

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

12

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
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3 United States, as amicus curiae, supporting Appellee
4 Arizona Independent Redistricting Commission.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 14-232, Harris v. The Arizona Independent Redistricting Commission.

Mr. Hearne.

ORAL ARGUMENT OF MARK F. HEARNE, II

ON BEHALF OF THE APPELLANTS

MR. HEARNE: Thank you, Mr. Chief Justice, and may it please the Court:

The one-person, one-vote principle of the Equal Protection Clause requires an apportionment authority to make a good-faith effort to equally apportion the population as -- as practically as possible, and while deviations are tolerated, they are only minor deviations made for legitimate purposes of a rational State policy intended not to be discriminatory or arbitrary.

Here, the Arizona Redistricting Commission malapportioned Arizona State legislature by almost 10 percent, 8.8 percent, and the district court below found it did so for two reasons.

The first reason was to obtain a partisan advantage for the Democrat party.

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, underpopulated
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 for preclearance
6 was flawed as a matter of legal advice that doesn't
7 justify 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 doesn'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 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 court case.
5 This 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 ORAL ARGUMENT OF GEN. MARK BRNOVICH

17 ON BEHALF OF THE APPELLEE ARIZONA SECRETARY OF STATE

18 MICHELE REAGAN IN SUPPORT OF THE APPELLANTS

19 GENERAL BRNOVICH: Thank you, Mr. Chief
20 Justice. May it please the Court:

21 Fortunately or unfortunately, in this case
22 there are many facts that are not in dispute, addressing
23 Justice Kennedy's questions. The State does not dispute
24 that the Independent Redistricting Commission did indeed
25 draw districts of unequal population. All sides agree

1 that these deviations were not random, or that they were
2 not incidental.

3 We also know, and the record shows and no
4 one disagrees, that this pattern to under-populate
5 minority districts was done to help create or further
6 ability to elect districts. And we also know that the
7 direct evidence is they did it intentionally.

8 So why are we here today? In the background
9 versus Reynolds v. Sims, this Court has always held that
10 equal protection is not a criteria -- another factor
11 when it comes to redistricting, but it is essentially
12 the background in which all redistricting ledges take
13 place.

14 The State of Arizona and the Secretary do
15 not dispute the compliance of the Voting Rights Act was
16 a legitimate or is a legitimate State interest. And we
17 don't dispute that maybe there was an -- a good motive
18 on the part of drawing these districts. The problem is
19 those motives don't matter when what you have is an
20 undermining of the fundamental principle of one-person,
21 one-vote.

22 So in this case, what we have is a violation
23 of the Equal Protection Clause, because by intentionally
24 and systemically under-populating those minority
25 ability-to-elect districts, the IRC violated Equal

1 Protection Clause in that principle of one-person,
2 one-vote.

3 So essentially what happened was by
4 overpopulating the other districts, the voters in the
5 overpopulated districts had their votes diluted. And
6 by -- by diluting those votes, it violated the
7 Constitution.

8 JUSTICE KENNEDY: It sounds fundamental that
9 a statute can't authorize a constitutional violation, so
10 that even an attempt to comply with the Voting Rights
11 Act is not sufficient if it violates the Equal
12 Protection Clause.

13 Have we ever said that -- I mean it's
14 obvious, but have we ever said that in the context of
15 what the voting rights requires?

16 MR. BRNOVICH: Your Honor, this -- this
17 Court has consistently, from Reynolds v. Sims, has
18 always held that the concept and the principle of
19 one-person, one-vote, any attempts to undermine that
20 outside --

21 JUSTICE KENNEDY: So we have said that
22 even -- you read our cases saying even minor deviations
23 are not permitted if they are statutorily required?

24 GENERAL BRNOVICH: No statute can trump the
25 Constitution, and so if -- the Voting Rights Act,

1 whichever way it's read, can't be read in a way that
2 would violate the one-person, one-vote.

3 JUSTICE KENNEDY: And that's what Judge Wake
4 said in his dissent.

5 MR. BRNOVICH: And that's exactly what Judge
6 Wake said in his dissent.

7 And that is the State's position, is that we
8 don't dispute -- or we're not saying that complying with
9 the Voting Rights Act may indeed be a legitimate State
10 interest. What we are saying is, is that when it's done
11 in the systematic way where you have a one-way ratchet,
12 where you have consistently minority ability-to-elect
13 districts, essentially using votes based on racial or
14 ethnic classification, and under-populating those
15 districts and then overpopulating other districts, what
16 you have done is essentially undervalued or violated the
17 one-person, one-vote --

18 JUSTICE ALITO: Would you say it's correct
19 that compliance with the Voting Rights Act, the desire
20 to obtain preclearance, is at least like other
21 traditional districting considerations, like respecting
22 county lines, respecting municipal lines, having
23 contiguous districts? Would you agree with that?

24 GENERAL BRNOVICH: Yes, Justice Alito.

25 JUSTICE ALITO: So if -- if that is the

1 case, then is this what you were asking us to say with
2 respect to the Voting Rights Act, that the things that
3 were really necessary to obtain preclearance are
4 legitimate, but you can't go -- but they went further.
5 They -- they went beyond what was really necessary to
6 obtain preclearance, so we would have to determine
7 whether that was true or not, or some court would have
8 to determine whether that was true or not.

9 MR. BRNOVICH: In this instance, because of
10 the systematic way the deviations, the under-population
11 occurred, as well as the intention -- we know from the
12 Independent Redistricting Commission that they
13 intentionally under-populated those districts. So we
14 have all that evidence.

15 However, we do believe that the Voting
16 Rights Act is like any other criteria. So if you get
17 these population deviations and they're incidental, not
18 intentional -- and that is the key, I believe, is when
19 you intentionally under-populate and systemically
20 under-populate these districts -- that's what causes the
21 constitutional harm.

22 JUSTICE ALITO: Well, what if the only way
23 that you -- that a State could obtain preclearance when
24 Section 5 was still in force was to under-populate some
25 districts? Would that be permissible?

1 GENERAL BRNOVICH: Well --

2 JUSTICE ALITO: Just as you might have a
3 situation where the only way in which you could respect
4 municipal lines or county lines was to under-populate
5 some districts to some degree.

