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U.S. DISTRICT COURT
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AUG 20 2003

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

W. H. ...
Deputy Clerk

SARA LARIOS, et al.,)	
)	
Plaintiffs,)	CIVIL ACTION
)	NO. 1:03-CV-0693-CAP
v.)	(Three-Judge Court)
)	
GEORGE E. "SONNY" PERDUE,)	
et al.,)	
)	
Defendants.)	
)	

**DEFENDANTS PERDUE, COLEMAN, AND COX'S
MOTION TO DISMISS FIRST AMENDED COMPLAINT
PURSUANT TO FED. R. CIV. P. 12(b)(6)**

COME NOW Defendants George E. "Sonny" Perdue, Terry Coleman, and
Cathy Cox and, in accordance with Federal Rule of Civil Procedure 12(b)(6),
hereby move that the Court dismiss Plaintiffs' First Amended Complaint for
failure to state a claim upon which relief can be granted. A brief in support of this
Motion is being filed currently herewith for the Court's consideration.

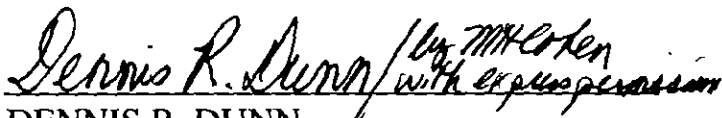
Respectfully submitted,

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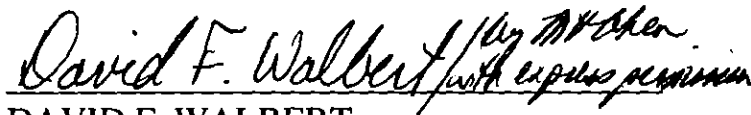
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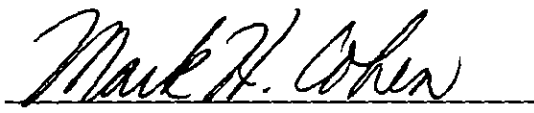
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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.


MARK H. COHEN

CERTIFICATE OF SERVICE


This is to certify that I have this day served or caused to be served a copy of the within and foregoing **DEFENDANTS PERDUE, COLEMAN, AND COX'S MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)**, prior to filing the same, by first class mail, with adequate postage addressed thereon, properly addressed to:

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This 20th day of August, 2003.



Mark H. Cohen

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W. Rose

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FOR THE NORTHERN DISTRICT OF GEORGIA
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SARA LARIOS, et al.,)	
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Plaintiffs,)	CIVIL ACTION
)	NO. 1:03-CV-0693-CAP
v.)	(Three-Judge Court)
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GEORGE E. "SONNY" PERDUE,)	
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)	
Defendants.)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS PERDUE, COLEMAN, AND COX'S
MOTION TO DISMISS FIRST AMENDED COMPLAINT
PURSUANT TO FED. R. CIV. P. 12(b)(6)**

I. STATEMENT OF FACTS AND PROCEEDINGS

Plaintiffs filed their Complaint for Declaratory, Injunctive, and Other Relief on March 18, 2003, challenging the legality of Georgia's current Congressional, House, and Senate redistricting plans. In this original Complaint, Plaintiffs attacked Georgia's Congressional and legislative redistricting plans by alleging in four separate counts as follows: (1) a violation of equal protection by contending that all three redistricting plans violate the principle of one person-one vote; (2) a violation of the First Amendment by contending that the state legislative plans "packed" districts that politically lean to the Republican Party; (3) a violation of

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Art. I, § 2 of the United States Constitution because each district of the congressional redistricting plan does not have the same exact number of people; and (4) a violation of 2 U.S.C. § 2 because the congressional districts are not “compact” or “contiguous.” Plaintiffs also filed an application for the convening of a three-judge court.

