TAPE ATTACHED IS PART OF MINUTES

Approved _____
Date

MINUTES OF THE SENATE COMMITTEE ON LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT.

The meeting was called to order by Senator Dan Thiessen at
Chairperson

8:00 a.m./~~p.m.~~ on Thursday, April 7, 1983 in room 423-S of the Capitol.

All members were present except:

Committee staff present:
Fred Carman, Revisor's Office
Arden Ensley, Revisor
Russell Mills, Research Department
Marion Anzek, Committee Secretary

Conferees appearing before the committee:

Chairman Dan Thiessen called the meeting to order, and said at the last meeting we did not have copies of two Federal Court Opinions, and he had them for the members now, and asked Fred Carmen to brief the committee on the opinions. (See Attachment 1 and 2)
Fred stated in both cases based upon the deviations disclosed by the 1980 census there was, in 1982 court orders requiring the Senate of both cases, to be reapportioned, based on the deviations mentioned, and in the House in the State of New York before an election could be had.

Chairman Thiessen: I would like to remind the committee that tape recorders are being used again in this committee, and asked the committee to glance at the minutes from the last meeting, and added the minutes are much more lengthy than usual but, he felt them necessary, so if there are any corrections, please let him know so we can make the necessary corrections.

Senator Gaar: When do you want to do that Mr. Chairman?

Chairman Thiessen: At any time.

Senator Gaar: Well, it is going to take a bit of time for us to read all through here, and I realize knowing your directions, I am skeptical that we will have a chance to meet again, unless we can pass a motion to require us to, so do you want to give us a little time to look at them now?

Chairman Thiessen: Certainly.

Senator Angell: On page one, 5 lines up in last big paragraph, were it says (Russell: Senator, I can not answer that, it was through the interim committee hearings that it was decided to abolish the State Agriculture Census.) Mr. Chairman, I don't remember what interim committee we were talking about, does anybody else?

Russell Mills: Senator, it was the 1977 interim Federal State Affairs Committee.

Senator Angell: Mr. Chairman, would there be any objections to including that in the minutes?

Chairman Thiessen: Are there any objections? There were none.

Senator Angell: Then you would insert before the word interim 1977 Federal State Affairs.
(Correction #1 to minutes of March 22, 1983)

Senator Angell: Then at the last of the same paragraph (Russell answers:In general, students and military were not counted in the State Agriculture Census, they are counted in the U.S. Federal Census.) The question that comes to my mind, I remember there being a little bit more explanation to that, that the State census counted them in one place and the Federal census counted them in another place. This referral states that the Ag census, they were not counted anywhere.
(Correction #2 to minutes of March 22, 1983)
Angell: Now when you talk about the students not counted, as your saying that the students that come from Salina, Ks. and go to the University of Kansas are not counted anywhere?

Russell Mills: In general, I don't believe any of them are counted in Lawrence, Ks.. Most of them are counted in their home counties.

Senator Angell: Then They were counted somewhere.

Russell Mills: Yes.

(End of correction #2.)

Senator Meyers: I have some questions. I don't remember exactly how it was framed, but it was about what percentages of deviation we had strived for in the 1979 session, and I think that Russell answereo as not more than 3 up and 3 down. I don't think that is in the minutes.

Chairman Thiessen: Senator Meyers, these minutes are not word for word.

Senator Meyers: I understand that, and you know, it's just fine, but I think that in relation to what we did do in 1979, I think that should be in the minutes.

(Addition to minutes of March 22, 1983, #3)
Senator Meyers : Russell, when we worked in 1979, do you re-call, it seems to me like the goal that we had for variation, was more like 3%, no more than 1 1/2% above and 1 1/2% below, wasn't that what we were working for? I don't think that we reached it.

Russell Mills: My recollection is 10%, 5% above and 5% below, and later changed it to 6%, 3% above and 3% below.

(End of addition #3)

Senator Gaar: I think that I can help the Chairman, here a little bit,as to the importance of these minutes is that they don't state anything erroneous, not that they may have left out something that we talked about, because verbatim minutes, I have under security, and they will be available if we need them or anyone else might happen to need them. So what we want to do is be sure that there isn't something transcribed here that is in conflict with the tape, of exactly what happened, otherwise, we are o'k, because we picked up questions like Senator Meyers has suggested, that took place and were answered, but are not reflected in the minutes.

