1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WESLEY W. HARRIS, ET AL., :

4 Appellants : No. 14-232

5 v. :

6 ARIZONA INDEPENDENT :

7 REDISTRICTING COMMISSION, :

8 ET AL. :

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10 Washington, D.C.

11 Tuesday, December 8, 2015

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13 The above-entitled matter came on for oral

14 argument before the Supreme Court of the United States

15 at 10:08 a.m.

16 APPEARANCES:

17 MARK F. HEARNE, II, ESQ., St. Louis, Mo.; on behalf

18 of Appellants.

19 GEN. MARK BRNOVICH, ESQ., Arizona Attorney General,

20 Phoenix, Ariz.; on behalf of Appellee Arizona

21 Secretary of State Michele Reagan in support of

22 Appellants.

23 PAUL M. SMITH, ESQ., Washington, D.C.; on behalf of

24 Appellee Arizona Independent Redistricting

25 Commission.

1 SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor
2 General, Department of Justice, Washington, D.C.; for
3 United States, as amicus curiae, supporting Appellee
4 Arizona Independent Redistricting Commission.
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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in Case 14-232, Harris v. The Arizona

5 Independent Redistricting Commission.

6 Mr. Hearne.

7 ORAL ARGUMENT OF MARK F. HEARNE, II

8 ON BEHALF OF THE APPELLANTS

9 MR. HEARNE: Thank you, Mr. Chief Justice,

10 and may it please the Court:

11 The one-person, one-vote principle of the

12 Equal Protection Clause requires an apportionment

13 authority to make a good-faith effort to equally

14 apportion the population as -- as practically as

15 possible, and while deviations are tolerated, they are

16 only minor deviations made for legitimate purposes of a

17 rational State policy intended not to be discriminatory

18 or arbitrary.

19 Here, the Arizona Redistricting Commission

20 malapportioned Arizona State legislature by almost

21 10 percent, 8.8 percent, and the district court below

22 found it did so for two reasons.

23 The first reason was to obtain a partisan

24 advantage for the Democrat party.

25 The second reason was a perceived belief

1 that malapportioned districts were necessary to obtain
2 Justice Department preclearance approval.
3 Neither of these reasons justifies a
4 deviation from the constitutional principle of one
5 person, one vote.
6 JUSTICE GINSBURG: Mr. Hearne --
7 JUSTICE KENNEDY: The second part, do -- do
8 you want us -- do you want us to overturn the factual
9 finding that compliance with the Voting Rights Act,
10 the -- the preclearance procedures, was the reason --
11 real reason for the deviation? Do you want us to
12 overturn that as a factual finding?
13 MR. HEARNE: No, I don't, as a factual
14 finding. But when you say, Justice Kennedy, the
15 preclearance obtaining Voting Rights Act compliance, we
16 have said, as we've noted in the briefing, it was not
17 necessary to under-populate districts to obtain
18 compliance with the Voting Rights Act.
19 JUSTICE GINSBURG: May I ask you a -- a
20 question? It's -- it's odd that you're making this
21 charge that there was an impermissible effort to
22 increase the Democratic authority, power, in the
23 legislature, but the end result was that the Arizona
24 plan gave Republicans more than their proportionate
25 share of seats in the State legislature. And I think

1 the numbers are, in total, Republicans won 56.6 percent
2 of the State Senate seats, 60 percent of the State House
3 seats. And that exceeded the Republican party's
4 Statewide registration share of 54.4 percent.
5 So if there was an attempt to stack this in
6 favor of Democrats, it certainly failed.
7 MR. HEARNE: Well, we would say, Your Honor,
8 that a -- an incompetent gerrymander is no less a
9 gerrymander when it unequally apportions the population
10 than a competent gerrymander that obtained the partisan
11 objective.
12 I think the objective that we are trying to
13 achieve here is the one-person, one-vote standard. And
14 that's why, whatever the ultimate political outcome, I
15 don't think that vindicates the fact that these are
16 unequally apportioned.
17 JUSTICE KENNEDY: It -- it -- it's still not
18 clear to me what -- what you want us to say about the --
19 the Commission's rationale for compliance and Voting
20 Rights Act compliance that was wrong as a matter of law,
21 because if you don't overturn the factual finding that
22 they had a -- a good-faith belief that what they were
23 doing is correct, then -- then you have -- then you have
24 a problem, it seems to me.
25 Or do you have a problem?

1 MR. HEARNE: I don't believe I do, because I
2 think it's not -- the good-faith -- what the district
3 court found was that their advisor told them, you can
4 depopulate districts up to 10 percent, and in fact, you
5 should do that because you need to create these
6 under-populated minority districts to obtain
7 preclearance.
8 That is wrong. The Voting Rights Act does
9 not command, does not compel or require, under-populated
10 districts to obtain preclearance. The Solicitor
11 Generals noted that as well in their briefing and the
12 Justice Department guidelines. And that's --
13 CHIEF JUSTICE ROBERTS: Well, I -- how
14 confident are you of that? I mean, the -- the
15 preclearance process at the Department of Justice is
16 famously opaque, and usually the States and
17 municipalities have to go through, or had to go through,
18 several layers of back and forth, here's a proposal --
19 it's sort of a bargaining process. I don't know how
20 confident you can be that -- that it wasn't necessary.
21 MR. HEARNE: We certainly agree that the
22 preclearance process was very opaque, as you said,
23 Mr. Chief Justice. I mean, we said it was like reading
24 chicken entrails, because no one really knows what you
25 do or don't need to do to -- to obtain preclearance.

1 But just fundamentally, the Voting Rights
2 Act, even prior to Shelby County, could not compel a
3 redistricting authority to under-populate districts. So
4 the advice they had been given, you must under-populate
5 these ten districts in order to obtain preclearance was
6 flawed as a matter of legal advice that doesn't justify
7 malapportionment.
8 So they could have achieved as, in fact,
9 their own expert, Dr. King, said. In the first map --
10 they had two maps. They had a draft map and a final
11 map. The draft map had a 4 percent, roughly, deviation,
12 and their own expert said this map satisfies the Voting
13 Rights Act.
14 Then they went and depopulated further to
15 get an 8.8 percent deviation.
16 JUSTICE SCALIA: So they were mistaken. I
17 mean, you're -- you say they -- they could have done it
18 without -- without disproportioning, but they -- they
19 thought that that was okay. They thought that they were
20 doing this in order to comply with the Justice
21 Department.
22 What's the test? Is the test what they
23 intended, or is it an objective test?
24 MR. HEARNE: Well, I think you have to look
25 at, actually, both. I think you look at the objective

1 test is: Does the Voting Rights Act require you to
2 depopulate districts? That's bad --
3 JUSTICE SCALIA: So let's assume the answer
4 to that is no.
5 MR. HEARNE: Right.
6 JUSTICE SCALIA: But the people who -- who
7 made this apportionment were mistaken, and they thought
8 that it allowed, and indeed may require, you to do that.
9 So? That doesn't show a bad motive on their part, does
10 it?
11 MR. HEARNE: No, but I don't think this
12 Court's ever held that bad legal advice justifies a
13 constitutional violation, which in this case that's what
14 they're saying is the --
15 JUSTICE KENNEDY: Well, bad legal advice is
16 different from an impermissible motive.
17 MR. HEARNE: Well, we have a --
18 JUSTICE KENNEDY: Justice Scalia is asking
19 what -- what -- what the test -- what is the test here?
20 MR. HEARNE: Well, I would say this case, as
21 the district court noted, and all three judges split on
22 what the burden of proof was, is a mixed-motive case
23 where you have one assumed illegitimate motive, partisan
24 advantage, and you have another motive which is, oh,
25 it's okay because we needed to do this because our

1 advisor said that was necessary for preclearance.

2 Then I think it -- the task falls to the

3 Commission to justify, under this Court's decisions in

4 Mt. Healthy and Arlington Heights standard of a

5 mixed-motive case to justify, oh, this was necessary in

6 fact to comply with that.

7 And that was not done.

8 JUSTICE GINSBURG: And -- and it was more

9 than mixed motive. It was a finding of dominance, that

10 the dominant purpose of this was to attempt to meet

11 Section 5.

12 MR. HEARNE: Two of the judges, Judge

13 Clifton and Judge Silver, did find that that was a

14 predominant motive or primary motive.

