sure winner, there was genuine uncertainty about the meaning of the Arizona constitutional provision regarding equal population. Plaintiffs believed "the Arizona Constitution's equal population clause is plain" and it required absolute equality of population. While defendants disagreed with plaintiffs' reading, they conceded there was *some*

uncertainty about the meaning of Arizona's equal population requirement. That concession was wise given the language of the Arizona Constitution coupled with the Arizona Supreme Court's cryptic comments in a prior redistricting case. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 686 (Ariz. 2009). And, in any event, the required amount of "uncertainty" for *Pullman* purposes is not very difficult to show.

"Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." *Pearl Inv. Co. v. City and Cnty. of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985). That uncertainty might be because of a statutory ambiguity or "because the question is novel and of sufficient importance that it ought to be addressed first by a state court." *Id.* In my view, we do not know how the Arizona courts would interpret the state constitutional language. Accordingly, the third condition was met.

Because the three *Pullman* conditions were met, the question becomes whether some other factor rendered abstention inappropriate. The Supreme Court has recognized that a court deciding whether to abstain must be cognizant that "abstention operates to require piecemeal adjudication in many courts," possibly "delaying ultimate adjudication on the merits for an undue length of time." *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964). And abstention is particularly troublesome in voting rights cases "because of the importance of safeguarding

the right to vote." *Cano v. Davis*, 191 F. Supp. 2d 1140, 1142 (C.D. Cal. 2002). But even in a voting rights case, the Ninth Circuit affirmed a decision to abstain when the abstention order was issued only six months before a relevant voting deadline. *Badham v. U.S. Dist. Court*, 721 F.2d 1170, 1174 (9th Cir. 1983). In doing so, the court noted the focus should be on the risk that delay would harm the right to vote. Because, in that case, there was no substantial risk of harm to that right, abstention was appropriate. *Id.*

The per curiam opinion relies on the possibility of undue delay as the primary basis for rejecting the abstention request. But *at the time the motion was filed* it was very unlikely plaintiffs' right to vote would have been impacted if they were sent to state court. The Commission represented that, upon arriving in state court, it would stipulate to consolidating the preliminary injunction hearing with the trial. It also agreed that the discovery performed in federal court could be used in state court. The first relevant deadline for the 2014 elections was April 28, 2014, the first day candidates could file their nomination petitions. Thus, when the abstention motion was filed in December 2012, sending the parties to state court would have given the state court approximately fourteen months to order relief before any possible harm could be suffered. Given that length of time, the state courts would have had ample time to act.[2]

2. I recognize that redistricting cases pose a unique abstention problem. In the normal *Pullman* setting, the federal court stays the federal claim and, if the parties are not able to obtain timely relief in state court, they can return to federal court to litigate their

In addition to concerns about the possible delay should the parties be sent to state court, the per curiam opinion also seems to rely on the dismissal of plaintiffs' state-law claim as a special factor weighing against abstention.[3] But the absence of a pending state-law claim should have had no impact on the abstention inquiry. In *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 81 (1975), the Supreme Court found *Pullman* abstention appropriate even though the plaintiffs in that case "did not expressly raise a statelaw claim in their complaint." In *Moore*, there was an issue of state law lurking in the background of the federal Equal Protection claim that, if decided a certain way, *might* have negated the factual premise for the federal claim. *Id.* at 85-88. There is no real dispute that, in this case, resolution of the state-law claim raised by plaintiffs might have had a similar impact.

Finally, now that the first important election deadline is upon us, I recognize that the abstention calculus is significantly different. If the motion were being decided

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federal claim. *Cf. Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975) (abstention not appropriate when litigation already "long delayed"). But under Supreme Court precedent applicable to redistricting suits, if plaintiffs had been forced to file in state court, we would have been absolutely barred from proceeding on the federal claim until the state court litigation concluded. *Growe v. Emison*, 507 U.S. 25, 33 (1993). Plaintiffs did not provide any persuasive reason why this complication would matter because the state court would have had ample time to address the state-law claim before any harm was suffered.

3. The state-law claim was formally dismissed at the same time the abstention motion was denied. Thus, even if a pending state-law claim is a necessary prerequisite to abstention, it was met at the relevant time.

today, abstention likely would not be appropriate because the state court would not have time to provide relief. Thus, today I am comfortable reaching the merits of plaintiffs' claim. I note only that something is not quite right with plaintiffs choosing to litigate a very tenuous federal claim when they have a state-law claim they believe is guaranteed to give them a victory. Therefore, absent the looming election deadlines, I would still be inclined to send the parties to state court.[4]

2. Partisanship Likely Not Cognizable Basis for Suit

The per curiam opinion wisely refuses to decide whether minor population deviations, *i.e.* deviations below ten-percent, motivated by partisanship offend the Equal Protection Clause. I doubt they do.

The redistricting process, with all its adversarial tensions, has *always* been recognized as a profoundly partisan process. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are

4. Because the Eleventh Amendment barred the state-law claim, plaintiffs' alternative request to certify the state-law issue to the Arizona Supreme Court was correctly denied. It would have been a futile gesture to certify the question because we could not have ordered relief on the basis of state law, regardless of how the Arizona Supreme Court might have ruled. *See Citizens for John W. Moore Party v. Bd. of Election Comm'rs*, 781 F.2d 581, 584-86 (Easterbrook, J., dissenting) (noting that certification is not appropriate when the Eleventh Amendment means relief cannot be granted on basis of state law).

inseparable from districting and apportionment."). The Supreme Court has repeatedly noted without condemnation that entities responsible for redistricting often act in explicitly partisan ways, such as drawing lines to protect incumbents or drawing lines to ensure a particular district elects a Democratic representative. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 248 (2001) (plan was drawn "to protect incumbents–a legitimate political goal"); *id.* at 245 (noting a legislature might draw lines to "secure a safe Democratic seat"). And while partisanship is not a terribly noble means of establishing parameters impacting the fundamental right to vote, it has long been a given, embedded in our system of government. Thus, actual use of partisanship–or at least allegations that partisanship drove redistricting decisions–are inevitable as long as partisan entities are responsible for redistricting.

Of course, Arizona has attempted to "*remove* redistricting from the political process by extracting [the authority to conduct redistricting] from the legislature and governor and instead granting it to an independent commission of balanced appointments." *Ariz. Indep. Redistricting Comm'n v. Brewer*, 275 P.3d 1267, 1273 (Ariz. 2012). But the very structure of Arizona's reformed redistricting process reflects that partisanship still plays a prominent role. In practice, the Arizona Constitution requires two commissioners be Republicans, two commissioners be Democrats, and the fifth commissioner be neither a Republican nor a Democrat.[5] The fact that

5. The Arizona Constitution requires the twenty-five candidates for commissioner consist of "ten nominees from each of the two

one's party affiliation is a qualifying characteristic to serve as a commissioner is at least an implicit acknowledgment that redistricting remains inextricably intertwined with partisan concerns.

Recognizing that partisanship remains an inevitable ingredient in Arizona's redistricting scheme is not the same as saying redistricting decisions actually based on partisanship are immune from challenge. Under the federal constitution, it may be possible to challenge redistricting plans when partisan considerations go "too far." *See Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (noting most Justices believed partisanship "*is* a traditional criterion, and a constitutional one, so long as it does not go too far"). But it is presently obscure what "too far" means. It is highly improbable that *any* use of partisanship is "too far." However, maybe partisanship can be used to justify population deviations below ten-percent but not above ten-percent. Or maybe it is unconstitutional to make decisions based on partisanship only if those decisions have "an actual discriminatory effect on" a particular political group. *Cf. Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (attempting to establish standard for "political gerrymandering" claim). The Supreme Court has not yet indicated which of these possibilities, if any, is correct. And the one case plaintiffs repeatedly rely upon to support their theory cannot bear nearly the weight they wish.

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largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties." Ariz. Const. art. IV, pt. 2, § 1(5).

Appendix C

Plaintiffs believe *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) "cast extreme doubt on whether partisanship alone ever could justify deviations from population equality." But a brief exploration of the facts, legal holdings, and subsequent history of *Larios* show plaintiffs' reliance is not well-placed.

In *Larios*, a three-judge panel addressed the map drawn by the Democratic majority in the Georgia General Assembly. After considering the evidence, the court clearly identified the Democrat legislators as having "made no effort to make the districts as nearly of equal population as was practicable." *Id.* at 1341. Instead, the Democrats had entered the redistricting process under the assumption they were free to manipulate the maps however they wished, provided the final population deviations were kept below ten percent. With that assumption in mind, the final map contained population deviations of 9.98%. *Id.* In addition, the Democrats refused to allow Republican legislators meaningful involvement in the process. *Id.*

The record made "abundantly clear that the population deviations in the Georgia House and Senate" were driven by two prohibited considerations. *Id.* at 1341. First, the deviations were a "concerted effort to allow rural and inner-city Atlanta regions of the state to hold on to their legislative influence (at the expense of suburban Atlanta), even as the rate of population growth in those areas was substantially lower than that of other parts of the state." *Id.* at 1342. And "[s]econd, the deviations were created to protect incumbents in a wholly inconsistent and discriminatory way." *Id.* In reaching these conclusions, the *Larios* court

stressed it was not required to "resolve the issue of whether or when partisan advantage alone may justify deviations in population, because . . . the redistricting plans [were] plainly unlawful" on other grounds. *Id.* at 1352.

The Supreme Court summarily affirmed *Larios*. *Cox v. Larios*, 542 U.S. 947 (2004). That summary affirmance meant the Supreme Court agreed with the judgment "but not necessarily the reasoning by which it was reached." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (quotation omitted). In other words, the summary affirmance "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Id.* There are no prior decisions directly rejecting partisanship as a justification for minor population deviations, meaning the summary affirmance has little value on that issue. But Justice Scalia voted to set the case for argument, likely out of a concern the lower court decision would be read as addressing the issue. As explained by Justice Scalia, the Supreme Court has never made clear whether "politics as usual" is a "'traditional' redistricting criterion" that can be used to justify minor population deviations. *Larios*, 542 U.S. at 952 (J. Scalia, dissenting). Justice Scalia also noted that, in a case the previous term, "all but one of the Justices agreed [partisanship] *is* a traditional criterion, and a constitutional one, so long as it does not go too far." *Id.*

With the lower court's explicit refusal to address the partisanship issue, and the Supreme Court's summary affirmance, I doubt *Larios* offers *any* useful guidance

on the question of partisanship.[6] Absent other instructive authority supporting their claim, we might have been better served by dismissing plaintiffs' federal claim for failure to state a claim on which relief can be granted. *See Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 313 (E.D.N.Y. 2003) (granting motion to dismiss because an allegation of "rank partisanship by the Democratic majority . . . is not violative of the Fourteenth Amendment"). But having allowed plaintiffs to survive the motion to dismiss, we must now reach the merits. Fortunately, we need not decide whether partisanship can be considered in redistricting because, in fact, partisanship was not behind the final map. Unfortunately, reaching the merits required a lengthy trial and a tremendous expenditure of resources. If plaintiffs' theory is viable, and maps containing minor deviations can be challenged as attempts to give one political party an electoral advantage, the federal courts should prepare to be deluged with challenges to almost every redistricting map. If that course is before us, a decision by the Supreme Court on whether this theory is viable, and if so when, would be welcomed.

3. Standard Applicable to Plaintiffs' Claim

Assuming minor population deviations due to partisanship present a cognizable Equal Protection claim, the question is what standard applies to such a claim. I believe the correct standard is that plaintiffs were

6. In 2006, Justice Kennedy explained that the *Larios* district court opinion did not give "clear guidance" on when partisanship can justify population deviations. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423 (2006).

required to prove partisanship was the *actual* and *sole* reason for the population deviations.

In their initial filings, plaintiffs explicitly agreed they needed to show the "sole reason" behind the population deviations was partisanship.[7] All three judges seemingly agreed because, in resolving the motion to dismiss, we set forth the standard as requiring plaintiffs "prove that 'the asserted unconstitutional or irrational state policy is the *actual reason* for the deviation.'" The opinion we relied on, *Rodriguez v. Pataki*, further explains a plaintiff must show "the deviation in the plan results *solely* from the promotion of an unconstitutional or irrational state policy." 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004) (quoting *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994)). Thus, from the very beginning of this case, plaintiffs were on notice–and they did not seem to dispute–that they needed to establish partisanship was the actual and sole reason for the population deviations.

As the case developed, plaintiffs apparently were enlightened and rethought their stance by beginning to describe the standard as requiring they show "no constitutional goal justified" the population deviations. In connection with that softened burden, plaintiffs also,

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7. Plaintiffs' filings could not have made it any clearer that they conceded the issue was whether partisanship was the "sole" cause for the population deviations. *See Plaintiffs' Response in Opposition to Motion to Dismiss* ("[Defendants] diluted Plaintiffs' votes and the votes of all citizens residing in the overpopulated districts solely to maximize the Democratic Party's representation in the Legislature.").

much to defendants' frustration, began to substantively change their theory of the case such that partisanship was advanced merely as the "principal theory," along with other prohibited characteristics such as race being implicated. But despite plaintiff's vacillations, I always understood their case as based on the allegation that partisanship drove the entirety of the redistricting process.[8]

By the time of trial, plaintiffs were again describing their claim as grounded on a belief that partisanship was the "sole" explanation for the population deviations. *See Plaintiffs' Proposed Findings of Fact* (Final Map was created "for the sole purpose of providing Democratic candidates with partisan advantage"); *Plaintiffs' Trial Brief* ("The IRC systematically under-populated Republican plurality districts and over-populated Democratic plurality districts for the *sole* purpose of providing Democratic candidates with a partisan advantage . . . .") (emphasis added). The Final Pretrial Order we approved accepted this framing, describing the case as requiring resolution of whether the population deviations were done "for the sole purpose of partisanship." I am not aware of any clear request by plaintiffs that we adopt something other than the "actual and sole reason" standard. And I believe there are compelling reasons for retaining this very high standard on this type of claim.

Adopting a lower standard on this type of claim invites individuals "to challenge any minimally deviant

8. As described on the last day of the trial, plaintiffs' theory was that "this pattern of deviation was driven by partisanship."

redistricting scheme based upon scant evidence of ill will by district planners, thereby creating costly trials and frustrating the purpose of [the Supreme Court's] 'ten percent rule.'" *Rodriguez*, 308 F. Supp. 2d at 365. Federal court challenges to redistricting plans are not only expensive and very time-consuming, they are also "a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

Moreover, the bright-line standard of requiring plaintiffs establish the actual and sole reason behind redistricting decisions is workable. Under this standard, a court need not engage in the formidable task of divining which reason "predominated" over the myriad of possible reasons presented by those defending a new map. Instead, a court must simply determine whether the map was drawn *solely* for an illegitimate reason. If other reasons were involved, that ends the case.

Plaintiffs repeatedly stated they would establish partisanship as the actual and sole reason for the population deviations and we adopted that as the standard plaintiffs needed to meet. I believe that remains the appropriate standard.

4. No Evidence of Partisanship

The history of the redistricting process, as well as when and who ordered various map changes, are documented in the record and not subject to dispute. Therefore, I join most of the factual findings in the per curiam opinion. I cannot, however, join those findings

pointing to partisanship as motivating certain actions. I do not believe plaintiffs carried their burden of establishing that partisanship, rather than neutral redistricting criteria, motivated the Commission.

The final map comes to us with a "presumption of good faith." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). It was never clear to me how plaintiffs planned to overcome this presumption. Plaintiffs made general allegations about a plan to harm the interests of the Republican party but they never specified *who* was allegedly behind the plan.[9] At various points during the litigation, it appeared plaintiffs believed the Commission's counsel, the Commission's experts, the Commission's mapping consultant, and even the Republican commissioners themselves, were all motivated by the desire to systematically harm the Republican party's electoral chances.[10] And even having sat through the trial, it remains unclear to me whether plaintiffs were trying to prove a knowing plot amongst all these actors or coincidental uncoordinated acts of partisan

9. Plaintiffs also had difficulty identifying what would be a sufficient reason for the population deviations at issue. For example, plaintiffs' complaint recognized "compliance with the Voting Rights Act" was a "legitimate state interest."

10. Plaintiffs' expert also had significant difficulty deciding who was behind the plan to harm Republicans. Originally, the expert stated "the individuals who were drawing the maps for the Commission were engaged in intentional political gerrymandering." (Trial Tr. 677). At trial, the expert abandoned that position. (Trial Tr. 677, 685). Later, the expert agreed that one of the *Republican* commissioners had "engaged in invidious discriminatory vote dilution" to benefit the Democratic party. (Trial Tr. 719).

discrimination that occurred merely by happenstance. But regardless of who plaintiffs believed was responsible, I did not see sufficient evidence that anyone set out to harm the Republicans. And certainly not enough evidence to establish the Commission as an entity did so.

a. The Alleged Plot Failed

Before directly addressing why I believe plaintiffs failed to prove their case, it is worth noting that the 2012 election using the new map proved their theory has no basis in reality. In the 2012 elections, Republicans won 17 out of 30 (56.6%) senate seats and 36 out of 60 (60%) house seats. As of June 2012, Republicans had a statewide two party registration share of 54.4%. Thus, under the map plaintiffs believe was created to systematically harm Republican electoral chances, Republicans are *overrepresented* in the legislature. In other words, assuming the relevant actors drew the map to harm the Republican party's electoral chances, the evidence shows the actors failed to achieve their goal. Because this is not a political gerrymandering case, these results are not necessarily fatal to plaintiffs' case. *See Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (political gerrymandering claim requires proof of "actual discriminatory effect"). But it is hard to take plaintiffs' challenge seriously given that the alleged contrivance against Republicans failed. *See* Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001, 1062 (2005) ("And certainly it makes sense not to overturn a plan that, whatever the intent of the planners, did not actually hurt their political opponents.").

b. No Explanation for Choosing Harder Path

Beyond having a theory not grounded in actual harm to a particular political party, plaintiffs also failed to offer any coherent explanation why the Commission would have chosen such an elaborate and difficult way to advantage the Democratic party. That is, assuming everyone involved in the redistricting process was driven solely by a desire to advantage Democrats over Republicans, they had a much easier path available to them than engaging in the complicated task of minor population deviations: the Commission could have set up districts of equal population but drawn the district boundaries differently. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("[I]t requires no special genius to recognize the political consequences of drawing a district line along one street rather than another."). That would have resulted in far greater partisan impact and the approach would have had the added benefit of being almost impossible to challenge. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (rejecting political gerrymandering claim). It is not sensible to conclude everyone involved in the process–or at least whomever plaintiffs believe are responsible for the alleged discrimination–decided to adopt a method that was less effective and more susceptible to challenge than an obvious and available alternative.

c. Insufficient Evidence of Partisanship

Turning to the merits of plaintiffs' claim, the evidence is overwhelming the final map was a product of the commissioners's consideration of appropriate redistricting

criteria. In particular, the commissioners were concerned with obtaining preclearance on their first attempt.[11] Before this round of mapping, Arizona had *never* obtained preclearance on its first legislative map. Therefore, the focus on first-attempt-preclearance was reasonable given that, at that time, any failure to obtain preclearance on the first attempt would have meant Arizona could not "bail out" of Section 5 of the Voting Rights Act for another ten years. 42 U.S.C. § 1973b(a)(1)(E); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 199 (2009) (explaining "bail out" requirements). In these circumstances, the commissioners were not content to make simply a plausible case for preclearance; rather, the commissioners set out to make the absolute strongest possible showing for preclearance.

To present the best preclearance case possible, the Commission's counsel and consultants recommended ten minority ability-to-elect districts. The Commission agreed with that advice and the draft map contained ten districts identified by the Commission as ability-to-elect districts. Plaintiffs presented no convincing evidence this advice was the result of a conscious effort to harm Republicans. In fact, it is not even clear whether plaintiffs contend the draft map was the result of partisanship. But if partisanship actually were at the heart of the draft map, and assuming the Republican commissioners were not Democratic sleeper-agents, one would expect the record to be replete with objections by the Republican commissioners. It is not.

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11. Plaintiffs' counsel conceded obtaining preclearance was a legitimate state interest.

I view the Republican commissioners' silence as evidence that partisanship was not the driving force behind the draft map.

With no credible evidence the draft map was drawn to favor the Democratic party, the focus turns to whether the changes to the draft map were motivated by partisanship or if they can be explained on some other ground. Again, the vast majority of the changes to the draft map were agreed to by the Republican commissioners. And as observed by Commissioner Mathis, all of the commissioners are "very strong people" who would have spoken up if they had an objection. I do not believe we are in a better position to divine invidious discrimination than the partisan actors actually involved in the process.

Much more important than the relative lack of objections is that plaintiffs did not identify, with reasonable particularity, the exact changes to the final map they believe were due solely to partisanship. Plaintiffs initially seemed to be claiming *every* aspect of the final map was due to partisanship. However, at trial and in their post-trial briefing, they focused primarily on three districts: Districts 8, 24, and 26. The per curiam opinion explains some of the changes to Districts 24 and 26 and why the Commission believed compliance with the Voting Rights Act supported such changes. While plaintiffs disagree with those actions, I did not see any evidence that partisanship, rather than compliance with the Voting Rights Act, was the *actual* reason for the changes in Districts 24 and 26.

As for District 8, the per curiam opinion concludes partisanship did motivate certain changes. At trial, however, Commissioner McNulty explained those changes were meant to make District 8 more competitive. I found her explanation reasonable and credible. Also, when asked squarely whether these particular changes were due to any reason other than competitiveness and compliance with the Voting Rights Act, Commissioner McNulty said no. Again, I found her testimony credible. I would require much more evidence than what plaintiffs presented to conclude Commissioner McNulty was being untruthful in her trial testimony. More importantly, even if Commissioner McNulty *did* make changes to District 8 with partisanship in mind, that is not enough.