Chairman Thiessen: There were 20 pages of rough draft minutes, and this has been reduced down to 4 pages, so obviously there are some things that are not in there.

Senator Norvell: I have a question, page 1, 3rd paragraph from bottom, starting with intensive questioning, in reading that paragraph, obviously there is no ideal deviation, and I think perhaps that we might have the secretary correct that phraseology, there was 1 senatorial district, I believe having a 43.6%, another had a -14.3¢. Correction would be strike IDEAL DEVIATION, so that it would read WHILE THE IDEAL MATHEMATICALLY PERFECT DISTRICT IS A POPULATION OF 59,106.

Senator Gaar: So you would change some to one, and districts to district to district, and strike, and the ideal deviation.

Senator Norvell: Right, and I think that it would reflect accurately on the discussion and the facts. (CORRECTION #4)

Senator Pomeroy: On page 2, in the 3rd full paragraph, rather than being the Plato case, I think that is the Flateau case, and change this throughout the minutes. (CORRECTION #5)

Senator Gaar: I am not sure but there might be something missing on page 2, paragraph 5 up from bottom. Paragraph 5 from bottom o'k. See Paragraph 4 up from bottom, change populous to population and mathematical to mathematically exact. Paragraph 2 up from bottom, change premise to supremacy clause. (CORRECTION #6).

Chairman Thiessen: We will make the corrections.

Senator Angell: I wonder if the suggestion could be that we just make the tapes that the secretary has, as a part of the minutes, and attach them as part of the minutes.

Senator Gaar: That is alright with me, as I have a duplicate of it, so no problem. Well, my secretary's name isn't Rosemary, so I have it under lock and key and I will have to speak for her, and not Marion though, who I know and like and trust.

Chairman Thiessen: Well, it is difficult to condense them back from twenty pages, and the tape is there to back it up.

Senator Gaar: Well, I would suggest Senator that we make a notation in that area that the tape should be of the actual verbatim conversation, and be referred to for an accurate decription of the line of questioning.

Chairman Thiessen: Do you want to include that in a motion on the minutes, when we get ready to adopt them as amended.

Senator Pomeroy: Mr. Chairman, I move that the minutes as corrected and the additions, including the reference to the tapes, and those corrections and additions of the minutes be approved. 2nd by Senator Angell.

Chairman Thiessen: The motion was moved and seconded, that the minutes be approved as directed and that the provision be added that the tapes be attached. All in favor say aye. Opposed, nay. Motion carried.

Senator Gaar: Mr. Chairman, for the record, do I understand the motion made by Senator Pomeroy to formally include the tape as part of the record, of this committee?

Chairman Thiessen: Yes, that was my understanding.

Senator Pomeroy: That was my intention.

Senator Gaar: Is there any objection from any member understanding that as the motion, that was passed as I've heard unanimously?

No objections from committee members.

Chairman Thiessen: Well, we did have the attorney general's opinion, the fact that he said we could have a problem in the future, and we had repealed the state census, and this was an area that there might be some question about the future, and I did ask to have a bill prepared to be presented to this committee, to reinstate the state census, and we would have to ask the Ways and Means to introduce that bill. I would like to have Fred Carmen explain what is in the draft. (See Attachment #3)

Arden Ensley: Explained the draft to the committee members.

Senator Pomeroy: Mr. Chairman, I move conceptually that the draft be amended to provide that this census be the basis for distribution of funds, in other words wherever we now use the federal census figures, that this would be used for state census. I don't know just where all those would be, we would have to find them. Motion was 2nd by Senator Angell.

Arden Ensley:One clarification, I believe the existing law really states, that we have to use the statutes of the state as opposed to out of state funds.

Senator Pomeroy: Well, mine was not a specific motion, it was a conceptional motion.

Chairman Thiessen: All in favor of the motion to broaden the scope of this according to the conceptional motion that Senator Pomeroy made, say aye, opposed no. Motion was 2nd by Senator Angell, Motion carried.

Senator Gaar: I move that if the bill is going to be introduced, direct the Secretary of State, and the Assistant County Election Officer, follow the same methodology of counting residence of Kansas, as is required by the Federal census. Motion was 2nd by Senator Pomeroy.

