

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

WALTER SESSION, *et al.*,  
*Plaintiffs,*

vs.

RICK PERRY, *et al.*,  
*Defendants.*

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Civil Action No. 2:03-CV-354

**INITIAL BRIEF ON REMAND OF  
TRAVIS COUNTY AND THE CITY OF AUSTIN**

This brief by Travis County and the City of Austin addresses the further consideration the Supreme Court directed this Court to give this case following the decision of *Vieth v. Jubelirer*, 124 S.Ct. 1769 (2004):

**I. THE SALIENCE OF THE POST-*VIETH* DECISION OF *COX v. LARIOS***

This warning, in a very recent summary decision striking down a legislative redistricting plan as a violation of one person, one vote, should be heeded:

After our recent decision in *Vieth v. Jubelirer*..., the equal-population principle remains the *only clear limitation* on improper districting practices, and we must be *careful not to dilute its strength*.

*Cox v. Larios*, 124 S.Ct. 2806 (2004) (Justices Stevens and Breyer, concurring) (emphasis added).

The just-quoted two-Justice concurrence signals the importance of rigorous judicial enforcement of the one person, one vote rule in the post-*Vieth* world of redistricting. The county and city, as they did the first time through in this case, urge this Court to insist that the state adhere to the stringent equal population rule for congressional districts.

This Court earlier mused that, if excessive partisan gerrymanders are to face any judicial limitations, the better focus of those limitations should be upon the “time and circumstance” of partisan line-drawing. *Session v. Perry*, 298 F.Supp.2d 451, 475 (E.D. Tex. 2004). The equal population rule does precisely that, imposing a well established and objective constitutional limitation on the “time and circumstance” of partisan line-drawing.

The Court should be careful not to be taken in by the intersection of the equal population rule with the partisan gerrymander issues in this case and in the Supreme Court-affirmed district court decision in *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004). The one person, one vote rule is independent of the debate about where, if anywhere, the legitimate legal boundaries might be to partisan gerrymandering. By itself, without reference to partisanship, the constitutional requirement of equal population for congressional districts invalidates Plan 1374C. What has happened – and, really, what Justices Stephens and Breyer have flagged for attention in their *Larios* concurrence – is that the uncertain state of partisan gerrymandering jurisprudence, combined with the increasing vigor of real-world partisan gerrymandering legislative efforts, has served up a new context for the now-venerable constitutional rule. It turns out that everything really is somehow linked and that the current wave of partisan gerrymandering – both legislative and judicial – has collided with the one person, one vote rule in heretofore unexpected and unexplored ways. Until the Texas situation, *Larios* is the case that best exemplifies the renewed vigor of the one person, one vote doctrine and how it checks what might otherwise be uncontrolled partisan gerrymandering.

*Larios* involved the Georgia legislature's redistricting of its state legislative districts. The legislators and map drawers chose to honor the one person, one vote rule for state legislative districts by relying on what had been thought to be the "safe harbor" rule of thumb that a five percent population variance, up or down, from absolute equality. 300 F.Supp.2d at 1325. Then, inside that harbor, those controlling the districting process sought to further two objectives, one of which was the protection of Democratic – but not Republican – incumbents. *Id.* In other words, the redistricting plan was devised to satisfy conventional understanding of the equal population rule for state legislative districts but not to achieve more exacting one person, one vote demands because doing so would have prevented reaching the objective of partisan districting. It was partisan gerrymandering seeking shelter under the umbrella of conventional wisdom on one person, one vote.

The trial court invalidated the redistricting plan because it violated the one person, one vote rule – even though the safe harbor standard had been met. The court found that the "major cause" of the population deviations was "an intentional effort to allow incumbent Democrats to maintain or increase their delegation" and an intent to "oust many of their Republican counterparts." 300 F.Supp.2d at 1329-30. While recognizing that deviations from exact population equality are permissible for certain reasons – such as compactness, contiguity, respect for political subdivisions, and avoiding incumbent pairings – sheer partisanship was not a legitimate state policy. 300 F.Supp.2d at 1338. Finding that the partisan incumbent protection plan "went far beyond anything the Supreme Court has ever allowed," 300 F.Supp.2d at 1347, the court determined that the Supreme Court "has never sanctioned partisan advantage as a legitimate justification for

population deviations.” 300 F.Supp.2d at 1351. It concluded that the Georgia legislature had not made a good faith effort to achieve zero deviation.

