

judgment on their claim that the current plans for Georgia's state legislative and Congressional districts violate the constitutional guarantees of one person one vote.¹

A. STATE LEGISLATIVE PLANS

This Court has confirmed that Plaintiffs' burden on summary judgment is to show that the population deviations are not justified by rational and legitimate state policies but are tainted by arbitrariness or discrimination. 8/29/03 Order at 25-27. The undisputed material facts related to the state legislative plans are:

1. During the 2001 redistricting process, plan drawers had the capacity to draw plans at a total population deviation of $\pm 1\%$. Meggers Dep., at 120-121.

¹ In its August 29, 2003 Order, the Court stayed judicial resolution of Plaintiffs' claims with respect to the Senate Plan pending the decision of the United States District Court for the District of Columbia in Georgia v. Ashcroft, No. 01-2111. 8/29/03 Order at 23. Plaintiffs move that the stay be lifted for two reasons. First, Defendants appear to have abandoned their support of the stay in moving for summary judgment on the 2002 Senate Plan. Second, and more importantly, the Court's decision to stay the case was based on Defendant's assertion that the D.C. Court would likely act "soon" to preclear the 2001 Senate Plan, given the D.C. Court's order that defendants show cause why the 2001 Senate Plan should not be precleared. 8/29/03 Order at 19-21. However, on November 17, 2003, the D.C. Court ordered the parties to complete a pretrial meet and confer report and set an initial scheduling conference for December 12, 2003. See Georgia v. Ashcroft, No. 01-2111, 11/17/03 Order, attached hereto as Attachment A. In light of this new order, it no longer appears likely that the D.C. Court will preclear the 2001 Senate Plan soon, if at all.

2. The Democratic-controlled General Assembly, however, used a goal of $\pm 5\%$ population deviation (for an overall limit of 10%) in drawing the state legislative plans, which became the “de facto” limitation. Meggers Dep., 167:12-22.

3. The 2001 Senate Plan, 2002 Senate Plan and House Plan each have a total population deviation range of 9.98% and an average deviation of 3.98%, 3.78% and 3.47%, respectively. Defendant’s Response to Plaintiffs’ Statement of Material Facts, ¶¶ 46, 47, 49.

4. Of the overpopulated districts in the House and Senate Plans, approximately 70% are Republican-leaning. Of the 49 overpopulated House seats, 37 are Republican-leaning; in both the 2001 and 2002 Senate Plans, of the 27 overpopulated districts, 19 are Republican-leaning. Bensen Report, Pl. Ex. 1 at General Comments Sec., Figure 1; House Plan, p. 5; Hose App. at 15; 2001 Senate Plan Sec., p.5; 2001 Senate Plan App. at 9; 2002 Senate Plan Sec., p.5; 2002 Senate Plan App. at 15.

5. No attempt was made to consider principles such as compactness or the preservation of political subdivisions or other communities of interest. Bensen Report, Pl. Ex. 1 at General Comments Sec.; Gaddie Report, Pl. Ex. 10, at 13-20; Kirincich Dep., at 76:1-6; Moore Dep., at 30:10-15; Stanton Dep., at 24:10-20,

106:25-107:5; Meggers Dep., at 42:18-46:25; Brown Dep., at 57:11-17; Shelton Dep., at 10:5-9.

6. The goal of the drafters of Georgia's 2001-2002 legislative lines was to increase the number of seats held by Democrats in the State House and Senate and create maps that were good for Democrats. Moore Dep., at 108:6-14, 32:21-33:2; Kirincich Dep., at 27:1-10, 61:25-62:1, 70:1-3, 73:14-16, 71:21-22; Brown Dep., at 31:18-32:10.

Under the law, Plaintiffs are entitled to summary judgment because there is no legitimate state policy which justifies the deviation. The General Assembly thought it had leeway to use a \pm 5% deviation to advance the goals of the Democratic Party, but such conduct is exactly that which the cases interpreting one person, one vote endeavor to prevent. Brown v. Thomson, 462 U.S. 835, 843 (1983); Reynolds v. Sims, 377 U.S. 533, 577 (1964); Roman v. Sincock, 377 U.S. 695, 710 (1964).

B. CONGRESSIONAL PLAN

To be entitled to summary judgment on the Congressional Plan, Plaintiffs must show that the districts are not equal and that there was no good faith attempt to make them equal; the State must then show that the deviations are justified by a consistently applied, legitimate state interest. 8/29/03 Order at 29.

The undisputed material facts related to the Congressional Plan are:

1. During the 2001 redistricting process, plan drawers had the capacity to draw Congressional plans at a total population deviation of zero. Pl. Ex. 21; Meggers Dep., at 122-123; Stanton Dep., at 42:11-20; 78:25-79:7; Kirincich Dep., at 217:1-5; Second Dec. of Bryan Tyson, ¶11.