Defendants Perdue, Cox, and Coleman (“the Perdue Defendants”) filed a motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6); a motion to stay consideration of the challenge to the State Senate plan pending the resolution of the Georgia v. Ashcroft¹ litigation, initiated by the State of Georgia under Section 5 of the Voting Rights Act of 1965 in the United States District Court for the District of Columbia; and a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(7) or, in the alternative, to join Lieutenant Governor Mark Taylor as a party defendant. Defendant Eric Johnson filed an Answer to the Complaint admitting most of the substantive allegations.

Given what the Perdue Defendants believed were insubstantial allegations, they questioned the requirement of the appointment of a three-judge court in this case. Defendant Johnson supported the convening of a three-judge court. The then-single judge assigned to this case held a hearing on June 18, 2003, to consider

¹ See Georgia v. Ashcroft, 123 S. Ct. 2498 (2003).

the Perdue Defendants' motions and whether a three-judge court should be convened. Given Defendant Johnson's continued support for Plaintiffs' positions in his Answer, his responses, and in the Initial Joint Preliminary Report, the Perdue Defendants moved shortly before the hearing to realign Defendant Johnson as a party plaintiff.²

Following the hearing, an Order was issued on June 19, 2003, concluding that this case falls within the classes of cases that must be heard by a three-judge district court, and that all pending motions would be deferred for consideration by that Court. On July 3, 2003, the Three-Judge Court ordered that the parties file supplemental memoranda addressing four questions. The Perdue Defendants filed their supplemental memorandum on July 17, 2003. In an apparent effort to "cure" some of the deficiencies existing in their original Complaint as well as in response to the Court's July 3 inquiries, Plaintiffs filed a Motion for Leave to Amend Complaint on July 31, 2003. However, six days later, after receiving a letter from Defendant Johnson's counsel "consenting" to the amendment, Plaintiffs withdrew their Motion for Leave to Amend Complaint and instead filed their First Amended

² Defendant Johnson does not oppose this realignment. See LR 7.1B, NDGa.

Complaint.³

The amendments: (1) add a factual allegation in an attempt to bolster Count One of the original Complaint, which appears to assert that violations of the one-person, one-vote principle have occurred in all three redistricting plans due to disparities in voting age populations, registered voters, and actual voters in individual districts (Am. Compl. ¶ 76); (2) add the race of each named Plaintiff, add a factual allegation, and amend Count One to assert that the redistricting of the Georgia State Senate constituted a *racial* gerrymander (while still maintaining their previous claim that the same redistricting plan was the result of a *political* gerrymander) (Am. Compl. ¶¶ 7-36, 77, 92, 95-6); (3) in obvious response to the Court's second question in its July 3, 2003 Order, add factual allegations that "the particular combination" of multi-member and single-member districts in the Georgia House plan was used to preserve Democratic incumbents (Am. Compl. ¶¶ 78-80); and (4) amend Count Four to allege that the congressional redistricting plan somehow violates Article I, § 2 of the United States Constitution because it

³ Although Plaintiffs obtained consent for the amendment from the party who filed a responsive pleading, they did not obtain permission of the Court or consent of any "adverse party" as required by Rule 15(a), Fed. R. Civ. P. Therefore, it could be argued that Plaintiffs have failed to comply with Rule 15(a) prior to filing their First Amended Complaint. This Court could, of course, enter an order permitting the amendment to remove any procedural ambiguity concerning the appropriateness of its filing.

purportedly “dictates election outcomes” through “a carefully crafted gerrymander” thereby exceeding the State’s authority to regulate the “time, places, and manner of congressional elections” (Am. Compl. ¶¶ 105-7).

As discussed below, the proposed amendments do nothing to save the original Complaint from dismissal for failure to state a claim upon which relief can be granted.

II. ARGUMENT AND CITATION OF AUTHORITIES⁴

A. Plaintiffs continue to fail to allege a prima facie claim of population inequality for either the Georgia House of Representatives or the Senate redistricting plans.