Evidence that one commissioner was motivated by partisanship is only a good starting point and it is a given that four of the five commissioners always have at least *some* partisan self-interest. There must be evidence that two other commissioners had that same motivation. But the Supreme Court has cautioned that "inquiry into legislative motive is often an unsatisfactory venture" because "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates . . . others to enact it." *Pac. Gas and Elec. Co. v. State Energy Res. Conservation*, 461 U.S. 190, 216 (1983). Thus, even if Commissioner McNulty was motivated by partisanship, plaintiffs would still need to show two commissioners voted with Commissioner McNulty "at least in part 'because of,' not merely 'in spite of,'" the alleged adverse effects that particular change would have on Republicans. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). I saw no such evidence.

In the end, Plaintiffs' evidence of partisanship consisted largely of pointing to the final map and asking the Court to conclude by inference only that the pattern reflected in the map established an intent to discriminate against Republicans.[12] This appears to be an attempt to invoke the "disparate impact" theory of liability. But only in exceptionally rare cases is disparate impact enough to prove an Equal Protection violation. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of [invidious discrimination] forbidden by the Constitution."). Those rare cases involve situations of a clear pattern unexplainable on any legitimate grounds. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, *unexplainable on grounds other than race*, emerges from the effect of the state action . . . .") (emphasis added). Here, the final map's population deviations *can* be explained on grounds other than partisanship.

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12. Plaintiffs repeatedly claimed the partisan breakdown of the final population deviations could not be explained by chance. Of course, there is no claim that the map was designed at random, meaning the argument that the deviations could not have occurred by chance is trivial. More importantly, plaintiffs fail to take account of a basic problem always presented in cases where the court is asked to infer intent based on statistics: "statistics demonstrating that chance is *not* the more likely explanation are not by themselves sufficient to demonstrate that [reliance on the prohibited characteristic] *is* the more likely explanation." *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 553 (9th Cir. 1982). In other words, a statistical aberration negating chance is very different from a statistical aberration establishing invidious intent.

Appendix C

The final map represents an attempt to satisfy legitimate redistricting criteria, especially the Voting Rights Act. As observed in the per curiam opinion, "changes that strengthened minority ability-to-elect districts were also changes that improved the prospects for electing Democratic candidates." In other words, the changes the Commission made to strengthen its case for complying with the Voting Rights Act also had the effect of improving Democratic prospects. In light of this, the alleged pattern in the final map easily is explainable on grounds other than partisanship.

I join the judgment against plaintiffs.

DATED this 29th day of April, 2014.

/s/_____
Roslyn O. Silver
Senior United States
District Judge

APPENDIX D — NEIL V. WAKE DISSENT IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED APRIL 29, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-12-00894-PHX-ROS-NVW-RRC

WESLEY W. HARRIS, *et al.*,

Plaintiffs,

vs.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

NEIL V. WAKE, District Judge, concurring in part, dissenting in part, and dissenting from the judgment:

In this action voters challenge the final map of Arizona legislative districts approved by the Independent Redistricting Commission on January 17, 2012. They allege that the districts violate the one person, one vote requirement of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by systematically overpopulating Republican plurality districts and underpopulating Democratic plurality districts with no lawful justification for deviating from numerical equality. Arizona's final legislative district map violates the Equal Protection Clause unless the divergence from equal population is "based on legitimate

considerations incident to the effectuation of a rational state policy," *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), "that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 12 L. Ed. 2d 620 (1964).

Partisan advantage is not itself a justification for systematic population inequality in districting. No authority says it is, and neither does the Commission or any judge of this Court. So the Commission must point to something else to justify its deviation. Without something else, there is nothing to weigh against the force of equality, and this inequality must fall under constitutional doctrine settled for half a century.

The Commission contends the systematic population deviation for Democratic Party benefit was permissible to increase the likelihood of obtaining preclearance required by Section 5 of the Voting Rights Act. So this case turns on whether systematic population inequality is a lawful and reasonable means of pursuing preclearance.

But after the trial, the United States Supreme Court held Section 5 preclearance unenforceable, extinguishing that sole basis for this deviation. We must apply current law in pending cases, especially cases to authorize future conduct. So even if Section 5 saved the inequality when adopted, it cannot save the inequality for future elections. The Court exceeds its power in reanimating Section 5 to deny the Plaintiffs equal voting rights for the remaining election cycles of this decade.

If we do look back at Section 5, it never had the force the Commission hopes. The Court further errs when it holds, for the first time anywhere, that systematic population inequality is a reasonable means of pursuing Voting Rights Act preclearance. That is contrary to the text, purpose, case law, and constitutional basis for Section 5 preclearance. Until struck down, Voting Rights Act preclearance was a legitimate and mandatory purpose in redistricting for covered jurisdictions. But its legitimacy in general has no connection to the principled bases for compromising population equality. Compliance with the Voting Rights Act requires line-drawing with an eye to expected voting behavior, but only within equal population. Section 5 does not require or permit systematic inequality of population that would otherwise violate the Equal Protection Clause. It does not authorize the federal executive branch to exact such inequality for preclearance, a power the Attorney General disclaims. Nor does it license redistricting authorities to volunteer inequality to the Attorney General for which he never asks. The Commission's reliance on the Voting Rights Act for systematic malapportionment is precluded by the plain language of Section 17 that nothing in the Act "shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person." 42 U.S.C. § 1973n.

Judge Clifton correctly finds that the Commission was actually motivated by both party advantage and hope for Voting Rights Act preclearance. So we have a majority for that finding of fact. And while that fact is obvious on this record, the finding of partisan motive is not needed to make the case. No precedent would require proof and a finding of

subjective purpose of party advantage when it is already proven that the systematic numerical inequality has no justification that is legal and reasonable. It is enough to strike down this systematic overpopulation of Republican plurality districts and underpopulation of Democratic plurality districts that neither the Commission's stated reason to get preclearance nor its other actual motive of party advantage is a valid reason for population inequality. So even if one could believe that the aggressive party advantage was just a side effect and no part of the wellsprings of conduct, the Commission's only offered justification still falls. With no valid counterweight, the population-skewed map falls to the force of equal voting rights under the Constitution.

When voting districts were set without standards and behind closed doors, true reasons for systematic population deviation were easily disguised. But in states that have made the redistricting process transparent and accountable with limited grounds to deviate, it is now sometimes possible to prove that systematic population inequality for party advantage has no other reason, or none that passes under equal protection doctrine.

No better example could be found than this. Of 30 legislative districts, the 18 with population deviation greater than ±2% from ideal population correlate perfectly with Democratic Party advantage. The Commission majority showed other partisan bias, but even without that, the statistics of their plan are conclusive. Because this population deviation range of 8.8% is under 10%, the Plaintiffs have the burden of showing it is not

"incident to effectuation of a rational state policy." The Commission offers no justification except Voting Rights Act preclearance, which is insufficient as a matter of law. The Commission knew the legal risk they were taking in grounding systematic numerical inequality on the Voting Rights Act. The circumstance that the Commission took that risk with advice of counsel does not make losing the gamble as good as winning, not when they are gambling with other people's rights. The Plaintiffs have carried their burden. This numerical dilution or inflation of all the votes in 60% of Arizona's legislative districts for nearly two million voters cannot be squared with our fundamental law of equal voting rights.

The Commission has been coin-clipping the currency of our democracy—everyone's equal vote—and giving all the shavings to one party, for no valid reason. The novel and extraordinary claim of Voting Rights Act license to dilute votes systematically and statewide should be rejected. That should decide this case and end our inquiry. This plan must be sent back and done again.

I. THE ARIZONA REDISTRICTING PROCESS

By an initiative measure in 2000, Arizona voters removed legislative and congressional redistricting from the legislature and entrusted them to an Independent Redistricting Commission under mandatory processes with substantive standards. *See* Ariz. Const. art. IV, pt. 2, § 1. Four party commissioners are appointed, one each by the highest-ranking majority and minority members of the Senate and the House of Representatives. They choose

an independent fifth member. All appointments are from 25 nominations made by another commission.

The constitutional amendment requires the Commission to follow a four-step process. *Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 220 Ariz. 587, 597, 208 P.3d 676, 686 (2009). First, the Commission must create "districts of equal population in a grid-like pattern across the state." Ariz. Const. art. IV, pt. 2, § 1(14). Second, the Commission must adjust the equally populated grid map "as necessary to accommodate" compliance with the United States Constitution and the United States Voting Rights Act and then to accommodate the remaining five goals "to the extent practicable": (1) equal population; (2) geographically compact and contiguous districts; (3) respect for communities of interest; (4) use of visible geographic features, city, town, and county boundaries, and undivided census tracts; and (5) competitive districts, where such districts would create no significant detriment to the other factors. *Id.* § 1(14)(A)—(F). Third, the Commission must advertise their adjusted draft map for at least 30 days and consider public comments and recommendations made by the Arizona legislature. *Id.* § 1(16). Lastly, the Commission must establish final district boundaries and certify the new districts to the Arizona Secretary of State. *Id.* § 1(16)—(17).

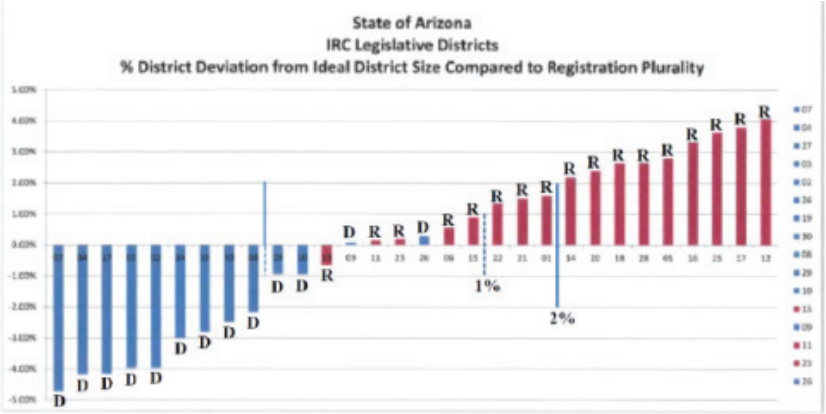
Other states have also "adopted standards for redistricting, and measures designed to insulate the process from politics." *Vieth v. Jubelirer*, 541 U.S. 267, 277 n.4, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004) (identifying Hawaii, Idaho, Iowa, Maine, Montana, New Jersey, and

Washington). In 2009, 13 states gave a redistricting commission primary responsibility for drawing the plan for legislative districts, five states required a backup commission to draw the plan if the legislature failed to do so, two states had an advisory commission, and Iowa required nonpartisan legislative staff to develop maps without any political data to be voted upon by the legislature. National Conference of State Legislatures, *Redistricting Commissions*, http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx (last visited April 23, 2014).

In Arizona, the Commission is required to comply with the state public meetings law and constitutional procedural and substantive requirements. Transcripts of their meetings are available to the public. The Commission's weighing of considerations, including the advice they received from counsel and consultants, is laid bare for public and judicial scrutiny. The voters "imposed a specific process that the Commission must follow," and judicial review "must include an inquiry into whether the Commission followed the mandated procedure." *Ariz. Minority Coal. for Fair Redistricting*, 220 Ariz. at 596, 208 P.3d at 685. Limited substantive judicial review addresses only whether "the record demonstrates that the Commission took [the] goal[s] into account during its deliberative process" and whether "the plan lacks a reasonable basis." *Id.* at 597-98, 600, 208 P.3d at 686-87, 689.

On January 17, 2012, the Commission approved the 2012 final legislative map by a vote of three to two,

the independent chair and the two Democratic Party appointees against the two Republican Party appointees. In the prior decade the first redistricting commission drew no district with a population deviation greater than ±2.42%, not for any reason, including Voting Rights Act preclearance, which was eventually received. In contrast, the 2012 map establishes 30 legislative districts with a maximum population deviation of 8.8%. Nine districts have populations that exceed the ideal population by more than 2%. All of those districts have more registered Republicans than registered Democrats. Nine other districts are underpopulated by more than 2%. All of those districts have more registered Democrats than registered Republicans. Therefore, of the 18 districts that deviate more than ±2% from ideal population, all are underpopulated Democratic-leaning districts or overpopulated Republican-leaning districts. Here is the array of districts from most underpopulated to most overpopulated, showing predominant party registration:



(Trial Ex. 40.)

Appendix D

Districts 7, 4, 27, 3, 2, 24, 19, 30, and 8 are all underpopulated by more than 2% and contain more registered Democrats than Republicans (Democratic registration plurality). Districts 14, 20, 18, 28, 5, 16, 25, 17, and 12 are all overpopulated by more than 2% and contain more registered Republicans than Democrats (Republican registration plurality). The following table isolates the 18 districts with population deviations exceeding 2%.

	District	Population	Deviation from Ideal Population	
			#	%
Democratic registration plurality	7	203,026	-10,041	-4.7
	4	204,143	-8924	-4.2
	27	204,195	-8872	-4.2
	3	204,613	-8454	-4.0
	2	204,615	-8452	-4.0
	24	206,659	-6408	-3.0
	19	207,088	-5979	-2.8
	30	207,763	-5304	-2.5
	8	208,422	-4645	-2.2
Republican registration plurality	14	217,693	+4625	+2.2
	20	218,167	+5099	+2.4
	18	218,677	+5609	+2.6
	28	218,713	+5645	+2.6
	5	219,040	+5972	+2.8
	16	220,157	+7089	+3.3
	25	220,795	+7727	+3.6
	17	221,174	+8106	+3.8
	12	221,735	+8667	+4.1

(Doc. 35-1 at 101.)

II. PARTISAN ADVANTAGE ALONE DOES NOT JUSTIFY SYSTEMATIC UNEQUAL POPULATION

A. Unequal Population Under the Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment "guarantees the opportunity for equal participation by all voters in the election of state legislators." *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The right to vote is personal, and impairment of the constitutional right to vote touches a sensitive and important area of human rights:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Id. at 561-62. "Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there." *Id.* at 563. "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Id.* at 566 (citations omitted).

A person's place of residence "is not a legitimate reason for overweighting or diluting the efficacy of his vote." *Id.* at 567.

Each state is required to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577. Although "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters," divergences from a strict population standard must be "based on legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 577, 579. To satisfy the Equal Protection Clause, legislative apportionment must result from "faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 12 L. Ed. 2d 620 (1964). Deviation even for a permitted purpose is discriminatory and unconstitutional if applied only where it benefits one party. *Larios v. Cox*, 305 F. Supp. 2d 1335, 1339 (N.D. Ga. 2004) (three-judge court) (deviation to protect incumbents, but only Democrats), *aff'd*, 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004).

Because some legitimate districting goals compete with numerical equality, states may weigh them against each other up to a point. There is a burden-shifting framework for population deviation claims. Generally, a legislative apportionment plan with a maximum population

deviation greater than 10% creates a prima facie case of discrimination and therefore must be justified by the state.[1] *Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983). The plan may include "minor deviations," which is a technical term meaning less than 10%, free from arbitrariness or discrimination. But there is no safe harbor for population deviations of less than 10%. There is a rebuttable presumption that a population deviation less than 10% is the result of an "honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Daly v. Hunt,* 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Reynolds*, 377 U.S. at 577). The burden shifts to the plaintiff to prove that the apportionment was "an arbitrary or discriminatory policy." *Larios*, 305 F. Supp. at 1338-39 (citing *Roman*, 377 U.S. at 710); *Daly*, 93 F.3d at 1220.

In sum, arbitrariness and discrimination disqualify even "minor" population inequality within 10%. The flexibility accorded to states for those minor deviations, without the initial burden of justifying them, accommodates

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1. In contrast, congressional districts must be drawn with equal population "as nearly as is practicable." *Tennant v. Jefferson Cnty. Comm'n*, __ U.S. __, 133 S. Ct. 3, 5, 183 L. Ed. 2d 660 (2012) (total population variance of 0.79% was justified by the state's legitimate objectives). "[T]he 'as nearly as is practicable' standard does not require that congressional districts be drawn with 'precise mathematical equality,' but instead that the State justify population differences between districts that could have been avoided by 'a good-faith effort to achieve absolute equality.'" *Id.* (quoting *Karcher v. Daggett*, 462 U.S. 725, 730, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983)).

legitimate interests that are reasonably served by some population inequality. But it is tautologically true that legitimate state goals that harmonize with population equality can carry no weight against the constitutional value of equality. Those goals legitimately may be pursued, but not by population inequality.

B. Partisan Advantage

The Supreme Court has not decided whether partisan advantage itself is a permissible reason for population inequality, that is, whether it carries any weight or no weight against equality in the analysis.[2] *See, e.g., Cox v. Larios*, 542 U.S. 947, 951, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004) (Scalia, J., dissenting from summary affirmance) ("No party here contends that . . . this Court has addressed the question" of whether a redistricting plan with less than 10% population deviation may be invalidated on the basis of evidence of partisan political motivation.); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) ("Even in addressing political motivation as a justification for an equal-population violation . . . *Larios* does not give clear guidance.").

The Supreme Court precedents discussed above readily yield the conclusion that partisan advantage is not itself a legitimate, reasonable, and non-discriminatory

2. Nor has the Supreme Court addressed whether party advantage carries any weight against equality in the federal constitutional calculus if state law itself bars it, as Arizona does.

purpose for systematic population deviation. Again, the Commission does not argue that it is. General principles of voting rights capture the issue, and there is no contrary gravitational pull from any competing constitutional principle. Party discrimination in population punishes or favors people on account of their political views. It is discriminatory and invidious. It serves an unfair purpose at the price of a constitutional right that all voters have, regardless of how they plan to vote.

Bare party advantage in systematic population deviation carries no weight against the baseline constitutional imperative of equality of population. Under settled constitutional analysis, unless the Commission has some other legitimate, actual, and honest reason for the inequality, the force of equality must win out.

Federal law would have this force even if state law purported to legitimate population deviation for partisan advantage. Imagine a state statute that required Democratic-leaning districts to be overpopulated up to +5% and Republican-leaning districts to be underpopulated down to -5%. Such a statute would add no weight to the weightless purpose of party advantage and could not change the federal equal protection balance from what it would be without the statute. Arizona law makes our task even easier by excluding partisan advantage as a purpose for unequal population or anything else in redistricting. The Arizona Constitution twice mandates equal population, subject only to adjustments for four other permitted goals and compliance with federal law. Ariz. Const. art. IV, pt. 2, § 1(14). None of those permitted goals encompasses partisan political advantage.

C. Systematic Inequality of Population for Partisan Advantage Is Sometimes Provable and Is Subject to Judicially Manageable Standards

Systematic inequality of population for partisan advantage is sometimes provable from the statistics alone and exclusion of other justifications. Where that demanding test is met, as it is here, the equal protection violation is proven and remediable.

Before the reform of redistricting procedures and substantive standards in Arizona and other states, it was usually possible to mask actual partisan purposes by overlaying some other arguable reason for the population deviation. In the absence of state-mandated standards and transparent processes, any standard permissible under federal law could be invoked after the fact and without regard to true motives. No doubt that will remain the case for specific instances of partisan population inequality. But Arizona now prohibits the secrecy of process and the indeterminacy of standards that previously put even systematic partisan deviation beyond judicial remedy because of the inability to exclude other explanations. In the states with redistricting reform, it can sometimes be proven that partisan advantage was a real and substantial cause of the deviation, with no additional reason, or none that is valid.

To be sure, when political actors are charged with applying even neutral criteria of districting, they will know and enjoy the political benefits of using that wide

discretion one way and not another. Political motivations will remain, resulting in population inequality here and there in innumerable line-drawing choices that are overlain with defensible neutral purposes even though they may not be the real purposes. Limitations of judicial competence weigh against inquiry as extensive as that of the redistricting authority itself to find and remedy specific abuses of equality.

But this case is not about a district here or there that is out of balance for partisan benefit. This is about systematic population inequality for party advantage that is not only provable but entirely obvious as a matter of statistics alone. A bright line requirement of statistical proof, not just anecdotal evidence, is well within judicial competence. By the expert evidence here, the neutral principles of districting are politically random, and it is statistically impossible for them to yield this perfect correlation of population inequality with one party advantage in 18 of 18 districts. But it does not take a Ph.D. to see this stark fact of intended party benefit. It would be reversible error to find the facts otherwise, even if the Commission did not admit it was consciously drawing party advantage. As thus narrowly defined, the test for proof of intended systematic party advantage—statistical proof and exclusion of other justifying reasons—will exclude all but the obvious cases, easily proven, as this one is. The low-hanging fruit is within the reach of the Equal Protection Clause even if the rest is not. Constitutional doctrine must mark out systematic population inequality, proven by statistics, as unreasonable, discriminatory, and actionable, provided no other legal reason saves it.

Appendix D

Limitations of judicial competence that weigh against remedy of partisan gerrymandering even within equal population are no barrier to proof or remedy for systematic inequality of population for partisan advantage. Line-drawing within equal population can be done with an eye to expected voting behavior to serve some legitimate purposes. Line-drawing within equal population for unworthy purposes, like party advantage, escapes judicial remedy for lack of judicially manageable standards. *Vieth v. Jubelirer*, 541 U.S. 267, 281, 305, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004). But the narrow and bright line test stated above for proving discrimination in numerical inequality has no such infirmity. The sound reasons for judicial hesitation to remedy partisan gerrymandering within equal population do not fit the different wrong of systematic population inequality for partisan advantage with no other justification.

The systematic inequality for partisan purposes does not end the case if the inequality has other justification. Those unworthy partisan motives should not trump parallel valid motives. The equal protection analysis requires further inquiry whether those other justifications are legally sufficient and actual, honest motives. The Arizona Constitution's exclusion of all but a few permitted reasons to deviate from equal population leaves the Commission with only Section 5 preclearance to explain its pervasive party preference.

The Commission has not made and cannot make any general invocation of theoretically valid reasons for the unequal population. There is only the Voting Rights Act, on which the case now hangs.