2. The Democratic-controlled General Assembly, however, using a one percent deviation, simply “strove for a near zero deviation . . . and came extremely close to that goal” Def. S.J. Brief, p. 25 (emphasis added); Brown Dep., at 18:19-19:5; 132:19-24 (stating that the standard was 1 percent deviation).

3. The Congressional Plan has a total population deviation of 72. Answer, ¶ 50.

4. The goal of the Democratic Party in Georgia’s 2001 Congressional Plan was to increase the number of Democrats in Georgia’s Congressional delegation. Kirincich Dep., at 202-203.

5. There are 88 split precincts in the Congressional Plan. Meggers Affidavit, ¶37.

6. There is no evidence in the record that splitting more precincts (the one concern now asserted by the State) was a concern of legislators during the crafting of the 2001 Congressional Plan. In fact, the evidence is that Ms. Meggers, the

chief witness for the State, considered splits of precincts to be a non-issue in drawing the plans. Meggers' Dep., at 142:3-14 (testifying that "at the time you draw the plan we always split a lot of precincts.").

With an admitted population deviation of 72, the State failed to achieve districts of equal population. By not aiming for zero and by failing to consider any factor that might justify the deviation, the State failed to make a good faith effort to achieve population equality. Because the splitting of precincts was either a nonissue or only considered after splitting 88, the State cannot demonstrate a consistently-applied legitimate state interest that allows this Court to excuse the population deviation. Plaintiffs are therefore entitled to summary judgment on their one person one vote claim on the Congressional Plan. Karcher v. Daggett, 462 U.S. 725 (1983); Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

II. ARGUMENT AND CITATION OF AUTHORITIES

A. The Legislative Plans Violate The One Person One Vote Requirement Because Plaintiffs Have Proven That The Plans Were Not Drawn With The Goal Of Equally Populous Districts And That Population Deviations Are Not The Result Of Adherence To Rational State Policy. No Authority Supports Defendant's Novel Argument That Plaintiffs Must Also Prove An Independent Constitutional Infringement.

The material facts are not in dispute – in drawing the legislative plans, the State neither attempted to draw districts with population as nearly equal as is practicable, nor followed legitimate state redistricting policy when deviating from

population equality. Plaintiffs have therefore satisfied the burden of proof set by the Supreme Court to establish their one person one vote claim. To cloud this undeniable fact, Defendant attempts to change the burden of proof that Plaintiffs must meet to a novel one requiring proof of an “independent constitutional violation.” Essentially, because the State has recognized late in the game that it cannot win under the established rules, it seeks to change them in the last remaining seconds before the buzzer sounds. The new rules advocated by defendant, however, have no basis in law or logic.

1. Plaintiffs’ Burden Of Proof

Forty years ago, the Supreme Court gave a mandate to states in clear and unambiguous language: “make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” Reynolds, 377 U.S. at 577. In evaluating whether a state has met this mandate, the Supreme Court directed lower courts to ascertain whether “there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing factors that are free from any taint of arbitrariness or discrimination.” Roman, 377 U.S. at 710 (emphasis added). Deviations are only constitutionally permissible if they are “based on legitimate considerations incident to the effectuation of a rational state policy.” Reynolds, 377 U.S. at 579 (emphasis

added). As the Court recognized in its August 29, 2003 Order, this standard continues to govern the burden that Plaintiffs must meet to establish their one person one vote claim.² 8/29/03 Order at 25-26. See also discussion at pages 7-10 of Pls. S.J. Brief.

Despite the unambiguous standard set by the Supreme Court, Defendant argues for a new standard – one requiring Plaintiffs to prove not that the deviations have no basis in rational state policy untainted by arbitrariness or discrimination but instead that the deviations amount to an “independent constitutional violation.” Def. Resp. Brief at 3. Incredulously, Defendant asserts that “there is no legal basis” for Plaintiffs’ position that “every deviation from population equality must advance a rational state policy.” Def. Resp. Brief at 8 (quoting the section heading on page 7 of Pls. S.J. Brief). As discussed above, that is the exact standard set by the Supreme Court in Reynolds.

In Plaintiffs’ brief in response to Defendant’s motion for summary judgment, Plaintiffs discuss at length why the “independent constitutional infringement” standard advocated by Defendant is both contrary to the law and without logic. See Pls. Resp. Brief at 15-19. Plaintiffs continue to assert that

² Contrary to Defendant’s assertion on pages 3-5 of her brief, Plaintiffs recognize that, pursuant to this Court’s August 29, 2003 Order, Plaintiffs bear the burden of proving the unconstitutionality of the legislative plans.

argument and stress that the State has not cited a single case, Supreme Court or otherwise, that supports its argument. The State apparently created the “independent constitutional violation” from whole cloth.³ Plaintiffs have met the correct legal standard.

