

ORIGINAL

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JUN 17 2003

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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.	)	
	)	

**REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS CLAIMS AGAINST THE REDISTRICTING PLANS FOR CONGRESS AND THE GEORGIA HOUSE OF REPRESENTATIVES**

**I. INTRODUCTION**

Plaintiffs' opposition to Defendants' Motion to Dismiss is largely just an incantation of the rule of liberal pleading. Plaintiffs discuss Rule 12(b)(6) and cite at length various cases that stand for the proposition that allegations in a complaint are taken as true and construed in the light most favorable to the plaintiff.

Defendants take no issue with this general proposition, of course. But what Plaintiffs fail to do is to apply that general proposition to the particulars of this case.

Defendants demonstrated in their principal brief in support of their motion that, under the *undisputed* facts of this case, Plaintiffs are unable to prevail on their claims as a matter of law. Defendants' contentions are supported by controlling Supreme Court authority that addresses the specific legal claims advanced by the Plaintiffs here. Under that authority, the facts alleged, and facts subject to judicial notice, the Plaintiffs' claims must fail.

To be sure, the Defendants' initial brief noted certain facts outside of the Plaintiffs' pleadings, but only facts that are indisputable and subject to judicial notice. It has long been the practice that courts look to such undisputed matters that are subject to judicial notice in deciding a motion to dismiss. Mack v. South Bay Beer Distrib. Inc., 798 F.2d 1279, 1282 (9<sup>th</sup> Cir. 1986) (citing to 5A, *C. Wright & A. Miller*, FEDERAL PRACTICE AND PROCEDURE § 1363); LoCicero v. Leslie, 948 F.Supp. 10, 12 (D.Mass. 1996); Briggs v. Newberry County Sch. Dist., 838 F.Supp. 232, 233-34 (D.S.C. 1992). Under the undisputed facts here, Plaintiffs have failed to state a claim cognizable under federal law as it presently exists.

## II. ARGUMENT AND CITATION OF AUTHORITY

### A. **Plaintiffs' Claims of Malapportionment and Political Discrimination are Legally Insufficient**

The best argument the Plaintiffs can marshal in their attack on Georgia's state legislative districts rests on the proposition that those districts are not completely immunized from challenge *solely* because their total deviations are less than 10%. The fact that their total deviation is under 10%, however, does unquestionably create a presumption of constitutionality. Brown v. Thomson, 462 U.S. 835, 843 (1983); Gaffney v. Cummings, 412 U.S. 735, 750-51 (1973). Indeed, that is precisely the holding of the Fourth Circuit case that Defendants rely upon so heavily, Daly v. Hunt, 93 F.3d. 1212, 1220 (4<sup>th</sup> Cir. 1996). It is here that the Plaintiffs' claims fail. They try to overcome the presumption of constitutionality with allegations that, themselves, have no *legal* merit whatsoever. In effect, the Plaintiffs are trying to combine two legally insufficient theories, as if two losses might somehow make a win.

The Plaintiffs' malapportionment claims rest on the notion that Georgia's population deviations violate the Constitution because the districts discriminate politically against Republicans. This argument -- that the presumption of

constitutionality may be overcome with a claim of “political discrimination” -- cannot possibly succeed under any conceivable set of facts that exist here. Claims of political discrimination -- to the extent they are ever cognizable under the law today -- are nearly impossible to win. At the very least, a claim can be stated only if the redistricting plan challenged has a dramatic exclusionary impact on the plaintiff party members, and the challenged political system permits no remedies in the normal political process. Davis v. Bandemer, 478 U.S. 109 (1986); Badham v. March Fong Eu, 694 F.Supp. 664 (N.D.Ca. 1988); Republican Party of Virginia v. Wilder, 774 F.Supp. 400 (W.D.Va. 1991); Pope v. Blue, 809 F.Supp. 392 (W.D.N.C. 1992), sum. aff’d, 506 U.S. 801 (1992). Given the undisputed presence of Republican political power in Georgia -- including holding the governorship, 8 of 13 congressional seats, a majority in the State Senate, and one of two United States Senate seats -- Plaintiffs’ claim of “political discrimination” cannot possibly be maintained. Id.

Because Plaintiffs’ claim of unconstitutional discrimination against Republicans in Georgia is frivolous, that claim cannot overcome the presumption of constitutionality that Plaintiffs face. The several cases Plaintiffs cite do nothing to advance their position. To the contrary, most of them further undercut their

claims. Plaintiffs repeatedly cite Cecere v. County of Nassau, 2003 U.S. Dist. LEXIS 7123 (E.D.N.Y. 2003). But the Cecere opinion -- which was issued by a single judge -- provides no help at all for the Plaintiffs here. The case merely holds that the Plaintiffs' claims there were so insubstantial that the Court would not even allow 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. Id. \*9.

