No. 14-232

In the Supreme Court of the United States

WESLEY W. HARRIS, *et al.*,
Appellants,
v.
ARIZONA INDEPENDENT REDISTRICTING COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Arizona

REPLY BRIEF OF APPELLEE SECRETARY OF STATE MICHELE REAGAN IN SUPPORT OF APPELLANTS

Mark Brnovich
Attorney General of Arizona

John R. Lopez IV*
Solicitor General
1275 West Washington St.
Phoenix, AZ 85007
(602) 542-3333
John.Lopez@azag.gov
**Counsel of Record*

Dalton Lamar Oldham, Jr.
Dalton L Oldham LLC
1119 Susan St.
Columbia, SC 29210
(803) 237-0886
dloesq@aol.com

E. Mark Braden
Richard B. Raile
Baker & Hostetler LLP
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 861-1504
mbraden@bakerlaw.com
rraile@bakerlaw.com

Jason Torchinsky
Holtzman Vogel Josefiak Torchinsky PLLC
45 North Hill Dr.
Suite 100
Warrenton, VA 20186
(540) 341-8808
jtorchinsky@hvjlaw.com

Counsel for Appellee Arizona Secretary of State

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

STATEMENT

The systematic population deviations in the IRC's plan resulted from the IRC's explicit choice to intentionally under-populate a class of districts based on the race and ethnicity of their residents. The district court found that the IRC believed "*under*populating minority districts" to be "an acceptable tool" in redistricting. JSA 30a (emphasis added). The district court also found that the systematic deviations challenged here were "primarily the result" of the IRC's scheme of "*de*populating minority ability-to-elect districts." JSA 39a (emphasis added). The IRC Commissioners' trial testimony and the hard numbers confirm these findings. The IRC admitted them in its briefing below and on appeal.

The IRC now contends that these systematic population deviations are a mere byproduct of legitimate, neutral redistricting criteria. IRC Br. 2, 48–49. But the court's decision and the record are clear that the IRC decided that these districts *ought* to be *under*-populated. In contrast, under neutral criteria, any given district may as easily fall above as below the ideal population. Deviations, if any, would result from the interplay between the neutral criteria and the state's political and geographic landscape—not from the state's deliberate choice that some districts should be more equal than others. A blanket decision to remove population from a class of districts (rather than remove *or add* as each case may require) is, by definition, not neutral. The IRC's decision was inconsistent with its duty to make a good-faith effort at equality, *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), and it infected the IRC's plan with a "built-in bias" in

favor of minority districts. *Hadley v. Junior College Dist, No. 37*, 397 U.S. 50, 58 (1970).

The IRC's invocation of the Voting Rights Act is a diversion. The one person, one vote principle trumps all other redistricting concerns. That principle forbids rigging deviations in favor of a class of voters or districts. So while the IRC had some flexibility in drawing voting-rights districts (like any other districts), it was forbidden from manipulating population deviations to favor those districts. The United States, as *amicus* supporting the IRC, appears to suggest that the Voting Rights Act trumps the equal-population requirement in this case. Besides misconstruing this Court's racial gerrymandering cases—which allow a Voting Rights Act defense only because a limited use of race in drawing districts is not unconstitutional—the United States' argument runs counter to its advocacy in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 654 (1964), and *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015) ("*ALBC*"). In both cases, the United States was a vigorous proponent of the primacy of the equal-population requirement—against both manipulative districting and the notion that equal population becomes a matter of state discretion once deviations dip below five percent. The Court adopted the United States' position in both cases, and that position—not the view the United States now offers—is the law.

Finally, even if there were permissible bases for distinguishing between citizens for enhanced and diminished representation, race and ethnicity would not be among them. This proposition is so obvious, *see Gray v. Sanders*, 372 U.S. 368, 379 (1963), that it is

remarkable the Court is called on to announce it yet again.

Indeed, this case is a troubling example of how far redistricting can stray from equal protection, even while paying lip service to this Court's standards. The Court should take this opportunity to reaffirm the fundamental requirements of equality under the Constitution, especially as to the sacrosanct nature of citizens' votes. It should reverse the decision below.[1]

ARGUMENT

I. The District Court Found That the IRC Intentionally Under-Populated a Class of Districts, and Its Findings Are Supported by the Record.