The Perdue Defendants incorporate their prior legal arguments made in their original motion to dismiss and reply on this issue. See Br. in Supp. of Defs. Mot. To Dismiss Claims, April 17, 2003, at 3-8; Reply Br. in Supp. of Defs. Mot. To

⁴ Aside from the few changes to the original Complaint discussed in more detail herein, Plaintiffs’ First Amended Complaint is substantially similar to their original Complaint. Accordingly, the Perdue Defendants will focus this brief on these new allegations and adopt and incorporate herein by reference all of their earlier arguments contained in the following briefs, which apply to the portions of Plaintiffs’ First Amended Complaint which have remain unchanged from their original Complaint: (1) Brief in Support of [the Perdue] Defendants’ Motion to Dismiss Plaintiffs’ Claims Against the Redistricting Plans for Congress and the House of Representatives (filed 4/17/03), (2) Reply Brief of the Perdue Defendants’ Motion to Dismiss Claims (filed 6/17/03), (3) The Perdue Defendants’ Supplemental Memorandum of Law in Response to Court’s Order of July 3, 2003 (filed 7/17/03), and (4) Reply Memorandum of the Perdue Defendants Pursuant to Court’s Order of July 3, 2003 (filed 8/8/03).

Dismiss Claims; June 17, 2003, at 3-10. The Equal Protection Clause requires that representatives to an elected body be drawn from districts of substantially equal population. Reynolds v. Sims, 377 U.S. 533, 568 (1964). However, because state elections are not subject to the explicit commands of the U. S. Constitution regarding federal elections, they are not held to a standard of absolute population equality. If the maximum variation between districts exceeds a certain threshold, then a state is required to justify the variation by introducing evidence of legitimate state concerns. See, e.g., Mahan v. Howell, 410 U.S. 315, 329-30 (1973) (upholding 16.4% total deviation from ideal district size).

The Supreme Court has expressly stated that *below* a certain deviation threshold, a plaintiff has failed to establish a *prima facie* case and the districting body will not be required to justify minor deviations. Gaffney v. Cummings, 412 U.S. 735, 745 (1973). The Court has indicated that threshold is 10%. Brown v. Thompson, 462 U.S. 835, 843 (1983); Connor v. Finch, 431 U.S. 407, 418 (1977).

As previously stated, the fact that the total deviation in both the House and Senate plans is under 10% (from a -4.99% to a +4.99% in both the House and Senate plans) falls within the category of “minor deviations” and is presumptively constitutional, a presumption which can only be rebutted by a plaintiff establishing

an *independent* constitutional deficiency. Brown, supra; Daly v. Hunt, 93 F.2d 1212, 1220-21 (4th Cir. 1996).

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. A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified by the State.

Brown, 462 U.S. at 842-43. Plaintiffs' attempt to "round up" a total deviation of less than 10% to somehow equal 10% has no basis in law or in fact. See, e.g., White v. Regester, 412 U.S. 755, 763 (1973) (population differential of 9.9% fails to make out a *prima facie* case of a Fourteenth Amendment violation); Montiel v. Davis, 215 F. Supp. 2d 1279, 1282 (S.D. Ala. 2002) (three-judge court), aff'd, No. 02-12803, 2003 U.S. App. LEXIS 9051 (11th Cir. Feb. 21, 2003) (overall population deviation of state senate districts of 9.78% and of state house districts of 9.93% was presumptively constitutional); Holloway v. Hechler, 817 F. Supp. 617, 619 (S.D. W. Va. 1992) (three-judge court), aff'd, 507 U.S. 956 (1993) (total deviation of 9.97% in state house plan fails to establish a *prima facie* case of a violation of equal protection).

