# OF ALL THE GIN JOINTS: *HARRIS* AND THE SUPREME COURT'S RELUCTANT JURISPRUDENCE ON PARTISANSHIP IN REDISTRICTING

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## INTRODUCTION

> *Rick*: How can you close me up? On what grounds?
> *Captain Renault*: I'm shocked . . . shocked to find that gambling is going on in there.
> *Croupier*: Your winnings sir.
> *Captain Renault*: [*sotto voce*] Oh, thank you very much.[1]

The Supreme Court has shown great reluctance to expand its jurisprudence on partisanship in redistricting. Like Renault's attitude towards gambling, the Supreme Court has consistently allowed partisanship to influence the legislative redistricting process, condemning it only when it is forced into the light because it has gone "too far."[2]

As a result, courts have had a difficult time discerning the motivations for drawing legislative maps.[3] If a change has the effect of furthering a legitimate state policy while also promoting a partisan end, the Court has given little guidance on how to proceed. To further complicate the matter, the Supreme Court has consistently held that compliance with the Voting Rights Act[4] is a legitimate state rationale,[5]

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1. CASABLANCA (Warner Bros. 1942).
2. *See* Cox v. Larios, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (noting most Justices believed partisanship "is a traditional criterion, and a constitutional one, so long as it does not go too far").
3. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (rejecting a political gerrymandering claim).
4. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.
5. *See, e.g.*, Abrams v Johnson, 521 U.S. 74, 91 (1997); Bush v. Vera, 517 U.S. 952, 977

but recently invalidated the coverage formula under Section 4(b) of the Act, freeing all covered states (including Arizona) from the requirement to seek preclearance for all new legislative maps.[6]

*Harris v. Arizona Independent Redistricting Commission*[7] turns on two questions: First, if partisanship can justify population deviations from the Equal Protection Clause's one-person, one-vote standard;[8] and second, if attempting to obtain preclearance[9] from the Department of Justice is a valid justification for population deviations, even after *Shelby County v. Holder*.

This Commentary will detail the facts of the case and describe the current state of the law on partisanship and preclearance as justifications for population deviations. Next, it will outline the three-judge panel's holding. Then, it will sketch out each party's arguments regarding the two issues on appeal. Finally, it will analyze the competing arguments and conclude that the Supreme Court should affirm the lower court, holding that although neither partisanship nor preclearance are acceptable justifications for population deviations, the Arizona Independent Redistricting Commission's final map did not contain sizeable enough deviations to establishing a prima facie violation of the Fourteenth Amendment.

## I. FACTUAL AND PROCEDURAL HISTORY

The Arizona Independent Redistricting Commission (AIRC) is a commission created by a 2000 state ballot initiative to design new maps for state legislative districts based on the federal census every ten years.[10] AIRC is comprised of five individuals: two Democrats chosen by Democratic leadership in the state house and state senate respectively, two Republicans chosen by Republican leadership in the

(1996).

6. Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2623 (2015).

7. 14-232 (U.S. Dec. 8, 2015).

8. *See* Baker v. Carr, 369 U.S. 186, 254–55 (1962) (Clark, J., concurring) (explaining that a wide disparity in voting strength between large and small counties within a state will give rise to an equal protection claim.)

9. Preclearance is a process in which states submit proposed voting changes to the Department of Justice in order to gain assurance that the changes will not trigger subsequent litigation from the federal government.

10. Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1050–51 (D. Ariz. 2014) (per curiam), *prob. juris. noted,* 135 S. Ct. 2926 (2015).

state house and state senate respectively, and one Independent selected to chair the commission by the other four members.[11]

After the 2010 census, AIRC began its required mapping process by creating "districts of equal population in a grid-like pattern across the state."[12] AIRC ultimately voted to adopt a grid map beginning in the southeast corner of the state and moving inwards in a clockwise fashion with a maximum population deviation[13] of 4.07 percent.[14]

AIRC then began to adjust the map to "comply with the United States Constitution and the Voting Rights Act" per state constitutional directive.[15] AIRC also took into account five other factors required by the Arizona Constitution: "(1) equality of population between districts; (2) geographic compactness and contiguity; (3) respect for communities of interest; (4) respect for visible geographic features, city, town and county boundaries, and undivided census tracts; and (5) competitiveness."[16] Until this point, AIRC appeared to be largely unified in its map considerations, but one key question threatened to disrupt the entire process: How many benchmark districts existed in the previous map?[17]

