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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

By: *OC Martin*
Deputy Clerk

SARA LARIOS, et al.,

Plaintiffs,

versus

CATHY COX,

Defendant.

CIVIL ACTION

NO. 1:03-CV-693-CAP

Before MARCUS, Circuit Judge, O'KELLEY and PANNELL, District Judges.

BY THE COURT:

Memorandum Opinion

In an order dated December 9, 2003, this court granted in part and denied in part the defendant's motion for summary judgment and denied the plaintiffs' motion for summary judgment. The purpose of this memorandum opinion is to outline the court's reasoning with respect to the plaintiffs' one person, one vote claim challenging the congressional reapportionment plan, the Georgia House of Representatives reapportionment plan, and the 2002 Georgia State Senate reapportionment plan.

I. Factual and Procedural Background

Because of Georgia's substantial growth in population, evidenced by the 2000 decennial census results, the state became entitled to two additional congressional

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seats pursuant to 2 U.S.C. § 2a. Moreover, the state's growth during the last decade had created population disparities in the state House and Senate districts which had to be corrected pursuant to the Georgia Constitution, Art. III, § 2, ¶ 2.

The Georgia General Assembly therefore met in two special sessions during August and September of 2001 to consider reapportionment issues. During those sessions, the General Assembly formulated reapportionment plans for the state's congressional districts and for its state House of Representatives and Senate districts. The governor signed the reapportionment scheme for the state Senate ("the 2001 state Senate plan") into law on August 24, 2001, and signed the reapportionment schemes for Congress and the state House into law on October 1, 2001.

However, because Georgia is a jurisdiction covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, it was necessary for the state to preclear those plans under the Voting Rights Act. Accordingly, on October 10, 2001, the State of Georgia filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking a declaration that the reapportionment plans did not have the purpose or would not have the effect of denying or abridging the right to vote on account of race or color. In an order dated April 5, 2002, the three-judge district court presiding over that action precleared the congressional and state House plans,

but refused to preclear the 2001 state Senate plan. See Georgia v. Ashcroft, 195 F. Supp.2d 25 (D.D.C. 2002), vacated, 123 S.Ct. 2498 (2003).

In response, the General Assembly enacted a new state Senate reapportionment plan ("the 2002 state Senate plan"), which the governor signed into law on April 11, 2002. That legislation specifically provides that the 2002 state Senate plan applies only unless and until the 2001 state Senate plan is precleared under the Voting Rights Act. The three-judge district court in the District of Columbia promptly precleared the 2002 state Senate plan under the Voting Rights Act. See Georgia v. Ashcroft, 204 F. Supp.2d 4, 15-16 (D.D.C. 2002).

Meanwhile, the State of Georgia appealed the three-judge district court's decision denying preclearance of the 2001 state Senate plan. On June 26, 2003, the Supreme Court vacated and remanded the district court's decision, holding that its initial preclearance inquiry was overly narrow. See Georgia v. Ashcroft, 123 S.Ct. 2498, 2517 (2003). The district court has not yet issued a ruling on remand.

Because it is unclear whether or not the 2001 plan will ultimately be precleared and reinstated, this court considers the plaintiffs' claims only with respect to the 2002 state Senate plan now in effect, as well as with respect to the congressional and state House plans enacted during the 2001 special sessions.

II. Legal Analysis

A. The Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure authorizes a court to enter summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute exists as to any material fact. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S.Ct. 1598, 1608 (1970). This burden is discharged by "'showing'--that is, pointing out to the district court--that there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986). In determining whether the moving party has met its burden, a district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996).

Once the moving party has adequately supported its motion, the nonmovant has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Electric Industrial Co. v. Zenith

Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1356 (1986). Ultimately, the court's function is not to resolve issues of material fact, but rather to determine whether there are any such issues to be tried. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S.Ct. 2505, 2511 (1986). Facts that are disputed, but which do not affect the outcome of the case, are not material and thus will not preclude the entry of summary judgment. Id. at 248, 106 S.Ct. at 2510.

B. Application of the Summary Judgment Standard

As previously indicated, this memorandum opinion concerns only the plaintiffs' one person, one vote claim challenging the congressional reapportionment plan, the state House reapportionment plan, and the 2002 state Senate reapportionment plan.

1. The Plaintiffs' One Person, One Vote Challenge to the Congressional Reapportionment Plan

Article I, § 2 of the Constitution provides, in relevant part, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States. . . ." The Supreme Court has interpreted this constitutional mandate, commonly known as the one person, one vote principle, to require that congressional districts achieve population equality "as nearly as is

practicable." Wesberry v. Sanders, 376 U.S. 1, 7-8, 84 S.Ct. 526, 530 (1964).

A court's inquiry in a one person, one vote challenge to congressional reapportionment focuses on two questions. Karcher v. Daggett, 462 U.S. 725, 730, 103 S.Ct. 2653, 2658 (1983). "First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." Id. The parties challenging the reapportionment legislation bear the burden of proof on this issue; and if they fail to show that the population differences could have been avoided, the reapportionment scheme must be upheld. Id. at 730-31, 103 S.Ct. at 2658. "If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal." Id. at 731, 103 S.Ct. at 2658.

