No. 14-232

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 For The District Of Arizona

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED
(Restated)

The Arizona Independent Redistricting Commission approved a state legislative districting plan that included minor population deviations between districts. The Supreme Court has held that States may apportion with population deviations that are based on "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), and that the existence of "minor deviations" like those in Arizona's plan "are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State," *Gaffney v. Cummings*, 412 U.S. 735, 745-48 (1973). The district court assumed without deciding that the desire for partisan gain would not be a legitimate consideration.

1. Should the Court summarily affirm the district court's conclusion that Appellants failed to overcome the presumption that Arizona's legislative redistricting plan is constitutional when the facts showed that the plan's minor deviations predominately resulted from the Commission's good-faith desire to comply with the Voting Rights Act, not partisan gain?

2. Should the Court summarily affirm the district court's decision that the Commission's desire to comply with § 5 of the Voting Rights Act was a

QUESTIONS PRESENTED (Restated)
– Continued

rational state policy notwithstanding that this Court decided more than a year after the Commission acted that the coverage formula subjecting Arizona to the requirements in § 5 is unconstitutional, *see Shelby County v. Holder*, 133 S. Ct. 2612 (2013)?

3. Should the Court summarily affirm the district court's decision or dismiss the appeal as to Appellant's question presented asserting that the Commission "disregard[ed] the majority-minority rule" when compliance with § 2 of the Voting Rights Act is not an issue in the case and the district court concluded that the minor population deviations in the districts were the result of a good faith effort to comply with § 5 of the Voting Rights Act?

PARTIES TO THE PROCEEDING

The Appellants/Plaintiffs are listed in the jurisdictional statement.

The Appellees/Defendants are listed correctly except for the inclusion of the commissioners of the Arizona Independent Redistricting Commission. The district court granted the individual commissioners' motion for judgment on the pleadings, dismissing them as defendants. J.S. App. 44a-47a. Appellants do not challenge that portion of the district court's order.

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JURISDICTION

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

In addition to those set forth in Appellant's jurisdictional statement, the Commission refers to the following constitutional provision.

Article IV, Part 2, § 1 of the Arizona Constitution states, in relevant part:

> (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 . . . 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.

. . .

(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. . . .

. . .

(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. . . .

. . .

(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.

. . .

(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 tracks;
>
> F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.
>
> . . .
>
> (16) The independent redistricting commission shall advertise . . . a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. . . . The independent redistricting commission shall then establish final district boundaries.

MOTION TO DISMISS OR AFFIRM

Despite Appellants' efforts to reframe the fact-bound per curiam order into a new case posing broad legal questions, the appeal does not present any substantial federal issues meriting this Court's attention. Appellee Arizona Independent Redistricting Commission therefore respectfully requests that the Court summarily affirm the decision below.

Appellants raise far-reaching issues that have little to do with the actual findings and ruling on appeal. They brought this suit on the theory (and told the court they would prove at trial) that "a policy of increasing the Democratic Party's strength" caused

the minor population deviations – an average overall deviation of 2.2 percent and a maximum deviation of 8.8 percent – in Arizona's legislative redistricting plan. Doc. 176 at 2. After a five-day trial and review of transcripts of the Commission's many public meetings, the district court found that was not true and that "compliance with federal voting rights law was the predominant reason for the deviations." J.S. App. 6a. The court did not need to decide whether political motivations are illegitimate redistricting considerations because even assuming they are, Appellants could not prove their claim. At most, "some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects." *Id*. The limited extent of that partisan motive does not indicate any constitutional infirmity. If it did, Appellants' argument could result in overturning virtually every state's legislative redistricting plan, an untenable and constitutionally unacceptable affront to State sovereignty.

The district court held that the Commission's desire to comply with the Voting Rights Act, including the obligation to obtain preclearance, is a rational state policy capable of justifying minor deviations in population. J.S. App. 65a-72a. The Court should summarily affirm on the same narrow grounds. Appellants' argument would require the Court to hold that compliance with federal law, although mandatory, was irrational. It would also clash with this Court's decisions holding that non-mandatory policy decisions to respect county lines or protect incumbent politicians can justify deviations that go far beyond

the minor ones at issue here. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 847-48 (1983) (holding that state policy of adhering to county boundaries justified underpopulating district by 60 percent); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (listing "avoiding contests between incumbent[s]" among policies that "might justify some variance" in congressional districts). The fact that this Court's subsequent decision in *Shelby County v. Holder,* 133 S. Ct. 2612 (2013), removes Arizona's obligation to seek preclearance does not render the Commission's efforts to obtain preclearance irrational or illegitimate.

This is not the case for the Court to decide whether partisan motivations can invalidate a map with minor population deviations. The district court rejected Appellants' partisanship arguments based on the evidence. This Court should summarily affirm.

STATEMENT OF THE CASE

The Jurisdictional Statement disregards much of the record below, which includes four days of testimony and transcripts of the hundreds of hours of public meetings during which the Commission did its work. The pertinent facts set forth here are based on the record below, including the findings in the district

court, which the Jurisdictional Statement nowhere challenges as clearly erroneous.[1]

I. The Arizona Constitution required the Commission to draw legislative districts based on enumerated criteria, including compliance with the Voting Rights Act.

Since 2000, the five-member Commission has created Arizona's state legislative districts after each decennial census. *See generally* Ariz. Const. art. IV, pt. 2, § 1(3). The Commission begins anew each decade with partisan appointments made by the Legislature's majority and minority leadership who choose four of the five commissioners. *Id*. § 1(3)-(5). The four party-affiliated commissioners then select the fifth commissioner who serves as chairperson. *Id.* § 1(8).

To create legislative districts, the Commission must start from a blank slate by forming a map in a "grid-like pattern across the state." *Id*. § 1(14). From there, the Arizona Constitution requires the Commission to make a draft map by adjusting the "grid-like" map to accomplish various enumerated legislative "goals." *Id*. § 1(14). The first goal is mandatory:

[1] The Court reviews a district court's factual findings regarding a legislative body's motivation for clear error. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). The lower court's findings stand unless the Court is "left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (internal quotation marks omitted)).

"Districts shall comply with the United States Constitution and the United States voting rights act." *Id*. § 1(14)(A). The constitution directs the Commission to accommodate the remaining enumerated goals "to the extent practicable," including: equal population between districts; "geographically compact and contiguous" districts; boundaries that "respect communities of interest"; lines that "use visible geographic features, city, town and county boundaries, and undivided census tracts"; and "competitive districts should be favored where to do so would create no significant detriment to the other goals." *Id*. § 1(14)(B)-(F). Once done, the Commission must advertise the "draft map of legislative districts to the public for comment . . . for at least thirty days." *Id*. § 1(16). After the public comment period and any final revisions, the Commission approves the final map. *Id*. The Commission cannot consider the residence locations of incumbents or candidates when it redraws the maps. *Id*. § 1(15).

The Commission must complete its work "in meetings open to the public," *Id*. § 1(12), which it did during dozens of public meetings during 2011 and early 2012. Transcripts of the hundreds of hours of meetings are in the record below.

II. The Commission considered compliance with the Voting Rights Act and obtaining preclearance on the first try an important priority.

At the time of the Commission's work, Arizona was subject to § 5 of the Voting Rights Act, meaning

that to implement the districting plan Arizona was required to obtain preclearance from the Department of Justice (the "Department") or (via a declaratory judgment) from a three-judge panel in the District of Columbia. J.S. App. 19a-20a; *see* 52 U.S.C. § 10304(a).[2] To receive preclearance, a State must prove that a redistricting plan has neither the purpose nor effect of "diminishing the ability of any citizens . . . on account of race or color, [or membership in a language minority group], to elect their preferred candidates of choice." *See* 52 U.S.C. § 10304(b).

In general, § 5 prohibits covered States from enacting a plan 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 (1997) (internal quotation marks and citation omitted). At a minimum, a State's new plan, when compared to the previous (or "benchmark") plan, may not reduce the number of districts in which a minority group has the ability to elect a candidate of choice. *See Texas v. United States*, 887 F. Supp. 2d 133, 157 (D.D.C. 2012) (citing *Abrams v. Johnson*, 521 U.S. 74, 97-98 (1997)), *vacated and remanded*, 133 S. Ct. 2885 (2013) (remanding in light of *Shelby County*).

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[2] After the Commission's districting plan received preclearance and was used in the 2012 election, this Court invalidated the coverage formula used to designate which states are subject to § 5 preclearance. *See Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

Arizona's legislative districting plans had never been precleared on the first attempt. The consequences of a failure to preclear are significant. Because of the time pressures of election cycles, a federal court must often step in to impose a districting plan on a State. That is what happened to Arizona's Commission-drawn map in the 2000 cycle. *See Navajo Nation v. Ariz. Ind. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002). In addition, a failure to obtain preclearance makes a jurisdiction ineligible to "bail out" of § 5 obligations for another decade. *See* 52 U.S.C. § 10303(a)(1)(E).

Given these consequences and Arizona's troubled history with preclearance, the record shows that the commissioners considered compliance with the Voting Rights Act and preclearance an important priority. *See, e.g.*, J.S. App. 23a-24a; Supplemental Appendix to Motion to Dismiss ("Supp. App.") 2, 5, 12-13, 17.

A. The Commission reasonably attempted to create at least ten ability-to-elect districts to show a lack of retrogression and obtain preclearance.

As the district court observed, designing districts and proving that they avoid retrogression is not a simple task. J.S. App. 20a-24a. Many factors "encourage states to do more than the bare minimum to avoid retrogression." *Id*. at 22a. Retrogression is not decided based on a single statistic or easily ascertainable metric. *See* 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011)

(describing Department's use of "functional analysis" that does not turn on "any predetermined or fixed demographic percentages"). In addition, the Department does not provide any explanation when it approves a plan, meaning that a State could not know how many benchmark districts or ability-to-elect districts the Department believed existed. J.S. App. 22a-23a; Supp. App. 11-12, 15.

The Jurisdictional Statement is therefore wrong when it implies (at 6-7) that the Commission knew there were only eight benchmark districts. *See* J.S. App. 27a-28a. When it was drawing the draft map, the Commission's legal team advised that the Commission should assume that the benchmark plan contained ten ability-to-elect districts. J.S. App. 205a; Supp. App. 5, 20-21.

In October 2011, on a 4-1 vote, the Commission approved of a draft map that attempted to create ten ability-to-elect districts. J.S. App. 28a.

B. The Commission understood that minor population deviations were a permissible byproduct of good faith efforts to avoid voting-rights retrogression, and the facts show that such deviations are a common feature of many redistricting plans.

Before the Commission made adjustments to the draft map, it received racial polarization voting analysis. J.S. App. 29a-30a. The analysis prompted the Commission's counsel to advise the Commission

to improve the case for preclearance by strengthening minority voting ability in three of the proposed ability-to-elect districts (Districts 4, 24, and 26). Supp. App. 13, 35.

The Commission's counsel and consultants also advised that slight deviations in population were permissible effects of efforts to enhance a minority group's ability to elect in a given district. *Id*. at 12, 21-22, 36-37. The Commission's counsel explained that minor population deviations were constitutional if they existed as a result of legitimate, rational objectives; the record shows that the Commission's actions were not based on an absolute "safe harbor" range of population deviations. *Id*. at 28-31, 35-37.

