COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 2012-CI-00109

JOSEPH M. FISCHER, ET AL. **PLAINTIFFS**

v.

ALISON LUNDERGAN GRIMES, ET AL. **DEFENDANTS**

LRC'S REPLY TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM

May it please the Court:

Plaintiffs fabricate a standard under the Equal Protection Clause of U.S. Constitution out of *Cox v. Larios*.[1] But there is no opinion of the Court at that citation, at all, for the obvious reason that the decision is merely a summary affirmance of a decision by a three-judge District Court.

It is well settled that "[a] summary affirmance such as *Cox* represents no more than a decision of the United State Supreme Court not to hear an appeal . . . ."[2] "When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached."[3] It is therefore well settled that "summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

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[1] 542 U.S. 947, 124 S. Ct. 2806, 159 L.Ed. 2d 831 (2004). A copy of the one line affirmance, together with the concurring opinion of Justice Stevens and the dissenting opinion of Justice Scalia, are attached for the Court's convenience.

[2] *In re: Municipal Reapportionment of the Township of Haverford*, 873 A.2d 821, 835 (Comm. Ct. Pa. 2005).

[3] *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (footnote omitted) (citing *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)).

Plaintiffs nevertheless contend that *Cox v. Larios* is a ground-breaking precedent. Despite U.S. Supreme Court cases expressly holding that apportionment plans which satisfy a 10% maximum population deviation do not violate the federal Equal Protection Clause,[4] Plaintiffs proclaim that the Defendant "acts as if *Cox* – and its **holding** that redistricting plans with deviations of less than 10% are nonetheless unconstitutional if the deviations are not based on a rational state policy but are instead designed to punish the incumbents of one party, or to prefer the voters and candidates of one party on the basis of where they live within a state – was never decided." Plaintiffs' Supplemental Memorandum, pp. 13-14. And Plaintiffs say "the United States Supreme Court has made this plain in *Cox v. Larios*, 124 S.Ct. 2006, 2007-08 (1984) . . . ." *Id.* But there is no "holding" in *Cox*, at all, and nothing is made "plain" in *Cox*, at all, because there is no opinion of the Court in *Cox*, much less an opinion of the Court with the holding attributed to it in Plaintiffs' Supplemental Memorandum.

Every quotation that Plaintiffs' Supplemental Memorandum attributes to *Cox* is either a quotation from the separate opinion of Justice Stevens concurring in the summary affirmance, or a quotation from the District Court opinion below. Neither has any precedential value for this Court.

While there is delicious irony in Federalist Society lawyers relying so heavily upon the idiosyncratic ideological preferences of a liberal lion, they are obviously relying upon an opinion that has zero precedential value. Mr. Justice Stevens was consistently in the minority in the cases attacking redistricting plans as partisan in motive and result. *See, e.g., League of United*

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[4] *Brown v. Thomson*, 462 U.S. 835 (1983); *Connor v. Finch*, 431 U.S. 403 (1977); *Gaffney v. Cummings*, 412 U.S. 735 (1973). The standard textbook recognizes the 10% maximum population deviation as a safe harbor. *See* Daniel Hays Lowenstein, Richard L. Hasen and Daniel P. Tokaji, Election Law: Cases and Materials, p. 73 (4th ed. 2008) ("small deviations (up to 10%) at the state level require no justification at all."); *see also Fund for Accurate & Informed Representation v. Weprin*, 796 F.Supp. 662, 668 (N.D. N.Y. 1992) ("This concession [that the redistricting plan had a 9.43% maximum population deviation] is fatal to the one person, one vote claim because, absent credible evidence that the maximum deviation exceeds 10 percent, plaintiffs fail to establish a *prima facia* case of discrimination . . . sufficient to warrant further analysis by this Court."), aff'd, 506 U.S. 1017 (1992).

Latin American Citizens v. Perry, 548 U.S. 399, 447 (2006) (Stevens, J., concurring in part and dissenting in part, *Veith v. Jubelirer*, 541 U.S. 267, 318 (2004) (Stevens, J., dissenting)). His concurrence in the summary affirmance in *Cox* adds nothing to his minority view.

And the District Court opinion quoted by Plaintiffs is the only reported decision subsequent to *Brown v. Thomson* that inquired into a state apportionment plan that fell within the 10% safe harbor. That District Court opinion is therefore referred to in the academic literature as an "aberrantly" decided "outlier" case.[5]

From the 5-4 decision in *Davis v. Bandemer*[6] through a series of fractured decisions culminating in *Veith*,[7] the notion that attacking a redistricting plan as partisan is justiciable hangs by the thread of Justice Kennedy's separate concurrence in *Veith*. The Supreme Court has dismissed every such "partisan politics" case it has considered for failure to state a claim because of the total absence of any "judicially established and manageable standards for adjudicating political gerrymandering claims . . . ." *Veith*, 541 U.S. at 281 (plurality). Consequently, the result in each of those cases was that the claim was dismissed as not judicially reviewable. Thus, as Justice Cooper wrote in *Jensen*:[8]

> Nevertheless, the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm.