Significantly, the *Larios* trial court recognized the role of burden-shifting in this context, derived from the congressional redistricting case of *Karcher v. Daggett*, 462 U.S. 725 (1983). If the plaintiffs meet their initial burden of showing that a redistricting plan is not undergirded by a good faith effort to achieve zero deviation, then the defendant state must show that the plan is nonetheless justified by “a consistently applied legislative policy that is within constitutional norms.” 300 F.Supp.2d at 1353. The plaintiffs established that the redistricting plan was not based on a good faith effort to achieve zero deviation – the safe harbor 5% deviation rule of thumb was the only population equality principle at work. That left the state defenseless on the facts because there was not a cognizable legislative policy within constitutional norms but instead only an aim of protecting one party (and aiding urban over other areas). Thus, the plan was invalidated on one person, one vote grounds.

The city and county understand that summary affirmances are of limited precedential value; however, there *was* an affirmance, and the trial court opinion, coupled with the explicit warning from Justices Stevens and Breyer, are well worth attending to.

The context of the one person, one vote decision in *Larios* is remarkably similar to the context here – though the equal population rule has even greater force in the Plan 1374C context because of the tighter leash it places on *congressional* redistricting. Here, as in *Larios*, the state made no secret of the fact that it was resting on a conventionally accepted measure of population to meet the equal population rule. (Here, it is the 2000 census; there, the 5% deviation rule.) Here, as in *Larios*, the state’s primary redistricting

objective was to gain partisan advantage. (It was, according to the Court, the “single-minded purpose” here, 298 F.Supp.2d at 470, whereas it was only a key driving force in *Larios*.) And here, as in *Larios*, the state rested on the “usual suspect” in population equality in order to carry out its partisan objective, disregarding any effort to achieve real population equality. (The 2000 census numbers were well out-of-synch with current population realities by the time the Texas legislature voluntarily undertook and completed its redistricting task in the summer of 2003, yet the state never make the slightest feint toward identifying current population numbers with any rigor or exactitude.)

There only three meaningful differences between *Larios* and this case. First, the constitutional rule of equal population is to be more strictly applied in this case (involving congressional redistricting and Article I, § 2, of the Constitution) than in *Larios* (involving legislative redistricting and the Equal Protection Clause). Second, this case involves a redistricting that did not have to be undertaken at all, whereas the Georgia legislative redistricting was necessitated by other legal factors, including the need to comply with the one person, one vote rule in the first instance. Third, this case involves a temporally-phased effort to use conventional one person, one vote measures to further partisan goals, whereas the Georgia redistricting used a conventional measure in response to census-driven and court-required demands.

*Larios*, therefore, is a new and particularly salient decision, both at the district court level and in the Supreme Court’s summary affirmance. (Only Justice Scalia dissented.) Other than this case, the Supreme Court disposition of *Larios* is the only circumstance in which the Court’s *Vieth* decision has come into play. It bears close

attention from this Court because it marks the way for the very concerns this Court has addressed – that is, the need for judicial measures that get at the timing and circumstances of overt and extreme partisan redistricting efforts rather than sorting through the questions of how much is too much. In short, *Larios* directly supports the arguments the city and county have previously made to this Court<sup>1</sup> and the arguments they made to the Supreme Court: that there is already at hand a constitutional doctrine that is objective and does not unduly tread in the territory of hard-to-define measures of how much politics is too much politics in the realm of redistricting.

**II. The State improperly relied on a legal fiction to meet the strict equal population rule for congressional districts and failed to satisfy its burden of showing a legitimate policy basis for deviating from the one person, one vote rule in Plan 1374C.**

Plan 1374C, enacted on October 12, 2003, uses the identical population numbers used by this Court to draw Plan 1151C two years and a full election cycle earlier. Those numbers are drawn directly from the official 2000 decennial census. By its own admission, the state “did not make any effort to determine the current population of the congressional districts ... as of October 12, 2003.” Joint Final Pretrial Order Stip. E.85. Instead, it relied exclusively on the uncorrected census numbers from before the 2002 congressional elections. *Id.*<sup>2</sup>

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<sup>1</sup> The city and county’s one person, one vote arguments have been in this case from its inception and were argued in motions, briefs, and orally before the Court; however, the Court’s opinion makes no direct mention whatever of them in its now-vacated disposition of the case. Others, too, have joined in those arguments. *See, e.g.*, Initial Brief of the Jackson Plaintiffs and the Democratic Congressional Intervenors on Remand at 26 n.9 (adopting and incorporating these arguments). The city and county urge the Court to address these issues now, especially in light of the post-*Vieth* decision in *Larios* and the Supreme Court’s vacating of this Court’s judgment in the city and county’s particular appeal in Supreme Court Docket No. 03-1400.

