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SEP 17 2003

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

LUTHER... Deputy Clerk  
By: *J. Murphy*

SARA LARIOS, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. 1:03-CV-693-CAP
v.	)	(Three-Judge Court)
	)	
CATHY COX, in her official	)	
capacities as Secretary of State and	)	
Chair of the State Election Board,	)	
	)	
Defendant.	)	

**REPLY BRIEF IN SUPPORT OF**  
**DEFENDANT'S<sup>1</sup> MOTION TO DISMISS FIRST AMENDED COMPLAINT**  
**PURSUANT TO FED. R. CIV. P. 12(b)(6)**

I. Standard of Review

Plaintiffs correctly cite Conley v. Gibson, 355 U.S. 41 (1957) and its progeny for the proposition that a complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 45-46. However, it is also clear that "[a] complaint is also subject to dismissal under Rule 12(b)(6) when its allegations – on their face – show that an affirmative defense

<sup>1</sup> Since the filing of the Motion to Dismiss, two of the three remaining Defendants were dismissed in accordance with the September 12, 2003 Consent Order of the Court.

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bars recovery on the claim.” Marsh v. Butler County, 268 F.3d 1014, 1022 (11<sup>th</sup> Cir. 2001). Moreover, it is entirely appropriate in reviewing a 12(b)(6) motion to consider whether the allegations are sufficient to permit Plaintiffs to conduct discovery in any attempt to prove the allegations. Jackam v. Hosp. Corp. of Am. Mideast, Ltd., 800 F.2d 1577, 1580 (11th Cir. 1986).

Plaintiffs have made claims in their First Amended Complaint which should be dismissed for failure to state a claim upon which relief can be granted under the Conley standard.

II. Plaintiffs Have Failed to State a Claim of a Violation of One-Person, One-Vote Principles by Alleging Deviations of Voting Age Population, Registered Voters, and Individuals Casting Votes.

As stated in Defendant’s opening brief in support of the motion to dismiss the First Amended Complaint, Plaintiffs’ claim that Georgia’s legislative redistricting plans are unconstitutional because of a failure to maintain population equality amongst demographic variables other than total population is baseless as a matter of law. In response, Plaintiffs fail to cite one case which supports their contention, and admit that no case *requires* that Georgia use any census data other than total population to reapportion its State House or Senate districts. As previously stated by Defendant, the decision to redistrict based upon total population, as opposed to registered voters or other demographic factors, is within

the complete discretion of the state, and its choice to use one demographic factor over another does not create any constitutional claim. See Burns v. Richardson, 384 U.S. 73, 91-92 (1976); Chen v. City of Houston, 206 F.3d 502, 523 (5th Cir. 2000), cert. denied, 532 U.S. 1046 (2001); Daly v. Hunt, 93 F.3d 1212, 1227 (4th Cir. 1996); Garza v. City of Los Angeles, 918 F.2d 763, 773-76 (9th Cir. 1991).

Plaintiffs cite heavily to a dissenting opinion by Judge Kozinski of the Ninth Circuit in Garza which argues for the satisfaction of one-person, one-vote requirements based upon voting capability as opposed to total population. Garza, 918 F.2d at 780-86 (Kozinski, J., concurring and dissenting in part). Judge Kozinski's opinion flies in the face of Burns and its progeny. "Unless the choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in Reynolds v. Sims is to be measured thereby." Burns, 384 U.S. at 92. Moreover, contrary to Plaintiffs' contention, evidence of "electoral inequality" in voter registration or actual voting does not fulfill Plaintiffs' burden to make out a *prima facie* case of a Fourteenth Amendment violation; such evidence is immaterial to a claim alleging a one-person, one-vote violation when the state in its discretion has chosen to redistrict based upon the accepted census factor of total population.

Consequently, to the extent Plaintiffs have attempted to raise a claim of a violation of the Fourteenth Amendment based upon deviations in demographic factors other than total population, that claim should be dismissed.

### III. Plaintiffs' Racial Gerrymandering Claim Should Be Dismissed.

Plaintiffs make what can only be described as a contorted response to Defendant's assertion that Plaintiffs lack standing to assert a racial gerrymandering claim; moreover, their one-person, one-vote claims completely undercut their attempt to raise a claim of racial gerrymandering.

