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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Wesley W. Harris, et al.,)	No. CV-12-894-PHX-ROS-NVW-RRC
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. Pullman Abstention

In December 2012, defendants requested we stay this case and defer hearing plaintiffs'

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

1 federal claim until plaintiffs' state-law claim could be resolved by the Arizona courts. At
2 that specific time, I believed abstention was appropriate. The following explains why I
3 reached that conclusion and why, if the motion were being decided today, abstention likely
4 would not be appropriate.

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

14 On the first condition, as observed by another three-judge panel hearing a redistricting
15 suit, "[r]edistricting is undoubtedly a sensitive area of state policy." *Cano*, 191 F. Supp. 2d
16 at 1142. Neither plaintiffs nor the per curiam opinion disputes this condition was satisfied.

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

1 ever been addressed, meaning the second condition for abstention was satisfied.

2 Finally, on the third condition, and despite plaintiffs' arguments that their state-law
3 claim was a sure winner, there was genuine uncertainty about the meaning of the Arizona
4 constitutional provision regarding equal population. Plaintiffs believed "the Arizona
5 Constitution's equal population clause is plain" and it required absolute equality of
6 population. While defendants disagreed with plaintiffs' reading, they conceded there was
7 *some* uncertainty about the meaning of Arizona's equal population requirement. That
8 concession was wise given the language of the Arizona Constitution coupled with the
9 Arizona Supreme Court's cryptic comments in a prior redistricting case. *Ariz. Minority Coal.*
10 *for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 208 P.3d 676, 686 (Ariz. 2009).
11 And, in any event, the required amount of "uncertainty" for *Pullman* purposes is not very
12 difficult to show.

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

20 Because the three *Pullman* conditions were met, the question becomes whether some
21 other factor rendered abstention inappropriate. The Supreme Court has recognized that a
22 court deciding whether to abstain must be cognizant that "abstention operates to require
23 piecemeal adjudication in many courts," possibly "delaying ultimate adjudication on the
24 merits for an undue length of time." *Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964). And
25 abstention is particularly troublesome in voting rights cases "because of the importance of
26 safeguarding the right to vote." *Cano v. Davis*, 191 F. Supp. 2d 1140, 1142 (C.D. Cal. 2002).
27 But even in a voting rights case, the Ninth Circuit affirmed a decision to abstain when the
28 abstention order was issued only six months before a relevant voting deadline. *Badham v.*

1 *U.S. Dist. Court*, 721 F.2d 1170, 1174 (9th Cir. 1983). In doing so, the court noted the focus
2 should be on the risk that delay would harm the right to vote. Because, in that case, there
3 was no substantial risk of harm to that right, abstention was appropriate. *Id.*

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

15 In addition to concerns about the possible delay should the parties be sent to state
16 court, the per curiam opinion also seems to rely on the dismissal of plaintiffs' state-law claim
17 as a special factor weighing against abstention.³ But the absence of a pending state-law claim
18 should have had no impact on the abstention inquiry. In *Harris County Commissioners*

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20 ² I recognize that redistricting cases pose a unique abstention problem. In the normal
21 *Pullman* setting, the federal court stays the federal claim and, if the parties are not able to
22 obtain timely relief in state court, they can return to federal court to litigate their federal
23 claim. *Cf. Harris Cnty. Comm'rs Court v. Moore*, 420 U.S. 77, 84 (1975) (abstention not
24 appropriate when litigation already "long delayed"). But under Supreme Court precedent
25 applicable to redistricting suits, if plaintiffs had been forced to file in state court, we would
26 have been absolutely barred from proceeding on the federal claim until the state court
litigation concluded. *Grove 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.

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

1 *Court v. Moore*, 420 U.S. 77, 81 (1975), the Supreme Court found *Pullman* abstention
2 appropriate even though the plaintiffs in that case “did not expressly raise a statelaw claim
3 in their complaint.” In *Moore*, there was an issue of state law lurking in the background of
4 the federal Equal Protection claim that, if decided a certain way, *might* have negated the
5 factual premise for the federal claim. *Id.* at 85-88. There is no real dispute that, in this case,
6 resolution of the state-law claim raised by plaintiffs might have had a similar impact.

