

ORIGINAL

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

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

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS PERDUE, COLEMAN AND COX'S MOTION TO DISMISS PLAINTIFFS' CLAIMS AGAINST THE REDISTRICTING PLANS FOR CONGRESS AND THE GEORGIA HOUSE OF REPRESENTATIVES PURSUANT TO FED. R. CIV. P. 12(b)(6)

COME NOW PLAINTIFFS in the above-styled case and file their Brief in Opposition to the Motion to Dismiss Plaintiffs' Claims Against the Redistricting Plans for Congress and the Georgia House of Representatives filed by Defendants Perdue, Coleman and Cox ("Movants") under Federal Rule of Civil Procedure 12(b)(6), showing the Court as follows:

I. STATEMENT OF THE CASE

In this action, Plaintiffs challenge the validity of both Georgia's Congressional Representative districts ("the current Congressional redistricting

plan”) and the current plans for the Georgia Senate and the Georgia House of Representatives (collectively, “the current state legislative redistricting plans”). Plaintiffs assert three claims: (1) the districts contained in the current Congressional and state legislative redistricting plans violate Article IV, § 2 of the United States Constitution and the Fourteenth Amendment to United States Constitution in that the disproportionate sizes of the districts and the use of multimember districts in the current House redistricting plan districts violate the constitutional principle of “one person, one vote;” (2) the current Congressional redistricting plan violates Article I, § 2 of the United States Constitution and the provisions of 2 U.S.C. §§ 2a, 2b and 2c; (3) the districts contained in the current Congressional and state legislative redistricting plans impinge upon the freedom of association rights guaranteed by the First Amendment of the United States Constitution by penalizing Republican voters and Representatives solely because of their party affiliation and political beliefs. Plaintiffs maintain that because the continued use of the districts in the current Congressional and state legislative redistricting plans cannot be justified as furthering any legitimate state interest, the continued use of the plans is unconstitutional.

Plaintiffs request that the Court declare the plans unconstitutional and order injunctive relief, prohibiting further qualifications or elections from being

conducted under the current Congressional and state legislative redistricting plans. Plaintiffs further request that, in the event that constitutional plans are not enacted and precleared under 42 U.S.C. § 1973c in sufficient time for 2004 candidate qualifying period and elections to proceed according to the statutory schedule, the Court formulate and implement redistricting plans for Georgia's Congressional and state legislative districts that comport with constitutional and statutory requirements. Finally, as Plaintiffs bring their constitutional claims pursuant to 42 U.S.C. § 1983, Plaintiffs seek their costs and attorney's fees pursuant to 42 U.S.C. §1988.

Movants have moved to dismiss Plaintiffs' Complaint under Fed. R. Civ. P. 12(b)(6), alleging that the complaint fails to state a claim upon which relief may be granted. In particular, Movants contend that Plaintiffs cannot prevail on their one person, one vote claim as to the Congressional plan because, in the Movants' estimation, the population deviation is "de minimis" and cannot prevail on their claim as to the state House plan because the population deviation is less than 10% overall. Additionally, Movants conclude that Plaintiffs' complaint for partisan gerrymandering should be dismissed because, at this moment, Republicans constitute the majority of Georgia's Congressional delegation and the Georgia state Senate. Movants next contend that because there are 13 Congressional "districts,"

no matter how little those areas resemble a common-sense notion of “districts,” Plaintiffs cannot allege a violation of 2 U.S.C. 2c. Movants seek dismissal of Plaintiffs’ challenge to the sporadic use of multimember districts in the House plan, mistakenly contending that the claims alleged by these Plaintiffs with respect to such districts have either (1) already been litigated in Georgia’s Section 5 preclearance case before the three-judge court in the District Court of the District of Columbia or (2) already been rejected by the Supreme Court. Finally, Movants incorrectly assert that the Plaintiffs have standing only to challenge the districts in which they reside.

Under well-established law, each argument in Movants’ motion to dismiss fails. In order to be entitled to dismissal, the standard which Movants must meet (but never mention), is quite high. Because Movants have failed to meet that standard, their motion to dismiss under Rule 12(b)(6) should be denied.

II. STATEMENT OF FACTS

Every ten years, the United States Census Bureau conducts the Decennial Census. The 2000 United States Decennial Census (“the 2000 decennial census”) documented a significant population growth in Georgia, entitling the state to two additional Congressional districts, pursuant to 2 U.S.C. § 2a. Complaint, ¶ 43. In addition increased population, the 2000 decennial census also showed material

geographic shifts in the population between Georgia's Congressional and state legislative districts over the past decade. Complaint, ¶¶ 44, 57.

The increase in population and the geographic shifts of population meant that the number of persons represented by each Congressional or state legislative member was not equal; therefore, after receipt of the 2000 decennial census figures, the General Assembly was required to redistrict Georgia's Congressional and state legislative districts. Complaint, ¶¶ 44, 57.

The significant increase in northern Georgia's population, excluding urban Fulton County and DeKalb County, and the movement of population from southern to northern Georgia, meant that the northern part of the state would have more state legislative seats and the southern portion of the state would have fewer legislative seats, if those seats were apportioned in accordance with the constitutional mandate of one person, one vote. Complaint, ¶ 58. This trend of proportional population growth, as well as the shift of population from southern Georgia to northern Georgia, have been in process for at least five decades and are expected to continue through this decade. Complaint, ¶59. The effect of overpopulating the northern Georgia districts, i.e., the dilution of the votes of Plaintiffs and other citizens of those districts, was well-known to the Democratic leadership of the 2001-2002 General Assembly and to then-Governor Roy E.

Barnes. Complaint, ¶ 59.

Furthermore, the technology and statistics available to the state of Georgia in the state legislative redistricting process allowed the drawing of Congressional and state legislative districts with minimal population deviations. Complaint, ¶¶ 48, 69. In fact, alternative Congressional redistricting plans were available to the General Assembly during 2001 which proved that one person deviations were not only possible but were easily attained and therefore practicable. Complaint, ¶ 49. Likewise, state legislative redistricting plans were available to the General Assembly, (1) proving lower population deviations were easily attained and (2) distributing state legislative seats geographically, according to population figures. Complaint, ¶ 70. However, the leadership in the 2001-2002 General Assembly and then-Governor Barnes systematically and intentionally used their knowledge of past and anticipated future growth to identify fast-growing state legislative districts and slow or no growth districts, then overpopulated the fast-growth districts and underpopulated the slow-growth districts. Complaint, ¶ 71.

Furthermore, some Plaintiffs were assigned to single-member House districts and therefore have only one Representative upon whom they can call and who can speak for them in the Georgia House of Representatives. However, other citizens have 2, 3 or even 4 Representatives to whom they can turn for assistance

and who speak for them in the Georgia House of Representatives. Complaint, ¶¶ 65, 67, 68 and 87.

