No. 14-232

In the Supreme Court of the United States

WESLEY W. HARRIS, ET AL., APPELLANTS

v.

ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE ARIZONA INDEPENDENT REDISTRICTING COMMISSION

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QUESTION PRESENTED

Whether the district court correctly rejected appellants' Equal Protection Clause challenge to Arizona's redistricting plan.

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INTEREST OF THE UNITED STATES

This case involves a claim that population deviations in Arizona's 2012 legislative redistricting plan violate the Equal Protection Clause. The United States participated as *amicus curiae* in this Court's cases analyzing the constitutionality of malapportioned state legislative districts. *E.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962). In addition, the United States, through the Attorney General, has primary responsibility for enforcing the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* At the time of the redistricting decisions in this case, the United States was responsible for reviewing voting changes in jurisdictions, including Arizona, that were subject to Section 5 of the VRA. 52 U.S.C. 10303, 10304. The United States accordingly has a substantial interest in this case.

STATEMENT

1. Drawing legislative districts is a quintessential state sovereign function. *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995). States therefore have considerable discretion to engage in the balancing and compromises inherent in the districting process—subject to the requirements of the Constitution and federal law. *Ibid.*

As relevant here, the Equal Protection Clause requires States to draw legislative districts that are substantially equal in population. *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964). The VRA imposes additional obligations. When the map challenged here was drawn and implemented, Section 5 of the VRA required certain jurisdictions identified through Section 4 to secure preclearance of changes to electoral practices, including districting changes. 52 U.S.C. 10303(b), 10304(a).

To obtain preclearance, a covered jurisdiction must demonstrate that a proposed change does not have the purpose or effect of discriminating based on race. 52 U.S.C. 10304(a). A districting change cannot receive preclearance, for example, if it results in retrogression by diminishing a minority group's ability "to elect [its] preferred candidates." 52 U.S.C. 10304(b). To determine whether a redistricting plan is retrogressive, the new voting plan is compared against the existing, or "benchmark," plan, using updated census data in each and conducting a functional analysis focusing on whether the proposed plan maintains a minority group's ability to elect. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (*2011 Guidance*). A proposed plan with fewer minori-

ty ability-to-elect districts than the benchmark plan is generally impermissibly retrogressive, unless retrogression is unavoidable. 52 U.S.C. 10304(b) and (d).

2. Arizona's bicameral legislature is divided into 30 legislative districts, each of which elects one member of the Senate and two members of the House of Representatives. Ariz. Const. Art. 4, Pt. 2, § 1, ¶ 1. The Arizona Constitution vests redistricting responsibility in a five-member independent commission known as the Arizona Independent Redistricting Commission (AIRC or Commission). *Id.* ¶¶ 3-8.

Each decade, the leadership of the two main political parties in the state legislature take turns selecting the first four Commission members, who may be affiliated with a political party; those four members then select an individual not affiliated with any party already represented on the Commission to serve as the Commission's chair. Ariz. Const. Art. 4, Pt. 2, § 1, ¶¶ 5-6, 8. The Commission starts the redistricting process by creating "districts of equal population in a grid-like pattern across the state." *Id.* ¶ 14. The Commission then adjusts the grid "as necessary" to comply with the federal Constitution and the VRA. *Id.* ¶ 14(A). "To the extent practicable," the Commission must also pursue five goals: (1) population equality; (2) geographic compactness and contiguity; (3) respect for communities of interest; (4) respect for locality boundaries, visible geographic features, and undivided census tracts; and (5) competitive districts, if creating them does not significantly impede the other goals. *Id.* ¶ 14(B)-(F).

3. Following the 2010 census, the AIRC was established and began the redistricting process. At that time, Arizona was required to comply with Section 5 of

the VRA, and the Commission accordingly prioritized avoiding retrogression among its districting goals. J.S. App. 19a-20a, 23a-24a.[1] In accordance with its counsel's and consultants' advice, the Commission determined that there were likely ten minority ability-to-elect districts in the benchmark plan. *Id.* at 27a-28a. The Commission therefore aimed to create ten corresponding districts in the new plan to avoid retrogression and achieve preclearance. *Ibid.*

The Commission adopted a draft map in October 2011, which contained ten districts it believed might qualify as minority ability-to-elect districts. J.S. App. 28a-30a. The Commission's counsel subsequently urged additional steps to ensure minority groups could elect their preferred candidates in those districts to reduce the risk that the plan might be deemed retrogressive. *Id.* at 30a. Many of the potential ability-to-elect districts in the draft map were already slightly underpopulated, but counsel advised that such variances were a permissible byproduct of efforts to comply with the VRA, "so long as the maximum deviation remained within ten percent." *Ibid.* The Commission ultimately adopted several changes that, among other things, increased the percentage of Hispanics in two potential ability-to-elect districts, with a resulting minor increase in population deviations. *Id.* at 31a-32a (summarizing that one district increased from 0.1% to 0.3% above the ideal population, while the other decreased from 0.2% above to 3% below).

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[1] In *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), this Court held that the coverage formula in Section 4(b) of the VRA could no longer be used to require preclearance under Section 5. *Id.* at 2631. Thus, Arizona is not currently subject to Section 5.

In addition, a Democratic commissioner explored possibilities for making District 8, which was Republican-leaning, more competitive. J.S. App. 32a-33a. Although the Commission had not previously counted District 8 as an ability-to-elect district, counsel suggested it might qualify as one if lines were shifted to keep communities with high minority populations together, which would enhance the case for VRA compliance if another potential ability-to-elect district were found not to qualify. *Ibid.* The Commission subsequently voted 3-2 to implement that change, with Republican commissioners voting against—the only alteration to the draft map that resulted in a divided vote. *Id.* at 33a-34a. The modification had a slight effect on the population counts in District 8 and three other districts. *Id.* at 34a (summarizing that the changes increased deviations by 0.7%, 1.4%, and 2.4% in three districts, and decreased one district's deviation by 1.6%). Although the change increased the percentage of Hispanics in District 8, the AIRC ultimately concluded that it did not qualify as an ability-to-elect district. *Ibid.*

In January 2012, the AIRC approved the final map in a 3-2 vote, with the Republican commissioners voting against it. J.S. App. 35a. In April 2012, the Attorney General precleared the plan under Section 5. *Ibid.* The first election cycle using the map occurred later that year. *Id.* at 9a-11a.