15 JUSTICE GINSBURG: And that's a -- that's a

16 fact-finding which you -- you have a burden if you're

17 seeking to overturn it.

18 MR. HEARNE: But they also found that there

19 was another illegitimate motive that they assumed --

20 Judge Silver didn't necessarily agree, but she assumed,

21 for purposes of decision, that this partisan advantage

22 was a illegitimate motive.

23 So you have a case where this body is

24 unconstitutionally departing from one-person, one-vote.

25 They come forward with two explanations, one

1 illegitimate, one supposedly legitimate: This
2 preclearance based on erroneous legal advice. And on
3 the basis of that, the court split on what the burden of
4 proof was. We would --
5 JUSTICE KAGAN: Just to pin this down a -- a
6 little bit, Mr. Hearne: You -- you are not contesting
7 the factual finding that the predominant motive was to
8 comply with the Voting Rights Act; is that right?
9 MR. HEARNE: We -- we take the -- the
10 factual findings from the district court. We don't
11 protest those. But what we do believe is that the court
12 applied the wrong burden-shifting standard in that, in
13 their analysis of those facts.
14 When they have a mixed motive, the proper
15 response would have been to say, okay, you've shown, we
16 found one illegitimate motive.
17 JUSTICE KAGAN: Well, you keep on saying
18 mixed motive, and I guess people keep on coming back to
19 you and just trying to figure out whether you are, in
20 fact, or are not, in fact, contesting that -- that the
21 predominant motive was the Voting Rights Act.
22 MR. HEARNE: The -- when -- when we say the
23 Voting Rights Act -- again, I want to make my position
24 clear --
25 JUSTICE KAGAN: Was the attempt to comply

1 with the Voting Rights Act?

2 MR. HEARNE: Correct.

3 JUSTICE KAGAN: And this -- and the -- and

4 the court found, and it is a factual finding, that

5 that's the predominant motive?

6 And I don't mean to harangue you on this. I

7 just want to understand what your argument is.

8 MR. HEARNE: No. We -- we -- we -- to be

9 very clear, yes, we accept the factual finding of the

10 two judges, that that was -- what they said was the

11 primary motive. But they erred when they did not shift

12 the burden in a mixed-motive case, under Arlington

13 Heights, I think footnote 21, or Mt. Healthy, kind of

14 standard.

15 Secondly, they erred when they gave a

16 justification and found it legitimate when there really

17 was not a legal need to do what they did. There was

18 no -- the Voting Rights Act can't compel vote dilution.

19 And that justification, even if it was had in good

20 faith, does not excuse a constitutional violation of

21 one-person, one-vote.

22 So at minimum, it would need to be remanded

23 for an opportunity for them to somehow -- the

24 Commission -- explain why they can justify these

25 population deviations. And that's -- that is our

1 position, Justice Kagan.

2 JUSTICE SOTOMAYOR: You -- I'm -- I'm even

3 further confused. I -- I understand that you gave up

4 any racial or -- or political gerrymandering case. This

5 is just a voter-dilution case.

6 MR. HEARNE: That's absolutely correct,

7 Justice Sotomayor.

8 JUSTICE SOTOMAYOR: Now, I understand

9 there's one case you're relying on that was summarily

10 affirmed, but is there any other case from this Court

11 that has ever said that a -- a deviation of this amount

12 is significant?

13 I think we've always called it anything

14 below 9 percent de minimis, correct?

15 MR. HEARNE: What the Court has said, as I

16 read the jurisprudence, is that a deviation of over

17 10 percent is prima facie constitutional, and the

18 statements justify it.

19 If it's a deviation of less than 10 percent,

20 the obligation is on the party challenging it to come

21 forward and present some evidence showing that it is

22 done for an arbitrary or discriminatory purpose.

23 That's what we understand that standard to

24 be out of Brown v. Thomson. And again, that was a

25 plurality opinion.

1 But under that standard --

2 JUSTICE SOTOMAYOR: I -- I don't actually

3 understand. I don't know of any case where we've

4 required an explanation under 10 percent.

5 MR. HEARNE: Well, I think two -- I have two

6 responses to that, Justice Sotomayor. First in Cox v.

7 Larios, certainly this Court had a summary affirmance,

8 and the concurring opinion in that case by Justice

9 Stevens and Breyer does say that there is not this magic

10 bright line, and then other decisions of this Court have

11 always disavowed creating some simple bright-line test

12 where deviations from the constitutional standard below

13 that are tolerated.

14 So, for example in Karcher, that decision

15 said we specifically don't want to set some line,

16 because the minute we do that, legislators or

17 redistricting authorities will immediately use that as

18 the new standard.

19 JUSTICE SOTOMAYOR: Well, in fact, they

20 have. They've pretty much used 10 percent. We've not

21 discouraged them from doing that.

22 MR. HEARNE: It is certainly -- it certainly

23 appeared in some of the district court decisions --

24 JUSTICE SOTOMAYOR: I --

25 MR. HEARNE: -- that -- that's -- that they

1 have looked at that. And again, we see that as the
2 burden shift --
3 JUSTICE BREYER: What it says, actually, in
4 Brown v. Thomson, it says our decisions have
5 established, as a general matter, that an apportionate
6 plan with a maximum population deviation under
7 10 percent falls within this category of minor
8 deviations. And what we held previously was that minor
9 deviations from mathematical equality among State
10 legislatures are insufficient to make out a prima facie
11 case of invidious discrimination.
12 All right. So that's the holding of the
13 Court. And this seems to be within the category of
14 minor deviations where you have to make out -- you have
15 to do something more than you would have to do if it
16 were a -- larger than 10 percent.
17 MR. HEARNE: Right.
18 JUSTICE BREYER: Now, what do you think you
19 have to do?
20 MR. HEARNE: Well, I think we have to do,
21 Justice Breyer, what we did, which is to come to the
22 court -- to come to a district court and to present to
23 them evidence which the district court found of you have
24 a deviation that, though minor, is done for an
25 illegitimate purpose.

1 And yes, there was this other pretext of the
2 preclearance issue. That satisfied the burden of
3 requiring judicial scrutiny of that redistricting, and
4 so we have satisfied that burden.
5 JUSTICE SOTOMAYOR: Why bother having a
6 minor? Don't you think this will lead every single plan
7 to be challenged as voter dilution?
8 MR. HEARNE: Well, no. I think that you
9 would have to still have a showing of an illegitimate
10 purpose behind the deviation.
11 JUSTICE SCALIA: You didn't show that. You
12 didn't just establish it by the fact of the deviation.
13 What kind of evidence did you present to the
14 district court?
15 MR. HEARNE: Well, I think in this case,
16 this -- this case is a very unique case because, as
17 Judge Wake found in his dissent, the chart shows
18 statistically that there was systematic, partisan
19 malapportionment done for that partisan reason. Just
20 looking at the numbers --
21 JUSTICE KENNEDY: Looking at the chart at
22 112a of the appendix?
23 MR. HEARNE: Yes. I think that if it is --
24 it is the chart that is in color, I think we've also
25 provided --

1 JUSTICE KENNEDY: It's got the color chart.
2 MR. HEARNE: Yes. And it shows that the
3 districts were systemically, statistically
4 malapportioned for that purpose.
5 So that would be the kind of showing,
6 Justice Scalia, that you would be --
7 JUSTICE KAGAN: But I -- I thought -- I -- I
8 thought, Mr. Hearne, that you were saying that the --
9 that the thing that you had presented had to do with an
10 impermissible motive, and the impermissible motive was
11 that they didn't have to do all this for Voting Rights
12 Act compliance; is that right?
13 MR. HEARNE: I'd say there's two -- the --
14 the first impermissible motive or illegitimate
15 justification is partisanship, to gain an advantage --
16 JUSTICE KAGAN: Right. But that's the very
17 thing that you said, you weren't challenging the factual
18 finding, that that was a subsidiary part of the
19 redistricting.
20 MR. HEARNE: That was --
21 JUSTICE KAGAN: The dominant part was the
22 voting rights compliance, and I take it you want to
23 undermine the voting rights compliance rationale.
24 But then I'm stuck on the same question that
25 Justice Scalia is stuck on, is what evidence did you