Appendix D

III. PRECLEARANCE UNDER THE VOTING RIGHTS ACT DOES NOT REQUIRE OR PERMIT SYSTEMATIC POPULATION INEQUALITY

A. The Voting Rights Act and Section 5 Preclearance

The Voting Rights Act, enacted in 1965 to enforce the Fifteenth Amendment, "employed extraordinary measures to address an extraordinary problem." *Shelby Cnty. v. Holder*, __U.S. __, 133 S. Ct. 2612, 2618, 186 L. Ed. 2d 651 (2013). Section 4 suspended literacy, education, character, and reference qualifications to vote in certain jurisdictions as defined in that section. 42 U.S.C. § 1973b. Under Section 5, no change in voting standard, practice, or procedure could take effect in those jurisdictions without obtaining administrative "preclearance" through the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia that the voting change comports with Section 5. *Shelby Cnty.*, 133 S. Ct. at 2620.

> Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And § 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racism in voting, "an insidious and

> pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). As we explained in upholding the law, "exceptional conditions can justify legislative measures not otherwise appropriate." *Id.* at 334. Reflecting the unprecedented nature of these measures, they were scheduled to expire after five years.

Id. at 2618.

This "extraordinary measure" and "strong medicine" was an appropriate remedy for the century of racially discriminatory voting practices and procedures in the six states originally targeted for preclearance. Successful but time-consuming and costly litigation against state and local practices was routinely evaded by bad faith enactment of new discriminatory laws. The repetitive new laws blunted the Constitution's stated measure for protecting federal rights—the Supremacy Clause and case-by-case adjudication. That history justified freezing voting practices in those jurisdictions, absent advance determination that the changes do not have the purpose or effect of denying or abridging the right to vote on account of race or color. *Id.* at 2618-19, 2624.

The 1975 amendment created new rights for four language minority groups in certain jurisdictions and extended Section 5 preclearance to those jurisdictions,

including Arizona. The 1975 amendment also added the Fourteenth Amendment as a basis for the Act.

Any voting change that had the purpose or effect of diminishing the ability of any citizens of the United States "on account of race or color or in contravention of the [language] guarantees" to elect their preferred candidates of choice, *i.e.*, "retrogression," would not receive preclearance. *See* 42 U.S.C. § 1973c(b). Retrogression requires a comparison of a jurisdiction's new voting plan with its existing plan; the existing plan is the benchmark against which the effect of voting changes is measured. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478, 117 S. Ct. 1491, 137 L. Ed. 2d 730 (1997).

Notwithstanding "the unprecedented nature of these measures," originally intended for only five years, they were extended repeatedly. *Shelby Cnty.*, 133 S. Ct. at 2618. On June 25, 2013, after the trial in this case, the Supreme Court held Section 5's coverage formulas in Section 4(b) no longer constitutional because they had lost rational connection to the circumstances and criteria originally justifying that extraordinary remedy. *Id.* at 2631. But Congress may restore Section 5 by giving Section 4(b) a reasonable application.

B. This Case Must Be Decided in Accordance With Current Law, Under Which Section 5 Is Now Unenforceable

Pending civil cases must be decided in accordance with current law. The Commission relied on maximizing Voting

Rights Act Section 5 preclearance as a legitimate state interest to justify systematic partisan population deviation. Because of *Shelby County*, Section 5 preclearance now cannot be applied in any jurisdiction because the formulas in Section 4 are unconstitutional. Thus, even if Section 5 could justify population inequality before *Shelby County*, it cannot now. To allow the current map to govern successive election cycles until 2020 would give continuing force to Section 5 despite the unconstitutionality of applying it anywhere.

"When [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993). The circumstance that Arizona could and did comply with the law at the time—seeking and getting preclearance—does not release it from the rule of law that governs everyone else for future events. If it did, retroactivity would rarely apply.

In some circumstances, however, "a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications," may prevent the new rule from applying retroactively. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759, 115 S. Ct. 1745, 131 L. Ed. 2d 820 (1995). Reliance alone—even reasonable reliance—is generally insufficient to avoid retroactivity. *Id.* at 758-59.

For example, qualified immunity sometimes shields state officers from personal liability under 42 U.S.C. § 1983 and other statutes based on the state of the law at the time of the conduct, even if the law has changed by the time of the adjudication. This exception to retroactivity is animated by "special federal policy concerns related to the imposition of damages liability upon persons holding public office." *Id.* at 758. Those policy concerns are not present here, where the Plaintiffs seek prevention of future government injuries rather than personal money damages for past harm. Qualified immunity has nothing to do with injunction against violating federal rights in the future, even newly announced rights that could not have been anticipated.

There are no "significant policy justifications" or "special circumstance[s]," *id.* at 759, or other reasons to think "the importance of the reliance interests that are disturbed" makes this an "exceptional case[]," *id.* at 761 (Kennedy, J., concurring), dispensing with the general rule of retroactivity. The party urging an exception to retroactivity bears the burden, and here the case for retroactivity is easy. Applying *Shelby County* to this case cannot change the outcomes of elections conducted under the current map. Instead, the only things at stake are future elections. After *Shelby County*, Section 5 has ceased to be a valid justification for unequal population, even if, by hypothesis, it was a valid justification before. The Commission's "reliance" interest here is only the trivial one of not wanting to spend a few weeks finishing the job for which they volunteered. They can shave their boundaries into equality for nothing compared to the

years and millions they are spending to resist doing so. If *Shelby County* is not applied, then Section 5 will continue to dilute votes in Arizona for the next four election cycles of this decade, in disregard of the law that binds us and the rights of hundreds of thousands of voters. For this reason alone, the Commission must revise the current map.

The Court would avoid these clear principles by splitting fine hairs between being constitutional, but nowhere, and being unconstitutional anywhere. The Court bases the difference on invalidation of Section 4(b) coverage formulas in general rather than invalidation of Section 5 as a substantive remedy for any particular jurisdiction. It has long been settled that the extraordinary remedy of preclearance is not intrinsically unconstitutional if extraordinary circumstances justify it. *South Carolina v. Katzenbach*, 383 U.S. 301, 334-35, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966). Because *Shelby County* made Section 5 inapplicable everywhere by invalidating the coverage formulas in general, the Supreme Court did not reach as-applied challenges to Section 5 for specific jurisdictions, including Arizona.

It does not distinguish the retroactivity doctrine to say that "the preclearance process" was not invalidated though the coercion to do it was. Slip Op. at 47. Retroactivity does not make it misconduct for a jurisdiction to have complied with Section 5, it just prevents that past conduct from reverberating into the future to the detriment of other people's rights as we now know them to be.

Retroactively stripping the Voting Rights Act cover from the Commission's systematic partisan malapportionment, assuming it was cover before, would not mean all the 2010 maps done in covered jurisdictions "are now invalid." Slip Op. at 48-49. Hopefully few or no other jurisdictions conscripted Section 5 preclearance to work statewide partisan malapportionment. But if any others did, their maps most assuredly "are now invalid" and need to be remedied. That does not cut against the general principle of retroactivity; it is the very reason for it.

C. Voting Rights Act Preclearance Does Not and Could Not Authorize Systematic Population Inequality

If we had power to give continuing effect to Section 5 in deciding this case, on the merits it is further error to give it effect that changes the outcome of this case. Complying with Section 5 and obtaining preclearance under the Voting Rights Act was a legitimate objective in redistricting; indeed, at the time it was mandatory. But the legitimacy of the goal in general has no relation in logic or principle to the validity of using population inequality to get there. A state must "show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." *Karcher v. Daggett*, 462 U.S. 725, 741, 103 S. Ct. 2653, 77 L. Ed. 2d 133 (1983) (congressional districting). The reasoning from general validity of complying with the Voting Rights Act to using systematic population inequality to do so is entirely circular. All Section 5 compliance must

be by means that are legal under federal law, and there is nothing but assertion behind the conclusion that the one person, one vote principle is excepted from that.

The Supreme Court has not directly addressed whether systematic population inequality is a legal means of pursuing preclearance. But there is no basis in statutory text, administrative interpretation, or precedent to conclude that Congress purported to authorize state redistricting authorities or the federal executive branch to systematically dilute people's equal voting rights for any reason, least of all as a protection of equal voting rights.

1. At the highest level of generality and within limits, the Constitution "defers to state legislative policies, so long as they are consistent with constitutional norms":

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent[s] . . . . As long as the criteria are nondiscriminatory . . . these are all legitimate objectives that on a proper showing could justify minor population deviations.

Id. at 740 (congressional districting). This deference respects the state's autonomy of policies where they require accommodation from numerical equality, provided the other conditions are met of nondiscrimination,

consistent application, and consistency with constitutional norms.

But there is no *state* policy in this case, except ironically the equal population policy that prohibits what the Commission has done unless federal law mandates it. There is only the state's duty to federal law under the Supremacy Clause. The Arizona Constitution restates what it need not have said, that Arizona districting must comply with federal law, including the Voting Rights Act. Arizona has made a firm policy choice that does merit federal deference, but it is the choice to forbid inequality except for four reasons not relevant in this case. If Arizona's restatement of its duty to federal law can be called a state policy, it is a state policy that takes its entire content from the substance of the federal law and policy to which it yields. It has no independence from federal policy that could change federal policy to accommodate it.

So we must look to federal law to find what obtaining preclearance requires, permits, and does not permit. The critical question then is whether Congress did and could authorize systematic population inequality to comply with Section 5 preclearance. This case does not turn on whether the Commission had a bad motive of partisan preferment, though it did, or on which motive predominated, though the preclearance motive fell short of covering all the depopulation here. It turns on whether the valid motive of preclearance changes the equal protection calculus for using the means of systematic population inequality to get there. There is no independent state policy of preclearance malapportionment to defer to.

The Commission and the Court would start and end with the fact that wanting to get Section 5 preclearance is valid. But again, there must be "some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." *Id.* at 741. They would have federal policy deferring to state policy, state policy deferring to federal policy, and the buck stopping nowhere. We proceed to address whether Section 5 preclearance authorizes systematic population inequality.

2. Nothing in the text of the Voting Rights Act purports to require or authorize population inequality in legislative districting, directly or by implication. *See* 42 U.S.C. § 1973c(a). Section 17 of the Voting Rights Act forbids it in sweeping terms:

> Nothing in subchapters I-A to I-C of this chapter shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision.

42 U.S.C. § 1973n. Distorting the weight of all the votes in 60% of the legislative districts in Arizona would plainly "impair, or otherwise adversely affect" half of the voters in those districts. It is hard to think of more comprehensive language to exclude systematic vote dilution as a required or permitted means to comply with the Voting Rights Act. The Act must be honored, but with the other available tools that do not steal from some voters to give to others.

3. There is conclusive proof that Section 5 non-retrogression and preclearance yield to population equality. We have in real life what would be a perfect experiment if designed for a laboratory. In covered states, preclearance is also required for congressional redistricting and is given despite near perfect equality of population in every instance. The Department of Justice knows how to accommodate non-retrogression goals for protected minorities with population equality.

4. The blunt fact is that the Department of Justice has never required unequal population for preclearance in the 48 years of administering Section 5. Although the Attorney General must state the reasons for interposing an objection, 28 C.F.R. § 51.44(a), the Commission's expert witness had no knowledge of the Department of Justice ever denying preclearance for lack of population deviation or otherwise communicating that it would be required to obtain preclearance. If the Attorney General had ever done so, it is unbelievable that it would be unknown in the intensely scrutinized world of Voting Rights Act compliance. The Commission does not contend the Attorney General ever did so.

5. Nor does the Constitution grant Congress power to enact legislation requiring or permitting population inequality among voting districts. The Fourteenth and Fifteenth Amendments grant Congress power to enforce by "appropriate legislation," which must be "plainly adapted" to the end of enforcing equal protection of the laws or preventing abridgement of the right to vote on account of race, consistent with "the letter and spirit of

the constitution." *Katzenbach v. Morgan*, 384 U.S. 641, 650-51, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966). "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as federal elections." *Reynolds v. Sims*, 377 U.S. 533, 554, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). The right to vote "includes the right to have the vote counted at full value without dilution or discount." *Id.* at 555 n.29 (quoting with approval *South v. Peters*, 339 U.S. 276, 279, 70 S. Ct. 641, 94 L. Ed. 834 (1950) (Douglas, J., dissenting)). Further,

> The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

Gray v. Sanders, 372 U.S. 368, 381, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963). If Section 5 permits otherwise unconstitutional numerical vote dilution, it exceeds Congress's power to enforce the Fourteenth and Fifteenth Amendments' commands of equal voting rights.

Congress's inability to mandate systematic population inequality would not invalidate every preclearance effort with any population deviation. That would not arise because other legitimate purposes for deviation will always come into play. This case is in court precisely because the extent of the preclearance/malapportionment deviation outruns all others and must be defended on its own.

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Statutory text, constitutional boundaries, and a half-century of administration without exception are all the same. They take all seriousness out of the Commission's wild speculation that it can race to the bottom of population inequality to get preclearance. Sources that lack the effect of law could not count against this, but even those sources confirm this conclusion.

6. In its Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, which explicitly "is not legally binding," the Department of Justice stated:

> Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle.

76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). The Department has also acknowledged the obvious, that compliance with constitutional equal population requirements could result in unavoidable retrogression. Long ago the Department stated:

> Similarly, in the redistricting context, there may be instances occasioned by demographic changes in which reductions of minority percentages in single-member districts are unavoidable, even though "retrogressive," *i.e.*, districts where compliance with the one person, one vote standard necessitates the reduction of minority voting strength.

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Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987). The current Guidance is to the same effect. 76 Fed. Reg. at 7472. This concession to demographic change, where it happens, is dictated by the text of Section 5 itself, which does not forbid all retrogression in the minority's "ability to elect their preferred candidates of choice" as some of the Commissioners and their advisors unqualifiedly and repeatedly said. Rather, to deny preclearance the text also requires that the retrogression be "on account of race or color or in contravention of the [language] guarantees." The "on account of" language was necessary to keep Section 5 validly within Congress's enforcement power. But whether or not it is constitutionally necessary, it is there. Retrogression because of relative population changes is not on account of race or language.

7. The Court puts some weight on an "implication" in the Guidance that the Attorney General "might" require "slightly greater population deviation" to avoid retrogression. Slip Op. at 46. The Guidance notes that an alternative congressional plan with any increase in population deviation "is not considered a reasonable alternative" to a submitted plan. The Guidance continues:

> For state legislative and local redistricting, a plan that would require significantly greater overall population deviations is not considered a reasonable alternative.

76 Fed. Reg. at 7472.

From this statement that a "significant" additional deviation would not be required, the Court infers that a deviation that is *not* "significant" "might" be required. Supposing that is persuasive, the "slightly greater population deviation" that is not "significant" could not possibly support the Commission's stampede to the limits of population deviation. "Significant" population deviation that "is not considered a reasonable alternative" certainly would include any deviation that would change a plan from what is otherwise legal to otherwise illegal. That is the meaning of "significant" in usual legal discourse.

The Court next equates "not significant" with "minor population deviations," the technical term meaning below the 10% burden-shifting boundary. Falling below 10% does not make population deviations constitutionally insignificant. It just changes who has the burden of proof.

8. There is much confusion in this case over whether the Commission tried to make too many Voting Rights Act districts. Federal law does not limit a jurisdiction to creating only the number of such districts needed to avoid retrogression. A jurisdiction may seek a margin of safety or go entirely beyond the Voting Rights Act if it thinks it good policy and complies with state and federal law. A court does not second guess how many such districts are needed or permitted because any number is permitted *if legal means are used to create them*. But choosing to create such districts gives no absolution to use any districting practice that is otherwise illegal. No matter how many or few majority-minority, minority-influence, or cross-over districts a jurisdiction tries to create,

systematic population inequality is an illegal means to get there.

9. This part of the discussion returns to where it began. The Commission's assertion that preclearance was a legitimate redistricting goal at the time is correct and undisputed. But that proves nothing. What needs to be proved is that systematic population inequality that is otherwise irrational and discriminatory is a reasonable means to obtain preclearance, so as to count against the baseline force of equality under the Equal Protection Clause.

It begs the question to say population inequality is "compliance with a federal law concerning voting rights" without demonstrating that the meaning and effect of that federal law is to permit systematic population inequality. Slip Op. at 44. The Court circles its reasoning twice in finding the importance of preclearance in general comparable to that of some valid state purposes for deviation, but sliding past what means are legal and what effect the Act has. It is no answer to say, "The question is not whether the Voting Rights Act *specifically* authorizes population deviations . . . ." Slip Op. at 45 (emphasis added). A statute does not have to "specifically" prohibit something if it generally prohibits it or it does not as a whole have the effect of legalizing what is otherwise illegal.

Federal equal protection doctrine is the gatekeeper for what are permissible state purposes for deviation. Those state purposes need not be codified in state statutes. But there is no independent state purpose here, only

respect for federal law and the Supremacy Clause. This is a case of first impression in another way, as it is the first time systematic malapportionment has been defended from the effect of a federal statute. The dispensing effect must come from that federal statute, expressly, generally, or by implication, or the defense fails. It has nothing to do with whether truly independent state purposes are codified in statutes.

IV. MIXED VALID AND INVALID PURPOSES

Because the majority finds the Voting Rights Act a legitimate reason for population inequality, they must decide what to make of one permitted and one possibly forbidden purpose. They propose different tests. For Judge Clifton the case turns on which consideration predominated. For Judge Silver the impermissible motive has no legal consequence unless it was the only motive. Both tests are trying to grapple with the problems of not diminishing other actual and valid purposes and not yielding to theoretically valid purposes that are only pretext.

Both tests would need to be refined to work. Mixed motives often have no predominance. Some motives are from different domains and incapable of quantitative comparison. A test of predominance of motives is subjective and unreviewable. It disguises judicial choice. Literally, a test of single motive can never be met, not in this kind of case, as covered jurisdictions must be motivated by Section 5 compliance.

There is a better statement of the test for cases of concurrent valid and invalid purposes. The law should defer to state districting authorities' actual, substantial, and honest pursuit of a legitimate means for a legitimate purpose with systematic population inequality, notwithstanding the actual and additional motive of party preferment. But the valid motive must fairly cover the entirety of the otherwise wrongful inequality. Even a valid means may not pass from reasonable application to pretext in any part. Here the Commission continued adjusting the map with an eye to depopulation for party advantage even after the cover of the Voting Rights Act played out. If the Commission's first acts of depopulation had the cover, the last acts did not. In light of the intervening invalidation of Section 5 preclearance, if sent back for any reason to be redone in any part, the Commission could not do again what it did here.

The difficulty of forming and applying any test for mixed motives shows why it should be left for a case in which it would matter. It is not needed to decide this case, where neither motive justifies systematic partisan malapportionment.

V. OTHER MATTERS

The other opinions run in directions that cannot be responded to in every respect without prolonging this dissent. The matters already addressed are enough to decide this case. Brief additional comments follow.

Appendix D

1. The Court says that "Counsel's advice does not insulate the Commission from liability, but it is probative of the Commission's intent." Slip Op. at 52. To that end, the Court concludes that the systematic population deviation was the result of "reasonable, good-faith efforts to comply with the Voting Rights Act" and that "the Commission's attorneys gave reasonable advice as to how to pursue what they identified as a legitimate objective, and the Commission appeared to act in accordance with that advice." Slip Op. at 1, 52. Counsel did not give advice that underpopulation for preclearance would thereby escape liability under the one person, one vote principle. If their advice could be stretched to have said that, it would not be reasonable.

The Attorney General does not—and indeed, under his statutory authority could not—deny preclearance for any illegality except Section 5 retrogression. The Guidance says:

> The Attorney General may not interpose an objection to a redistricting plan on the grounds that it violates the one-person, one-vote principle, on the grounds that it violates *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1983), or on the grounds that it violates Section 2 of the Voting Rights Act. . . . Therefore, jurisdictions should not regard a determination of compliance with Section 5 as preventing subsequent legal challenges to that plan under other statutes by the Department of Justice or by private plaintiffs. 42 U.S.C. 1973c(a); 28 CFR 51.49.

Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7470 (Feb. 9, 2011). In the teeth of this explicit disclaimer that the Attorney General does not examine inequality of population and gives no protection against future challenge for it, any advice that unequal population is immunized from later challenge if it might help persuade the Attorney General to preclear would be unreasonable.

The Commission began with correct advice that any population deviation must be justified under federal constitutional standards and that no legal precedent said Section 5 preclearance justified any inequality or how much. Their counsel informed them the question lacked a reliable answer and whatever they did must survive scrutiny if scrutiny came. (Trial Ex. 361 at 11-14; Trial Tr. at 826:6-15.) Later, the advisors offered pragmatic license but never circled back to actual legal analysis from sources and reasoning. (Trial Ex. 395 at 114-16, 118-20; Trial Ex. 405 at 10-11, 14-15, 19, 30, 32, 36, 50.) They gave bare conclusions, no principled exposition, and no written opinion.

At best this was advice to take a legal risk, which lawyers often counsel when there is possible benefit and no cost to their client from being wrong. It could be taken as advice that the course of action complied with one person, one vote principles only by not taking it as a whole, which would not be reasonable.

2. Both opinions contend that the Republican commissioners really approved the partisan inequality in

the final plan they voted against because they had voted for some earlier changes that moved in that direction. The Court leaves out the facts that refute it. The Republican commissioners explained their voting for iterations of the map. Commissioners Freeman and Stertz objected to map changes that promoted Democratic Party advantage without justification. (*See, e.g.*, Trial Ex. 405 at 30:18-31:8; Trial Ex. 406 at 240:21.) The minutes from the public hearings and the Republican commissioners' trial testimony explain that Commissioner Stertz voted for the final tentative legislative map to stave off an attempt by Commissioner Herrera to introduce a "more extreme map" to favor Democratic Party interests that they thought was already prepared. (Trial Tr. at 261:10-15, 877:17-879:8; Trial Ex. 406 at 266:14-267:3.) The inference that, though voting against the final plan, the Republican commissioners actually accepted the plan because they did not protest at every opportunity throughout the meetings misses how people disagree in collective bodies if they hope for compromise later. Concurring Op. at 14.