Each legislative district in the final map has a minor population deviation from the ideal, with 12 underpopulated and 18 overpopulated. J.S. App. 9a-10a. The maximum deviation is 8.8% and the average variance is 2.2%. *Id.* at 12a; Supp. App. 15a. Nine of the 12 underpopulated districts were viewed by the Com-

mission as ability-to-elect districts, and each elected only Democrats to the state legislature in 2012. J.S. App. 9a-10a. Of the remaining three underpopulated districts, one elected only Republicans, one elected only Democrats, and one elected both Republicans and Democrats. *Ibid.* Of the 18 overpopulated districts, one was viewed as an ability-to-elect district, and it elected only Democrats. *Ibid.* Of the remaining 17 overpopulated districts, 15 elected only Republicans and two elected both Republicans and Democrats. *Ibid.* In total, Republicans won 56.6% of state senate seats and 60% of state house seats in 2012, which exceeded the Republican Party's statewide registration share of 54.4%. *Id.* at 98a (Silver, J., concurring in relevant part).

4. Appellants are Arizona voters who brought this suit to challenge the state legislative plan, asserting that "the Commission underpopulated Democrat-leaning districts and overpopulated Republican-leaning districts for partisan reasons, in violation of" the Equal Protection Clause. J.S. App. 3a-4a.

a. Following a bench trial, a three-judge district court rejected appellants' equal protection claim. J.S. App. 3a-81a.

At the outset, the district court recognized that the Constitution does not require state legislative districts of perfectly equal population; rather, "[s]ome deviation * * * is constitutionally permissible" if "the disparities are based on 'legitimate considerations incident to the effectuation of a rational state policy.'" J.S. App. 60a-61a (quoting *Reynolds*, 377 U.S. at 579). Because the overall deviation was under 10% and therefore qualified as minor under this Court's precedents, the court observed that the disparities them-

selves did not "make out a prima facie case of discrimination." *Id.* at 61a. Appellants accordingly bore the burden "to prove that the deviations did not result from the effectuation of legitimate redistricting policies." *Ibid.*

The district court held that appellants failed to carry that burden. In particular, appellants did not prove "that the Commission deviated from perfect population equality out of a desire to increase the electoral prospects of Democrats at the expense of Republicans," which the court assumed without deciding would not be a valid justification for minor disparities. J.S. App. 62a. The court observed that the pattern of population disparities correlated not only with party affiliation but also with efforts to create minority ability-to-elect districts. As between those two explanations, it made a factual finding that "the population deviations were primarily a result of good-faith efforts to comply with the [VRA]." *Id.* at 4a, 36a-42a, 75a. Thus, while the court found that "some of the commissioners were motivated in part in some of the line-drawing decisions by a desire to improve Democratic prospects in the affected districts," it determined that "compliance with federal voting rights law was the predominant reason for the deviations." *Id.* at 6a.

The district court further concluded that VRA compliance was "a legitimate justification for [the] minor population deviations." J.S. App. 72a. The court could discern no reason why VRA compliance would not qualify as "a legitimate, rational state policy on par with" other districting goals, "such as avoiding contests between incumbents and respecting municipal lines," which can justify comparable disparities. *Id.* at 65a, 67a. Nor was that conclusion altered by

Shelby County v. *Holder*, 133 S. Ct. 2612 (2013), "which was decided after the legislative map in question here was drawn and implemented." J.S. App. 69a. The court observed that States should "comply with federal voting rights law as it stands at the time rather than attempt to predict future legal developments and selectively comply with voting rights law in accordance with their predictions." *Id.* at 72a. Moreover, *Shelby County* invalidated only Section 4(b)'s coverage formula and did not "hold that any effort by a state to comply with Section 5 was improper." *Ibid.*

b. Judge Silver concurred in relevant part. J.S. App. 82a-104a. She would have required appellants to show that "partisanship was the *actual* and *sole* reason for the population deviations," which they could not do in light of the "overwhelming" evidence that "the final map was a product of the commissioners'[] consideration of appropriate redistricting criteria." *Id.* at 93a-94a, 99a-100a. She also expressed doubt that "minor population deviations due to partisanship present a cognizable Equal Protection claim." *Id.* at 93a. If "maps containing minor deviations can be challenged as attempts to give one political party an electoral advantage," she cautioned, "the federal courts should prepare to be deluged with challenges to almost every redistricting map." *Ibid.*

c. Judge Wake dissented in relevant part. J.S. App. 105a-145a. Although he agreed with the majority that "[c]omplying with Section 5 and obtaining preclearance under the [VRA] was a legitimate objective" when the Commission adopted the map, he did not believe such compliance could justify what he viewed as "systematic population inequality," especially after *Shelby County*. *Id.* at 126a, 128a.

SUMMARY OF ARGUMENT

The Equal Protection Clause requires that state legislative districts be apportioned on a population basis, but does not demand perfect mathematical equality in subordination of other traditional districting goals. To provide States with flexibility to pursue rational and legitimate districting policies within the bounds of substantial population equality, this Court's precedents establish a strong presumption that plans with deviations under 10% are constitutional. Appellants failed to overcome that presumption, and the district court thus correctly rejected their equal protection claim.

A. Because the population deviations in Arizona's redistricting plan are minor, appellants bore an initial burden of producing evidence sufficient to infer that the deviations resulted from invidious discrimination. To make out a prima facie case, appellants needed to come forward with evidence to negate the presumption that the population deviations were the byproduct of legitimate districting criteria. That burden is appropriately high to ensure that States retain leeway to pursue legitimate districting policies and to ensure that federal courts are not entangled in state redistricting as a matter of course. When the alleged infirmity is "too much" partisanship, a plaintiff's burden is higher still, for "[p]olitics and political considerations are inseparable from districting and apportionment," and it is "idle * * * to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney* v. *Cummings*, 412 U.S. 735, 752-753 (1973).