Finally, all Plaintiffs were assigned to Congressional Districts which do not comport with the requirements of 2 U.S.C. § 2. The “districts” are simply amalgamations of census geography or blocs bearing no identifiable relationship to any geographic entity. They are neither compact nor contiguous, were created solely for partisan political purposes, and fail to have the minimum rational geographic or representational basis to constitute a single member district as contemplated by 2 U.S.C. § 2. Complaint, ¶ 102.

There is no legitimate public policy or governmental purpose supported or furthered by the deviation from ideal population in any of the districts; the intentional overpopulation of perceived “Republican-leaning districts;” the use of sporadic multi-member House districts; the failure to adhere to 2 U.S.C. § 2. Complaint, ¶¶ 55, 7, 91, 96.

III. ARGUMENT AND CITATION OF AUTHORITIES

A. Movants’ Motion to Dismiss Fails to Meet the Standard for Such Motions Under 12(b)(6) and Should Therefore Be Denied.

In considering Movants’ Motion to Dismiss under 12(b)(6), the Court must apply a rigorous test, never once referenced by Movants in their motion. A complaint “should not be dismissed for failure to state a claim unless it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *In re Johannessen*, 76 F.3d 347, 349 (11th Cir.1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984) (citing *Conley*, 355 U.S. at 45-46, 78 S.Ct. at 101-02, 2 L.Ed.2d 80 (1957)); *Lopez v. First Union Nat'l Bank of Fla.*, 129 F.3d 1186, 1189 (11th Cir.1997); *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir.1992). In considering a motion to dismiss, the Court may look only to the pleadings, Fed. R. Civ. P. 12(b); *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510 (11th Cir. 1993), must "accept all allegations in the complaint as true and construe those allegations in the light most favorable to the plaintiff." *Lopez v. First Union Nat'l Bank of Fla.*, 129 F.3d 1186, 1189 (11th Cir.1997). See also *Cooper v. Pate*, 378 U.S. 546, 546, (1964); *Powell v. United States*, 945 F.2d 374, 375 (11th Cir. 1991); *Conner v. Tate*, 130 F. Supp. 2d 1370, 1373 (N.D. Ga. 2001).

The purpose of a Rule 12(b)(6) motion is to determine whether the plaintiff's complaint adequately states a claim for relief. The motion concerns only the complaint's legal sufficiency; the issue is not whether the plaintiff will ultimately prevail, but "whether the claimant is entitled to offer evidence to support the claims." *Little v. City of North Miami*, 805 F.2d 962, 965 (11th Cir.1986) (citation

omitted). See 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (2d ed. 1990)(Rule 12(b)(6) is not a procedure for resolving factual questions or for addressing the merits of the case.) Thus, the "threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low," *Quality Foods de Centro Am. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 994 (11th Cir.1983), and consequently, a motion to dismiss under Rule 12(b)(6) is viewed with disfavor and rarely granted. *Gasper v. La. Stadium & Exposition Dist.*, 577 F.2d 897, 900 (5th Cir. 1978);¹ *Woodham v. Fed. Transit Admin.*, 125 F. Supp. 2d 1106, 1108 (N.D. Ga. 2000).

In their Motion to Dismiss, Movants do not argue the sufficiency of the complaint but instead improperly argue ask the Court to weigh the merits of Plaintiffs' claims. For that reason alone, Movants' motion to dismiss under Rule 12(b)(6) should be denied. Furthermore, as discussed below, Plaintiffs have stated valid claims for relief in their Complaint.

B. Plaintiffs Have Stated A Valid Equal Protection Claim Under The Fourteenth Amendment As to Claims Regarding the State House Plan²

¹ The United States Court of Appeals for the Eleventh Circuit adopted as binding precedent the decisions of the United States Court of Appeals for the Fifth Circuit handed down prior to September 30, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

² Although Movants have not moved for dismissal of the State Senate plan under Rule 12(b)(6), they argue in a footnote that the "exact same argument asserted here

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Movants contend that because the apportionment plan for the Georgia House has a total population deviation under 10%, it is presumed to be valid as a matter of law, and Plaintiffs' Equal Protection claim must therefore be dismissed. That argument, however, ignores and distorts the Supreme Court's appreciation of the basic principle of representative democracy, that of one person, one vote.

Under Supreme Court precedent, states are required to "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Every deviation from population equality must advance a rational state interest. While the Supreme Court recognized in *Brown v. Thomson*, 462 U.S. 835 (1983), that "as a general matter" an apportionment plan with a maximum population deviation less than 10% falls into the category of "minor deviations," the Court went on to reaffirm that "the ultimate inquiry . . . is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy.'" 462 U.S. 835, 843 (1983) (emphasis

(continued)

applies equally to the state Senate plan." Movants' Brief, p. 8, fn. 5. Likewise, the same rationale set forth in this section of Plaintiffs' response applies to equally to the Senate plan, and any motion to dismiss the claim against the Senate redistricting plan under Rule 12(b)(6), if asserted, should fail on the same grounds.

added) (citations omitted). *Brown*, therefore, still requires states to prove that population deviations are rational and justified.

Movants' reading of *Brown* as establishing a threshold of 10% before a claim can even be made obliterates the goal of strict population equality (0%) enunciated in *Reynolds*. Indeed, a number of United States District Courts, as well as the Fourth Circuit, have specifically rejected the argument made by Defendants. See *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996); *Cecere v. County of Nassau*, 03-CV-1548, 2003 U.S. Dist. LEXIS 7123, *12-14 (E.D.N.Y. April 23, 2003), (copy attached); *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1047 (S.D. Ill. 2001); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1031-32 (D. Md. 1994); see also, *Licht v. Quattrochi*, 449 A.2d 887 (R.I. 1982) (5% overall deviation invalidated); *Licht v. Quattrochi*, CA No. 82-1494 (R.I.Super.Ct., 1982) (1% deviation appeared to be the limit to the Court); *Farnum v. Burns*, 561 F.Supp. 83 (D.R.I., 1983) (5.6% deviation invalidated); *White v. Crowell*, 434 F.Supp. 1119 (W.D. Tenn., 1977) (political considerations insufficient to justify deviation over 5%.)

In *Daly*, the Fourth Circuit addressed the scope of *Brown* and explained:

The 10% de minimis threshold recognized in *Brown* does not completely insulate a state's districting plan from attack of any type. Instead, the level serves as the determining point for allocating the burden of proof in a

one person, one vote case. . . 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. . . In other words, for deviations below 10%, the state is entitled to a presumption that the apportionment plan was the result of an “honest and good faith effort to construct districts . . . as nearly of equal population as practicable.” *Reynolds v. Sims*, 377 U.S. at 577. However, this is a rebuttable presumption.