1 present that -- that there was an impermissible motive
2 with respect to that, as opposed to different views as
3 to what the Voting Rights Act compelled.
4 MR. HEARNE: Two quick answers to that,
5 Justice Kagan.
6 First is, legally the justice -- the Voting
7 Rights Act couldn't compel them to do what they did, so
8 that justification legally is invalid.
9 Secondly, we bring up that point about the
10 burden shift with Arlington Heights and Mt. Healthy,
11 where when we show an illegitimate motive partisanship,
12 then the burden -- task falls to the Commission to
13 justify that.
14 And I would reserve the balance of my time.
15 CHIEF JUSTICE ROBERTS: Thank you, counsel.
16 General Brnovich.
17 ORAL ARGUMENT OF GEN. MARK BRNOVICH
18 ON BEHALF OF THE APPELLEE ARIZONA SECRETARY OF STATE
19 MICHELE REAGAN IN SUPPORT OF THE APPELLANTS
20 GENERAL BRNOVICH: Thank you, Mr. Chief
21 Justice. May it please the Court:
22 Fortunately or unfortunately, in this case
23 there are many facts that are not in dispute, addressing
24 Justice Kennedy's questions. The State does not dispute
25 that the Independent Redistricting Commission did indeed

1 draw districts of unequal population. All sides agree
2 that these deviations were not random, or that they were
3 not incidental.
4 We also know, and the record shows and no
5 one disagrees, that this pattern to under-populate
6 minority districts was done to help create or further
7 ability to elect districts. And we also know that the
8 direct evidence is they did it intentionally.
9 So why are we here today? In the background
10 versus Reynolds v. Sims, this Court has always held that
11 equal protection is not a criteria -- another factor
12 when it comes to redistricting, but it is essentially
13 the background in which all redistricting ledges take
14 place.
15 The State of Arizona and the Secretary do
16 not dispute the compliance with the Voting Rights Act
17 was a legitimate or is a legitimate State interest. And
18 we don't dispute that maybe there was an -- a good
19 motive on the part of drawing these districts. The
20 problem is those motives don't matter when what you have
21 is an undermining of the fundamental principle of
22 one-person, one-vote.
23 So in this case, what we have is a violation
24 of the Equal Protection Clause, because by intentionally
25 and systemically under-populating those minority

1 ability-to-elect districts, the IRC violated Equal
2 Protection Clause in that principle of one-person,
3 one-vote.
4 So essentially what happened was by
5 overpopulating the other districts, the voters in the
6 overpopulated districts had their votes diluted. And
7 by -- by diluting those votes, it violated the
8 Constitution.
9 JUSTICE KENNEDY: It sounds fundamental that
10 a statute can't authorize a constitutional violation, so
11 that even an attempt to comply with the Voting Rights
12 Act is not sufficient if it violates the Equal
13 Protection Clause.
14 Have we ever said that -- I mean it's
15 obvious, but have we ever said that in the context of
16 what the voting rights requires?
17 MR. BRNOVICH: Your Honor, this -- this
18 Court has consistently, from Reynolds v. Sims, has
19 always held that the concept and the principle of
20 one-person, one-vote, any attempts to undermine that
21 outside --
22 JUSTICE KENNEDY: So we have said that
23 even -- you read our cases saying even minor deviations
24 are not permitted if they are statutorily required?
25 GENERAL BRNOVICH: No statute can trump the

1 Constitution, and so if -- the Voting Rights Act,
2 whichever way it's read, can't be read in a way that
3 would violate the one-person, one-vote.
4 JUSTICE KENNEDY: And that's what Judge Wake
5 said in his dissent.
6 MR. BRNOVICH: And that's exactly what Judge
7 Wake said in his dissent.
8 And that is the State's position, is that we
9 don't dispute -- or we're not saying that complying with
10 the Voting Rights Act may indeed be a legitimate State
11 interest. What we are saying is, is that when it's done
12 in the systematic way where you have a one-way ratchet,
13 where you have consistently minority ability-to-elect
14 districts, essentially using votes based on racial or
15 ethnic classifications, and under-populating those
16 districts and then overpopulating other districts, what
17 you have done is essentially undervalued or violated the
18 one-person, one-vote --
19 JUSTICE ALITO: Would you say it's correct
20 that compliance with the Voting Rights Act, the desire
21 to obtain preclearance, is at least like other
22 traditional districting considerations, like respecting
23 county lines, respecting municipal lines, having
24 contiguous districts? Would you agree with that?
25 GENERAL BRNOVICH: Yes, Justice Alito.

1 JUSTICE ALITO: So if -- if that is the
2 case, then is this what you were asking us to say with
3 respect to the Voting Rights Act, that the things that
4 were really necessary to obtain preclearance are
5 legitimate, but you can't go -- but they went further.
6 They -- they went beyond what was really necessary to
7 obtain preclearance, so we would have to determine
8 whether that was true or not, or some court would have
9 to determine whether that was true or not.
10 MR. BRNOVICH: In this instance, because of
11 the systematic way the deviations, the under-population
12 occurred, as well as the intention -- we know from the
13 Independent Redistricting Commission that they
14 intentionally under-populated those districts. So we
15 have all that evidence.
16 However, we do believe that the Voting
17 Rights Act is like any other criteria. So if you get
18 these population deviations and they're incidental, not
19 intentional -- and that is the key, I believe, is when
20 you intentionally under-populate and systemically
21 under-populate these districts -- that's what causes the
22 constitutional harm.
23 JUSTICE ALITO: Well, what if the only way
24 that you -- that a State could obtain preclearance when
25 Section 5 was still in force was to under-populate some

1 districts? Would that be permissible?
2 GENERAL BRNOVICH: Well --
3 JUSTICE ALITO: Just as you might have a
4 situation where the only way in which you could respect
5 municipal lines or county lines was to under-populate
6 some districts to some degree.
7 MR. BRNOVICH: Justice Alito, the irony is
8 in the draft maps; seven of the ten minority
9 ability-to-elect districts were under-populated.
10 However, when the Independent Redistricting Commission
11 went from the draft maps to the final maps, there was a
12 one-way ratchet. They intentionally and systemically
13 under-populated those districts.
14 JUSTICE KENNEDY: But Justice Alito can
15 protect his own question, but he's asking you whether or
16 not a deviation is permissible for protecting
17 communities of interest, protecting municipal lines,
18 whether some slight deviation is permissible.
19 MR. BRNOVICH: Yes. Yes, Justice Kennedy,
20 if it's incidental and not intentional.
21 JUSTICE KAGAN: I guess I'm not sure what
22 that means.
23 JUSTICE SCALIA: Yes, I'm not sure. I had
24 thought you -- I had thought you were saying that it
25 doesn't matter whether you were doing it to obtain

1 Justice Department clearance. You cannot do something
2 that is unconstitutional.
3 MR. BRNOVICH: That is --
4 JUSTICE SCALIA: If in fact you're -- you
5 don't have equally apportioned districts, it goes beyond
6 what is tolerable. It's a violation, regardless of
7 whether you're -- you're actually trying to comply with
8 the Justice Department. Isn't that what you were
9 saying?
10 MR. BRNOVICH: Yes, Justice Scalia, but I
11 think that it's important to note that we look at this
12 as a qualitative not a quantitative analysis. So there
13 isn't like some magic number where you say at this point
14 this becomes unconstitutional or it doesn't.
15 The State's position is, is that compliance
16 with the Voting Rights Act was like other neutral or
17 traditional criteria, like protecting, as Justice Alito
18 alluded to, communities of interest, geographical
19 boundaries. And so in that -- in considering that, you
20 may have incidences where you get somebody -- some
21 districts above or below the line.
22 So the fact that a district may be below the
23 line in and of itself is not a constitutional violation.
24 The harm occurs when the Independent Redistricting
25 Commission systemically under-populates those