Chairman Thiessen: All in favor of the motion say aye, opposed no. Ayes have it, motion carried.

Senator Gaar: I would like to ask, that the Secretary take a roll call on the vote.

Marion Anzek, Committee Secretary: Senators, Angell, Arasmith, Francisco and Thiessen voted no. Senators, Pomeroy, Gaar, Hess, Meyers, Norvell, Parrish and Steineger voted yes. Motion carried.

MINUTES OF THE SENATE COMMITTEE ON LEGISLATIVE AND CONGRESSIONAL APPORTIONMENT,

room 423-S, Statehouse, at 8:00 a.m./~~xxx~~m. on Thursday, April 7, 19 83

Senator Arasmith: I make a motion to introduce the bill and be reffered back to committee, 2nd by Senator Pomeroy.

Senator Pomeroy: We would want a fiscal note, before we could take action. We have adopted it, we had a roll call vote.

Chairman Thiessen adjorned the meeting at 9:08 a.m.

Attachment #1
April 7, 1983

John FLATEAU, Robert V. Connelly, Audrey Bynoe and Angel A. Rodriguez, and all persons similarly situated, and Stanley Fink, both individually and as Speaker of the Assembly of the State of New York, Plaintiffs,

and

Puerto Rican Legal Defense and Education Fund, Inc., et al., and Manfred Ohrenstein, Plaintiffs-Intervenors,

v.

Warren M. ANDERSON, both individually and as Temporary President and Majority Leader of the New York State Senate; Jay P. Rolison, Jr., both individually and as Co-chairman of the Legislative Task Force on Reapportionment; the Senate of the State of New York; Melvin Miller, both individually and as Co-chairman of the Legislative Task Force on Reapportionment; the Assembly of the State of New York; Hugh L. Carey, both individually and as the Governor of the State of New York; Mario M. Cuomo, both individually and as Lieutenant Governor of the State of New York and as Presiding Officer and President of the Senate of the State of New York; the Legislative Advisory Task Force and the Board of Elections of the State of New York, Defendants,

and

James L. Emery, Defendant-Intervenor.

No. 82 Civ. 876.

United States District Court,
S. D. New York.

April 2, 1982.

Voters, speaker of state assembly and minority leader of state senate brought action against majority leader of state senate, senate itself, and minority leader of state senate assembly and others challenging constitutionality of present apportionment scheme of New York state senate, assembly and congressional districts. The three-judge District Court, Pierce, Ward and Broderick, JJ., held that: (1) challenge to state's failure to reapportion was ripe for adjudication, and (2) court would direct that reapportionment of state senate and assembly take place this year as failure of reapportionment to take place would be constitutionally unacceptable and as machinery for 1982 elections in year state was not yet in full operation and primary elections were six months in the future.

Order entered.

1. States ⇐27(2)

New York State's failure to reapportion in wake of 1980 decennial census would be constitutionally unacceptable. U.S.C.A. Const.Art. 1, § 2, cl. 1 et seq.; Amend. 15; Voting Rights Act of 1965, § 2 et seq. as amended 42 U.S.C.A. § 1973 et seq.

2. Federal Courts ⇐13

Where unless three-judge district court directed that reapportionment of New York State senate in assembly district take place this year, it would not take place, and such failure would be constitutionally unacceptable, challenge to state's failure to reapportion was ripe for adjudication, notwithstanding fact that New York legislature remained in session and presumably would remain in session. U.S.C.A.Const.Art. 1, § 2, cls. 1 et seq., 3; Amends. 14, 15; N.Y.Const.Art. 3, § 4; Voting Rights Act of 1965, § 2 et seq. as amended 42 U.S.C.A. § 1973 et seq.

3. Constitutional Law ⇐225.3(6)

Individual's right to vote for state legislators is unconstitutionally impaired when its weight is against substantial fashion diluted when compared with votes of citizens living in other parts of the state. U.S.C.A. Const.Art. 1, § 2, cl. 1 et seq.; Amends. 14, 15.

4. States ⇐27(5)

Reapportionment plan must contain "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state." U.S.

Atch. 1

C.A.Const.Art. 1, § 2, cl. 1 et seq.; Amends. 14, 15.