6 MR. BRNOVICH: Justice Alito, the irony is
7 in the draft maps; seven of the ten minority
8 ability-to-elect districts were underpopulated.
9 However, when the Independent Redistricting Commission
10 went from the draft maps to the final maps, there was a
11 one-way ratchet. They intentionally and systemically
12 under-populated those districts.

13 JUSTICE KENNEDY: But Justice Alito can
14 protect his own question, but he's asking you whether or
15 not a deviation is permissible for protecting
16 communities of interest, protecting municipal lines,
17 whether some slight deviation is permissible.

18 MR. BRNOVICH: Yes. Yes, Justice Kennedy,
19 if it's incidental and not intentional.

20 JUSTICE KAGAN: I guess I'm not sure what
21 that means.

22 JUSTICE SCALIA: Yes, I'm not sure. I had
23 thought you -- I had thought you were saying that it
24 doesn't matter whether you were doing it to obtain
25 Justice Department clearance. You cannot do something

1 that is unconstitutional.

2 MR. BRNOVICH: That is --

3 JUSTICE SCALIA: If in fact your -- you
4 don't have equally apportioned districts, it goes beyond
5 what is tolerable. It's a violation regardless of
6 whether your -- you're actually trying to comply with
7 the Justice Department. Isn't that what you were
8 saying?

9 MR. BRNOVICH: Yes, Justice Scalia, but I
10 think that it's important to note that we look at this
11 as a qualitative not a quantitative analysis. So there
12 isn't like some magic number where you say at this point
13 this becomes unconstitutional or it doesn't.

14 The State's position is, is that compliance
15 with the Voting Rights Act was like other neutral or
16 traditional criteria, like protecting, as Justice Alito
17 alluded to, communities of interest, geographical
18 boundaries. And so in that -- in considering that, you
19 may have incidences where you get somebody -- some
20 districts above or below the line.

21 So the fact that a district may be below the
22 line in and of itself is not a constitutional violation.
23 The harm occurs when the Independent Redistricting
24 Commission systemically under-populates those
25 districts -- those ability-to-elect districts, and

1 overpopulates other districts thereby --

2 JUSTICE KAGAN: Can you explain --

3 MR. BRNOVICH: -- diluting the votes of
4 those people.

5 JUSTICE KAGAN: I guess I'm just not really
6 sure. Let's -- let's say that there's a policy that
7 says we want to respect county lines. And we also know
8 that we want to do one-person, one-vote, but we think we
9 have, basically, some leeway up to 10 percent. And --
10 and there's a policy. We want to respect county lines,
11 even though that's going to cause a little bit more
12 deviation on the one-person, one-vote metric. Are you
13 saying that that's impermissible?

14 MR. BRNOVICH: Justice Kagan, we are
15 saying --

16 JUSTICE KAGAN: It's a policy. I mean, it's
17 an intentional policy.

18 MR. BRNOVICH: I guess, you know, the road
19 to hell is paved with good intentions. And so our
20 position is, regardless of their intention, if they are
21 doing it in a systematic way or intending to
22 overpopulate certain districts, under-populate other
23 districts, that is unconstitutional.

24 The Voting Rights Act then would --

25 JUSTICE KAGAN: Even though it just, say,

1 takes you from 4 to 5 percent, or from 7 to 8 percent.
2 You're not crossing the 10 percent threshold. But as
3 long as you're going up, and you're doing it
4 purposefully --

5 MR. BRNOVICH: Yes.

6 JUSTICE KAGAN: -- in the sense of we have a
7 policy to maintain county lines, that's impermissible?

8 MR. BRNOVICH: Yes, Justice Kagan. The
9 position of the State is that when it's done in a
10 systematic and intentional manner, when you create,
11 essentially, barrios of -- boroughs, excuse me -- of
12 certain folks, and then you overpopulate other
13 districts, that violates this Court's one-person,
14 one-vote principle.

15 JUSTICE SCALIA: General Brnovich, just as a
16 matter of curiosity, how do you end up being on this
17 side of the case? You -- you were defended in the
18 district court, weren't you?

19 MR. BRNOVICH: The -- the Secretary in the
20 State thought the principle of one-person, one-vote and
21 upholding that principle was very, very important, and
22 that's why we felt compelled to be involved in this --
23 this case.

24 JUSTICE SCALIA: Well, but only on appeal.
25 You didn't argue this side in the district court, did

1 you?

2 MR. BRNOVICH: That -- that's is correct,
3 Your -- Justice Scalia.

4 JUSTICE SCALIA: What happened? Was there
5 an election in between or something?

6 (Laughter.)

7 MR. BRNOVICH: Yes, and I won
8 overwhelmingly.

9 JUSTICE SCALIA: I knew it.

10 MR. BRNOVICH: Thanks. Thank you very much.
11 I will be up for reelection in three more years, so
12 the ... anyway.

13 JUSTICE GINSBURG: Do you -- do you agree
14 with your colleague that it doesn't make any difference;
15 that in the end result, the -- the legislature -- that
16 the Republicans were disproportionately advantaged, had
17 a disproportionate share of the seats?

18 MR. BRNOVICH: Yes, Justice. Our -- our
19 position is, is that that really is irrelevant as far as
20 the numbers ultimately, whether the percentage --

21 JUSTICE GINSBURG: Whether it would have
22 ended up, if you're right, an even greater
23 disproportion -- a greater disproportion of Republican
24 representatives.

25 MR. BRNOVICH: And so ultimately the

1 number -- this is not a line drawing case; this is an
2 overpopulation/under-population case. So how the lines
3 are drawn, and what the Republican or Democratic
4 representation is in the State House or the State Senate
5 is not important or not key to our argument.

6 Our -- the key to the State's argument is
7 that this intentional and systematic one-way ratcheting
8 of under-populating minority ability-to-elect districts
9 is what undermines the one-person, one-vote principle,
10 and what makes the actions of the IRC unconstitutional.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 MR. BRNOVICH: Thank you.