The Supreme Court has rejected various attempts to create an exception to this rule for *de minimis* population variations. See, e.g., id. at 731-34, 103 S.Ct. at 2658-60; Kirkpatrick v. Preisler, 394 U.S. 526, 530-31, 89 S.Ct. 1225, 1228-29 (1969). Thus, unless population variances among districts are shown to have resulted despite the state's good-faith effort to achieve precise mathematical equality, the state must

justify each variance, no matter how small. Karcher, 462 U.S. at 734, 103 S.Ct. at 2660; Kirkpatrick, 394 U.S. at 531, 89 S.Ct. at 1229.

Nonetheless, minor population deviations may be justified by consistently applied legislative policies, such as making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbents, as long as the criteria are nondiscriminatory. Karcher, 462 U.S. at 740, 103 S.Ct. at 2663. In order to make the necessary showing, a state must demonstrate "with some specificity that a particular objective required the specific deviations in its plan." Id. at 741, 103 S.Ct. at 2664. Moreover, the showing required to justify population deviations is a flexible one, "depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." Id.

The congressional reapportionment plan challenged in this case has a maximum population deviation of 72 people.¹ The plaintiffs have brought forward

¹ The maximum population deviation is calculated as "the difference in population between the two districts with the greatest disparity." Abrams v. Johnson, 521 U.S. 74, 98, 117 S.Ct. 1925, 1939 (1997). The congressional districts with the greatest disparity in this case are district 9, with +35 people, and district 4, with -37 people, yielding a maximum population deviation of 72 people.

evidence indicating not only that alternative plans with deviations of 0 or 1 person were possible, but also that one such plan was introduced to the Joint Conference Committee which drew the congressional plan. Although the defendant disputes that no formal introduction was made and no vote was taken on the plan referenced by the plaintiffs, she does not dispute that the plan was created; nor does she contend that it was impossible--or even difficult--to draw a plan with a deviation of less than 72 people.

The evidence shows that the 72 person deviation in the congressional reapportionment plan was avoidable; therefore, the burden shifts to the state to justify that deviation. To that end, the defendant has presented evidence, primarily in the form of affidavits submitted by Linda Meggers, director of the reapportionment office, which provides technical assistance to the General Assembly, indicating that modifying the congressional reapportionment plan so as to achieve population equality would result in (1) the splitting of more voting precincts, (2) the breaching of major natural, geographic, and highway boundaries, and (3) the carving out of small portions of neighborhoods and subdivisions. The plaintiffs argue, however, that there is no evidence suggesting that these factors were considered in drafting the plan and that, even if such factors were considered, they were not consistently

applied. The plaintiffs also contend that an entirely new plan could be drawn which would achieve a 0 or 1 person deviation, even taking these factors into account.

The court finds that there are factual issues that cannot be resolved at the summary judgment stage. Accordingly, the court has DENIED the defendant's and the plaintiffs' motions for summary judgment with respect to the one person, one vote challenge to the congressional reapportionment plan.

2. The Plaintiffs' One Person, One Vote Challenge to the State House and 2002 State Senate Reapportionment Plans

The Equal Protection Clause requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis. Reynolds v. Sims, 377 U.S. 533, 568, 84 S.Ct. 1362, 1385 (1964). This one person, one vote principle ensures that the constitutionally guaranteed right of suffrage is not denied by debasement or dilution of the weight of a citizen's vote. Id. at 555, 84 S.Ct. at 1378. The Supreme Court has recognized, however, that mathematical precision is not a workable constitutional requirement and that it is practically impossible to arrange legislative districts so that each one has an identical number of citizens. Id. at 577, 84 S.Ct. at 1390. Thus, each state is simply required to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal

population as is practicable." Id. Moreover, some deviations from population equality are constitutionally permissible with respect to apportionment of seats in a state legislature, so long as such deviations are "based on legitimate considerations incident to the effectuation of a rational state policy," such as maintaining the integrity of political subdivisions or providing for compact districts of contiguous territory. Id. at 578-79, 84 S.Ct. at 1390-91.

The Supreme Court has further indicated that "minor deviations from mathematical equality among state legislative districts 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 v. Cummings, 412 U.S. 735, 745, 93 S.Ct. 2321, 2327 (1973). A plurality of the Court in Brown v. Thomson explained this rule in more precise terms, stating that, as a general matter, "an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations" and, therefore, is insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment. 462 U.S. 835, 842, 103 S.Ct. 2690, 2696 (1983). In contrast, a plan with larger population disparities creates a prima facie case of discrimination and thus must be justified by the state. Id. at 842-43, 103 S.Ct. at 2696. The "ultimate inquiry," the plurality explained, is "whether the

legislature's plan 'may reasonably be said to advance a rational state policy' and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.'" Id. at 843, 103 S.Ct. at 2696 (quoting Mahan v. Howell, 410 U.S. 315, 328, 93 S.Ct. 979, 987 (1973)).