Moreover, Kentucky continues to adhere to the political question doctrine. *Fletcher v. Commonwealth ex rel. Stumbo*, 163 S.W.2d 852, 860 (Ky. 2005). To be sure, vindication of the principle of equal representation is justiciable. *Ragland v. Anderson*, 125 Ky. 141, 100 S.W.

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[5] "Vigo, Hulme, and Larios are outliers in the canon of reapportionment jurisprudence, not only because the three redistricting plans at issue were aberrantly struck down as unconstitutional post-*Brown v. Thomson*, but also because the defendants in all three cases were uncharacteristically frank about what motivated them to malapportion districts." Stephanie Cirkovich, Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote, 31 Cardozo L. Rev. 1823, 1844 (2010).

[6] 478 U.S. 109 (1986).

[7] *Veith v. Jubelirer*, 541 U.S. 267 (2004).

[8] *Jensen v. Ky. State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997).

865, 866-67 (1907). But judicial review of the process by which the various lines are (literally) drawn during redistricting to determine partisan motivations would contravene Kentucky's "strictly construed" doctrine of separation of powers.

Clearly, a plan that satisfies the 10% maximum population deviation falls within the safe harbor set forth in controlling U.S. Supreme Court precedent. It is equally important to understand that the "maximum population deviation" is **not** the "plus or minus 5%" invented in *Fischer II.* Stating a statistic as plus or minus relative to the so-called "ideal population of a district" is a "relative deviation."[9] The federal 10% rule is not a "relative deviation" but is the "overall range." "The 'overall range' is the difference in population between the largest and smallest districts, expressed either as a percentage or as the number of people. . . . Although the courts normally measure a plan using the statistician's 'overall range,' they almost always call it something else, such as 'maximum deviation.'"[10] Accordingly, House Bill 1 satisfies the federal "maximum population deviation" of 10% and therefore cannot be attacked under the federal Equal Protection Clause for deviations in population between districts.

In this case, the Senate districts concededly fall within the 10% safe harbor provided by settled U.S. Supreme Court precedent. And to a statistician, the House districts' deviation rounds out to 10%. Moreover, it is indisputable from the statistics available in the attested documents that were introduced into evidence that the deviation of 10.0013287 among the House districts is a mathematical function of 166 people in Larue county retained in that particular district in order not to divide that county. Thus the microscopic statistical deviation from 10% results from the principle of "county integrity" upon which Plaintiffs have built their entire case under Section 33 of the Kentucky Constitution. And preserving the integrity of counties justifies

[9] Redistricting Law 2010 (National Conference of State Legislatures) (November 2009), p. 23.
[10] *Id.*, pp. 23-24, n. 71 (collecting cases).

such an insignificant population deviation under federal law, as well. *Brown*, 462 U.S. at 843 (quoting *Abate v. Mundt*, 403 U.S. 182, 185 (19741) (citing *Mahn v. Howell*, 410 U.S. 315, 329 (1973)).

In sum, Plaintiffs federal Equal Protection Clause argument misstates the governing precedents. House Bill 1 falls within the 10% safe harbor. Even assuming *arguendo* that the House districts exceed 10% by 166 people in one district, that deviation is justified by the fact that it results from a refusal to split the county in which those 166 people reside. Analyzed under federal one-person one-vote principles, both facially and as applied, House Bill 1 is plainly constitutional.

CONCLUSION

For the foregoing reasons, and the reasons set forth in LRC's Memorandum of Law, House Bill 1 is constitutional.

Respectfully Submitted,

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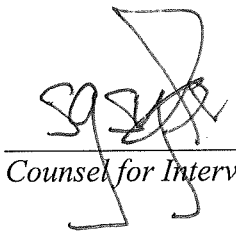

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124 S.Ct. 2806
Supreme Court of the United States

Cathy COX, Georgia Secretary of State,
v.
Sara LARIOS et al.

No. 03–1413. | June 30, 2004.

Case below, 300 F.Supp.2d 1320.

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Opinion

The judgment is affirmed.

Justice STEVENS, with whom Justice BREYER joins, concurring.