In addition, the Commission understood that modest underpopulation of ability-to-elect districts was commonly done in other jurisdictions. *Id*. at 15-18, 29. In fact, in the plan the federal court approved for Arizona in 2002, several of the ability-to-elect districts were underpopulated. *Navajo Nation*, 230 F. Supp. 2d at 1008-09 (showing districts 13-16, all voting rights districts, with populations below the "ideal" population, and affirming constitutionality of plan with "total deviation of 9.03%").

To underpopulate an ability-to-elect district and thereby strengthen a minority's ability to elect candidates of its choice, the consequence often would be to remove population from districts that had a higher

proportion of voters who were registered Democrats. As a commissioner explained, the Commission's data showed that "70, 74 percent of Hispanics are registered Democrats." Supp. App. 5-7.

III. The final legislative map contained minor deviations that resulted from efforts to satisfy many redistricting policies, including the Commission's desire to comply with the Voting Rights Act.

The 30 legislative districts in the final map have varying minor population deviations. J.S. App. 9a-10a. Of the 30 districts, 12 are underpopulated to varying degrees and 18 are overpopulated. At the outer boundaries, District 7, the sole majority Native American district, was 4.7 percent below the ideal population and District 12 was 4.1 percent over, for a total maximum deviation of 8.8 percent. *Id*. at 12a. The average variation from strict equality is only 2.2 percent. *Id*. at 9a-10a; Supp. App. 15.

A. The minor population deviations in the final map resulted from the Commission's consideration of legitimate state policies.

Appellants' primary claim is that the Commission's plan was designed to "gain an advantage for the Democrats by overweighting the votes of Democrat voters." J.S. at 7. Their central proof is the

statistics of the map: the districts that are underpopulated by more than 2 percent had a Democrat plurality of registered voters and the districts overpopulated by more than 2 percent had a Republican plurality. J.S. at 8-9. To Appellants, this is all the proof they need; the correlation of under-and-overpopulation with party-registration plurality "tell[s] the story." J.S. at 9.

That the plan was designed to "gain an advantage" may be Appellants' premise, but it is not what the district court found and not what the record shows. The district court's opinion focuses only on the population changes made to three districts (Districts 8, 24, and 26) because those were the changes the plaintiffs emphasized at trial. J.S. App. 7a. The record also shows that the Commission balanced many competing policies, including using county boundaries, enhancing compactness, respecting communities of interest, increasing competitiveness, and obtaining preclearance and compliance with § 5 of the Voting Rights Act. *See* Ariz. Const. art. IV, pt. 2, § 1(14)(A)-(F); Supp. App. 2-5, 7-10, 32-33, 41-42.[3]

With respect to the Voting Rights Act, several population shifts occurred because of the advice given

[3] Appellants incorrectly describe the Commission's position, including that preclearance is the sole justification for the map's minor deviations. *See* J.S. at 27, 31. That is not the Commission's position. *See, e.g.*, Doc. 219 at 10-21. The district court focused on only a narrow set of changes made to Districts 8, 24, and 26 because that was Appellants' focus at trial. J.S. App. 7a. This Court need not go further to summarily affirm.

to the Commission that Districts 4, 24, and 26 should be strengthened to bolster the case for preclearance. *See, e.g.*, *id*. at 13. Appellants focus their challenge on Districts 24 and 26, arguing that their expert witness "opined that neither District 24 nor 26 . . . could be Hispanic ability-to-elect districts." J.S. at 7. From this premise, Appellants suggest that any population deviations resulting from changes to these districts must have been a pretext.

The district court concluded differently, finding that "[c]reation 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." J.S. App. 78a. The record supports the court's findings. *E.g.*, Supp. App. 13, 35. The resulting shifts in population were small: District 24 decreased from barely overpopulated (+0.2 percent) to modestly underpopulated (-3.0 percent); District 26 remained essentially unchanged, ending up very slightly over-populated (+0.3 percent). J.S. App. 9a-10a, 31a-32a.

B. The Commission intentionally reduced population variance before finalizing the legislative districts.

The record also shows that the Commission reduced population inequality between districts. In District 4, for example, the Commission only made changes that caused additional population deviations after its consultant advised that other options would cause undesired consequences, such as splits of towns

and counties. Supp. App. 24-27. And before the Commission approved a final map, it implemented an overall population deviation reduction which substantially reduced the population deviations in many districts. *Id*. at 41-47.

The Department of Justice precleared the final map on April 26, 2012, J.S. App. 35a.

C. The district court's finding that partisanship may have played some role is exceptionally narrow.

The Jurisdictional Statement elides the limited nature of the lower court's findings with respect to partisan motivation. Contrary to the broad assertions in the Jurisdictional Statement, there was no finding that the Commission "systematically diluted votes" of Republicans and "amplif[ied]" Democrat votes "to achieve a partisan advantage," J.S. at 8-9, or that "the [Commission's] actions were based on illegitimate partisan motive," *id*. at 17. The per curiam opinion found that the bipartisan support for most change orders and decisions leading to population deviations undermined the contention that partisan motive drove the process. J.S. App. 38a-40a.

The partisanship finding is narrow and unremarkable: "*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." J.S. App. 6a (emphasis added). That is, some of the party-appointed commissioners – not the

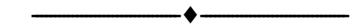
Commission as a whole – were motivated in part by political interests in some decisions. There is no finding that the Commission itself was politically motivated, nor any finding that a single commissioner was driven solely by partisan motives. Indeed, as Judge Silver's concurrence noted, the allegation of a scheme against Republican interests is "hard to take . . . seriously" given that Republicans have retained strong majorities after each election and are likely to continue to do so throughout the decade. *See* J.S. App. 98a; Supp. App. 8-9.

The only population changes the district court identifies in connection with that finding are the limited changes that Commissioner McNulty (a Democrat) proposed for District 8. *Id*. at 41a-42a. Commissioner McNulty asked the mapping consultant to explore ways to enhance the competitiveness of District 8, which was leaning Republican at the draft-map stage. Supp. App. 13-15. *See* Ariz. Const. art. IV, pt. 2, § 1(14)(F) (competitiveness as a redistricting goal). Because the proposal was limited to enhancing Democratic prospects in one Republican-leaning district, the per curiam order concluded that "partisanship played some role" in District 8's creation. J.S. App. 41a-42a, 78a-79a.

As the district court explained, however, the changes to District 8 gained majority support only after the Commission's advisors suggested that the adjustments to District 8 also might help support the case for preclearance – the new district included territory from a previous ability-to-elect district and

counsel advised that efforts to avoid retrogression for voters in the previous district would help the Commission prove its case. J.S. App. 42a; Supp. App. 38-40. Moreover, the impact of the District 8 changes does not fit Appellants' "systematic dilution" theory because the population changes resulting from those changes were very slight and mixed, with "a small decrease in deviation in one district and small increases . . . in three districts." J.S. App. 79a-80a.

In the end, Appellants' evidence of partisan bias begins and ends with the statistics. The district court rejected this "disparate impact" theory based on the evidence.



ARGUMENT

I. The Court should summarily affirm because existing precedent holds that seeking to comply with the Voting Rights Act is a legitimate state interest.

The majority of the lower court held that the minor deviations in this case were constitutional because they were predominately motivated by the Commission's desire to comply with the Voting Rights Act, and "compliance with the Voting Rights Act is among the legitimate redistricting criteria that can justify minor population deviations." J.S. App. 65a.

The Court should summarily affirm because the district court's holding is fully consistent with existing law. Appellants' arguments to the contrary are meritless.

A. The district court correctly applied existing law to conclude that the minor population deviations were the result of legitimate state policies.

1. Appellants do not contest that they had the burden to prove the Commission's deviations were motivated by an illegitimate purpose.

The Equal Protection Clause requires states to apportion legislative districts "on a population basis." *Brown*, 462 U.S. at 842 (quoting *Reynolds v. Sims*, 377 U.S. 533, 568 (1964)) (internal quotation marks omitted). The Supreme Court, however, has never held that the Fourteenth Amendment requires strict mathematical population equality among districts. *See Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). Rather, the Court has always recognized that deviations are constitutional if they are based on "legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. "Any number of consistently applied legislative policies" can qualify as a rational state policy in this context, "including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent[s]." *Karcher*, 462 U.S. at 740.

When the deviations in a state legislative plan are minor – those with a maximum variance of less than 10 percent – the Court presumes that the plan is constitutional and does not "require justification by the State." *Brown*, 462 U.S. at 842 (quoting *Gaffney*, 412 U.S. at 745) (internal quotation marks omitted). Deference to the State's policy-making prerogative is important because the intervention of a federal court in state reapportionment is "a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). "[R]edistricting . . . is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978).

Appellants do not dispute that Arizona's deviations are minor and that they had the burden of proof below, including at a minimum the burden to prove that the deviations were not "incident to effectuation of a rational state policy." Although the judges and parties disputed below what precise standard of review should apply, resolving that question is unnecessary to dispose of this appeal.[4]

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[4] The Commission's position (and Judge Silver's) is that to overcome the map's presumption of constitutionality, Appellants have the burden to prove that the "plan results *solely* from the promotion of an unconstitutional or irrational state policy." *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365 (S.D.N.Y.) (quoting *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1032 (D. Md. 1994)) *aff'd,* 543 U.S. 997 (2004). Given the federalism interests at stake, the complex legislative process involved, and that minor deviations are presumed constitutional,

(Continued on following page)

2. Appellants could not satisfy their burden because the Commission's desire to comply with the Voting Rights Act is a legitimate redistricting policy.

Based on the voluminous record, the majority concluded that "the deviations in the Commission's plan were largely motivated by efforts to gain preclearance under the Voting Rights Act." J.S. App. 65a. The Jurisdictional Statement does not contend that any of the district court's factual findings were clearly erroneous. Appellants now argue (at 14) that neither political gain nor Voting Rights Act compliance could be legitimate redistricting objectives and therefore "trying to divine which was the 'primary' factor is irrelevant" and "the degree of partisan political intent required [to prove their claim] is not crucial here," J.S. at 16 n.14.

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plaintiffs should have to do more than show an absence of a legitimate state policy to force a legislative do-over. *Cf. Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) ("the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale"). Judge Clifton reasoned that the burden required plaintiffs to show that "illegitimate criteria at least predominated over legitimate considerations." J.S. App. 64a. The per curiam order applied Judge Clifton's standard, reasoning that because the Commission prevailed under that standard it would also prevail under the more deferential standard. *Id.* at 63a-64a n.10. In dissent, Judge Wake stated that deciding the precise test "should be left for a case in which it would matter." J.S. App. 139a. The Commission agrees.

Appellants' argument that compliance with the Voting Rights Act does not justify even minor population deviations is incorrect. This Court has long assumed that compliance with the Voting Rights Act is a compelling state interest capable of justifying districting decisions subject to strict scrutiny. *See Abrams*, 521 U.S. at 91; *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). For § 5 compliance in particular, eight justices recently held that compliance was a compelling state interest (and thus necessarily also a rational one). *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id*. at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id*. at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.). As Justice Scalia explained, "[i]f compliance with § 5 were not a compelling state interest, then a State could be placed in the impossible position of having to choose between compliance with § 5 and compliance with the Equal Protection Clause." *Id*. at 518.