1 districts -- those ability-to-elect districts, and
2 overpopulates other districts thereby --
3 JUSTICE KAGAN: Can you explain --
4 MR. BRNOVICH: -- diluting the votes of
5 those people.
6 JUSTICE KAGAN: I guess I'm just not really
7 sure. Let's -- let's say that there's a policy that
8 says we want to respect county lines. And we also know
9 that we want to do one-person, one-vote, but we think we
10 have, basically, some leeway up to 10 percent. And --
11 and there's a policy. We want to respect county lines,
12 even though that's going to cause a little bit more
13 deviation on the one-person, one-vote metric. Are you
14 saying that that's impermissible?
15 MR. BRNOVICH: Justice Kagan, we are
16 saying --
17 JUSTICE KAGAN: It's a policy. I mean, it's
18 an intentional policy.
19 MR. BRNOVICH: I guess, you know, the road
20 to hell is paved with good intentions. And so our
21 position is, regardless of their intention, if they are
22 doing it in a systematic way or intending to
23 overpopulate certain districts, under-populate other
24 districts, that is unconstitutional.
25 The Voting Rights Act then would --

1 JUSTICE KAGAN: Even though it just, say,
2 takes you from 4 to 5 percent, or from 7 to 8 percent.
3 You're not crossing the 10 percent threshold. But as
4 long as you're going up, and you're doing it
5 purposefully --
6 MR. BRNOVICH: Yes.
7 JUSTICE KAGAN: -- in the sense of we have a
8 policy to maintain county lines, that's impermissible?
9 MR. BRNOVICH: Yes, Justice Kagan. The
10 position of the State is that when it's done in a
11 systematic and intentional manner, when you create,
12 essentially, barrios of -- boroughs, excuse me -- of
13 certain folks, and then you overpopulate other
14 districts, that violates this Court's one-person,
15 one-vote principle.
16 JUSTICE SCALIA: General Brnovich, just as a
17 matter of curiosity, how do you end up being on this
18 side of the case? You -- you were defended in the
19 district court, weren't you?
20 MR. BRNOVICH: The -- the Secretary in the
21 State thought the principle of one-person, one-vote and
22 upholding that principle was very, very important, and
23 that's why we felt compelled to be involved in this --
24 this case.
25 JUSTICE SCALIA: Well, but only on appeal.

1 You didn't argue this side in the district court, did
2 you?
3 MR. BRNOVICH: That -- that's is correct,
4 Your -- Justice Scalia.
5 JUSTICE SCALIA: What happened? Was there
6 an election in between or something?
7 (Laughter.)
8 MR. BRNOVICH: Yes, and I won
9 overwhelmingly.
10 JUSTICE SCALIA: I knew it.
11 MR. BRNOVICH: Thanks. Thank you very much.
12 I will be up for reelection in three more years, so
13 the ... anyway.
14 JUSTICE GINSBURG: Do you -- do you agree
15 with your colleague that it doesn't make any difference;
16 that in the end result, the -- the legislature -- that
17 the Republicans were disproportionately advantaged, had
18 a disproportionate share of the seats?
19 MR. BRNOVICH: Yes, Justice. Our -- our
20 position is, is that that really is irrelevant as far as
21 the numbers ultimately, whether the percentage --
22 JUSTICE GINSBURG: Whether it would have
23 ended up, if you're right, an even greater
24 disproportion -- a greater disproportion of Republican
25 representatives.

1 MR. BRNOVICH: And so ultimately the
2 number -- this is not a line drawing case; this is an
3 overpopulation/under-population case. So how the lines
4 are drawn, and what the Republican or Democratic
5 representation is in the State House or the State Senate
6 is not important or not key to our argument.
7 Our -- the key to the State's argument is
8 that this intentional and systematic one-way ratcheting
9 of under-populating minority ability-to-elect districts
10 is what undermines the one-person, one-vote principle,
11 and what makes the actions of the IRC unconstitutional.
12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 MR. BRNOVICH: Thank you.
14 CHIEF JUSTICE ROBERTS: Mr. Smith.
15 ORAL ARGUMENT OF PAUL M. SMITH
16 ON BEHALF OF THE APPELLEE
17 ARIZONA INDEPENDENT REDISTRICTING COMMISSION
18 MR. SMITH: Mr. Chief Justice, and may it
19 please the Court:
20 There is no basis for concluding that the
21 minor, modest population variances among the districts
22 in the Arizona map violate the Equal Protection Clause.
23 That's because --
24 JUSTICE SCALIA: Do you -- do you accept
25 the -- the fact -- speaking of accepting fact-finding,

1 do you accept the fact-finding that at least part of the
2 motive was partisan?
3 MR. SMITH: I don't think that's a fair
4 characterization of what the district court found, Your
5 Honor.
6 JUSTICE SCALIA: Oh, really? Why?
7 MR. SMITH: The district court found that
8 the predominant motive for the under -- for the
9 population --
10 JUSTICE SCALIA: Predominant motive. That's
11 right.
12 MR. SMITH: It said that -- that there may
13 have been two of the five commissioners who, as to one
14 district, District 8, had some mixed motives in -- in
15 urging that that district be made more competitive, but
16 did not find that the Commission as a whole acted, even
17 in that one instance, with partisan motivations, and
18 it -- that district is not one of the ones that's
19 significantly under-populated.
20 The decision to move population around and
21 make that district somewhat more competitive, even if it
22 was motivated by partisanship, has nothing to do with
23 what we're really talking about here, which is the 8.8
24 deviation.
25 JUSTICE SCALIA: Well, you know, I would be

1 very upset if -- if it -- there was any motivation of
2 partisanship because -- I wish this case had come up
3 before the case we had last term, which -- which
4 approved your commission, despite the -- the text of the
5 Constitution --
6 (Laughter.)
7 JUSTICE SCALIA: -- because this commission
8 was going to end partisanship, get politics out of
9 redistricting. And here the very next term we have this
10 case which -- which asserts that there has been a lot of
11 partisanship on the part of this --
12 MR. SMITH: With respect --
13 JUSTICE SCALIA: -- supposedly divine
14 commission.
15 MR. SMITH: Not a fair characterization of
16 what happened, and not a fair characterization of what
17 the district court found after a full trial. What it
18 found, after giving them a full opportunity to try to
19 prove their claim that there was some invidious
20 discrimination here, is that's simply not what happened.
21 Instead what happened is that they had --
22 these population deviations emerged in the final part of
23 the process as they worked to make sure that their map
24 would pass preclearance on the first try, something that
25 the State of Arizona had failed to achieve in each of

1 the three previous decades.

2 JUSTICE ALITO: Well, the district court

3 found -- and this is on 79a of the Appendix to the

4 Jurisdictional Statement -- "partisanship played some

5 role." So do you want us to interpret that to mean that

6 if there was no partisanship, everything would have come

7 out exactly the same way? It had no affect whatsoever

8 on the districting?

9 MR. SMITH: What the court said was with

10 respect to the changes to District 8, which by the way,

11 remained a largely Republican-leaning competitive

12 district, that two of the commissioners may have had

13 mixed motives, both thinking about aiding the

14 preclearance arguments and also thinking about bringing

15 the Democratic party up closer to parity, it still

16 didn't get to parity.

17 And I think that to say --

18 JUSTICE ALITO: Well, that's a -- that's a

19 red herring. We don't need to discuss the issue of

20 parity. If you have a system of proportional

21 representation and you get 55 percent of the vote,

22 you'll get 55 percent of the -- of the representatives.