Appellants failed to make the required showing here. Appellants maintain that they produced suffi-

cient evidence of invidious partisan discrimination because the pattern of population deviations correlated with party affiliation. But the deviations also correlated with the effort to maintain minority ability-to-elect districts, and appellants failed to negate that obvious alternative explanation. Thus, statistics alone did not create the requisite inference that the Commission intentionally discriminated along partisan lines. To the contrary, the district court's factual findings, which appellants have not challenged as clearly erroneous, confirm that the deviations were best explained by the Commission's desire to comply with the VRA—just as the statistics suggested.

Evidence that political considerations motivated some commissioners in some line-drawing decisions also does not suffice to establish a prima facie case of invidious discrimination. This Court's precedents refute the notion that a map with minor deviations must be entirely free of political influence to avoid triggering an intrusive judicial inquiry into the justification for population disparities. And the facts of this case stand in stark contrast to the blatant regional favoritism and selective incumbent protection held to invalidate a reapportionment plan in *Larios* v. *Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), aff'd, 542 U.S. 947 (2004)—the sole case in which this Court has approved an equal-population challenge to a map with minor deviations. Indeed, Arizona's plan gave Republicans slightly more than their proportionate share of seats in the state legislature. Particularly because a "plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority," *League of United Latin Am.*

Citizens (*LULAC*) v. *Perry*, 548 U.S. 399, 419 (2006) (opinion of Kennedy, J.), appellants' minimal showing regarding the role of political considerations in the design of Arizona's map does not suffice to trigger further inquiry.

B. The minor deviations were in any event fully justified by the Commission's rational and legitimate interest in complying with Section 5 of the VRA.

States undoubtedly have a rational interest in abiding by the VRA's mandates when they redistrict, and that interest, no less than other traditional districting criteria, can justify minor deviations from perfect population equality. If States had to simultaneously comply with the VRA *and* adopt the smallest possible population deviation, they could be forced to abandon other important goals long recognized to warrant minor deviations.

Nor does *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), undermine the legitimacy of the Commission's efforts to comply with Section 5, which applied to Arizona when the challenged map was drawn and implemented. Strong reliance interests counsel against requiring mid-decade redistricting to eliminate the minor population variances in Arizona's plan based on the change in the law brought about by *Shelby County*.

ARGUMENT

THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' EQUAL PROTECTION CLAIM

The Equal Protection Clause provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. That provision requires "both houses of a bicameral state legislature" to "be apportioned

on a population basis." *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964). This Court has recognized, however, that the Constitution does not demand perfect population equality in state legislative districts; States are afforded a modicum of flexibility "to pursue other legitimate objectives." *Brown* v. *Thomson*, 462 U.S. 835, 842 (1983); see *Gaffney* v. *Cummings*, 412 U.S. 735, 748-749 (1973) ("Fair and effective representation" does not "depend solely on mathematical equality," but may also turn on other "relevant factors" and "important interests" that "States may legitimately be mindful of."). Legislative policies that may justify some population variance include, for example, "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher* v. *Daggett*, 462 U.S. 725, 740 (1983). As the Court has explained, "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement." *Gaffney*, 412 U.S. at 749.

To provide States with leeway to pursue traditional districting goals within the bounds of substantial population equality, this Court has adopted a strong presumption that a state legislative "apportionment plan with a maximum population deviation under 10%" is constitutional. *Brown*, 462 U.S. at 842. Such "minor deviations from mathematical equality," the Court has observed, "are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the

State." *Gaffney*, 412 U.S. at 745, 751 (holding that plaintiffs failed to carry their initial burden when the deviation was approximately 8%); *White* v. *Regester*, 412 U.S. 755, 764 (1973) (declining to find that a disparity of 9.9% "must be justified to the satisfaction of the judiciary to avoid invalidation"); *Fund for Accurate & Informed Representation, Inc.* (*FAIR*) v. *Weprin*, 796 F. Supp. 662, 668 (N.D.N.Y.) (finding no prima facie case warranting further judicial analysis where deviation was 9.43%), aff'd, 506 U.S. 1017 (1992).[2]

In order to overcome the strong presumption of constitutionality and impose a burden of justification on the State, a plaintiff challenging minor population deviations must come forward with sufficient evidence to infer that a redistricting plan reflects invidious discrimination. *Gaffney*, 412 U.S. at 740-741. If a plaintiff makes that showing, the State must offer a "rational state policy" to justify the disparities. *Brown*, 462 U.S. at 843 (citation omitted). The plaintiff must ultimately prove that invidious discrimination, rather than legitimate districting goals, produced the deviations. See *Larios* v. *Cox*, 300 F. Supp. 2d 1320, 1338 (N.D. Ga.) (per curiam), aff'd, 542 U.S. 947 (2004).

Applying that framework, appellants' equal protection claim fails. Appellants did not make out a prima facie case that the minor population disparities in

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[2] In contrast, plans with deviations exceeding 10% are presumptively unconstitutional and must be justified by the State. See *Brown*, 462 U.S. at 843. In evaluating significant deviations, "[t]he ultimate inquiry" is whether the plan "may reasonably be said to advance [a] rational state policy and, if so, whether the population disparities" nevertheless "exceed constitutional limits." *Ibid.* (citation and internal quotation marks omitted).

Arizona's plan resulted from deliberate partisan discrimination. The inquiry should end there, but if the disparities are further scrutinized, they were justified by the rational and legitimate policy of VRA compliance. The district court therefore properly rejected appellants' claim.

A. Appellants Failed To Establish A Prima Facie Case That The Minor Population Deviations In Arizona's Plan Resulted From Invidious Partisan Discrimination

Because the overall population deviation in Arizona's redistricting plan is only 8.8%, appellants bore the initial burden of producing evidence sufficient to infer that the disparities resulted from invidious discrimination. J.S. App. 9a-10a, 12a.[3] Appellants failed to carry that burden.