3. In the Final Pretrial Order the Plaintiffs stated "unjustified population deviations in legislative districting for the sole purpose of partisanship" as their claim, but they elaborated it and then summarized as follows:

Accordingly, Plaintiffs must prove (A) the legislative districts deviate from equality, (B) the adjustments the Arizona Constitution authorized did not cause the deviations from strict equality, (C) deviations from equality are not the incidental result of adjustments made to attain legitimate state interests, and (D) no legitimate

State interests justify or warrant the IRC's deviations from equality.

Their Trial Brief said the same thing: "Thus, Plaintiffs are bound to prove only that no legitimate and constitutional policy drove the population deviations." The Plaintiffs tried and proved that. This is the answer to the concurring Judge's concern that she is "not aware of any clear request by plaintiffs that we adopt something other than the 'actual and sole' reason standard." Concurring Op. at 10. It is in the quoted passages, and elsewhere.

4. I join in the sections of the Per Curiam Opinion concerning dismissal of the individual commissioners, dismissal of the state law claims, denial of abstention, and legislative privilege. On the merits, the facts and findings in this dissent are sufficient to dispose of this case. Though I accept most of the factual narrative in the Opinion, I disagree with some, including some that matters under the Court's analysis. The facts that determine the outcome under the analysis in this dissent are few, simple, and, I believe, undisputed. Therefore, I join only in sections III.A, B, and C of the Opinion.

VI. PERSPECTIVE

This dissent applies voting rights equal protection doctrine as it has been settled for half a century. Deference to reasonable state policies begins the analysis, but deference stops where the state policy or its application is irrational or discriminatory. Systematic numerical inequality for partisan benefit is discriminatory and invidious viewpoint punishment or reward.

The first thing novel about this case is that, thanks to the reform of redistricting processes and standards in Arizona, state law itself now excludes most of the traditional pretexts for partisan inequality. Of necessity, the Commission summons up only the Voting Rights Act as redeeming what is otherwise old-fashioned partisan malapportionment.

The second thing novel about this case is that, the Arizona voters having cast out that grossest of redistricting abuses, a *federal* law is now invoked to bless its return. No other instance is found in which Congress is said to have ordered or permitted systematic population inequality that otherwise violates the Equal Protection Clause.

The third thing novel about this decision is the effect it has to give to the Voting Rights Act itself. Assuming we could give Section 5 preclearance continuing reach into the future, it would be extraordinary that Congress used a law protecting equality of voting rights to authorize systematic partisan malapportionment, even defeating state law that prohibits it.

Systematic malapportionment is an affront to the rights and dignity of the individual. The essential empowerments for that abuse are unaccountable discretion and ready pretexts to cover true motives. Population equality is the most objective limitation on abusable discretion, and it cannot be used unfairly against anyone. "[T]he equal-population principle remains the only clear limitation on improper districting practices, and we

must be careful not to dilute its strength." *Cox v. Larios*, 542 U.S. 947, 949-50, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004) (Stevens, J., concurring in summary affirmance).

Numeric equality yields to some other worthy goals, within limits. Arizona voters left little to weigh against equality, and none of what they did allow is invoked here except homage to the Supremacy Clause. With that wedge the Commission pries pervasive party malapportionment back into Arizona, in the name of Congress and federal statute. It is a misplaced sense of federalism that stands aside while officers of a state that repudiated partisan malapportionment return to it on federal command that Congress never gave.

VII. CONCLUSION

Based on these findings of fact and conclusions of law, I would enter judgment for the Plaintiffs declaring that the Arizona Independent Redistricting Commission's legislative redistricting plan violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. I would enjoin the Commission to promptly prepare and promulgate a plan that is free of that error.

Dated: April 29, 2014.

/s/ Neil V. Wake
Neil V. Wake
United States District Judge

APPENDIX E — ARIZONA STATE LEGISLATURE, FIFTY-FIRST LEGISLATURE, SECOND REGULAR SESSION

Arizona State Legislature

Fifty-first Legislature - Second Regular Session

1. Senate; house of representatives; members; special session upon petition of members; congressional and legislative boundaries; citizen commissions

Section 1. (1) The senate shall be composed of one member elected from each of the thirty legislative districts established pursuant to this section.

The house of representatives shall be composed of two members elected from each of the thirty legislative districts established pursuant to this section.

(2) Upon the presentation to the governor of a petition bearing the signatures of not less than two-thirds of the members of each house, requesting a special session of the legislature and designating the date of convening, the governor shall promptly call a special session to assemble on the date specified. At a special session so called the subjects which may be considered by the legislature shall not be limited.

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside

in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

(4) The commission on appellate court appointments shall nominate candidates for appointment to the independent redistricting commission, except that, if a politically balanced commission exists whose members are nominated by the commission on appellate court appointments and whose regular duties relate to the elective process, the commission on appellate court appointments may delegate to such existing commission (hereinafter called the commission on appellate court appointments' designee) the duty of nominating members for the independent redistricting commission, and all other duties assigned to the commission on appellate court appointments in this section.

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based

on party registration, and five who are not registered with either of the two largest political parties in Arizona.

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate. Each such official shall have a seven-day period in which to make an appointment. Any official who fails to make an appointment within the specified time period will forfeit the appointment privilege. In the event that there are two or more minority parties within the house or the senate, the leader of the largest minority party by statewide party registration shall make the appointment.

(7) Any vacancy in the above four independent redistricting commission positions remaining as of March 1 of a year ending in one shall be filled from the pool of nominees by the commission on appellate court appointments or its designee. The appointing body shall strive for political balance and fairness.

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any party already represented on the independent redistricting commission and who shall serve as chair. If the four commissioners fail to appoint a fifth member within fifteen days, the commission on appellate court appointments or

its designee, striving for political balance and fairness, shall appoint a fifth member from the nomination pool, who shall serve as chair.

(9) The five commissioners shall then select by majority vote one of their members to serve as vice-chair.

(10) After having been served written notice and provided with an opportunity for a response, a member of the independent redistricting commission may be removed by the governor, with the concurrence of two-thirds of the senate, for substantial neglect of duty, gross misconduct in office, or inability to discharge the duties of office.

(11) If a commissioner or chair does not complete the term of office for any reason, the commission on appellate court appointments or its designee shall nominate a pool of three candidates within the first thirty days after the vacancy occurs. The nominees shall be of the same political party or status as was the member who vacated the office at the time of his or her appointment, and the appointment other than the chair shall be made by the current holder of the office designated to make the original appointment. The appointment of a new chair shall be made by the remaining commissioners. If the appointment of a replacement commissioner or chair is not made within fourteen days following the presentation of the nominees, the commission on appellate court appointments or its designee shall make the appointment, striving for political balance and fairness. The newly appointed commissioner shall serve out the remainder of the original term.

(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.

(13) A commissioner, during the commissioner's term of office and for three years thereafter, shall be ineligible for Arizona public office or for registration as a paid lobbyist.

(14) 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 below:

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.

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

(16) 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 thirty 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.

(17) The provisions regarding this section are self-executing. The independent redistricting commission shall certify to the secretary of state the establishment of congressional and legislative districts.

(18) Upon approval of this amendment, the department of administration or its successor shall make adequate office space available for the independent redistricting commission. The treasurer of the state shall make $6,000,000 available for the work of the independent redistricting commission pursuant to the year 2000 census. Unused monies shall be returned to the state's general fund. In years ending in eight or nine after the year 2001, the department of administration or its successor shall submit to the legislature a recommendation for an appropriation for adequate redistricting expenses and shall make available adequate office space for the operation of the independent redistricting commission. The legislature shall make the necessary appropriations by a majority vote.

(19) The independent redistricting commission, with fiscal oversight from the department of administration or its successor, shall have procurement and contracting authority and may hire staff and consultants for the purposes of this section, including legal representation.

(20) The independent redistricting commission shall have standing in legal actions regarding the redistricting plan and the adequacy of resources provided for the operation of the independent redistricting commission. The independent redistricting commission shall have sole authority to determine whether the Arizona attorney general or counsel hired or selected by the independent redistricting commission shall represent the people of Arizona in the legal defense of a redistricting plan.

(21) Members of the independent redistricting commission are eligible for reimbursement of expenses pursuant to law, and a member's residence is deemed to be the member's post of duty for purposes of reimbursement of expenses.

(22) Employees of the department of administration or its successor shall not influence or attempt to influence the district-mapping decisions of the independent redistricting commission.

(23) Each commissioner's duties established by this section expire upon the appointment of the first member of the next redistricting commission. The independent redistricting commission shall not meet or incur expenses after the redistricting plan is completed, except if litigation or any government approval of the plan is pending, or to revise districts if required by court decisions or if the number of congressional or legislative districts is changed.

APPENDIX F — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED MARCH 25, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CV-12-00894-ROS-NVW-RRC

WESLEY W. HARRIS, qualified elector of the State of Arizona, *et al.*,

Plaintiffs,

vs.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,

Defendants.

Phoenix, Arizona
March 25, 2013
8:32 a.m.

BEFORE: THE HONORABLE ROSLYN O. SILVER, CHIEF JUDGE
THE HONORABLE NEIL V. WAKE, JUDGE
THE HONORABLE RICHARD R. CLIFTON, JUDGE

Appendix F

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

BENCH TRIAL

***

[Examination by David J. Cantelme]

[Witness: Richard Stertz]

[138]Q. Did the Commission receive any advice in public session during phase two from the mapping consultant or from counsel about the need, if any, to conduct a racial bloc voting analysis to construct the voting rights districts?

A. Well, the voter rights polarization analysis was a discussion point of expectation.

Q. Meaning?

A. Meaning that we were always in anticipation of getting that product. There was a desire to not do that work product until after the draft maps were completed. So we were using, recommended by legal counsel, what we called the Cruz Test, which was the Mining Inspector Test. The Mining Inspector Test was that in the previous statewide election, there was a — it's a — it's one of the few statewide elections where sort of [139]no one knows who the person is or why — what their role is and everyone votes for them. In this case, the Democrat had a Hispanic surname and the Republican had an Anglo surname. And that balance in that analysis assisted the Commission by virtue of the

fact that during this time we only had data sets from the 2008 and the 2010 election. We did not have the data sets from 2004 and 2006, so it gave us very little to go off of as far as moving the maps forward.

So we were using whatever data that we had available that our consultant was able to provide for us during that time frame to use as a governor to be able to see whether or not the maps were going to be able to meet the test that would hit our benchmarks.

Q. Am I correct to say, then, that at that point, the metric to determine compliance with the Voting Rights Act was the so-called Cruz Index?

A. Yes.

Q. And that's named after candidate Cruz who was a candidate for the mine inspector slot in the 2010 election?

A. Yes.

Q. How do we know whether that metric truly measured the minority-preferred candidate or simply measured the strength of Mr. Cruz as a Democrat candidate?

MR. CAMPBELL: Objection. Leading.

CHIEF JUDGE SILVER: Overruled.

[140]THE WITNESS: I have got no way of testing it one way or the other. It was the only method that we had, because we had — there was not a consultant that was on board that would be able to provide us this ongoing data analysis.

***

Q. Back to Dr. King. Now, Dr. King ultimately was the individual who performed that racial bloc voting analysis. True?

A. Yes.

Q. When did Dr. King get hired?

A. Late. Late on in the process.

Q. He didn't really start his work until after the draft maps were prepared. True?

[141]A. I'd have to look back at the actual dates and schedule, but we didn't get our — my recollection is that on January 9th of 2012 is when we received the final analysis from Dr. King.

Q. All right. I'm jumping ahead. But he did make — presentation on his work was made on November 29?

A. Preliminary analysis, yes.

Q. His preliminary analysis. We're going to get to that in detail. But I want to establish the fact that during the draft phase you did not have Dr. King's input?

A. No, we did not, nor any other expert.

***

[143]Q. Communities of interest, was any definition of the term "communities of interest" ever adopted by the Commission?

A. No.

Q. How would the Commission then know whether any particular plan was, in fact, respecting or not respecting communities of interest?

A. We did not have a test to measure and the decision was arbitrary.

Q. Let's talk about competitiveness. Was any definition of competitiveness ever adopted by the Commission?

[144]A. Not any one specific competitiveness index was ever created.

Q. At some point, metrics were developed, were they not?

A. Yes.

Q. Those metrics evolved and became more sophisticated over time?

A. They became sophisticated over time because the first three measures of competitiveness did not include any of the 2004 and 2006 election results. So over the course of time we developed over nine — I believe there's a total of nine different competitiveness indices, and they all were based on different data sets that were put into them. Not one of those were developed or — pardon me — not one of those were approved as a given competitiveness index. They were — they evolved over the course of the Commission's work.

Q. How would we know, then, whether any given iteration was more competitive than any other given iteration?

A. Each indices, each index, had different results based on the data sets that were put into it. For example, if one index did not include the outline election results, for example, there was a race where Senator McCain ran for all intents and purposes unopposed, so it would skew the results. And if it was weighted too heavily for — if that election would have been included it would have skewed the outcome of whether or not competitiveness would have existed.

[145]There was never an algorithm developed that defined actual data that went into each one of the indexes. It was a general set of percentages that were used in each index and those indexes could be used sort of at will at the desire of any one of the commissioners to be used to study

to see which particular district may or may not fall into a competitive — be considered to be competitive.

Q. With no algorithm having been developed, and with the multiplicity of indices, how would the Commission be able to determine the competitiveness of any map iteration other than an I-know-it-when-I-see-it type of standard?

A. There would be no other way of doing it other than to use a know-it-when-I-see-it.

***

[147]Q. Do we know how many competitive districts your Commission drew?

A. No, because there was no metric. There was no definition of competitiveness.

***

Q. How would we know, then, whether the criterion of competitiveness drove the adoption of any particular iteration?

A. You would not.

Q. Okay. I want to talk to you about compactness for a moment. That is one of the criteria in the State — in Prop 106. True?

A. Yes.

Q. Did the Commission ever adopt a definition of the term "compactness"?

A. We adopted — we didn't adopt, but we accepted three premise for compactness: One was what's called the Roeck Test; [148] the other is the Popper-Polsby Test; and the other is the Perimeter Test. Each one of them look at the — either measuring from the inside of a district out, from the outside of the district in, or the perimeter of the district itself.

Because Arizona has small centers of population and large real estate, we, as a Commission, used those three as measuring governors. But more so we looked at if it just didn't look right, it probably wasn't, sort of test as our sort of adopted measure.

***

[150]Q. Now, to come back to the legislative map and how we got to what became adopted as the draft map, have you heard the term merge map?

A. Yes.

Q. Explain to us what that means, please, in this context.

A. Commissioner Freeman and Commissioner McNulty had been working together to each work on a legislative map. At the direction of the Chair, the Chair requested that Commissioner Freeman work on the northern part of Arizona and Commissioner McNulty work on the southern

part of Arizona and then merge [151]those maps together for the legislative maps.

Q. Is that how it actually took place, to your knowledge?

A. It started that way but it did not end that way.

Q. How did it end?

A. The majority of the work product as Commissioner Freeman had put forth did not show up in the final approved draft map.

Q. Whose work product did show up in it?

A. The majority of that was Commissioner McNulty's.

Q. So Commissioner McNulty went beyond drawing just the southern Arizona districts?

A. Yes.

Q. Can you say then whether the concept of merge map between McNulty and Freeman actually played out?

MR. CAMPBELL: Objection. Leading.

CHIEF JUDGE SILVER: Overruled. And let me just say something now, Mr. Campbell. You have, without a doubt, demonstrated your prowess in identifying leading objections but Mr. Cantelme has demonstrated his prowess in overcoming my sustaining those objections. So

you have both met the mark on evidence jeopardy. What I'm going to do from this point forward, however, is I'm going to overrule those objections unless the question is highly prejudicial.

MR. CANTELME: Thank you, Your Honor.

BY MR. CANTELME:

Q. Let me restate it.

[152]A. Please.

Q. Because I have forgotten exactly how I put it so I will do it all over again.

CHIEF JUDGE SILVER: Whatever it was, it was leading.

JUDGE CLIFTON: Just say yes, and that's the end of it.

BY MR. CANTELME:

Q. Okay. It was along these lines: If the concept of the merge map was to put Freeman in northern Arizona and McNulty in southern Arizona, that's not really what happened, was it?

A. No.

Q. What actually happened?

A. The merge map was a — the majority of Freeman's map lines did not make it into the final map.

***

[176]Q. Well, I will go about it this way then.

You will see in District 19 an increase in HVAP of 0.4 percent?

A. Yes.

Q. How do we know whether that made any difference?

A. It's going to have to be looking backwards to see whether or not it made any difference.

Q. So you would look at actual results?

A. Actual results of the 2012 election.

Q. So to speak, the coin of the realm. And you look backwards to see whether a district actually performed?

A. Yes.

Q. Do we know whether District 24 actually performed?

[177]A. As a Hispanic majority-minority district?

Q. Yes.

A. It did not.

Q. You say it did not?

A. No, it did not.

Q. Why do you say that?

A. Because out of 24 and 26, only one of the six members entering the State House, only one of the six is of Hispanic descent.

Q. So the other five elected from 24 and 26 to the State House, non-Hispanic whites?

A. Yes.

***

[182]JUDGE WAKE: Mr. Cantelme, before you go to the next subject, let me ask a question before I forget it.

Mr. Stertz, in the chart we were looking at at the changes to the final map, it looked like — I didn't see all of the map because it was off the screen, but it looked like the majority of the changes reduced the Hispanic voting age population for the districts in question. A few are essentially neutral, and one increased. Is that about right?

THE WITNESS: Yes.

JUDGE WAKE: How does reducing the Hispanic voting age population in the Voting Rights Act districts strengthen the ability to elect for the protected minority?

THE WITNESS: I think that's a fantastic question. I think that there's a couple of things to take into [183] consideration, and that's that in certain blocks we've got, even though there might be a high Hispanic voting age population but no propensity to actually vote. So voting results were also taken into consideration. And even though they are not mapped this way, you might have been able to pick up an area, a precinct, of very active voters that might have given a higher propensity to actually elect, even though in certain districts, where we have that minority and majority protected districts, we have very low turnout.

So my view of reduction to meet benchmarks was always defaulted back to recommendations from the experts to say, we're reducing ln voting age population for Hispanics in that district, but you are saying that it's strengthening the district. I have got to rely on their expertise to be able to say that that makes sense.

JUDGE WAKE: Let me recast the question maybe more sharply in terms of what was or was not said by the commissioners. Do you recall the commissioners stating the reasons for making these changes, most of which resulted in reducing Hispanic voting age population? Did they say reasons, or was it just — well, do you remember?

THE WITNESS: They — it was always the goal to take whatever district it was, to strengthen the district even if it required depopulating the district if the depopulation included reduction of Hispanic voting age population in that area, if it [184]showed in a competitiveness analysis that there would be a higher propensity to elect.

JUDGE WAKE: But what I'm trying to get at is what was given as reasons for changes? I guess all of them are depopulating changes.

THE WITNESS: Yes.

JUDGE WAKE: That how was it explained that changes that reduced the Hispanic voting age population would strengthen the ability to elect? Was that explained by anyone as they made those changes?

THE WITNESS: I have got no recollection of ever hearing a cognitive string of thought that said let's take more Hispanic members out of the community and then that's going to give a greater opportunity for an Hispanic to be elected. If that answers your question.

JUDGE WAKE: Actually, I might understand the logic of it if reducing population resulted in increasing Hispanic voting age population. But what these data show is that most of these reducing the population also reduced the Hispanic voting age population.

THE WITNESS: Yes.

JUDGE WAKE: And I'm trying to figure out what the stated reasons were for how that would improve the ability to elect. And if you are telling me you don't remember —

THE WITNESS: It's not that I don't remember. There [185]was not a string of conversation that led to being able to say, we're going to reduce this and we're going to have a better opportunity.

JUDGE WAKE: It just came down to your consultant said, do this.

THE WITNESS: Yes.

JUDGE WAKE: Take it on faith, or take it on what they gave you.

THE WITNESS: Yes.

* * *

[188]Q. And then we come to registration. And we see in the old iteration the percentage of Republican registration was 36.2 percent, right?

A. Yes.

Q. And we see that it drops to 28.5 percent. True?

A. For Republican registration, yes.

Q. Right. And we see Democrat go the other way, 32.0 percent in the old and goes up to 38.0 percent in the new?

A. Yes.

* * *

[194]Q. And the Commission itself never claimed 8 was a district in which Hispanics could elect their preferred candidate, right?

A. Correct.

Q. Yet with much lower CVAPs it claimed that 24 and 26 could. I find that a little anomalous. Do you also?

[195]A. Yes. 24, 26, and 8 have always been districts that were viewed as an attempt to add a coalition of non-Hispanic whites being the minority where someone that would be a non-Hispanic white would have the opportunity to be elected.

***

Q. "The Benchmark Plan has only six majority-minority districts that provide minority voters the ability to elect their candidates of choice." Right?

A. Yes.

Q. I read that right?

Okay. So if the Commission claimed it created 10 in the enacted plan, that is, nine Hispanic and one Native American, right?

A. Yes.

Q. And you take away 24 and 26, that leaves you with only [196]eight; seven Hispanic and one Native American?

A. Yes.

Q. That's still one better than the Benchmark?

A. Yes.

Q. That being the case, Mr. Stertz, what was all the fuss about districts in 24 and 26 for?

A. During the course of deliberation on 24, 26, and finally 8, 24 and 26, in my opinion, were an attempt to create a — to create districts where we were offloading neighborhoods that were — they became sort of contrived districts in their design, and 8 more so than even 24 and 26. 8, at the last minute, created a line that moved across Interstate 10, split Casa Grande in half, consolidated a large population of the prison population into one particular district which was something that we as a Commission had made a concerted effort early on after hearing many hours of testimony about prison gerrymandering.