The total number of benchmark districts represents the number of districts where minorities are able to elect a candidate of their choosing.[18] A potential redistricting map has an impermissible effect under Section 5 of the Voting Rights Act if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[19] In practice, the new redistricting plan cannot create fewer districts in which minorities have the ability to elect candidates of their choosing.[20] At the time of AIRC's work, all potential new maps made by the commission were subject to preclearance by the Department of Justice to ensure no retrogression would take place.[21]

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11. *Id.*
12. *Id.* at 1053 (quoting ARIZ. CONST. art. IV, pt. 2, § 1(14)).
13. Population deviation is the difference between the most populated district and the least populated district divided by the average population of a district.
14. Harris, 993 F. Supp. 2d at 1053. Typically, any deviation less than 10% is considered acceptable. *See* Brown v. Thomson, 462 U.S. 835, 842 (2014).
15. *Id.* at 1055 (citing ARIZ. CONST. art. IV, pt. 2, § 1(14)).
16. *Id.* (quoting ARIZ. CONST. art. IV, pt. 2, § 1(14)).
17. *Id.* at 1056–57.
18. *Id.* at 1053–54.
19. *Id.* at 1054 (quoting Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 478 (1997)).
20. *Id.*
21. *Id.* at 1055.

For AIRC, there was disagreement over exactly how many benchmark districts existed in the old map.[22] In an initial presentation to AIRC before it began adjusting the grid map, Bruce Adelson, the commission's mapping and Voting Rights Act consultant, stated that he had found nine benchmark districts in the 2002 map.[23] However, AIRC soon began contemplating the existence of ten benchmark districts based on the fact that a few districts where minorities did not make up a majority of the population were still consistently able to elect minority candidates.[24] Uncertain of how many benchmark districts the Department of Justice would find in its review of the new plan, AIRC followed the advice of counsel, opting to go the safe route and include ten benchmark districts—seven minority-majority districts and another three ability-to-elect districts.[25] This rough draft was then approved by a 4-1 vote.[26]

After the vote, AIRC continued to take advice from its attorneys and consultants as to whether or not ten benchmark districts was the proper total.[27] AIRC received a draft racial polarization voting analysis prepared by hired experts, confirming that minorities would be able to elect candidates of their choice in all ten proposed benchmark districts.[28] "The Commission also received advice [from Adelson] that it could use population shifts, within certain limits, to strengthen [benchmark] districts," and that such a course of action would be "prudent" given the uncertainty regarding the Department of Justice's preclearance procedures.[29]

AIRC ultimately adopted changes to Districts 24 and 26 aimed at increasing the minority populations' ability to elect in each district.[30] Shortly after the adoption, however, the Commission also began to consider changes to Districts 8 and 11.[31] While Adelson felt that AIRC could turn District 8 into another ability-to-elect district if it nudged the minority population up slightly, the two Republican Commissioners worried that the change would result in

22. *Id.* at 1057.
23. *Id.* at 1056.
24. *Id.* at 1057.
25. *Id.*
26. *Id.*
27. *Id.* at 1058.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1059.

"hyperpacking" Republican voters into District 11 to favor Democratic voters in District 8.[32] A Democratic Commissioner noted that making districts more competitive was one of the five criteria set for AIRC to consider and expressed support because the change would make District 8 more competitive.[33] AIRC ultimately voted 3-2 to implement the changes to Districts 8 and 11—the only set of changes to the draft map that resulted in a split vote.[34]

In early 2012, AIRC voted 3-2 to approve the final legislative map with both Republican Commissioners voting against it.[35] The maximum population deviation of the final map was 8.8%.[36] The map was submitted to the Department of Justice for preclearance and received approval shortly thereafter.[37]

Appellants sought an injunction against the map, a declaration that the final legislative map violated the Equal Protection Clause of the Fourteenth Amendment, and a mandate that AIRC draw a new map for all elections after 2012.[38] Pursuant to 28 U.S.C. § 2284(a), a three-judge panel was convened.[39] After deciding several pre-trial motions, including dismissing a state law claim and dismissing the Commissioners from the suit in their individual capacities, the three-judge panel presided over a five day bench trial.[40]