Plaintiffs first contend that they have standing to raise a Shaw v. Reno<sup>2</sup> racial gerrymandering claim against the State Senate redistricting plan because the legislature "subordinated all traditional districting principles . . . to race," so that Plaintiffs who reside in white-majority districts were denied "equal treatment" because of reliance on racial criteria in the reapportionment of other majority-minority districts in the Georgia Senate. That does not establish standing under applicable Supreme Court precedent.

Standing is a threshold jurisdictional question which must be answered prior to and independent of the merits of a party's claims. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998). In United States v. Hays, 515 U.S. 717

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<sup>2</sup> 509 U.S. 630 (1993).

(1995), a challenge was made based upon Shaw v. Reno to Louisiana's redistricting plan for its board of education. The plan contained two majority-minority districts. The plaintiffs lived in a majority-white district that bordered on one of the majority-minority districts. The plaintiffs challenged the entire plan, including their own district, as an unconstitutional racial gerrymander. Hays, 515 U.S. at 739-42. The Supreme Court assumed for the sake of argument that the evidence was sufficient to establish a Shaw claim, but nevertheless concluded that the plaintiffs lacked standing to maintain their racial gerrymandering challenge because they did not reside in a majority-minority district and had not otherwise shown they had been "personally denied equal treatment" by the alleged racial gerrymander. Id. at 744-46. The failure to show the requisite injury was not changed by the fact that the racial composition of their own district might have been different had the legislature drawn an adjacent majority-minority district another way. Id. at 746.

Aside from Georgia Benton, it is undisputed that all of the remaining Plaintiffs reside in majority-white districts. Like the plaintiffs in Hays, none of these Plaintiffs reside in a majority-minority district and cannot show that they have been personally denied equal treatment in the creation of any majority-

minority district. The Supreme Court recently rejected another attempt to raise a racial gerrymandering claim in a similar situation based upon lack of standing:

Appellees' position here is essentially indistinguishable from that of the appellees in *Hays*. Appellees are challenging their own majority-white districts as the product of unconstitutional racial gerrymandering under a redistricting plan whose purpose was the creation of majority-minority districts, some of which border appellees' districts. Like the appellees in *Hays*, they have neither alleged or produced any evidence that any of them was assigned to his or her district as a direct result of having "personally been subjected to a racial classification." . . .

Appellees' suggestion thus boils down to the claim that an unconstitutional use of race in drawing the boundaries of majority-minority districts necessarily involves an unconstitutional use of race in drawing the boundaries of neighboring majority-white districts. We rejected that argument in *Hays* . . . .

Sinkfield v. Kelly, 531 U.S. 28, 31 (2000) (internal citations omitted). See also Sanders v. Dooly County, 245 F.3d 1289, 1291 (11th Cir. 2001) (plaintiffs who lived in majority-white districts suffered no cognizable harm from the alleged gerrymandering of their districts).

The frivolity of Plaintiffs' position also is evident by their own Exhibit B to the Complaint,<sup>3</sup> which shows that of the 22 majority-white districts where

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<sup>3</sup> "In determining whether to grant a Rule 12(b)(6) motion, the Court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account." Watson v. Bally Mfg. Corp., 844 F. Supp. 1533, 1535 n.1 (S.D. Fla. 1993), aff'd, 84 F.3d 438 (11th Cir. 1996), quoting

Plaintiffs reside (see Complaint, ¶¶ 7-9, 11-36), 18 of them have African-American populations of between 2-14%, and five others have African-American populations of between 27-39%. Most of these districts do not even border a majority-minority district, let alone are affected by the drawing of any of the 13 majority-minority districts. Therefore, none of these Plaintiffs who reside in majority-white districts have standing to assert any claim of racial gerrymandering – they do not live in any majority-minority district and the creation of the majority-minority districts does not affect them personally.