1. To guard against unwarranted federal-court superintendence of state districting decisions, this Court has evaluated whether a plaintiff made out a prima facie case of invidious discrimination even where, as here, the case proceeded to a trial at which the State offered justifications for minor population disparities. See *Gaffney*, 412 U.S. at 738-739, 740-751 (reversing judgment for plaintiffs after trial without considering justifications because "a prima facie case of invidious discrimination * * * was not made out");

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[3] Like other States, Arizona uses total population data to comply with population-equality principles when redistricting. Apportionment plans that equalize total population are constitutional because they ensure equal representation for equal numbers of people, see U.S. Amicus Br. at 11-12 & n.3, *Evenwel* v. *Abbott*, No. 14-940 (Sept. 25, 2015), and appellants have not argued that States must use a different metric.

Regester, 412 U.S. at 759, 763-764 (same).[4] But the Court has not had occasion to articulate the circumstances under which a plaintiff carries that initial burden. In other contexts, the Court has emphasized that "[t]he prima facie case serves an important function" by "eliminat[ing] the most common nondiscriminatory reasons for" the challenged action. *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253-254 (1981); see *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977) (plaintiff must "at least" negate the "most common legitimate reasons" that could explain the action). Thus, although "the precise requirements of a prima facie case can vary depending on the context," *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 512 (2002), a "plaintiff carries the initial burden" only when he produces evidence "from which one can infer, if such actions

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[4] In this respect, review of redistricting decisions differs from some other contexts in which discrimination is alleged. In Title VII cases, the Court has held that, after a trial on the merits, it "is no longer relevant" whether the plaintiff made out a prima facie case because the burden-shifting framework is not "rigid" but instead is "merely a sensible, orderly way to evaluate the evidence." *United States Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983) (citation omitted); see *Hernandez* v. *New York*, 500 U.S. 352, 359 (1991) (plurality opinion) (applying same principle to a claim under *Batson* v. *Kentucky*, 476 U.S. 79 (1986)). In contrast, this Court's redistricting precedents correctly impose a rigid initial burden on plaintiffs in recognition that redistricting is a core sovereign function that should not ordinarily trigger intrusive scrutiny of a State's justifications for minor population deviations, even on appeal following a trial. See *Gaffney*, 412 U.S. at 751 ("The point is, that such [judicial] involvements should never begin" if a plaintiff fails to make out a prima facie case.). The prima-facie-case requirement thus plays a substantive role in the adjudication of a population-equality challenge.

remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion." *Furnco Constr. Corp.* v. *Walters*, 438 U.S. 567, 576 (1978) (citation and internal quotation marks omitted).

In the redistricting context, this Court's precedents indicate that adherence to traditional districting criteria is the most common legitimate explanation for minor population deviations. See, *e.g.*, *Brown*, 462 U.S. at 842-843. At a minimum, therefore, a plaintiff who alleges that such disparities instead resulted from invidious discrimination must come forward with evidence that reasonably negates the inference that the deviations were produced by the pursuit of legitimate state districting goals. That is a stringent burden—and appropriately so. Given the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995), courts should exercise considerable caution before inferring that a State intentionally departed from equal-population principles for invidious reasons. "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions," *id.* at 915, and States therefore should not have to justify minor disparities "to the satisfaction of the judiciary" absent a strong initial evidentiary showing of invidious discrimination, *Regester*, 412 U.S. at 764. Placing a high initial burden on the plaintiff guards against "repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality" and ensures that federal courts do not "become bogged down in a vast, intractable apportionment slough

* * * when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 U.S. at 749-750.

These considerations apply with particular force when a plaintiff alleges that minor deviations resulted from "too much" partisanship. As the *Gaffney* Court recognized, "[t]he reality is that districting inevitably has and is intended to have substantial political consequences." 412 U.S. at 753. The Court accordingly has not interpreted constitutional standards to require the "impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Id.* at 754.[5] Recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney* deemed it "idle * * * to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it"—even where the map contains minor population deviations. *Id.* at 752-753.

Indeed, if minor deviations coupled with allegations of partisanship sufficed to make out a prima facie constitutional violation, the risk of federal court overinvolvement would skyrocket. "District lines are rarely [politically] neutral phenomena," *Gaffney*, 412 U.S. at 753, so a challenger may always credibly contend that lines in a map with minor disparities were

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[5] The Arizona Constitution likewise makes no quixotic attempt to strip all political considerations from the redistricting process. Four AIRC commissioners are chosen by partisan actors with attention to the commissioners' personal political affiliations. Ariz. Const. Art. 4, Pt. 2, § 1, ¶¶ 3, 5, 6. In addition, the Commission is directed to create "competitive districts" when possible and may consider party registration and voting history data in specified circumstances. *Id.* ¶¶ 14(F), 15.

motivated in some part by partisanship. If that allegation suffices to require justification by the State, virtually no state legislative map will be immune from challenge. See *Cox* v. *Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (observing that a rule that "politics as usual" is "go[ing] too far" will more likely "encourage politically motivated litigation than * * * vindicate political rights"). States will have no choice but to seek perfect population equality to avoid intrusive judicial inquiries into districting decisions and possible federal-court control of the districting process. That is precisely the result this Court has repeatedly sought to avoid. See, *e.g.*, *Gaffney*, 412 U.S. at 749-751; *Brown*, 462 U.S. at 842.