23 But in the kind of electoral system we have

24 in the United States, with single-member districts and

25 winner-take-all, a neutral -- a neutral districting plan

1 will never produce exactly the same breakdown of
2 legislators as the breakdown of the votes in the
3 election. But that's -- I mean, that's a side issue.
4 What do we do with this statement: Partisanship played
5 some role?
6 MR. SMITH: Your Honor, partisanship by
7 itself cannot violate the Constitution. You have a --
8 you have -- even if it -- even if you inflate that far
9 beyond what was intended by the judges who wrote that
10 opinion, the case of Gaffney v. Cummings was a case
11 where you had partisanship being the dominant,
12 controlling factor in every single line that was drawn.
13 JUSTICE ALITO: This is what -- this is what
14 interests me about the case. If we assume, as the
15 district court did, that partisanship is not a
16 legitimate consideration, and it's not, like, respecting
17 county lines, and if we interpret the district court's
18 opinion as finding that partisanship was part of the
19 reason for the plan that was adopted, then is the test,
20 the Mt. Healthy test -- which in my understanding is
21 what we normally apply in a constitutional mixed motive
22 situation.
23 So that if an illegitimate, unconstitutional
24 consideration is one of the reasons, the burden shifts
25 to the defendant to show that things would have come out

1 the same way, even if that factor had not been in the
2 case, or is it what the court said in Bush v. Vera and a
3 few other cases, that in this particular context, that's
4 not the test? The test is whether the illegitimate
5 factor there, race, was the predominant consideration.
6 MR. SMITH: Well, that's --
7 JUSTICE ALITO: It seems to me it -- it
8 turns on the choice between the two.
9 MR. SMITH: Well, this accepting a lot of --
10 JUSTICE ALITO: Is that a wrong?
11 MR. SMITH: Accepting a lot of the premises
12 of the question, which I think are counterfactual, about
13 the opinion and -- and what was found here and all of
14 that, it does seem to me that even if you're going to
15 make partisanship something illegitimate and
16 redistricting, which seems kind of like a fool's error,
17 frankly, it ought to at least have to be predominate. I
18 mean, in a situation where -- you wouldn't -- you
19 wouldn't want to say that the -- that the -- the -- the
20 line drawers have to have complete purity of heart.
21 JUSTICE KENNEDY: Well, aren't you saying
22 that it's permissible to use, as one factor, an illegal
23 standard if there are some other factors that are also
24 in play? That it's permissible to use an illegal
25 standard, in part?

1 MR. SMITH: If there were --
2 JUSTICE KENNEDY: Is that what you want us
3 to write in this opinion?
4 MR. SMITH: No, your Honor. Nobody thinks
5 that it's illegal to consider --
6 JUSTICE KENNEDY: Well, that's one of the
7 issues in the case. We'll talk about that later, about
8 partisanship. If you -- if you want to say it doesn't
9 make any difference because partisanship is -- is a
10 valid consideration, fine. That's your point. But my
11 question is, it sounds to me, in response to your answer
12 to Justice Alito, that you're saying that it is all
13 right to use an illegal standard, in part, to reduce
14 equal -- equal representation.
15 MR. SMITH: For all the same reasons that
16 the Court has many times said we're not going to say any
17 racial consciousness is enough to invalidate it unless
18 it predominates, I would think you would want to follow
19 the same approach, even if you're going to adopt the
20 parity between racial considerations and partisan
21 considerations, which makes no sense. You're entire
22 Shaw v. Reno line of cases is about trying to decide
23 whether it's race or party, and when you come to the
24 conclusion easily that it's party, then it's okay.
25 JUSTICE KENNEDY: Can I put in my notes that

1 you're arguing that partisanship is a valid
2 consideration in redistricting? Is that what you want
3 me to say?
4 MR. SMITH: You -- you -- you certainly can,
5 Your Honor. You said it last year in the Alabama case.
6 You said political affiliation is one of the legitimate
7 traditional redistricting criteria that line drawers
8 always can consider. That it's --
9 JUSTICE BREYER: That's the problem.
10 There -- there is -- I'm suddenly waking up here and
11 following --
12 MR. SMITH: That's your opinion, Your Honor.
13 (Laughter.)
14 JUSTICE BREYER: Well -- well, how -- how do
15 you -- it's a -- how -- how do we write this? There are
16 two areas that are difficult to write.
17 One is, I know there is this 10 percent
18 rule, but it doesn't say we don't look at it at all. We
19 institutionally can't review thousands of pages of
20 record in every redistricting case. So what are the
21 words there that describe the standard we should bring
22 to this?
23 And the second, which is a direct
24 application of the first, is you're quite right. How
25 can we say that partisanship can't be used at all when

1 you're doing one-person, one-vote but the sky is the
2 limit. Vieth.
3 MR. SMITH: Vieth.
4 JUSTICE BREYER: When in fact -- of course,
5 I dissented there. I -- but the sky is the limit when
6 you're drawing boundaries.
7 Now, how do we reconcile -- how do we
8 reconcile our institutional ability with the need to
9 have some policing here? And how do we reconcile what
10 we say in this case with what we've held in the
11 line-drawing area?
12 MR. SMITH: Okay.
13 JUSTICE BREYER: Now, those -- those are two
14 questions in the back of my mind, and I'd like to have
15 your position.
16 MR. SMITH: Can I answer the second question
17 first, Your Honor?
18 JUSTICE SCALIA: Fifty words or less.
19 (Laughter.)
20 MR. SMITH: It -- it seems to me like it
21 would be -- like it would be not -- not defensible to
22 adopt a rule that says partisanship in creating minor
23 population deviations is actionable absent some effect
24 in terms of biasing the map, whereas in the -- in the
25 line-drawing area, the Vieth situation, you have always

1 insisted that there not only be a bias effect, but it be
2 very large.
3 JUSTICE BREYER: Well, I didn't ask you what
4 we shouldn't say. I asked you what we should say.
5 MR. SMITH: What you should say is -- what
6 you should apply is the rule that -- that applied in all
7 of these cases about minor population deviations: Is
8 there a rational, legitimate policy that the State can
9 articulate which is the reason why they arrived at this
10 difference? And here we have, the Voting Rights Act is
11 the rational and legitimate State policy.
12 CHIEF JUSTICE ROBERTS: Well, let's not --
13 let's talk about that for a second. If action in
14 redistricting or overpopulation would constitute
15 illegitimate racial discrimination, can the answer that
16 we're doing that to comply to get preclearance from the
17 Justice Department legitimize that?
18 MR. SMITH: Yes, Your Honor. This Court has
19 said a number of times that complying with the Voting
20 Rights Act is a compelling State interest. It -- it
21 assumed that just last year.
22 CHIEF JUSTICE ROBERTS: No, my -- my
23 question is if the action that is taken would otherwise
24 constitute illegitimate racial discrimination. I'm
25 trying to find out if the Justice Department's

1 procedures can trump the requirements of the
2 Constitution. In other words, it's -- it's an issue
3 of -- you know, we -- we said in Ricci v. DeStefano that
4 it's not an excuse -- not a complete excuse for
5 intentional discrimination, that you're trying to avoid
6 liability under Title VII --
7 MR. SMITH: Right.
8 CHIEF JUSTICE ROBERTS: -- for
9 discrimination on the basis of effects.
10 MR. SMITH: Right.
11 CHIEF JUSTICE ROBERTS: And I'm wondering if
12 it's somehow different. If the Justice Department is
13 insisting on conduct that would constitute a violation,
14 if they're insisting on more than they should be, is
15 that a defense for the -- for the redistricting?
16 MR. SMITH: Well, Your Honor, the one thing
17 that is clear, Mr. Chief Justice, is that the Voting
18 Rights Act does require people drawing lines to consider
19 race. And Section 5 required it to avoid retrogression.
20 Section 2 requires it right now.
21 CHIEF JUSTICE ROBERTS: I understand that.
22 MR. SMITH: So --
23 CHIEF JUSTICE ROBERTS: But it doesn't say
24 that all bets are off.
25 MR. SMITH: No, Your Honor. The -- what --

1 the line this Court has drawn is between maps which go
2 too far and maps which don't, maps in which the racial
3 considerations predominate and subordinate all other
4 traditional districting principles here. And what you
5 have in this case is the quintessential map where that's
6 not true, where --
7 CHIEF JUSTICE ROBERTS: Well, it seems to me
8 you're avoiding my question.
9 MR. SMITH: Sorry.
10 CHIEF JUSTICE ROBERTS: What if the
11 requirements that the Justice Department asks for, for
12 preclearance go too far?
13 MR. SMITH: Well, I think if the -- the
14 Justice Department reads the Voting Rights Act in a
15 manner that requires them to do something that would go
16 too far in the predominant sense, there might be a
17 constitutional problem. There's no indication here that
18 that's what happens. Nobody --
19 CHIEF JUSTICE ROBERTS: Right. So -- so
20 whether or not preclearance is a defense depends upon
21 whether the Justice Department is insisting on too much.
22 MR. SMITH: It -- it could be, Your Honor.
23 There's -- but there's no indication of anything of --
24 like that here. This is a case where they simply said
25 no retrogression. This is not like the '90s, where they