The panel ultimately held that Appellants had the burden of proof to show that the deviations from district to district did not result from the implementation of legitimate redistricting policies and that Appellants had failed to meet their burden.[41] The panel determined that because the deviations in population amounted to less than 10%, Appellants lacked the requisite facts to show "a prima facie case of a one-person, one-vote violation" and shift the burden onto the state.[42] The panel also concluded that Appellants failed to show that the illegitimate criteria, in this case partisan political motivations, predominated over other legitimate criteria.[43] Finally, the panel held

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 1060.
36. *Id.* at 1049.
37. *Id.* at 1060.
38. *Id.* at 1048.
39. *Id.*
40. *Id.*
41. *Id.* at 1072–73.
42. *Id.* at 1071–72.
43. *Id.* at 1073.

that seeking preclearance under the Voting Rights Act is a legitimate and rational goal in the redistricting process.[44]

Appellants appealed the three-judge panel's decision to the Supreme Court.[45] There, the Court noted jurisdiction of the case for two questions[46]: "Does the desire to gain partisan advantage for one political party justify creating legislative districts of unequal population that deviate from the one-person, one-vote principle of the Equal Protection Clause?" and "Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle," even after *Shelby County v. Holder*?[47]

## II. LEGAL BACKGROUND

### *A. Partisan Redistricting*

The Supreme Court has consistently held that the drawing of legislative districts which dilute the voting power of citizens of certain districts is justiciable[48] and prohibited by the Equal Protection Clause of the Fourteenth Amendment.[49] Although a population deviation is permitted if it is based on "legitimate considerations incident to the effectuation of rational state policy,"[50] the state must justify that deviation if the plaintiff can establish a prima facie case.[51] Minor population deviations, however, are insufficient to establish a prima facie case,[52] and a "plan with a maximum population deviation under 10% [generally] falls within this category of minor deviations."[53] This does not mean that deviation under 10% shields the state from liability; rather, it keeps the burden on the plaintiff to establish that illegitimate criteria predominated the state's considerations.[54]

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44. *Id.* at 1074.

45. Appellant's Motion to Dismiss or Affirm, Harris v. Ariz. Indep. Redistricting Comm'n, No. 14-232 (U.S. Nov. 13, 2014).

46. Harris v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2946 (2015).

47. Brief for Appellants at i, *Harris* (U.S. Sept. 4, 2015) [hereinafter Brief for Appellants].

48. Baker v. Carr, 369 U.S. 186, 237 (1962).

49. *See* Reynolds v. Sims, 377 U.S. 533, 567 (1964) ("The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.").

50. *Id.* at 579.

51. Brown v. Thomson, 462 U.S. 835, 842 (2014).

52. *Id.*

53. *Id.*

54. *See, e.g.*, Cox v. Larios, 542 U.S. 947 (2004) (summarily affirming the invalidation of a map with 9.98% maximum population deviation).

Although it had touched on the question in previous decisions, the Supreme Court first analyzed the justiciability of partisan justifications for population deviation in *Davis v. Bandemer*.[55] There, Indiana Democrats challenged a redistricting map that led to only 43 Democrats winning seats out of 100 available in the Indiana House of Representatives despite Democrats garnering 51.9% of the vote in all house races.[56] The Court ultimately determined that, based on its precedents with other types of constituencies including racial gerrymandering cases, such claims are in fact justiciable.[57] But beyond that, the Court was unable to determine a standard for prima facie cases of partisan gerrymandering, choosing instead to conclude that the district court applied an insufficiently demanding standard when it found a less than 2% deviation unconstitutional.[58]

Eighteen years later, the Supreme Court again examined partisan motivations in redistricting in *Vieth v. Jubelirer*.[59] There the Court examined a map put in place by Pennsylvania Republicans "as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans elsewhere."[60] The Supreme Court affirmed a dismissal of the claim against the map in a 5-4 decision but had only four votes in favor of overruling *Davis v. Bandemer*.[61] Justice Kennedy concurred in the judgement, noting that partisan gerrymandering claims face two obstacles: "the lack of comprehensive and neutral principles for drawing electoral boundaries" and "the absence of rules to limit and confine judicial intervention."[62] Despite his inability to find an acceptable standard, Justice Kennedy did not join the rest of the majority in overturning *Davis* because the arguments were "not so compelling as that they require us now to bar all future claims of injury from a partisan gerrymander."[63]