2. Appellants did not come forward with sufficient evidence to make out a prima facie case that the minor disparities in Arizona's plan were more likely than not caused by impermissible partisan discrimination.[6]

a. Appellants contend (Br. 28 n.20) that "partisanship is statistically explicit" in the plan because most of the underpopulated districts had a plurality of

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[6] Appellants suggest (Br. 56-59) that, because the AIRC is not a state legislature, no "principle of deference" applies to its redistricting plan and "this Court should exercise scrutiny." But States have "primary responsibility for apportionment," whether through their "legislature[s] *or other bod*[*ies*]." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993) (emphasis added); see *Arizona State Legislature* v. *AIRC*, 135 S. Ct. 2652, 2668 (2015) (recognizing that the Commission here was engaged in "a legislative function" that is "performed in accordance with the State's prescriptions for lawmaking"). *Gaffney* itself involved a redistricting plan drawn by a "three-man bipartisan Board" composed of state-court judges, and the Court nonetheless affirmed that "state reapportionment is the task of local legislatures or of those organs of state government selected to perform it." 412 U.S. at 736, 751.

Democratic-registered voters and most of the overpopulated districts had a plurality of Republican-registered voters. But, as the district court recognized, the pattern of population deviations equally corresponded with the most obvious alternative explanation—the Commission's effort to maintain minority ability-to-elect districts under the VRA. J.S. App. 37a; see *id.* at 9a-10a (summarizing statistics showing that most of the underpopulated districts were presented as ability-to-elect districts); *Hunt* v. *Cromartie*, 526 U.S. 541, 552 (1999) (recognizing the difficulty in discerning a State's motivation for drawing district lines when evidence "shows a high correlation between race and party preference"). The statistics alone thus do not make it "more likely than not" that the Commission invidiously discriminated against Republicans, *Furnco Constr.*, 438 U.S. at 576, because "the alleged pattern in the final map easily is explainable on grounds other than partisanship"—namely, VRA compliance, J.S. App. 104a (Silver, J., concurring in relevant part).[7]

This Court's summary affirmance in *Weprin* further supports the conclusion that a correlation between minor population deviations and party affiliation does not suffice to make out a prima facie case of invidious partisan discrimination. *Weprin* involved an equal protection challenge to a state redistricting plan with a total deviation of 9.43%. 796 F. Supp. at 668.

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[7] Notably, neither underpopulation nor overpopulation necessarily reflects invidious intent. It would not be appropriate to infer a motive to discriminate against Republicans simply because they were placed in an overpopulated district, for example, if the overpopulation tipped the district from competitive to a safe Republican seat.

The district court treated the 10% threshold for minor variations as an absolute safe harbor and so did not require the State to justify the deviation. *Ibid.* The plaintiffs appealed to this Court, arguing that they had carried their initial burden by pointing to evidence of invidious partisan discrimination, including statistics demonstrating that "the most over-populated and *under*-represented districts [were] areas favorable to the Assembly Minority while the most under-populated and *over*-represented areas [were] those most favorable to the Assembly Majority." J.S. at 10 n.2, *Weprin*, *supra* (No. 92-586).

This Court summarily affirmed. *FAIR* v. *Weprin*, 506 U.S. 1017 (1992). Although that disposition cannot be read to signal approval of the district court's reasoning, the Court necessarily concluded that the plaintiff's allegations—citing a statistical correlation similar to the one here—did not suffice to require justification by the State. See *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (per curiam) ("Summary affirmances * * * without doubt reject the specific challenges presented in the statement of jurisdiction."). In this case, as in *Weprin*, the Court should conclude that the correlation between population deviations and political affiliation, which is easily explainable on non-invidious grounds, does not create a reasonable inference of intentional partisan discrimination.

The district court's factual findings do not alter that conclusion. Appellants erroneously suggest (Br. 21) that the court found that the Commission "deliberately and systematically underpopulat[ed] Democrat districts" in order "to provide partisan benefit to the Democrat party." What the court actually found was that "the population deviations were primarily a

result of good-faith efforts to comply with the [VRA]"—just as the statistics indicated could be the case. J.S. App. 4a; see *Arizona State Legislature* v. *AIRC*, 135 S. Ct. 2652, 2675 (2015) (understanding the district court in this case to have found that the deviations "in the main[] could *not* be attributed to partisanship") (emphasis added).[8]

b. Focusing on the changes to District 8, the district court did find that some "commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects." J.S. App. 6a. By any measure, that evidence does not suffice to create a prima facie showing of invidious partisan discrimination warranting further review.

This Court has only once affirmed invalidation of a map with minor population deviations, and the facts of that case are a far cry from those present here. See *Larios*, *supra*. In *Larios*, a three-judge district court struck down a state legislative map with a population deviation of 9.98% based on "abundant[]" evidence that the disparities "were not driven by any traditional redistricting criteria" but instead "resulted from the arbitrary and discriminatory objective of increasing the political power of southern Georgia and inner-city Atlanta at the expense of voters living" elsewhere, "and from the systematic favoring of Democratic incumbents and the corresponding attempts to eliminate as many Republican incumbents as possible." 300 F. Supp. 2d at 1341-1342, 1352-1353; see *id.* at 1329-1330

[8] Appellants do not challenge that factual finding as clearly erroneous. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287-288 (1982) (district court determinations regarding intent or motivation are factual findings subject to clear-error review).

(observing that 22 Republican incumbents lost seats due to incumbent pairings in the 2002 election held under the map, while only 3 Democratic incumbents lost seats that way). Because the policies of regional favoritism and selective incumbent protection were "plainly unlawful," the district court did not attempt to resolve whether or when a map with minor disparities is vulnerable to challenge simply because partisanship played some role in its creation. *Id.* at 1352. *Larios* thus does not support the argument that any degree of political influence in a legislative apportionment plan suffices to infer that population deviations resulted from invidious discrimination.

Indeed, *Gaffney* refutes the suggestion that any consideration of political impact in the design of malapportioned districts makes out a prima facie claim of invidious discrimination. The Court in *Gaffney* reversed the judgment of a three-judge district court, which had invalidated a map with a total deviation of about 8% on the ground that "[a] policy of partisan political structuring" could not "be approved as a legitimate reason for violating the requirement of" population equality. 412 U.S. at 740, 751 (internal quotation marks omitted) (quoting *Cummings* v. *Meskill*, 341 F. Supp. 139, 149-150 (D. Conn. 1972)). The plaintiffs argued that the plan was a "gigantic political gerrymander" because virtually every "line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." *Id.* at 752. But this Court nevertheless held that "the allegations and proof of population deviations among the districts fail[ed] in size *and quality*" to make out a prima facie

case of invidious discrimination. *Id.* at 741 (emphasis added).