Daly, 93 F.3d at 1220 (emphasis added).

In support of its holding, the *Daly* Court also cited the Supreme Court’s decision in *Gaffney v. Cummings*, 412 U.S. 735 (1973), *Daly*, 93 F.3d at 1220. In *Gaffney*, the Supreme Court specifically recognized that “State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment.” *Gaffney*, 412 U.S. at 751.

Similarly, in *Hulme v. Madison County*, 188 F. Supp. 2d 1041 (S.D. Ill. 2001), the United States District Court for the Southern District of Illinois, specifically rejected the assertion that *Brown* established “that an apportionment plan with a maximum population deviation under 10% is immune from Constitutional attack.” *Hulme*, 188 F. Supp. at 1047. Citing *Reynolds*, the *Hulme* court ruled that “a plaintiff may prove a prima facie violation of the Fourteenth Amendment by an apportionment plan with a population deviation of less than 10% if he can produce further evidence to show that the apportionment process had

a taint of arbitrariness or discrimination.” *Hulme*, 188 F. Supp. at 1047 (internal citations and quotations omitted).

Most recently, in *Cecere v. County of Nassau*, 03-CV-1548, 2003 U.S. Dist. LEXIS 7123, *12-14 (E.D.N.Y. April 23, 2003), the United States District Court for the Eastern District of New York also rejected the defendant’s argument that plaintiff’s dilution claim failed simply because the maximum deviation population rate was less than 10%. *Cecere*, 2003 U.S. Dist. LEXIS 7123, at *12-14. The court stated: “[A] plaintiff could, with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below ten percent. To prevail, . . . , the plaintiffs have the burden of showing that the ‘minor’ deviation in the plan results solely from the promotion of an unconstitutional or irrational state policy. *Hulme*, at *13-14 (quoting *Marylanders for Fair Representation, Inc.*, 849 F. Supp. at 1032). In the Section 5 case before the District Court for the District of Columbia, the State of Georgia relied almost exclusively on the contention that all the redistricting plans at issue were drawn for the sole purpose of “increasing Democratic political performance.” It is Plaintiffs’ intention to prove that goal and that such a goal is neither a constitutional nor rational state policy. In fact, in its briefs to the United States Supreme Court, the State of Georgia conceded that fact, noting: “Guaranteeing a particular political result is not a constitutionally

legitimate goal.” See Jurisdictional Statement of the State of Georgia, p. 25 and Brief of Appellant State of Georgia, p. ____.

Given the foregoing, Plaintiffs’ one person, one vote challenge to the Georgia State House plan is viable as a matter of law, and Movants’ Motion to Dismiss should, therefore, be denied.

C. Plaintiffs Have Stated Valid Claims Challenging Georgia’s Congressional Redistricting Plan

Movants further contend that Plaintiffs’ equal protection challenge to Georgia’s congressional redistricting plan fails to state a claim because the maximum population deviation of 72 people is, in Movants’ opinion, “minimal.” This contention is also without merit and contrary to well-established law that even de minimis population deviations in Congressional plans are not permissible without justification if they are avoidable. *Karcher v. Daggett*, 462 U.S. 725, 730, 734 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969); *Vieth v. Pennsylvania*, 195 F. Supp.2d 672 (M.D.Pa. 2002).

Article I, Section 2 of the United States Constitution requires that members of Congress be chosen with equal representation for equal number of people. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). In accordance with this constitutional mandate, the Supreme Court has directed that Congressional districts must be designed so that “as nearly as practicable one man’s vote in a

congressional election is worth as much as another's." *Wesberry*, 376 U.S. at 7-8.

The Supreme Court explained:

The "nearly as practicable" standard requires that the State make a good-faith effort to achieve precise mathematical equality Unless population variances among congressional districts are shown to have resulted, despite such effort, the State must justify each variance, no matter how small [Article I, § 2, therefore] permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."

Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969) (emphasis added). Indeed, "[a]bsolute population equality [is] the paramount objective . . . in the case of congressional districts . . ." *Karcher*, 462 U.S. at 732-33.

To establish an Article I, Section 2 claim, plaintiff bears the burden of proving that "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Karcher*, 462 U.S. at 730-31; *Kirkpatrick*, 394 U.S. at 531 (1969); *Vieth*, 195F. Supp. At 675. Once the plaintiff makes the required showing, then the burden shifts to the defendant to prove "that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher*, 462 U.S. at 730-31. Whether deviations are justified is a fact-intensive inquiry that requires case-by-case attention. *Karcher*, 462 U.S. at 741.

Here, Plaintiffs allege that the technology and statistics available to the General Assembly during the Congressional redistricting process allowed the legislature to draw a plan with a deviation of 0 or 1 person. Complaint, ¶ 49. Plaintiffs also contend that alternative Congressional redistricting plans were available to the General Assembly which proved that one person deviations were not only possible but were easily attained; therefore, such plans were practicable. Complaint, ¶¶ 48-49. Finally, Plaintiffs allege that there were no legitimate state policies, which explain or justify either the deviations or the shapes of the purported districts in the current Congressional redistricting plan.” Complaint, ¶ 55.

Given these pleaded facts, which the Court must accept as true for purposes of Movants’ motion, *Lopez*, 129 F.3d at 1189, Plaintiffs have stated a viable Article I, Section 2 claim. *Karcher*, 462 U.S. at 730-31; *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 676 (M.D. Pa. 2002) (declaring congressional reapportionment plan with a deviation of 19 people unconstitutional and recognizing that any population deviation, “even though relatively small,” shifts to the defendants the burden of proving justification). Whether Movants can establish that the deviations were necessary to establish some legitimate goal—which Plaintiffs contend they cannot—is a factual inquiry that is not appropriately addressed

through a motion to dismiss. See 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (2d ed. 1990).

D. Plaintiffs Have Stated A Valid Partisan Gerrymandering Claim.

Movants concede that the Supreme Court has recognized partisan gerrymandering claims as justiciable and that an overreaching partisan redistricting can violate the equal protection guarantees of the Fourteenth Amendment. *Davis v. Bandemer*, 478 U.S. 109 (1986). Nevertheless, in their Motion to Dismiss, Movants improperly ask this Court to weigh the merits of Plaintiffs' partisan gerrymandering claim, contending that it will be difficult to prevail on such a claim. As noted above, however, whether Plaintiffs will prevail is not an appropriate inquiry at this juncture. *Little*, 805 F.2d at 965. Instead, this Court's inquiry is limited to whether the allegations at issue constitute "a short and plain statement of the claim showing that the pleader is entitled to relief." See Fed. R. Civ. P. 8(a)(2)); Fed. R. Civ. P. 12(b); *GSW, Inc.*, 999 F.2d at 1510.