In the wake of Kennedy's concurrence, the Supreme Court did not take up the question of partisan redistricting again until *Harris*. Despite its silence on the issue the Court did find "an intentional effort to allow incumbent Democrats to maintain or increase their

55. Davis v. Bandemer, 478 U.S. 109 (1986).
56. *Id.* at 115.
57. *Id.* at 126–27.
58. *Id.* at 113–14.
59. Vieth v. Jubelirer, 541 U.S. 267 (2004) (plurality opinion).
60. *Id.* at 272.
61. *Id.* at 270–71.
62. *Id.* at 306–07 (Kennedy, J., concurring).
63. *Id.* at 309.

delegation" based on the new legislative map.[64] Given the Court's previous symmetrical reasoning between racial and political gerrymandering,[65] it could also draw on recent jurisprudence in the racial gerrymandering context. The Court recently held in *Alabama Legislative Black Caucus v. Alabama*[66] that the equal population goal is the background of redistricting, "taken as a given, when determining whether race, or other factors, predominate."[67] Given this statement of law, it seems likely that the Court will move in a similar way in its analysis of partisan redistricting if it finds the case at hand justiciable.

### *B. Section 5 Preclearance as a Goal of Redistricting*

Prior to *Shelby County v. Holder*, the Supreme Court consistently held that general compliance with the Voting Rights Act was a legitimate reason for population deviations in the redistricting process.[68] Although the Court has never specifically addressed whether or not the goal of obtaining preclearance from the Department of Justice through Section 5 of the Voting Rights Act is also a legitimate reason for deviations, in *LULAC v. Perry*,[69] eight justices found obtaining preclearance to be a "compelling state interest."[70]

Despite this strong backing, the Court's decision in *Shelby County* drastically altered the voting rights landscape.[71] Although it struck down the coverage formula section of the act rather than the preclearance section,[72] the Court seemed to suggest that the reasoning behind the Voting Rights Act itself and subsequent judicial decisions relying on that reasoning are no longer valid because the Voting

64. Cox v. Larios, 542 U.S. 947, 947 (2004) (Stevens, J., concurring).

65. Davis v. Bandemer, 478 U.S. 109, 125–26 (1986).

66. Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257 (2015).

67. *Id.* at 1270.

68. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 91 (1997); Bush v. Vera, 517 U.S. 952, 977 (1996).

69. League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

70. *Id.* at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id*. at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id*. at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.).

71. *See* Guy-Uriel Charles & Luis Fuentes-Rowher, *The Voting Rights Act in Winter: The Death of a Superstatute,* 100 IOWA L. REV. 1389, 1391 (2015) ("*Shelby Cty.* marks the death of the VRA as a superstatute.").

72. Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2015).

Rights Act itself is no longer necessary.[73] However, the Court has not addressed any question regarding the constitutionality of Section 5 since *Shelby County,* and it explicitly chose not to rule Section 5 unconstitutional at the time.[74]

## III. HOLDING

### *A. Partisan Redistricting*

The three-judge panel began its opinion under the assumption that partisanship was not a legitimate reason for population deviation in redistricting.[75] The panel found that the primary factor behind population deviation between the districts was AIRC's attempt to comply with the Voting Rights Act and receive preclearance from the Department of Justice.[76] Moreover, the court found that the maximum population deviation was less than 10%, leaving the plaintiffs with the burden to prove a prima facie case.[77]

The panel also noted that, in this case, it was especially difficult to separate legitimate reasons for deviations from illegitimate ones.[78] In Arizona, the legitimate rationale of increasing minority ability-to-elect districts paralleled the (assumed) illegitimate rationale of increasing the prospects of electing Democratic candidates.[79] Ultimately, the bipartisan support from the Commissioners for the changes leading to the population deviations "undermine[d] the notion that partisanship, rather than compliance with the Voting Rights Act, was what motivated those deviations."[80]

### *B. Section 5 Preclearance as a Goal of Redistricting*

The panel concluded that "compliance with the Voting Rights Act is among the legitimate redistricting criteria that can justify minor population deviations."[81] The panel first relied on the Supreme

73. Charles & Fuentes-Rowhar, *supra* note 71, at 1421–22.
74. *See* Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2015) ("We issue no holding on § 5. . . .").
75. Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1047 (D. Ariz. 2014) (per curiam).
76. *Id.*
77. *Id.* at 1060.
78. *Id.* at 1061.
79. *Id.*
80. *Id.*
81. *Id.* at 1073.