The district court found that the deviations in the final 2012 IRC plan resulted from a decision to de-populate the minority districts as a class. JSA 30a, 39a. In fact, the district court believed this was beyond dispute: "The Commission does not argue that the population deviations came about by accident." JSA 5a. The litigation centered on the IRC's "motivation" for de-populating these districts—*i.e.*, whether it was partisan or racial. JSA 5a.

According to the district court, the IRC's draft legislative map "had ten districts identified by the Commission as minority ability-to-elect districts." JSA 28a. The IRC received a statistical analysis from its

---

[1] Despite the constitutional harm here, the imminent 2016 elections necessitate relief be delayed until after 2016. *See Reynolds*, 377 U.S. at 585.

expert concluding that minorities would be able to elect their preferred candidates in all ten minority districts. JSA 30a. Subsequently, the IRC decided to "strengthen" this class of districts by "underpopulating" them, along with District 8, which the IRC believed might also qualify as an ability-to-elect district. JSA 30a, 33a. The IRC viewed "underpopulating" these districts as an "acceptable tool" for Section 5 compliance, "so long as the maximum deviation remained within ten percent." JSA 30a.

The resulting inequality was systematic. JSA 11a–12a.[2] Ten of the eleven districts identified as potential minority districts lost population, all of those ten ended up 0.9% or more below the ideal, and six fell at or below the -3.0% floor in the draft map. The districts classified for de-population were Districts 2 (-0.1% to -4.0%), 3 (-1.4% to -4.0%), 4 (0.5% to -4.2%), 7 (-1.3% to -4.7%), 8 (1.5% to -2.2%), 19 (-0.5% to -2.8%), 24 (0.2% to -3.0%), 27 (-2.2% to -4.2%), 29 (-0.4% to -0.9%), and 30 (-2.4% to -2.5%). Secretary Br. 10–12. The final minority district (District 26) was drawn a smidgen above the ideal. *Id.* Other districts, receiving population from the minority districts, rose above the ideal, *see* JSA 9a–10a, resulting in "an increase in population inequality." JSA 32a. None of this "came about by accident." JSA 5a.[3] The district court found

---

[2] Some commissioners expressed concern about this course of action, but it was implemented nonetheless. JSA 39a–40a.

[3] Because the IRC selected Hispanic districts, which have below-average voter eligibility, the differences here are exacerbated under the metric of voting strength. Under the rubric of citizen voting age population, the deviations run from 28.98% below the

that "the additional population deviation in these ten districts . . . between the passage of the draft map and the final map were primarily the result of efforts to obtain preclearance"—namely, the decision to "further depopulat[e] minority ability-to-elect districts." JSA 39a.

The court's holding that the deviations were caused by a decision to under-populate finds ample support in the record. The IRC commissioners freely admitted this fact at trial. Trial Tr. 328 (Commissioner Stertz) (admitting that the IRC "received advice from counsel . . . that it was okay to underpopulate districts"); Trial Tr. 329 (Commissioner Stertz) ("Q: Okay. The notion of underpopulating districts was yours; true? A: True."); Trial Tr. 871-72 (Commissioner Freeman) (agreeing that "[f]rom November 29, 2011, until final adoption, the Commission went through a process in which it actually depopulated minority districts"). And the Commissioners' testimony was unmistakable that the decision to under-populate was the cause of the inequality:

> JUDGE WAKE: One last question: It appears just looking at the numbers [and] from what we have heard that there was a decision to underpopulate the Voting Rights Act districts and that that is what necessarily drove the overpopulation of other districts.
>
> THE WITNESS: Yes. That's absolutely correct.

---

ideal to 25.83% above the ideal, for a total deviation of 54.81%. JSA 243a–244a.

> JUDGE WAKE: And was there any other reason that drove the overpopulation of the overpopulated districts?
>
> THE WITNESS: The only other thing that I can think of is that -- well, no, not really.

Trial Tr. 820 (Commissioner McNulty);[4] *see also* Trial Tr. 1071–72 (Commissioner Mathis) (admitting that "the majority-minority districts, were underpopulated" precisely "because" the IRC "received advice . . . that that was okay to do").