And at the very last minute, we have a redesign of 11 and 8 which created a district that had — that was not competitive. It moved Republicans out of District 8, moved them into 11. It touched on edges that took population out of other districts weaken — in my opinion, weakening those, and packed a lot of the prison population in. And

the reason why the prison population is important is that they count in your total population. They count in their ethnicity, yet they are [197]not voting. And, of course, if you are in prison you are over the age of 18 so you are part of the voting age population.

So 8 became a very contrived district that was created at the very end. And there was a lot of contentious testimony between myself and Commissioner McNulty about this of which her argument prevailed on a push vote between Commissioner McNulty, Commissioner Herrera, and Chairwoman Mathis.

In regards to 24 and 26, the majority of that argument I left to Commissioner Freeman, even though we both have got a great amount of experience in both of these neighborhoods. I have done development in all these. I know the area as well. We studied them well. We were trying to — I believe that they ended up becoming a bit contrived, not only in their design, but trying to back fit the story about whether or not they truly had a community of interest.

Now, are they better today than they were when they were first developed in draft maps in design? Yes. Did some of the edges get taken away, were some of the — was there some positive movement in those two districts in how they were designed? Yes. Should they have been part of the overall scheme of trying to convince someone that they were minority-majority districts? I never could grasp that as being why.

However, by virtue of our consultants and our attorneys, they drove the message home that we needed to have [198]10. And these 10 benchmark districts that needed to be created needed to be included, including these coalition districts as they became called. And that's what 24 and 26 became.

Q. So they are telling you you need to get 10, yet they told Department of Justice the benchmark was only 6 and 1. True?

A. True.

***

[Examination by David Cantelme]

[Witness: Richard Stertz taken on re-direct]

[328]Q. Okay. That being the case, you had received advice from counsel, that would be Mr. Adelson, that it was okay to underpopulate districts in order to strengthen them as districts in which minorities could elect their preferred candidates?

A. True.

***

Q. Now, Exhibit 34 is a document entitled Guidance Concerning [329]Redistricting under Section 5 of the Voting Rights Act notice. It's dated February 9, 2011 and

it's published at 76 Federal Register beginning on page 7470.

And what I would like to do on page 515 is go to the lower left-hand corner and highlight for me the paragraph beginning with preventing retrogression. You'll see there, Mr. Stertz, that it reads, quote, preventing retrogression under Section 5 does not require jurisdictions to violate the one person, one vote principle.

Are you with me there?

A. Yes.

Q. Were you ever advised by counsel that the position of the Department of Justice in enforcing Section 5 is that preventing retrogression under Section 5 does not require jurisdictions to violate the one person, one vote principle?

A. Not with any specificity of recollection.

Q. Okay. The notion of underpopulating districts was yours; true?

A. True.

***

[343]Q. All right. And you'll recall that according to Dr. King in his draft analysis, which Mr. Campbell reviewed with you that Cruz, Mr. Cruz, the Mine — the Democrat Mine Inspector candidate in 2010 had received substantial White votes in those two districts; true?

A. True.

Q. Now, here's the clincher, Mr. Stertz. How do we know that those voters were voting for Mr. Cruz because he was Hispanic as opposed to Democrat?

A. We do not.

Q. It's speculation, is it not?

A. It is. That is why Ms. O'Grady coined the phrase "the [344]down and dirty Cruz test," because it was the only way to—it was the easiest way, with the limited data that we had, to be able to do an ongoing analysis.

***

[355]Q. I want to conclude with this, Mr. Stertz. Can you explain to us why this exhibit shows such a partisan skew in overpopulation and underpopulation?

A. I could explain it in a couple of ways.

Q. I want to put it in this context.

A. Yes, please.

Q. The draft map, which we've heard testimony in Dr. King's report, would satisfy Section 5 and it did not have that skew. Using that to set the table, explain please.

Appendix F

A. By virtue of advice from counsel and their consultant subsequent delivery of the Dr. King draft map analysis, it was the opinion of our team that we needed to strengthen the districts. And to strengthen the districts, underpopulating those districts was an acceptable mechanism to do so.

Therefore, to underpopulate those districts, other districts needed to become overpopulated. And by strengthening those districts, you offload Republicans from one district to another; therefore, overpopulating Republican districts and underpopulating the Democrat districts.

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[Examination by Mary R. O'Grady]

[Witness: William Desmond taken on cross]

[439]Q. Let's look at the mine inspector vote that's added as a column to this particular report.

Does the mine inspector — and the mine inspector candidate that this — this means that 46.1 percent of the people in this configuration of District 8 voted for the mine inspector, correct? Excuse me, the democratic candidate for the mine inspector?

A. This is what we called the Cruz Index. Manny Cruz ran for mine inspector in 2010. It served as a good statewide election for us to have an easy way of, I guess, looking at

what polarized voting would show us when we did further analysis.

Q. But it's not the complete analysis?

A. No, it's just something that's on the fly, a little bit easier for the commissioners to digest. It's a number that's always available.

[440]Q. So here the Hispanic candidate who is also the Democratic candidate would have lost in this district?

A. Correct.

***

[447]JUDGE WAKE: Ms. O'Grady, could I interrupt just a minute?

Do you know whether there's any Arizona Corporation Commission races in — I guess the times to look at would be maybe 2010, 2008? I don't remember off the top of my head.

THE WITNESS: I don't know, to be honest. So errors [448]in the results?

JUDGE WAKE: No. No. I was just thinking about looking for a benchmarks of generic party success that traditionally the Corporation Commission races has been viewed as a low information race. I mean, there is campaigning for it but a race about which people don't

know as much or care as much and so the popular belief is that voters tend to default to their party preference. And so looking at Corporation Commission races is one way to get an idea about what the party default position is. I'm just wondering if there were such races that could have been looked at.

THE WITNESS: I think some of those were studied. I mean, the reason these races were chosen for this portion, I believe, was because this section really just deals with a different Voting Rights Act pieces of information we were curious about. I believe corporation commissioner, as a statewide race, did factor into some of the competitive indexes that were used.

JUDGE WAKE: I'm also thinking that the mine inspector race, did you run comparisons — it might not have been in the same year — of Corporation Commission race to the mine inspector race? Because you would wonder, at least I would wonder, if they came at it about the same, that might suggest that the mine inspector race was just similar to a generic Republican-Democrat race for? Of course, nothing is ever [449]perfect.

But I'm wondering, was that —my question really relates to all of these indexes. Was that looked at?

THE WITNESS: I believe all the election results were looked at, you know, since it was Manny Cruz who ran in 2010 and since mine inspector is a fairly, I think, low interest election as well, the thought was that Hispanic voting for, you know, a Hispanic candidate of choice would probably default there to a Hispanic surname.

JUDGE WAKE: Of course, the thought that just occurred to me now was that if the performance in that race were comparable to the performance in Corporation Commission races that would tend to suggest that that mine inspector race didn't reflect — would not have reflected Hispanic preference but just generic Republican and Democrat.

I don't know. It just occurred to me right now and I was wondering if it was examined to — as a check on the mine inspector race as to whether it really had much indication of ethnic preference for Hispanics compared to generic Republican and Democrat preference.

THE WITNESS: Yeah. No. Because they could both be — people could be voting for the D in front of his name not the last name.

* * *

Appendix F

[Examination by David J. Cantelme]

[Witness: DJ Quinlan taken on direct]

[474]Q. Okay. You met with Commissioner McNulty more than once at her home in Tucson. True?

A. That is correct.

Q. In fact, between the period of the adoption of the grid map

and the adoption of the draft map you met with her as many as five times at home. True?

A. That was what we discussed in my deposition, and I couldn't remember the exact number of times. I do remember it was more than once, and I don't recall it being very many times. So I would say that would be a fair thing to say.

Q. It's fair to say as many as five times?

A. Correct.

Q. And then you met with her again at home during that period between November 29, 2011, and adoption of the final map. True?

A. I'm sorry. To clarify, five times total. I don't -- I can't remember the timeline as to when we were meeting exactly. I believe that would probably make sense, though,

because after the draft map there probably wouldn't have been much map drawing going on.

Q. Let's turn to Page 27, beginning at Line 12 of your [475] transcript.

And I'm going to read you from the transcript and ask you if you gave the answers to the questions recorded in your transcript. Beginning at Page 27, Line 12:

"QUESTION: How many times did you meet with her at home during that period between adoption of the grid map on August 18, 2011, and adoption of the draft map on October 10, 2011?

"ANSWER: I can't recall.

"QUESTION: More than once. Though?

"ANSWER: More than once, but I don't believe it was very many times.

"QUESTION: As many as five?

"ANSWER: Maybe. Maybe as many as five."

You gave those answers to those questions, right?

A. Yes, sir.

Q. Then you met with Commissioner McNulty regarding District 8, true?

A. Specifically regarding District 8?

Q. Yes.

A. I did meet with her and I do remember District 8. I do remember discussing District 8 with her in a general context. I don't remember if that was the only thing we were meeting about.

Q. Page 36, please, Line 21 through 24.

[476]"QUESTION: Okay.

"ANSWER: That's just my recollection of it, though.

"QUESTION: Who initiated the meetings between you and Commissioner McNulty relative to District 8 after the Commission reconvened on November 29, 2011?

"ANSWER: She did."

You gave those answers to those questions. True?

A. I did.

* * *

Appendix F

[Examination by Michael T. Liburdi]

[Witness: Jose Herrerra taken on direct]

[497]Q. Let's shift gears now to the grid map. And when I say "grid map," what is your understanding, briefly, of what we mean by the term grid map?

A. Grid map to me means the map that uses population and it's population divided equally among — equally some squares, if it's 30 for the Legislative, it's 9 for the Congressional.

Q. So let me focus on something that you had just said. So equal population, correct?

A. That's correct, for a grid map, yes.

Q. Is it not the case that the Arizona Constitution requires that the grid map employ equal population in the districts?

A. I believe for the Congressional it is mandatory.

Q. And then what about for the state Legislative side?

A. If I remember correctly, there's some leeway there.

***

[530]Q. Let's now go to Page 114. And let's focus on the statement from Chair Mathis at the end of the page, please.

Would you take a look at that?

A. Okay.

Q. We're missing— seems like we're missing a line, something on this line. At least in my copy it ends with the word "districts."

Do you see on there it says "districts"?

A. I do.

Q. So Chairperson Mathis is asking the propriety of underpopulating majority-minority districts?

A. I believe that's what she's asking.

Q. Now, Mr. Strasma's answer is, quote, "That would be my recommendation," end quote.

A. That's what it says there.

Q. Do you recall this exchange independently right now?

A. Independently, no.

Q. Okay. Now, let's highlight where Chairperson Mathis responds to the end of Mr. Strasma's two-paragraph response. There you go. Why don't you take a look at that.

A. Okay.

Q. And this — you recall this exchange between Chair Mathis [531]and Mr. Strasma where Ms. Mathis asks,

quote, "Is there a rule of thumb at all in terms of how much?"

A. I do not recall.

Q. Nevertheless, Mr. Strasma answers: "I'm going to summarize with the, quote, plus or minus 5 percent," correct?

A. That's what it says there.

Q. Now, that's consistent with what you have heard throughout the Redistricting Commission process from your counsel and your advisors that it was acceptable to underpopulate and overpopulate districts plus or minus 5 percent, correct?

A. I believe the deviation — some deviation was acceptable.

***

Appendix F

[Examination by David J. Cantelme]

[Witness: Thomas Hofeller taken on direct]

[553]Q. What I'd like to do then is turn to, because each of those affidavits reports served a distinct function, I'd like to start with your first, and that, I believe, is Exhibit — I believe it's 39 but it might be 40. Let me look on the list to be sure. 39, please.

A. Yes.

Q. And if we look to the last page of the affidavit, we see that it's dated June 25, 2012. Right?

A. That's correct. Yes.

Q. Now, Dr. Hofeller, I'm not going to go through the entire affidavit, because it's in the record and I'm sure the Court has had an opportunity to read it. What I'd like to do is I'd like to get to the substance of it. The affidavit indicates what you reviewed and all that sort of stuff.

But you reached some conclusions in this affidavit, and I'd like to have you tell us what those conclusions were, and then I will ask you for the basis of them. And for that purpose, what I'd like to do is direct you to Paragraph 17, please.

Would you read that paragraph to yourself, please.

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[554]Tell us what opinion you formed in this paragraph, please. You don't need to read it to us, just summarize it for us.

A. Right. I believe my opinion — well, I know my opinion was that the only logical reason for the underpopulation and overpopulation of the districts was to gain an advantage politically.

Q. Would you explain the bases of that opinion, please.

A. When I first examined the districts and looked at the deviations, I noted that all of the Republican districts, the districts that had two-party registration with the Republican majority were all overpopulated, save, I believe, one, and that all the Democratic districts with the Democrat plurality in the two-party registration were underpopulated.

Q. In your experience, is that an unusual result in redistricting?

A. Absolutely.

Q. Explain, please.

A. Well, if you look at the graph I provided, the bar chart, you note that there is a skew from the most underpopulated up to the most overpopulated. And the chances of that happening are almost impossible to calculate in terms of it happening according to neutral criteria which Arizona has in its State Constitution.

Q. I have put on ELMO so we can try to pull up Exhibit 40.

[555]A. I don't believe the whole chart is showing.

Q. Jessica, why don't you see if you can pull it up that way.

Okay. We've got the whole chart now on the screen and it's marked as Exhibit 40. Explain how this chart figures into your opinion, please.

A. Well, once again, you see an almost perfect skew of these district deviations from a low of over 4 percent to a high of over 4 percent. And you can see the chart is colored in accordance with the two-party registration with the Democrats being in their now traditional blue and the Republicans being in red. And that this sort of a pattern in a chart is, again, something that could never have come about by chance or by execution of normal neutral state criteria.

Q. What does that then tell you, Dr. Hofeller?

A. Well, that then tells me that there was a conscious effort made to create a plan that had that sort of a skew. It couldn't have come about by the normal redistricting process.

Q. It happened as a result of design then, true?

A. Yes, it did.

***

[556]Q. Now, when we say minority districts, these are the districts that the Commission has said are those in which a protected group has the ability to elect its preferred candidate?

A. Yes. Although I would say that 9, for instance, which is one of them, is barely over zero percent.

Q. Okay.

A. So it's a prevailing pattern.

Q. What's the significance of this chart then?

A. Well, I think this demonstrates what we all know, and that was that the Commission was following a policy of underpopulating minority districts. And it's just demonstrated in this chart.

Q. The correlation there is too striking to be anything caused by accident or randomness?

A. Well, I wouldn't account it to randomness at all. I would account it to a deliberate policy. But, of course, now, in studying the other evidence involved in the case, I know this to be the fact.

***

[563] Q. Okay. Let's continue then to District 24.

A. Yes.

Q. You have got a deviation of only 127 individuals?

A. Yes.

Q. What is the non-Hispanic white voting age population in that district?

A. It's 62.34.

Q. Now, in that district, the Commission did not achieve 50 percent plus 1 minority voting age population. True?

[564] A. Well, I think that's a little bit of an apples and oranges.

Q. Straighten me out, please.

A. Okay. The minority voting age population there would be about 38 percent, I believe. And I'd have to look at all the charts, but I don't recall, because the Commission actually handled that district a lot differently than I handled it in my plan.

Q. Why the difference?

A. Well, the difference is because I didn't believe that it was a Hispanic district, and the way the plan was constructed, some of the Hispanic population in District 24 was drawn out into the other Hispanic districts to bring them up to population so that they would meet the proper deviation.

Q. Now Dr. Hofeller, District 26 has got similar problems. True?

A. That's true.

Q. Now, as you have drawn District 26 in plan X, it's only got 183 individuals below perfect?

A. That's true.

Q. What about the non-Hispanic white population? What do you have there?

A. 56.70.

Q. How does that compare with the Commission?

A. I believe the Commission's non-Hispanic white population is less, but again, I'd have to see the two charts to compare [565] them.

Q. All right. Now, you will recall from Mr. Stertz's testimony when I reviewed with him the Commission's DOJ submission for preclearance dated February 28, 2012, you will recall that we established that citizen voting age population in Districts 24 and 26 was just about 20 percent or a little bit under, right?

A. Yes.

* * *

Appendix F

[594]Q. Now, Dr. Hofeller, I took calculus back in 1974 I think and I've forgotten every bit of it. I don't even know if we would have covered this issue. So I'm going to try to put this into layperson terms and you tell me if I have it right.

One of the things you are focusing on here is not just whether there are deviations but the magnitude of those deviations. Have I said that fairly?

A. Well, that's one aspect, yes. It's the magnitude.

Q. And the distribution of the deviations within levels of magnitude. Have I said that right?

A. The distribution among the parties and also the distribution of the demographics.

Q. And I'm getting the sense that if that magnitude is greater, that means that it is less likely that the intent was simply to draw, according to the neutral criteria, and had deviations be the incidental by-product?

A. I think that's true but also I would say that, again, the [595]distribution of the demographic and political factors among those deviations would also have been expected to have been different.

***

[600]JUDGE WAKE: Dr. Hofeller, if one puts aside the Voting Rights Act compliance issues in this case and

just looks at the constitutional factors to be considered, I would like to ask you whether those factors — those are county and city splits, communities of interest, respecting geographical features, compactness, and contiguity. Are those factors — each of those factors could reasonably result in population disparity off of the ideal; correct?

THE WITNESS: Your Honor, they certainly could result [601]in population deviations off the ideal. But nowhere near to the extent that the AIRC's plan did. If you look at my Plan X, you'll see that it honors counties, it honors cities and towns. So if the AIRC took, for instance, as a goal to stay within two percent or even one percent, in my opinion, they would not have had — they would have been able to accomplish all of the goals in the Arizona State Constitution as I believe did the last Commission.

JUDGE WAKE: Well, suppose that they did lead to population disparity. Is there a statistical reason to think that the skewing of those population disparities would run almost entirely in favor of one party and almost entirely against another party as to those neutral factors?

THE WITNESS: I would find it inconceivable that that could happen if one were just looking at the neutral factors.

MR. CANTELME: And just taking one at a time, respecting county and city boundaries, is that a factor that if one could statistically expect a result in six out of eight underpopulated districts being one party and a similar number on the other side for —

THE WITNESS: No, Your Honor.

JUDGE WAKE: And how about for respecting communities of interest, same question?

THE WITNESS: Well, then again, community of interest is sort of an overlap with cities and towns. One of the [602]problems we have, and I had in reading through the record and listening to what went on in the courtroom already, has just reinforced my conclusion that community of interest is a very nebulous term which means different things to different people and you'll always have to ask the question of whose community and whose interest is involved. So –

JUDGE WAKE: My question is whether — however one variously defined communities of interest, could one expect that it would statistically turn out that almost all of the underpopulated would be in one property if you are just looking at community of interest figures?

THE WITNESS: No.

JUDGE WAKE: And the same for compactness and contiguity?

THE WITNESS: Well, definitely absolute contiguity wouldn't really play in at all but compactness would not require population deviations really at all. The change in compactness from moving the AIRC's plan to almost serial deviation would be minimal.

JUDGE WAKE: All right. Thank you.

JUDGE CLIFTON: Let me follow on a question that was suggested by one of Judge Wake's questions that has to do with splitting or adhering to the political boundaries of the state, counties and cities and so forth. Your report contains a paragraph which you just talked about, paragraph 19, with [603]regard to your analysis of the Commission's plan. Did you do a similar analysis for the plan — your Plan X?

THE WITNESS: Yes. I ran a split report for my plan and —

JUDGE CLIFTON: Is that contained in your affidavit report? I may have missed it.

THE WITNESS: I don't recall, Your Honor. I'm not sure that it did.

JUDGE CLIFTON: Is there anything that tells us that your report is as good as or superior to the Commission's plan?

THE WITNESS: I think that comparison could be made visually, yes. But my recollection is that it is better. But I don't think that that is in the report. I just don't recall.

JUDGE WAKE: I have a follow-up on that. In terms of city and county splits, some of those are absolutely mathematically necessary; correct?

THE WITNESS: Well, yes, they are because, for instance, a city such as Phoenix exceeds the population of a district. But it doesn't only become a matter of that. It becomes a matter of how many fragments into which a city is split. It isn't just that it's split. If it's less than the district population, it's split five ways and that you're going to look at that and say why did that have to happen under neutral criteria?

JUDGE WAKE: But, did you run a calculation of how [604]many splits were necessary— mathematically unavoidable? I'm not suggesting you need to, or even whether this is routinely done. I'm just wondering. It would seem that there would be a baseline of number of splits that have to happen because of any jurisdiction that has a larger population than the ideal. And the number above that would seem to be what is in play and what is the criterion of merit for minimizing such splits.

Did you run that minimum analysis?

THE WITNESS: I don't think you can run that per se, Your Honor, but an experienced redistricting map maker, as part of the preliminary exploration of the state, which I do in any state that I address, would draw what they would refer to as a good government plan which would look at those very same factors. You could see what is possible.

Now, that may not fulfill all of the other goals that you're trying to accomplish, too, but the wider your deviation, the more — you know, if you go out to one percent from zero, it's a little easier to accommodate.

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[623]Q. And that's the so-called Cruz index falls in that category; right?

A. Well, Cruz is part of that equation. Cruz is a down-ballot election that had a lot of drop-off and there's a lot of voters that cast ballots that would vote for a position on the top of the ballot. Sometimes they call it ballot fatigue and as you move down ballot, people vote for less and less offices.

Q. Okay.

A. And I think Cruz is an excellent Democratic baseline vote.

[624]Q. Excellent Democratic baseline vote?

A. Democratic baseline vote, yes.

Q. Why not minority baseline vote?

A. Well, once again, in order to really ascertain the preferred choice of the Hispanic community or the Black community, it would be normal to look at primary elections and see how they support each other's candidates within the parties' primaries.