Like the Plaintiffs here, the Plaintiffs in Cecere challenged a redistricting with a total deviation below 10% in part because a "better" plan could be drawn. That argument was rejected as a matter of law:

[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. Id. \*6 (citations omitted).

The Plaintiffs in Cecere had also claimed that the deviations there were the "product of impermissible political gerrymandering," just as the Plaintiffs do here. Apparently realizing the legal futility of that claim, however, it was abandoned. Id. \*7. In short, Cecere gives no support to the present Plaintiffs' position.

Plaintiffs' reliance on Hulme v. Madison County, 188 F.Supp.2d 1041 (S.D.Ill. 2001) is equally misplaced. That decision rests primarily on Illinois state law requirements that imposed very specific guidelines on local government redistrictings, including a prohibition against splitting municipalities. Plaintiffs allege no such state law requirement in Georgia, nor could they since there is none. Plaintiffs' other authorities are as unhelpful to them as the Cecere and Hulme cases.<sup>1</sup>

To the extent that Hulme also suggests that there can be a federal claim under the Fourteenth Amendment for deviations of less than 10% if "the apportionment process had a 'taint of arbitrariness and discrimination,'" id. at 1047, that notion must be read in concert with controlling precedent.<sup>2</sup> Whatever might be the pros

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<sup>1</sup> Plaintiffs cite Republican Party v. Martin, 980 F.2d 943 (4<sup>th</sup> Cir. 1992). That case is completely inapposite to the claims asserted here. The Court there acknowledged that a complaint was justiciable where a bizarre election scheme vested the power to *nominate* judicial candidates in one geographical group of voters, and the power to *elect* those same judgeship in an entirely different electorate (the state as a whole). That system has no parallel at all to Georgia's redistricting plans, where the eligible electorate in the primary and general elections are the same in all districts. Davis v. Bandemer, supra, and its progeny are the framework for the Plaintiffs' claims here, and under that authority, Plaintiffs cannot possibly prevail in light of the undisputed facts.

<sup>2</sup> This quotation originated in Daly v. Hunt, which went on to explain what the statement meant: "Presumably, an apportionment plan that satisfies the 10% de

and cons of a reapportionment process, the legality of a redistricting plan rests on its ultimate results. Even in the area of racial discrimination in voting -- where courts have a much greater role than in political discrimination cases -- discrimination in the legislative process is irrelevant absent *illegal impact*. Johnson v. DeSoto County Bd. of Comm'rs, 72 F.3d 1556, 1561-64 (11<sup>th</sup> Cir. 1996); Brooks v. Miller, 158 F.3d 1230, 1237 (11<sup>th</sup> Cir 1998). Those cases were decided under the more permissive standards of the Voting Rights Act. The Constitution, like the Voting Rights Act, also requires discriminatory impact.

[I]n order to succeed, the Bandemer plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.

Davis v. Bandemer, 478 U.S. at 127. Plaintiffs alleging political gerrymandering have no claim where they are unable to establish the grave political exclusion required under Davis. Because the Plaintiffs here cannot allege any such impact in Georgia, as a matter of law they are foreclosed from claiming that the political process was

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minimis threshold could nevertheless be challenged under another theory, such as a violation of the Voting Rights Act or an unconstitutional racial gerrymander . . . ." 93 F.3d at 1220-21.

unconstitutionally “tainted with arbitrariness” because it was “infected” with politics.

Indeed, Plaintiffs’ entire theory must fail because their thesis flies in the face of every Supreme Court statement on the subject. Politics is an inherent part of the legislative process and of redistricting in particular. Plaintiffs’ bizarre argument, that political considerations somehow “taints” that process and states a claim, is nonsensical. The Supreme Court has made this point clear in any number of cases. “Politics and political considerations are inseparable from districting and apportionment . . . . The reality is that districting inevitably has and is intended to have substantial political consequences.” Gaffney v. Cummings, 412 U.S. 735, 752-753 (1973); Davis v. Bandemer, *supra* at 128-29.

Plaintiffs’ brief virtually admits that their theory of political discrimination is divorced from existing Supreme Court authority. They simply make the political complaint that the Democratic majority in the General Assembly in 2002 enacted plans designed to “increase Democratic political performance.” (Pls’ Brief, p. 13).

They then go on to say:

*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 brief 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.” *Id.* 13-14 (emphasis added).