There is much wisdom in *Gaffney*. As noted, politics is part of redistricting, and an allegation that partisanship caused population inequality is easily made. See pp. 17-18, *supra*. Moreover, minor population deviations abound: Following the 2010 census, almost all States adopted redistricting plans with some minor disparities, and 28 States have maps with deviations exceeding 8%. See Nat'l Conference of State Legislatures, *2010 NCSL Congressional and State Legislative Redistricting Deviation Table*, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Oct. 30, 2015). If any showing of political influence suffices to trigger a lengthy legal battle culminating in the possible invalidation of those redistricting plans (and consequent federal-court control of the districting process), States will have little choice but to draw perfectly equal districts at the expense of districting goals long recognized to justify minor deviations.

Here, the evidence that political considerations played some role—although not a predominant one—with respect to some district lines should not suffice to establish a prima facie case of invidious discrimination. J.S. App. 4a, 36a, 41a-42a, 78a-79a. That evidence did not rule out legitimate districting goals as the primary explanation for the disparities. In fact, the record was replete with evidence that many of the Commission's districting determinations—including those that resulted in deviations—served legitimate districting aims and drew broad bipartisan support. See, *e.g.*, *id.* at 39a (describing "the bipartisan support for the changes leading to the population deviations in

the draft map"); *ibid.* (noting that all five commissioners supported the final configurations of the ten potential ability-to-elect districts); see also AIRC Br. 15-18.

Nor did appellants come forward with evidence to suggest that the Commission used population deviations to "fence[]" a political group "out of the political process" and "invidiously minimize[]" its "voting strength." *Gaffney*, 412 U.S. at 754. To the contrary, the Republican Party gained slightly more seats in the 2012 elections conducted under the map than its proportionate two-party registration share. J.S. App. 98a (Silver, J., concurring in relevant part) ("[U]nder the map [appellants] believe was created to systematically harm Republican electoral chances, Republicans are *overrepresented* in the legislature."); see *LULAC* v. *Perry*, 548 U.S. 399, 419 (2006) (opinion of Kennedy, J.) (noting that a districting plan that "more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority").

The evidence that "partisanship played some role in" the design of District 8 likewise does not raise an inference of invidious discrimination even with respect to that district. J.S. App. 78a. The evidence showed that the changes to District 8, which had only a slight effect on population deviations, did not gain the support of the majority of the commissioners until they received guidance that the changes could strengthen the map's compliance with the VRA; thus, appellants could not show "that partisanship predominated over legitimate factors." *Id.* at 42a, 79a. Because appellants failed to carry their initial burden of showing that partisanship impermissibly infected the Commis-

sion's work with respect to this one district, let alone the map as a whole, the court correctly rejected their equal protection claim.

B. The Minor Population Deviations In Arizona's Plan Were Justified By The Rational And Legitimate Goal Of Complying With Section 5 Of The VRA

Applying the proper framework, no inference of invidious discrimination arose in this case and Arizona should not have been required to justify the minor deviations in its redistricting plan. If the Court chooses to scrutinize those deviations, however, it should conclude that they were justified by the Commission's interest in avoiding retrogression under Section 5 of the VRA, and that *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), which was decided after the challenged map was drawn and implemented, does not call into question the legitimacy of that interest.

1. Compliance with Section 5 was a rational state policy that justified the population deviations in Arizona's plan

1. As eight Justices of the Court have previously recognized, compliance with Section 5 constitutes not only a rational government policy, but a compelling interest for redistricting plans subject to strict scrutiny. See *LULAC*, 548 U.S. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, J.J.); *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in

part and dissenting in part, joined by Ginsburg, J.).[9] The Arizona Constitution mandates that redistricting plans comply with the VRA, Ariz. Const. Art. 4, Pt. 2, § 1, ¶ 14(A), and there can be no dispute that such compliance qualifies as a legitimate districting criteria. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 284 (2004) (plurality opinion) (listing examples of traditional redistricting criteria, including "compliance with requirements of the [VRA]").

No less than any other legitimate districting goal, compliance with the VRA can justify minor population disparities. This Court has explained that "[a]ny number of consistently applied legislative policies might justify some variance." *Daggett*, 462 U.S. at 740. It would be anomalous to insist on perfect equality in districts that are configured to avoid retrogression, while permitting deviations to, for example, "maintain the integrity of [a State's] political subdivision lines," *Mahan* v. *Howell*, 410 U.S. 315, 326-327 (1973), or "ensur[e] that each county has one representative," *Brown*, 462 U.S. at 843. Compliance with the VRA is surely "as legitimate a reason" for population variances "as [those] other policies." J.S. App. 67a.

Indeed, a policy of zero tolerance for small population deviations in minority ability-to-elect districts

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[9] Compliance with other VRA provisions, such as Section 2, likewise would constitute a rational state policy that may justify minor deviations. Cf. *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997) (assuming, without deciding, that compliance with Section 2 is a compelling state interest). Indeed, the status of Section 5 for redistricting plans based on the 2010 census may not be relevant where the jurisdiction had a strong basis in evidence to believe that Section 2 required the same result as Section 5.

could force States to choose between risking noncompliance with the VRA or sacrificing other traditional districting goals. If a jurisdiction were required to simultaneously avoid retrogression *and* adopt the smallest possible population deviations, it might have no option but to split local political subdivisions, abandon principles of compactness and contiguity, or draw incumbents into the same district. This Court has rightly declined to interpret the Constitution to impede States in their pursuit of other goals within the bounds of substantial population equality, and the rationale animating those decisions applies with full force to districts designed to comply with the VRA.[10]

2. There is no merit to appellants' and the Arizona Secretary of State's arguments that VRA compliance cannot justify small population disparities.