Some testimony referenced partisan tension arising from this strategy. Trial Tr. 181 (Commissioner Stertz) (testifying that the IRC was "hyper-packing districts of Republicans in an effort to actually marginalize and create an overpopulated district of Republicans in an effort to give the ability to elect in an underpopulated district"); Trial Tr. 882–83 (Commissioner Freeman) (testifying that "we had the advice, well, you can always improve the metrics and one way to do it is to depopulate these districts" and that, when the advice was questioned, Commissioner Herrera "said, basically 'Too bad. That's what we're going to do.'"). And while the IRC denies any partisan motivation, there is not a single suggestion in the record that the IRC did not depopulate these districts. To the contrary, this fact was reiterated over and over again, as Judge Clifton observed: "we have heard repeatedly the advice

---

[4] Commissioner McNulty offered additional ambiguous testimony concerning a single other factor that may have affected the deviation in one district. Trial Tr. 820. The district court was well within its discretion not to credit this as the cause the inequality endemic in all districts.

received with regard to voting rights districts and the ability to underpopulate those districts." Trial Tr. 822. And there was testimony that population deviations did *not* result from redistricting goals such as creating competitive districts. Trial Tr. 820 (Commissioner McNulty) ("[W]e wouldn't have used population deviations to achieve competitiveness. We simply would not have done that.").

The IRC admitted in its trial briefing that a class of districts was selected for under-population and that this caused the systematic deviations:

> Mr. Adelson and other Commission counsel advised that underpopulating voting rights districts to help comply with Section 5 was common practice. . . . Consequently, in the final map, nine of the ten districts that the Commission created as ability-to-elect districts to receive preclearance were below the ideal population for a legislative district.

IRC Pre-Trial Br. 12, ECF No. 219. The IRC repeated this factual assertion to this Court in requesting dismissal of this appeal:

> [T]he Commission understood that modest underpopulation of ability-to-elect districts was commonly done in other jurisdictions. . . . To underpopulate an ability-to-elect district and thereby strengthen a minority's ability to elect candidates of its choice, the consequence often would be to remove population from districts that had a higher proportion of voters who were registered Democrats.

MTD 12–13. Consistent with the IRC's testimony and admissions, the district court found that a deliberate decision to under-populate minority districts was the cause of the systematic inequality. JSA 30a, 39a–40a. It likely would have committed clear error in finding otherwise.

The IRC provides no basis for revisiting the district court's findings. Contrary to these previously undisputed findings of fact, the IRC now claims that the district court identified "traditional state redistricting objectives" as a partial cause of the deviations. IRC Br. 2. But the IRC fails to identify a single finding of this nature in the decision.[5] The IRC also fails to explain how these traditional redistricting goals could have caused every minority district save one to fall below the ideal. IRC Br. 15–16, 49; *see also Larios v. Cox*, 300 F. Supp. 2d 1320, 1350 (N.D. Ga. 2004) *aff'd*, 542 U.S. 947 (2004) (holding that "the record evidence squarely forecloses the idea that *any* of these legitimate reasons could account for the deviations") (emphasis in original). As the IRC itself notes, pursuing traditional redistricting goals both "removed population" and "added population." IRC Br. 16. Thus, unlike the IRC's explicit choice to under-populate, these traditional redistricting goals cannot

---

[5] The IRC cites JSA 24a and JSA 36a, *see* IRC Br. 38; yet neither reference supports the IRC. At JSA 24a, the district court states only that: "Although the Commission considered and often adjusted lines to meet other goals, it put a priority on compliance with the Voting Rights Act." This does not link the systematic deviations to those "other goals." Similarly, at JSA 36a, the district court makes no reference to redistricting goals other than the Voting Rights Act and partisanship.

explain the systematic inequality in the IRC's final plan.[6] In contrast, choosing to under-populate minority districts, by definition, only removed and never added population. *See* JSA 166a (Commissioner Stertz).