Second, as stated in Defendant's initial brief, the only Plaintiff to reside in a majority-minority district is Georgia Benton (Complaint, ¶ 10). Plaintiffs suggest that Ms. Benton has standing under Hays because "[h]er injury would be that the district was drawn primarily based on race." Pls' Brief at 16. But, as previously discussed by Defendant, Ms. Benton's prior intervention in Georgia v. Ashcroft to urge that her district's African-American population should be increased so as not to constitute retrogression as compared to the benchmark plan completely undermines her position in this case. Plaintiffs' response here also shows that Ms. Benton is not unlike any other Plaintiff in that her real complaint is that her

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5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 299 (1990).

district's *underpopulation*, as opposed to any emphasis on *race*, violates one-person, one-vote principles:

Ms. Benton's position in *Georgia v. Ashcroft* is that the State retrogressed because it removed minority voters, including Ms. Benton, from Senate District 2, which was already underpopulated according to the 2000 Census, and thereby decreased the minority voting power in that district. Furthermore, by placing those minority voters into an overpopulated majority white district, the state ensured that the minority voters would lose their voice. Her position here is no different: the State took voters from an underpopulated district, thereby underpopulating it further.

Pls. Brief at 17 (emphasis in original). Thus, Ms. Benton's complaint here has nothing to do with alleged racial gerrymandering but is just another Equal Protection challenge based upon purported one-person, one-vote violations. She has no standing to raise any racial gerrymandering claims.

Finally, it cannot be understated how Plaintiffs are attempting to maintain two alternative and totally inconsistent theories in their effort to undermine the State Senate plan. Plaintiffs' Complaint primarily asserts that the Senate plan violates Equal Protection because of population deviations that violate one-person, one-vote standards due to illegal political gerrymandering. Counsel for Plaintiffs admitted during the previous motions hearing that their Complaint was basically a one-person, one-vote challenge. Plaintiffs assert that the Senate redistricting plan was created principally as a result of political gamesmanship. At the same time,

Plaintiffs try to also assert that the reapportionment of the Senate was so irrational that it can only be explained by the use of race.

Defendant can find no reported case where a court has held that a plaintiff could successfully strike down a redistricting plan based upon the theory that it was *both* a political *and* a racial gerrymander. The reason is obvious – while a redistricting plan can have race and politics as considerations for its creation, it is impossible to maintain simultaneous claims based upon each consideration being the “predominant” or controlling factor. Indeed, the Supreme Court’s recent decision in Georgia v. Ashcroft, 123 S. Ct. 2498 (2003), indicates that race was not the predominant factor in the drawing of the Senate plan. Plaintiffs’ attempt to add a racial gerrymandering claim to its existing political gerrymandering claim should be disallowed by this Court.

#### IV. Plaintiffs’ Amended Art. I, § 2 Claim Lacks Merit.

In response to Defendant’s critique of Plaintiffs’ claim that Art. I, § 2 of the Constitution prohibits states from redistricting Congressional lines because it exceeds the regulation of the time, place, and manner of elections, Plaintiffs’ allege that the claim should be permitted because a similar contention is being asserted by appellants in a brief in a case pending before the United States Supreme Court.

See Vieth v. Pennsylvania, 241 F. Supp.2d 478 (M.D. Pa. 2003) (three-judge

court), *prob. juris. noted sub nom.*, Vieth v. Jubelirer, 123 S. Ct. 2652 (2003).

Suffice it to say that the fact that an unsupported argument is being made in a brief in an appeal of another case from another district does not provide grounds for avoiding dismissal on 12(b)(6) grounds. Moreover, Plaintiffs' unsupported argument, if taken to its logical end, would prohibit states from redistricting congressional lines at all, because such an activity would not amount to a regulation of "the time, places, and manner" of an election.

V. The Portions of Plaintiffs' First Amended Complaint Which Include Claims Previously Dismissed by This Court in its August 29, 2003 Order Should Also Be Dismissed.

In their Brief in Opposition to Defendants' Motion to Dismiss the First Amended Complaint, Plaintiffs abandon their claim against multi-member districts, given this Court's August 29, 2003 Order. However, this Court's August 29, 2003 Order also dismissed Plaintiffs' claim under 2 U.S.C. § 2c, which has been restated in the First Amended Complaint. That claim should be dismissed as well.

VI. Conclusion


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

This 17<sup>th</sup> day of September, 2003.

Respectfully submitted,

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**Local Rule 7.1D Certification**

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

  
MARK H. COHEN

**CERTIFICATE OF SERVICE**

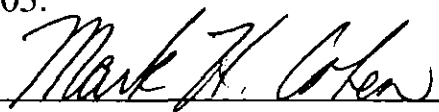
This is to certify that I have this day served or caused to be served a copy of the within and foregoing **REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)**, prior to filing the same, by first class mail, with adequate postage addressed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

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This 17<sup>th</sup> day of September, 2003.

  
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