2. Plaintiff's Have Met Their Burden Of Proving That The Plans Were Not Drawn With The Goal Of Equally Populous Districts

Defendant does not seriously dispute that clear and unequivocal Supreme Court precedent requires states to “make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable.” Reynolds, 377 U.S. at 577. Defendant also concedes that legislators and line drawers did not make such an honest and good faith effort to achieve population equality in the legislative plans. Accordingly, summary judgment must be entered for Plaintiffs on their one person one vote claim.

Defendant admits that “the General Assembly was given legal guidance that deviations between $\pm 5\%$ would generally be acceptable,” Def. Resp. Brief at 9, and that “[l]egislators and plan drawers believed there was a ‘safe harbor’ of $\pm 5\%$

³ In any event, Plaintiffs will be able to establish their independent political and racial gerrymander claims at trial. Plaintiffs did not seek summary judgment on these claims because factual questions have yet to be resolved, not because, as Defendant asserts, Plaintiffs “admit” that these claims cannot be established as a matter of law. See Def. Resp. Brief at 5-6, 20, 22.

when drawing legislative districts,” Def. Resp. to PSMF 41. Defendant further admits that, in drawing the plans, the architects followed “the goal of keeping deviations within the $\pm 5\%$ standard,” rather than the goal of reaching population equality. Defs. Res. 1st Inter., Pls. Ex. 2, at 10, 12, 15; Brown Decl. at ¶ 25 (the objective in drawing the plans was “to draw district populations at +/- 5% of the ideal population for state plans”). As Linda Meggers noted at her deposition, “Once you give [$\pm 5\%$] as an allowable range to legislators as they’re drawing their plan . . . they don’t push for zero.” Meggers Dep. at 167:18-22. See also arguments and citations at pages 10-15 of Pls. S.J. Brief.

Defendant argues that “there is no evidence that the drafters of the plans considered 10% total deviation to be a ‘safe harbor.’”⁴ Even if this assertion were

⁴ Defendant’s counsel has repeatedly told first the legislature, and now this Court, that the Supreme Court’s decision in Brown created a 10% safe harbor. To the contrary, the range of total population deviation between Wyoming legislative districts was not even material to the Court’s decision in Brown:

The issue therefore is not whether a 16% average deviation and an 89% maximum deviation, considering the state apportionment plan as a whole, are constitutionally permissible. Rather, the issue is whether Wyoming’s policy of preserving county boundaries justifies the additional deviations from population equality resulting from the provision of representation to Niobrara County.

462 U.S. at 846. The Supreme Court’s holding in Brown is not based on the range of population deviation. Rather, the decision is based on the State’s use of the traditional redistricting criteria of preserving counties. The Wyoming legislative plan was not invalidated only because of a “legitimate policy of preserving county boundaries” with no “taint of arbitrariness or

true, it is not relevant. First, Defendant's assertion is false. There is evidence, which Defendant has not disputed, that plan drawers did consider deviations up to $\pm 5\%$ to fall in a safe harbor. Def. Resp. to PSMF 41; Meggers Dep. at 109:16-110:2. Even when legislators and drafters did not use the term "safe harbor," they nonetheless confirmed that it was their understanding that legislative plans with total deviations not exceeding $\pm 5\%$ were immune from one person one vote attack. Stanton Dep. at 63:11-16; Transcript of 8/6/01 Senate Committee Meeting, Pl. Ex. 3, at 7:5-17. Indeed, such was the testimony of Senator Brown, cited in Defendant's response brief at page 11.

Second, the issues of (1) whether or not total deviations of $\pm 5\%$ were considered to fall within a safe harbor, and (2) whether or not deviations of $\pm 5\%$ was a goal followed by the drafters, are not directly relevant.⁵ The relevant inquiry

discrimination," a state policy applied "non discriminatorily." Id. at 848. These are all factors lacking in Georgia's district plans.

⁵ The goals and beliefs of Republican legislators who had no influence in passing the contested plans are also not relevant to the issue of whether the plans were the result of a good faith effort to achieve population equality. In any event, the quoted portion of Representative Westmoreland's deposition testimony is taken out of context. Def. Resp. Brief at 10. Representative Westmoreland was clear in his deposition that he understood the goal of legislative redistricting to be a total population deviation of zero. Westmoreland Dep. at 74-76. In the quote, Representative Westmoreland was referring to the perceived belief of Democratic legislators that "as long as you were in a plus or minus five percent, that satisfied the deviation requirement." Id. at 77, 81-82.

is whether or not the State made a good faith effort to draw districts with population “as nearly of equal population as is practicable.” Reynolds, 377 U.S. at 577. Defendant has not submitted any testimony that zero population deviation was the goal in drawing the legislative plans. This failure alone requires the Court to declare the legislative plans unconstitutional. See Pls. S.J. Brief at 10-15; Pls. Resp. Brief at 13-14.