As this court stated in ruling on the defendant's first motion to dismiss, this so-called "ten percent rule" is not a bright-line test for determining the constitutionality of a reapportionment plan, thus foreclosing one person, one vote challenges to any plan with a maximum population deviation of less than 10%. Rather, as the Fourth Circuit has explained, "[t]he 10% *de minimis* threshold . . . serves as the determining point for allocating the burden of proof in a one person, one vote case." Daly v. Hunt, 93 F.3d 1212, 1220 (4th Cir. 1996). That court summarized the rule as follows:

A maximum deviation of greater than 10% automatically establishes a *prima facie* violation of the one person, one vote principle. If the plaintiff establishes this level of disparity in population among the districts, the burden of proof shifts to the state to justify the deviations by showing a rational and legitimate state policy for the districts. On the other hand, if the maximum deviation is less than 10%, the population disparity is considered *de minimis* and the plaintiff cannot rely on it alone to prove invidious discrimination or arbitrariness. To survive summary judgment, the plaintiff would have to produce further evidence to show that the apportionment process had a "taint of arbitrariness or discrimination."

Id. (quoting Roman v. Sincock, 377 U.S. 695, 710, 84 S.Ct. 1449, 1458 (1964)).

Both of the state legislative reapportionment plans challenged in this case--the state House plan and the 2002 state Senate plan--have maximum population deviations of 9.98%. Because the maximum deviation in each instance is less than 10%, the ten percent rule applies. Accordingly, while the plaintiffs' one person, one vote challenge is not entirely foreclosed, they bear the burden of rebutting the presumption that the plans were the result of "an honest and good faith effort by the state to construct districts . . . as nearly of equal population as is practicable." Reynolds, 377 U.S. at 577, 84 S.Ct. at 1390.

In order to rebut this presumption, the plaintiffs must "produce further evidence to show that the apportionment process had a 'taint of arbitrariness or discrimination.'" Daly, 93 F.3d at 1220 (quoting Roman, 377 U.S. at 710, 84 S.Ct. at 1458). Alternatively, some courts have indicated that plaintiffs can satisfy this burden by showing that population deviations were not caused by the promotion of legitimate state policies, but rather resulted solely from the promotion of an unconstitutional or irrational state policy. See, e.g., Montiel v. Davis, 215 F. Supp.2d 1279, 1285-86 (S.D. Ala. 2002) (three-judge court); Marylanders for Fair Representation, Inc. v. Shaefer, 849 F. Supp. 1022, 1032 (D. Md. 1994) (three-judge court).

Here, the plaintiffs attempt to rebut the presumption of constitutionality by urging that the deviations in the state House plan and the 2002 state Senate plan resulted from an illegitimate purpose of increasing Democratic legislative power, so long as the maximum population deviation remained less than 10%. However, the parties dispute whether political considerations, as opposed to protection of incumbents and other concerns, were the cause of the deviations and whether the plan drafters considered 10% to be a "safe harbor." Indeed, both the plaintiffs and the defendant have brought forward significant evidence on these issues.

The parties also dispute whether a showing that plan drafters sought to maximize partisan gain within a $\pm 5\%$ population window can rebut the presumption of constitutionality. The defendants have cited cases from other courts, including one within this circuit, suggesting that the use of a 10% population window is not an illegitimate objective in reapportionment. See, e.g., Montiel, 215 F. Supp.2d at 1286; Marylanders, 849 F. Supp. at 1034. They also cite cases indicating that politics is an inherent part of the reapportionment process and, therefore, cannot constitute an illegitimate objective. See, e.g., Gaffney, 412 U.S. at 753, 93 S.Ct. at 2331; Cecere v. County of Nassau, 274 F. Supp.2d 308, 313-15 (E.D.N.Y. 2003). However, the plaintiffs counter that the defendant's proposed rule would, in effect, create a 10%

"safe harbor" and thereby circumvent the standard set forth by Reynolds, i.e., that states must "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." 377 U.S. at 577, 84 S.Ct. at 1390. Additionally, the plaintiffs point out that one district court declared a reapportionment plan invalid because, *inter alia*, its drafter's primary objective was "to construct a map with a population deviation within the 'target' of less than 10%, regardless of the practicality of reaching a lower percentage of population deviation." Hulme v. Madison County, 188 F. Supp.2d 1041, 1051 (S.D. Ill. 2001).

The court finds that these arguments present complicated factual and legal questions, in part because the district courts appear to be divided and the Supreme Court has not addressed the specific issues presented in this case. The court thus concludes that summary judgment cannot be granted to any party, as it is necessary to develop the exact facts to be applied. Accordingly, the court has DENIED the defendant's and the plaintiffs' motions for summary judgment with respect to the one person, one vote challenge to the state House plan and the 2002 state Senate plan.

III. Conclusion

For the foregoing reasons, the defendant's and the plaintiffs' motions for summary judgment have been DENIED with respect to the plaintiffs' one person, one vote claim challenging the congressional reapportionment plan, the Georgia House of Representatives reapportionment plan, and the 2002 Georgia State Senate reapportionment plan.

This 17th day of December, 2003.



CHARLES A. PANNELL, JR.
United States District Judge
for the court