

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

CATHY COX, GEORGIA SECRETARY OF STATE *v.*
SARA LARIOS ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA

No. 03–1413. Decided June 30, 2004

JUSTICE SCALIA, dissenting.

When reviewing States’ redistricting of their own legislative boundaries, we have been appropriately deferential. See *Mahan v. Howell*, 410 U. S. 315, 327 (1973). A series of our cases established the principle that “minor deviations” among districts—deviations of less than 10%—are “insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.” *Brown v. Thomson*, 462 U. S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U. S. 735, 745 (1973)); see also *Voinovich v. Quilter*, 507 U. S. 146, 160–162 (1993). This case presents a question that *Brown*, *Gaffney*, and *Voinovich* did not squarely confront—whether a districting plan that *satisfies* this 10% criterion may nevertheless be invalidated on the basis of circumstantial evidence of partisan political motivation.

The state officials who drafted Georgia’s redistricting plan believed the answer to that question was “no,” reading our cases to establish a 10% “safe harbor” with which they meticulously complied. The court below disagreed. No party here contends that, beyond grand generalities in cases such as *Reynolds v. Sims*, 377 U. S. 533, 577 (1964), this Court has addressed the question. The opinion below is consistent with others to have addressed the issue; there is no obvious conflict among the lower courts. This is not a petition for certiorari, however, but an appeal, and we should not summarily affirm unless it is clear that the disposition of this case is correct.

SCALIA, J., dissenting

In my view, that is not clear. A substantial case can be made that Georgia’s redistricting plan *did* comply with the Constitution. Appellees do not contend that the population deviations—all less than 5% from the mean—were based on race or some other suspect classification. They claim only impermissible *political* bias—that state legislators tried to improve the electoral chances of Democrats over Republicans by underpopulating inner-city and rural districts and by selectively protecting incumbents, while ignoring “traditional” redistricting criteria. The District Court agreed. See App. to Juris. Statement 8a–25a.

The problem with this analysis is that it assumes “politics as usual” is not *itself* a “traditional” redistricting criterion. In the recent decision in *Vieth v. Jubelirer*, 541 U. S. ___ (2004), all but one of the Justices agreed that it *is* a traditional criterion, and a constitutional one, so long as it does not go too far. See *id.*, at ___ (plurality opinion) (slip op., at 16–17); *id.*, at ___ (KENNEDY, J., concurring in judgment) (slip op., at 2); *id.*, at ___ (SOUTER, J., dissenting) (slip op., at 2); *id.*, at ___ (BREYER, J., dissenting) (slip op., at 1). It is not obvious to me that a legislature goes too far when it stays within the 10% disparity in population our cases allow. To say that it does is to invite allegations of political motivation whenever there is population disparity, and thus to destroy the 10% safe harbor our cases provide. Ferreting out political motives in minute population deviations seems to me more likely to encourage politically motivated litigation than to vindicate political rights.

I would set the case for argument.