If you follow that analogy down to its logical conclusion, it means that in any district where a majority of the minorities vote for the Democratic candidate no

matter what that size is, that that is somehow or other a protected district.

Q. You find that somewhat problematic?

A. It certainly isn't true in my experience.

Q. All right. Now, one of Dr. Handley's criticisms of Dr. King's analysis was the failure to primary elections.

A. That was one of them.

Q. We're going to get to —

A. Okay.

Q. We're going to go through them and I want to take them one by one.

Did you join in that criticism

A. Yes.

Q. Why?

[625]A. Well, again, if I'm approaching a redistricting effort and in conjunction with my counsel and am advising people preparing for the election, one of the main things that I advise them, number one, is to get their database ready and get all of the prior elections for the decade and, most importantly, to collect all of the primary elections they can where minority candidates ran against minority

candidates or where minority candidates ran against each other because data is tremendously important in analyzing the voting polarization and making a determination of cohesion among voters. General election just doesn't tell the full story.

Q. All right. One of the criticisms of the Cruz index, then, is it was only one election, 2010; right?

A. Well, yes, it's a single point.

Q. Single point. Two, it was a general election; right?

A. Yes.

Q. And number three, it was an anomalous election which really was a very heavily Republican year in 2010; right?

A. Yes. And as I mentioned before, there were also down-ballot Democratic candidates that had very similar percentages of the state's votes in that election.

Q. Which tells us, then, that's a Democrat index but not a minority index?

A. Well, in my experience, from years of targeting elections and analyzing districts, I would say yes, it's a baseline vote.

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Appendix F

[Examination by David J. Cantelme]

[Witness: Linda McNulty taken on direct]

[776]Q. Mr. Adelson, you know who he was, of course?

A. Yes.

Q. And he was counsel to the Commission. True?

A. Yes.

Q. And he gave the Commission advice concerning the Voting Rights Act?

A. Yes.

Q. And compliance therewith, right?

A. Yes.

Q. And Mr. Adelson advised the Commission that it could depopulate the minority districts for purposes of compliance with Section 5. True?

A. He advised that it was an accepted way to strengthen [777]certain of the minority districts. Yes.

Q. So long as you stayed within 5 percent up or 5 percent down?

A. I don't think he gave us a hard and fast rule that way, but he said that we could not deviate by 10 percent, that we needed a valid reason for doing it, but that the Courts had ruled that it was an accepted way of strengthening minority districts.

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Appendix F

[Examination by Mary R. O'Grady]

[Witness: Linda McNulty taken on cross]

[780]Q. And according to plaintiffs Exhibit 69, the HVAP in districts -- in the districts that you identified were improved from draft to final, is that correct? We can go district by district. HVAP in District 4 improved by 2 percent, is that correct?

A. That's correct.

Q. HVAP in District 24 improved by 2.3 percent, is that correct?

A. Yes.

Q. And in District 26 by 1.6 percent, is that correct?

A. Yes.

* * *

[782]Q. And in 24 — or excuse me, in 26, in addition to adding some minority population, was there — there was some white non-Hispanic population?

A. Yes. In those central Phoenix neighborhoods, there was — I don't know that racially polarized voting is the correct term for that, but there was some white neighborhoods that were less strong in terms of minority voting strength, and we moved those [783]out.

Appendix F

Q. Now, when you are referring to central Phoenix, are you referring then to District 24?

A. Yes. I mean the central valley, because 26 is really Tempe and West Mesa. But yes, that whole area.

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Appendix F

[Examination by David J. Cantelme]

[Witness: Linda McNulty taken on voir dire]

[796]Q. Commissioner McNulty, when I say the phrase "communities of interest" could you explain what that means to you in the context of your redistricting work?

A. Yes. My perspective with regard to community of interest, which I talked about during our work, was that a community of interest is a cohesive group of people who have a common cultural, ethnic, historical tie, and who come together to take part in the political process that whatever the district is you're drawing, that it is relevant to whatever it is that your district — that the district that you are drawing to advance those interests.

So for example, the Town of Guadalupe is a strong cohesive ethnic community, and they do participate in a Legislative district together. I saw SaddleBrooke as a neighborhood that came together and exercised their — participated in the political process together.

It was my own personal perspective that Marana, a big sprawling city, and Oro Valley and SaddleBrooke were not altogether one community of interest necessarily. But nevertheless, we heard a lot of testimony from folks who felt that they were.

MR. CANTELME: May I ask one question on voir dire, Your Honor?

[797]CHIEF JUDGE SILVER: I'm not sure what it is.

MR. CANTELME: It's related to her definition of community of interest. Just one question.

CHIEF JUDGE SILVER: Well, I'm going to allow it, maybe in the nature of cross-examination. But we'll see. Go ahead.

VOIR DIRE EXAMINATION

BY MR. CANTELME:

Q. Community of interests include as an ethnic group non-Hispanic white?

A. If they have a common cultural or historical or, you know, other bond, I think they could. For example, it wouldn't make sense to me, if I understood your answer, I mean, your question correctly, it wouldn't make sense to me to divide SaddleBrooke into two Legislative districts. And I think they are non-Hispanic white voters by and large, because they come together to work on their problems, you know, seek solutions with their legislators as a group.

And I think I should be clear that community of interest is something that is not well defined. Folks have different perspectives on it. Folks on the Commission had different perspectives on it. But we heard — we did a great deal of thinking and paid a great deal of attention to that.

Appendix F

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[Examination by Mary R. O'Grady]

[Witness: Linda McNulty taken on cross]

[806]Q. And now, in some areas, District 12, 16, 25, the east valley of Maricopa County, is it fair to say you are not going to create a competitive district there because it's so predominantly Republican?

A. Yes. That's fair to say.

* * *

[822]JUDGE CLIFTON: I don't know you. I obviously know your firm by reputation.

The Commission received a lot of legal advice, and we have heard repeatedly the advice received with regard to voting rights districts and the ability to underpopulate those districts. And you just made reference to that.

Did you do any independent research or think independently about the merits of the questions you were being advised about, whether that was your independent conclusion or reach an independent conclusion like that?

THE WITNESS: You know, I did— I don't want to get too far astray from what my expertise here. I thought a lot about it. I think I did look at the *Larios* case that Mr. Adelson had explained to us. And, of course, I read many times the Department of Justice Guidance that we had to follow for preclearance.

Appendix F

I had — and the record shows, I had a lot of questions that I asked about why we needed 10 benchmarks and what the Hispanic election history had been in those benchmarks. But so at the end, I concluded that the advice that we were getting was cautious advice, but that it was consistent with what we — with our situation given how the [823]State of Arizona had been viewed by the Department of Justice, given the election history of Hispanics in the state, given that we had never gotten preclearance, given that Section 5 had been strengthened, and that we — I think the thing that I found most that justice would find most difficult about us is that we're the only Section 5 state in the country that starts from a clean slate. And so they can't look at the prior districts and see what we've done to them. They, you know, everything gets moved around.

And so it was going to be very hard for them to analyze where the populations were in these new districts and their perspective on us was that the last time we did this, we had intentionally discriminated.

So I knew they were going to be scrutinizing us very, very carefully, and I didn't — I felt like it was — I felt like the advice that we were being given was, as I said, very careful advice, very thoughtful advice, and that I should follow it.

And you know, I — this brings to mind that when we started and I first looked at the data from the last districts, it was clear there were eight benchmarks. And then very soon it became clear that there were nine. And I think Mr. Cantelme even testified that we needed to have at least nine benchmarks.

MR. CANTELME: Objection. Move to strike. That's not in the record.

***

[827]JUDGE WAKE: But did he ever address the possibility of simply telling the justice department that Arizona law requires minimum population deviation except for what's necessary to comply with the Voting Rights Act and it's not necessary to deviate in population, therefore, the Commission and the state are complying with the state law in achieving or pursuing as closely as possible equal population districts and therefore, that this is the best that can be done in terms of whatever plan would be submitted in terms of achieving none-retrogression? Did he ever tell you that that was an option?

THE WITNESS: No. We didn't talk about that.

***

[838]Q. Can you highlight that for me please, Jessica?

And so what we see is this change caused District 8 to go from 3,262 over to 4,873 under in total population. True?

A. Yes. That's correct.

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Appendix F

[Examination by David J. Cantelme]

[Witness: Scott Freeman taken on direct]

[867]Q. Now, in your comments on — at the Commission hearing on January 17, 2012, appearing at page 47 of the transcript, you comment, beginning at line 14: "All the lines in southern Arizona remained virtually unchanged, with only minor changes to southern Arizona.

[868]"And in the rest of the state, whatever remained of my nine put, eventually over time got completely washed away.

"There is nothing of Commissioner Freeman in these maps."

Explain what you meant by that, "There is nothing of Commissioner Freeman in this maps."

A. I think where I was going was I think it was that there was another Commissioner saying, well, this was a product of compromise or deliberation or something like that trying to portray it as this was some sort of by partisan map or supposed to be an independently drawn map and I didn't view it that way at all. If there was any resemblance between a district and what became the final map and some district that I had drawn and some iteration of some map that I had drawn, it was happenstance or it was a trivial similarity. I didn't view it as that there had been a contribution by me in that map.

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Appendix F

[914]JUDGE WAKE: I have one question, Commissioner. Did the Commission ever draw a plan trying approach equal population to see how it would play out for non-retrogression?

[915]THE WITNESS: No.

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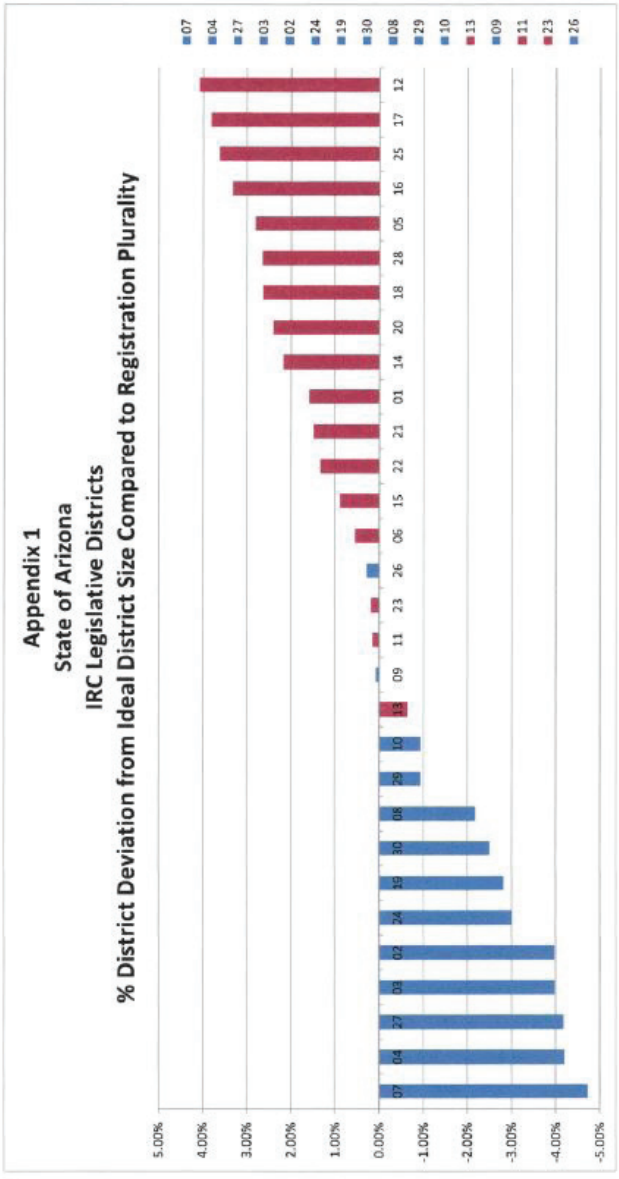
APPENDIX G — STATE OF ARIZONA, IRC LEGISLATIVE DISTRICTS, % DISTRICT DEVIATION FROM IDEAL DISTRICT SIZE COMPARED TO REGISTRATION PLURALITY



APPENDIX H — A.R.S. § 16-1103

§ 16-1103. Legislative and congressional redistricting; census enumeration

For purposes of adopting legislative and congressional district boundaries, the legislature or any entity that is charged with recommending or adopting legislative or congressional district boundaries shall make its recommendations or determinations using population data from the United States bureau of the census identical to those from the actual enumeration conducted by the bureau for the apportionment of the representatives of the United States house of representatives in the United States decennial census and shall not use census bureau population counts derived from any other means, including the use of statistical sampling, to add or subtract population by inference.

APPENDIX I — RELEVANT CONSTITUTIONAL AMENDMENT

U.S.C.S. Const. Amend. 14, § 1

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J — RELEVANT STATUTES

42 U.S.C.A. § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Appendix J

42 U.S.C.A. § 1973c. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose

nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

APPENDIX K — EXPERT REPORT OF THOMAS BROOKS HOFELLER PH.D.

Expert Report of Thomas Brooks Hofeller Ph.D.

Harris, et al. v. Arizona Independent Redistricting Commission, et al.
No. CV 12-0894-PHX-ROS-NVW-RCC

Expert Qualifications

I am a Partner in Geographic Strategies, LLC, located in Columbia, South Carolina. Geographic Strategies provides redistricting services including database construction, strategic political and legal support planning in preparation for actual line drawing, support services and training on the use of geographic information systems (GIS) used in redistricting, analysis of plan drafts, and actual line-drawing when requested. The corporation and its principals also provide litigation support.

I hold a Ph.D. from Claremont Graduate University, where my major fields of study were American political philosophy, urban studies and American politics. I hold a B.A. from Claremont McKenna College with a major in political science.

I have been involved in the redistricting process for over 46 years, and have played a major role in the development of computerized redistricting systems, having first supervised the construction of such a system for the California State Assembly in 1970-71. I have been active in the redistricting process leading up to and following

each decennial census since 1970. I have been intimately involved with the construction of databases combining demographic data received from the United States Census Bureau with election results which are used to determine the probable success of parties and minorities in proposed and newly enacted districts. Most of my experience has been related to congressional and legislative districts, but I have also had the opportunity to analyze municipal and county-level districts. I served for a year and a half as Staff Director for the U.S. House Subcommittee on the Census in 1998-99. I was Staff Director of the Subcommittee when the Census Bureau was proposing to substitute the American Community Survey (ACS) for the use of the decennial long form questionnaire in the 2000 and previous decennial Censuses. The long form was not used in the 2010 Decennial Census. I have drafted and analyzed plans in most states including, but not limited to, California, Nevada, Arizona, New Mexico, Colorado, Texas, Oklahoma, Kansas, Missouri, Minnesota, Wisconsin, Illinois, Indiana, Ohio, Arkansas, Mississippi, Louisiana, Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia, New York, New Jersey and Massachusetts.

In this decennial round of redistricting, I have already been intensely involved in Texas, Alabama, North Carolina, Virginia and Massachusetts. As much of my consulting activity involves work in states subject to the provisions of Section 5 of the Voting Rights Act, I am very familiar with the data used to analyze the expected performance of redrawn and newly-created minority districts. I regularly advise clients about the

characteristics of minority districts in their plans, and whether or not they meet the requirements of both Sections 2 and 5 of the Voting Rights Act.

I have given testimony as an expert witness in a number of important redistricting cases including, but not limited to, *Gingles v, Edmisten*, 590 F. Supp. 345 (N.D.N.C. 1984), *aff'd in part and rev'd in part Thornburg v. Gingles* 478 U.S. 30 (1986); *State of Mississippi v, United States*, 490 F. Supp. 569 (D.C.D.C. 1979); *Shaw v. Hunt*, 92-202-CIV-5-BR, U.S. District Court for the Eastern District of North Carolina, Raleigh Division (1993-4); *Ketchum v. Byrne*,740 F.2d 1398, *cert. denied City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985), *on remand, Ketchum v. City of Chicago* 630 F. Supp. 551 (N.D. Ill. 1985); and *Arizonans for Fair Representation v. Symington*, CIV 92-0256, U.S. District Court Arizona (1992), *aff'd mem. sub nom. Arizona Community Forum v. Symington*, 506 U.S. 969 (1992).

I have done considerable work regarding compactness as a criterion in redistricting maps, including but not limited to a work I coauthored in *The Journal of Politics*, "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering." *Id*., Vol. 52, No. 4 (Nov., 1990), pp. 1155-1181 (with Richard G. Niemi, Bernard Grofman, and Carl Carlucci).

A copy of my curriculum vitae, which sets forth additional qualifications, my publications, and all cases in which I have testified as an expert witness at trial or by deposition, is attached hereto as *Exhibit A*.

Appendix K

Fee Disclosure

The work I am performing in support of this litigation is being paid by the Republican National Committee as part of a general contract to provide litigation support to various potential Republican litigants with Geographic Strategies LLC, billing the RNC at the rate of $16,000 per month.

Documents Reviewed

I reviewed the following documents in the preparation of this expert report,

1. Legislative Draft Map Competitiveness Report

2. Final Legislative Districts Compactness and Competitiveness Data Table

3. Districts with Registration Shifts Over 1% From Draft to Final Plans

4. My June 25, 2012 and September 7, 2012 Affidavits, including the documents attached thereto

5. The Final Congressional Map adopted on January 17, 2012, by the Arizona Independent Redistricting Commission ("IRC")

6. The Final Legislative Map adopted on January 17, 2012 by the IRC

7. The IRC's four reports accompanying each of the two maps as published on its website

8. The IRC's three data files accompanying each of the reports as published on its website

9. The 2010 Decennial Census data as it pertains to the State of Arizona

10. The 2010 5-year estimates from the U. S. Census Bureau's American Community Survey ("ACS")

11. IRC Splits Reports

12. Plaintiffs' Application for Preliminary Injunction and the exhibits attached thereto

13. The prior legislative plan, referred to herein as the Benchmark Plan, using the 2010 Decennial Census Redistricting Data File and the ACS

14. A CD containing a computerized district to census block assignment file that was delivered to opposing counsel with my June 25, 2012 Affidavit provided in this matter.

Factual Background

1. The 2010 Census report discloses that Arizona's 2010 population was 6,392.017.

2, Ariz. Const. art. 4, pt. 2, § 1(1) provides for 30 legislative districts. Thus, the ideal population for an Arizona legislative district is 213,067.

3. The technology of demographics has evolved to the point that demographers, assisted by computer GIS software, are capable of drawing legislative districts of precisely equal population, They are also capable of using this same technology to create intentional and arbitrary deviations from the ideal population in order to attain partisan and other political gains. The IRC 2011 Legislative Plan's range of district deviations from +4.07% to -4.71% is remarkably and unnecessarily wide, given Arizona's large ideal district population and the absence of any rational state criteria requiring such a wide range of deviation.

4. For purposes of this Report, I will refer to Republican districts, which contain more registered Republicans than Democrats (Republican registration plurality). Democrat districts contain more registered Democrats (Democrat registration plurality than Republicans. With one exception, every Republican district exceeds the ideal population of 213,067 residents, These include Districts 1, 5, 6, 11, 12, 14-18, 20-23, 25, and 28. The exception is District 13, which is only 0.64% below ideal population.

5. All of the 14 most overpopulated districts are Republican. All of the 12 under-populated districts, save one (District 13) are Democrat. The four remaining districts are all over-populated by less than 0.30%. Of

them, Districts 9 and 26 are Democrat and Districts 11 and 23 are Republican.

6. With just two exceptions, every Democrat district falls short of the ideal population of 213,067 persons. The over-populated Democrat districts are only slightly over-populated than the ideal -- District 9 by 0.07% and District 26 by 0.28%. The under-populated Democrat Districts are 2-4, 7, 8, 10, 13, 19, 24, 27, 29, and 30. Eighty-nine percent of the overpopulated districts are Republican and ninety-two percent of the under-populated districts are Democrat,

7. One Democrat district -- District 7 -- falls below population equality by 4.71 percent, the largest absolute deviation in the plan. District 7 is also the only Native American legislative district in the State. Four Democrat districts fall below by more than 3.5 percent: District 4 at 4.19 percent, District 27 at 4.16 percent, and Districts 3 and 2 at 3.97%. Four more fall below by more than 2 percent: District 24 at 3.01 percent, District 19 at 2.81 percent, District 30 at 2.49 percent, and District 8 at 2.18%.

8. On average the 11 under-populated Democrat districts fall short of the ideal by 3.03%. This high average population deviation indicates that an abnormal number of the Democratic districts are underpopulated and, indeed, underpopulated in excess of 3%. One would expect a more normal distribution of the deviations along the scale from minus 5% to plus 5%, unless these deviations were intentional.

9. Appendix 1 contains a bar chart showing the amplitude of deviation of each district with each district's bar colored according to party registration plurality. The bars colored green are the districts with Democrat pluralities, while the red bars are Republican.

10. I examined the Hispanic citizen voting age population ("HCVAP") and HVAP of the previous legislative map (the Benchmark Plan), as well as the election results from the 2002 through 2010 elections, to analyze the degree to which Hispanic candidates were elected in the seven districts with the highest HVAP.

11. Hispanic citizen voting age percentages were calculated using the U. S. Census Bureau's 2010 release of the American Community Survey (ACS). The lowest level of geography for which ACS data are compiled is the 2010 census block group. Using the ACS data in combination with the district block identification file generated from the Maptitude for Redistricting GIS system, it was possible to identify those block groups which have either 50% or 75%o of a district's population in them, The HCVAP data are then summarized for each district at both the 50% and 75% level. These tables are attached as Tables 1 and 2.