Court's decision in *Bush v. Vera*, noting that if compliance with the Voting Rights Act were not a legitimate state policy, "we doubt that the Court would have assumed in *Vera* that it is a compelling state interest."[82] The three-judge panel rejected Appellants' argument that the Voting Rights Act cannot serve as such an interest because the text of the Act does not explicitly allow population deviations.[83]

The panel also held that its decision was not altered by the recent Supreme Court decision in *Shelby County v. Holder*.[84] *Shelby County* did not control because it pertained to the coverage formula for preclearance rather than to preclearance itself.[85] Although the decision in *Shelby County* may have rendered preclearance as a requirement inapplicable, it did not hold that Section 5 itself was unconstitutional.[86]

## IV. ARGUMENTS

### *A. Harris's Arguments*

Harris argues that the panel found two reasons for the population deviations in AIRC's final map: partisan benefits on behalf of the Democratic Party and preclearance approval from the Department of Justice.[87] He contends that neither of these reasons "justifies deviating from this Court's one-person, one-vote principle."[88] Harris also relies on the Supreme Court's summary affirmance in *Larios v. Cox* to show that population deviations of less than 10% still require justification in the first place.[89]

Harris first argues that AIRC's final map contained population deviations due to partisanship and that such a goal does not justify deviating from the Equal Protection Clause's one-person, one-vote standard.[90] According to Harris, the three-judge panel was correct in its assumption that unequally apportioning a legislature in order to gain a partisan advantage is an illegitimate reason for population

82. *Id.*
83. *Id.* at 1074.
84. *Id.* at 1075.
85. *Id.*
86. *Id.*
87. Brief for Appellants, *supra* note 47, at 21.
88. *Id.* at 22.
89. *Id.* at 50.
90. *Id.* at 22.

deviations.[91] However, the panel failed to properly understand how much influence partisanship had on the final map for Arizona's apportionment.[92] Partisanship was actually the only possibly legitimate reason for the population deviations because seeking preclearance from the Department of Justice is no longer a valid reason for deviating from the one-person, one-vote standard after *Shelby County v. Holder*.[93]

Harris next argues that the Voting Rights Act never required states to make districts of unequal population,[94] but even if it had in the past, *Shelby County* eliminated that justification.[95] The benchmark map for Arizona from 2000 had seven ability-to-elect districts.[96] Although creating fewer than seven ability-to-elect districts in the current map would have triggered retrogression and prevented the map from getting preclearance, Harris claims that nothing in the Voting Rights Act required AIRC to create three additional ability-to-elect districts.[97] "The Department of Justice has never required unequal population for preclearance in the 48 years of administering Section 5."[98] Further, "[t]he Justice Department's own manual states preventing retrogression under Section 5 does *not* require jurisdictions to violate the one-person, one-vote principle."[99]

Even if creating additional ability-to-elect districts at one point justified deviations from the one-person, one-vote principle, Harris argues that in the wake of *Shelby County* such justifications are void.[100] He contends that even though the map was drawn before *Shelby County*, its holding still applies, just as any school segregated under *Plessy v. Ferguson* would not be exempt from the Supreme Court's decision in *Brown v. Board of Education*.[101] Instead, Harris

91. *Id.* at 24.

92. *See id.* at 28 ("The only issue that divided the three judges was whether obtaining a partisan advantage was the '*predominant*' motive (Judge Clifton) or the '*actual and sole*' motive (Judge Silver)") (citing Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1072 n.10, 1085 (D. Ariz. 2014) (per curiam)).

93. *Id.* at 48–49.

94. *Id.* at 41.

95. *Id.* at 46.

96. *Id.* at 41.

97. *Id.* at 41–42.

98. *Id.* at 43 (quoting Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1103 (D. Ariz. 2015) (Wake, J., dissenting)).

99. *Id.* (quoting Justice Department Guidance Concerning Redistricting under Section 5, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011)) (emphasis added).

100. *Id.* at 46.