7 Finally, now that the first important election deadline is upon us, I recognize that the
8 abstention calculus is significantly different. If the motion were being decided today,
9 abstention likely would not be appropriate because the state court would not have time to
10 provide relief. Thus, today I am comfortable reaching the merits of plaintiffs’ claim. I note
11 only that something is not quite right with plaintiffs choosing to litigate a very tenuous
12 federal claim when they have a state-law claim they believe is guaranteed to give them a
13 victory. Therefore, absent the looming election deadlines, I would still be inclined to send
14 the parties to state court.⁴

15 **2. Partisanship Likely Not Cognizable Basis for Suit**

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

19 The redistricting process, with all its adversarial tensions, has *always* been recognized
20 as a profoundly partisan process. *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) (“Politics
21 and political considerations are inseparable from districting and apportionment.”). The
22 Supreme Court has repeatedly noted without condemnation that entities responsible for
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24 ⁴ Because the Eleventh Amendment barred the state-law claim, plaintiffs’ alternative
25 request to certify the state-law issue to the Arizona Supreme Court was correctly denied. It
26 would have been a futile gesture to certify the question because we could not have ordered
27 relief on the basis of state law, regardless of how the Arizona Supreme Court might have
28 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).

1 redistricting often act in explicitly partisan ways, such as drawing lines to protect incumbents
2 or drawing lines to ensure a particular district elects a Democratic representative. *See, e.g.,*
3 *Easley v. Cromartie*, 532 U.S. 234, 248 (2001) (plan was drawn “to protect incumbents—a
4 legitimate political goal”); *id.* at 245 (noting a legislature might draw lines to “secure a safe
5 Democratic seat”). And while partisanship is not a terribly noble means of establishing
6 parameters impacting the fundamental right to vote, it has long been a given, embedded in
7 our system of government. Thus, actual use of partisanship—or at least allegations that
8 partisanship drove redistricting decisions—are inevitable as long as partisan entities are
9 responsible for redistricting.

10 Of course, Arizona has attempted to “remove redistricting from the political process
11 by extracting [the authority to conduct redistricting] from the legislature and governor and
12 instead granting it to an independent commission of balanced appointments.” *Ariz. Indep.*
13 *Redistricting Comm’n v. Brewer*, 275 P.3d 1267, 1273 (Ariz. 2012). But the very structure
14 of Arizona’s reformed redistricting process reflects that partisanship still plays a prominent
15 role. In practice, the Arizona Constitution requires two commissioners be Republicans, two
16 commissioners be Democrats, and the fifth commissioner be neither a Republican nor a
17 Democrat.⁵ The fact that one’s party affiliation is a qualifying characteristic to serve as a
18 commissioner is at least an implicit acknowledgment that redistricting remains inextricably
19 intertwined with partisan concerns.

20 Recognizing that partisanship remains an inevitable ingredient in Arizona’s
21 redistricting scheme is not the same as saying redistricting decisions actually based on
22 partisanship are immune from challenge. Under the federal constitution, it may be possible
23 to challenge redistricting plans when partisan considerations go “too far.” *See Cox v. Larios*,
24 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (noting most Justices believed partisanship

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26 ⁵ The Arizona Constitution requires the twenty-five candidates for commissioner
27 consist of “ten nominees from each of the two largest political parties in Arizona based on
28 party registration, and five who are not registered with either of the two largest political
parties.” Ariz. Const. art. IV, pt. 2, § 1(5).