In addition, Arizona also has a legitimate interest in ensuring compliance with the Voting Rights Act because compliance ensures that the voter-approved Commission's plan is used in elections rather than one a federal court adopts. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 34 (1993) (reaffirming that federal courts

should whenever possible "leave[ ] with the States primary responsibility" for redistricting).

B. Appellants' arguments that compliance with the Voting Rights Act could not justify Arizona's minor population deviations lack merit.

Appellants raise several arguments meant to delegitimize the Commission's decisions. They contend that this Court's opinion in *Shelby County* renders what was once a legitimate governmental objective irrational and illegitimate, even though *Shelby County* does not undo the validity of § 5 or the possibility of preclearance. *Shelby County*, 133 S. Ct. at 2631. Appellants further argue that States must maintain strict mathematical population equality when complying with the Voting Rights Act, even though the Supreme Court has rejected the notion that there is a right to strictly equal state legislative districts and has warned that "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge" other important considerations. *Gaffney*, 412 U.S. at 749. Failing that, Appellants argue that the Commission's redistricting decisions must have been a pretext because some of the districts do more than Appellants say is necessary for preclearance, an argument that is deeply flawed for many reasons, including (as the district court noted) that the issue of retrogression was not before the district court. J.S. App. 73a-74a. The district court properly rejected these arguments and there is no compelling reason for this Court to consider them.

1. *Shelby County* does not render the Commission's objective of obtaining preclearance irrational and illegitimate.

Appellants argue that this Court's decision in *Shelby County* should apply retroactively to render the Commission's efforts to comply with § 5 and obtain preclearance illegitimate. The district court correctly rejected this argument. *See* J.S. App. 69a-72a.

First, Appellants' position overstates *Shelby County*. The Court held that the coverage formula in § 4(b) is unconstitutional. 133 S. Ct. at 2631. The "decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2" and "issue[s] no holding on § 5 itself, only on the coverage formula." *Id*. *Shelby County* does not call into question the substantive objectives underlying § 5, or otherwise make avoiding retrogression an illegitimate state policy. *See id*. (noting that Congress could draft a new coverage formula and that "any racial discrimination in voting is too much"). Nor does the Court suggest that seeking preclearance is by itself unlawful, only that Congress may no longer force jurisdictions to do so based on the current coverage formula. Indeed, *Shelby County* leaves in place the § 3(c) "bail in" provision, which allows a court to impose a preclearance requirement if a State has engaged in intentional discrimination. *See* 52 U.S.C. § 10302(c); Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping:*

Evidence and Implications for VRA Preclearance After Shelby County, 102 Cal. L. Rev. 1123, 1176 (2014) (predicting that parties will turn to bail-in procedures if Congress does not revise the coverage formula). Thus, even applying *Shelby County* retroactively, there is nothing that the Commission did that would become unlawful.

That *Shelby County* does not purport to hold § 5 or preclearance itself unconstitutional separates this case from the principal case on which Appellants rely, *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). *See* J.S. at 29-30. In that case, the Court held that its earlier decision on the constitutionality of a kind of tax scheme should be given retroactive effect, explaining that the Supreme Court's ruling on federal law "is the controlling interpretation of federal law and must be given full retroactive effect in all" pending cases. 509 U.S. at 97. The only "controlling interpretation of federal law" is that Congress may not subject States to preclearance using the current coverage formula. Had *Shelby County* held that designing districts to avoid retrogression and without discriminatory intent was an impermissible governmental objective, then this case may well come under *Harper*. But that is not what *Shelby County* did.

For the same reasons, Appellants are mistaken when they invoke the dissenting judge's warning that allowing the Commission's plan to remain in force would "give continuing force to Section 5 despite the unconstitutionality of applying it anywhere." J.S. at 30. *Shelby County* does not hold § 5 unconstitutional,

and nothing in *Shelby County* (or any other case) supports the notion that a map designed to comply with § 5 would be unconstitutional.

Second, Appellants' argument misapprehends the rational basis inquiry. In this context, "the proper equal protection test is not framed in terms of 'governmental necessity,' but instead in terms of a claim that a State may 'rationally consider.'" *Mahan v. Howell*, 410 U.S. 315, 326 (1973) (quoting *Reynolds*, 377 U.S. at 580-81). *Reynolds* asks whether there was an "honest and good faith effort" to achieve population equality, not whether decisions were, in retrospect, inaccurate even if made honestly and in good faith. *Mahan*, 410 U.S. at 324-25. In other words, the relevant question is not whether Arizona was certainly required (in light of *Shelby County*) to seek preclearance; the question is whether its decision to do so was irrational.

It should be beyond question that Arizona had a rational interest in complying with a federal law that was a prerequisite to implementing the State's new districts. The Commission was not free to disregard its obligations under the Voting Rights Act, and like other federal statutes, the Act is "presumed constitutional." *Vera*, 517 U.S. at 991-92 (O'Connor, J., concurring); U.S. Const., art. VI, cl. 2. Beyond presuming its constitutionality, this particular statute had been tested, and until *Shelby County*, the Court repeatedly affirmed the constitutionality of the Voting Rights Act, including § 4. *See Shelby County*, 133 S. Ct. at

2620 (collecting cases). This backdrop gave the Commission a rational, if not compelling, basis to comply with § 5.

Appellants' position would put Arizona, and all other § 5 jurisdictions, in the "impossible" bind that Justice Scalia warned about in *LULAC,* forcing Arizona to risk non-compliance with § 5 out of a concern that a court would later say (contrary to all existing law) that § 5 is an unlawful legislative objective. *See* 548 U.S. at 518. But even when strict scrutiny applies under § 2 claims, "deference is due to [the States'] reasonable fears of, and to their reasonable efforts to avoid, § 2 liability." *Vera*, 517 U.S. at 978 (plurality opinion). That kind of deference is surely warranted here, where Arizona is performing one of "the most vital of local functions," *Miller*, 515 U.S. at 915, and where Arizona's previous § 5 problems made the Commission well aware of the consequences of a failure to prove non-retrogression. This decade, for the first time since Arizona became a covered jurisdiction, the Department precleared Arizona's legislative redistricting plan on the first submission, without any objection or request for additional information. This enabled the State to implement its new districts without the need for emergency judicial relief and affirmed the Commission's decision to stress compliance with Section 5 when redrawing the districts.

2. The Equal Protection Clause does not require strict population equality.

Appellants assume that the "constitutional imperative on population equality" means that the Constitution requires or highly values strict population equality. It does not. Appellants invoke *Reynolds*, but even in that early case, the Court held that "individual's right to vote . . . is unconstitutionally impaired when its weight ***is in a substantial fashion*** diluted." *Reynolds*, 377 U.S. at 568 (emphasis added). Appellants' argument disregards the line of cases holding that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case . . . so as to require justification by the State." *Brown*, 426 U.S. at 842 (quoting *Gaffney*, 412 U.S. at 745) (internal quotation marks omitted). As explained in *Gaffney*, elevating strict mathematical equality above other concerns risks subjecting State legislative discretion to invasive federal oversight "in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature." 412 U.S. at 749.

Appellants counter that the Voting Rights Act itself and Department of Justice regulatory guidance both state that § 5 "does not require jurisdictions to violate the one-person, one-vote principle." J.S. at 32-33 (quoting 76 Fed. Reg. 7470, 7471). That the Voting

Rights Act does not require States to violate the Constitution is true but irrelevant. Appellants presume the flawed premise that "the one-person, one-vote principle" guarantees strict population equality.

If anything, the Department's guidance undermines Appellants' argument. The section Appellants cite contains the Department's discussion of "Alternative Retrogressive Plans," an issue that comes up when a State seeking preclearance has to prove "that a less-retrogressive plan cannot reasonably be drawn." 76 Fed. Reg. 7470, 7472. After stating that the Department would not require a jurisdiction to violate the "one-person, one-vote principle," it explains that for a congressional plan, the Department would not consider an alternative plan to be reasonable if it "would require a greater overall population deviation." *Id*. For "state legislative and local redistricting," however, "a plan that would require ***significantly*** greater overall population deviations is not" a reasonable alternative. *Id*. (emphasis added). The addition of the word "significantly" to the sentence conforms the Department's guidance to the law governing non-federal districting: legislative plans with only minor (*i.e.*, insignificant) deviations are presumed to be constitutional and do not require justification.

Moreover, Appellants' position would result in an illogical set of rules for States. Under Appellants' argument, a State would have to adhere to strict population equality when deciding how to comply

with the Voting Rights Act, but could allow the same minor deviations at issue here if caused by efforts to protect incumbent politicians, adjust the geographic compactness of the district, or accommodate "[a]ny number of consistently applied legislative policies." *Karcher*, 462 U.S. at 740.[5]

Beyond illogical, Appellants' rule would value the "statistical niceties involved in equalizing individual voting strength," *Gaffney*, 412 U.S. at 748, at the expense of the State's flexibility in deciding how to accomplish a core sovereign function. This case illustrates the problem. When exploring ways to strengthen the minority voters' ability to elect candidates of choice in District 4, the Commission resorted to minor de-population only after its consultant explained that other options would split up towns and compromise other legitimate redistricting goals. Supp. App. 24-26. Under Appellants' rule, the Commission would have been forced to choose between compromising its other goals or risking non-compliance with federal law, all in service of avoiding "insignificant population variations." *Gaffney*, 412 U.S. at 748.

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[5] *Karcher* itself implies that "preserving the voting strength of racial minority groups" could justify deviations in a congressional districting plan. *Karcher v. Daggett*, 462 U.S. 725, 742 (1983). The Court rejects that rationale not because it is incapable of justifying deviations but because the evidence showed that the voting-strength goal was "not related in any way" to the deviations at issue. *Id*. (citation omitted).

3. The district court correctly held that whether the Commission did more than was strictly required to comply with § 5 is not at issue, and Appellants' race-based arguments are wrong in any event.

Finally, Appellants contend that the Commission's efforts to ensure preclearance must have been illegitimate because the Commission has not proved that "its redistricting scheme . . . [was] necessary – or even helpful – for obtaining preclearance." J.S. at 33-37. The chief contention seems to be that the Commission went beyond what would be required and improperly created "additional crossover and influence districts" to unnecessarily boost the chances of preclearance. *Id*. at 34. In making this argument, Appellants also contend that the Commission "us[ed] race as the predominant criteria" and imply that the Commission must satisfy some version of strict scrutiny. *Id*. at 34-36. The Court should bypass these scattershot arguments for multiple reasons.

1. The district court correctly rejected Appellants' similar argument below. J.S. App. 73a-75a. As the court explained, the issue at trial was whether legitimate rationales justified population deviations, not whether "the Commission might have been able to adopt a map that would have precleared with less population deviation." *Id*. at 75a.

Moreover, Appellants did not give "the court a basis to independently determine that there existed only eight ability-to-elect districts in the benchmark

plan," a fact necessary to determine what was minimally required to avoid retrogression.[6] *Id*. at 73a. In other words, this argument is not properly part of this case and not suitable for the Court's review.