12. The legislative redistricting map pre-cleared by the Department of Justice in 2003 only contained one majority-minority citizen voting age population (CVAP) district. This district, Benchmark District 13, is one of only two districts in the Benchmark Plan which has consistently elected Hispanic candidates of choice in all three legislative seats within the district (There are

two House and one Senate seat – all elected at-large in each legislative district). As discussed below, the map produced a decade earlier obviously performed below expectations and well below proportionality for Hispanic voters in Arizona. According to the results of the 2010 ACS, Hispanics citizens of voting age comprise 17.89%o of Arizona's total citizen voting age population. Proportionality in terms of legislative districts for Arizona is, therefore, 5.37 districts which would be the equivalent of five state senators and 10 state house seats.

13. In the old IRC plan used in the 2010 election, four Hispanic senators were elected. All are Democrats. Seven Hispanic representatives, one of whom is a Republican, were elected to the House of Representatives. If Arizona had five HCVAP majority legislative districts one could expect the election of 5 Hispanic senators and 10 state house members.

14. The Benchmark Plan only contains two districts in which the Hispanic candidates have been consistently elected to both the one state senate and two state house seats in each of these districts. The first is Benchmark District 13, in Maricopa County (West Phoenix, Central Avondale and Tolleson, which has a HCVAP of 51.50% and a HVAP of 68.27%. The second is Benchmark District 27, Pima County (primarily the west side of Tucson), which has a HCVAP of 43.67% and a HVAP of 49.89. Benchmark Districts 14 and 16 also have HCVAP percentages in the mid-forty percent range. Benchmark District 14 has a HCVAP of 44.27% and a HVAP of 64.90%, while Benchmark District 16 has a HCVAP of 44.27% and a

HVAP of 56.74. Benchmark District 16 also has an African-American CVAP of over 18% - by far the highest in any legislative district. Benchmark District 14 elects primarily non-Hispanic white candidates while Benchmark District l6 elected either Hispanic or African-American candidates in the last 5 previous elections. The IRC's map fractured both county and city boundaries in order to craft their purported Hispanic districts.

15. Enacted-2011 District 13 is one of only two legislative districts in Arizona that have consistently elected the Hispanic community's candidates of choice to all three legislative seats throughout the decade. It is also the only legislative district which currently has a majority HCVAP. Remarkably, this district is the second most retrogressed district in the IRC's entire plan. Moreover, the IRC has so radically shifted District l3 and its surrounding area that it is now difficult to know exactly which district it should be compared to in the IRC's Plan. Just over 56% of the Hispanics in Benchmark District 13th are now located in new District 29 and just over 38% are now located in new District 19. The newly-Enacted 29th District draws just under 50% of its Hispanics from the Benchmark 13th District. This scrambling of benchmark districts, absent overriding state criteria, is highly uncommon in a Voting Rights Act state. Despite this issue, one point of comparison is inescapable: there is no legislative district in the Commission's 2011-Enacted plan that has a majority of Hispanic citizens of voting age.

16. The IRC's Final Legislative Map contained what the IRC purported to be seven "Hispanic opportunity districts." The seven are Districts 2, 3, 4, 19, 27, 29, and 30.

Appendix K

17. Table 1 below shows the Hispanic voting-age population ("HVAP") of the seven so called "opportunity" districts using the IRC's population breakdowns. The chart also shows the Hispanic HCVAP of these seven districts, as drawn from the 2010 American Community Survey, and compiled on Exhibit 7 to Plaintiffs' Application for Preliminary Injunction.

Table 1: Hispanic "Opportunity Districts"

Legislative District	Percentage HVAP	Percentage HCVAP
2	52.8%	41.29%
3	50.1%	43.59%
4	55.7%	45.38%
19	60.4%	46.26%
27	52.1%	39.82%
29	61.9%	43.88%
30	50.7%	33.01%

18. As shown in Table 2 below, of the seven purported Hispanic districts contained in the Final Legislative Map, five have HCVAP percentages that are retrogressed from the Benchmark Plan. All but one of these districts has a population significantly under the ideal district population of 213,067. The seven districts average a deviation of -2.2%. The seven districts' cumulative under-population is 32,588 persons from the ideal. Appendix 3 is a table which contains VAP and CVAP data for the IRC's so-called 2011 purported Hispanic Districts compared to the Hispanic districts in the Benchmark plan.

Appendix K

Table 2: HCVAP Retrogression

New Legislative District	Percentage HCVAP Retrogression from the Benchmark District
3	0.08 -
19	5.24 -
27	3.29 -
29	7.62 -
30	11.26 -

19. As shown on IRC's splits report, the Final Legislative Map split five of Arizona's 15 counties twice, and split another five counties more than twice. It left only five counties in a single district. The Final Legislative Map split the City of Glendale's population among five districts, the City of Peoria's population among three districts, the City of Mesa's population among 4 districts, the City of Tempe among three districts, the City of Surprise among three districts, the City of Scottsdale's population among two districts, and the City of Chandler's population among two districts. There was further fragmentation of these cities among more districts, but the populations in those splits were minor.

20. The firm hired as the IRC's mapping consultant, Strategic Telemetry, had no prior redistricting experience. Strategic Telemetry had other aptitudes, however, including political campaign advisory skills and voter behavior micro-targeting skills.

Appendix K

Expert Opinion

The IRC's Final Legislative Map

21. In my expert opinion, the only logical explanation for the systematic overpopulation of Republican-leaning districts and systematic under-population of Democrat-leaning districts is to maximize the number of Democrat-leaning districts, and to pack excess population into Republican-leaning districts.

22. This high average population deviation indicates that an abnormal number of these districts are overpopulated and, indeed, overpopulated in excess of 3%. One would expect a more normal distribution of the deviations along the scale from minus 5% to plus 5% unless these deviations were intentional. If the IRC had been drawing with equal population as a principal criterion, most of the districts would be expected to be within +/-1% of the ideal. Only nine of the IRC's 2011 districts are that close. If the IRC had used neutral redistricting criteria as its guiding principle in drawing the map, one might see some population deviations higher than 1%, but the pattern of district deviations would not correlate with partisanship to anywhere near the extent as seen in the IRC's plan. The only logical explanation is that the IRC's pattern of deviations was intended to have a partisan effect.

23. A complementary explanation for the wide range of deviations in the IRC's 2011 Legislative Plan becomes evident when one examines the correlation between the underpopulated districts and the minority percentages in

those districts. This correlation is even stronger than the partisan deviation correlation. A chart demonstrating this pattern is contained in Appendix 2. The five most under-populated districts in the IRC's 2012 map are also five of the districts which the Commission identified as so-called "minority opportunity districts." One of these districts is Native American and the other four are Hispanic. All seven of the districts which the IRC describes as so-called "Hispanic opportunity districts" are under-populated. The ten most under-populated districts in the IRC's 2012 map all have a total voting age minority populations in excess of 50% (less than 50% non-Hispanic adult whites). Only one additional legislative district has a voting age minority population in excess of 50%. That is District 26, which has a population only .28% over the ideal. There was no valid justification for this pattern of deviations as will be further discussed below.

24. One way to measure district deviations is in terms of the difference between the most and least populous district called top-to-bottom, overall range or total deviation. For the IRC's 2011 Legislative Plan total deviation would be calculated by taking the percentage deviation of most populous district (District 10 +4.07%) and adding to it the percentage deviation of the least populous district (District 7 -4.71%). Those two percentages are added together without the negative sign (absolute value) to yield an overall deviation range (or total deviation) of 8.79%. Another problem with the IRC's plan is that it only kept its district deviations within 2% for 12 districts and within 1% for 9 districts. In contrast, the California Citizens Redistricting Commission managed

to construct all 40 state senate districts all within a total deviation of 2% and with 12 of 40 districts with 1%. Other states such as Florida, Georgia, Iowa, Minnesota and Nevada were able to keep their state senate district plan total deviations below 2%. Indiana, Oregon and Virginia drew theirs below 4%.

25. Had the IRC properly followed the criteria for drawing districts mandated by ARIZ CONST. art. 4, pt. 2, § 1(14), it could not have made all but one Republican district over-populated and all but two Democrat districts under-populated. That such results occurred by chance defies all logic and probability.

26. Leaving aside the legal question of whether the Voting Rights Act can ever require a violation of the 14th Amendment's one person - one vote principle, it was totally unnecessary for the IRC to have created its high deviations or patterns of deviations, in order to draft its so-called Hispanic minority districts at the percentages of Hispanic voting age population (HVAP) found in the enacted map. The collective under-population of the IRC's seven Hispanic districts is 32,588 persons from what it would have been if all the districts were draw at the ideal population.

27. Yet there are a number of whole or split precincts on the boundaries of the IRC's seven so-called Hispanic districts persons which have very high percentages of Hispanic adults and contain about 87,500 persons. My analysis has shown that these seven districts could have been drafted at or above the ideal district population with

the same or higher level of Hispanic VAP. This is also true for the new 7th District, which the IRC drew with a Native American VAP of 63.1%. This district can be drawn with a population deviation of .02% with a Native American VAP of 61.0%, more than enough to qualify this as a Native American majority district. Thus, the only reasonable conclusion is that these highly Hispanic precincts have been deliberately separated from the IRC's purposed seven Hispanic districts to use their high percentages of Democratic votes to shore up the partisan composition of neighboring Democrat districts, or to directly or indirectly weaken Republican districts.

28. My study further indicates that the ratio of HCVAP (Hispanic citizen voting age population) compared to HVAP (both citizens and non-citizens Hispanic voting age population) is much higher in the Tucson area than the Phoenix area.

29. I conclude that the IRC could have drawn at least four majority Hispanic citizen voting age districts and at least one more majority minority citizen voting age district. The IRC decided instead to create 7 purported and weak, Hispanic districts, only two of which had HCVAP's above the HCVAP of Benchmark District 27. Even worse, 2011-Enacted District 29, the successor district to Benchmark District 13 had its HCVAP reduced from 51.50% to 43.88%.

30. The IRC had the opportunity to draw these seats extremely close to or over 50% HCVAP, which it did not. Three of these districts could have been in Maricopa

County, one in Pima County and one running along the State's southern border from Yuma to Nogales. What the IRC elected to do was to create 7 even weaker seats.

31. All these facts guide me to the conclusion that the IRC map drafters created all their Democrat legislative districts with negative population deviations, including the minority districts, in order to move substantial numbers of Hispanic voters into neighboring non-Hispanic white Democrat districts to shore up the Democrats' partisan advantage. What the Commission should have done was to place more population in the underpopulated districts so as to eliminate the dilution of voters in the overpopulated districts. It is clear from the numbers in this report that this could have been done without affecting the ability of Hispanics to elect candidates of their choice.

32. The IRC appeared to have engaged in intentional invidious dilution of Hispanic voting strength throughout the map. The IRC systematically spread Hispanic Democrats into predominantly non-Hispanic white Democrat districts in order to increase the strength of Democratic registration pluralities in them. Conformance with the Voting Right Act is factually clearly not a rationale for the IRC's violation of the equal population standard. Once again, the IRC weakened the ability of the Hispanic community to elect Hispanic candidates of their choice in order to elect more non-Hispanic white Democrats.

33. The lack of Hispanic members in the Arizona House of Representatives could also be tied to the interplay of the minority compositions of these districts and the use

of the multimember district election structure for the Arizona House of Representatives. The multimember districts used for House of Representatives elections combined with the Arizona "first past the post" election method can make it difficult for Hispanic candidates to win nomination or election to one, or sometimes both, of the House of Representatives seats when multiple Hispanic candidates run in the Democratic primary, or general, unless Hispanics constitute a majority of the HCVAP within the district. In the new plan approved by the IRC, no legislative district would have a majority of HCVAP.

34. The percentage HCVAP identified in Table 1 (Hispanic "Opportunity Districts") are inadequate HCVAP percentages to consistently allow the Hispanic community to elect candidates of their choice in Districts 2, 3, 4, 19, 27, 29, and 30.

35. An analysis of the percentages of retrogression in Final Legislative Map in terms of HCVAP (see Table 2) reveals that the IRC majority of Ms. Mathis, Mr. Herrera, and Ms. McNulty deliberately diluted the voting strength of Hispanic voters to protect Democratic districts.

36. The only possible explanation for these facts is that the individuals who were drawing the maps for the Arizona Commission were engaged in intentional political vote dilution. Their method for accomplishing this was to dilute the Hispanic voting strength as much as was politically possible so that they could use these Hispanic Democrats to shore up non-Hispanic white Democratic candidates. The Commission then increased

the Hispanic Democrat percentages for this purpose by under-populating the Hispanic districts. The Commission then artificially increased Democrat electoral strength even more by under-populating the non-Hispanic white Democrat districts so that fewer Democrat votes were necessary in order to control these districts. This fact was still further enhanced by removing Republican voters from these under-populated non-Hispanic white Democrat districts and placing them in highly Republican and massively overpopulated districts.

37. It would not have been necessary for the IRC's mapping consultant, Strategic Telemetry, to use partisan election results to understand exactly what was being done here. Strategic Telemetry is a Washington, D.C. based firm, serving primarily Democrat clients and which specializes in correlating election data with demographic data.

38. Factoring in the effect of under-population of both the Hispanic and adjacent Democrat districts, coupled with ethnic fragmentation, creates a deliberate and classic example of political vote dilution. It also represents a dilution of the votes of all registered voters in the overpopulated districts. This effect is further exacerbated by the low citizen voting age population percentages in some of the most underpopulated districts. My study also demonstrates that as the decade progresses this effect will intensify as all but one of the districts which presently have Democrat voter registration pluralities will become even more underpopulated relative to the 2020 ideal population, This is shown in Appendix 4 which is a chart

upon which the Democrat districts are represented by blue bars and the Republican districts by red bars.

39. These facts show that the IRC could have made up these districts' population shortfalls with minor adjustments in district lines, but chose not to do so to benefit Democrat incumbents or to increase the number of Democratic-leaning districts.

40. Respecting the neutral goals of city, town, and county boundaries, undivided census tracts, communities of interest, compactness, and contiguity, did not require the IRC's deviation from equality among legislative districts, as Plan X discussed below illustrates.

41. Respecting boundaries of counties, cities, towns, reservations, communities of interest, and undivided census tracts did not require the high deviations contained in the IRC's 2011 Legislative Plan. In my study, I was able to draft a plan with deviations under +/-.5%, the same number of split cities, town and reservations, and better compactness scores. Maps of this sample plan are attached as an appendix to my June 25, 2012 Affidavit provided in this case.

42. Neither compactness nor contiguity bears any relation to the IRC's deliberate overpopulation of Republican districts and under population of Democrat districts.

43. All my studies prove that the IRC has no valid reason for its violation of the one-person, one vote rule.

44. Despite its lack of prior redistricting experience, Strategic Telemetry's other political analysis abilities to correlated voter registration with voter behavior would allow it to carve out districts that might appear neutral but which, in fact, would maximize, to greatest extent possible, the Democrats 2011 redistricting goals.

45. In conclusion, it is my expert opinion that there is no logical or reasonable explanation for the deviations in the IRC's legislative redistricting scheme other that they were intentionally created with the invidious, discriminatory purpose of gerrymandering on the basis of partisanship and ethnicity. Additionally, I conclude that a plan with districts of equal or better Hispanic voting strength, but with less division of cities, towns and communities of interest, could have been drafted by the IRC with deviations under +/-.5% from the ideal.

Plan X: Minimal Population Deviations

46. The subject of my September 7, 2012 Affidavit in this matter was to create a legislative district plan for Arizona that (a) contains the number of what the IRC contend are Latino districts required by the mandates of sections 2 and 5 of the federal Voting Rights Act, and (b) includes minimal population deviations. I used the IRC's definitions of a Latino district in Plan X, even though it is my expert opinion that many of the "so called" Latino districts in Plan X, as well as in the IRC's Final Legislative Map, are not functional minority districts. I did this only to prove that they did not have to create these districts with excessively high negative deviations.

Appendix K

47. Using the IRC's Final Legislative Plan as a starting point I drafted a new legislative map I called Plan X. My goal was to: bring the deviations of the districts down as low as practicable, honor city and county boundaries, and maintain the same or greater percentages of adult Latino population as in the IRC redistricting scheme for Legislative Districts 2, 3, 4, 19, 27, 29 and 30.

48. Plan X clearly fulfills those requirements. The adult Latino populations are the same or greater, cities and county boundaries have been respected to the extent practicable, and the population deviations of the districts range from a high of +0.19% to a low of -0.19%. This gives Plan X a total deviation of 0.38%, which is more in line with the deviation percentages found in the map draw by the IRC in the last redistricting cycle. Chart 1, attached to my September 7, 2012 Affidavit, contains the demographic information for Plan X.

49. Since Plan X only took 2 days to draw, it is my expert opinion that the actual plan drafters employed by the IRC would have been fully aware that the high deviations contained for districts in the IRC's Final Legislative Plan were not necessary to fulfill the IRC's requirements under the VRA. It is also important to note that while the Commission's enacted plan split 70 census places, of which 17 were zero population splits, Plan X only splits 47 places, of which 3 were zero population splits.

50. It is also my expert opinion that plan drafters and the majority of members voting for the Final Legislative Map appear to have engaged in a cynical process of

deliberately under populating Democratic districts (including all seven of those districts which the IRC contends were their Latino districts) in violation of *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), aff'd 542 U.S. 947 (2004), to advantage of future Democrat legislative candidates. I also contend that there is no basis, under the requirements of Arizona redistricting criteria, for such high deviations.

51. Chart 2, attached to my September 7, 2012 Affidavit, lists the 7 "so called" Latino districts in question along with the percentages of adult Hispanic population for these 7 districts in both Plans.

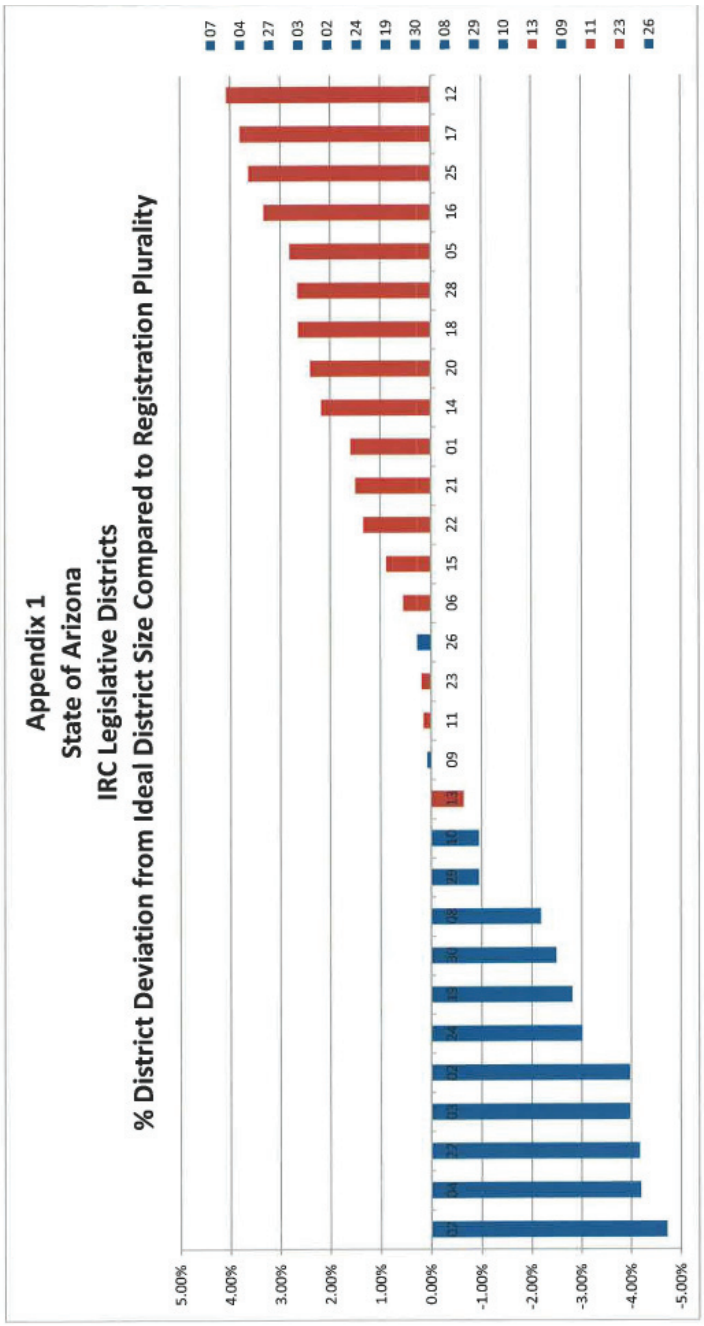
52. My opinions are unquestionably supported by Plan X, for which the maps and data are attached to this affidavit along with an electronic block file containing one record for each 2012 census block in Arizona and the district to which it is assigned in Plan X.

I declare under penalty of perjury that the foregoing is true and correct.