3. Plaintiffs Have Met Their Burden Of Proving That Population Deviations Are Tainted By Arbitrariness and Discrimination And Not The Result Of Adherence To Rational State Policy

If the Court looks beyond the State’s legal mistake, Plaintiffs have proven that the plans’ deviations are not justified by any “rational state policy,” i.e., by “factors that are free from any taint of arbitrariness or discrimination.”

a. The High Deviations In The Plans, Including High Average Deviations, Are Relevant And Indicate That The Plans Are Tainted By Arbitrariness And Discrimination

Defendant admits the deviations from ideal population found in the Legislative Plans, Def. Resp. to PSMF 46, 47, 49, & 50, and does not dispute that these deviation percentages are among the highest of any legislative plans passed in any state this redistricting cycle, Bensen Report, Pl. Ex. 1, at 2002 Senate Sec. p. 6-7, House Sec. p.6-7. Instead, Defendant makes the legal argument that the excessive average deviations in the plans are not relevant to the Court’s

consideration. Def. Resp. Brief at 6-8. Defendant is mistaken. In White v. Regester, the Supreme Court carefully considered the average deviation of the legislative plan before it. 412 U.S. 755, 764 (1973). The Court concluded that although, “[v]ery likely, larger differences between districts would not be tolerable without justification based on legitimate considerations incident to the effectuation of a rational state policy, . . . appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variances alone.” Id. (internal quotations and citations omitted). In the very next sentences, which Defendant fails to quote to this Court, the Supreme Court explained its finding: while the total deviation was 9.9%, the average deviation was only 1.82%. Id. The average deviation was low, in comparison to the plans at issue here, because “[o]nly 23 districts, all single member, were overrepresented or underrepresented by more than 3%.” Id. Clearly, the White Court looked at the big picture -- the combination of both the total deviation and average deviation in the plan. Here, while the total range of deviations is the same as that in White, the average deviations are more than double those in White. Accordingly, these “larger differences between districts” are not “tolerable without justification based on legitimate considerations incident to the effectuation of a rational state policy.” Id.

The Supreme Court's evaluation of average deviation in one person one vote inquiries did not end with White. Indeed, the Court has discussed average deviation in nearly every one person one vote challenge that has since come before it. See Abrams v. Johnson, 521 U.S. 74, 100 (1997); Karcher v. Daggett, 466 U.S. 910, 912 (1984); Brown, 462 U.S. at 838-39; Karcher, 462 U.S. at 728; White v. Weiser, 412 U.S. 783, 785 (1973); Gaffney v. Cummings, 412 U.S. 735, 737 (1973).

The Supreme Court's attention to average deviation, viewed in conjunction with total range of deviation, makes good sense. Total range of population deviation indicates the presence of an inequality amongst districts; average deviation quantifies the degree to which this inequality permeates the entire plan by examining the number of citizens whose votes are diluted. Thus, average deviation is a better indication of the pervasiveness of vote dilution in a plan than is the simple total deviation number.⁶ To Plaintiffs' knowledge, no federal case

⁶ This concept, i.e., the number of voters actually affected by deviations, is at the forefront of the Supreme Court's decision in Brown. The Brown plaintiffs' sole complaint was that a representative was apportioned to Wyoming's smallest county. 462 U.S. at 846, 849. The Court concluded that the addition of the single disputed district did not result in a dilution pervasive enough to constitute an Equal Protection violation, because the state had a traditional, legitimate and consistently applied policy of preserving county boundaries. Id. at 847-48. The Court's opinion makes clear that it is not just the size (total), but also the breadth (average) and nature (legitimate state interests) of population deviations which are important

has ever validated a legislative plan with an average deviation of over 2.8%, let alone a plan with an average deviation of 3.78%. See cases cited in Def. Resp. Brief at 7; cases cited in Pls. S.J. Brief at 8. The Supreme Court has repeatedly refused to create a single number or statistical analysis which, if simply plugged in, answers whether a redistricting plan violates constitutional one person one vote requirements. The Court looks to both size and scope of the population inequalities and the reason for the inequalities.

Both the high average deviations and total deviations in these plans, in conjunction with the bizarre shape of the legislative districts, indicate that the districts were drawn on an arbitrary and discriminatory basis. See discussion at pages 17-21 in Pls. S.J. Brief. While Defendant asserts that Plaintiffs rely on their experts to support this conclusion, the numbers and maps actually tell the story on their own. In any event, Defendant has presented no evidence to dispute the conclusions reached by Plaintiffs' experts. See Report of Clark Bensen, Pls. Ex. 1; Report of Keith Gaddie, Pl. Ex. 10. Defendant has offered no evidence indicating that the experts' methodology or numbers were erroneous. Defendant has not addressed the experts' conclusions on district configurations, compactness, contiguity, political subdivision splits, the "valley of discrimination" that results

to an equal protection analysis. The entire apportionment plan was invalidated after the 1990 census. Gorin v. Karpan, 788 F. Supp. 1199 (D.Wyo. 1992).