In order to state a partisan gerrymandering claim, a plaintiff must allege "intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Bandemer*, 478 U.S. at 127.³ In *Bandemer*,

³ Although a majority of the *Bandemer* Court agreed that political gerrymandering claims are justiciable, the Court did not reach a consensus on the issue of what a

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the Supreme Court concluded that “unconstitutional discrimination occurs . . . when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.”

Bandemer, 478 U.S. 132-33. In this case, Plaintiffs assert that the current Congressional and State legislative redistricting plans were designed and intended to discriminate and in fact do discriminate against Republicans on a statewide basis and Republican voters in particular districts. See Complaint, ¶¶ 53, 92.

The gross partisan gerrymandering of the current plans violates democratic values by conceding to the legislature the power of self-selection, and has effectively shut out the Plaintiffs from influencing the political process. The allegations set forth in Plaintiffs' Complaint state a valid partisan gerrymandering claim, and should not be dismissed. See *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 958 (4th Cir. 1992)(holding that the complaint of political gerrymandering in the election of North Carolina Superior Court judges presented a justiciable question, and stated a claim upon which relief could be granted under

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plaintiff must allege, and ultimately prove, in order to prevail on a claim of vote dilution in the context of political gerrymandering. The plurality opinion provides the "narrowest grounds" for decision, and is cited herein. Since *Bandemer*, the Supreme Court has not addressed the issue of establishing political gerrymandering claims. Moreover, the cases relied upon in Movants' motion are all non-binding decisions of lower courts in other districts.

the Fourteenth Amendment).

Movants contend that the Court should dismiss the Plaintiffs' Complaint partisan gerrymandering claim because Georgia currently has a Republican Governor, eight Republican Congressmen and a Republican-controlled state Senate. Movants assert that, therefore, Plaintiffs cannot be said to be disadvantaged. Movants' Brief, p. 19. Movants' argument with respect to the Governor is irrelevant; his election is in no way affected by redistricting, and Plaintiffs' representational rights in the General Assembly and Congress are in no way affected by the Governor. With respect to the current Congressional delegation, it is true that for the first two years of this decade, 8 of 13 seats will be held by Republicans; however, redistricting is for a ten-year cycle and the gerrymandered districts may well prevent a repeat of that bare majority. Finally, as Movants are well aware, the fact that the Senate is currently controlled by Republicans is not because a majority of Republicans were elected under the Senate redistricting plan; instead, four Senators, elected as Democrats, changed parties shortly after the election, making the Senate 30-26, Republican to Democrat.

E. Plaintiffs' Have Stated a Claim Under 2 U.S.C. § 2

Finally, Movants assert that the Supreme Court's decision in *Branch v. Smith*, Nos. 01-1437 and 01-1596, 2003 U.S. Lexis 2709 (U.S. March 13, 2003) precludes Plaintiffs' claim that the Georgia Congressional plan violates 2 U.S.C. § 2c ("the Act")⁴ because *Branch* construed 2 U.S.C. § 2c to require nothing more than the drawing of single-member districts for the election of members of Congress. However, *Branch* only addressed the issue of whether single-member districts are mandated; it did not address the issue raised by Plaintiffs here, namely, whether the "districts" in fact qualify as such under federal law.

In a nutshell, Plaintiffs argue that the current tortuously-shaped land masses that Georgia calls "districts" are not truly "districts," as that term was used by Congress in the Act or by the Supreme Court in decisions subsequent to the Act; instead, the so-called districts are "amalgamations of census geography or blocs bearing no identifiable relationship to any geographic entity." Complaint, ¶ 102. True districts are recognizable and understandable to both the electorate, who benefit from being able to identify their legislator and citizens with whom they

⁴ 2 U.S.C. § 2c states, in relevant part: "In each State . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative"

share an interest, and to the elected, who benefit from recognizing the electorate and interests they represent.

It should be noted initially that the Constitution of the United States of America does not specifically require states to use the district system for the election of members of Congress. Article 1, § 4, cl. 1 simply provides that the “Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,” and that “Congress may at any time by Law make or alter such Regulations.” In exercising its power to “make or alter such Regulations,” it was Congress that first mandated the use of the district system in 1842. The Act of June 25, 1842, Ch. 47, § 2, 5 Stat. 491 (the “1842 Act”) is the earliest predecessor of 2 U.S.C. § 2c. For the first time, the use of single-member districts was explicitly mandated for the election of members of the United States House of Representatives: “[Representatives] shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which said State may be entitled, no one district electing more than one Representative.”

American political history makes clear that Congress used the term “district” to delineate a specific geographically-based representational unit, a concept rooted in British law. Early colonists modeled the first legislative assembly held in

America after the House of Commons, with members coming from and representing various plantations, towns, and areas. See Kenneth C. Martis, *The Historical Atlas of the United States Congressional Districts, 1789-1983*, § 1: *Congressional Districts* (1982). The area-specific notion of localized districts is also evident in James Madison's writings urging ratification of the Constitution. In *Federalist Paper No. 56*, Madison argued that geographically-limited representative districts would ensure that representatives mirrored the ideology and concerns of their constituents: "Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests in either which will not be within the knowledge of the representative of the district." *Federalist Papers*, No. 56. Madison clearly viewed districts as encompassing local, recognizable geographical units from which elected representatives would "bring with them . . . a local knowledge of their respective districts." *Federalist Papers*, No. 56.

In addition to the historical context illuminating the manner in which the term "district" was generally used in 1842, debate on the 1842 Act further indicates that Congress used the term to refer to a recognizable local representational unit of geography that respects political subdivisions. Senator Graham commented, "[W]e find in every great nation with any extension of country... that the representative assemblies of the people have been chosen by

counties, parishes, departments, and districts, by whatever named called. It ensures that personal and intimate acquaintance between the representative and constituent which is of the very essence of true representation.” Appendix to the Congressional Globe of the Second Session of the Twenty-Seventh Congress, 749 (1842). The House debate also focused on the advantages of localized, geographically recognizable, districts; Congressman Summers stated, “The essential feature . . . of representative democracy, is, that the Representative shall reflect the will and know the wants of his constituents. He should live among them, be familiar with their condition, and hold with them a common political interest. These ends can only be secured by providing for representative elections in districts suited to the situation and convenience of the people.” *Id.* at 354. To be sure, there is nothing in the legislative history of the first reapportionment act that would indicate that the drafters ever considered that districts would be divided in any way other than straightforward geographic partitions representing local interests.