Plaintiffs would have this Court substitute for the 10% threshold a new, amorphous standard whereby a person might state a *prima facie* case if a state came "close" to the 10% threshold. Plaintiffs incorrectly assume that there is

something wrong with a state coming close to the 10% limit, even though staying within that limit. Plaintiffs' approach would destroy the whole purpose behind having a reliable guideline for states to follow. The 10% threshold serves a critical function by providing an objective standard for both legislatures and courts to follow. It provides a clear distinction between state political decisions and *bona fide* federal constitutional issues.

If a state stays within the 10% guideline, legislatures can know that their actions presumptively satisfy the Equal Protection Clause. If Plaintiffs were correct and that clear guideline became a grey band of uncertainty, the goal of allowing states political flexibility while keeping their political decisions out of the courts would be lost. Legislatures are properly entitled to know, in advance, the permissible standards that control redistricting decisions. As long as they stay within those standards, persons like Plaintiffs here should be barred from seeking a new round of redistricting by second-guessing the legislature's decisions.

Plaintiffs' amendment to Count One of their Complaint tries to bolster their equal protection challenge by now asserting that there is a violation of the one-person, one-vote principle due to "very substantial disparities in voting age population, citizens of voting age, registered voters and individuals actually casting votes, thereby giving differing voting power to voters in different parts of the

state.” (Am. Compl. ¶ 76.) Plaintiffs’ suggestion that redistricting legislation may be unconstitutional not because of supposed population inequality, but because of disparities in *other* demographic variables, is baseless as a matter of law and implausible as a matter of fact. Factually, it is impossible for a state to draw districts that would maintain substantial equality (within the 10% overall deviation rule) with regard to population, voting age population, registered voters, *and* “individuals actually casting votes.” In census tracts with proportionally older populations, for example, there are many more persons of voting age, percentage wise, than in areas where there are many younger persons and minors. There are also substantial variations from census tract to census tract in the percentage of persons who are registered to vote and those actually voting in a particular election. It would be impossible to achieve equality across all of these variables. That Plaintiffs would add these allegations into their First Amended Complaint underscores just how baseless their one-person, one-vote argument is under the law.

As a matter of law, there is no constitutional or statutory requirement that legislative districts must be “equal” with respect to voting age population, registered voters, or actual voters. Almost 40 years ago, the Supreme Court laid this issue to rest in Burns v. Richardson, 384 U.S. 73 (1966). The Court there

discussed what statistics were to be used in passing on one-person, one-vote claims. Burns unequivocally approved the use of census population data. Id. at 91. To the extent that Plaintiffs claim that a state must create equality between registered voters and other categories, they have the constitutional rule exactly backwards. States may satisfy the constitutional one-person, one-vote requirement when they redistrict based upon census numbers. They may *also* satisfy the one-person, one-vote rule if they redistrict based on other demographic factors, such as the number of citizens or the number of registered voters. But that is a decision for the states to make. Id. at 91-92.

Neither in Reynolds v. Sims nor in any other decision has this Court suggested that the States are required to use aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. *The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.* Unless the choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in Reynolds v. Sims is to be measured thereby.

Id. at 92 (citations and footnote omitted; emphasis added).

Under Burns and all other Supreme Court decisions, a state will satisfy its constitutional responsibility when it redistricts based on total population. It may also satisfy those responsibilities by redistricting based on registered voters, but it

has no obligation to do so. The failure to have population equality among registered voters – or voting age population – states no claim. In Abrams v. Johnson, 521 U.S. 74 (1997), the last Supreme Court case addressing a population equality challenge, the Court, once again, focused its analysis on total population in the various districts as determined by total census figures. Id. at 98-100. The Supreme Court precedent leaves no room for Plaintiffs’ attempted new theory.

Lower court decisions, of course, are to the same effect. See Daly, 93 F.3d at 1227 (“This is quintessentially a decision that should be made by the state, and not the federal courts, in the inherently political and legislative process of apportionment.”); see also Chen v. City of Houston, 206 F.3d 502, 523 (5th Cir. 2000), cert. denied, 532 U.S. 1046 (2001) (rejecting claim that city was required to use citizen voting age population instead of total population); Garza v. City of Los Angeles, 918 F.2d 763, 773-76 (9th Cir. 1991) (districting based upon voting populations instead of the total population *violated* equal protection).