2. The argument depends on applying some version of strict scrutiny, which the district court correctly refused to do. J.S. App. 64a. Appellants quote the strict scrutiny standard and simply assume it applies.[7]

Neither the law nor the facts supports Appellants' assumption. In racial gerrymandering claims, strict scrutiny applies only if "race was the predominant factor" to which other districting interests are subordinated. *Miller*, 515 U.S. at 916. As the district court observed, the strict scrutiny standard applicable in a racial gerrymandering case should not apply in this context, where "the Supreme Court has made clear that [a federal court] owe[s] state legislators

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[6] Appellants now contend (without citation to the record) that the Commission "identified eight minority ability-to-elect districts in its draft plan." J.S. at 35. To the extent this sentence is intended to imply that the Commission identified ***only*** eight such districts, it is inaccurate. The draft plan identified ten.

[7] Appellants inaccurately cite *Miller v. Johnson* and *LULAC* for descriptions of the standard they seek to apply. The quote attributed to *Miller* (J.S. at 33) and the block quote described as the Court's holding in *LULAC* (J.S. at 34) both come from Justice Scalia's partial concurrence and partial dissent in *LULAC*, not the Court's opinion. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518-19 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.).

substantial deference." J.S. App. 64a (citing *Gaffney*, 412 U.S. at 749).

Furthermore, Appellants have not explained how "race was the predominant factor" in the Commission's districting decisions. "Strict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Vera*, 517 U.S. at 958 (plurality opinion). The evidence must show that "traditional districting criteria [were] *subordinated to race*." *Id*. at 962. Although the Jurisdictional Statement asserts (without record citation) that the Commission "used racial and ethnic gerrymandering" (at 37), and that the Commission "admits that it used race as a predominant motive" (at 39), these are not facts they proved to the district court and the issue is not presented in this case. To the contrary, as the district court observed, the Commission used a functional analysis that, for example, considered candidate performance to assess the ability of minorities to elect candidates of choice. *See* J.S. App. 26a (explaining Commission's use of formal and informal racial polarization data); *id*. at 73a-74a (noting Commission performed functional analysis). Moreover, Appellants' theory going into trial was that all districting criteria were subordinated to politics, not race.[8]

[8] In addition, Appellants lack standing to raise the sort of race-based claim that would be subject to strict scrutiny because they have not alleged they reside in a district underpopulated because of race or that they were "assigned to [their] district[s] as a direct result of having 'personally been subjected to a racial

(Continued on following page)

3. Even assuming Appellants could state a cognizable claim based on a theory that the Commission mistakenly over-complied with § 5, no evidence supports their claim. Their argument has two incorrect premises: (1) that the benchmark plan used to measure retrogression had eight benchmark ability-to-elect districts, and (2) that "coalition districts" do not count under § 5.

As to the number of benchmark districts, the record supports the Commission's conclusion that the Department of Justice could conclude that the benchmark plan had ten ability-to-elect districts. *See, e.g.*, J.S. App. 77a-78a; Supp. App. 20-21. More importantly, nothing in the record establishes Appellants' position that there were eight such benchmark districts. Indeed, Appellants did not perform any independent functional analysis needed to determine which districts provided minority voters the ability to elect candidates of their choice. J.S. App. 73a-74a; Supp. App. 10-12.

As to so-called "coalition districts," Appellants are simply incorrect when they suggest that the existence of an ability-to-elect district depends on whether a district has a specific percentage of minority voting age or citizen voting age population (or "CVAP"). J.S. at 35-36 (arguing that Districts 24 and

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classification.'" *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)). *See* Doc. 95 at 5-7.

26 were "flawed" because the Hispanic population was "short of a majority"). *See Texas*, 887 F. Supp. 2d at 140 (affirming that district with less than 50 percent CVAP could qualify as ability-to-elect district); *see also* 76 Fed. Reg. 7470, 7471 (describing Department's use of "functional analysis" that does not turn on "any predetermined or fixed demographic percentages").

II. Appellants' partisanship argument does not raise a substantial question for review.

Appellants' partisanship argument depends on assertions that are not at issue on appeal and that do not merit further review. Moreover, under the facts of this case, Appellants' arguments are incorrect under existing law. Assuming they are valid questions at all, whether there is a 10 percent "safe harbor" or whether partisan-driven deviations are unlawful are questions that the Court should leave for another case in which the answers might matter based on the lower court's factual findings.

A. The district court assumed that partisanship could not justify population deviations but rejected Appellants' factual premise regarding partisanship, a finding Appellants do not challenge as clearly erroneous.

Reading the Jurisdictional Statement, one might think that Appellants prevailed at trial. They contend,

for example, that the Commission's "purpose was to dilute Republican votes and amplify Democrat votes," J.S. at 19, and that "the reason for deviation[s] is an effort to gain advantage for [a] political party," J.S. at 18. From this flawed premise, Appellants ask the Court to review the merits to judge the legality of "systematic state-wide population deviations motivated by partisan advantage." *Id.* at 20.

But the district court rejected Appellants' theory that partisan gain caused the population deviations, as explained above (at 23-24). Although the dissent would have gone farther, Judge Clifton would only go so far as to find that partisan gain played "some role" in "some" decisions, but that partisanship did not "predominate[ ] over legitimate factors." J.S. App. 6a, 79a. That much narrower finding is the majority position reflected in the per curiam opinion, a finding that Appellants nowhere contend was clearly erroneous.[9] The factual premise of the issues Appellants want the Court to decide are not part of this case.

The legal issues Appellants' raise with regard to partisanship are likewise irrelevant. Appellants argue that there is no "safe harbor" for population

[9] To the extent Appellants intend to argue that the majority committed clear error as it made its factual findings, they have waived that argument by failing to make it more explicitly. *E.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) (Calabresi, J.). Even had they not, the majority's "account of the evidence is plausible in light of the record viewed in its entirety." *Anderson*, 470 U.S. at 573-74.

deviations. J.S. at 20-22. The Commission has never argued, and the district court did not hold, that there is an "absolute safe-harbor for arbitrary or discriminatory practices." J.S. at 22.

Appellants further argue that the Commission's "systematic state-wide population deviations motivated by partisan advantage" violate equal protection principles. J.S. 20, 24-26. The court did not need to decide whether the partisan motivation could justify population deviations because it "conclude[d] that the redistricting plan here does not violate the Fourteenth Amendment whether or not partisanship is a legitimate redistricting policy." J.S. App. 62a. Thus, the district court "assume[d] without deciding that partisanship is not a legitimate reason to deviate from population equality" and still found in the Commission's favor. J.S. App. 6a.

Consequently, because they do not matter to the outcome, this case is not the one for the Court to address the partisanship issues Appellants raise.

B. The district court's narrow finding that partisanship played "some" non-predominant role is of no constitutional significance.

Summary affirmance is also appropriate because precedent supports the district court's holding that its limited finding of partisanship could not turn the Commission's districting decisions as a whole unconstitutional.

This Court has repeatedly recognized that politics has an unavoidable and constitutional place in the redistricting process. In *Vieth v. Jubelirer*, eight Justices agreed that "politics as usual" is a "traditional [redistricting] criterion, and a constitutional one, so long as it does not go too far." *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (citing *Vieth v. Jubelirer*, 541 U.S. 267, 285-86 (2004) (plurality opinion); *id.* at 307 (Kennedy, J., concurring in the judgment); *id.* at 344 (Souter, J., dissenting); *id.* at 355 (Breyer, J., dissenting)). In the racial-gerrymandering context, this Court has considered political motivation as a defense. *Hunt v. Cromartie*, 526 U.S. 541, 549-51 (1999); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). And in *Gaffney*, the Court explained that "[p]olitics and political considerations are inseparable from districting and apportionment." 412 U.S. at 753.[10]

These precedents establish that the presence of political motivations is an expected and perfectly constitutional ingredient of the redistricting process. It should not be surprising (much less constitutionally suspect) that an individual legislator might favor redistricting policies that also align with the legislator's political interests, as the district court found

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[10] *See also Cecere v. County of Nassau*, 274 F. Supp. 2d 308, 310-11, 315 (E.D.N.Y. 2003) (rejecting vote dilution claim where "gravamen of the complaint is that the map was drawn to favor Democrats" because, in light of *Gaffney* and *Hunt*, an allegation of "political motivation . . . does not, standing alone, implicate the equal protection clause.").

occurred here with respect to a single commissioner's proposal to make District 8 marginally more competitive. *See* J.S. App. 78a-79a. *See also* Ariz. Const. art. IV, pt. 2, § 1(14)(F) (establishing competitiveness as a redistricting objective). As Justice Scalia observed, to say that "politics as usual" is "go[ing] too far . . . seems . . . more likely to encourage politically motivated litigation than to vindicate political rights." *Cox*, 542 U.S. at 952 (Scalia, J., dissenting). Where, as here, the population deviations are minor and evidence of partisanship is minimal and aimed solely at increasing a district's competitiveness, federal courts should not wade into the "political thicket" and "become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 at 750.

C. This case is nothing like *Larios v. Cox*, the sole case to invalidate maps with minor population deviations.

The Court's summary affirmance of *Larios v. Cox* does not alter this analysis. 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd,* 542 U.S. 947. In *Larios*, the challengers produced evidence of intentional misuse of population deviations for improper ends. The legislature conceded that it had "pushed the deviation as close to the 10% line as it thought it could get away with." *Id.* at 1352. Indeed, "dozens of districts c[a]me close to the 5% line." *Id.* The legislature believed that the ± 5 percent range was an unimpeachable safe

harbor within which deviations "did not have to be supported by any legitimate state interest." *Id.* at 1325.

The legislature abused the 10 percent window to deliberately push a number of intentionally partisan goals, including an "intentional effort to allow incumbent Democrats to maintain or increase their delegation" through underpopulation and "pairing numerous Republican incumbents against one another." *Id.* at 1329. Rather than attempt to achieve "a districting plan that would achieve a rough approximation of the statewide political strengths," *Gaffney*, 412 U.S. at 752, Georgia's efforts "led to a significant overall partisan advantage . . . in the electoral maps." *Larios*, 300 F. Supp. 2d at 1331.

Even with such strong evidence of intentional partisanship, however, the court struck down the map because of the legislature's blatant regionalism and targeting of one party's incumbents. *Id.* at 1342. It did not need to decide "whether or when partisan advantage alone may justify deviations in population" because the "partisan interests are bound up inextricably" with the plainly illegitimate "interests of regionalism and [one-party] incumbent protection." *Id.* at 1352; *see also id*. at 1342 ("Supreme Court has long and repeatedly held that favoring certain geographic regions of a state over other regions is unconstitutional.").

Larios has nothing in common with this case. Most significantly, the Commission never acted as

though the 10 percent deviation window was an unimpeachable safe harbor where deviations could be used for improper ends without justification. The Commission understood just the opposite, having been warned that the Commission needed to articulate legitimate reasons for changes and should venture to minimize the deviations. Supp. App. 29-30, 35-37. In addition, despite a full trial, the district court found none of the kind of intentional and rampant partisan maneuvering the court describes in *Larios*. Moreover, the Commission made significant "good faith effort[s] to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. For instance, the Commission implemented a change to the lines for the sole purpose of reducing population deviations. Supp. App. 41-47. In other words, none of the features that made the population deviations in *Larios* unconstitutional exist in this case.

III. Appellants' claims regarding § 2 and "influence" districts have nothing to do with this case.

Appellants' Question Presented three purports to argue that § 2 of the Voting Rights Act does not justify the Commission's districting plan. J.S. at 39-41. It is unclear what the point of the argument is, but it is not relevant to the appeal and should be disregarded. Arizona's compliance with § 2 is not at issue, was not tried or decided below, and nothing Appellants assert merit this Court's attention.