The IRC also asserts—again, with no support in the district court's decision—that, on December 16, 2011, it took steps to minimize population deviations. IRC Br. 18. But these steps applied to districts "other than the voting rights district[s]." MTD App. 35. Thus, the districts the IRC suggests were nudged closer to the ideal—Districts 1, 6, 9, 14, 16, and 25, IRC Br. 18 & n.16—are not the minority districts that were systematically under-populated. This course of action served to reinforce, rather than eradicate, the built-in bias in favor of the minority districts.

Ultimately, the IRC's factual contentions—aside from having no basis in the findings below—are a smoke screen. They show merely that the IRC made other redistricting choices in addition to the decision to

---

[6] For instance, the IRC mentions alterations to District 2, but they occurred on December 19, 2011—*after* the decision to de-populate minority districts was ratified and executed. IRC Br. 16 (citing Trial Ex. 405). District 2 was over 4.0% below the ideal population prior to those changes, and the changes did little to the deviation. *See* Trial Ex. 405 at 92. Likewise, the testimony concerning Districts 29 and 30 represented merely that the changes the IRC references "would have affected population in some manner." Trial Tr. 786 (Commissioner McNulty) (cited at IRC Br. 17). And the testimony on alterations to District 7 is ambiguous, to say the least. *See* Trial Tr. 820 (Commissioner McNulty) (testifying that "some moving of some population" may have been unrelated to "underpopulating" the district pursuant to the advice to under-populate). None of this provides a basis for second-guessing the district court's findings.

de-populate the minority districts. Yet that latter decision ensured that, regardless of whatever else was transpiring in the redistricting process, the minority districts would end up on the low end of the overall deviation. The district court did not err in finding that it was the decision to de-populate, and not some other decision, that caused the systematic inequality.

II. The IRC's Deliberate Under-Population of Minority Districts Violates Equal Protection.

The relevant facts are indisputable, and they show that the IRC violated the Equal Protection Clause. The Equal Protection Clause requires an honest effort at equality. The IRC made a deliberate effort at *in*equality. The Equal Protection Clause forbids built-in bias in favor of certain districts. The IRC made the deliberate choice to favor the minority districts. The IRC's contentions notwithstanding, this course of action was not required. In fact, it was not even helpful in creating strong ability-to-elect districts: the IRC's blanket under-population weakened many of the minority districts.

Even if the Voting Rights Act required enhanced representation for minority districts—it does not—a requirement of this nature would be unconstitutional. The IRC does not seriously contest this point. But the United States, contrary to decades of precedent and its own positions taken in developing that precedent, suggests that the Voting Rights Act may trump the one person, one vote rule. This argument is backwards. And it finds no support in the Court's racial gerrymandering precedent, which allows a defense in those situations where the Constitution permits a

limited use of race in redistricting. Violations of the one person, one vote rule are altogether different and cannot be justified by reference to the Voting Rights Act.

A. Under-Populating Districts Violates the One Person, One Vote Rule.

A state must "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. The IRC determined that it would under-populate a class of districts. That is the very opposite of trying to make them equal. The IRC claims that this was not actually a decision calculated to produce inequality. IRC Br. 48. But it fails to answer the obvious question: what else could have been the objective of under-populating a class of districts, JSA 30a, other than that they be, in fact, *under*-populated?

This choice infected the plan with more than a "taint of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964). While the IRC disclaims any discriminatory intent and trumpets the district court's references to "good faith," IRC Br. 49–50, the decision to under-populate a class of districts, again, speaks for itself.[7] That decision falls on the wrong side of the Court's decision in *Hadley*, 397 U.S. at 57–58, which clarified the difference between

---

[7] In finding "good faith," the court clearly understood the IRC to be sincere in its belief that under-populating districts would be helpful in the preclearance process and found that this was not a pretext for partisanship. *See* JSA 35a–42a. But sincerity on that point bears no relation to the standards enunciated in *Reynolds* and *Hadley*.

neutral and discriminatory districting. *Hadley* condemned a redistricting formula under which an identifiable class of districts (large districts) "may frequently have less effective voting power than" others but "can never have more." 397 U.S. at 57–58. The *Hadley* Court contrasted that formula to deviations resulting from "inherent mathematical complications" of the districting scheme and "did not contain a built-in bias in favor of small districts." *Id.* In choosing to under-populate the minority districts as a class, the IRC ensured that they would fall at or below the ideal, not noticeably above it. JSA 30a, 39a. Deviations cannot be neutral if they are the result of a one-way ratchet.[8]