1 “is a traditional criterion, and a constitutional one, so long as it does not go too far”). But it
2 is presently obscure what “too far” means. It is highly improbable that *any* use of
3 partisanship is “too far.” However, maybe partisanship can be used to justify population
4 deviations below ten-percent but not above ten-percent. Or maybe it is unconstitutional to
5 make decisions based on partisanship only if those decisions have “an actual discriminatory
6 effect on” a particular political group. *Cf. Davis v. Bandemer*, 478 U.S. 109, 127 (1986)
7 (attempting to establish standard for “political gerrymandering” claim). The Supreme Court
8 has not yet indicated which of these possibilities, if any, is correct. And the one case
9 plaintiffs repeatedly rely upon to support their theory cannot bear nearly the weight they
10 wish.

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

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

24 The record made “abundantly clear that the population deviations in the Georgia
25 House and Senate” were driven by two prohibited considerations. *Id.* at 1341. First, the
26 deviations were a “concerted effort to allow rural and inner-city Atlanta regions of the state
27 to hold on to their legislative influence (at the expense of suburban Atlanta), even as the rate
28 of population growth in those areas was substantially lower than that of other parts of the

1 state.” *Id.* at 1342. And “[s]econd, the deviations were created to protect incumbents in a
2 wholly inconsistent and discriminatory way.” *Id.* In reaching these conclusions, the *Larios*
3 court stressed it was not required to “resolve the issue of whether or when partisan advantage
4 alone may justify deviations in population, because . . . the redistricting plans [were] plainly
5 unlawful” on other grounds. *Id.* at 1352.

6 The Supreme Court summarily affirmed *Larios*. *Cox v. Larios*, 542 U.S. 947 (2004).
7 That summary affirmance meant the Supreme Court agreed with the judgment “but not
8 necessarily the reasoning by which it was reached.” *Mandel v. Bradley*, 432 U.S. 173, 176
9 (1977) (quotation omitted). In other words, the summary affirmance “should not be
10 understood as breaking new ground but as applying principles established by prior decisions
11 to the particular facts involved.” *Id.* There are no prior decisions directly rejecting
12 partisanship as a justification for minor population deviations, meaning the summary
13 affirmance has little value on that issue. But Justice Scalia voted to set the case for argument,
14 likely out of a concern the lower court decision would be read as addressing the issue. As
15 explained by Justice Scalia, the Supreme Court has never made clear whether “politics as
16 usual” is a “‘traditional’ redistricting criterion” that can be used to justify minor population
17 deviations. *Larios*, 542 U.S. at 952 (J. Scalia, dissenting). Justice Scalia also noted that, in
18 a case the previous term, “all but one of the Justices agreed [partisanship] is a traditional
19 criterion, and a constitutional one, so long as it does not go too far.” *Id.*

20 With the lower court’s explicit refusal to address the partisanship issue, and the
21 Supreme Court’s summary affirmance, I doubt *Larios* offers *any* useful guidance on the
22 question of partisanship.⁶ Absent other instructive authority supporting their claim, we might
23 have been better served by dismissing plaintiffs’ federal claim for failure to state a claim on
24 which relief can be granted. *See Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 313
25 (E.D.N.Y. 2003) (granting motion to dismiss because an allegation of “rank partisanship by

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

1 the Democratic majority . . . is not violative of the Fourteenth Amendment”). But having
2 allowed plaintiffs to survive the motion to dismiss, we must now reach the merits.
3 Fortunately, we need not decide whether partisanship can be considered in redistricting
4 because, in fact, partisanship was not behind the final map. Unfortunately, reaching the
5 merits required a lengthy trial and a tremendous expenditure of resources. If plaintiffs’
6 theory is viable, and maps containing minor deviations can be challenged as attempts to give
7 one political party an electoral advantage, the federal courts should prepare to be deluged
8 with challenges to almost every redistricting map. If that course is before us, a decision by
9 the Supreme Court on whether this theory is viable, and if so when, would be welcomed.