Today we affirm the District Court's judgment that Georgia's legislative reapportionment plans for the State House of Representatives and Senate violate the one-person, one-vote principle of the Equal Protection Clause. The District Court's findings disclose two reasons for the unconstitutional population deviations in the state legislative reapportionment plans. The first was "a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta." 300 F.Supp.2d 1320, 1327 (N.D.Ga.2004). The second was "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another." *Id.*, at 1329. The court found that Democratic incumbents "attempted to draw districts that would enhance their own prospects at re-election ***948** and further their other political ends (such as building up a support base for a future run for Congress)" and also "targeted particular Republicans to prevent their re-election." *Id.*, at 1330. As a result,

> ****2807** "[w]hile Democratic incumbents who supported the plans were generally protected, Republican incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many of them as possible. In the House Plan, forty-seven incumbents were paired, including thirty-seven Republicans, which was 50% of the Republican caucus, but only nine Democrats, comprising less than 9% of that caucus (as well as one Independent). Because six of the twenty-one districts involved were multi-member districts, the end result was that a maximum of twenty-eight of the paired incumbents could be re-elected, and the remaining nineteen would be unseated. Similarly, the 2002 Senate Plan included six incumbent pairings: four Republican–Republican pairings and two Republican–Democrat pairings. In the 2002 general election, eighteen Republican incumbents in the House and four Republican incumbents in the Senate lost their seats due to the pairings, while only three Democratic incumbents in the House and no Democratic incumbents in the Senate lost seats this way." *Id.*, at 1329–1330 (citations and footnote omitted).

Although "[t]he numbers largely speak for themselves," the District Court found that the shapes of many of the newly created districts supplied further evidence that the plans' drafters "inten[ded] not only to aid Democratic incumbents in getting re-elected but also to oust many of their Republican incumbent counterparts." *Id.*, at 1330. The court noted, for example, that a Republican senator had been "drawn into a district with a Democratic incumbent who ultimately won the 2002 general election, while an open district was drawn within two blocks of her residence," that two of the most senior Republican senators had been drawn into the same district, and that a Republican House member "who was generally disliked by several of the Democratic incumbent[s] was paired with another representative in an attempt to unseat him." *Ibid.* Moreover, many of the districts that paired Republicans were both oddly shaped and overpopulated, "suggesting that the districts were drawn to force Republican ***949** incumbents to run against each other and to draw in as many Republican voters as possible in the process." *Ibid.*

The drafters' efforts at selective incumbent protection "led to a significant overall partisan advantage for Democrats in the electoral maps," with "Republican-leaning districts ... vastly more overpopulated as a whole than Democratic-leaning districts," and with many of the large positive population deviations in districts that paired Republican incumbents against each other. *Id.*, at 1331. The District Court found that

the population deviations did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts. *Id.*, at 1331–1334. Rather, the court concluded, "the population deviations were designed to allow Democrats to maintain or increase their representation in the House and Senate through the underpopulation of districts in Democratic-leaning rural and inner-city areas of the state and through the protection of Democratic incumbents and the impairment of the Republican incumbents' reelection prospects." *Id.*, at 1334. The District Court correctly held that the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote. See *Reynolds v. Sims*, 377 U.S. 533, 565–566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (regionalism is an impermissible basis for population deviations); *Gaffney v. Cummings*, ****2808** 412 U.S. 735, 754, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ("[M]ultimember districts may be vulnerabl[e] if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"). See also *Reynolds*, 377 U.S., at 579, 84 S.Ct. 1362 (explaining that the "overriding objective" of districting "must be substantial equality of population among the various districts" and that deviations from the equal-population principle are permissible only if "incident to the effectuation of a rational state policy").

In challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation. After our recent decision in *Vieth v. Jubelirer*, 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its ***950** strength. It bears emphasis, however, that had the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case. Appellees alleged that the House and Senate plans were the result of an unconstitutional partisan gerrymander. The District Court rejected that claim because it considered itself bound by the plurality opinion in *Davis v. Bandemer*, 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986), and appellees could not show that they had been " 'essentially shut out of the political process.' " App. to Juris. Statement 86a (quoting *Bandemer*, 478 U.S., at 139, 106 S.Ct. 2797). Appellees do not challenge that ruling, and it is not before us. But the District Court's detailed factual findings regarding appellees' equal protection claim confirm that an impermissible partisan gerrymander is visible to the judicial eye and subject to judicially manageable standards. Indeed, the District Court's findings make clear that appellees could satisfy either the standard endorsed by the Court in its racial gerrymandering cases or that advocated in Justice Powell's dissent in *Bandemer*, 478 U.S., at 173–185, 106 S.Ct. 2797. *