13 CHIEF JUSTICE ROBERTS: Mr. Smith.

14 ORAL ARGUMENT OF PAUL M. SMITH

15 ON BEHALF OF THE APPELLEE

16 ARIZONA INDEPENDENT REDISTRICTING COMMISSION

17 MR. SMITH: Mr. Chief Justice, and may it
18 please the Court:

19 There is no basis for concluding that the
20 minor, modest population variances among the districts
21 in the Arizona map violate the Equal Protection Clause.
22 That's because --

23 JUSTICE SCALIA: Do you -- do you accept
24 the -- the fact -- speaking of accepting fact-finding,
25 do you accept the fact-finding that at least part of the

1 motive was partisan?

2 MR. SMITH: I don't think that's a fair
3 consideration of what the district court found, Your
4 Honor.

5 JUSTICE SCALIA: Oh, really? Why?

6 MR. SMITH: The district court found that
7 the predominant motive for the under -- for the
8 population --

9 JUSTICE SCALIA: Predominant motive. That's
10 right.

11 MR. SMITH: It said that -- that there may
12 have been two of the five commissioners who, as to one
13 district, District 8, had some mixed motives in -- in
14 urging that that district be made more competitive, but
15 did not find that the Commission as a whole acted, even
16 in that one instance, with partisan motivations, and
17 it -- that district is not one of the ones that's
18 significantly underpopulated.

19 The decision to move population around and
20 make that district somewhat more competitive, even if it
21 was motivated by partisanship, has nothing to do with
22 what we're talking about here, which is the 8.8
23 deviation.

24 JUSTICE SCALIA: Well, you know, I would be
25 very upset if -- if it -- there were any motivation of

1 partisanship because -- I wish this case had come up
2 before the case we had last term, which -- which
3 approved your commission, despite the -- the text of the
4 Constitution --

5 (Laughter.)

6 JUSTICE SCALIA: -- because this commission
7 was going to end partisanship, get politics out of
8 redistricting. And here the very next term we have this
9 case which -- which asserts that there has been a lot of
10 partisanship on the part of this --

11 MR. SMITH: With respect --

12 JUSTICE SCALIA: -- supposedly divine
13 commission.

14 MR. SMITH: Not a fair characterization of
15 what happened, and not a fair consideration of what the
16 district court found after a full trial. What it found,
17 after giving them a full opportunity to try to prove
18 their claim that there was some invidious discrimination
19 here, is that's simply not what happened.

20 Instead what happened is that they had --
21 these population deviations emerged in the final part of
22 the process as they worked to make sure that their map
23 would pass preclearance on the first try, something that
24 the State of Arizona had failed to achieve in each of
25 the three previous decades.

1 JUSTICE ALITO: Well, the district court
2 found -- and this is on 79a of the Appendix to the
3 Jurisdictional Statement -- "partisanship played some
4 role." So do you want us to interpret that to mean that
5 if there was no partisanship, everything would have come
6 out exactly the same way? It had no affect whatsoever
7 on the districting?

8 MR. SMITH: What the court said was with
9 respect to the changes to District 8, which by the way,
10 remained a largely Republican-leaning competitive
11 district, that two of the commissioners may have had
12 mixed motives, both thinking about aiding the
13 preclearance arguments and also thinking about bringing
14 the Democratic party up closer to parity, it still
15 didn't get to parity.

16 And I think that to say --

17 JUSTICE ALITO: Well, that's a -- that's a
18 red herring. We don't need to discuss the issue of
19 parity. If you have a system of proportional
20 representation and you get 55 percent of the vote,
21 you'll get 55 percent of the -- of the representatives.

22 But in the kind of electoral system we have
23 in the United States, with single-member districts and
24 winner-take-all, a neutral -- a neutral districting plan
25 will never produce exactly the same breakdown of

1 legislators as the breakdown of the votes in the
2 election. But that's -- I mean, that's a side issue.
3 What do we do with this statement: Partisanship played
4 some role?

5 MR. SMITH: Your Honor, partisanship by
6 itself cannot violate the Constitution. You have a --
7 you have -- even if it -- even if you inflate that far
8 beyond what was intended by the judges who wrote that
9 opinion, the case of Gaffney v. Cummings was a case
10 where you had partisanship being the dominant,
11 controlling factor in every single line that was drawn.

12 JUSTICE ALITO: This is what -- this is what
13 interests me about the case. If we assume, as the
14 district court did, that partisanship is not a
15 legitimate consideration, and it's not, like, respecting
16 county lines, and if we interpret the district court's
17 opinion as finding that partisanship was part of the
18 reason for the plan that was adopted, then is the test,
19 the Mt. Healthy test -- which in my understanding is
20 what we normally apply in a constitutional mixed motive
21 situation.

22 So that if an illegitimate, unconstitutional
23 consideration is one of the reasons, the burden shifts
24 to the defendant to show that things would have come out
25 the same way, even if that factor had not been in the

1 case, or is it what the court said in Bush v. Vera and a
2 few other cases, that in this particular context, that's
3 not the test? The test is whether the illegitimate
4 factor there, race, was the predominant consideration.

5 MR. SMITH: Well, that's --

6 JUSTICE ALITO: It seems to me it -- it
7 turns on the choice between the two.

8 MR. SMITH: Well, this accepting a lot of --

9 JUSTICE ALITO: Is that a wrong?

10 MR. SMITH: Accepting a lot of the premises
11 of the question, which I think are counterfactual, about
12 the opinion and -- and what was found here and all of
13 that, it does seem to me that even if you're going to
14 make partisanship something illegitimate and
15 redistricting, which seems kind of like a fool's error,
16 frankly, it ought to at least have to be predominate. I
17 mean, in a situation where -- you wouldn't -- you
18 wouldn't want to say that the -- that the -- the -- the
19 line drawers have to have complete purity of heart.

20 JUSTICE KENNEDY: Well, aren't you saying
21 that it's permissible to use, as one factor, an illegal
22 standard if there are some other factors that are also
23 in play? That it's permissible to use an illegal
24 standard, in part?