To the extent Appellants argue that *Bartlett v. Strickland*, 556 U.S. 1 (2009), discredits the Commission's decision to promote Districts 24 and 26 as part of its proof of non-retrogression under § 5, or supports their contention that the Commission's districting was done for irrational or illegitimate purposes, they are wrong. The "holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion." *Id.* at 23 (plurality opinion). And in *Bartlett*, the plurality opinion expressly stated that the standards for § 5 and § 2 are different. *Id*. at 25. As later courts recognized, the Supreme Court "has long acknowledged the existence of coalition and crossover districts, recognizing at times that they can provide the means for minority voters to elect their candidates of choice." *Texas*, 887 F. Supp. 2d at 148 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993)).

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CONCLUSION

The Court should summarily affirm the district court or dismiss the appeal for want of a substantial federal question.

Respectfully submitted,

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November 13, 2014

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Wesley W. Harris, qualified elector of the State of Arizona, et al.,	)	
Plaintiffs,	)	
vs.	)	CV-12-00894-ROS-NVW-RRC
Arizona Independent Redistricting Commission, et al.,	)	Phoenix, Arizona
Defendants.	)	

BEFORE: THE HONORABLE ROSLYN O. SILBER, CHIEF JUDGE

THE HONORABLE NEIL V. WAKE, JUDGE

THE HONORABLE RICHARD R. CLIFTON, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BENCH TRIAL

* * *

[50] [RICHARD STERTZ] A. I would hasten to say that to use words like being never advised. And I say that because there was – we would rely – again, we would rely heavily on the representations that were put forth by legal counsel and their consultants and in doing so, we would hear from them and say we are – we don't want to overcompensate. We want to

not hit the minimum requirements either. We – the priority out of this Commission from the very beginning was – from this Commissioner's perspective, was to follow all aspects of the constitutional requirements, one of which is the meeting the intent of the Voting Rights Act in Section 5 which had to do with retrogression and that was a key component, is that we did not want to ever look at a map where we had retrogression designed into the map.

* * *

[246] Q. And, in fact, if you turn the page and go to the change, let's get the numbers up. Let's go to District 1, the top of it.

So in order to keep the county whole on this particular map change, you see the District 1 is going from an under population of 5,165 to being overpopulated. True?

[RICHARD STERTZ] A. True.

Q. And that change is being made because the interest you are trying to do is to keep Cochise County whole, correct?

[247] A. Again, I can't answer that as a yes or no.

Q. I thought you told me on direct examination you heard a lot of comments from people that wanted to keep Cochise County together.

CHIEF JUDGE SILVER: Mr. Campbell, I'm having trouble hearing you again.

BY MR. CAMPBELL:

Q. I thought on direct examination you told me that you heard a lot of comments from Cochise County that they wanted to keep Cochise County whole. True?

A. Yes.

Q. And if you look at what happens to the Hispanic population in Cochise County, you will see it's the third one down, Hispanic, it goes from 21 percent up to 29 percent. True?

A. True.

Q. And that's because that tail had a heavy concentration of Hispanic population. True?

A. True.

Q. Okay. Let's go down to what happens to District 2.

Now District 2 is a Voting Rights Act district, right?

A. Yes.

Q. And you see that it deviates in ideal population. It goes from minus 200, which is nearly almost equal, you would agree with me on that, right?

A. Yes.

[248] Q. And it actually is now underpopulated by 8,700 people, correct?

A. At that change report, yes.

Q. At that change report. And that happens because you are trying to keep Cochise County whole and not give those Hispanics over to District 2. True?

A. Again, I can't answer that as a yes or no. If you ask if the keeping it whole was one of the desires, then the answer would be yes.

* * *

[249] Q. And Judge Clifton can't see this, but the other judges will know that Flagstaff is up here in District 6, correct, near the Schultz Flood Area?

[RICHARD STERTZ] A. That's correct.

Q. And the community in the Schultz Flood Area didn't want to be in District 7, correct?

A. There was the desire to not be in District 7.

Q. District 7 was the Native American district, correct?

A. Correct.

Q. And they wanted – they thought their interests were more in line in Flagstaff and wanted to be put in Legislative District 6. True?

A. That's the testimony that they gave, yes.

Q. And the Commission accommodated that. True?

A. True.

Q. And the result of that, though, is it was moving population from Legislative District 7 into Legislative District 6, right?

A. True.

* * *

[265] Q. All right. Let's go to the Voting Rights Act. Okay?

You wanted to comply with the Voting Rights Act. True?

[RICHARD STERTZ] A. True.

Q. You wanted to do everything you could do to get preclearance on the very first try. True?

A. True.

* * *

[270] [RICHARD STERTZ] A. We were following, in my opinion, I was following clearly with what was being delivered to us by legal counsel and their consultants. They said that 10 was going to be the magic number that we needed to hit. So when 10 passed, 10 was used, and it cleared. Then all of the recommendations that we had [271] been given were correct.

* * *

[308] Q. All right. I would like you to turn to your deposition, page 246. And let's start at line 13. Let me see if I asked you these questions and you gave me these answers.

QUESTION: I realize these are small, incremental changes, but it was your understanding that the purpose of this change was to make it a better ability-to-elect district?

[RICHARD STERTZ] ANSWER: This was a questionable change, because of the area of Yuma that got shifted from Yuma into – which is an ability-to-elect district to a highly now underpopulated Republican district 13 has got a much greater amount of Republicans now in it, and there was an offload at that part of the city that is a highly Republican area that got offloaded from 4 to 13.

I have to tell you – let me just back up a little bit here. That's a natural consequence of improving the ability-to-elect districts is you need to offload Republicans. Because typically, we found 70, 74 percent of Hispanics are registered Democrats. So by offloading the Republicans, you're increasing the ability-to-elect. And you are increasing the [309] Hispanic population in a particular district or in a particular area. So offloading blocks of Republicans into other districts enhances two things. It enhances the voting data to creep away from any view of retrogression, second, it does strengthen the ability to elect, because in a Democrat district, they're going to elect Democrats. So 4 is two and one. They've got a state senator and two house members that were elected.

Correct?

MR. CANTELME: Objection, Your Honor. Improper impeachment. No inconsistency under Rule 32(A)(2).

CHIEF JUDGE SILVER: Overruled.

BY MR. CAMPBELL:

Q. Did you give me those answers to those questions?

[RICHARD STERTZ] A. I did.

* * *

[316] Q. All right. And in public hearings you heard testimony from non-Hispanic Whites in the eastern area of Arizona that they didn't want to be in Legislative District 7; correct?

[RICHARD STERTZ] A. To the best of my recollection, yes.

Q. And let's go to the tentative final map which is going to be Tab 5 in the map book. Do you see that Greenlee County has been moved into District 1 with Cochise County?

A. Correct.

Q. That underpopulates, to some extent, Legislative District 7 and move population into Legislative District 1; true?

A. True.

Q. And that would satisfy a community of interest the [317] Greenlee County residents articulated; true?

A. True.

Q. It would also keep counties whole. You're not splitting Greenlee County; true?

A. Under one of the requirements of the Constitution.

Q. And then over on the other end of the state, I think we went through yesterday where parts of Mohave County were taken out of the Legislative District 7 and put into Legislative District 5; true?

A. True.

Q. And that would improve keeping counties whole; correct?

A. Again, one of the requirements mandated by the Constitution.

* * *

[326] Q. Let's go down to the chart down below. 2004 election, 18 Republicans, 12 Democrats, correct, in the Senate?

[RICHARD STERTZ] A. Yes.

Q. 17, 13 in 2006?

A. Yes.

Q. 17, 13, in 2008?

A. Yes.

Q. And then let's go to 2010, it's 21, 9?

A. It was an outlier election year.

Q. Right. Let's go to the first sentence of the next paragraph or just blow up the next paragraph.

You see Mr. Cantelme says that the averages were skewed by the 2010 election results, the product of an atypical wave election influenced by national politics and by calls from some politicians to boycott Arizona. Do you see that?

A. Yes.

Q. So in the 2012 election in the Senate it's 17 Republicans [327] and 13 Democrats; right?

A. Yes.

Q. Just the way it was throughout the decade of the 2000s except for the 2010 election; correct?

A. Yes.

Q. And it's your opinion, sir, that the Republicans will hold the Senate and the House until 2020; correct?

A. Yes.

* * *

[669] Q. Now, in your deposition I asked you whether your opinion was the only logical explanation for the underpopulation of Legislative District 7

was to increase Democratic voting strength. Do you remember asking you that question?

[THOMAS HOFELLER] A. No.

MR. CANTELME: Page and line, please.

BY MR. CAMPBELL:

Q. Do you remember in your deposition withdrawing your opinion as to Legislative District 7?

A. Which opinion was that? The one you just mentioned?

Q. Yes.

A. Yes, I think I did.

* * *

[735] Q. Mr. Hofeller, did you do a functional analysis with respect to any district in this case under a Section 5 analysis?

[THOMAS HOFELLER] A. No.

MR. CANTELME: Your Honor it's "Dr. Hofeller."

[736] MR. CAMPBELL: I'm sorry.

CHIEF JUDGE SILVER: Remember, you can call him "Doctor." He likes it.

THE WITNESS: I don't really care.

BY MR. CAMPBELL:

Q. Doctor, you understand the Commission had to do a functional analysis of the district before submitting a plan to the Department of Justice. True?

A. True.

Q. And you understand that the Department of Justice doesn't tell you where the fence is with respect to hitting a home run. True?

A. That's true. They will often tell you when they reject you where it was, but not ahead of time, sort of like the tax man.

Q. But the problem the Commission has with getting preclearance is anticipating what the Department of Justice will require. True?

A. That certainly has to be part of their deliberation, yes.

Q. And to be fair to the Commission, they have to exercise judgment as to how many Voting Rights Acts districts they should draw to make sure they get preclearance. Isn't that fair?

MR. CANTELME: Objection. Calls for a legal conclusion.

CHIEF JUDGE SILVER: Overruled.

[737] THE WITNESS: I think they have to make that judgment, but it has to be based on logical deduction.

* * *

[776] Q. And Mr. Adelson advised the Commission that it could depopulate the minority districts for purposes of compliance with Section 5. True?

[LINDA MCNULTY] 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.

Q. And the Commission proceeded accordingly. True?

A. Yes. That's correct.

* * *

[778] Q. And receiving preclearance from the Department of Justice on its first attempt was important to you as a commissioner?

[LINDA MCNULTY] A. Yes, it was. It was very important to me.

* * *

[779] Q. And let me – from draft map to final, the Commission was trying to strengthen minority voting power in certain districts, is that correct?

[LINDA MCNULTY] A. Yes. That's correct.

Q. And was that effort focused on Districts 4, 24, and 26? Is that correct?

A. That's correct. I had asked Mr. Adelson several times to help us understand which districts he thought were most important for us to focus on, and those were the three that he thought were the priority.

* * *

[791] Q. Briefly, on Districts 8 and 11, you attempted to make District 8 more competitive, is that correct?

[LINDA MCNULTY] A. Yes.

Q. Let's look at a census place map of LD 8. That's in the notebook, and that's at Tab 7C. Just to get a better sense of what's in that, because I wanted to talk not about the numbers, but just about communities of interest in that district and what that district is comprised of.