10 **3. Standard Applicable to Plaintiffs’ Claim**

11 Assuming minor population deviations due to partisanship present a cognizable Equal
12 Protection claim, the question is what standard applies to such a claim. I believe the correct
13 standard is that plaintiffs were required to prove partisanship was the *actual* and *sole* reason
14 for the population deviations.

15 In their initial filings, plaintiffs explicitly agreed they needed to show the “sole
16 reason” behind the population deviations was partisanship.⁷ All three judges seemingly
17 agreed because, in resolving the motion to dismiss, we set forth the standard as requiring
18 plaintiffs “prove that ‘the asserted unconstitutional or irrational state policy is the *actual*
19 *reason* for the deviation.’” The opinion we relied on, *Rodriguez v. Pataki*, further explains
20 a plaintiff must show “the deviation in the plan results *solely* from the promotion of an
21 unconstitutional or irrational state policy.” 308 F. Supp. 2d 346, 365 (S.D.N.Y. 2004)
22 (quoting *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1032 (D.
23 Md. 1994)). Thus, from the very beginning of this case, plaintiffs were on notice—and they
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25 ⁷ Plaintiffs’ filings could not have made it any clearer that they conceded the issue was
26 whether partisanship was the “sole” cause for the population deviations. *See Plaintiffs’*
27 *Response in Opposition to Motion to Dismiss* (“[Defendants] diluted Plaintiffs’ votes and the
28 votes of all citizens residing in the overpopulated districts solely to maximize the Democratic
Party’s representation in the Legislature.”).

1 did not seem to dispute—that they needed to establish partisanship was the actual and sole
2 reason for the population deviations.

3 As the case developed, plaintiffs apparently were enlightened and rethought their
4 stance by beginning to describe the standard as requiring they show “no constitutional goal
5 justified” the population deviations. In connection with that softened burden, plaintiffs also,
6 much to defendants’ frustration, began to substantively change their theory of the case such
7 that partisanship was advanced merely as the “principal theory,” along with other prohibited
8 characteristics such as race being implicated. But despite plaintiff’s vacillations, I always
9 understood their case as based on the allegation that partisanship drove the entirety of the
10 redistricting process.⁸

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

23 Adopting a lower standard on this type of claim invites individuals “to challenge any
24 minimally deviant redistricting scheme based upon scant evidence of ill will by district
25 planners, thereby creating costly trials and frustrating the purpose of [the Supreme Court’s]
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27 ⁸ As described on the last day of the trial, plaintiffs’ theory was that “this pattern of
28 deviation was driven by partisanship.”

1 ‘ten percent rule.’” *Rodriguez*, 308 F. Supp. 2d at 365. Federal court challenges to
2 redistricting plans are not only expensive and very time-consuming, they are also “a serious
3 intrusion on the most vital of local functions.” *Miller v. Johnson*, 515 U.S. 900, 915 (1995).

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

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

13 **4. No Evidence of Partisanship**

14 The history of the redistricting process, as well as when and who ordered various map
15 changes, are documented in the record and not subject to dispute. Therefore, I join most of
16 the factual findings in the per curiam opinion. I cannot, however, join those findings
17 pointing to partisanship as motivating certain actions. I do not believe plaintiffs carried their
18 burden of establishing that partisanship, rather than neutral redistricting criteria, motivated
19 the Commission.

20 The final map comes to us with a “presumption of good faith.” *Miller v. Johnson*, 515
21 U.S. 900, 916 (1995). It was never clear to me how plaintiffs planned to overcome this
22 presumption. Plaintiffs made general allegations about a plan to harm the interests of the
23 Republican party but they never specified *who* was allegedly behind the plan.⁹ At various
24 points during the litigation, it appeared plaintiffs believed the Commission’s counsel, the
25 Commission’s experts, the Commission’s mapping consultant, and even the Republican

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

1 commissioners themselves, were all motivated by the desire to systematically harm the
2 Republican party's electoral chances.¹⁰ And even having sat through the trial, it remains
3 unclear to me whether plaintiffs were trying to prove a knowing plot amongst all these actors
4 or coincidental uncoordinated acts of partisan discrimination that occurred merely by
5 happenstance. But regardless of who plaintiffs believed was responsible, I did not see
6 sufficient evidence that anyone set out to harm the Republicans. And certainly not enough
7 evidence to establish the Commission as an entity did so.