Hadley therefore refutes the IRC's claim that "there is no constitutionally significant difference" between its decision to under-populate and redistricting goals, neutrally applied, such as honoring city and county boundaries or retaining district cores. IRC Br. 49–50. The decision, for instance, to honor political subdivisions, does not require that any district—much less a class of districts—must fall on one side or the other of mathematical equality. Any deviations will be

---

[8] Where the ten-percent rule articulated in *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983), provides a burden-shifting framework for evidence based on the overall magnitude of population deviation, intentional under-population is a distinct form of invidious discrimination in redistricting. *See Roman*, 377 U.S. at 710; *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment"); *Abate v. Mundt*, 403 U.S. 182, 185–86 (1971) ("In this case . . . there is no suggestion that the Rockland County plan was designed to favor particular groups.").

incidental, occurring by happenstance from inherent complications of a state's criteria and its geographic and political landscape. These types of incidental deviations are therefore not, as the IRC suggests, similar to the IRC's intentional decision to de-populate a specific class of districts. *See* IRC Br. 50 n.30.

For the same reason, the IRC's blanket decision to under-populate did not, as the IRC claims, fall within its "flexibility" to make "sovereign choices" in redistricting. *See* IRC Br. 48, 50. Under *Hadley*, the IRC's flexibility extended only to deviations from inherent complications of its criteria. It did not allow the IRC to rig deviations in favor of certain districts. *See also WMCA*, 377 U.S. at 654; *Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Roman*, 377 U.S. at 710; *Larios*, 300 F. Supp. 2d at 1343. A state may undertake any number of actions based on any number of considerations, be they geographic, political, partisan, or (within limits) racial. But the state must remain strictly neutral as to the weight of citizens' votes. *See Bush v. Gore*, 531 U.S. 98, 104–05 (2000) ("[T]he State may not . . . value one person's vote over that of another."). The IRC's effort to under-populate a class of districts was not neutral.

Moreover, nothing about the IRC's stated goals, including Voting Rights Act compliance, required a departure from neutrality. As the United States acknowledges, if the IRC needed to increase the percentage of minority population in the minority districts, it could have as easily "move[d] in population that might enable the minority group to elect its preferred candidates"—and thereby *increased* total population in a given district—as it could have

"move[d] out population that might preclude the ability to elect"—and thereby reduced total population. U.S. Br. 30–31. The IRC also could have done some of both, thereby increasing minority population while keeping total population steady. This course of action, conducted neutrally, would have entailed an analysis of each district and a decision to adjust the district—using all available tools—as necessary to attain a certain minority percentage.[9]

Instead, with addition, subtraction, and a combination of both available as options to "strengthen" the districts, the IRC decided, in advance of district-specific considerations, only to subtract. JSA 166a (Commissioner Stertz). When weighing the advice to de-populate uniformly across districts, Commissioner Mathis inquired whether this advice referred to adjusting the percentage of minority population within the minority districts, and the IRC's counsel clarified that the concepts are separate. Trial Ex. 395 at 115.

Indeed, they are. The blanket decision to under-populate did not improve minority voting strength in all districts. The percentage of minority voting-age population plummeted in District 2 (61.4% to 52.8%), fell in Districts 3 (51.2% to 50.1%), and 27 (53.7% to 52.1%), and remained exactly the same in District 30 (50.7%). *See* Trial Ex. 69. At trial, Judge Wake

---

[9] Notably, Arizona "experienced significant growth in its Hispanic population" between the 2000 and 2010 censuses, so there were more minority residents available in 2012 for the *same number* of ability-to-elect districts as compared to the benchmark plan. IRC Br. 6.

observed that "the majority of" a series of changes made in the course of de-populating minority districts "reduced the Hispanic voting age population for the districts," and Commissioner Stertz testified that this occurred. JSA 164a. When asked how removing minority voters from minority districts "strengthen[s]" them as minority districts, Commissioner Stertz conceded that the IRC ratified this course of action "on faith." JSA 166a–167a. In fact, the decision to de-populate did "strengthen" the minority districts in a different manner: it enhanced those districts' representation and voting strength at the expense of other districts. And that is precisely the type of inequality this Court's precedent forbids.