While the 1842 reapportionment act has gone through a number of renditions over the past 150 years, the requirement that Congressional elections be

held in “districts” has remained constant since 1862.⁵ Thus, the use of the term in 2 U.S.C. § 2c must be given its historical significance. The term “district” encompasses the explicit views of the Founding Fathers and early legislators that effective representation can only be had by dividing a state into unassuming geographic units encompassing a relatively small area. Such “districts” give effect to political subdivisions, allow representatives to gain the “intimate familiarity” with local interests necessary to represent communities of interest, and are “convenient” for constituents. The evidence will show that the tortuous and sprawling amalgamations in the Georgia Congressional plan, in contrast, largely fail to follow city or county lines, prevent representatives from becoming intimately familiar with issues important to their constituents, and, to the extent that a representative is familiar with issues, often require the representative to represent communities of diverse interests, and are inconvenient for voters. Geographical compactness services independent values; it facilitates political organization, electoral campaigning and constituent representation. *Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring). See also, *Prosser v.*

⁵ An apportionment act passed in 1850 (9 Stat. 433) dropped the provision requiring election by districts, but this provision was restored by act in 1862 (12 Stat. 572).

Elections Bd., 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge court per curiam).

To understand the concept of district as found in 2 U.S.C. § 2c, one must examine districts as they existed at the time of the Act's enactment in 1967, and at the time of the first predecessor Act requiring districts in 1842. The simplest comparison is visual. Plaintiffs intend to provide the Court with maps from these time periods, even a cursory review of which will show the stark differences between districts as they existed in 1842 and 1967, and the geographic pieces which Georgia presents as its 21st century Congressional districts. Of course, visual inspection by the Court can be supplemented with quantitative and qualitative measurements. There are a number of specific measurements of compactness or geographic unity which can assist the Court in comparing districts as they existed at the time of the enactment of the federal statutory district requirement and now.⁶ These various methods recognized in political science and geographic professional literature permit the Court not to be consigned solely to an esthetic consideration.

⁶ Adams, "A Model Slate Reapportionment Process: The Continuing Quest for Fair and Effective Representation," 14 Harv. J. on Legis 825 (1977). See also *Connor v. Finch*, 431 U.S. 407 (1977). Reoch, "Measuring Compactness as a Requirement of Legislative Apportionment," 5 Midwest J. of Pol.Sci. 70 (1971).

The same manner in which the Supreme Court has wrestled with pornography is not an unreasonable analogy, as gerrymandering has been called political pornography. In fact, Justice Potter Stewart's test for pornography, "I know it when I see it," see *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), was cited in context of gerrymandering by Justice Stevens in *Karcher v. Daggett*, 402 U.S. 725, 755 n.15 (1983) (Stevens, J. concurring). Justice Stevens noted, "Dramatic departures from compactness are a sign that something must be amiss." Id.

The purported "districts" in Georgia's current Congressional plan wind around Georgia in unrecognizable and confusing shoestrings to a degree inconceivable in 1842 or 1967. These "districts" are not contiguous in the sense that one can travel between different parts and remain within a district. The points of contiguity are at locations so narrow as not to permit transit.

The level of bizarreness is so self-evident as to require some form of explanation or justification by Defendants. Amalgamations of census blocs are not districts if they have no underlying geographic existence or governmental interest justification. Any comparison of the most recent Congressional map with Georgia Congressional districts over the century and a half since 1842 demonstrates a dramatic difference, a difference so large that the new map is no longer recognizable as a district map.

The U.S. Supreme Court has also had a role in defining the term “district.” That the Supreme Court has not expressly addressed the issue of what constitutes a district under 2 U.S.C. § 2c does not mean that the Supreme Court has not expressed an understanding of what constitutes a district. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court clearly expressed an understanding of the requirement of a degree of geographic compactness for the creation of representational districts, holding that, a threshold matter in Voting Rights Act Section 2 litigation, single-member districts may be required from a multi-member district scheme when a minority group is “sufficiently large and geographically compact to constitute a majority in a single member district.” *Gingles*, 478 U.S. at 50-51 (emphasis added). In *Gingles* and numerous following opinions, the Court recognized in the requirement of geographic compactness in the creation of representational districts. See *Grove v. Emison*, 507 U.S. 25, 40 (1993). There is a point that districts go from “ugly” to “nonexistent.” As the Supreme Court observed in *Shaw v. Reno*, 509 U.S. 630 (1993) and *Shaw v. Hunt*, 116 S. Ct. 1894 (1996), “appearances do matter” in redistricting. The Court requires that districts preserve logical and identifiable geographic units. Otherwise, districts have no representational meaning and the perceived legitimacy of structures of political

representation disappears. Not every list of census blocks can be a Congressional district without consideration of actual geography.

The 21st century technology, i.e., electronic maps, provides an avenue for legislatures to manipulate the line-drawing process beyond that which could have been conceived in 1842, or even in 1967. The present Georgia Congressional maps simply could not have been created in 1842 or 1967 because of the absence of the technological ability to craft such a map. The present Georgia “districts” are created from an amalgamation of census blocs, not political subdivisions, neighborhoods or any recognizable geographic, social, governmental or political unit.

In *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), Chief Justice Earl Warren, writing for the Court describing a legislative plan, said, “[T]he existing apportionment . . . presents little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone.” *Reynolds*, 377 U.S. at 568. The Chief Justice surely could be describing the present Georgia Congressional plan.

F. Plaintiffs Have Stated a Claim as to Multi-Member Districts

Although asserting that they do not understand Plaintiffs’ claims with respect to the use of multi-member districts in the House redistricting plan,

Movants move to dismiss it nonetheless. The claim, as set forth in paragraphs 65, 67, 68 and 87 of Plaintiffs' complaint, is that the use of sporadic multi-member districts in the House plans debases and dilutes the votes of Plaintiffs living in single member districts. Plaintiffs living in single-member House districts have one representative; citizens residing in multi-member districts have 2, 3 and even 4 representatives.

As recognized by the North Carolina Supreme Court last year, “[t]he proposition that use of both single-member and multi-member districts within the same redistricting plan violates equal protection principles is not novel.” *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002). The Court concluded that in its view, the “use of *both* single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution unless it is established that the inclusion of multi-member districts advances a compelling state interest.” *Stephenson*, 562 S.E.2d at 395.

The North Carolina Supreme Court came to its conclusion based largely on the reasoning of the Iowa Supreme Court in *Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N.W. 2d 355, cert. denied, 385 U.S. 851, 17 L. Ed. 2d 80 (1966). In *Kruidenier*, the Iowa Supreme Court determined that the use of both single and multi-member districts in the same plan violated the right of residents in single-

member districts under both the state and federal constitutions. The *Kruidenier* court explained the issue succinctly: when multi-member and single member districts are used in the same plan, the residents of single member districts are afforded less representation - less representatives to call, less representatives to be appointed to committees and thus, less of a voice in the process. *Kruidenier*, 142 N.W. 2d at 370-71.