5. Constitutional Law ⇐225.3(6)

Under rule that reapportionment plan must contain "substantial equality" of population among various districts, "substantial equality" does not mean that each district must have an identical number of residents, or citizens, or voters because mathematical exactness or precision is hardly workable constitutional requirement; however, district must be nearly of equal population as is practicable. U.S.C.A.Const.Art. 1, § 2, cl. 1 et seq.; Amends. 14, 15.

See publication Words and Phrases for other judicial constructions and definitions.

6. States ⇐27(10)

Where failure to reapportion New York State senate and assembly districts in this year would be constitutionally unacceptable, and where machinery for 1982 elections in New York State was not yet in full operation and primary elections were six months in future, court would order that legislature enact and governor sign, valid reapportionment statute in time for a 1982 election to proceed as scheduled. U.S.C.A. Const.Art. 1, § 2, cl. 1 et seq.; Amends. 14, 15.

Paul Wooten, Brooklyn, N. Y., for plaintiffs John Flateau, Robert V. Connelly, Audrey Bynoe, and Angel A. Rodriguez.

Lizette A. Cantres, Cesar A. Perales, New York City, for plaintiff-intervenor Puerto Rican Legal Defense and Ed. Fund, Inc.

C. Daniel Chill, New York City, for plaintiff Stanley Fink, Speaker of the New York State Assembly.

Martin E. Connor, Brooklyn, N. Y., for plaintiff-intervenor Manfred Ohrenstein, Minority Leader of the New York State Senate.

John F. Haggerty, Michael R. Lanzarone, New York City, for defendants Warren M. Anderson, Temporary President and Majority Leader of the New York State Senate, State Senator Jay P. Rolison, Jr., and the New York State Senate.

Robert Abrams, New York State Atty. Gen. by George D. Zuckerman, and Richard Liskov, Asst. Attys. Gen., New York City, for defendants Hugh L. Carey, Mario Cuomo, and the New York State Bd. of Elections.

Richard S. Scolaro, Scolaro, Shulman & Cohen, P. C., Syracuse, N. Y., for James L. Emery, Minority Leader of the New York State Assembly.

Robert F. Kelly, New York City by Arthur Eisenberg and Richard Emery, New York Civil Liberties Union, New York City, and by William J. Hibsher, U. S. Dept. of Justice, Civil Rights Unit, as amici curiae, for defendant Legislative Advisory Task Force on Reapportionment.

Before PIERCE, Circuit Judge, and ROBERT J. WARD, and VINCENT L. BRODERICK, District Judges.

OPINION

PER CURIAM.

I.

This lawsuit challenges the constitutionality of the present apportionment scheme of the New York State Senate, Assembly and congressional districts. Plaintiffs are four New York State voters, the Speaker of the State Assembly, the Minority Leader of the State Senate, and the Puerto Rican Legal Defense and Education Fund, Inc. Defendants are the Majority Leader of the State Senate, the Senate itself, the Minority Leader of the State Assembly, the Assembly, the Governor, the Lieutenant Governor, the State Board of Elections, and the Legislative Advisory Task Force on Reapportionment and its two co-chairmen.[1]

1. The original plaintiffs were voters John Flateau, Robert V. Connelly, Audrey Bynoe and Angel A. Rodriguez. Stanley Fink, Speaker of the Assembly, was originally named as a defendant; with the consent of all parties he was realigned as a plaintiff. The Puerto Rican Legal Defense and Education Fund, Inc. and Manfred Ohrenstein, the Minority Leader of the

The complaint was filed on February 10, 1982. Pursuant to 28 U.S.C. § 2284, a three-judge court was convened. The court heard argument on various motions, including motions for summary judgment, on March 26, 1982.

All plaintiffs essentially argue that based on the 1980 New York decennial census data, which show a shift and decrease in total population, the existing apportionment schemes for New York's legislative and congressional districts, drawn pursuant to the 1970 census, violate, respectively, the "one-person, one-vote" principle enunciated under the Equal Protection Clause, *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and Article 1, § 2 of the United States Constitution. Some plaintiffs also urge that due to an increase in minority population the existing apportionment scheme for the state legislature violates the Fifteenth Amendment to the United States Constitution and the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 *et seq.* (1981). All the plaintiffs urge that the present apportionment schemes be declared unconstitutional.