B. The Voting Rights Act Does Not Justify Unconstitutional Districting.

The IRC and the United States contend that the Voting Rights Act can justify deviations from equality. IRC Br. 41–44; U.S. Br. 25–32. It may justify deviations from mathematical equality, but it cannot justify departures from *equal protection*. To be consistent with equal protection, a state's decisions about how to comply with the Voting Rights Act must be made in the course of a good-faith effort at equality and therefore must be free from a "built-in bias" in favor of certain districts.[10] *Hadley*, 397 U.S. at 58.

---

[10] The same rule supersedes state criteria. If a state manipulates population deviations in the name of its traditional criteria—such as by under-populating rural districts in the name of communities of interest or under-populating the districts of favored incumbents in the name of "incumbency protection"—it violates equal protection for the same reason that under-populating districts in the name of the Voting Rights Act violates equal protection. *See*

Otherwise, those decisions violate the Constitution and cannot be justified by a statute. For the reasons discussed above, good faith and neutrality are incompatible with a blanket decision to under-populate. That should end the matter.

The United States, however, pushes the argument further, suggesting that even biased districting can be justified by the Voting Rights Act. U.S. Br. 31 n.12. It fails to cite, much less confront, the Court's precedent forbidding biased redistricting, such as *Hadley* and *WMCA*, 377 U.S. at 654. That is perplexing given that the United States, as an *amicus* in *WMCA*, proposed that deviations resulting from "a built-in, discriminatory mechanism" in favor of some districts violate equal protection. Brief for the United States as Amicus Curiae, *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1963) (No. 20), 1963 WL 105658, at *18. The Court agreed and rejected a districting scheme designed to under-represent urban districts. *See WMCA*, 377 U.S. at 654–55.

Additionally, the United States' view runs contrary to the Court's holding last term that the "equal population goal is not one factor among others" in redistricting, but rather is "a background rule against which redistricting takes place." *ALBC*, 135 S. Ct. at 1270–71. The Court in *ALBC* declined to view the state's "efforts to create districts of approximately equal population" as falling "in the balance" with other districting goals—even where the state attempted to keep deviations within plus or minus one percent of the

---

Secretary Br. 32–34. The Secretary's position therefore does not place the Voting Rights Act below state criteria.

ideal. *Id.* In other words, the Court in *ALBC* did not view five percent as the mark below which the equal-population goal ceases to be a federal mandate and becomes a state prerogative to be balanced and traded with other goals.

The United States, participating as an *amicus*, formulated and advanced that view. While acknowledging that the legislature attempted to keep deviations below two percent, the United States argued that the state's equal-population decisions were not discretionary but were mandated by a constitutional obligation that "trumps other districting objectives in *every* decennial redistricting." Brief for the United States as Amicus Curiae, *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015) (No. 13-895), 2014 WL 4101232, at *18 (emphasis in original). This argument was sound, given the constitutional requirement that a state "make an honest and good faith effort" at equality—even below five percent. *Reynolds*, 377 U.S. at 577.

Now, rather than explain why intentionally drawing unequal districts does not offend the equal-population goal that "trumps other districting objectives," the United States suggests that the Voting Rights Act can trump equal protection. *See* U.S. Br. 31 n.12. That, of course, runs contrary to the most fundamental principles of constitutional law. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

The United States relies on the Court's decisions citing the Voting Rights Act as a potential defense to charges of racial gerrymandering. U.S. Br. 25–26, 31 n.12. This reliance neglects the difference between violations of the one person, one vote rule, which are

always unconstitutional, and the use of race in redistricting, which is sometimes permissible. A limited use of race can be justified by the Voting Rights Act only because "[i]mplicit in" the Court's decisions applying the Voting Rights Act to redistricting "is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving . . . majorities [of racial minorities] in particular districts."[11] *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 161 (1977) ("*UJO*") (discussing, *inter alia*, *Beer v. United States*, 425 U.S. 130 (1976), and *City of Richmond v. United States*, 422 U.S. 358 (1975)). But only measures tailored to a "constitutional reading and application" of the Voting Rights Act justify the use of race in redistricting. *Miller v. Johnson*, 515 U.S. 900, 911, 921 (1995) (rejecting a Section 5 defense where the state's use of race amounted to "segregat[ing]" citizens by race, in violation of equal protection). Any other reading brings the Voting Rights Act "into tension with the Fourteenth Amendment." *Id.* at 927. That is because even a legitimate end does not justify means that are not permissible. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