<sup>2</sup> The Census Bureau issued corrected (not updated or newly estimated) official census numbers for Texas before enactment of Plan 1374C. *See* Travis County/City of Austin Exh. 2. Plan 1374C did not take into account this census correction, even though a review of its details reveals that, notwithstanding the fact that it does not make corrections at the block level, the corrected numbers necessarily affected the population

The usual legal justification for ignoring the reality of population distribution in redistricting rests on an openly acknowledge legal fiction. As the Supreme Court explained in another major ruling on redistricting issues, “[w]hen the decennial census numbers are released, States *must* redistrict to account for any changes or shifts in population.” *Georgia v. Ashcroft*, 123 S.Ct. 2498, 2515 n.2 (2003) (emphasis added). It is this necessity that dictates the use of official census numbers in the redistricting year immediately after their release and in the immediately ensuing election. And it was this necessity that led this Court to devising *some* plan – it turned out to be Plan 1151C – for use in the 2002 elections after the Texas Legislature failed to meet its one person, one vote legislative obligations after the new nationwide apportionment following release of the census.<sup>3</sup>

However, as *Georgia v. Ashcroft* further explains, after this initial – and necessary – round of redistricting (and its use of comparatively fresh census population numbers), and before the next official census ten years later, states have been permitted to operate “under the *legal fiction* that even ten years later, the plans are constitutionally apportioned.” *Id.* (emphasis added); *see also Gaffney v. Cummings*, 412 U.S. 735, 746 (1973) (observing that census measures population at only an instant in time and that district populations are constantly changing, even at different rates in either direction).

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distribution among districts in such a way as to make them unequal. Even chained to the official 2000 census, Plan 1374C’s CD3, for example, became overpopulated by 60 people at a minimum and CD32 lost 86 people. That means that, officially insofar as the 2000 census is concerned, those two districts had a 146-person differential in population. The city and county do not rely on this corrected census analysis to establish their case, only to highlight how little attention the state paid to the one person, one vote rule in 2003.

<sup>3</sup> This judicial duty is noted in *Georgia v. Ashcroft*. “And if the State has not redistricted in response to the new census figures, a federal court will ensure that the districts comply with the one-person, one-vote mandate before the next election.” 123 S.Ct. at 2515 n.2.

Again, in the typical situation in the past, the Supreme Court has treated this legal fiction of inter-censal accuracy as a presumptive necessity in making the one person, one vote rule work. *See, e.g., Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969) (rejecting deviation based on legislative claim that it was anticipating population shifts, while acknowledging that deviation from census-based equality is possible if done with a high degree of accuracy).

There is a very obvious and basic judicial policy behind the legal fiction of inter-censal population stasis in the redistricting context. Any other rule would inject terrible instability into districts. They would have to be changed repeatedly – even after every election – to meet the real-world population shifts.

But, it takes no piercing intellect or sparkling language to see how the reason for the legal fiction disappears entirely in the context of Plan 1374C and the circumstances of its enactment. In fact, the state’s complacent reliance on the fiction and its argument that the reliance is legally justified under the one person, one vote rule turns the rationale for the legal fiction upside down. The state is not asking the Court to bless its reliance on the fiction to avoid frequent redistricting; nor is it invoking the fiction out of necessity (because, for example, its redistricting plan has been invalidated under some other legal doctrine and the legislature needs to remedy the legal infirmity). Instead, the state is asking the Court to bless its equal population complacency so that, instead of avoiding frequent redistricting, the state instead engage in it. Further, it is not invoking the fiction’s protection to meet necessity’s demands; instead, it is invoking it so that its wholly voluntary undertaking to redistrict to shift the partisan balance can remain judicially untouched.



So, the reason for the legal fiction is completely absent in the circumstances of this case. The only reason for using it would be to permit voluntary redistricting after every election whose results were disliked – without the necessity of actually trying to ensure equal population among the constantly shifting district alignments.