1 were saying you have to create new districts, no matter
2 how ugly, to comply with --
3 JUSTICE BREYER: Look at the finding to
4 support what the -- the Chief Justice is drawing there.
5 While partisanship played a role in the increased
6 population deviation associated with changing
7 District 8, so, too, did the preclearance goal play a
8 role in motivating the change. It's the first half of
9 the sentence which is raising the issue that I think
10 people are trying to -- to get you to say how we write
11 that. You see? Because it says it played a role.
12 And so we're going to be asked here by the
13 other side to expand on what that means, "play a role,"
14 and we have to write an opinion. And if you win this
15 case, there will have to be words that support you.
16 And so how do we take this thing? What
17 would you say about the words "play a role"?
18 MR. SMITH: I would say two things, Your
19 Honor.
20 First of all, it's a tiny role in this case.
21 But second of all, even if it were the only
22 reason why you had a -- population deviations under
23 10 percent, I think it would be not defensible for this
24 Court to say that, by itself, is unconstitutional.
25 There is so -- de minimis effect on any

1 interest in terms of representation from this difference
2 of population, absent some bias in the way that the
3 districts elect candidates, that it's simply not a
4 constitutional problem that you ought to recognize where
5 the -- even if the pure motive was -- was partisanship,
6 it's simply not something that ought to be taken
7 seriously as a constitutional problem.
8 But here, where the predominant motive is to
9 try to make sure these districts will pass preclearance,
10 and less than 50 -- 50 percent of the commissioners may
11 have had, for one district, where they increased the
12 deviation slightly, like .2 percent, may have had some
13 partisanship as well as the Voting Rights Act in mind
14 for District 8. Not one of the ten that were offered to
15 the Justice Department as ability-to-elect districts.
16 That's a tiny, tiny, tiny sliver of partisanship for
17 less than the full commission. It was never --
18 JUSTICE ALITO: Well, what if there were?
19 What if there were a case where the -- the commissioner
20 or whoever was responsible for producing the plan
21 produced -- chose between two plans. Plan A has a
22 deviation of .1 percent; Plan B has a deviation of
23 9.9 percent. And they write a report, and they say,
24 well, we -- it came down to these two plans, and we
25 chose B, because we want to maximize the representation

1 in the legislature of Republicans or Democrats.
2 And you would say that that would be
3 constitutional?
4 MR. SMITH: I think if -- if that's the only
5 thing that they -- that -- that was problematic about
6 the map, you might well say that's constitutional. But
7 that's -- that's not this case, obviously.
8 JUSTICE ALITO: No, it's not this case, but
9 it --
10 MR. SMITH: And it -- it -- you know, you've
11 gone as far as Larios. You've said a map that's an --
12 an egregious gerrymander, massive disparate pairing of
13 incumbents, plus the not -- intentional abuse of the
14 10 percent rule at 9.98 percent, all of that together,
15 you summarily affirmed a finding of unconstitutionality.
16 But by itself, I don't know that I would
17 even say that --
18 JUSTICE SCALIA: Well, that's because
19 there's no constitutional criterion for where you draw
20 the district lines. There is a constitutional criterion
21 for -- for how you -- how you weigh voters, district by
22 district. There is.
23 MR. SMITH: Yes, Your Honor.
24 JUSTICE SCALIA: One-person, one-vote.
25 There's -- there's no -- no such criterion for where the

1 location of a district line has to be.

2 MR. SMITH: But this Court has said, over

3 and over again, we want to give States leeway in this

4 area, because representation is often better if you give

5 them some chance to make districts within the 10 percent

6 band. And if you allow them to do what's -- what's

7 being suggested here, to accuse -- to bring partisanship

8 in and they can get to Federal court and they can get to

9 trial just by that, then exactly what you said is going

10 to happen in -- in your dissent in Larios. Every --

11 everybody with a -- with a political motivation to try

12 to do something to undercut a map is going to come in.

13 It's easy enough to -- to allege partisanship. Here

14 the -- all -- the only evidence they have of

15 partisanship, leaving aside the little story of

16 District 8, is simply the pattern, that the Hispanic

17 districts they under-populated and the Native American

18 district happened to vote Democratic. So you have this

19 pattern. The chart on -- they point to on page 112a,

20 but that's not evidence. It's equally consistent with

21 what the court found happened, which is they wanted to

22 make these districts more persuasive as ability-to-elect

23 districts so they could get preclearance. And voila,

24 they got preclearance.

25 This is a -- this is a case where you

1 wonder: Where's the beef? What exactly are we here
2 for? There's no problem with this map. It's not a
3 partisan gerrymander. It's not a racial gerrymander.
4 It's within the 10 percent boundary. They -- they did
5 everything in open.
6 Everything that -- that's being complained
7 about here, all of this under-population of these
8 districts that was done at the -- was done unanimously
9 by all five commissioners who adopted the goal of
10 getting preclearance, who adopted the -- the -- the idea
11 that they had to get 10 districts, not eight districts,
12 that every single change to those 10 districts that
13 increased their under-population was unanimously voted
14 by all five commissioners. This is a case where there
15 is simply nothing seriously being argued here that could
16 possibly amount to a constitutional violation.
17 And it seems to me that we can talk about
18 whether a pure partisan case ought to, by itself, if the
19 only -- if the only problem is deviation, to be
20 unconstitutional, I would recommend that you not do that
21 for the reasons you said in your dissent in Larios.
22 But, boy, this -- this case is so far from that. I
23 mean, the Republican commissioner -- appointed
24 commissioners are voting for everything that they're
25 complaining about because they, too, want to get

1 preclearance.

2 The State of Arizona wants very much to have

3 its map go into effect for the first time since the

4 1960s when it became covered by the Voting Rights Act,

5 rather than having a Federal court have to put the map

6 into effect because preclearance was denied.

7 And they -- they hire lawyers who worked in

8 the Justice Department, told them how many districts

9 they needed, told them that if necessary in rejiggering

10 these lines, they could go down -- up to the 10 percent

11 limit. They then tried very hard to minimize that.

12 And one of the things that's important to

13 recognize here is you could have probably equalized the

14 population here and still gotten districts to the same

15 level of Hispanic population, but you would have had to

16 draw tentacles of the kind that the Court has many times

17 criticized. There's lots and lots of other Hispanic

18 people in the State of Arizona who are not in these

19 districts, but that's because they're spread out all

20 over the place.

21 And so if you're going to draw compact

22 districts, if you're going to draw districts that

23 respect county boundaries, if you're going -- and census

24 tracts and communities of interests, something has to

25 give. And what gave here was this modest, tiny, small

1 amount of population variation that seems to me just not
2 a serious candidate for any kind of constitutional
3 invalidation on the facts of this case, which aren't
4 even challenged here, is clearly erroneous.
5 If the Court has no further questions, thank
6 you.
7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Ms. Harrington.
9 ORAL ARGUMENT OF SARAH E. HARRINGTON
10 FOR UNITED STATES, AS AMICUS CURIAE, SUPPORTING
11 APPELLEE ARIZONA INDEPENDENT REDISTRICTING COMMISSION
12 MS. HARRINGTON: Thank you, Mr. Chief
13 Justice, and may it please the Court:
14 The question in this case is not whether
15 Section 5 can compel deviations from a perfect
16 population standard. The question is whether de minimis
17 deviations are permitted by the Constitution. This
18 Court has made very clear that when State districting
19 plans are within the 10 percent deviation, total
20 deviation from a perfect population equality standard,
21 those plans are presumed to be constitutional.
22 Now, that presumption is a substantive rule
23 that serves three important principles.
24 Just if I can briefly tick them off, the
25 first is that such de minimis deviations do not by