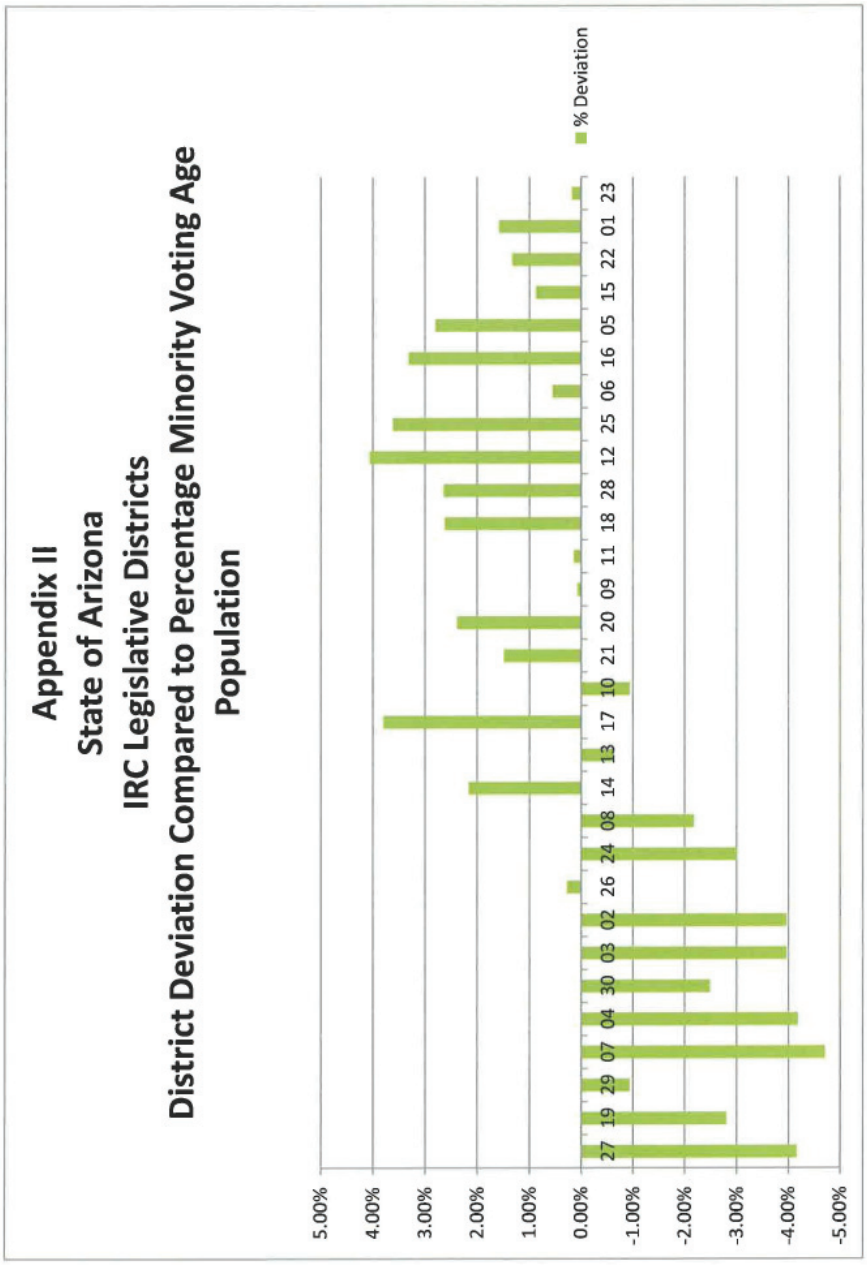
Dated: December 17, 2012

/s/_____
Thomas Brooks Hofeller, Ph.D.

Appendix K


Appendix 1
State of Arizona
IRC Legislative Districts
% District Deviation from Ideal District Size Compared to Registration Plurality
07 04 27 03 02 24 19 30 08 29 10 13 09 11 23 26
12 17 25 16 05 28 18 20 14 01 21 22 15 06
5.00%
4.00%
3.00%
2.00%
1.00%
0.00%
-1.00%
-2.00%
-3.00%
-4.00%
-5.00%

Appendix K


Appendix II
State of Arizona
IRC Legislative Districts
District Deviation Compared to Percentage Minority Voting Age Population
% Deviation
5.00%
4.00%
3.00%
2.00%
1.00%
0.00%
-1.00%
-2.00%
-3.00%
-4.00%
-5.00%
27 19 29 07 04 30 03 02 26 24 08 14 13 17 10 21 20 09 11 18 28 12 25 06 16 05 15 22 01 23

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APPENDIX 3

STATE OF ARIZONA- LEGISLATIVE DISTRICTS

RETROGRESSION ANALYSIS FOR HISPANIC DISTRICTS

Comparing Benchmark to 2011 Enacted Districts

Using Citizen Voting Age Population*

Benchmark District	% Hispanic CVAP	Enacted District	% Hispanic CVAP	Percent Above or Below Bench
13**	51.50	19	46.26	-5.24
	51.50	29	43.88	-7.62
14	44.27	30	33.01	-11.26
16	43.11	27	39.82	-3.29
24	39.74	4	45.38	5.64
27	43.67	3	43.59	-0.08
29	38.66	2	41.29	2.63
13	51.50	29	43.88	-7.62

Source: U. S. Census Bureau - 2006-2010 American Community Survey
2010 Decennial Census Data - Redistricting Data Set

NOTE: Districts were matched using both a District Core Analysis and an incumbency Pairing Report. There were 5 Democrat to Democrat, 13 Republican to Republican, and 10 Republican to Democrat pairings.

* Populations were based on all Census Blocks from the ACS that had more than 75% of its population contained within the legislative district.

** There is some ambiguity in designating the Benchmark 13th District as becoming the Enacted 19th or 29th District. Either way it is retrogressed.

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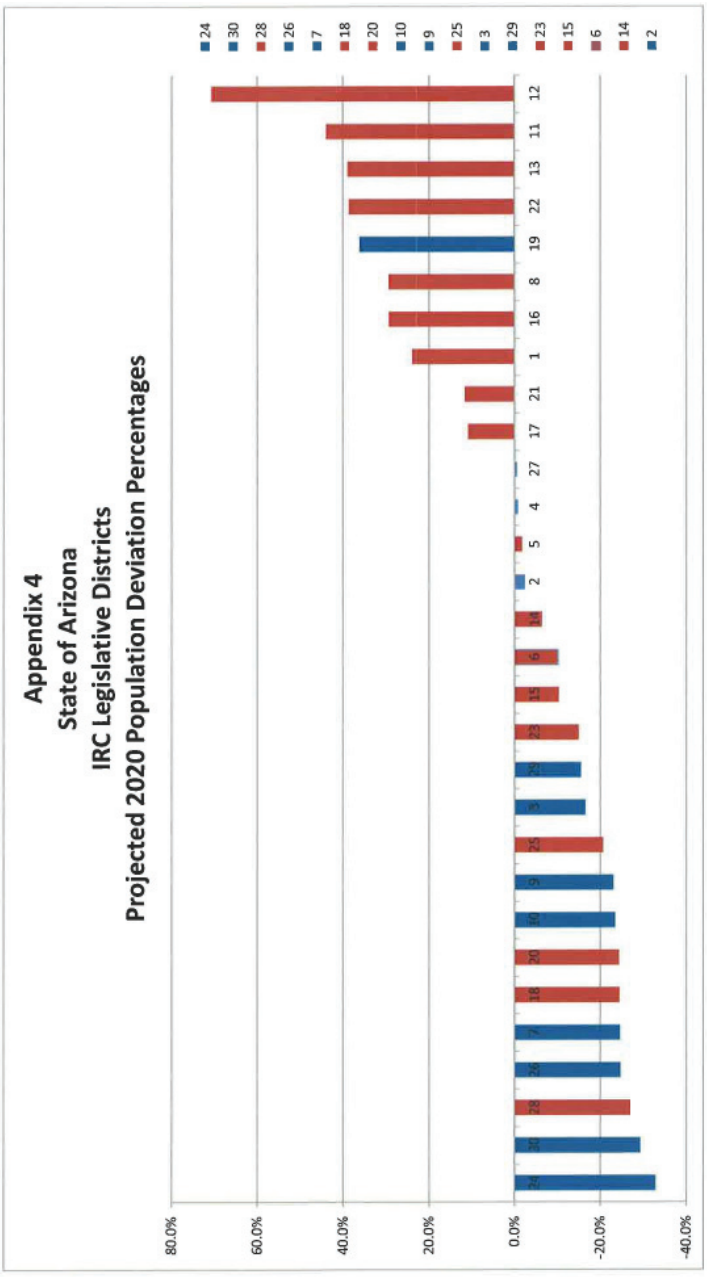
Appendix 4
State of Arizona
IRC Legislative Districts
Projected 2020 Population Deviation Percentages
80.0%
60.0%
40.0%
20.0%
0.0%
-20.0%
-40.0%

Appendix K

STATE OF ARIZONA

2012 AIRC ENATED LEGISLATIVE PLAN

Individual District Deviations Calculated Using Total Citizen Voting Age Population (TCVAP) as the Base - Sorted by Percent Deviation

District	HCVAP	% HCVAP	TCVAP	TCVAP Deviation	TCVAP % Deviation
29	42,432	43.80%	96,877	-39,525	-28.98%
27	42,910	43.30%	99,099	-37,303	-27.35%
19	47,169	47.50%	99,303	-37,099	-27.20%
4	42,790	42.90%	99,744	-36,658	-26.88%
8	32,245	30.50%	105,721	-30,681	-22.49%
30	35,571	32.90%	108,119	-28,283	-20.74%
2	45,508	41.10%	110,725	-25,677	-18.82%
13	23,429	19.60%	119,536	-16,866	-12.37%
12	15,949	12.40%	128,621	-7,781	-5.70%
26	24,140	8.90%	129,091	-7,311	-5.36%
3	55,904	43.10%	129,708	-6,694	-4.91%
11	19,747	14.70%	134,333	-2,069	-1.52%
21	20,698	15.30%	135,281	-1,121	-0.82%
24	30,860	22.80%	135,351	-1,051	-0.77%
7	6,450	4.70%	137,234	832	0.61%
22	9,911	7.10%	139,592	3,190	2.34%
14	32,188	22.70%	141,797	5,395	3.96%

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17	20,229	14.10%	143,468	7,066	5.18%
16	13,387	9.20%	145,511	9,109	6.68%
1	9,112	6.20%	146,968	10,566	7.75%
15	10,166	6.90%	147,333	10,931	8.01%
6	11,868	8.00%	148,350	11,948	8.76%
5	14,425	9.10%	158,516	22,114	16.21%
25	15,544	9.80%	158,612	22,210	16.28%
28	14,373	8.90%	161,494	25,092	18.40%
10	26,172	15.90%	164,604	28,202	20.68%
20	21,418	13.00%	164,754	28,352	20.79%
18	18,319	11.10%	165,036	28,634	20.99%
9	23,354	14.10%	165,631	29,229	21.43%
23	6,694	3.90%	171,641	35,239	25.83%
Total	732,962	17.91%	4,092,050	-10	-0.01%

Source: AIRC Submission to DOJ Requesting Preclearance ("Proposed Legislative Plan Demographic Data")

Note #1: Individual district TCVAP is calculated by dividing the district HCVAP by the district percentage HCVAP.

Note #2: Ideal district TCVAP population is computed by dividing the total statewide TCVAP by 30 yielding an ideal district TCVAP of 136,402.

Note #3: Red = AIRC Clined Hispanic - Purple = Elected both Dems and Reps - Blue = Other Dem Districts - Green = Native American District

APPENDIX L — ARIZONA INDEPENDENT REDISTRICTING COMMISSION 2012 CONGRESSIONAL DISTRICT POPULATION DATA TABLE

Final Legislative Districts - Approved 1/17/12 - Population Breakdown

Final Legislative Districts - Approved 1/17/12 - Population Breakdown

District	Population	Deviation from Ideal Population		Hispanic Population		Non-Hispanic (NH) White		NH African American		NH Native American		NH Asian		NH Hawaiian		NH Multi-Race and Other	
		#	%	#	%	#	%	#	%	#	%	#	%	#	%	#	%
1	216,451	3,383	1.6%	24,035	11.1%	181,967	84.1%	1,913	0.9%	1,789	0.8%	2,812	1.3%	205	0.1%	3,730	1.7%
2	204,615	-8,452	-4.0%	121,900	59.6%	69,116	33.8%	5,909	2.9%	2,702	1.3%	2,302	1.1%	191	0.1%	2,495	1.2%
3	204,613	-8,454	-4.0%	115,569	56.5%	67,222	32.9%	6,053	3.0%	7,611	3.7%	4,750	2.3%	189	0.1%	3,219	1.6%
4	204,143	-8,924	-4.2%	123,594	60.5%	58,192	28.5%	5,891	2.9%	11,559	5.7%	2,083	1.0%	198	0.1%	2,626	1.3%
5	219,040	5,972	2.8%	34,316	15.7%	172,081	78.6%	1,822	0.8%	4,609	2.1%	2,106	1.0%	320	0.1%	3,786	1.7%
6	214,244	1,176	0.6%	33,176	15.5%	159,161	74.3%	2,004	0.9%	13,062	6.1%	2,406	1.1%	230	0.1%	4,205	2.0%
7	203,026	-10,041	-4.7%	13,878	6.8%	50,373	24.8%	914	0.5%	133,830	65.9%	757	0.4%	78	0.0%	3,196	1.6%
8	208,422	-4,645	-2.2%	72,456	34.8%	104,152	50.0%	9,211	4.4%	14,534	7.0%	3,042	1.5%	1,261	0.6%	3,766	1.8%
9	213,224	156	0.1%	46,661	21.9%	146,025	68.5%	5,917	2.8%	2,065	1.0%	7,573	3.6%	317	0.1%	4,666	2.2%
10	211,073	-1,994	-0.9%	49,128	23.3%	138,868	65.8%	9,556	4.5%	1,807	0.9%	6,076	2.9%	425	0.2%	5,213	2.5%
11	213,377	309	0.1%	48,249	22.6%	145,091	68.0%	7,160	3.4%	3,108	1.5%	5,124	2.4%	273	0.1%	4,372	2.0%
12	221,735	8,667	4.1%	34,578	15.6%	162,476	73.3%	6,797	3.1%	1,385	0.6%	10,823	4.9%	377	0.2%	5,299	2.4%
13	211,701	-1,366	-0.6%	66,106	31.2%	126,954	60.0%	7,530	3.6%	1,757	0.8%	4,990	2.4%	299	0.1%	4,065	1.9%
14	217,693	4,625	2.2%	67,082	30.8%	132,552	60.9%	7,070	3.2%	1,851	0.9%	3,654	1.7%	506	0.2%	4,978	2.3%
15	214,941	1,873	0.9%	22,035	10.3%	172,110	80.1%	4,086	1.9%	1,359	0.6%	10,720	5.0%	254	0.1%	4,377	2.0%
16	220,157	7,089	3.3%	36,222	16.5%	169,113	76.8%	4,816	2.2%	1,776	0.8%	3,734	1.7%	363	0.2%	4,133	1.9%
17	221,174	8,106	3.8%	47,472	21.5%	140,660	63.6%	9,238	4.2%	2,221	1.0%	16,160	7.3%	362	0.2%	5,061	2.3%
18	218,677	5,609	2.6%	31,641	14.5%	153,658	70.3%	10,190	4.7%	3,190	1.5%	13,997	6.4%	549	0.3%	5,452	2.5%
19	207,088	-5,979	-2.8%	134,862	65.1%	45,004	21.7%	16,061	7.8%	2,350	1.1%	4,855	2.3%	365	0.2%	3,591	1.7%
20	218,167	5,099	2.4%	46,856	21.5%	148,114	67.9%	8,325	3.8%	2,947	1.4%	6,714	3.1%	373	0.2%	4,838	2.2%
21	216,242	3,174	1.5%	53,053	24.5%	143,644	66.4%	8,819	4.1%	1,562	0.7%	4,485	2.1%	307	0.1%	4,372	2.0%
22	215,912	2,844	1.3%	22,375	10.4%	175,513	81.3%	5,822	2.7%	839	0.4%	7,117	3.3%	276	0.1%	3,970	1.8%
23	213,451	383	0.2%	12,212	5.7%	186,190	87.2%	2,833	1.3%	1,616	0.8%	6,889	3.2%	168	0.1%	3,543	1.7%
24	206,659	-6,408	-3.0%	85,381	41.3%	92,695	44.9%	13,046	6.3%	6,716	3.2%	4,291	2.1%	330	0.2%	4,200	2.0%
25	220,795	7,727	3.6%	43,023	19.5%	160,255	72.6%	5,837	2.6%	3,655	1.7%	3,397	1.5%	536	0.2%	4,092	1.9%
26	213,659	591	0.3%	82,251	38.5%	96,917	45.4%	11,034	5.2%	10,155	4.8%	7,254	3.4%	1,031	0.5%	5,017	2.3%
27	204,195	-8,872	-4.2%	116,568	57.1%	40,058	19.6%	29,982	14.7%	7,628	3.7%	5,757	2.8%	436	0.2%	3,766	1.8%
28	218,713	5,645	2.6%	48,111	22.0%	152,121	69.6%	5,919	2.7%	2,958	1.4%	5,492	2.5%	244	0.1%	3,868	1.8%
29	211,067	-2,000	-0.9%	142,923	67.7%	45,815	21.7%	12,402	5.9%	2,119	1.0%	4,250	2.0%	184	0.1%	3,374	1.6%
30	207,763	-5,304	-2.5%	119,436	57.5%	59,550	28.7%	12,944	6.2%	4,666	2.2%	6,899	3.3%	312	0.2%	3,956	1.9%

Appendix L

Final Legislative Districts - Approved 1/17/12 -
Voting Age Population Breakdown

Final Legislative Districts - Approved 1/17/12 - Voting Age Population Breakdown

District	Voting Age Pop.	Hispanic Voting Age Pop.		Non Hispanic (NH) White Voting Age		NH African American		NH Native American Voting		NH Asian Voting Age Pop.		NH Hawaiian Voting Age		NH Multi-Race and	
		#	%	#	%	#	%	#	%	#	%	#	%	#	%
1	170,136	15,190	8.9%	147,538	86.7%	1,457	0.9%	1,386	0.8%	2,189	1.3%	174	0.1%	2,202	1.3%
2	148,925	78,653	52.8%	60,416	40.6%	4,539	3.0%	1,933	1.3%	1,881	1.3%	152	0.1%	1,351	0.9%
3	154,745	77,451	50.1%	60,946	39.4%	4,632	3.0%	5,111	3.3%	4,225	2.7%	139	0.1%	2,241	1.4%
4	141,485	78,816	55.7%	47,013	33.2%	4,529	3.2%	7,926	5.6%	1,599	1.1%	158	0.1%	1,444	1.0%
5	174,701	22,009	12.6%	143,620	82.2%	1,424	0.8%	3,291	1.9%	1,773	1.0%	246	0.1%	2,338	1.3%
6	169,965	21,327	12.5%	132,925	78.2%	1,639	1.0%	9,210	5.4%	2,092	1.2%	186	0.1%	2,586	1.5%
7	139,259	8,545	6.1%	40,013	28.7%	778	0.6%	87,851	63.1%	590	0.4%	61	0.0%	1,421	1.0%
8	153,405	48,030	31.3%	81,918	53.4%	7,014	4.6%	10,829	7.1%	2,524	1.6%	1,141	0.7%	1,949	1.3%
9	172,120	31,504	18.3%	125,635	73.0%	4,346	2.5%	1,550	0.9%	6,038	3.5%	222	0.1%	2,825	1.6%
10	166,639	32,487	19.5%	117,413	70.5%	7,195	4.3%	1,339	0.8%	4,970	3.0%	326	0.2%	2,909	1.7%
11	160,257	29,474	18.4%	117,449	73.3%	4,935	3.1%	2,131	1.3%	3,890	2.4%	185	0.1%	2,193	1.4%
12	147,754	20,504	13.9%	111,743	75.6%	4,497	3.0%	930	0.6%	7,639	5.2%	258	0.2%	2,183	1.5%
13	156,650	40,759	26.0%	103,306	65.9%	5,333	3.4%	1,363	0.9%	3,675	2.3%	218	0.1%	1,996	1.3%
14	163,012	43,999	27.0%	105,951	65.0%	5,448	3.3%	1,479	0.9%	3,034	1.9%	388	0.2%	2,713	1.7%
15	162,579	13,970	8.6%	133,974	82.4%	3,037	1.9%	973	0.6%	8,176	5.0%	193	0.1%	2,256	1.4%
16	164,719	21,337	13.0%	133,781	81.2%	3,353	2.0%	1,260	0.8%	2,806	1.7%	245	0.1%	1,937	1.2%
17	161,935	29,525	18.2%	110,213	68.1%	6,526	4.0%	1,515	0.9%	11,568	7.1%	269	0.2%	2,319	1.4%
18	168,966	21,459	12.7%	124,070	73.4%	7,413	4.4%	2,280	1.3%	10,644	6.3%	384	0.2%	2,716	1.6%
19	133,549	80,622	60.4%	35,275	26.4%	10,325	7.7%	1,639	1.2%	3,645	2.7%	278	0.2%	1,765	1.3%
20	166,570	29,476	17.7%	120,748	72.5%	6,029	3.6%	2,102	1.3%	5,315	3.2%	268	0.2%	2,632	1.6%
21	164,688	32,423	19.7%	119,158	72.4%	6,140	3.7%	1,098	0.7%	3,531	2.1%	204	0.1%	2,134	1.3%
22	167,688	13,708	8.2%	141,890	84.6%	4,149	2.5%	586	0.3%	5,277	3.1%	206	0.1%	1,872	1.1%
23	176,271	8,631	4.9%	156,821	89.0%	2,284	1.3%	1,189	0.7%	5,263	3.0%	121	0.1%	1,962	1.1%
24	157,984	53,875	34.1%	82,855	52.4%	9,883	6.3%	4,861	3.1%	3,635	2.3%	237	0.2%	2,638	1.7%
25	167,944	26,254	15.6%	129,933	77.4%	4,217	2.5%	2,399	1.4%	2,711	1.6%	378	0.2%	2,052	1.2%
26	164,423	52,537	32.0%	85,964	52.3%	8,347	5.1%	6,994	4.3%	6,575	4.0%	705	0.4%	3,301	2.0%
27	140,329	73,051	52.1%	34,090	24.3%	21,210	15.1%	5,177	3.7%	4,502	3.2%	312	0.2%	1,987	1.4%
28	169,608	30,085	17.7%	126,340	74.5%	4,391	2.6%	2,136	1.3%	4,405	2.6%	174	0.1%	2,077	1.2%
29	135,426	83,827	61.9%	36,737	27.1%	8,345	6.2%	1,459	1.1%	3,193	2.4%	135	0.1%	1,730	1.3%
30	141,271	71,675	50.7%	50,160	35.5%	8,834	6.3%	3,210	2.3%	4,952	3.5%	237	0.2%	2,203	1.6%