In contrast to this limited use of race in redistricting, there is nothing even implicit in the Court's Voting Rights Act or equal protection jurisprudence that permits enhancing the voting and representation of ability-to-elect districts as compared to other districts. To the contrary, the Court rejected

---

[11] The Court has continued to interpret the Voting Rights Act to require drawing minority districts at percentage thresholds. *See Bartlett v. Strickland*, 556 U.S. 1 (2009).

this type of action as a "means" appropriate for "the protection of minorities." *Reynolds*, 377 U.S. at 566. Thus, however availing the Voting Rights Act may be in defense of a state's limited use of race in drawing ability-to-elect districts, it has no role in justifying the decision to intentionally manipulate the value of individual votes.

Even if the Voting Rights Act could, in some situations, provide a defense, that defense would not extend to all actions stemming from the "desire to obtain preclearance under Section 5." *See, e.g.*, IRC Br. 41. The Court has flatly rejected the notion "that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Miller*, 515 U.S. at 921–22. The correct focus is not on what the IRC believed "was required in order to obtain preclearance," but rather on what "was required by the substantive provisions of the Act." *Id.* at 922.

Neither the IRC nor any of its *amici* explain how under-populating the minority districts had anything to do with the "substantive provisions" of the Voting Rights Act—let alone how it was "required." *Id.* Section 5 of the Voting Rights Act prohibits changes in voting laws that have "the effect of diminishing" the ability of minorities to elect their preferred candidates, but it does not promise enhanced voting strength. 52 U.S.C. § 10304(b).[12] There was therefore neither a

[12] Section 2, which serves a similar purpose as Section 5, also does not promise enhanced voting strength and expressly disclaims any contrary interpretation. 52 U.S.C. § 10301(b).

requirement of, nor advantage to, blanket under-population.

The IRC and its *amici* complain that the IRC was unsure how many minority districts to draw or how high the minority percentages should be. But the process was at least transparent enough for the IRC to know that the requisite course of action was "creating or preserving" high percentages of Hispanics or Native Americans "in particular districts." *See UJO*, 430 U.S. at 161; *see also* IRC Br. 9–10; Former DOJ Amici Br. 29 (observing that the "critical question" concerns the "number of ability-to-elect districts" required). There was never a reason to fear that the minority districts might have too many residents in terms of total population. As described above, these concepts are separate, the IRC was explicitly advised that they are separate, and the IRC's blanket decision to under-populate at times *conflicted* with the legitimate objective of creating or preserving high percentages of minorities in the ability-to-elect districts. The Voting Rights Act cannot justify a course of action entirely unrelated to its requirements.

III. The IRC's Use of Race Was Impermissible.

The arguments made above are sufficient for reversal. Because there is no classification by which a state may intentionally give some citizens more valuable votes than others, it hardly matters what classification a state chooses for this distinction. *Reynolds*, 377 U.S. at 565–66. But if there were any doubt on that point as a general matter, the IRC's choice of race and ethnicity as its classification provides all the clarity that is needed in this case. This Court in both *Gray*, 372 U.S. at 379, and *Reynolds*, 377 U.S. at 565–66, ruled out race as a characteristic by which to

distinguish citizens for enhanced and diluted representation.