A. Okay.

* * *

[792] Q. From draft map to final, do you recall moving – did that affect the community of SaddleBrooke?

[793] [LINDA MCNULTY] A. Yes. My recollection is that I had specifically in a public meeting asked Willie Desmond to look at these two districts and to determine whether they could be adjusted to increase the competitiveness of one of the districts. As we had approved them in the draft map, the Republican registration and the Republican effectiveness, the gap between Republican and Democrat was, I think, 11 percent in one district and 13 in another based on our competitive measures.

And I also wanted to – I had in mind and had raised a couple times in the course of our work keeping the Copper Corridor communities together and seeing if we could preserve any opportunity to vote there. I know that's a longer answer than you wanted.

But my recollection is that at the end November or beginning of December I was flying back and forth to the east coast a lot right about then. I had asked Willie in a meeting to do that. And on December 5th I was not at the hearing, but he presented the map in which he had made the changes. And one of the changes he had made, in order to accomplish making one of the districts more competitive, was to combine the towns of SaddleBrooke, Marana, and Oro Valley into 11 and they had previously been split in our draft

map with a couple of them in one and a couple of them in another. And so this did combine those into 11.

* * *

[984] Q. In order to gain preclearance, does it help a state like Arizona, especially with its history of objections, to show that it is doing everything it can to improve the district?

[BRUCE CAIN] A. Absolutely.

Q. When Arizona is preparing its preclearance submission, does it know what numbers it needs to hit on each of its districts to satisfy the Department of Justice?

A. No. Unfortunately, they don't send you a letter and tell you aim for 8, aim for 9, aim for 10.

* * *

[985] Q. In your opinion is it fair to call these minor population deviations?

[BRUCE CAIN] A. Yes. They are – the average is 2.2, which is very much within the norm for Legislative Districts. If you look across the states there were some states that had much higher deviations as I point out in my report. There were 12 states that had larger deviations as of a couple months ago when I looked at the NCSL data. They are probably more now. And the 2.2 is really a quite moderate level.

Q. In your experience, have other states used minor population deviations to improve the ability to elect candidates of choice [986] in Voting Rights Act districts?

MR. CANTELME: Objection. Foundation. Time and state.

CHIEF JUDGE SILVER: Sustained.

BY MR. CAMPBELL:

Q. Have you worked in other states with respect to Section 5 Voting Rights Act issues?

A. California has Section 5 counties. I believe Arizona is the only Section 5 state that I personally worked with.

Q. Okay. Did you deal with any population deviations in county drawing?

A. Yes, but it was never an issue like this.

Q. So your knowledge is just academic?

A. It's academic, I'm afraid.

Q. With that foundation, I will see if we get an objection.

With that foundation, are you aware of other states that use minor population deviations to enhance the ability to elect candidates of choice in Voting Rights Act districts?

MR. CANTELME: Same objections.

CHIEF JUDGE SILVER: Overruled.

THE WITNESS: There are, yes. I looked at some of the states that had population deviations that were greater than nine, and indeed they were greater than Arizona. And several of the other Section 5 states, and I put them into the report, had had larger deviations. And when you go in you see some [987] number of them are minority districts.

* * *

[1070] Q. So the Commission completed its work – so you completed it so after this you adopted the final map in January of 2017 -excuse me 2012.

[COLLEEN MATHIS] A. Correct.

Q. And then that got pre-cleared?

A. Yes. And it was – that was great news. It was something I was very proud of. And one of the reasons my stated goal from the beginning was to pass pre-clearance from the first try is Arizona had never done that. And I felt like getting it out from under that track record of never passing preclearance on the first try was a goal that this Commission should strive for and when it happened I was extremely proud and pleased.

* * *

[1085] Q. Now, let's go back to the 11-29 – I told you I would come back to this – the 11-29 transcript of the Commission meeting. Page 117, line 4.

It says – now, again you testified that you were at this meeting. True?

[COLLEEN MATHIS] A. True.

Q. "Commissioner Stertz, I think that a lot of what we're talking about today as far as evaluating turnout, electoral success, registration rates, for example, looking at combining voters from districts where they cannot elect, that was a big issue in Texas. In Texas, what Texas did" – let's go to 118. Line 18. I apologize. If we could blow that up, Line 18. Says, "There's no bright line rule that says, okay, 6 percent is good or 7 percent is good, but I think as Mr. Strasma said looking in the 5 percent range and concluding that you have a rational basis for perhaps going to 7 percent in one district or 8 percent, and I'm just throwing numbers out, a rational basis is compliant with the Voting Rights Act. And underpopulating certain districts to the extent that you increase the minority proportion, another acceptable tool is [1086] reducing the Anglo voters who have been shown through analysis do not support minority candidates of choice. That's a very accepted redistricting tool that is something that I have been doing with many of my clients around the country. That's something that the Department of Justice looks at."

Do you remember getting that advice from Mr. Adelson?

A. I do. I didn't specifically but –

Q. It refreshes your memory?

A. Now that I have read it, yes.

Q. And again, ma'am, you followed that advice in the way that you voted relative to the maps. True?

A. I did. I felt he was a credible person since he worked at DOJ and was on the receiving end of the submission last time.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Tuesday, November 29, 2011
1:35 p.m.

Location

Fiesta Resort – Fiesta Ballroom
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Linda C. McNulty, Commissioner
Richard P. Stertz, Commissioner

Ray Bladine, Executive Director
Buck Forst, Information Technology Specialist
Kristina Gomez, Deputy Executive Director

Mary O'Grady, Legal Counsel
Joe Kanefield, Legal Counsel
Bruce Adelson, Legal Counsel

Excerpts of Transcript

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[104] BRUCE ADELSON: Commissioner Stertz, in the first part of that – let me back up for a little bit.

[105] In looking at – in determining these districts, we look to determine the – whether or not minority voters are able and have been able to elect their candidates of choice.

In looking at the various districts in Arizona, my belief is that there are ten districts, benchmark districts, meaning precleared districts, where minority voters have demonstrated the ability to elect.

* * *

[107] In terms of the introduction to the legislative question, the question of ten benchmark districts has been a ongoing point of discussion. And I believe the document that you have today has the same assertion that we've made now that were operating under the assumption that there are ten benchmark districts and that our burden is to prove that we have the same number of equal or better quality.

* * *

[115] KENNETH STRASMA: We've been trying to keep the deviation well within plus or minus five percent. I believe it's two point something to three point something, so just over five percent of total range.

And so I would say if we can avoid underpopulating by more than three percent, that would still be within the acceptable population deviation range. And there would be an acceptable compelling reason for doing of, to underpopulate majority minority.

CHAIRPERSON MATHIS: Is that of the population as a whole or the minority population in that district?

KENNETH STRASMA: Population as a whole.

The deviation constraints are total population, not any racial category.

COMMISSIONER STERTZ: Madam Chair, Mr. Strasma, is that merely to gain a percentage?

KENNETH STRASMA: Beg your pardon?

COMMISSIONER STERTZ: Is that merely to gain a percentage of opportunity? Is it purely a numbers game?

KENNETH STRASMA: There are two reasons for that.

One is in order to strengthen the ability to elect [116] in that district.

If we have guidance that allows a certain percent of population deviation and the choice of some districts be over and some districts be under, and were able to strengthen the minority vote by underpopulating the minority, then that in other jurisdictions has been held to be acceptable.

The other reason for doing that is because of the disproportionate share of population growth that has been in Hispanic community in Arizona. It is likely that these districts that are currently underpopulated would be overpopulated by the end of the decade, if not by the next election.

So taking into account areas of population growth is another reason why the Commission might choose to underpopulate.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Thursday, December 1, 2011
1:05 p.m.

Location

Fiesta Resort
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Linda C. McNulty, Commissioner
Richard P. Stertz, Commissioner

Ray Bladine, Executive Director
Kristina Gomez, Assistant Executive Director
Buck Forst, Information Technology Specialist
Stuart Robinson, Public Information Officer

Mary O'Grady, Legal Counsel
Joe Kanefield, Legal Counsel
Bruce Adelson, Legal Counsel

Excerpts of Transcript

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[21] WILLIE DESMOND: Then the other one we have prepared for today is changes to Legislative District 4, the district that goes through southern Yuma and comes up through the western portion of Maricopa County, and also [22] includes the Tohono O'odham Nation.

* * *

WILLIE DESMOND: District 14, looking at it in the Tucson area, there wasn't any real obvious places to grab minority population, because it does border voting rights districts in Districts 2 and 3.

And then the area by Picture Rock, Marana and stuff, there wasn't any real good population to grab that [23] would improve it.

I'll turn on the block. This is shaded differently.

There was no real strong areas following in District 11 to pick up minority population.

So continuing along, I went up into Maricopa County, and found kind of the same thing.

It runs along District 19, which is one of our voting rights districts. And on the north side, District 13 does not have much to offer by way of minority population or strong support for the mine inspector's race.

So, really, we're left with the possibility of removing population is the only – only method.

Again, because in this area we didn't want to remove any of the reservation area, in order to keep that whole, that was not a very good option.

There is the town of Three Points here. We didn't want to split another boundary, so I left that.

And found the same thing in Maricopa.

What we're left with, really, is trying to improve it in Yuma, so that's where I proceeded.

District 4 did not gain any population. It really just shed some of its whiter areas.

In this case, since District 4 already started with a fairly strong voting age percentage, there wasn't [24] consideration to increase that.

What we were aiming to do was to improve the ability to elect.

So the consideration that kind of trumped the racial makeup of the area was the performance.

Again, I used mine inspector here, and probably looked at other races. We certainly want to verify it and make sure the changes are good, and put it in the report.

But you can see again the numbers are on the whole, let me – are how the Hispanic candidate performed in the mine inspector's race.

So by and large, these areas were very low performing. That's why they were removed.

District 4 started highly overpopulated, so it did have quite a lot of population to shed.

District 13, where the population was transferred to – started about 500 people under-populated, so with that population to gain, I guess.

We moved about 8,000 people. 8,622 people from District 4 to District 13. And by doing so, we were able to – District 4 went from HVAP of 53.65, up to 54.46. So it did improve there.

And also we were able to bring the mine inspector race from 51 percent up to 52 percent, so it gained about one percent.

[25] Curious, I'll turn on the streets here, so you can kind of see where these changes are.

So I used the one when – Palo Verde back up at Pacific.

Then on 26th Place, what we did is take it straight across at 24th Street and then down here at, think that's First Avenue, kind of around, following the census block.

One other thing that was affected by this is there are two fewer unsplit districts for census tracts and five fewer census block groups, so it did improve on our splits report, also.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Thursday, December 8, 2011
11:13 a.m.

Location

Phoenix-Airport
Crowne Plaza Holiday Inn
4300 East Washington
Phoenix, Arizona 85034

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Scott Day Freeman, Vice Chair
Linda C. McNulty, Commissioner

Ray Bladine, Executive Director
Kristina Gomez, Deputy Executive Director
Buck Forst, Information Technology Specialist

Kristin Windberg [sic], Legal Counsel
Bruce Adelson, Legal Counsel

Excerpts of Transcript

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[17] CHAIRPERSON MATHIS: Any other questions on this or comments?

This may be a question for legal counsel. I'm not sure. But the deviation from ideal population, what we've determined that to be, what is an acceptable range?