25 MR. SMITH: If there were --

1 JUSTICE KENNEDY: Is that what you want us
2 to write in this opinion?

3 MR. SMITH: No, your Honor. Nobody thinks
4 that it's illegal to consider --

5 JUSTICE KENNEDY: Well, that's one of the
6 issues in the case. We'll talk about that later, about
7 partisanship. If you -- if you want to say it doesn't
8 make any difference because partisanship is -- is a
9 valid consideration, fine. That's your point. But my
10 question is, it sounds to me, in response to your answer
11 to Justice Alito, that you're saying that it is all
12 right to use an illegal standard, in part, to reduce
13 equal -- equal representation.

14 MR. SMITH: For all the same reasons that
15 the Court has many times said we're not going to say any
16 racial consciousness is enough to invalidate it unless
17 it predominates, I would think you would want to follow
18 the same approach, even if you're going to adopt the
19 parity between racial considerations and partisan
20 considerations, which makes no sense. You're entire
21 Shaw v. Reno line of cases is about trying to decide
22 whether it's race or party, and when you come to the
23 conclusion easily that it's party, then it's okay.

24 JUSTICE KENNEDY: Can I put in my notes that
25 you're arguing that partisanship is a valid

1 consideration in redistricting? Is that what you want
2 me to say?

3 MR. SMITH: You -- you -- you certainly can,
4 Your Honor. You said it last year in the Alabama case.
5 You said political affiliation is one of the legitimate
6 traditional redistricting criteria that line drawers
7 always can consider. That it's --

8 JUSTICE BREYER: That's the problem.
9 There -- there is -- I'm suddenly waking up here and
10 following --

11 MR. SMITH: That's your opinion, Your Honor.
12 (Laughter.)

13 JUSTICE BREYER: Well -- well, how -- how do
14 you -- it's a -- how -- how do we write this? There are
15 two areas that are difficult to write.

16 One is, I know there is this 10 percent
17 rule, but it doesn't say we don't look at it at all. We
18 institutionally can't review thousands of pages of
19 record in every redistricting case. So what are the
20 words there that describe the standard we should bring
21 to this?

22 And the second, which is a direct
23 application of the first, is you're quite right. How
24 can we say that partisanship can't be used at all when
25 you're doing one-person, one-vote but the sky is the

1 limit. Vieth.

2 MR. SMITH: Vieth.

3 JUSTICE BREYER: When in fact -- of course,
4 I dissented there. I -- but the sky is the limit when
5 you're drawing boundaries.

6 Now, how do we reconcile -- how do we
7 reconcile our institutional ability with the need to
8 have some policing here? And how do we reconcile what
9 we say in this case with what we've held in the
10 line-drawing area?

11 MR. SMITH: Okay.

12 JUSTICE BREYER: Now, those -- those are two
13 questions in the back of my mind, and I'd like to have
14 your position.

15 MR. SMITH: Can I answer the second question
16 first, Your Honor?

17 JUSTICE SCALIA: Fifty words or less.

18 (Laughter.)

19 MR. SMITH: It -- it seems to me like it
20 would be -- like it would be not -- not defensible to
21 adopt a rule that says partisanship in creating minor
22 population deviations is actionable absent some effect
23 in terms of biasing the map, whereas in the -- in the
24 line-drawing area, the Vieth situation, you have always
25 insisted that there not only be a bias effect, but it be

1 very large.

2 JUSTICE BREYER: Well, I didn't ask you what
3 we shouldn't say. I asked you what we should say.

4 MR. SMITH: What you should say is -- what
5 you should apply is the rule that -- that applied in all
6 of these cases about minor population deviations: Is
7 there a rational, legitimate policy that the State can
8 articulate which is the reason why they arrived at this
9 difference? And here we have, the Voting Rights Act is
10 the rational and legitimate State policy.

11 CHIEF JUSTICE ROBERTS: Well, let's not --
12 let's talk about that for a second. If action in
13 redistricting or overpopulation would constitute
14 illegitimate racial discrimination, can the answer that
15 we're doing that to comply to get preclearance from the
16 Justice Department legitimize that?

17 MR. SMITH: Yes, Your Honor. This Court has
18 said a number of times that complying with the Voting
19 Rights Act is a compelling State interest. It -- it
20 assumed that just last year.

21 CHIEF JUSTICE ROBERTS: No, my -- my
22 question is if the action that is taken would otherwise
23 constitute illegitimate racial discrimination. I'm
24 trying to find out if the Justice Department's
25 procedures can trump the requirements of the

1 Constitution. In other words, it's -- it's an issue
2 of -- you know, we -- we said in Ricci v. DeStefano that
3 it's not an excuse -- not a complete excuse for
4 intentional discrimination, that you're trying to avoid
5 liability under Title VII --

6 MR. SMITH: Right.

7 CHIEF JUSTICE ROBERTS: -- for
8 discrimination on the basis of effects.

9 MR. SMITH: Right.

10 CHIEF JUSTICE ROBERTS: And I'm wondering if
11 it's somehow different. If the Justice Department is
12 insisting on conduct that would constitute a violation,
13 if they're insisting on more than they should be, is
14 that a defense for the -- for the redistricting?

15 MR. SMITH: Well, Your Honor, the one thing
16 that is clear, Mr. Chief Justice, is that the Voting
17 Rights Act does require people drawing lines to consider
18 race. And Section 5 required it to avoid retrogression.
19 Section 2 requires it right now.

20 CHIEF JUSTICE ROBERTS: I understand that.

21 MR. SMITH: So --

22 CHIEF JUSTICE ROBERTS: But it doesn't say
23 that all bets are off.

24 MR. SMITH: No, your Honor. The -- what --
25 the line this Court has drawn is between maps which go

1 too far and maps which don't, maps in which the racial
2 considerations predominate and subordinate all other
3 traditional districting principles here. And what you
4 have in this case is the quintessential map where that's
5 not true, where --

6 CHIEF JUSTICE ROBERTS: Well, it seems to me
7 you're avoiding my question.

8 MR. SMITH: Sorry.

9 CHIEF JUSTICE ROBERTS: What if the
10 requirements that the Justice Department asks for, for
11 preclearance go too far?

12 MR. SMITH: Well, I think if the -- the
13 Justice Department reads the Voting Rights Act in a
14 manner that requires them to do something that would go
15 too far in the predominant sense, there might be a
16 constitutional problem. There's no indication here that
17 that's what happens. Nobody --

18 CHIEF JUSTICE ROBERTS: Right. So -- so
19 whether or not preclearance is a defense depends upon
20 whether the Justice Department is insisting on too much.