The *Kruidenier* court also noted that the issue raised there (and here), i.e., that residents in multi-member districts are afforded greater representation, was not considered in *Fortson v. Dorsey*, 379 U.S. 433,436 (1965), the case upon which Defendants principally rely. While Plaintiffs agree that multi-member districts are not per se unconstitutional, Plaintiffs' complaint is based upon the use of such districts in the same plan with single-member districts. In *Kruidenier*, the court recognized the inherent equal protection problem and cited federal cases in which the same conclusion had been reached. *Davis v. Cameron*, 238 F. Supp. 462 (D.C. Iowa 1965); *Drew v. Scranton*, 229 F. Supp. 310, 328 (D.C. Pa.), judgment vacated on other grounds, *Scranton v. Drew*, 379 U.S. 40, 85 S.Ct. 207, 13 L.Ed.2d 107 (1964) (holding that "the provisions of the representative apportionment act for multi-member districts in certain parts of certain counties deny to the voters in the single-member districts of those and other counties the equal protection of the laws

by depriving them of voting power equal to that of the voters of the multi-member districts.”)

These decisions are consistent with the majority opinion in *Reynolds*:

And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote, two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable.

Reynolds, 377 U.S. at 562-63.

G. Plaintiffs' Standing to Attack the Redistricting Plans is Not Limited to Attacks on the Districts in Which they Live

For their final argument, Movants argue that “the law is clear that [Plaintiffs] may only challenge those districts in which they actually reside and may assert only those claims that directly affect them.” Movants’ Brief, p. 27. Movants’ argument is not clear, in light of the facts that each Plaintiff lives in at least one overpopulated district, some Plaintiffs live in single-member districts and all

Plaintiffs live under the gerrymandered plans and the Congressional plan which they contend violates 2 U.S.C. § 2's requirement of "districts." Complaint, ¶¶ 7-36.

Plaintiffs assume that Movants are arguing that Plaintiffs may not challenge the plans in their entirety, but instead, that Plaintiffs may only challenge the districts in which they reside. As a legal matter, Movants' contention is incorrect. In the equal protection cases cited by Movants, i.e. *Baker, Fairley, Hawkins*, the plaintiffs challenged the plans, as is the case here. Because they lived in an affected district, they had standing to do so, as is also the case here.

Furthermore, as a practical matter, the nature of a districting plan means that a successful challenge to some districts necessarily affects the plan as a whole. If one district is changed, surrounding districts must also be changed. In short, it is not possible to remedy a challenged district without affecting other parts of the plan. Thus, it is the plans which are attacked; Plaintiffs have standing to bring the challenge because they reside in districts that are underrepresented, gerrymandered and/or violative of 2 U.S.C. § 2.

IV. CONCLUSION

In their Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), Movants ask the Court to do what it cannot: to decide the merits of each of the claims asserted by

Plaintiffs. Plaintiffs are entitled to have all facts alleged taken as true and have all those facts construed in their favor. Plaintiffs are also entitled to put Movants to the test of justifying the plans constitutionally. The inquiry at this stage of the litigation is not whether Plaintiffs will prevail but whether they might. As outlined above, a large body of law indicates that Plaintiffs may prevail. Therefore, Movants' Motion to Dismiss under Rule 12(b)(6) should be denied.

Local Rule 7.1.D Certification:

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

Respectfully submitted,



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

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

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 PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS PERDUE, COLEMAN AND COX'S MOTION TO DISMISS PLAINTIFFS' CLAIMS AGAINST THE REDISTRICTING PLANS FOR CONGRESS AND THE GEORGIA HOUSE OF REPRESENTATIVES PURSUANT TO FED. R. CIV. P. 12(b)(6) by first class U.S. mail, properly addressed to counsel for Plaintiffs and Defendants as follows:

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United States District Court,
E.D. New York.

Michael J. CECERE, III, Christine A. Nagy,
William Odol, Carolyn Delvecchio and
Donald V. Pupke, Jr., Plaintiffs,

v.

THE COUNTY OF NASSAU, the Nassau County
Legislature, Judith Jacobs, as
Presiding Officer of the Nassau County Legislature,
and Nassau County Board of
Elections, John A. Degrade, in his official capacity as
a Commissioner of the
Nassau County Board of Elections, Eric. S. Brown, in
his official capacity as a
Commissioner of the Nassau County Board of
Elections, Defendants.

No. 03-CV-1548 (DRH).

April 23, 2003.

County residents who brought suit challenging constitutionality of county legislature's redistricting plan moved for expedited discovery in view of forthcoming legislative elections. The District Court, Hurley, J., held that plaintiffs failed to establish probability of success on the merits so as to warrant expedited discovery.

Motion denied.


[1] Federal Civil Procedure  1261

170Ak1261 Most Cited Cases


Among the factors to be considered in determining an application for expedited discovery are (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.

[2] Constitutional Law  225.3(3)
92k225.3(3) Most Cited Cases

The equal protection principle of "one person, one vote" is applied less stringently in state and local redistricting matters than is true for congressional reapportionments. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law  225.3(6)
92k225.3(6) Most Cited Cases

The equal protection clause requires states to make an honest and good faith effort to construct legislative districts as nearly of equal population as is practicable, but minor deviations from absolute population equality may be necessary to permit the states to pursue other legitimate state policies. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law  225.3(6)
92k225.3(6) Most Cited Cases

All that the equal protection clause requires with respect to state and local redistricting efforts is that the resulting plan produces substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law  225.3(6)
92k225.3(6) Most Cited Cases

Under the equal protection clause's substantial equality of population requirement for state and local legislative redistrictings, a maximum population deviation rate of 10 percent or above creates a prima facie case of discrimination, whereas a rate under 10 percent is, as a general matter, deemed to be a minor deviation. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law  225.3(5)
92k225.3(5) Most Cited Cases

An effort by a majority political party to redistrict with a specific intention of disadvantaging another political party's election prospects does not, alone, run afoul of the Equal Protection Clause. U.S.C.A. Const.Amend. 14.

[7] Federal Civil Procedure  1261
170Ak1261 Most Cited Cases

County residents who brought suit challenging constitutionality of county legislature's redistricting plan on basis that the plan impermissibly diluted their

--- F.Supp.2d ---

(Cite as: 2003 WL 1956273 (E.D.N.Y.))

voting power as residents of more populous districts, in violation of equal protection, failed to establish probability of success on the merits so as to warrant expedited discovery in view of forthcoming county legislative elections; allegation that majority party drew gerrymandered lines, splitting long standing communities and joining communities with no common interests, in order to disadvantage other party's election prospects, was insufficient, without more, to serve as a legitimate predicate for expedited discovery where alleged maximum population deviation rate among the districts was less than ten percent. U.S.C.A. Const. Amend. 14.