1 themselves violate equal protection. The second is that
2 giving States a 10 percent leeway actually enhances
3 citizens' fair and equal representation by allowing
4 States to pursue other important districting principles.
5 And the third is that limiting Federal court
6 intervention in de minimis deviation cases protects
7 State's sovereign right to draw districts for their own
8 legislature.
9 CHIEF JUSTICE ROBERTS: Is -- is 10 percent
10 really de minimis? I mean, I think you can say it's
11 minor, but de minimis strikes me as misleading when
12 you're talking about 10 percent.
13 MS. HARRINGTON: Well, I certainly don't
14 mean to be misleading about this term that this Court
15 has used --
16 CHIEF JUSTICE ROBERTS: I know it has, yes.
17 (Laughter.)
18 MS. HARRINGTON: I would never accuse the
19 Court of being misleading. I mean, I think the point
20 that the Court has made is that these sort of, you know,
21 10 percent deviations from perfect population equality
22 don't have enough of a dilutive effect to really affect
23 any citizen's right to fair and equal --
24 JUSTICE SCALIA: Does anybody contest that?
25 I don't think that's contested here. I think the other

1 side is willing to -- to concede that it's presumptively
2 okay, which means they have to come forward to show that
3 there were invalid reasons why there is this
4 discrepancy. Right?
5 MS. HARRINGTON: That's true. And our view,
6 Justice Scalia, is that the case should begin and end at
7 the prima facie case requirement. Our view is that the
8 plaintiffs did not make a prima facie case of invidious
9 discrimination in this case, and so the district court's
10 factual findings about the Commission's actual motives
11 actually aren't relevant at this point.
12 JUSTICE SCALIA: I don't understand that. I
13 thought a prima facie case means if -- if you haven't
14 made a prima facie case, it means you have to bring in
15 other evidence. It doesn't mean you're out of court.
16 MS. HARRINGTON: Well, if you haven't made
17 the prima facie case, it means that the State doesn't
18 have to justify its reasons for the deviations. And so
19 in this context, in order to make -- in really any
20 context, to make a prima facie case, what you have to do
21 is put in enough evidence from which an inference of
22 invidious discrimination can be made.
23 What that generally requires is that the
24 challenger has to put in enough in evidence to rebut the
25 presumed reasons for the challenged action. In this

1 case the Arizona -- Arizona constitution sets forth the
2 redistricting criteria that the Commission is to use in
3 drawing district lines, and so at a minimum the
4 plaintiffs should have come in and demonstrated that
5 the -- that the deviations that they observed were not
6 explainable as in service of the --
7 JUSTICE ALITO: Well, let -- let's assume
8 that the -- the opinion of the district court found that
9 partisanship was a consideration.
10 So are you saying that that finding can't be
11 sustained because it wasn't based on sufficient evidence
12 brought forward by the plaintiffs?
13 MS. HARRINGTON: Well, first, just a point
14 of clarification. Part of the opinion that you read was
15 just talking about District 8, and so it wasn't defining
16 that partisanship played any role with respect to the
17 rest of the map. And if you read on in the paragraph
18 from which you were quoting, the district court said
19 that the amount of deviation that was attributable to
20 the attempts to make the district more competitive was
21 less than 1 percent. I think it was .7 percent.
22 And so it's really a small, very small --
23 JUSTICE ALITO: Well, was it a factor or
24 not? Was partisanship just irrelevant, that it played
25 no role, everything would have come out the same way --

1 MS. HARRINGTON: The district court found --
2 JUSTICE ALITO: -- without partisanship
3 according the district court's finding?
4 MS. HARRINGTON: The district court found
5 that with respect to one district, two of the five
6 commissioners were motivated in part by -- by
7 partisanship motives.
8 But, again, our -- our first position is
9 that this Court doesn't need to get to what the actual
10 findings were as to the motives because what the
11 plaintiffs needed to do was come in and demonstrate at
12 the front end that the lines on the map couldn't be
13 explained as an effort to comply with legitimate
14 districting criteria.
15 CHIEF JUSTICE ROBERTS: If the --
16 JUSTICE ALITO: The district of --
17 CHIEF JUSTICE ROBERTS: What is the position
18 of the United States on the question of whether it's
19 permissible to intentionally take partisanship -- to use
20 partisanship as a guiding principle in redistricting?
21 Is that permissible or not?
22 MS. HARRINGTON: We haven't taken a position
23 on that that --
24 CHIEF JUSTICE ROBERTS: I know you haven't.
25 It seems very unfortunate. It's a little difficult for

1 us to address it since that's one of the main questions
2 in the case.
3 MS. HARRINGTON: Well, the United States has
4 never participated in the political gerrymandering
5 cases. It certainly -- you know, there are lessons that
6 can be drawn from this Court's cases. In Gaffney, the
7 Court indicated that certainly consideration of politics
8 and partisanship does not necessarily make a plan
9 unconstitutional.
10 But, again, in this case, I think in
11 order -- before you even get to the question of what the
12 State's actual motives were, there has to be some
13 demonstration that the motives were not the announced
14 motives that are in the Arizona Constitution.
15 CHIEF JUSTICE ROBERTS: So you're -- you're
16 unwilling to tell me whether intentional use of
17 partisanship in redistricting is acceptable or not?
18 MS. HARRINGTON: Well, I think this Court's
19 decision in Gaffney indicates that it can be
20 permissible. The districting body in Gaffney was driven
21 by a desire to equalize partisanship --
22 JUSTICE BREYER: I took it that the position
23 of the United States is at least, since many commissions
24 are nonpartisan because they have two people who are
25 more partisan on one side, two people on the other side

1 and one neutral. So at the least, where the
2 commissions -- commissioners don't account for a
3 majority, the partisan motive is not held by a majority
4 of the commission, then it is constitutional --
5 MS. HARRINGTON: That --
6 JUSTICE BREYER: -- for some members of the
7 commission to take partisan considerations into account
8 where they're not a majority and where the result is
9 under 10 percent.
10 MS. HARRINGTON: I think that was the
11 district court's conclusion. Our position --
12 JUSTICE BREYER: Is your conclusion as
13 representing the United States.
14 MS. HARRINGTON: Well, again, we haven't
15 taken a position on how one would analyze a
16 partisanship -- if there was a finding that you get
17 there, about a partisanship -- partisanship motive.
18 JUSTICE KAGAN: Ms. --
19 JUSTICE BREYER: I read the finding as
20 saying, well, two members of the commission out of five
21 did have a partisan motive, in part.
22 MS. HARRINGTON: Yes.
23 JUSTICE BREYER: So I have to -- you have
24 to -- I think have to say whether you think that is --
25 that situation, is constitutional or not.

1 MS. HARRINGTON: Well, no. Let me make the
2 pitch one more time for the -- for having a robust prima
3 facie case.
4 So the -- what the Plaintiff needed to do
5 was come into this -- come into court and say, here is a
6 map; it can't be explained by the criteria that are
7 identified in the Constitution that the Commission is
8 supposed to go by. The very first criterion listed in
9 the Constitution is complying -- includes compliance
10 with the Voting Rights Act.
11 If you look at the map and you look at
12 which -- which districts were under-populated and which
13 are the ability-to-elect districts, there's almost a
14 perfect correlation. And I think -- I think that was a
15 perfectly legitimate explanation for why there are
16 deviations in the case.
17 JUSTICE SCALIA: I don't understand this two
18 out of five. Do you -- do you think if four of the
19 justices of this Court voted a certain way in a case
20 because they were racists, the opinion would still be
21 valid because, after all, five of us weren't? Would you
22 even consider that? And why is it any different for a
23 -- for a commission like this? The mere fact that two
24 of them are -- if -- if partisanship is indeed bad --
25 MS. HARRINGTON: Well, again, I think, you

1 know, we don't have a position on how one would analyze
2 that --
3 JUSTICE BREYER: Well, not -- what I
4 think -- one, this isn't racist.
5 Number two, it's not this Court.
6 Number three, I don't know any court like
7 that.
8 And number four, if you're --
9 (Laughter.)
10 JUSTICE BREYER: -- if you're going to
11 say -- if you're going to say. If you're going to say
12 that no members of a redistricting commission can ever
13 have -- can ever have partisan views, I don't know where
14 you're going to get your membership from.
15 (Laughter.)
16 JUSTICE BREYER: I mean that -- that is --
17 that many of these commissions, I would think, would
18 balance people who know about districting and who are
19 also Republicans with people who know about it and are
20 also Democrats, and then you have someone of undoubted
21 neutral --
22 JUSTICE SCALIA: Which is not the case here.
23 That places a lot of weight on selecting the fifth
24 person who is lily -- lily-white pure, right? And if
25 that person, deep down, is partisanship one side or the

1 other, the whole -- the whole thing goes.