from plans with both high total and average deviation, the pairing of Republican incumbents, and the built-in partisan advantage in favor of the Democrats.⁷ The single substantive portion of the experts' reports that Defendant cites is Mr. Bensen's analysis of the dilution of the votes of citizens in underpopulated districts. Without citing any evidence or contrary analysis, Defendant criticizes this analysis because it is based in part on voting population, rather than total population. As discussed in Plaintiffs' earlier briefs, however, voting population distribution is a measure accepted by the Supreme Court in evaluating voting inequality in its one person one vote jurisprudence. See Pls. S.J. Brief at n.15; Pls. Resp. Brief at n.3.⁸

b. Deviations Are Not The Result Of Compliance With Legitimate State Policies

Defendant admits that legislative plans with lower population deviations were introduced and that plans with deviation ranges less than $\pm 1\%$ are easily and quickly drawn. Def. Resp. to PSMF 57. Yet Defendant asserts no legitimate state

⁷ In a motion for summary judgment, the respondent is obligated to introduce evidence or counter-affidavits to create issues of material fact and cannot rely on mere denials in their pleadings. See First National Bank of Arizona v. Cities, 391 U.S. 253, 289 (1968); Anderson v. Liberty Lobby, 477 U.S. 242, 257 (1986).

⁸ The remainder of Defendant's discussion of Plaintiffs' experts amounts to little more than an unfounded attack on their qualifications, an attack that is refuted by a simple review of the experts' curriculum vitae at the front of their reports.

policy that justifies the State's passage of plans in which over 50% of the districts deviate from ideal population by more than $\pm 4\%$. See Pls. S.J. Brief at 22-24.⁹ Defendant has disclaimed following any of the traditional redistricting factors that the Supreme Court has recognized as legitimate state policies, such as compactness, contiguity, preservation of political subdivisions, protection of incumbents, protection of communities of interest, and maintaining the cores of existing districts. See Pls. S.J. Brief at 27-30 & n.20. Instead, Defendant makes the legal arguments that these traditional factors (1) are only applicable in cases in which a court, rather than a legislature, draws the plan, and (2) are not state policies of Georgia.¹⁰ Def. Resp. Brief at 16-20. The first argument is simply wrong, and the second argument is both irrelevant and wrong.

First, nothing in the Supreme Court's jurisprudence limits the consideration

⁹ Footnote 1 of the State's Response to Plaintiffs' statement of material fact is incorrect. The State's admissions in Georgia v. Ashcroft are admissible and relevant in this case. See Clark v. Putnam County, 293 F.3d 1261, 1269, 1272 (11th Cir. 2002); Shaw v. Hunt, 517 U.S. 899, 906 (1996); Bush v. Vera, 517 U.S. 952, 970 (1996).

¹⁰ Defendant also argues that the fact that "more county lines were crossed by Georgia's districts in 2001-02 than before" cannot raise a constitutional claim. Def. Resp. Brief at 17. Defendant misses the point. Plaintiffs are not asserting, and need not prove, that the splitting of county lines is unconstitutional. Rather, Plaintiffs simply must prove, and have proved, that the deviations in the plans are not attributable to a legitimate state policy, including the traditional legitimate state policy of preserving county lines.

of traditional legitimate redistricting considerations to court-drawn plans. For example, these traditional redistricting considerations were discussed in Shaw, which involved a challenge to a legislative-drawn plan. Shaw v. Reno, 509 U.S. 630, 647 (1993). Moreover, Reynolds specifically discusses giving states, not courts, a slight leeway from strict population equality so that states' "legitimate desires" may be accounted for. 377 U.S. at 580-81. See also cases cited on pages 9-10 of Pls. S.J. Brief.

Second, whether or not traditional criteria such as compact districts, contiguous districts, protecting communities of interest, or preserving political subdivisions are policies of Georgia is immaterial. To meet their legal burden, Plaintiffs do not need to show that Georgia has any legitimate state policies applicable to redistricting. It is clear that adherence to traditional districting principles is not constitutionally required. Shaw, 509 U.S. at 647. Rather, adherence to traditional districting principles is simply the reason why a state may deviate from population equality in its districts. Plaintiffs therefore have the burden of showing that the deviations in the plans are not attributable to Georgia attempting to accommodate a state policy. Indeed, if Georgia has no rational redistricting policies, as Defendant claims, Def. Resp. at 17-18, then Plaintiffs' burden of proving that such non-existent policies were not followed is an easy one

for Plaintiffs to meet.