101. *Id.*

argues the Court should invalidate any justification based on preclearance because it is unconstitutional to apply Section 5 anywhere.[102]

### *B. AIRC's Arguments*

AIRC advances two core arguments: first, the population deviations at issue fall within the permissible range of 10% and do not require justification without Harris establishing a prima facie case;[103] and second, even if justifications were required, the district court correctly found that the deviations between districts in the final map were justified.[104]

AIRC's first argument relies on a lack of precedent for its rejoinder.[105] The Supreme Court has held repeatedly that states do not have to adhere to perfect equality when constructing state legislative districts.[106] Further, "the Supreme Court has never held that a state must justify population deviations of less than 10% in a state legislative redistricting plan,"[107] because minor population deviations among districts do not substantially dilute the strength of individual votes to the point that those voters are deprived of fair and effective representation.[108] Perfect mathematical precision is impossible, so the burden remains on the plaintiff in cases where deviations are less than 10%.[109]

AIRC also distinguishes *Larios v. Cox*, Harris's primary case for requiring justifications from states for deviations less than 10%.[110] AIRC argues that, unlike the Commissioners here, in *Larios* the Georgia legislature gave no good faith effort towards legitimate goals

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102. *See id.* at 47 ("To allow the current map to govern successive elections cycles until 2020 would give continuing force to Section 5 despite the unconstitutionality of applying it anywhere.") (quoting Harris v. Ariz. Indep. Redistricting Comm'n, 993 F. Supp. 2d 1042, 1100 (D. Ariz. 2014) (Wake, J., dissenting)).

103. Brief of Appellee at 28, Harris v. Ariz. Indep. Redistricting Comm'm, No. 14-232 (U.S. Sept. 4, 2015).

104. *Id.* at 37.

105. *See id.* at 29 (noting that the Supreme Court has never held that a prima facie case exists with less than 10% population deviation).

106. *Id.* at 29–30 (citing Ala. Legis. Black Caucus v. Alabama, 135 S.Ct. 1257, 1262–63 (2015); Connor v. Finch, 431 U.S. 407, 417–18 (1977); Mahan v. Howell, 410 U.S. 315, 321–22 (1973); Reynolds v. Sims, 377 U.S. 533, 576 (1964)).

107. *Id.* at 29.

108. *Id.* at 30 (quoting White v. Regester, 412 U.S. 755, 764 (1973)).

109. *Id.* at 33–34.

110. *Id.* at 34.

in its redistricting process.[111] Additionally, AIRC notes that the *Larios* decision was a summary affirmance and argues that the Supreme Court does not "make new law in a summary affirmance like *Larios*."[112]

AIRC's second argument relies on the three-judge panel's finding that the primary reason for any population deviations was the legitimate goal of achieving preclearance from the Department of Justice.[113] AIRC notes first that this is a factual finding and thus "is entitled to deference and reviewed only for clear error."[114] This deference is due to the panel's close proximity to the facts of the case and the ability to best judge the credibility of witnesses.[115] As a result, the only option with de novo review available to Harris is to argue that as a matter of law, preclearance itself is not a legitimate rationale for deviations in the redistricting process.[116]

In response to Harris's arguments on this point, AIRC first points to the Supreme Court's decision in *LULAC v. Perry*, where eight justices endorsed the idea that compliance with Section 5 is a compelling state interest, "and thus necessarily a rational one."[117] AIRC further notes that the Supreme Court has repeatedly held that compliance with the Voting Rights Act generally is a rational state interest.[118] Finally, AIRC observes that while the Voting Rights Act did not require Arizona to have unequally populated districts, it did require Arizona to seek preclearance from the Department of Justice, which drove AIRC to create ten ability-to-elect districts in the first place.[119]

In response to Harris's final argument, AIRC claims that "[r]elying on *Shelby County* to invalidate Arizona's election map would be perverse."[120] *Shelby County* invalidated the coverage formula of the Voting Rights Act because "it imposed unjustified

111. *Id.*
112. *Id.*
113. *Id.* at 38.
114. *Id.*
115. *Id.*
116. *Id.* at 41.
117. *Id.* at 42–43 (citing LULAC v. Perry, 548 U.S. 399, 518 (2006) ((Scalia, J., concurring in the judgment in part and dissenting in part); *id*. at 475 n.12 (Stevens, J., concurring in part and dissenting in part); *id*. at 485 n.2 (Souter, J., concurring in part and dissenting in part)).
118. *Id.* at 43 (citing Abrams v. Johnson, 521 U.S. 74, 91 (1997); Bush v. Vera, 517 U.S. 952, 977 (1996)).
119. *Id.* at 45.
120. *Id.* at 53.