2 MS. HARRINGTON: Well, this Court --

3 JUSTICE SCALIA: And that is the allegation

4 here, by the way.

5 MS. HARRINGTON: I'm sorry to interrupt.

6 This Court has repeatedly said that politics

7 is always going to be a part of redistricting. And so I

8 think it's --

9 JUSTICE SCALIA: Right.

10 MS. HARRINGTON: -- you can't -- you can't

11 --

12 JUSTICE SCALIA: I agree with that. And

13 that's a different point.

14 MS. HARRINGTON: Okay. But --

15 CHIEF JUSTICE ROBERTS: I mean, you don't

16 have a position on whether that's acceptable or not.

17 MS. HARRINGTON: Well, I can --

18 CHIEF JUSTICE ROBERTS: There's a difference

19 between something's a necessary evil and saying it's

20 evil.

21 (Laughter.)

22 MS. HARRINGTON: Well, I think this Court's

23 decisions have told us that it's -- that it's fine to

24 have partisanship play some role in redistricting.

25 That's the -- that's the lesson of Gaffney.

1 JUSTICE ALITO: Well, I'm really surprised
2 with the way you -- the way you read the district
3 court's opinion. In footnote 10 of the district court's
4 opinion, they set out the standard that they apply.
5 MS. HARRINGTON: Can you give me the page,
6 please?
7 JUSTICE ALITO: It's on 62 -- I'm sorry --
8 63a, running over into 64a. And in the -- the final
9 paragraph that begins at the bottom of the page, "For
10 decision purposes, a majority of the panel made up of
11 Judge Clifton and Judge Silver have concluded that
12 Plaintiffs have not demonstrated that partisanship
13 predominated over legitimate redistricting
14 considerations."
15 Doesn't that mean that they found that there
16 were some illegitimate considerations, or at least
17 they -- and they assumed that partisanship was an
18 illegitimate consideration?
19 MS. HARRINGTON: They say that on 79a, which
20 is where you were reading from earlier --
21 JUSTICE ALITO: No, no.
22 MS. HARRINGTON: -- I think it's clear that
23 what they're talking about, that partisan -- that
24 partisanship played a role only with respect to
25 District 8.

1 But let me just say, if -- if this Court
2 allows the plaintiffs to come in and just point to -- to
3 deviations in districts --
4 JUSTICE ALITO: I'm sorry. Just to clarify
5 your answer.
6 So you think that what they said in
7 footnote 10 only applies to one district.
8 MS. HARRINGTON: Yes. That's my reading of
9 the opinion. I think -- I haven't heard the other side
10 disagree with that, but you can ask them.
11 You know, if this Court makes it too easy
12 for plaintiffs to come in and point to deviations and
13 partisan correlations, then it's going to totally wipe
14 away the 10-percent leeway, which itself serves
15 important districting principles.
16 CHIEF JUSTICE ROBERTS: Thank you,
17 Ms. Harrington.
18 General Hearne, you have four minutes
19 remaining.
20 REBUTTAL ARGUMENT OF MARK F. HEARNE, II
21 ON BEHALF OF THE APPELLANTS
22 MR. HEARNE: Thank you, Mr. Chief Justice.
23 JUSTICE SCALIA: What about footnote 10? Do
24 you agree with -- with the characterization that the
25 other side has made?

1 MR. HEARNE: Well, footnote 10, no, I do
2 not.
3 And the portion I would quote was not
4 limited just to District 8. Partisanship was rank in
5 this redistricting process, and is demonstrated
6 objectively, not just with Judge Wake's chart. But it's
7 also demonstrated by the fact of District 8, which was
8 not submitted for preclearance.
9 JUSTICE SCALIA: I want a finding. I want a
10 finding. I don't -- I don't want to look at a chart --
11 MR. HEARNE: Well --
12 JUSTICE SCALIA: -- to make my own factual
13 determination.
14 What factual finding other than footnote 10
15 is there?
16 MR. HEARNE: Then I would quote from the
17 Appendix at 107a, which is where the statement's made,
18 "Judge Clifton correctly finds that the IRC was actually
19 motivated by both partisan advantage and hope for voting
20 rights preclearance."
21 So we have a majority for that finding of
22 fact.
23 So that is two members of the court
24 specifically found that partisanship was one of the two
25 motives to explain these deviations from one-person,

1 one-vote. So clearly, it was a motive at that point, as
2 even Judge Silver noted, this is a mixed-motive case.
3 JUSTICE SCALIA: Yes, but to what extent? I
4 mean, the other side's going to say, yes, that's true,
5 but it's only true as to that one district discussed in
6 footnote 10.
7 MR. HEARNE: Well, if that's so, then they
8 would have stopped and adopted the initial map and not
9 continued to deviate from 4 percent to 8 percent for the
10 final map. The initial map, the draft map, was a
11 4-percent deviation.
12 Dr. King, their own expert, said that this
13 map complied with the Voting Rights Act. And yet, they
14 went after that and continued deviating and
15 under-populating districts to get to the 8.8 percent.
16 That included the machinations with District 8.
17 So if the only legitimate reason was to
18 obtain preclearance, then they would have accepted the
19 draft map, and it would have been game over. But they
20 didn't. They went ahead and conducted these
21 deviations --
22 JUSTICE KAGAN: I thought it was because
23 they wanted to make super sure that they complied with
24 the Voting Act. I think -- I think that that's why they
25 said they kept going.

1 MR. HEARNE: The explanation that was made
2 is that they were, quote, "strengthening" these
3 districts by continuing to under-populate districts
4 because their consultant said, oh, that does help us get
5 Voting Rights Act preclearance approval. That was the
6 explanation made.
7 But if their own expert said the original
8 map, the draft map satisfied the Voting Rights Act, and
9 the only reason to additionally depopulate these
10 districts was to achieve a further partisan skew, which
11 Judge Wake's chart demonstrates, then that shows that
12 partisanship was a very -- I understand two of the
13 members said that it was not the primary motive, but it
14 certainly was a pervasive motive in the process by which
15 these districts were drawn.
16 And our position is a very narrow one that
17 we ask the Court to hold, is that partisanship does not
18 justify deviating from one-person, one-vote, and that a
19 mistaken belief that preclearance was necessary to
20 under-populate certain districts also does not justify
21 deviating from one-person, one-vote.
22 CHIEF JUSTICE ROBERTS: But where -- where
23 is the district in which -- or the State in which
24 partisanship does not play a role in redistricting?
25 MR. HEARNE: Well, we think partisanship is

1 always going to play a role. We -- we would say, but
2 there's an outer limit, as certainly -- as -- as
3 Justice Scalia noted, a articulateable, justiciable
4 standard of one-person, one-vote. That's a rule that we
5 can cabin the partisanship.
6 You can be partisan. And we don't fault the
7 Commission for having partisan interests, Republican
8 members, Democrat members. Even if this fifth member
9 ended up being partisan interest for the Democrats,
10 that's fine. The problem here isn't that they had
11 partisan motives. It's that they deviated from the
12 one-person, one-vote principle to further those partisan
13 motives. And that's what we --
14 JUSTICE KAGAN: If I could ask the -- the
15 question that Ms. Harrington left with, was that -- I'm
16 sorry.
17 CHIEF JUSTICE ROBERTS: No, please. Finish.
18 JUSTICE KAGAN: Even -- if -- if you're
19 saying that even within the 10 percent, you know, to go
20 from 1 percent to 2 percent, or from 2 percent to
21 3 percent, and then somebody can come in and say that's
22 partisanship, it means that every single plan will be up
23 for grabs in every single place, doesn't it?
24 MR. HEARNE: I don't think it does. And the
25 answer would be it doesn't, because in this case, there

1 were no other legitimate reasons to explain it. If that
2 is the reason, and the only reason to deviate -- only
3 other legitimate reason to deviate from -- from
4 one-person, one-vote, then it is not a constitutional
5 plan. But that's not present in all the other cases.
6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 The case is submitted.
8 (Whereupon, at 11:07 a.m., the case in the
9 above-entitled matter was submitted.)
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