Even if the issue were legally material, there is no factual basis for Defendant's argument that the traditional redistricting factors recognized by the Supreme Court are not legitimate policies of Georgia. In Abrams v. Johnson, 521 U.S. 74 (1997), the Supreme Court noted that the district court had described, in detail, Georgia's historic attempts to maintain political subdivisions, maintain the cores of existing districts, and protect communities of interest. 521 U.S. at 99-100; Pls. S.J. Brief at 9. As discussed in Dr. Gaddie's report, the county has special importance in Georgia, particularly in light of the fact that county delegates hold sway over local legislation. Gaddie Report, Pls. Ex. 10, at 17. Defendant has presented no evidence to dispute Dr. Gaddie's conclusions. While Plaintiffs agree that the large number of counties and uneven population distribution in Georgia prevent the State from legally giving one seat to each county, see id. at 19, Georgia nonetheless has previously taken care to split only the minimum number of counties necessary and into the minimum number of parts necessary. See id.; Pls. Demonstrative Exhibits of Aug. 26, 2003, at Tabs 17 & 37.¹¹

¹¹ Moreover, in nearly every other context, counties and municipalities form the building blocks whereby the General Assembly has divided the state into regions, districts, authorities, and commissions. In these other contexts, the General Assembly has prohibited the subdivision of counties and municipalities. *See* Ga. Const. art. VI, § I, ¶ VII (judicial circuits); Ga. Const. art. IX, § IV, ¶ IV

As in Hulme v. Madison Co., “Defendants have not offered any state (governmental) policy to justify the plan’s population disparity.” 188 F. Supp. 2d

("regional facilities" such as "industrial parks, business parks, conference centers, convention centers, airports, athletic facilities, recreation facilities, jails or correctional facilities"); O.C.G.A. § 2-6-9 (county committees of agricultural producers); O.C.G.A. § 50-32-12 (special districts under the Georgia Regional Transportation Authority Act); O.C.G.A. § 8-3-100 (regional housing authorities); O.C.G.A. § 15-6-34(a) (judicial administrative districts comprising judicial circuits); O.C.G.A. § 12-3-682(a)(3) (the "Power Alley Development Authority"); O.C.G.A. § 12-5-573(4) (the "Metropolitan North Georgia Water Planning District"); O.C.G.A. § 12-10-81 (the "Historic Chattahoochee Compact"); O.C.G.A. § 42-4-93(a) (regional jail authorities); O.C.G.A. § 17-12-32(b) (the "Georgia Indigent Defense Council," with representation from among the judicial administrative districts); O.C.G.A. § 49-3-1(b) (district departments of family and children services); O.C.G.A. § 20-5-42(b) (regional boards of library trustees); O.C.G.A. § 50-32-10(a)(2) (the "Georgia Regional Transportation Authority"); O.C.G.A. § 31-3-15 (health districts); O.C.G.A. § 25-6-8(a) (mutual aid resource pact districts); O.C.G.A. § 31-7-72(d) (hospital authorities); O.C.G.A. § 36-63-5(b) (joint resource recovery development authorities); O.C.G.A. § 36-64-4 (multi-jurisdictional recreation systems); O.C.G.A. § 36-75-4(b) (joint public safety and judicial facilities authorities); O.C.G.A. § 36-85-2(a) (interlocal risk management agencies); O.C.G.A. § 50-4-7(a) (state service delivery regions); O.C.G.A. § 50-8-33(a) (regional development centers); O.C.G.A. § 37-2-5 (regional planning boards for disability services); O.C.G.A. § 37-2-3(a) ("to the extent practicable, the boundaries for [disability services] regional planning boards and offices and community service areas shall not subdivide any county unit"); O.C.G.A. §§ 50-8-80 to -84 (metropolitan area planning and development commissions such as the Atlanta Regional Commission); O.C.G.A. § 44-4-20(b) (division of the Georgia Coordinate System of the National Ocean Survey/National Geodetic Survey into zones); O.C.G.A. § 46-9-322(5) (the "Southwest Georgia Railroad Excursion Authority"); O.C.G.A. § 48-4-61(a) (interlocal cooperation agreements establishing land bank authorities).

1041, 152 (S.D. Ill. 2001) (emphasis in the original).¹² Accordingly, Plaintiffs have easily met their burden of showing that the deviations were not the result of the effectuation of a legitimate state policy, but were arbitrarily and discriminatorily based on politics and the personal desires of individual legislators. Summary judgment must be entered for Plaintiffs on their one person one vote claim.

B. Plaintiffs Are Entitled To Summary Judgment Declaring The Congressional Plan Unconstitutional Because Plaintiffs Have Established That The State Did Not Achieve Districts Of Equal Population And Did Not Make A Good Faith Effort To So Do. The State Has Failed To Establish That The Population Deviation Resulted From The Consistent Application Of A Legitimate State Policy.

Plaintiffs' one person one vote claim on the Congressional Plan is uncomplicated: the State failed to achieve districts of equal population, failed to make a good faith effort to so do and cannot demonstrate a consistently-applied legitimate state interest that allows this Court to excuse the population deviation.