Rivkin Radler LLP, Uniondale, By Evan H. Krinick, Esq., for Plaintiffs.

Lorna B. Goodman, Nassau County Attorney, Mineola, By Jeffrey M. Wice, Esq., David B. Goldin, Esq., for Defendants.

MEMORANDUM AND ORDER

HURLEY, District J.

*1 Pending before the Court is plaintiffs' motion for expedited discovery.

FACTS

On February 27, 2003, the Nassau County Legislature adopted a county legislature redistricting plan based upon the 2000 decennial census data, Local Law 2-2003. County Executive Thomas Suozzi signed that law into effect on February 28, 2003.

By complaint filed April 1, 2003, five individual "citizen[s] of the United States of America and the State of New York" who reside in various Nassau County districts, brought suit against the County, the County Legislature, Judith Jacobs as Presiding Officer of the Legislature and the Board of Elections and its Commissioners. Compl., ¶¶ 2-6. The relief sought includes:

1. a declaration by this Court that L.L. 2-2003 is in violation of the Fourteenth Amendment to the United States Constitution, Article I, § 1 of the New York State Constitution, Article I, § 11 of the New York State Constitution and § 112 of the Nassau County Charter;
2. a permanent injunction enjoining any election to take place in Nassau County under L.L. 2-2003; and
3. a permanent injunction compelling the defendants to adopt a redistricting plan that

satisfies all constitutional and statutory guidelines with all deliberate speed.

Id. at p. 36.

Expedited discovery is sought because "due to the upcoming November 2003 legislative elections, and the statutorily imposed political calendar leading up to the November 2003 election, it is imperative that plaintiffs be able to expeditiously garner all the necessary facts," lest they lose "their fundamental right to vote." Pls.' Mem. Supp. at 5.

STANDARD FOR DETERMINING MOTION FOR EXPEDITED DISCOVERY

[1] Among the factors to be considered in determining an application for expedited discovery are the following:

- (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between the expedited discovery and the avoidance of the irreparable injury, and (4) some evidence that the injury [that] will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.

Gidatex, S.R.L. v. Campaniello Imports, LTD., 13 F.Supp.2d 417, 420 (S.D.N.Y.1998) and cases cited therein; *see also* Pls.' Apr. 15, 2003 Letter Br. at 1 indicating that *Gidatex* provides the appropriate standard.

DISCUSSION

1. *Applicable Law*

a) Guarantee of "One Person, One Vote"

[2][3] The equal protection guarantee of "one person, one vote" was first articulated by the Supreme Court in Gray v. Sanders, 372 U.S. 368, 381, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963). The Supreme Court has applied the guarantee to congressional districts, as well as state and local election districts. Daly v. Hunt, 93 F.3d 1212, 1216-17 (4th Cir.1996). However, the principle is applied less stringently in state and local redistricting matters than is true for congressional reapportionments. *See, e.g., Gaffney v. Cummings*, 412 U.S. 735, 741-42, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973); Mahan v. Howell, 410 U.S. 315, 321, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973); Abate v. Rockland County Legislature, 964 F.Supp. 817, 819 (S.D.N.Y.1997) and Marylanders For Fair Representation, Inc. v. Schaefer, 849 F.Supp. 1022, 1030-31 (D. Maryland 1994). As explained in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), States are required to "make an

honest and good faith effort to construct districts ... as nearly of equal population as is practicable." *Id.* at 577. Which is to say, although "absolute population equality should be the paramount objective in plans allocating congressional districts ..., the Court affords more flexibility to States in formulating districting plans for state legislative seats by requiring only " 'substantial' population equality." *Marylanders For Fair Representation*, 849 F.Supp. at 1030 (citing *Karcher v. Daggett*, 462 U.S. 725, 732-33, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983) and *Gaffney*, 412 U.S. at 748). "This slightly relaxed requirement for state redistricting plans recognizes that minor deviations from absolute population equality may be necessary to permit the states to pursue other legitimate state policies." *Marylanders For Fair Representation, Inc.*, 849 F.Supp. at 1030.

*2 [4] Indeed, all that is required with respect to state and local redistricting efforts is that the resulting plan produces " 'substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.' " *Gaffney*, 412 U.S. at 744, (quoting *Reynolds*, 377 U.S. at 579).

[5] In an effort to quantify the "substantial equality of population" requirement for state and local redistrictings, the Supreme Court has developed a rule that a maximum population deviation rate of 10 percent or above creates a prima facie case of discrimination whereas a rate under 10 percent is, "as a general matter," deemed to be a "minor deviation." *Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983).

b) Local Law 2-2003 Has a Maximum Population Deviation Rate of Under 10 percent

Rocco A. Iannarelli, Clerk of the Nassau County Legislature, avers that the "redistricting of the Nassau County Legislature into 19 legislative districts ... has an overall population deviation of 8.93 percent (from the population of the smallest district to that of the largest. "). Iannarelli Aff. at ¶ 22.

During oral argument, plaintiffs acknowledged that the rate is below 10 percent. Yet, they proffer that their expert produced an alternate plan with a maximum deviation rate of approximately 4 percent, thereby suggesting that Nassau County was required to do more. However, "[t]he Supreme Court has expressly rejected the argument that the possibility of drafting a 'better' plan alone is sufficient to establish a violation of the one person, one vote principle." *Daly*,

93 F.3d at 1221 (citing *Gaffney*). Indeed, the *Gaffney* Court stated that judicial involvement in the inherently legislative process of apportionment " 'must end at some point, but that point constantly recedes if those who litigate need only produce a plan that is marginally 'better' when measured against a rigid and unyielding population-equality standard. The point is, that such involvements should never begin.' " *Id.* (quoting *Gaffney*, 412 U.S. at 750-51).

2. Pivotal Issue Before the Court

Of the four factors to be considered in determining a motion for expedited discovery, the pivotal factor for present purposes is number 2, to wit, that movant has demonstrated "some probability of success on the merits." Defendants, in opposing the requested relief, claim that plaintiffs' attack on the redistricting plan is deficient as a matter of law because the deviation rate is under 10 percent. In that regard defendants recognize, as they must, that a maximum deviation rate under 10 percent would not immunize a redistricting plan if, for example, it "fences out a racial group so as to deprive them of their pre-existing municipal vote." *Gaffney*, 412 U.S. at 751.