In the recently decided Ashcroft case, the Supreme Court noted with approval the fact that the State of Georgia utilized total population figures from the decennial census in order to draw up its legislative redistricting plans:

[E]xamining the benchmark plan with the census numbers in effect at the time the State [of Georgia] enacted its plan comports with the one-person, one-vote principle of Reynolds v. Sims, and its progeny.

When the decennial census numbers are released, States must redistrict to account for any changes in shifts of population.

Georgia v. Ashcroft, 123 S. Ct. at 2515 n.2 (citations omitted). Choosing to use the total population figures from the most recent decennial census is constitutionally permissible. Plaintiffs' contention that there is some constitutional flaw in not using some other population measure is groundless.

B. Plaintiffs lack standing to pursue their claim of racial gerrymandering, a claim which itself lacks merit.

Plaintiffs also amended Count One of their original Complaint to now assert that the redistricting of the Georgia State Senate constituted a racial gerrymander (Am. Compl. ¶¶ 92, 95-6), in an obvious attempt to try to latch on an independent constitutional ground to rebut the Senate plan's presumption of constitutionality under the Equal Protection Clause.⁵

As an initial matter, Plaintiffs lack standing to bring an equal protection claim against the current State Senate plan based upon alleged racial gerrymandering. Plaintiffs' own Complaint reveals that the named Plaintiffs reside in 23 of the existing 56 Senate districts (Am. Compl. ¶¶ 7-36.) Of the 13 majority-minority districts in the current state Senate plan, only one Plaintiff resides in any

⁵ As stated in the Perdue Defendants' prior briefs, Plaintiffs' attempt to allege an actual case of political gerrymandering under Davis v. Bandemer, 478 U.S. 109 (1986), fails as a matter of law. See also Section D, *infra*.

of those 13 districts (Georgia Benton in District 2). (Am. Compl. ¶ 10 & Exh. B.) As stated in the Perdue Defendants' Supplemental Memorandum of Law in Response to this Court's July 3, 2003 Order, at 20-21, it is well-established that a plaintiff must reside in an alleged racially gerrymandered district in order to have standing to bring a claim alleging racial gerrymandering. United States v. Hays, 515 U.S. 737, 744-46 (1995).

Moreover, Ms. Benton, the only Plaintiff to reside in a majority-minority district, is an Intervenor in Georgia v. Ashcroft, where she has asserted in sworn pleadings that her voting rights were abridged because of the State's failure to *increase* the number of African-Americans in District 2 in the original Senate redistricting plan, a position which the district court adopted in its original order. Georgia v. Ashcroft, 195 F. Supp. 2d 25, 32, 80-93 (D.D.C. 2002) (three-judge court). That opinion has now been vacated in accordance with the decision of the United States Supreme Court. Georgia v. Ashcroft, 123 S. Ct. 2498, 2517 (2003). For Ms. Benton to contend here that the *increase* in black population in District 2 in the revised Senate plan was some type of racial gerrymander after urging the United States District Court for the District of Columbia that the original Senate plan for District 2 violated the Voting Rights Act because of a *deficiency* in the number of African-American voters is, in a word, suspect. Plaintiffs' attempt to

use Ms. Benton to achieve standing, which all the other named Plaintiffs obviously lack, in order to raise a racial gerrymandering claim should be summarily rejected by this Court.