Though the seminal cases establishing the one person, one vote doctrine could not have anticipated the precise situation here, where there has been an unprecedented legislative effort to voluntarily undertake the reshaping of the state's congressional alignment for the single avowed reason of partisanship, those cases nonetheless provide the framework for the unique effort's invalidation for violating the equal population rule. *Wesberry v. Sanders*, 376 U.S. 1 (1964), located the constitutional command of equal population among congressional districts in Article I, § 2, of the Constitution. Later, *Karcher v. Daggett* sharpened the rule, requiring congressional districts to be equally populated and authorizing only “the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality[.]” 462 U.S. at 730.

If ever there were a situation in which population variances among districts was avoidable, the enactment of Plan 1374C is it. Plan 1151C had surmounted every conceivable legal hurdle. The Texas Attorney General had even formally opined that it was effective for the decade under Texas law, with no compulsion for the state to act legislatively to replace it. *See* TEX. ATT'Y GEN. OP. GA-0063 (April 23, 2003). Yet, in spite of this, and after waiting to see that the outcome of the 2002 congressional elections was not to its liking, the legislature redistricted. It was plain at the time that the population shifts in Texas were huge. The Office of the State Demographer for Texas by

then had issued updated population estimates for the state's 254 counties showing pervasive population shifts.<sup>4</sup>

The legislators not only knew these facts; they relied on them in making their political linedrawing decisions. One of the chief architects of the plan, Rep. King, testified about designing the new CD4 with an eye to what was happening on the ground there so that it could “grow into” a Republican district during the decade. Trial Tr., 12/18/03 (describing the fast-growing Republican areas of Grayson and Collin counties). The chief staff cartographer on the Senate side, Mr. Davis, even candidly admitted in testimony that he thought it “silly” to assume population stasis since the 2000 census in a state as big as Texas. Trial Tr., 12/18/03.

While the political linedrawers used an eagle-eye to discern post-2000 census population and political shifts, they conveniently turned a blind-eye to their constitutional obligations under the one person, one vote rule. They seek to have it both ways: use post-2000 population changes and knowledge about them when it helps them in their objective but ignore them when it is too much trouble to figure out what the shift means in terms of meeting constitutional demands.

Jettisoning the legal fiction in this circumstance – which has no connection to the reason for the fiction's creation – is the only way to restore some dignity to the one person, one vote rule. Even if the state were correct that its admittedly partisan effort in 2003 was trying to right the partisan wrongs of the early 1990s, that is not a legal justification for ignoring the equal population rule. “Problems created by partisan

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<sup>4</sup> See [http://txsdc.tamu.edu/download/pdf/estimates/2003\\_txpopest\\_county.pdf](http://txsdc.tamu.edu/download/pdf/estimates/2003_txpopest_county.pdf) (Table 1). According to the state's demographer, by July of 2003, when the legislative re-redistricting effort got seriously underway, the state had added 1,266,689 people to its official 2000 census population. Harris County alone had added 190,343 people. Travis County had added 47,128; Bexar, 70,606. Jefferson County had lost 1,344.

politics cannot justify an apportionment which does not otherwise pass constitutional muster.” *Kirkpatrick v. Preisler*, 394 U.S. at 533.

Not only is Plan 1374C’s blind reliance on 2000 population numbers avoidable, and therefore inconsistent with *Karcher*’s directive that only “unavoidable” population deviations are permitted among congressional districts, they also do not satisfy *Karcher*’s related requirement that the deviations follow only after a “good faith effort” to achieve absolute equality. As in *Larios*, it must be said here that ignoring absolute equality in service to an admitted partisan aim of helping one political party and hurting the other cannot be said to be a “good faith effort” within the meaning of *Karcher*.

In that circumstance, the burden shifts to the state to show it has a basis for satisfying the strict one person, one vote rule for congressional districts. *Karcher*, 462 U.S. at 731. The state can either show that it has updated the census numbers with some substantial rigor, *see Kirkpatrick v. Preisler*, or it has to demonstrate that the deviations were to achieve some otherwise legitimate goal, *see Karcher v. Daggett*. The state did neither of these things in the instance of Plan 1374C. It used numbers that can only be justified by use of a legal fiction that has no application in this situation – and whose application here would utterly pervert its origins – and it blinked at the deviations not in order to achieve a legitimate, cognizable goal but instead to further purely partisan ends whose legitimacy in the defensive equal population context here has been rejected in *Larios*.