burdens on the residual sovereignty of the States over their elections by subjecting them to federal oversight."[121] AIRC argues that here, Arizona, through its agent AIRC, chose to prioritize preclearance in order to further its own sovereignty by "keeping the final decision on its map out of the hands of the federal courts."[122] Moreover, AIRC contends that the decision in *Shelby County* invalidated the coverage formula under Section 4(b) of the Voting Rights Act, not Section 5 as Harris argues.[123] Finally, AIRC argues that *Shelby County*'s controlling statement of law on the coverage formula of the Voting Rights Act is immaterial to the governing substantive law in this case.[124] AIRC claims that at most, the law requires that minor deviations in populations between districts be "based on legitimate considerations incident to the effectuation of a rational state policy."[125] Thus, as long as Arizona was required to seek preclearance when it created the map, AIRC acted legitimately in implementing a rational state policy.[126]

## V. ANALYSIS

The Court should find in favor of AIRC. Although the Court should hold that neither partisanship nor the desire to obtain preclearance from the Department of Justice can justify the creation of legislative districts which deviate from the Equal Protection Clause's one-person, one-vote standard, the Court should ultimately find that the deviations in Arizona's map are minor and that as a result, Harris has not satisfied the clear error burden required to overturn the lower court's finding that he failed to establish a prima facie case.

### *A. Renault's Valor: Discretion in the Contemplation of Partisan Redistricting*

> *Captain Renault*: My dear Ricky, you overestimate the influence of the Gestapo. I don't interfere with them and they don't interfere with me. In Casablanca I am master of my fate! I am . . .
> *Police Officer*: Major Strasser [of the Gestapo] is here, sir!

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121. *Id.* (quoting Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2623 (2015)).
122. *Id.*
123. *Id.* at 51–52.
124. *Id.* at 52.
125. *Id.* (quoting Reynolds v. Sims, 377 U.S. 533, 579 (1964)).
126. *Id.* at 53.

*Rick*: You were saying?
*Captain Renault*: Excuse me.[127]

Like Captain Renault's rebellion against his Nazi commanders, the Supreme Court's holdings on partisan redistricting have often exercised discretion as the better part of their valor. Although the Court has recognized that partisan influences on redistricting can be problematic,[128] it has refused to set standards that would give the courts undue influence in politics.[129] However, the Court's reticence in this field has come solely in political gerrymandering cases as opposed to population deviation cases.[130] This makes sense given the Court's more exacting scrutiny in population deviation cases. As a result, the Court should be willing to set a clear standard for partisan justifications in population deviation cases.

Nonetheless, it is unlikely the Court will decide to do so here. Instead, the Court will likely follow *Davis v. Bandemer*, its first political gerrymandering case. The Court will probably condemn partisan influence on apportionment but fail to find a justiciable standard for such cases. Like Captain Renault in the scene above, the Court may trumpet its beliefs loudly but will likely fail to act on them in a meaningful way.

### *B. Renault's Wager: Compromising on Invalidation of the Preclearance Justification*

*Captain Renault*: This is the end of the chase.
*Rick*: Twenty thousand francs says it isn't.
*Captain Renault*: Is that a serious offer?
*Rick*: I just paid out twenty. I'd like to get it back.
*Captain Renault*: Make it ten. I'm only a poor corrupt official.[131]

Although some justices on the Court might wish to retroactively disallow all use of preclearance justifications for population deviations, the Court should ultimately only disallow such

127. CASABLANCA (Warner Bros. 1942).
128. *See* Cox v. Larios, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (noting most Justices believed partisanship "is a traditional criterion, and a constitutional one, so long as it does not go too far").
129. *See* Vieth v. Jubelirer, 541 U.S. 267, 306–07 (2004) (Kennedy, J., concurring) ("[C]ourts . . . would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.").
130. Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1003 (2005).
131. CASABLANCA (Warner Bros. 1942).

justifications going forward due to the excessive collateral consequences of retroactive application. Some justices would surely like to go further.[132]