The IRC claims it did not distinguish between citizens and districts on the basis of race because its "focus was Section 5 preclearance." IRC Br. 51. But Section 5 forbids retrogression of voting strength "on account of race or color," 52 U.S.C. § 10304(a), and the IRC created "ability-to-elect" districts in the only manner possible: by identifying "concentrations of minority populations," JSA 33a; *see also* JSA 21a. As discussed above, this was permissible. The IRC, however, decided that the ability-to-elect districts, besides having requisite levels of minority population, would *also* be the under-populated districts. It thus extended its use of race and ethnicity, using these identifiers to select districts for enhanced representation. The involvement of Section 5 did not somehow render that decision non-racial. *See Miller*, 515 U.S. at 907 (classifying state's efforts to comply with DOJ demands as racial).

The IRC further contends that the Court is powerless to remedy the IRC's use of race because a racial gerrymandering claim provides the only cause of action. IRC Br. 46 n. 27, 51. That is not true. "*Any* preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986) (quotation marks omitted) (emphasis added). Enhancing the power of votes, the "fundamental political right" that is "preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), is certainly a preference.

This preference is not "racial gerrymandering," as recognized in *Shaw v. Reno*, 509 U.S. 630, 658 (1993) ("*Shaw I*"). *Shaw I* applies the reasoning of *Brown v. Board of Education* to redistricting schemes designed "to segregate the races for purposes of voting." 509 U.S. at 642–44. But *Shaw I* was controversial because of the arguable *absence* of a tangible race-based preference: "the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others." *Id.* at 681–82 (Souter, J., dissenting); *see also id.* at 659 (White, J., dissenting). The *Shaw I* dissents asserted that, "without more," the creation of majority-minority districts—even bizarre districts—causes no injury because doing so does not "diminish the effectiveness of the individual as a voter." *See, e.g.*, *id.* at 682 (Souter, J., dissenting).

But where a redistricting plan does, in fact, "diminish the effectiveness of the individual as a voter," the case is even easier. Voting preferences that "advantage . . . one person . . . at the obvious expense of a member of a different race," *id.* at 681 (Souter, J., dissenting), far from being permitted by *Shaw I*, present an even more obvious case of discrimination, as recognized under *Gray*, 372 U.S. at 379, and *Reynolds*, 377 U.S. at 565–66.

Thus, unlike a *Shaw I* racial gerrymandering claim, there is an obvious race-based preference here: the IRC increased the value of some votes and decreased the value of others based on race. The racial gerrymandering test that allows the use of race to a limited degree in redistricting, *see Miller*, 515 U.S. at 916, thus does not apply. Instead, this case falls under the Court's decisions forbidding "[r]acial and ethnic

distinctions of *any sort*." *Univ. of Ca. Regents v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.) (emphasis added). So while the IRC is correct that there is a difference between this case and a racial gerrymandering case, that difference cuts against the IRC.

Analyzing the IRC's race-based under-population need not detain the Court for long because, as described above at II.B, there is no compelling basis for the IRC's actions. And, even assuming a compelling interest, the IRC's intentional under-population of districts based on race and ethnicity is not narrowly tailored. Where Section 5 is the asserted compelling interest, a plan "would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression." *Shaw I*, 509 U.S. at 655. In fact, the IRC's actions were entirely unrelated to the requirements of the Voting Rights Act. *See supra* II.B. The IRC's intentionally overbroad use of race was therefore not narrowly tailored to meet any legitimate goal.

CONCLUSION

For these reasons and those stated in the Secretary's opening brief, the district court should be reversed and the case remanded for appropriate relief.

Respectfully submitted,

Mark Brnovich
Attorney General of Arizona

John R. Lopez IV*
Solicitor General
1275 West Washington Street
Phoenix, AZ 85007
Phone (602) 542-3333
Fax (602) 542-8308
John.Lopez@azag.gov
**Counsel of Record*

E. Mark Braden
Richard B. Raile
Baker & Hostetler LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
Tel: (202) 861-1504
Fax: (202) 861-1783
mbraden@bakerlaw.com
rraile@bakerlaw.com

Dalton Lamar Oldham, Jr.
Dalton L Oldham LLC
1119 Susan Street
Columbia, SC 29210
(803) 237-0886
dloesq@aol.com

Jason Torchinsky
Holtzman Vogel Josefiak
Torchinsky PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
Tel: (540) 341-8808
Fax: (540) 341-8809
jtorchinsky@hvjlaw.com

Counsel for Appellee
Arizona Secretary of State