a. Appellants' observation (Br. 44) that "[a] statute cannot command a constitutional violation" is of course true, but is entirely beside the point. The relevant question is whether a constitutional violation occurs when a State's effort to comply with the VRA results in minor population deviations. As demonstrated above, VRA compliance qualifies as a legiti-

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[10] The Department of Justice's guidance supports the view that compliance with Section 5 may justify minor population deviations in a state or local legislative plan. When a covered jurisdiction asserts that it cannot avoid retrogression based on population shifts, the Department considers whether a reasonable alternative plan exists that is less retrogressive. In that context, the guidance states that "a plan that would require *significantly* greater overall population deviations is not considered a reasonable alternative." *2011 Guidance* 7472 (emphasis added). The guidance thus reflects the Department's position that a plan that produces minor, rather than significant, population deviations may be a reasonable alternative. J.S. App. 69a.

mate and rational state policy, pursuant to which "some deviations from the equal-population principle are constitutionally permissible." *Reynolds*, 377 U.S. at 579. Appellants provide no basis to conclude that VRA compliance stands on a different constitutional footing than other traditional districting criteria that may warrant minor disparities.

b. Appellants also suggest (Br. 41-45) that the VRA did not require Arizona to create ten minority ability-to-elect districts, attempting to undermine statutory compliance as a justification for the small deviations in the plan. But the district court recognized that appellants had not "given the court a basis to independently determine" whether the creation of ten ability-to-elect districts was "strictly necessary" to comply with the VRA. J.S. App. 73a-74a. Any such determination would require a functional analysis, see *2011 Guidance* 7471, and is "often complex in practice." *Georgia* v. *Ashcroft*, 539 U.S. 461, 480 (2003); see also *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1273 (2015) ("The standards of § 5 are complex; they often require evaluation of controverted claims about voting behavior; the evidence may be unclear; and, with respect to any particular district, judges may disagree about the proper outcome."). Because appellants did not provide the court with a functional analysis or any evidence establishing the number of ability-to-elect districts in the benchmark plan and the new plan, they did not show that the Commission's determination was incorrect. J.S. App. 74a, 77a-78a (emphasizing that all commissioners agreed the new plan should have ten ability-to-elect districts based on analysis of the benchmark plan).

More fundamentally, the Commission followed the right process, and its good-faith effort to comply with the VRA would justify the minor disparities even if it miscalculated the precise number of ability-to-elect districts necessary to avoid retrogression.[11] If a court instead were to "determine the minimum number of ability-to-elect districts necessary to comply with the [VRA]" and "strike down a plan if minor population deviations resulted from efforts that [the court] concluded were not strictly necessary for compliance," States would have "a very narrow target" as they reconciled constitutional and statutory mandates. J.S. App. 75a-76a. The Constitution does not place States in that bind, with the risk of either a constitutional or statutory violation if they miscalculate *exactly* what Section 5 requires.

Indeed, even when strict scrutiny applies to a redistricting decision, the Court has not required "the States to 'get things just right'" in that manner. *Bush* v. *Vera*, 517 U.S. 952, 978 (1996) (plurality opinion) (citation omitted). Rather, "deference is due to [States'] reasonable fears of, and to their reasonable efforts to avoid," liability under the VRA. *Ibid.* Appellants are wrong to suggest that States are afforded

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[11] This case thus differs from *Alabama Legislative Black Caucus*, in which the State followed the wrong process by incorrectly interpreting Section 5 to require maintenance of the precise percentage of minority voters in ability-to-elect districts as existed in the benchmark plan. 135 S. Ct. at 1272-1274. This Court remanded for application of the correct Section 5 standard, but notably emphasized that "[t]he law cannot insist that a [S]tate * * * determine *precisely* what percent minority population § 5 demands" when it redistricts because that would trap the State between competing constitutional and statutory requirements. *Id.* at 1273-1274.

less latitude to balance constitutional and statutory obligations in the context of a population-equality challenge—where their actions are subject to rational-basis review—than they are afforded under strict scrutiny.

c. The Arizona Secretary of State contends (Br. 27) that the minor population deviations cannot be justified by VRA compliance because, in her view, the Commission did not make "an honest and good faith effort" to construct equal districts. *Reynolds*, 377 U.S. at 577. To be sure, the Commission received advice that the Constitution permits minor deviations that result from legitimate districting policies, and it decided to tolerate small disparities to accommodate the rational goal of complying with the VRA. But it would be a topsy-turvy rule to find that a State's reliance on the leeway afforded under this Court's precedents interpreting the population-equality mandate somehow serves to invalidate the State's plan.

The Secretary's argument hinges on her assertion (Br. 1-2) that the Commission "intentionally underpopulated" ability-to-elect districts between the draft map and the final map based on counsel's advice "that underpopulating minority districts was an acceptable tool for complying with the [VRA]." J.S. App. 30a. But the Commission received that advice when it was exploring options to ensure minority groups had the ability to elect in districts that were almost all *already* underpopulated in the draft map. See Ariz. Sec'y of State Br. 10-11 (summarizing statistics showing that seven of the ten districts in the draft map were underpopulated). The Commission either had to move in population that might enable the minority group to elect its preferred candidates, or move out population

that might preclude the ability to elect—and counsel's advice reflected that the Commission could exercise discretion in choosing between those options as it balanced a variety of districting aims, so long as the resulting disparities remained within permissible bounds. There is no reason to think the Commission would not have made exactly the same population shifts if the ability-to-elect districts in the draft map had been overpopulated rather than underpopulated, which undermines the allegation that the changes reflected an intentional plan to underpopulate.[12]

Nor is there any indication that the Commission adopted population deviations it did not believe were actually needed to comply with the VRA. There was no evidence, for example, that the Commission could have created equally strong ability-to-elect districts that cohered equally well with other districting criteria yet produced fewer population variances.[13] In the

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[12] The Secretary erroneously assumes, moreover, that intentional underpopulation is *per se* impermissible. As noted, pp. 25-26, *supra*, even districting decisions subject to strict scrutiny may be constitutional if they serve the compelling interest of complying with the VRA. It follows that achieving VRA compliance through the intentional creation of districts that are slightly underpopulated, which would be subject to mere rational-basis review, likewise may be permissible.