21 MR. SMITH: It -- it could be, Your Honor.
22 There's -- but there's no indication of anything of --
23 like that here. This is a case where they simply said
24 no retrogression. This is not like the '90s, where they
25 were saying you have to create new districts, no matter

1 how ugly, to comply with --

2 JUSTICE BREYER: Look at the finding to
3 support what the -- the Chief Justice is drawing there.
4 While partisanship played a role in the increased
5 population deviation associated with changing
6 District 8, so, too, did the preclearance goal play a
7 role in motivating the change. It's the first half of
8 the sentence which is raising the issue that I think
9 people are trying to -- to get you to say how we write
10 that. You see? Because it says it played a role.

11 And so we're going to be asked here by the
12 other side to expand on what that means, "play a role,"
13 and we have to write an opinion. And if you win this
14 case, there will have to be words that support you.

15 And so how do we take this thing? What
16 would you say about the words "play a role"?

17 MR. SMITH: I would say two things, Your
18 Honor.

19 First of all, it's a tiny role in this case.

20 But second of all, even if it were the only
21 reason why you had a -- population deviations under
22 10 percent, I think it would be not defensible for this
23 Court to say that, by itself, is unconstitutional.

24 There is so -- de minimis effect on any
25 interest in terms of representation from this difference

1 of population, absent some bias in the way that the
2 districts elect candidates, that it's simply not a
3 constitutional problem that you ought to recognize where
4 the -- even if the pure motive was -- was partisanship,
5 it's simply not something that ought to be taken
6 seriously as a constitutional problem.

7 But here, where the predominant motive is to
8 try to make sure these districts will pass preclearance,
9 and less than 50 -- 50 percent of the commissioners may
10 have had, for one district, where they increased the
11 deviation slightly, like .2 percent, may have had some
12 partisanship as well as the Voting Rights Act in mind
13 for District 8. Not one of the ten that were offered to
14 the Justice Department as ability-to-elect districts.
15 That's a tiny, tiny, tiny sliver of partisanship for
16 less than the full commission. It was never --

17 JUSTICE ALITO: Well, what if there were?
18 What if there were a case where the -- the commissioner
19 or whoever was responsible for producing the plan
20 produced -- chose between two plans. Plan A has a
21 deviation of .1 percent; Plan B has a deviation of
22 9.9 percent. And they write a report, and they say,
23 well, we -- it came down to these two plans, and we
24 chose B, because we want to maximize the representation
25 in the legislature of Republicans or Democrats.

1 And you would say that that would be
2 constitutional?

3 MR. SMITH: I think if -- if that's the only
4 thing that they -- that -- that was problematic about
5 the map, you might well say that's constitutional. But
6 that's -- that's not this case, obviously.

7 JUSTICE ALITO: No, it's not this case, but
8 it --

9 MR. SMITH: And it -- it -- you know, you've
10 gone as far as Larios. You've said a map that's an --
11 an egregious gerrymander, massive disparate tearing of
12 incumbents, plus the not -- intentional abuse of the
13 10 percent rule at 9.98 percent, all of that together,
14 you summarily affirmed a finding of unconstitutionality.

15 But by itself, I don't know that I would
16 even say that --

17 JUSTICE SCALIA: Well, that's because
18 there's no constitutional criterion for where you draw
19 the district lines. There is a constitutional criterion
20 for -- for how you -- how you weigh voters, district by
21 district. There is.

22 MR. SMITH: Yes, Your Honor.

23 JUSTICE SCALIA: One-person, one-vote.
24 There's -- there's no -- no such criterion for where the
25 location of a district line has to be.

1 MR. SMITH: But this Court has said, over
2 and over again, we want to give States leeway in this
3 area, because representation is often better if you give
4 them some chance to make districts within the 10 percent
5 band. And if you allow them to do what's -- what's
6 being suggested here, to accuse -- to bring partisanship
7 in and they can get to Federal court and they can get to
8 trial just by that, then exactly what you said is going
9 to happen in -- in your descent in Larios. Every --
10 everybody with a -- with a political motivation to try
11 to do something to undercut a map is going to come in.
12 It's easy enough to -- to allege partisanship. Here
13 the -- all -- the only evidence they have of
14 partisanship, leaving aside the little story of
15 District 8, is simply the pattern, that the Hispanic
16 districts they under-populated and the Native American
17 district happened to vote Democratic. So you have this
18 pattern. The chart on -- they point to on page 112a,
19 but that's not evidence. It's equally consistent with
20 what the court found happened, which is they wanted to
21 make these districts more persuasive as ability-to-elect
22 districts so they could get preclearance. And voila,
23 they got preclearance.

24 This is a -- this is a case where you
25 wonder: Where's the beef? What exactly are we here

1 for? There's no problem with this map. It's not a
2 partisan gerrymander. It's not a racial gerrymander.
3 It's within the 10 percent boundary. They -- they did
4 everything in open.

5 Everything that -- that's being complained
6 about here, all of this under-population of these
7 districts that was done at the -- was done unanimously
8 by all five commissioners who adopted the goal of
9 getting preclearance, who adopted the -- the -- the idea
10 that they had to get 10 districts, not eight districts,
11 that every single change to those 10 districts that
12 increased their under-population was unanimously voted
13 by all five commissioners. This is a case where there
14 is simply nothing seriously being argued here that could
15 possibly amount to a constitutional violation.

16 And it seems to me that we can talk about
17 whether pure partisan case ought to, by itself, if the
18 only -- if the only problem is deviation, to be
19 unconstitutional, I would recommend that you not do that
20 for the reasons you said in your dissent in Larios.
21 But, boy, this -- this case is so far from that. I
22 mean, the Republican commissioner -- appointed
23 commissioners are voting for everything that they're
24 complaining about because they, too, want to get
25 preclearance.

1 The State of Arizona wants very much to have
2 its map go into effect for the first time since the
3 1960s when it became covered by the Voting Rights Act
4 rather than having a Federal court have to put the map
5 into effect because preclearance was denied.