Even if this Court found that Plaintiffs could overcome their standing hurdle, Plaintiffs' racial gerrymandering claim still would fail as a matter of fact and law. In order to be held to be an unconstitutional racial gerrymander, race must be the "predominant factor" in the drawing of district lines. Miller v. Johnson, 515 U.S. 900, 916 (1995). This was the situation in the 1990's redistricting process in Georgia, when the Department of Justice compelled Georgia to pack more African-Americans into districts in order to increase the number of majority-minority districts and create supermajority percentages, a history discussed in Georgia v. Ashcroft, 123 S. Ct. at 2504-06. In fact, for this very reason, the 1992 Senate redistricting plan was held to be unconstitutional. Johnson v. Miller, 929 F. Supp. 1529, 1543 (S.D. Ga. 1996) (three-judge court).

Unlike the redistricting process in the 1990's, as discussed by the Supreme Court in Ashcroft, the high percentages of African-American voters during the 2001 process were reduced or, in the Court's word, "unpacked." Ashcroft, 123 S. Ct. at 2506-07. This resulted in the Department of Justice and a group of Intervenor, including Ms. Benton, alleging in the Section 5 litigation that there

had been retrogression in the ability of minority voters to elect candidates of their choice. The Supreme Court disagreed, finding that the result of “unpacking” large minority concentrations created more districts where minority voters could in fact elect candidates of choice, because their opportunities for influence were increased. Id. at 2512. The Supreme Court made a specific finding that the “goal” of redistricting in the Georgia State Senate “was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats.” Id. at 2506.

Consequently, while race may have impacted the drawing of Senate districts, it was not the “predominant factor” in the redistricting of the State Senate. Politics was at least an equal, if not a more important factor, than the use of race, as specifically found by the Supreme Court in Ashcroft. See id.; see also Easley v. Cromartie, 532 U.S. 234, 241-42 (2001) (finding that politics, not race, predominated redistricting in North Carolina, thereby defeating a claim of racial gerrymandering). Therefore, Plaintiff cannot possibly maintain a claim of racial gerrymandering in this case.

The frivolity of Plaintiffs’ racial gerrymandering claim is underscored by the fact that Georgia Benton is an intervenor in Ashcroft who, represented by the same Plaintiffs’ counsel and Defendant Johnson’s D.C. counsel in Ashcroft, has

vociferously argued in that litigation that the State of Georgia *diluted* the vote of African-Americans in Senate District 2 in violation of the Voting Rights Act. After arguing that race should have been a greater consideration in the federal court in Washington D.C., Plaintiff Benton, through that same counsel, now tries to maintain here in Georgia that race was in fact “the predominant factor.” This is being alleged while the remainder of Plaintiffs still maintain that it was politics, and not race, that drove the redistricting process.

Plaintiffs’ schizophrenic claim alleging racial discrimination is frivolous on its face and cannot overcome the presumption of constitutionality attached to the Senate plan. Accordingly, Plaintiffs’ racial discrimination claim is subject to dismissal.

C. Plaintiffs’ challenge to multi-member districts is without merit.

Plaintiffs’ original Complaint made an amorphous challenge to the validity of certain unspecified multi-member districts in the Georgia House plan. After this Court’s June 3, 2003 Order asking whether Plaintiffs were, in fact, alleging whether any specific combination of single- and multi-member districts violated equal protection, Plaintiff amended their Complaint to now allege that some non-specified combination of single- and multi-member districts violate one-person, one-vote principles (Am. Compl. ¶ 80) and also operate to preserve Democratic

incumbents but not Republican incumbents (Am. Compl. ¶¶ 88-89). Once again, Plaintiffs' amendments cannot save their Complaint from dismissal.