Plaintiffs are wrong as a matter of law in their legal theory, and they are wrong as a matter of fact in their characterization of the State’s brief in the Georgia v. Ashcroft case. As a matter of law, political objectives do not constitute an unconstitutional or irrational state policy, as just noted. As a matter of fact, the State never asserted otherwise. The *partial quotation* the Plaintiffs refer to comes from the Jurisdictional Statement Georgia filed in Georgia v. Ashcroft. What Georgia actually argued there -- in the full quotation -- is that the Department of Justice, and the District Court in its ruling, had exceeded the Constitution in insisting that *safe minority seats* be drawn, rather than permitting the State to enact districts that afforded a reasonable or equal opportunity at minority victory. That contention is radically different than what the Plaintiffs here contend.<sup>3</sup>

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<sup>3</sup> The full paragraph in Georgia’s Jurisdictional Statement reads: In Bush v. Vera, [517 U.S. 952 (1996)] the Court addressed the constitutional power of the State to draw districts designed to do more than remedy the kind of vote dilution prohibited by § 2. The Court held in that case that it was unconstitutional for the Texas legislature to draw districts for racial purposes that were not required by § 2. *Here*, the district court’s admitted purpose for increasing the BVAPs in Georgia’s Senate was not to address voting discrimination -- which was at least offered as a justification in the Texas case -- but simply to create safe minority seats. Georgia could not constitutionally have drawn such districts for the

Finally, Plaintiffs make the strained argument that congressional districts are unconstitutional unless they have a total deviation of less than one *person*. For this argument, they rely on one aberrant case, a 2-1 decision by a district court in Pennsylvania. Vieth v. Pennsylvania, 195 F.Supp. 2d 672 (M.D.Pa. 2002), appeal dismissed as moot sub nom., Jubelirer v. Vieth, \_\_\_\_ U.S. \_\_\_\_, 123 S.Ct. 67 (2002). Vieth has been referred to as a “pariah on the sea of law,” using Justice Frankfurter’s expression, since it appears to stray so far from precedent. Whether or not Vieth is a pariah, the decision is unquestionably not in harmony with the Supreme Court’s decisions on the same point. The Supreme Court has upheld much greater congressional deviations than Georgia has, Karcher v. Daggett, 467 U.S. 1222 (1984), and the High Court’s most recent decision on the matter indicates, if anything, a relaxation of the quantitative population equality standard. Abrams v. Johnson, 521 U.S. 74 (1997).

#### **B. Plaintiffs State No Claim Based on Multi-Member Districts**

Plaintiffs claim that “the use of sporadic multi-member districts in the

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purpose of creating safe seats, and § 2 cannot be constitutionally construed to mandate the State to do so. Guaranteeing a particular political result is not a constitutionally legitimate goal. (J.S. at 24-25.)

House plans debases and dilutes the votes of Plaintiffs living in single-member districts” (Pls’ Brief, p. 29), ignores the contrary Supreme Court precedents cited in Defendants’ principal brief. As the Supreme Court held in White v. Regester, 412 U.S. 755, 765 (1973), a case involving both single-member and multi-member districts:

Plainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State.

White recognized that there could be claims that multi-member districts were used invidiously to “cancel out or minimize the voting strength of racial groups,” but there is no such claim here, nor could there be in light of the undisputed fact that Georgia’s multi-member districts afford minorities excellent electoral opportunities. Georgia v. Ashcroft, 195 F.Supp. 2d 25, 76, 196-200 (D.D.C. 2002).

In spite of the Supreme Court’s holdings, the Plaintiffs’ claim against multi-member districts boils down to the oft-rejected proposition that multi-member districts are *per se* unconstitutional. In support of this flawed constitutional claim, the Plaintiffs point to Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377(2002), a case decided under the North Carolina Constitution, which has nothing to do with the issues before this Court. Both Stephenson and the Plaintiffs here also rely upon

an Iowa case, Kruidenier v. McCulloch, 258 Iowa 1121, 142 N.W. 2d 355 (1966), for the odd “proposition that use of both single-member and multi-member districts within the same redistricting plan violates equal protection principles.” Stephenson, 562 S.E.2d at 395. Since Kruidenier, however, the United States Supreme Court has squarely rejected the notion that multi-member districts, without more, violate the equal protection clause. See, e.g., Whitcomb v. Chavis, 403 U.S. 124, 142-143 (1971); White, 412 U.S. at 765 .

**C. Plaintiffs Fail to State a Claim under 2 U.S.C. § 2**

Plaintiffs contend that they state a claim under 2 U.S.C. § 2 because they do not like the shape of Georgia’s legislative districts, and because they believe that more “regular” or “compact” districts better serve their political ends. Their argument is frivolous. As Plaintiffs admit throughout their pleadings, and as they must admit under the undisputed facts, Georgia is presently reapportioned into 13 separate, distinct and contiguous land areas. Each such district elects one member of Congress. That is all that is required by 2 U.S.C. § 2c, as amply shown in Movants’ principal brief. Plaintiffs cannot avoid a motion to dismiss by alleging that “districts” are not “districts.”