6 And they -- they hire lawyers who worked in
7 the Justice Department, told them how many districts
8 they needed, told them that if necessary in rejiggering
9 these lines, they could go down -- up to the 10 percent
10 limit. They then tried very hard to minimize that.

11 And one of the things that's important to
12 recognize here is you could have probably equalized the
13 population here and still gotten districts to the same
14 level of Hispanic population, but you would have had to
15 draw tentacles of the kind that the Court has many times
16 criticized. There's lots and lots of other Hispanic
17 people in the State of Arizona who are not in these
18 districts, but that's because they're spread out all
19 over the place.

20 And so if you're going to draw compact
21 districts, if you're going to draw districts that
22 respect county boundaries, if you're going -- and census
23 tracts and communities of interests, something has to
24 give. And what gave here was this modest, tiny, small
25 amount of population variation that seems to me just not

1 a serious candidate for any kind of constitutional
2 invalidation on the facts of this case, which aren't
3 even challenged here, is clearly erroneous.

4 If the Court has no further questions, thank
5 you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Ms. Harrington.

8 ORAL ARGUMENT OF SARAH E. HARRINGTON

9 FOR UNITED STATES, AS AMICUS CURIAE, SUPPORTING
10 APPELLEE ARIZONA INDEPENDENT REDISTRICTING COMMISSION

11 MS. HARRINGTON: Thank you, Mr. Chief
12 Justice, and may it please the Court:

13 The question in this case is not whether
14 Section 5 can compel deviations from a perfect
15 population standard. The question is whether de minimis
16 deviations are permitted by the Constitution. This
17 Court has made very clear that when State districting
18 plans are within the 10 percent deviation, total
19 deviation from a perfect population equality standard,
20 those plans are presumed to be constitutional.

21 Now, that presumption is a substantive rule
22 that serves three important principles.

23 Just if I can briefly tick them off, the
24 first is that such de minimis deviations do not by
25 themselves violate equal protection. The second is that

1 giving States a 10 percent leeway actually enhances
2 citizens' fair and equal representation by allowing
3 States to pursue other important districting principles.
4 And the third is that limiting Federal court
5 intervention in de minimis deviation cases protects
6 State's sovereign right to draw district for their own
7 legislature.

8 CHIEF JUSTICE ROBERTS: Is -- is 10 percent
9 really de minimis? I mean, I think you can say it's
10 minor, but de minimis strikes me as misleading when
11 you're talking about 10 percent.

12 MS. HARRINGTON: Well, I certainly don't
13 mean to be misleading about this term that this Court
14 has used --

15 CHIEF JUSTICE ROBERTS: I know it has, yes.

16 (Laughter.)

17 MS. HARRINGTON: I would never accuse the
18 Court of being misleading. I mean, I think the point
19 that the Court has made is that these sort of, you know,
20 10 percent deviations from perfect population quality
21 don't have enough of a dilutive effect to really affect
22 any citizen's right to fair and equal --

23 JUSTICE SCALIA: Does anybody contest that?
24 I don't think that's contested here. I think the other
25 side is willing to -- to concede that it's presumptively

1 okay, which means they have to come forward to show that
2 there were invalid reasons why there is this
3 discrepancy. Right?

4 MS. HARRINGTON: That's true. And our view,
5 Justice Scalia, is that the case should begin and end at
6 the prima facie case requirement. Our view is that the
7 plaintiffs did not make a prima facie case of invidious
8 discrimination in this case, and so the district court's
9 factual findings about the Commission's actual motives
10 actually aren't relevant at this point.

11 JUSTICE SCALIA: I don't understand that. I
12 thought a prima facie case means if -- if you haven't
13 made a prima facie case, it means you have to bring in
14 other evidence. It doesn't mean you're out of court.

15 MS. HARRINGTON: Well, if you haven't made
16 the prima facie case, it means that the State doesn't
17 have to justify its reasons for the deviations. And so
18 in this context, in order to make -- in really any
19 context, to make a prima facie case, what you have to do
20 is put in enough evidence from which an inference of
21 invidious discrimination can be made.

22 What that generally requires is that the
23 challenger has to put in enough in evidence to rebut the
24 presumed reasons for the challenged action. In this
25 case the Arizona -- Arizona constitution sets forth the

1 redistricting criteria that the Commission is to use in
2 drawing district lines, and so at a minimum the
3 plaintiffs should have come in and demonstrated that
4 the -- that the deviations that they observed were not
5 explainable as in service of the --

6 JUSTICE ALITO: Well, let -- let's assume
7 that the -- the opinion of the district court found that
8 partisanship was a consideration.

9 So are you saying that that finding can't be
10 sustained because it wasn't based on sufficient evidence
11 brought forward by the plaintiffs?

12 MS. HARRINGTON: Well, first, just a point
13 of clarification. Part of the opinion that you read was
14 just talking about District 8, and so it wasn't defining
15 that partisanship played any role with respect to the
16 rest of the map. And if you read on in the paragraph
17 from which you were quoting, the district court said
18 that amount of deviation that was attributable to the
19 attempts to make the district more competitive was less
20 than 1 percent. I think it was .7 percent.

21 And so it's really a small, very small --

22 JUSTICE ALITO: Well, was it a factor or
23 not? Was partisanship just irrelevant, that it played
24 no role, everything would have come out the same way --

25 MS. HARRINGTON: The district court found --

1 JUSTICE ALITO: -- without partisanship
2 according the district court's finding?

3 MS. HARRINGTON: The district court found
4 that with respect to one district, two of the five
5 commissioners were motivated in part by -- by
6 partisanship motives.

7 But, again, our -- our first position is
8 that this Court doesn't need to get to what the actual
9 findings were as to the motives because what the
10 plaintiffs needed to do was come in and demonstrate at
11 the front end that the lines on the map couldn't be
12 explained as an effort to comply with legitimate
13 districting criteria.

14 CHIEF JUSTICE ROBERTS: If the --

15 JUSTICE ALITO: The district of --

16 CHIEF JUSTICE ROBERTS: What is the position
17 of the United States on the question of whether it's
18 permissible to intentionally take partisanship -- to use
19 partisanship as a guiding principle in redistricting?
20 Is that permissible or not?