"[M]ultimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State." White, 412 U.S. at 765; see also Whitcomb v. Chavis, 403 U.S. 124, 158-59 (1971); Fortson v. Dorsey, 379 U.S. 433, 436 (1965). Plaintiffs have not alleged that multi-member districts were used intentionally to minimize the voting strength of any *racial* minority, the unique circumstance where courts have found them to be invalid. See Rogers v. Lodge, 458 U.S. 613, 617 (1982); White, 412 U.S. at 765-66.⁶

Plaintiffs are parroting the identical argument rejected in Holloway v. Hechler, 817 F. Supp. 617 (S.D. W. Va. 1992) (three-judge court). In Holloway, the plaintiffs alleged

that [the House plan] apportions 100 Delegate seats among 23 multi-member districts and 33 single-member districts for the purpose of maximizing Democratic, and minimizing Republican, political and electoral strength, which result would have been avoided had [the House plan] redistricted the State into 100 single-member districts, and that its enactment constitutes invidious, partisan gerrymandering to discriminate against Republican voters, including the plaintiffs, by

⁶ Plaintiffs could hardly allege any racial animus with respect to the creation of the multi-member districts in the House, since they have been held in Georgia v. Ashcroft, 195 F. Supp. 2d at 76, 196-200, not to have the purpose or effect of depriving minority citizens the right to vote under the Voting Rights Act.

diluting, minimizing and canceling out their voting and political strength and that of other Republican voters in given districts as well as in the State as a whole.

Id. at 620. The court, citing Whitcomb and Fortson, rejected the challenge. Id. at 624-25.

In addition, Plaintiffs' attempt to raise a constitutional claim based upon the alleged protection of incumbents must also fail. The Supreme Court has recognized that the protection of incumbents in redistricting is a legitimate political goal that does not rise to any constitutional violation unless it is used as a pretext to purposely dilute minority voting rights. Easley, 532 U.S. at 248; Abrams, 521 U.S. at 84; Bush v. Vera, 517 U.S. 952, 964 (1996).

Consequently, Plaintiffs' challenge to the use of multi-members districts in the House plan fails to state a claim. See also Perdue Defs. Br. in Supp. of Mot. to Dismiss, filed Apr. 17, 2003, at 24-26; Perdue Defs. Reply Br. in Supp. of Mot. to Dismiss, filed June 17, 2003, at 10-12.

D. Plaintiffs' amended Art. I, § 2 challenge lacks merit and fails on its face to allege a political gerrymandering claim concerning the Congressional redistricting plan.

Plaintiffs' final amendments to their Complaint merely supplement their prior allegation that the Congressional redistricting plan violates Art. I, § 2 of the U. S. Constitution, this time alleging that the consideration of politics in the

drawing of the plan exceeds the state's authority to regulate the time, place, and manner of congressional elections, and the result of the plan somehow dictates the outcome of the congressional elections. (Am. Compl. ¶¶ 105-7.) These amendments border on the absurd.

As stated in the Perdue Defendants' earlier briefs and in their response to this Court's July 3, 2003 Order, in order to establish a political gerrymandering claim which could survive a motion to dismiss, Plaintiffs would have to show not only proof of intentional discrimination against an identifiable political group but also a significant discriminatory impact upon that group's ability to function effectively. Davis v. Bandemer, 478 U.S. 109, 127 (1986). There must be an allegation and at least initial showing of a political party's exclusion from the political process before a court will entertain a political gerrymandering claim. Id. at 131.

For Plaintiffs to claim that the State of Georgia has violated Art. I, § 2 by the enactment of the existing Congressional plan because of its negative impact upon Republican voters is the height of folly. Republicans controlled the congressional delegation prior to redistricting and control it afterwards, occupying eight of 13 seats. In all six congressional districts in which Republican incumbents

offered for election, a Republican incumbent was victorious.⁷ In five district elections where no incumbent offered for election, the Republican nominee won twice.⁸ Other three-judge courts have not hesitated to dismiss political gerrymandering cases at this stage when the impact upon a particular political party was significantly greater than the impact here in Georgia. See Duckworth v. State Admin. Bd. of Election Laws, 213 F. Supp. 2d 543 (D. Md. 2002) (three-judge court), aff'd, 332 F.3d 769 (4th Cir. 2003); O'Lear v. Miller, 222 F. Supp. 2d 850 (E.D. Mich.) (three-judge court), aff'd, 123 S. Ct. 512 (2002); Holloway v. Hechler, 817 F. Supp. 617 (S.D. W.Va. 1992) (three-judge court), aff'd, 507 U.S. 956 (1993); Pope v. Blue, 809 F. Supp. 392 (W.D.N.C.) (three-judge court), aff'd, 506 U.S. 801 (1992); Republican Party of Virginia v. Wilder, 774 F. Supp. 400 (W.D. Va. 1991) (three-judge court); Badham v. March Fong Eu, 694 F. Supp. 664 (N.D. Cal. 1988), appeal dismissed, 488 U.S. 1024 (1988).