8 **a. The Alleged Plot Failed**

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

24 _____
25 ¹⁰ Plaintiffs' expert also had significant difficulty deciding who was behind the plan
26 to harm Republicans. Originally, the expert stated "the individuals who were drawing the
27 maps for the Commission were engaged in intentional political gerrymandering." (Trial Tr.
28 677). 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).

1 **b. No Explanation for Choosing Harder Path**

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

17 **c. Insufficient Evidence of Partisanship**

18 Turning to the merits of plaintiffs’ claim, the evidence is overwhelming the final map
19 was a product of the commissioners’s consideration of appropriate redistricting criteria. In
20 particular, the commissioners were concerned with obtaining preclearance on their first
21 attempt.¹¹ Before this round of mapping, Arizona had *never* obtained preclearance on its first
22 legislative map. Therefore, the focus on first-attempt-preclearance was reasonable given
23 that, at that time, any failure to obtain preclearance on the first attempt would have meant
24 Arizona could not “bail out” of Section 5 of the Voting Rights Act for another ten years. 42
25 U.S.C. § 1973b(a)(1)(E); *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 199
26 (2009) (explaining “bail out” requirements). In these circumstances, the commissioners were

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

1 not content to make simply a plausible case for preclearance; rather, the commissioners set
2 out to make the absolute strongest possible showing for preclearance.

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

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

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

1 As for District 8, the per curiam opinion concludes partisanship did motivate certain
2 changes. At trial, however, Commissioner McNulty explained those changes were meant to
3 make District 8 more competitive. I found her explanation reasonable and credible. Also,
4 when asked squarely whether these particular changes were due to any reason other than
5 competitiveness and compliance with the Voting Rights Act, Commissioner McNulty said
6 no. Again, I found her testimony credible. I would require much more evidence than what
7 plaintiffs presented to conclude Commissioner McNulty was being untruthful in her trial
8 testimony. More importantly, even if Commissioner McNulty *did* make changes to District
9 8 with partisanship in mind, that is not enough.

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

21 In the end, Plaintiffs’ evidence of partisanship consisted largely of pointing to the final
22 map and asking the Court to conclude by inference only that the pattern reflected in the map
23 established an intent to discriminate against Republicans.¹² This appears to be an attempt to
24


25 ¹² Plaintiffs repeatedly claimed the partisan breakdown of the final population
26 deviations could not be explained by chance. Of course, there is no claim that the map was
27 designed at random, meaning the argument that the deviations could not have occurred by
28 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

1 invoke the “disparate impact” theory of liability. But only in exceptionally rare cases is
2 disparate impact enough to prove an Equal Protection violation. *See, e.g., Washington v.*
3 *Davis*, 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the
4 sole touchstone of [invidious discrimination] forbidden by the Constitution.”). Those rare
5 cases involve situations of a clear pattern unexplainable on any legitimate grounds. *See, e.g.,*
6 *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266 (1977) (“Sometimes a
7 clear pattern, *unexplainable on grounds other than race*, emerges from the effect of the state
8 action”) (emphasis added). Here, the final map’s population deviations *can* be
9 explained on grounds other than partisanship.

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

17 I join the judgment against plaintiffs.

18 DATED this 29th day of April, 2014.

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Roslyn O. Silver
Senior United States District Judge

26 _____
26 to demonstrate that [reliance on the prohibited characteristic] *is* the more likely explanation.”
27 *Gay v. Waiters’ and Dairy Lunchmen’s Union*, 694 F.2d 531, 553 (9th Cir. 1982). In other
28 words, a statistical aberration negating chance is very different from a statistical aberration
establishing invidious intent.