Plan 1374C is uniquely unconstitutional. It is the “outlier” in the annals of redistricting. Holding the usual legal fiction of inter-censal population stasis inapplicable in this situation, and determining that the state has not discharged its burden of showing a

legitimate state policy basis for its unprecedented voluntary mid-decade redistricting effort, places no state legislature in a constitutional straightjacket. It does not even place the Texas Legislature in this instance in a redistricting straightjacket for the remainder of this decade – though the hurdle of developing a rigorous and careful new current population basis may be insurmountably high in a factual sense. Instead, the Court would be insisting that the one person, one vote rule – the one constitutional rule in this area that is the most firmly fixed and the most objectively administrable – not be relegated to an empty, rote observance, drained of nearly all its significance. The Court doesn't even have to enter the political thicket. It only has to perch itself on the well-pruned, carefully-tended tree of equal population.

**III. Supplementing the record: Consider designating the State Demographer as the Court's technical assistant or witness.**

Expert demographic testimony about Texas population shifts in the last half decade, what can be firmly established, and the spots of uncertainty could prove useful to the Court in evaluating the one person, one vote argument made here by the city and county (and adopted by various voter-plaintiffs). The city and county suggest that the Court consider designating the State Demographer as the Court's technical expert, to provide trial testimony on Texas population shifts during the relevant time period and the proper role of the official census.

**IV. A brief discussion of standing**

Because plaintiff-voters have adopted the arguments made here by the city and county, the Court need not reach the standing issues concerning the city and county. *See, e.g., Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 303-05 (1983). At the beginning of the modern era of judicial

involvement in redistricting, the Supreme Court avoided reaching this kind of standing issue, reserving decision on whether cities and counties had standing to raise the one person, one vote issue. *Baker v. Carr*, 369 U.S. 186, 204 n.23 (1962). It has never since reached and decided the question. There is no reason for this Court to do so in the circumstances of this case.

Yet, if the Court is inclined to reach the standing question, it should take note of the inapplicability of the typical standing rule to this atypical equal population case. The typical rule is that voters in over-represented (which is to say, underpopulated) districts do not have standing to raise the one person, one vote issue, while voters in under-represented (that is, overpopulated) districts do. *See, e.g., Fairley v. Patterson*, 493 F.2d 598, 603-04 (5<sup>th</sup> Cir. 1974). But this rule has only been applied in situations in which the relevant populations for one person, one vote purposes are discernible.

Here, they are not discernible. That is because the state simply ignored the normal restrictions and relied on stale data without providing anything in its stead. If the state can successfully insulate itself from a one person, one vote challenge in this situation because no one can establish standing through establishing residence in a provably overpopulated district, then its very constitutional violation insulates it from challenge. Standing rules do not operate so destructively to fundamental constitutional values.

The City of Austin and Travis County were carved into three parts in Plan 1374C. The three resulting districts – CD10, CD21, and CD25 – encompass four counties with substantial populations. Those four counties – Travis, Harris, Bexar, and Hidalgo – all experienced significant population growth between the 2000 census and the redistricting

in the fall of 2003. The state demographer estimates referenced earlier show interim population increases of 47,128 (5.8%) for Travis, 190,343 (5.6%) for Harris, 70,606 (5.1%) for Bexar, and 66,388 (11.7%) for Hidalgo. Thus, it is reasonable conclude that, comparatively speaking, the districts into which Travis and Austin have been carved are overpopulated and, therefore, underrepresented in one person, one vote terms.

Yet, because no single voter can definitively establish underrepresentation in this unique situation, no single voter can meet the traditional standing requirement. For that reason, the open question of whether cities and counties have standing to raise one person, one vote issues should be resolved in favor of Austin and Travis County in this situation. The city and the county are affected, as are their residents, by the underrepresentation. They should be afforded standing to seek a remedy for the constitutional violation that affects them.

## **V. Conclusion**

Plan 1374C should be invalidated as violative of Article I, § 2's, equal population requirement for congressional districts. Plan 1151C should be reinstituted as the governing plan until and unless the state can satisfy the one person, one vote rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **INITIAL BRIEF ON REMAND OF TRAVIS COUNTY AND THE CITY OF AUSTIN** was forwarded by e-mail on this 6<sup>th</sup> day of December, 2004, to each of the following counsel of record (except as indicated by \*) and by first class mail on the 7<sup>th</sup> day of December, 2004, to each of the following counsel of record (except those indicated by \*\*, who have indicated e-mail service suffices):

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