21 MS. HARRINGTON: We haven't taken a position
22 on that that --

23 CHIEF JUSTICE ROBERTS: I know you haven't.
24 It seems very unfortunate. It's a little difficult for
25 us to address it since that's one of the main questions

1 in the case.

2 MS. HARRINGTON: Well, the United States has
3 never participated in the political gerrymandering
4 cases. It certainly -- you know, there are lessons that
5 can be drawn from this Court's cases. In Gaffney, the
6 Court indicated that certainly consideration of politics
7 and partisanship does not necessarily make a plan
8 unconstitutional.

9 But, again, in this case, I think in
10 order -- before you even get to the question of what the
11 State's actual motives were, there has to be some
12 demonstration that the motives were not the announced
13 motives that are in the Arizona Constitution.

14 CHIEF JUSTICE ROBERTS: So you're -- you're
15 unwilling to tell me whether intentional use of
16 partisanship in redistricting is acceptable or not?

17 MS. HARRINGTON: Well, I think this Court's
18 decision in Gaffney indicates that it can be
19 permissible. The districting body in Gaffney was driven
20 by a desire to equalize partisanship --

21 JUSTICE BREYER: I took it that the position
22 of the United States is at least, since many commissions
23 are nonpartisan because they have two people who are
24 more partisan on one side, two people on the other side
25 and one neutral. So at the least, where the

1 commissions -- commissioners don't account for a
2 majority, the partisan motive is not held by a majority
3 of the commission, then it is constitutional --

4 MS. HARRINGTON: That --

5 JUSTICE BREYER: -- for some members of the
6 commission to take partisan considerations into account
7 where they're not a majority and where the result is
8 under 10 percent.

9 MS. HARRINGTON: I think that was the
10 district court's conclusion. Our position --

11 JUSTICE BREYER: Is your conclusion as
12 representing the United States.

13 MS. HARRINGTON: Well, again, we haven't
14 taken a position on how one would analyze a
15 partisanship -- if there was a finding that you get
16 there, about a partisanship -- partisanship motive.

17 JUSTICE KAGAN: Ms. --

18 JUSTICE BREYER: I read the finding as
19 saying, well, two members of the commission out of five
20 did have a partisan motive, in part.

21 MS. HARRINGTON: Yes.

22 JUSTICE BREYER: So I have to -- you have
23 to -- I think have to say whether you think that is --
24 that situation, is constitutional or not.

25 MS. HARRINGTON: Well, no. Let me make the

1 pitch one more time for the -- for having a robust prima
2 facie case.

3 So the -- what the Plaintiff needed to do
4 was come into this -- come into court and say, here is a
5 map; it can't be explained by the criteria that are
6 identified in the Constitution that the Commission is
7 supposed to go by. The very first criterion listed in
8 the Constitution is complying -- is compliance with the
9 Voting Rights Act.

10 If you look at the map and you look at
11 which -- which districts were under-populated and which
12 are the ability-to-elect districts, there's almost a
13 perfect correlation. And I think -- I think that was a
14 perfectly legitimate explanation for why there are
15 deviations in the case.

16 JUSTICE SCALIA: I don't understand this two
17 out of five. Do you -- do you think if four of the
18 justices of this Court voted a certain way in a case
19 because they were racists, the opinion would still be
20 valid because, after all, five of us weren't? Would you
21 even consider that? And why is it any different for a
22 -- for a commission like this? The mere fact that two
23 of them are -- if -- if partisanship is indeed bad --

24 MS. HARRINGTON: Well, again, I think, you
25 know, we don't have a position on how one would analyze

1 that --

2 JUSTICE BREYER: Well, not -- what I
3 think -- one, this isn't racist.

4 Number two, it's not this Court.

5 Number three, I don't know any court like
6 that.

7 And number five, if you're --

8 (Laughter.)

9 JUSTICE BREYER: -- if you're going to
10 say -- if you're going to say. If you're going to say
11 that no members of a redistricting commission can ever
12 have -- can ever have partisan views, I don't know where
13 you're going to get your membership from.

14 (Laughter.)

15 JUSTICE BREYER: I mean that -- that is --
16 that many of these commissions, I would think, would
17 balance people who know about districting and who are
18 also Republicans with people who know about it and are
19 also Democrats, and then you have someone of undoubted
20 neutral --

21 JUSTICE SCALIA: Which is not the case here.
22 That places a lot of weight on selecting the fifth
23 person who is lily -- lily-white pure, right? And if
24 that person, deep down, is partisanship one side or the
25 other, the whole -- the whole thing goes.

1 MS. HARRINGTON: Well, this Court --

2 JUSTICE SCALIA: And that is the allegation
3 here, by the way.

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

5 This Court has repeatedly said that politics
6 is always going to be a part of redistricting. And so I
7 think it's --

8 JUSTICE SCALIA: Right.

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

11 JUSTICE SCALIA: I agree with that. And
12 that's a different point.

13 MS. HARRINGTON: Okay. But --

14 CHIEF JUSTICE ROBERTS: I mean, you don't
15 have a position on whether that's acceptable or not.

16 MS. HARRINGTON: Well, I can --

17 CHIEF JUSTICE ROBERTS: There's a difference
18 between something's a necessary evil and saying it's
19 evil.

20 (Laughter.)

21 MS. HARRINGTON: Well, I think this Court's
22 decisions have told us that it's -- that it's fine to
23 have partisanship play some role in redistricting.
24 That's the -- that's the lesson of Gaffney.

25 JUSTICE ALITO: Well, I'm really surprised

1 with the way you -- the way you read the district
2 court's opinion. In footnote 10 of the district court's
3 opinion, they set out the standard that they apply.

4 MS. HARRINGTON: Can you give me the page,
5 please?

6 JUSTICE ALITO: It's on 62 -- I'm sorry --
7 63a, running over into 64a. And in the -- the final
8 paragraph that begins at the bottom of the page, "For
9 decision purposes, a majority of the panel made up of
10 Judge Clifton and Judge Silver have concluded that
11 Plaintiffs have not demonstrated that partisanship
12 predominated over legitimate redistricting
13 considerations."