[13] The Secretary asserts (Br. 14) that an alternative map produced by appellants' expert would have resulted in a smaller deviation while avoiding retrogression. But the district court found that the expert's map was not "a practical alternative." J.S. App. 74a. It contained only eight potential ability-to-elect districts and so conflicted with the Commission's judgment that it was necessary to create ten such districts. *Ibid.* Moreover, the expert admitted "he had not taken other state interests into account" in creating the map, "including interests clearly identified as legitimate." *Ibid.*

absence of that kind of evidence of a discriminatory purpose, the Secretary cannot show that the Commission shifted lines "because of" the (minor) effect on equality, rather than simply "in spite of" that effect. *Miller*, 515 U.S. at 916 (quoting *Personnel Adm'r* v. *Feeney*, 442 U.S. 256, 279 (1979)). There is accordingly no basis to disturb the district court's conclusion that the Commission's effort to comply with the VRA justified the minor deviations in the challenged plan.

2. **Shelby County *does not affect the validity of the Commission's effort to comply with Section 5 of the VRA***

This Court's decision in *Shelby County*, which held that the existing coverage formula in Section 4(b) of the VRA could not be used to make Section 5 mandatory for any State, does not undermine the legitimacy of Arizona's districting decisions.[14]

In arguing to the contrary (Br. 46-47), appellants misunderstand the nature of the inquiry into a State's justification for minor deviations. This Court has emphasized that "the proper equal protection test" to adjudicate a population-equality challenge "is not

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[14] Although *Shelby County* removed the legal compulsion to comply with Section 5, it did not suggest that an effort to preserve minority voting power is an illegitimate districting criteria or one that cannot warrant minor population deviations. See 133 S. Ct. at 2631 ("We issue no holding on § 5 itself, only on the coverage formula."); see also *Daggett*, 462 U.S. at 742-743 (assuming without deciding that a State that was not subject to Section 5 could justify population deviations based on the goal of "preserving the voting strength" of minority groups if the State offered evidence that disparities were caused by that goal). Appellants are therefore wrong to suggest (Br. 46-47) that the district court's decision gives "continuing force to Section 5" in an impermissible manner, akin to permitting racial segregation of schools.

framed in terms of 'governmental necessity,' but instead in terms of a claim that a State may 'rationally consider.'" *Mahan*, 410 U.S. at 326 (citation omitted). And it was eminently rational for the Commission to attempt to comply with Section 5 when it adopted the challenged map, notwithstanding the later decision in *Shelby County*. At the time, Section 4—which made compliance with Section 5 mandatory for Arizona—was "presumed constitutional" as an Act of Congress. *Vera*, 517 U.S. at 992 (O'Connor, J., concurring). Further, both Sections 4 and 5 had been repeatedly upheld by this Court. See, *e.g.*, *Lopez* v. *Monterey County*, 525 U.S. 266, 282-285 (1999); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328-333 (1966). After the VRA was reauthorized in 2006, every court to address the issue again upheld the relevant provisions until this Court decided *Shelby County*. See *Shelby County* v. *Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), aff'd, 679 F.3d 848 (D.C. Cir. 2012), rev'd, 133 S. Ct. 2612 (2013); *Northwest Austin Mun. Util. Dist. No. One* v. *Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008) (three-judge court), rev'd on other grounds, 557 U.S. 193 (2009). The presumption of constitutionality of federal statutes, and the long history of decisions upholding the relevant portions of the VRA, readily provided Arizona with a rational basis to conclude that it must comply with Section 5.

Because that compliance was rational, the minor population deviations were justified when the map was adopted and remain so today. Appellants' argument would place States in an impossible position by requiring them to "attempt to predict future legal developments and selectively comply with voting rights law in accordance with their predictions," or else risk invali-

dation of their redistricting plans years later. J.S. App. 72a. That result—which contravenes this Court's "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan," *Vera*, 517 U.S. at 978 (plurality opinion)—cannot be the law.

In addition, strong reliance interests are at stake. This Court has recognized that the interests protected by the Equal Protection Clause must be balanced against citizens' interests in political stability in determining when redistricting is required. For example, States are not required to redistrict more than once per census period because of the "need for stability and continuity in the organization of the legislative system." *Reynolds*, 377 U.S. at 583; see *LULAC*, 548 U.S. at 421 (opinion of Kennedy, J.) (describing legal fiction that plans are constitutionally apportioned through the decade as "a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability").

That same balancing counsels against requiring mid-decade redistricting to eliminate minor population variances, which were justified when adopted, based on the change in the law brought about by *Shelby County*. Any equal protection injury in this context is minimal because "relatively minor population deviations among state legislative districts" cannot be said to "deprive individuals * * * of fair and effective representation." *Regester*, 412 U.S. at 764 (rejecting an equal protection challenge to a deviation of 9.9%). On the other side of the balance, a requirement to redistrict now would undercut the stability and continuity of state governance in the 16 States that adopted plans in compliance with Section 5 following the

2010 census, see U.S. Dep't of Justice, *Status of Statewide Redistricting Plans* (Aug. 6, 2015), http://www.justice.gov/crt/status-statewide-redistricting-plans, in addition to the thousands of formerly-covered local jurisdictions. Under these circumstances, the Constitution does not "require[] repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature." *Gaffney*, 412 U.S. at 749.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. XIV, § 1 provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Ariz. Const. Art. 4, Pt. 2, § 1 provides in pertinent part:

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

* * * * *

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

political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

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

sion, and all other duties assigned to the commission on appellate court appointments in this section.

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

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

est minority party by statewide party registration shall make the appointment.

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

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

* * * * *

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below:

A. Districts shall comply with the United States constitution and the united states voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town and county boundaries, and undivided census tracts;

F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

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

* * * * *

3. 52 U.S.C. 10304 provides:

Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Co-

lumbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes

to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.