BRUCE ADELSON: Madam Chair, unfortunately, there is no black letter absolute this deviation is okay.

But the deviations are across the entire plan, across all 30 districts.

So, arguably, you could have deviation, I wouldn't recommend this, a 15 percent in one district, and two in another district. And the average is not going to be 15 percent across the plan.

So it's across the plan.

And in the various districts, of course, that I've looked at, and the various changes that are being suggested, I haven't seen any deviation that is hugely out of whack. But because there is no bright line, absolutely you must do the tasks. Just like many things, there's no absolute guarantee as far as liability in a court setting.

From a deviation – deviation from Justice's standpoint, Justice only views that as significant if you're violating the Voting Rights Act. So if you have a substantial deviation, or small deviation, and that results in retrogression, that's something that Justice cares about [18] that. But if you have an 8-percent deviation or a 9-percent deviation, without retrogression, that's not an issue for Justice.

That may be an issue from a liability standpoint for private individuals, but Justice focuses on discrimination as is detailed in the Voting Rights Act, That's what their primary concern would be.

CHAIRPERSON MATHIS: Thank you.

KRISTIN WINDTBERG: And I, Madam Chair, would add to that but I think there have been previous discussions with this Commission trying to keep the overall deviations close to the deviations that were in the benchmark.

So I would echo what Mr. Adelson is saying, that you need to keep this in mind as you're looking at all of the changes that you're making as to the amount of deviation district by district, but that one single district having a deviation of 6.2 is probably not going to be end all, be all. But I would keep it in mind as you're looking at all the changes you go through.

BRUCE ADELSON: Madam Chair, if I could add a point.

I agree with that. The Larios v. Cox, the federal court decision from 2004, that basically said that jurisdictions cannot assume that 10 percent deviation is safe harbor in. But the court did not establish 7.5 or [19] 8 percent as a new safe harbor.

I generally like to receive deviations in roughly the 5-percent range.

However, there have been jurisdictions that I've worked with in this redistricting cycle where the majority-minority districts deviation was higher than

that because we intentionally under-populated in order to comply with Section 5.

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ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Monday, December 12, 2011
9:49 a.m.

Location

Fiesta Inn Resort – Fiesta Ballroom
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Scott Day Freeman, Vice Chair
Linda C. McNulty, Commissioner
Richard P. Stertz, Commissioner

Buck Forst, Information Technology Specialist
Kristina Gomez, Deputy Executive Director

Joe Kanefield, Legal Counsel
Kristin Windtberg, Legal Counsel

Excerpts of Transcript

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[146] [WILLIE DESMOND] I guess seeing in the south, the next big – big change has been to Legislative District 2, which is another voting rights district.

The arm in Cochise County, as we all know, has been removed and added to District 1.

In order to balance the population, Green Valley has been added into congressional – or Legislative District 2.

District 10 remains the same.

District 9 sheds some population to District 3, but did not pick up any populations. It was a little overpopulated. Now it's probably a little underpopulated. That was just to balance between the two.

District 1, which is now all of Cochise County, all of the non-tribal portion of Graham County, and all of Greenlee County. Greenlee County was added in.

Changes were made to Legislative District 7, which is another one of our majority-minority districts. District 7 also picked up the areas of Show Low and Linden and the unincorporated, areas to the east of that, and gave up population here in Sun Valley and the unincorporated areas around that.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Friday, December 16, 2011
4:08 p.m.

Location

Fiesta Resort – Fiesta I Ballroom
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Scott Day Freeman, Vice Chair
Linda C. McNulty, Commissioner
Richard Stertz (via teleconference)

Ray Bladine, Executive Director
Buck Forst, Information Technology Specialist
Kristina Gomez, Deputy Executive Director
Stu Robinson, Public Information Officer

Mary O'Grady, Legal Counsel
Joe Kanefield, Legal Counsel
Bruce Adelson, Legal Counsel

Excerpts of Transcript

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[67] [WILLIE DESMOND] Also for today there's one more change report for the legislative. And that was something that Commissioner McNulty had asked me for this afternoon. That was just to try and balance some population of some of our non majority-minority districts that had either far too much pop – depending on what the legal team says,

too much population or too few, trying to bring down the deviation closer to zero.

* * *

[78] [BRUCE ADELSON] As far as the Guadalupe issue, my concern has been that District 26, the draft district, is arguably one of the weakest as far as several of the metrics in the draft map.

DOJ in Section 5 evaluation looks at many things.

They look at performance. They look at HVAP, HCVAP, total minority population, and they compare that with the benchmark.

The way District 26 now is in several categories District 26 is weaker than the weakest benchmark district in certain categories, not in all the categories.

And there are – because that doesn't match up well, my concern is that we should – my recommendation [79] respectfully is that the Commission should enhance the district to the extent that we can.

* * *

[124] MARY O'GRADY: Yeah, Madam Chair, commissioners, on the subject of deviations in the legislative map, the working map did have a – I think it made sense to make every effort, as this change does, to reduce the deviations that are in the map, other than the voting rights district.

We understand that they're low. We've made a record as to why they are low for the most part.

But in the other districts, to the extent there are deviations, you should try to reduce them and justify them. To the extent they aren't reduced, explain why they are there and so we have that record.

In no case, when we're done, should the deviations [125] exceed – I mean, under the federal law it's 10 percent.

And we suggest that you try and keep the range as minimal as possible.

Joe?

JOSEPH KANEFIELD: Madam Chair, the only thing I would add, and I think Mary hit on this, was that under the evolving case law on the subject of population deviation under the Equal Protection Clause for purposes of the legislative maps, the old rule used to be 10 percent was the safe harbor. Because of intervening precedent over the last decade, that's not necessarily the case.

There can be a deviation, but the Commission needs to explain why there has been a deviation. It's basically going to be judged on a reasonable basis, rational basis kind of standard by the court.

But they will – it would be good to justify those deviations, at least on the record, explain why they took place.

Voting Rights Act, adjusting districts to accommodate the Section 5 concerns of Voting Rights Act obviously would be one.

Such concern, keeping communities together, municipalities, that kind of thing.

So we would encourage you to put on the record the reasons for the deviations, when we get to that point, for [126] the final adoption.

* * *

ARIZONA INDEPENDENT REDISTRICTING COMMISSION

Monday, December 19, 2011
9:37 am,

Location

Fiesta Inn Resort
2100 South Priest Drive
Tempe, Arizona 85282

Attending

Colleen C. Mathis, Chair
Jose M. Herrera, Vice Chair
Scott Day Freeman, Vice Chair
Linda C. McNulty, Commissioner
Richard P. Stertz, Commissioner

Ray Bladine, Executive Director
Kristina Gomez, Deputy Executive Director
Buck Forst, Information Technology Specialist

Joe Kanefield, Legal Counsel
Mary O'Grady, Legal Counsel

Excerpts of Transcript

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[10] JOSEPH KANEFIELD: Bruce is not available today. He is in Florida. But we have corresponding copies issued, as Mary mentioned, and he has recommended, to the extent we [11] can strengthen LD 8, that would be very helpful in terms of the voting rights issue, especially given the numbers of 26 and 8.

* * *

[12] MARY O'GRADY: Well in terms of the geography, Commissioners, 6 measures – 8 is where 23 was, geographically. So they're in the same vicinity. So to some extent, this will help us show Justice that we did the best we could with the voters who were in what we argued was previously a voting rights district in 23, because before these people, these voters, under our prior configuration, weren't an ability to elect district.

Now at least shows argument that we've done as best as we can to maintain the same level of support in 23 that was in old 23, with the way we've configured 8.

* * *

[42] VICE-CHAIR HERRERA: Would you entertain a motion to send any of the changes to LD 8 to strengthen the majority-minority strength to get it analyzed?

CHAIRPERSON MATHIS: Yes, I would, based on the discussion Friday. And I would encourage anybody who didn't see Friday's meeting to be sure to pull that up online, to see the discussion regarding this potential for an 11th majority-minority district.

And if I'm phrasing that incorrectly, because it's actually called something else technically, I apologize. But you should watch that, and it's a discussion with Mr. Adelson regarding this.

And I do think it's worth considering for further analysis if it strengthens the overall plan for pre-clearance.

VICE-CHAIR HERRERA: Madam Chair, then I make that motion.

* * *

[50] CHAIRPERSON MATHIS: Any other discussion?

(No oral response.)

CHAIRPERSON MATHIS: All in favor?

VICE-CHAIR HERRERA: A strong, yes.

COMMISSIONER McNULTY: Aye.

CHAIRPERSON MATHIS: Aye.

CHAIRPERSON MATHIS: Any opposed?

COMMISSIONER STERTZ: No.

VICE-CHAIR FREEMAN: Nay.

[51] CHAIRPERSON MATHIS: Okay. The motion carries three, two. So we'll he sending this legislative working map draft change report, the malty LD 8, Version 2, to Dr. King for additional analysis.

* * *

[98] COMMISSIONER STERTZ: While Mr. Desmond runs the change report, I appreciate this work in progress, because it's also showing anybody

that's out there that we are looking at this thing at this level.

On various edges on certain districts on the map, I know some of these have to do with census blocks where we have small dips and notches.

One of the things we talked about a week ago to try to get to major – get away from local roads, local streets, and go to arterials and collectors, without going through all of the different lines on all of the maps, has that been an attempt by Strategic to do that?

For example, I noticed in the city between Districts 9 and 10, you moved off of Helen Street and moved to Speedway, for example, where it went from a local street to the south to Speedway Boulevard, which is an arterial.

[99] CHAIRPERSON MATHIS: That's a good thing, isn't it?

COMMISSIONER STERTZ: It is.

COMMISSIONER McNULTY: That was in the population balancing that we had just looked at.

* * *

[108] CHAIRPERSON MATHIS: So I'd entertain a motion to incorporate these changes as just described into the working map.

COMMISSIONER McNULTY: I move that we incorporate the swap that Mr. Stertz put forward,

and the changes on my population balance proposal, except for the movement of Camp Verde to District 6, which we'll hold off on until we discuss those districts. And with that exception, incorporate these into the working draft and request that Dr. King analyze District 2 as revised.

CHAIRPERSON MATHIS: There is a second?

COMMISSIONER STERTZ: I'll second.

[109] CHAIRPERSON MATHIS: Any discussion?

I didn't realize Mr. Herrera wasn't here.

I don't know if he needs to be for that.

I mean, I know we can move forward without him, but I would like – there he is.

Mr. Herrera, I didn't know you were out of the room when I said I'd entertain a motion.

COMMISSIONER McNULTY: We just moved to replace you.

VICE-CHAIR HERRERA: Sorry.

CHAIRPERSON MATHIS: To bring you up to speed, we just had a motion that was seconded, a motion made by Ms. McNulty, seconded by Mr. Stertz, to essentially put the changes we just talked about, Rita Road, the Rita Ranch neighborhood swap we just talked about the adjustments, for population balance

between 9 and 10, that change there, that was in, that Mr. Desmond has already done a change report on.

I'm trying to think of other parts of that motion.

Essentially, to put those into the working map as described, and then hold off on the Camp Verde population balance change until we deal with the districts up there.

Is there anything else I'm missing from that motion?

COMMISSIONER McNULTY: I don't think so, Madam [110] Chair. I think that covers it.