The frivolousness of Plaintiffs' legal theories is amply demonstrated by their argument on this issue. In ten pages, Plaintiffs cite not a single case, a single word in the statute, nor a single word of the legislative history that underlies *the law at issue*, that remotely supports their claim. Rather, Plaintiffs ignore the lengthy discussion the Supreme Court has just written about this statute; they ignore the plain words of the statute; and they ignore the legislative history that underlines the law at issue. Plaintiffs embark, instead, on a political discussion of what they would like the law to be. In that foray, Plaintiffs cite political theory drawn from the Federalist Papers, statements of legislators made 150 years ago, and theoretical writings by various authors about what might constitute a "model reapportionment process." Not a word of the Plaintiffs' "authority" pertains to the statute at issue here, which was adopted in 1967.

Section 2c is discussed at length in the Supreme Court's recent decision in Branch v. Smith, \_\_\_ U.S. \_\_\_, 123 S.Ct. 1429 (2003). The straightforward reading of the statute given by all of the Justices in Branch is diametrically contrary to Plaintiffs' argument. Unable to conjure any way around the inexorable and fatal impact of Branch, Plaintiffs simply ignore the case.

Finally, Plaintiffs mis-cite several Supreme Court decisions that discuss non-compact districts and circumstances where “appearances do matter.” (Pls’ Brief, pp. 26-27). Not a word in those cases suggests that there is any federal “right” to more regular or compact districts under either the Constitution or § 2c. What those cases addressed was the *evidentiary* issue of whether the challenged districts were predominately based on race. In that context, a district’s appearance may be considered as part of the evidence in determining whether a district has been drawn on the basis of race. Miller v. Johnson, 515 U.S. 900 (1995). That evidentiary rule provides no support for what the Plaintiffs advocate here.<sup>4</sup>

**D. Plaintiffs Cannot Challenge Districts They Do Not Reside In**

Plaintiffs cite to no case, because no case permits a resident to assert a constitutional challenge to an entire districting plan based on residency in a single district. The mandate of United States v. Hays, 515 U.S. 737 (1995), is clear and was recently followed in the Eleventh Circuit in Sanders v. Dooly County, 245 F.3d

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<sup>4</sup> How far-fetched the Plaintiffs’ § 2c argument is, is reflected by their contention that Justice Stewart’s pornography test -- “I know it when I see it” -- should be the legal “standard” for when a district looks “good enough” to pass muster under § 2c.

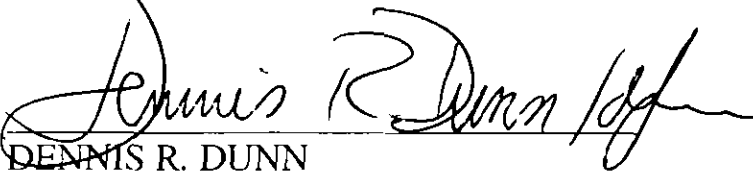
1289 (11th Cir. 2001). In Sanders, the Court observed that standing requirements have become increasingly stringent since Hays, so that "residents of intentionally racially gerrymandered districts have suffered no cognizable harm if the districts are not the ones the districting plan originally set out to create, even if those gerrymandered districts are indispensable to the racially motivated plan." Id. at 1291. Plaintiffs must reside in the districts they challenge and cannot rely on the bald assertion that a challenge to some districts necessarily affects the "plan as a whole."

### III. CONCLUSION

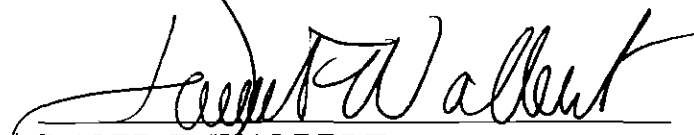
For the reasons set forth herein, in Defendants' initial motion and supporting brief, and based on the entire record, Defendants Perdue, Coleman and Cox respectfully request that Plaintiffs' Complaint be dismissed.

Respectfully submitted,  
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Defendants.	)	

**CERTIFICATE OF SERVICE AND TYPE**

Pursuant to Local Rule 7.1D, the undersigned counsel for the Defendants Perdue, Coleman and Cox hereby certify that the within pleading has been prepared with a font size (Times New Roman 14) which was approved by the Court, and that I have this day served counsel for the opposing parties with a copy of **Reply Brief in Support of Defendants' Motion to Dismiss Claims Against The Redistricting Plans For Congress And The Georgia House of Representatives** prior to filing the same, by causing to be hand delivered a copy thereof properly addressed upon:

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and by first class mail, with adequate postage thereon, properly addressed to:

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This 17 day of June, 2003.

  
\_\_\_\_\_  
~~Mark H. Cohen~~