14 Doesn't that mean that they found that there
15 were some illegitimate considerations, or at least
16 they -- and they assumed that partisanship was an
17 illegitimate consideration?

18 MS. HARRINGTON: They say that on 79a, which
19 is where you were reading from earlier --

20 JUSTICE ALITO: No, no.

21 MS. HARRINGTON: -- I think it's clear that
22 what they're talking about, that partisan -- that
23 partisanship played a role only with respect to
24 District 8.

25 But let me just say, if -- if this Court

1 allows the plaintiffs to come in and just point to -- to
2 deviations in districts --

3 JUSTICE ALITO: I'm sorry. Just to clarify
4 your answer.

5 So you think that what they said in
6 footnote 10 only applies to one district.

7 MS. HARRINGTON: Yes. That's my reading of
8 the opinion. I think -- I haven't heard the other side
9 disagree with that, but you can ask them.

10 You know, if this Court makes it too easy
11 for plaintiffs to come in and point to deviations and
12 partisan correlations, then it's going to totally wipe
13 away the 10-percent leeway, which itself serves
14 important districting principles.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Ms. Harrington.

17 General Hearne, you have four minutes
18 remaining.

19 REBUTTAL ARGUMENT OF MARK F. HEARNE, II
20 ON BEHALF OF THE APPELLANTS

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

22 JUSTICE SCALIA: What about footnote 10? Do
23 you agree with -- with the characterization that the
24 other side has made?

25 MR. HEARNE: Well, footnote 10, no, I do

1 not.

2 And the portion I would quote was not
3 limited just to District 8. Partisanship was rank in
4 this redistricting process, and is demonstrated
5 objectively, not just with Judge Wake's chart. But it's
6 also demonstrated by the fact of District 8, which was
7 not submitted for preclearance.

8 JUSTICE SCALIA: I want a finding. I want a
9 finding. I don't -- I don't want to look at a chart --

10 MR. HEARNE: Well --

11 JUSTICE SCALIA: -- to make my own factual
12 determination.

13 What factual finding other than footnote 10
14 is there?

15 MR. HEARNE: Then I would quote from the
16 Appendix at 107a, which is where the statement's made,
17 "Judge Clifton correctly finds that the IRC was actually
18 motivated by both partisan advantage and hope for voting
19 rights preclearance."

20 So we have a majority for that finding of
21 fact.

22 So that is two members of the court
23 specifically found that partisanship was one of the two
24 motives to explain these deviations from one-person,
25 one-vote. So clearly, it was a motive at that point, as

1 even Judge Silver noted, this is a mixed-motive case.

2 JUSTICE SCALIA: Yes, but to what extent? I
3 mean, the other side's going to say, yes, that's true,
4 but it's only true as to that one district discussed in
5 footnote 10.

6 MR. HEARNE: Well, if that's so, then they
7 would have stopped and adopted the initial map and not
8 continued to deviate from 4 percent to 8 percent for the
9 final map. The initial map, the draft map, was a
10 4-percent deviation.

11 Dr. King, their own expert, said that this
12 map complied with the Voting Rights Act. And yet, they
13 went after that and continued deviating and
14 under-populating districts to get to the 8.8 percent.
15 That included the machinations with District 8.

16 So if the only legitimate reason was to
17 obtain preclearance, then they would have accepted the
18 draft map, and it would have been game over. But they
19 didn't. They went ahead and conducted these
20 deviations --

21 JUSTICE KAGAN: I thought it was because
22 they wanted to make super sure that they complied with
23 the Voting Act. I think -- I think that that's why they
24 said they kept going.

25 MR. HEARNE: The explanation that was made

1 is that they were, quote, "strengthening" these
2 districts by continuing to under-populate districts
3 because their consultant said, oh, that does help us get
4 Voting Rights Act preclearance approval. That was the
5 explanation made.

6 But if their own expert said the original
7 map, the draft map satisfied the Voting Rights Act, and
8 the only reason to additionally depopulate these
9 districts was to achieve a further partisan skew, which
10 Judge Wake's chart demonstrates, then that shows that
11 partisanship was a very -- I understand two of the
12 members said that it was not the primary motive, but it
13 certainly was a pervasive motive in the process by which
14 these districts were drawn.

15 And our position is a very narrow one that
16 we ask the Court to hold, is that partisanship does not
17 justify deviating from one-person, one-vote, and that a
18 mistaken belief that preclearance was necessary to
19 under-populate certain districts also does not justify
20 deviating from one-person, one-vote.

21 CHIEF JUSTICE ROBERTS: But where -- where
22 is the district in which -- or the State in which
23 partisanship does not play a role in redistricting?

24 MR. HEARNE: Well, we think partisanship is
25 always going to play a role. We -- we would say, but

1 there's an outer limit, as certainly -- as -- as
2 Justice Scalia noted, a articulateable, justiciable
3 standard of one-person, one-vote. That's a rule that we
4 can cabin the partisanship.

5 You can be partisan. And we don't fault the
6 Commission for having partisan interests, Republican
7 members, Democrat members. Even if this fifth member
8 ended up being partisan interest for the Democrats,
9 that's fine. The problem here isn't that they had
10 partisan motives. It's that they deviated from the
11 one-person, one-vote principle to further those partisan
12 motives. And that's what we --

13 JUSTICE KAGAN: If I could ask the -- the
14 question that Ms. Harrington left with, was that -- I'm
15 sorry.

16 CHIEF JUSTICE ROBERTS: No, please. Finish.

17 JUSTICE KAGAN: Even -- if -- if you're
18 saying that even within the 10 percent, you know, to go
19 from 1 percent to 2 percent, or from 2 percent to
20 3 percent, and then somebody can come in and say that's
21 partisanship, it means that every single plan will be up
22 for grabs in every single place, doesn't it?

23 MR. HEARNE: I don't think it does. And the
24 answer would be it doesn't, because in this case, there
25 were no other legitimate reasons to explain it. If that

1 is the reason, and the only reason to deviate -- only
2 other legitimate reason to deviate from -- from
3 one-person, one-vote, then it is not a constitutional
4 plan. But that's not present in all the other cases.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 The case is submitted.

7 (Whereupon, at 11:07 a.m., the case in the
8 above-entitled matter was submitted.)

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