CHAIRPERSON MATHIS: Okay. And we are now at the any discussion standpoint, if anybody has comments on that.

(No oral response.)

CHAIRPERSON MATHIS: Okay. Hearing none, all in favor?

COMMISSIONER STERTZ: Aye.

COMMISSIONER McNULTY: Aye.

VICE-CHAIR FREEMAN: Aye.

CHAIRPERSON MATHIS: Any opposed?

VICE-CHAIR HERRERA: Abstaining.

CHAIRPERSON MATHIS: So we have four ayes and one abstention, Mr. Herrera.

* * *

UNITED STATES DEPARTMENT OF JUSTICE SUBMISSION
UNDER SECTION 5 OF VOTING RIGHTS ACT

STATE OF ARIZONA

LEGISLATIVE REDISTRICTING PLAN

Submitted By

Arizona Independent Redistricting Commission

February 28, 2012

Notebook 3 of 5

CONTENTS:

EXHIBITS 5A thru 5B

Change Report: Pop_balance_121611

OLD MAP: LEG-WORKING_MAP-120911-BLOCK_EQUIVALENCY
NEW MAP: LEG_DRAFT_CHANGE-POP_BALANCE_121611-BLOCK_EQUIVALENCY
DISTRICTS CHAN 1, 6, 7, 9, 10 & 14

POPULATION – Pop balance_121611

DIST	CATEGORY	OLD DISTRICT		NEW DISTRICT		CHANGE	
		#	%	#	%	#	%
1	Deviation from Ideal Population	11,766	5.5%	5,384	2.5%	-6,382	-3.0%
1	NH White	137,540	61.2%	132,916	60.8%	-4,624	0.3%
1	Hispanic	68,599	30.5%	67,523	30.9%	-1,076	0.4%
1	NH Native-American	1,921	0.9%	1,885	0.9%	-36	0.0%
1	NH African-American	7,285	3.2%	7,034	3.2%	-251	0.0%
1	Total minority	87,294	38.8%	85,536	39.2%	-1,758	0.3%
1	18+ NH White	110,198	65.3%	106,752	65.0%	-3,446	-0.3%
1	18+ Hispanic	45,087	26.7%	44,458	27.1%	-629	0.4%
1	18+ NH Native American	1,532	0.9%	1,508	0.9%	-24	0.0%
1	18+ African-American	5,613	3.3%	5,431	3.3%	-182	0.0%
1	18+ total minority	58,640	34.7%	57,553	35.0%	-1,087	0.3%
1	Hispanic CVAP	33,007	22.4%	32,341	22.7%	-666	0.3%
1	Hispanic Registration	21,552	17.2%	21,200	17.4%	-352	0.2%
1	2004 Prop 200 Yes	39,086	57.3%	37,931	57.4%	-1,155	0.1%
1	2004 President Dem	26,655	37.4%	25,698	37.2%	-957	-0.2%
1	2006 Sec of St. Dem	20,963	38.9%	20,159	38.8%	-804	-0.1%
1	2008 President Dem	31,496	37.3%	30,141	37.0%	-1,355	-0.3%
1	2010 Mine Dem	24,888	37.4%	23,826	37.2%	-1,062	-0.2%
6	Deviation from Ideal Population	-9,908	-4.7%	1,072	0.5%	10,980	5.2%
6	NH White	150,957	74.3%	159,090	74.3%	8,133	0.0%
6	Hispanic	31,382	15.4%	33,171	15.5%	1,789	0.0%
6	NH Native-American	12,404	6.1%	13,050	6.1%	646	0.0%
6	NH African-American	1,958	1.0%	2,004	0.9%	46	0.0%
6	Total minority	52,202	25.7%	55,050	25.7%	2,848	0.0%
6	18+ NH White	126,167	78.2%	132,859	78.2%	6,692	0.0%
6	18+ Hispanic	20,198	12.5%	21,324	12.6%	1,126	0.0%
6	18+ NH Native American	8,752	5.4%	9,207	5.4%	455	0.0%
6	18+ African-American	1,605	1.0%	1,639	1.0%	34	0.0%
6	18+ total minority	35,183	21.8%	37,030	21.8%	1,847	0.0%
6	Hispanic CVAP	11,420	8.1%	11,868	8.0%	448	-0.1%
6	Hispanic Registration	7,293	6.6%	7,639	6.6%	346	0.0%
6	2004 Prop 200 Yes	42,999	52.0%	45,241	52.4%	2,242	0.4%
6	2004 President Dem	41,622	47.4%	42,867	46.8%	1,245	-0.6%
6	2006 Sec of St Dem	27,396	42.8%	28,243	42.2%	850	-0.6%
6	2008 President Dem	40,723	46.1%	42,093	45.5%	1,370	-0.6%
6	2010 Mine Dem	26,619	41.7%	27,540	41.1%	921	-0.6%

7	Deviation from Ideal Population	-10,023	-4.7%	-10,023	-4.7%	0	0.0%
7	NH White	50,372	24.8%	50,372	24.8%	0	0.0%
7	Hispanic	13,882	6.8%	13,882	6.8%	0	0.0%
7	NH Native-American	133,841	65.9%	133,841	65.9%	0	0.0%
7	NH African-American	914	0.5%	914	0.5%	0	0.0%
7	Total minority	152,672	75.2%	152,672	75.2%	0	0.0%
7	18+ NH White	40,012	28.7%	40,012	28.7%	0	0.0%
7	18+ Hispanic	8,547	6.1%	8,547	6.1%	0	0.0%
7	18+ NH Native American	87,853	63.1%	87,853	63.1%	0	0.0%
7	18+ African-American	778	0.6%	778	0.6%	0	0.0%
7	18+ total minority	99,252	71.3%	99,252	71.3%	0	0.0%
7	Hispanic CVAP	6,450	4.7%	6,450	4.7%	0	0.0%
7	Hispanic Registration	4,745	4.1%	4,745	4.1%	0	0.0%
7	2004 Prop 200 Yes	27,269	53.6%	27,269	53.6%	0	0.0%
7	2004 President Dem	35,348	60.2%	35,348	60.2%	0	0.0%
7	2006 Sec of St Dem	25,582	61.4%	25,582	61.4%	0	0.0%
7	2008 President Dem	39,170	60.5%	39,170	60.5%	0	0.0%
7	2010 Mine Dem	32,166	63.0%	32,166	63.0%	0	0.0%

9	Deviation from Ideal Population	-10,347	-4.9%	150	0.1%	10,497	4.9%
9	NH White	139,334	68.7%	146,022	68.5%	6,688	0.2%
9	Hispanic	44,169	21.8%	46,661	21.9%	2,492	0.1%
9	NH Native-American	1,945	1.0%	2,065	1.0%	120	0.0%
9	NH African-American	5,339	2.6%	5,914	2.8%	575	0.1%
9	Total minority	63,386	31.3%	67,196	31.5%	3,810	0.2%
9	18+ NH White	119,682	73.2%	125,632	73.0%	5,950	-0.2%
9	18+ Hispanic	29,806	18.2%	31,504	18.3%	1,698	0.1%
9	18+ NH Native American	1,455	0.9%	1,550	0.9%	95	0.0%
9	18+ African-American	3,931	2.4%	4,343	2.5%	412	0.1%
9	18+ total minority	43,836	26.8%	46,482	27.0%	2,646	0.2%
9	Hispanic CVAP	22,051	13.9%	23,354	14.1%	1,303	0.2%
9	Hispanic Registration	10,309	9.5%	10,801	9.5%	492	0.0%
9	2004 Prop 200 Yes	42,241	46.7%	44,056	46.5%	1,815	-0.2%
9	2004 President Dem	50,341	53.1%	53,135	53.5%	2,794	0.4%
9	2006 Sec of St Dem	34,158	49.6%	36,088	50.0%	1,930	0.4%
9	2008 President Dem	51,535	54.1%	54,115	54.5%	2,580	0.4%
9	2010 Mine Dem	36,163	50.9%	37,977	51.4%	1,814	0.4%

10	Deviation from Ideal Population	2,121	1.0%	-1,994	-0.9%	-4,115	-1.9%
10	NH White	140,932	65.5%	138,868	65.8%	-2,064	0.3%
10	Hispanic	50,544	23.5%	49,128	23.3%	-1,416	-0.2%
10	NH Native-American	1,891	0.9%	1,807	0.9%	-84	0.0%
10	NH African-American	9,880	4.6%	9,556	4.5%	-324	-0.1%
10	Total minority	74,257	34.5%	72,205	34.2%	-2,052	-0.3%
10	18+ NH White	119,917	70.2%	117,413	70.5%	-2,504	0.2%
10	18+ Hispanic	33,556	19.7%	32,487	19.5%	-1,069	-0.2%
10	18+ NH Native American	1,410	0.8%	1,339	0.8%	-71	0.0%
10	18+ African-American	7,425	4.3%	7,195	4.3%	-230	0.0%
10	18+ total minority	50,785	29.8%	49,226	29.5%	-1,559	-0.2%
10	Hispanic CVAP	26,794	16.0%	26,157	15.9%	-637	-0.1%
10	Hispanic Registration	13,088	11.6%	12,948	11.5%	-140	0.0%
10	2004 Prop 200 Yes	44,835	48.3%	44,175	48.7%	-660	0.4%
10	2004 President Dem	50,600	51.9%	48,763	51.2%	-1,837	-0.7%
10	2006 Sec of St Dem	35,060	49.4%	33,934	48.8%	-1,126	-0.6%
10	2008 President Dem	51,888	52.6%	50,663	51.9%	-1,225	-0.7%
10	2010 Mine Dem	36,855	50.2%	36,103	49.5%	-752	-0.7%

14	Deviation from Ideal Population	7,382	3.5%	-3,598	-1.7%	-10,980	-5.2%
14	NH White	175,796	79.7%	167,663	80.0%	-8,133	0.3%
14	Hispanic	32,101	14.6%	30,312	14.5%	-1,789	-0.1%
14	NH Native-American	2,494	1.1%	1,848	0.9%	-646	-0.2%
14	NH African-American	3,219	1.5%	3,173	1.5%	-46	0.1%
14	Total minority	44,654	20.3%	41,806	20.0%	-2,848	-0.3%
14	18+ NH White	143,253	83.5%	136,561	83.7%	-6,692	0.3%
14	18+ Hispanic	19,814	11.5%	18,688	11.5%	-1,126	-0.1%
14	18+ NH Native American	1,865	1.1%	1,410	0.9%	-455	-0.2%
14	18+ African-American	2,186	1.3%	2,152	1.3%	-34	0.0%
14	18+ total minority	28,367	16.5%	26,520	16.3%	-1,847	-0.3%
14	Hispanic CVAP	10,475	7.2%	10,027	7.3%	-448	0.1%
14	Hispanic Registration	7,942	6.5%	7,596	6.5%	-346	0.0%
14	2004 Prop 200 Yes	42,248	59.4%	40,006	59.3%	-2,242	-0.1%
14	2004 President Dem	25,881	34.7%	24,636	34.7%	-1,245	0.1%
14	2006 Sec of St Dem	18,403	30.8%	17,553	30.9%	-850	0.1%
14	2008 President Dem	32,125	34.4%	30,755	34.5%	-1,370	0.1%
14	2010 Mine Dem	21,961	30.5%	21,040	30.6%	-921	0.1%