At oral argument, however, plaintiffs explained that they are not advancing a claim that Local Law 2-2003 is invalid because it discriminates against individuals falling within a protected class, or is the product of impermissible political gerrymandering. Instead, the sole basis for plaintiffs' attack is that the local law impermissibly dilutes their voting power as residents of some of the more populous districts.

*3 Plaintiffs counter by arguing that there is no judicially recognized per se principle, and that the 10 percent rule pertains only to the burden of proof, i.e. if the rate is over 10 percent, the municipality must justify the deviation; if it is under 10 percent, plaintiffs carry the burden of proof and are confronted with the presumption that the plan is constitutional.

3. Court's Analysis

[6] Plaintiffs' memorandum of law in support of their motion for expedited discovery speaks of the "Democratic majority of the Nassau County Legislature ... carv[ing] up Nassau County with a singular purpose of creating the most partisan map possible." Pls.' Mem. Supp. at 3. To accomplish that purported goal, it is opined that the Democratic majority resorted to an "arbitrary and discriminatory process [which] bizarrely shaped districts which split

long standing communities, while at the same time joining community's with no common interest." *Id.* However, during oral argument the political gerrymandering issue was jettisoned perhaps because, even assuming its factual legitimacy, such an effort by the Democrats to "redistrict[] with a specific intention of disadvantaging one political party's election prospects" does not, alone, run afoul of the Equal Protection Clause. See *Davis v. Bandemer*, 478 U.S. 109, 138-39, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986).

[7] It also warrants underscoring that plaintiffs have submitted no proof, by affidavit or otherwise, tending to support the assertions in their memorandum of law regarding the supposed misshapen communities embodied in the challenged redistricting plan. The allegations in the complaint, without more, do not serve as a legitimate predicate for expedited discovery. Simply put, movants have failed to establish that they have "some probability of success on the merits," notwithstanding the relative *de minimis* nature of that standard. Accordingly, the Court declines to order expedited discovery.

In reaching the above conclusion, the Court considered whether Local Law 2- 2003's low deviation rate renders plaintiffs' claim of improper dilution of their voting power insufficient as a matter of law. A credible argument may and, indeed has been advanced by defendants, that such is the case. Thus, in Justice Brennan's dissent in *Brown v. Thompson* it is explained:

"Our cases since *Reynolds* have clarified the structure of constitutional inquiry into state legislative apportionments, setting up what amounts to a four-step test. First, a plaintiff must show that the deviations at issue are sufficiently large to make out a prima facie case of discrimination. We have come to establish a rough threshold of 10% maximum deviation from equality (adding together the deviations from average district size of the most underrepresented and most overrepresented districts); below that level, deviations will ordinarily be considered *de minimis*.

462 U.S. at 852.

Language in *Gaffney* also tends to support defendants' position. There, the Supreme Court reversed a determination by a three judge district court panel which had invalidated a reapportionment plan for the Connecticut Assembly. In doing so, the Court emphasized that redistricting "is primarily a political and legislative process" (412 U.S. at 749)

and held that a reapportionment plan with a maximum population deviation rate of approximately 8 percent was constitutional.

*4 In *Fund For Accurate and Informed Representation, Inc. v. Weprin*, 796 F.Supp. 662 (N.D.N.Y.1992), a three judge panel found that plaintiffs' concession that the maximum population deviation rate in the reapportionment plan for the New York State Assembly was 9.43 percent was "fatal to the one person, one vote claim..." *Id.* at 668. As stated by the panel "absent credible evidence that the maximum deviation exceeded 10 percent, plaintiffs failed to establish a prima facie case of discrimination ... sufficient to warrant further analysis by this court," citing the Supreme Court's decision in *Brown, Id.*

However, in each of the above cases, and like decisions cited by the parties, the courts have stopped short--with the exception of the panel in *Fund For Accurate and Informed Representation*--of labeling 10 percent as a line of demarcation beneath which a dilution claim is per se insufficient. For instance, Justice Powell, in delivering the opinion for the Court in *Brown*, stated: "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." 462 U.S. at 842 (emphases added).

Reference to *Daly v. Hunt*,--cited by both parties in support of their respective, but divergent views--favors plaintiffs' position. Daly and his co- plaintiffs, like the plaintiffs here, alleged that the challenged "voting districts violate[d] the one person, one vote principle because the populations of the district are not sufficiently equal." *Id.* at 1214.

The lower court granted plaintiffs' cross-motion for summary judgment and enjoined defendants from conducting elections under the plan. [FN1] In vacating that termination and remanding the case to the district court, the Circuit explained:

The Circuit in *Daly* explained that

"[I]f 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....' In other words, for deviations below 10% the state is entitled to a presumption

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that the apportionment plan was the result of an 'honest and good faith effort to construct the districts ... as nearly of equal population as is practicable....' However this is an rebuttable presumption."

Id. at 1220.

In sum, although *Daly* has language which favors the position urged by defendants, its holding, including the remand to permit plaintiffs to endeavor "to establish that the apportionment plan at issue was the product of bad faith, arbitrariness, or invidious discrimination," supports plaintiffs' interpretation of the case. *Id.* at 1222. Needless to say, if plaintiffs' dilution claim was insufficient as a matter of law given that the maximum population deviation rate was less than 10 percent, a remand to determine whether the redistricting plan was the product of, inter alia, arbitrariness would not have occurred.

*5 Finally, the Court considers *Marylanders for Fair Representation, Inc.*, in which a three judge panel, after carefully analyzing the cases cited by the litigants on the issue of whether a plan with a deviation rate under 10 percent was *ipso facto* constitutional, concluded that it was not and held:

"[A] plaintiff could, with appropriate proof, successfully challenge a redistricting plan with a maximum deviation below 10 percent. To prevail, though, the plaintiffs have the burden of showing that the 'minor' deviation in the plan results solely from the promotion of an unconstitutional or a irrational state policy."

Id. at 1032.

Although plaintiffs have carried the day, at least on the information and cases thus far provided to the Court, in their argument that the mere fact that the maximum deviation rate under Local Law 2-2003 is less than 10 percent does not bar their constitutional challenge, they have, as previously explained, failed to make a sufficient showing to warrant expedited discovery.

CONCLUSION

Plaintiffs' motion for expedited discovery is denied.

FN1. Plaintiffs' *other* argument in *Daly* was that defendants should have utilized the voting-age population, rather than the total population, in formulating the redistricting plan. The district court adopted that argument, found that the resulting deviation rate exceeded 10 percent, and invalidated

the plan. *Daly v. Hunt*, 93 F.3d 1212, 1216 (4th Cir.1996). Parenthetically, the Circuit found that the district court's utilization of the voting-age population approach constituted error. *Id.* at 1228.

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