The ramifications of retroactively invalidating the seeking of preclearance from the Department of Justice as a justification are simply too great for the Supreme Court to allow.[133] After the last redistricting cycle, nine states and parts of seven more were covered under the coverage formula of the Voting Rights Act.[134] "During the 2010 Census redistricting cycle, the Department of Justice alone made a preclearance determination of 37 statewide redistricting plans in 11 States."[135] This does not include those states and counties that sought preclearance from the U.S. District Court for the District of Columbia instead of the Department of Justice.[136] A reversal of the lower court's decision would call into question the validity of each and every one of those plans, especially if they relied primarily on preclearance as a justification even if no partisan motivations were found.[137] Ultimately, the Court should exercise the same discretion it used in not recklessly wading into the question of partisan motivations for gerrymandering and decline to include retroactive application in its decision to invalidate preclearance as a justification for population deviations.

### *C. Renault's Bill: The Appellant's Burden and the Prima Facie Case*

> *Captain Renault*: Oh no, Emil, please. A bottle of your best champagne, and put it on my bill.
> *Emil*: Very well, sir.
> *Victor Laszlo*: Captain, please . . .
> *Captain Renault*: Oh, please, monsieur. It is a little game we play. They put it on the bill, I tear up the bill. It is very convenient.[138]

Although the Court is likely to rule in favor of Harris (or tie, given the current composition of the Court) on both of the substantive questions, it should ultimately affirm the lower court's judgment. The Court has yet to determine whether or not partisanship and

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132. *See* Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2631 (2015) (Thomas, J., concurring) ("I would find § 5 of the Voting Rights Act unconstitutional as well.").

133. *See* Brief of Former Officials of the U.S. Department of Justice Who Enforced the Voting Rights Act as Amici Curiae in Support of Appellees at 9, Harris v. Ariz. Indep. Redistricting Comm'n, No. 14-232 (U.S. Nov. 2, 2015) [hereinafter Brief of Former Officials].

134. *Id.* at 24.

135. *Id.* at 25.

136. *Id.*

137. *Id.* at 27.

138. CASABLANCA (Warner Bros. 1942).

preclearance are permissible justifications for population deviation, but it has spoken on when the state has the burden of showing such justifications in the first place. "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations."[139] Here, the maximum population deviation of 8.8% clearly falls into the minor deviations category. As a result, no prima facie case is established by the deviations alone and Harris failed to establish one at trial by proving that illegitimate justifications predominated over legitimate ones when the map was made. The lower court's predomination standard for illegitimate criteria tracks the Supreme Court's analysis in *Alabama Legislative Black Caucus v. Alabama* of racial gerrymandering justifications. If the Supreme Court seeks to create consistency on justifications for both racial and political claims *and* it declines to risk thousands of potential redistricting maps by retroactively removing preclearance as a valid justification, then it must affirm the lower court's judgement.

Moreover, the Court, through Justice Kennedy, has repeatedly shown a reticence to drastically shift the jurisprudence for redistricting questions.[140] Although Justice Kennedy also appeared to provide the "swing" vote in the drastic *Shelby County* decision, his decisions in the voting rights context are clearly distinguishable from his decisions in the redistricting context.[141] As a result, it is likely that he will continue to exercise his cautious approach to redistricting questions and join the Court's affirmance of the lower court's judgement.

## CONCLUSION

The Court may have done its best to avoid entering the political fray of the redistricting process but it will be unable to maintain that evasion here. Like Rick the moment Ilsa walked into Sam's, the wheels have been set in motion and there is no going back. This will be the Supreme Court's first case on partisan redistricting in over a decade and its second analysis related to the Voting Rights Act since

139. Brown v. Thomson, 462 U.S. 835, 842 (2014).

140. *See* Vieth v. Jubelirer, 541 U.S. 267, 306–07 (2004) (Kennedy, J., concurring).

141. *See* Dale Ho, *Two F's for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns*, 50 HARV. C.R.-C.L. L. REV. 403, 417 (2015) (examining the formalistic analysis of Kennedy's plurality opinion in a vote dilution case).

*Shelby County*. Moreover, the Court should keep in mind the potentially momentous effects its decision could have on other redistricting plans.[142] As a result, the Court should affirm the lower court's judgment, and compromise on the question of preclearance, without bringing much additional clarity to its partisanship analysis in its redistricting doctrine.

142. *See* Brief of Former Officials, *supra* note 133, at 9.