¹² Defendant's representation to the Court that the Hulme ruling relied upon by Plaintiffs "was based in large part on an Illinois law which required that [municipal] boundaries be respected" is blatantly erroneous. Def. Resp. Brief at 20. Hulme involved two separate challenges to a reapportionment plan: (1) it violated the Equal Protection Clause, and (2) it violated state law. 188 F. Supp. 2d at 1044. While the Hulme Court granted summary judgment to the plaintiffs on both counts, it is the Hulme Court's reasoning in its decision on the Equal Protection claim that supports Plaintiffs' claim here. See id. at 1051-52; Pls. S.J. Brief at 30-31.

As a matter of law, Plaintiffs are therefore entitled to summary judgment. Karcher, 462 U.S. at 730; Kirkpatrick, 394 U.S. at 530-31.

In its Response, the State asserts that this Court should deem its effort “good faith” because the General Assembly relied on the larger deviations in Abrams “and prior cases” when passing the Congressional Plan.¹³ Def. Resp. Brief, p. 23. As a justification, the State offers Ms. Meggers’ current speculation that to obtain a lower deviation plan she thinks the Democratic majority would have voted for, more precincts would have had to be split. Neither this “good faith” asserted by the State nor any newly invented justification saves the Congressional Plan from invalidation under the Equal Protection Clause.

The allegation that the General Assembly may have relied on Abrams does not make the State’s effort one of good faith to achieve population equality. There is no question that a congressional plan with a deviation of one person could certainly be drawn with today’s technology and computer databases. Meggers Dep., p. 122:16-20; 123:13-17. Because of this undeniable fact, the State cannot

¹³ In footnote 14 of their Response Brief, Plaintiffs, confusing Abrams with Miller, mistakenly stated that Abrams did not consider a one person one vote claim. As discussed above, the Supreme Court did consider such a claim but rejected it for reasons not applicable here, namely that the deviation was necessary to honor traditional principles of redistricting in Georgia and the census was 6 1/2 years past.

claim it made a good faith effort to achieve population equality but simply could not achieve that goal. There is no practical impediment to equal population.

Whether based on Abrams or prior plans, the State's misinterpretation of the one person one vote requirement does not make its plan a good faith effort to achieve population equality. Simply because legislators have a "good faith" misunderstanding of what population equality is does not mean there was a good faith effort to seek population equality. There is nothing in any Supreme Court opinion that indicates that a state's belief that its congressional plan complied with the one person one vote requirement is relevant.

Furthermore, even if legislators did rely on Abrams, it is clear that they relied only on the part they perceived to be favorable to their position -- the .35% deviation -- without any regard to the justification for that deviation. The Supreme Court approved the deviation because (1) the .35% deviation had resulted from the district court's attempt to honor traditional Georgia redistricting principles and (2) any attempt to correct the deviation would be based on census data then almost seven years old. Abrams, 521 U.S. at 100-01.

In this case, neither of those justifications exists. Taking the latter point first, the census figures in this case are 2 1/2, not 6 1/2, years old. The Abrams Court specifically noted that exactly such a difference was important:

Karcher was written only two years from the previous census, however, and we are now more than six years from one. The magnitude of population shifts since the census is far greater here than was likely to be so in Karcher. These equitable considerations disfavor requiring yet another reapportionment to correct the deviation.

521 U.S. at 101.

Therefore, the only remaining question is whether the State can demonstrate that the General Assembly, like the trial court in Abrams, consistently applied a legitimate state interest that resulted in, and thus will excuse, the population deviation found in the Congressional Plan. The State never makes that contention because it cannot; the General Assembly drew a congressional plan that pleased it politically without regard to any legitimate state interest and particularly without regard to a dedication to preserving natural, geographic, highway or precinct boundaries which it now claims, in retrospect, justifies the Plan.

Instead, the State maintains now that the deviation exists because in order to design a lower deviation plan “that had any realistic possibility of being enacted into law,” i.e., one that was “Democratic” enough to pass, there would have been breaches of “major natural, geographical or highway boundaries” and the splitting of additional precincts. Def. S. J. Brief, pp. 23-24. The State’s argument fails for several reasons.

First and foremost, there is no evidence that either the 2001 General Assembly, or, more importantly, the plan drafters, ever considered the “legitimate interest” now cited by the State, i.e., avoiding breaching certain boundaries or splitting “additional” precincts. In fact, the evidence is to the contrary. Senator Brown testified that his only primary considerations in drawing plans were the Voting Rights Act, his own political survival and accommodating other Democratic senators from his area. Brown Dep., p. 31:23-32:10. He never mentioned an attempt to preserve certain boundaries or avoid splitting more precincts. Likewise, both Doug Moore, who was a demographer on the Congressional Plan, was asked to detail the instructions he was given and/or considerations he used in drawing maps. His list was quite short and neither included a desire to preserve boundaries or avoid splitting additional precincts. Moore Dep., p. 30:2-9.