Plaintiffs apparently want this Court to guarantee them additional districts so that they not only control the Congressional delegation, they actually lock the

⁷ Republican incumbents who were victorious in 2002 congressional elections were Jack Kingston, District 1; Johnny Isakson, District 6; John Linder, District 7; Mac Collins, District 8, Charlie Norwood, District 9; and Nathan Deal, District 10. Bob Barr, another incumbent who chose to run against Representative Linder in District 7 rather than in District 11, which contained much of his former territory, lost. Another Republican, Phil Gingrey, won in the District 11 race.

⁸ Republican congressional candidates victorious in open seats were Phil Gingrey, District 11, and Max Burns, District 12.

opposing Democratic Party out of the process altogether. The undisputed truth is that the Republican Party of Georgia is competitive with the Democratic Party in Congressional, House, and Senate elections. They are not locked out or excluded from the political process and, therefore, can show no discriminatory impact so as to establish a Davis v. Bandemer claim with respect to the Congressional, Senate, or House plans. What was stated just two months ago by the Fourth Circuit Court of Appeals in Duckworth is equally applicable here:

As a consequence of the Court's holding in Davis, no plaintiff alleging an unconstitutional political gerrymander can survive a motion to dismiss, such as that Duckworth faces, by simply alleging that political gerrymandering has occurred. Rather, he must plead facts adequate to prove Davis' two required elements: that there has been intentional discrimination against an identifiable group and an actual discriminatory effect on that group.

Simple, formulaic restatements of Davis' two required elements cannot sustain a suit alleging unconstitutional political gerrymandering. Just as in the antitrust context where we have said that "the pleader must provide, whenever possible, some details of the time, place, and alleged effect of the conspiracy[,]" . . . , so too here must Duckworth do more than merely offer conclusory charges that there has been intentional discrimination against an identifiable group and that that group has suffered discriminatory effect under [the laws of Maryland].

Duckworth, 332 F.3d at 774-75 (citation omitted).

Accordingly, Plaintiffs' conclusory allegations concerning a violation of Art. I, § 2 fail to raise an actionable claim of political gerrymandering with respect to the Congressional redistricting plan and should be dismissed.

III. CONCLUSION

Plaintiffs First Amended Complaint fails to state a *prima facie* case of a violation of one-person, one-vote principles, fails to state either political or racial gerrymandering claims, fails to state a claim against Georgia's multi-member districts in its House plan, and fails to state a claim under 2 U.S.C. § 2c. For the reasons stated herein, as well as for the reasons previously stated in the Perdue Defendants' briefs in support of their original motions to dismiss, the Perdue Defendants respectfully urge this Court to dismiss the First Amended Complaint for failure to state a claim upon which relief can be granted.

This 20th day of August, 2003.

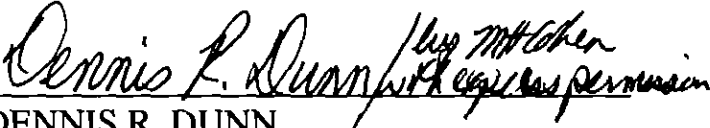
Respectfully submitted,

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(Signatures continued on next page)

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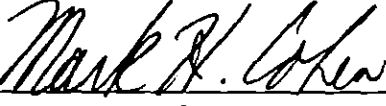
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Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.


MARK H. COHEN