Drawing district lines that have no neutral justification in order to place two incumbents of the opposite party in the same district is probative of the same impermissible intent as the "uncouth twenty-eight-sided figure" that defined the boundary of Tuskegee, Alabama, in *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), or the "dragon descending on Philadelphia from the west" that defined Pennsylvania's District 6 in *Vieth*, 541 U.S., at 340, 124 S.Ct., at 1812 (STEVENS, J., dissenting) (internal quotation marks omitted). The record in this case, like the allegations in *Gomillion* and ****2809** in *Vieth*, reinforce my conclusion that "the unavailability of judicially ***947** manageable standards" cannot justify a refusal "to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially." *Vieth*, 541 U.S., at 341, 124 S.Ct., at 1813. I remain convinced that in time the present "failure of judicial will," *ibid.*, will be replaced by stern condemnation of partisan gerrymandering that does not even pretend to be justified by neutral principles.

Justice SCALIA, dissenting.

When reviewing States' redistricting of their own legislative boundaries, we have been appropriately deferential. See *Mahan v. Howell*, 410 U.S. 315, 327, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). A series of our cases established the principle that "minor deviations" among districts—deviations of less than 10%—are " 'insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.' " *Brown v. Thomson*, 462 U.S. 835, 842, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973)); see also *Voinovich v. Quilter*, 507 U.S. 146, 160–162, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). This case presents a question that *Brown*, *Gaffney*, and *Voinovich* did not squarely confront—whether a districting plan that *satisfies* this 10% criterion may nevertheless be invalidated on the basis of circumstantial evidence of partisan political motivation.

The state officials who drafted Georgia's redistricting plan believed the answer to that question was "no," reading our

cases to establish a 10% "safe harbor" with which they meticulously complied. The court below disagreed. No party here contends that, beyond grand generalities in cases such as *Reynolds v. Sims,* 377 U.S. 533, 577, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), this Court has addressed the question. The opinion below is consistent with others to have addressed the issue; there is no obvious conflict among the lower courts. This is not a petition for certiorari, however, but an appeal, and we should not summarily affirm unless it is clear that the disposition of this case is correct.

In my view, that is not clear. A substantial case can be made that Georgia's redistricting plan *did* comply with the Constitution. Appellees do not contend that the population deviations—all less than 5% from the mean—were based on race or some other suspect classification. They claim only impermissible *political* bias—that state legislators tried to improve the electoral chances of Democrats over Republicans by underpopulating inner-city and ***952** rural districts and by selectively protecting incumbents, while ignoring "traditional" redistricting criteria. The District Court agreed. See App. to Juris. Statement 8a–25a.

The problem with this analysis is that it assumes "politics as usual" is not *itself* a "traditional" redistricting criterion. In the recent decision in *Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), all but one of the Justices agreed that it *is* a traditional criterion, and a constitutional one, so long as it does not go too far. See *id.,* at 285–286, 124 S.Ct., at 1781–1782 (plurality opinion); *id.,* at 307, 124 S.Ct., at 1793 (KENNEDY, J., concurring in judgment); *id.,* at 344, 124 S.Ct., at 1815 (SOUTER, J., dissenting); *id.,* at 355, 124 S.Ct., at 1822 (BREYER, J., dissenting). It is not obvious to me that a legislature goes too far when it stays within the 10% disparity in population our cases allow. ****2810** To say that it does is to invite allegations of political motivation whenever there is population disparity, and thus to destroy the 10% safe harbor our cases provide. Ferreting out political motives in minute population deviations seems to me more likely to encourage politically motivated litigation than to vindicate political rights.

I would set the case for argument.

Parallel Citations

124 S.Ct. 2806 (Mem), 159 L.Ed.2d 831, 72 BNA USLW 3777, 72 BNA USLW 3778, 2004 Daily Journal D.A.R. 7977

Footnotes

* A tally of the votes in the State Senate elections shows that, although Republicans won a majority of votes statewide (991,108 Republican votes to 814,641 Democrat votes), Democrats won a majority of the State Senate seats (30 to 26). See 2002 Georgia Election Results, www.sos.state. ga.us/elections/election_results/2002_1105/senate.htm (as visited June 23, 2004, and available in Clerk of Court's case file). Thus, it appears that appellees also could state a partisan gerrymandering claim under Justice BREYER's indicia of unjustified entrenchment. See *Vieth v. Jubelirer,* 541 U.S. 267, 366, 124 S.Ct. 1769, 1828, 158 L.Ed.2d 546 (2004) (dissenting opinion) ("[a] the boundary-drawing criteria depart radically from previous or traditional criteria; [b] the departure cannot be justified or explained other than by reference to an effort to obtain partisan political advantage; and [c] a majority party [*i.e.,* party receiving majority of total votes in relevant election] has once failed to obtain a majority of the relevant seats in election using the challenged map").

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