Most importantly, Ms. Meggers herself, who now asserts the justification on behalf of the State, never once referred to a desire of the 2001 General Assembly to avoid breaching certain boundaries or splitting more precincts in the Congressional Plan. In fact, she described the splitting of “a lot of precincts” as a regular occurrence, which was remedied by counties later:

- A. (by Ms. Meggers) Well, at the time you draw the plan we always split a lot of precincts. Over the period of time after the

redistricting plan the counties go back and they redraw their precincts to either match new legislative lines or the county commission or school board, so that when you run precincts in 2000 against a benchmark you're always going to get fewer.

Q. Because they've corrected them since the benchmark?

A. Well, they've adjusted them. I don't think corrected is a proper term.

Meggers' Dep., p. 142:3-14. See also Meggers Aff., ¶¶ 34-36 (splitting precincts not a real consideration to State in drawing plans). In short, none of the plan drawers ever listed a desire to preserve certain boundaries or keep more precincts whole as a goal of the 2001 General Assembly. Most tellingly, Ms. Meggers never referenced those when asked directly about the goals of the 2001 General Assembly in drawing the Congressional Plan and, in fact, testified that splitting "a lot" of precincts was the norm. See also Brown Dec., ¶¶ 27-30 (he did not consider communities of interest, compactness or county lines to be real considerations in the redistricting process.).

Second, even if the Court were to consider the State's allegation that the General Assembly did not enact a plan with a lower deviation in order to avoid breaching certain geographic boundaries or splitting more precincts, the Court must consider what the allegation actually is. The State's contention is that in order for Ms. Meggers to draw a plan that she thinks would have passed, the

deviation could not be reduced further without dividing more boundaries and splitting more precincts. Def. Resp. Brief, at 23. In other words, there was not a policy against breaching boundaries or splitting precincts, but in order to achieve a plan that the Democratic leadership would have liked, the deviation could not have been reduced without more such breaches and splits. In addition to that contention being pure speculation, this need for a Democratic gerrymander fails because the desire of the Democratic Party does not constitute the “consistently applied legitimate legislative policy” that Karcher and Kirkpatrick require.

The test is not just whether the State can come up with a legitimate state policy but whether there is proof that such a policy was consistently applied. Karcher, 462 U.S. at 740 (“Any number of consistently applied legislative policies might justify some variance . . .”); Kirkpatrick, 394 U.S. at 535 (policies supporting deviation must be applied “throughout the State in a systematic, not an ad hoc manner”). In the 2001 Congressional Plan, the evidence is clear that the policy now espoused by the State, i.e., not breaching certain boundaries and not splitting precincts, was not consistently applied. It is not a surprise that the major players in the line-drawing process never recalled a goal of preserving boundaries or precinct lines because the Congressional Plan does so at every turn.

The State never identifies what “natural, geographic or highway boundaries” might have had to be breached in a plan at a lower deviation. However, the county boundary line, considered to be Georgia’s most important boundary by the last court to consider the state Congressional Plan, was never even mentioned by any of the State’s numerous witnesses. Their testimony is confirmed by the fact that 34 counties are split, both in metro Atlanta and outside, as opposed to the 6 counties, all in metro Atlanta, split in the 1990’s court drawn plan and the much fewer split in the 1980’s plan (2) and the 1970’s plan (3), both drawn by the General Assembly. Johnson v. Miller, 922 F. Supp. 1556, 1566 (S.D. Ga. 1995); Gaddie Report, Pl. Ex. 10, p. 20. In addition to the facts that no witness testified that avoiding precinct splits was a state goal, and Ms. Meggers testified that splitting precincts was irrelevant, the reality that 88 precincts are split is proof that there was no consistently applied policy for not splitting precincts in Georgia’s Congressional Plan.

CONCLUSION

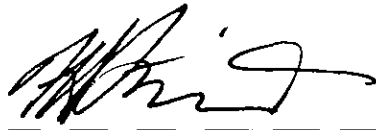
For the reasons stated above, the Court should declare the Georgia House, Senate, and Congressional Plans unconstitutional and enter summary judgment for

Plaintiffs.

Respectfully submitted this 24th date of November, 2003.

Local Rule 7 I.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.



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

SARA LARIOS, et al. and	§	
ERIC JOHNSON	§	
PLAINTIFFS,	§	CIVIL ACTION FILE
	§	NO. 1:03-CV-693 (CAP)
v.	§	
	§	THREE JUDGE COURT
CATHY COX, in her official capacities	§	
as Secretary of State of Georgia and	§	
Chair of the State Election Board,	§	
	§	
DEFENDANT.	§	

CERTIFICATE OF SERVICE

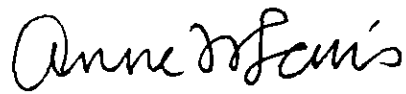
This is to certify that I have this day served or caused to be served a copy of the within and foregoing PLAINTIFFS' JOINT REPLY BRIEF IN SUPPORT OF PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT by email and first class mail, with proper postage affixed, to:

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