All but one plaintiff request the court to order New York State to enact a constitutional plan of reapportionment by April 16, 1982 and failing that, request that this court devise a reapportionment plan. The Puerto Rican Legal Defense and Education Fund, Inc. requests that the court itself immediately redistrict the State.

Certain of the defendants (the State Senate, Warren M. Anderson individually and as Majority Leader of the Senate, and Jay P. Rolison, Jr. individually and as co-chairman of the Legislative Advisory Task Force on Reapportionment) agree that a reapportionment plan must be enacted now with respect to New York's congressional districts but dispute the need to reapportion immediately with respect to the state legislative districts. They argue that Article 3, § 4 of the New York State constitution allows up to six years for the creation of a reapportionment plan for State Senate and Assembly districts.[2]

Governor Carey, another defendant, agrees with plaintiffs that the state should be required to prepare redistricting plans for congressional, Senate and Assembly districts by a date to be fixed by the court, but cautions against any finding of unconstitutionality which would affect either the power of the legislature to act as presently constituted, or the propriety of filling existing legislative vacancies by special elections prior to redistricting. All defendants urge that there should be no finding that the present district lines violate either the Voting Rights Act of 1965 or the Fifteenth Amendment.

At the conclusion of the arguments on March 26, 1982, we disposed of the pending motions for summary judgment by issuing an order 1) which held that the present

State Senate, were permitted to intervene as plaintiffs. James L. Emery, Minority Leader of the State Assembly, was permitted to intervene as a defendant.

2. The relevant part of Article 3, § 4, of the State constitution provides:

> Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor.... At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-one, they shall remain unaltered until the first regular session after the year nineteen hundred forty.

New York congressional, Senate and Assembly districts may not, consistent with the Equal Protection Clause of the Fourteenth Amendment and Article 1, § 2 of the Constitution, be employed to conduct any elections for terms commencing on or after January 1, 1983; 2) which directed New York State to devise and enact a constitutional reapportionment plan for Senate, Assembly and congressional districts by April 16, 1982; 3) which specified that special elections intended to fill vacancies in the present state legislature were not affected by the order; and 4) which retained jurisdiction in this court pending final resolution of all issues raised in this action. This opinion sets forth the bases upon which that order was issued.

II.

There is no dispute with respect to the following: [3]

In 1972, the New York State Legislature with the approval of the Governor enacted congressional and State Senate and Assembly reapportionment and redistricting plans for the 1972 statewide primary and general elections.[4]

On January 10, 1974 the United States District Court for the District of Columbia entered an order subjecting the counties of Kings, New York and Bronx to the provisions of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 *et seq.*, thus requiring compliance, as to those counties, with the preclearance requirements of Section 5, 42 U.S.C. § 1973c.[5] To effect such compliance, New York State in 1974 amended the 1972 reapportionment and redistricting plans by altering 16 out of 150 Assembly districts, 8 out of 60 Senate districts, and 4 out of 39 congressional districts. 1974 New York Laws, c. 588, c. 589.

Since 1974 no new reapportionment or redistricting has taken place.

On December 31, 1980 the United States Census Bureau officially certified to the President of the United States the total population of New York State as 17,557,288. As a result of the decrease in New York's population as evidenced by the census, New York State has lost 5 congressional seats, from 39 to 34. The population mean of each congressional district will be 516,391 persons.[6] Based on a presently existing State Senate of 60 members, the population mean of each senatorial district under the 1980 census will be 292,621 persons. The population mean of each of the 150 Assembly districts will be 117,048 persons.

3. The parties executed and filed a stipulation from which the statement of facts in this opinion is derived.

4. The Assembly and Senate are the legislative bodies of the State of New York. The Assembly presently consists of 147 duly elected members, with 3 vacancies, from 150 districts throughout New York State; the Senate consists of 58 duly elected members, with 2 vacancies, from 60 districts throughout New York State. The Senate and Assembly are required by Article 3, § 4 of the New York State constitution to act as co-equal participants in altering and adjusting congressional, Senate and Assembly district lines after each federal decennial census.

5. Section 5, 42 U.S.C. § 1973c, deals with, *inter alia*, the alteration of voting qualifications and procedures. Section 5 provides in pertinent part:

> [W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure . . .

6. If New York's 1980 census population of 17,557,288 were distributed among the 39 existing congressional seats, the population mean would be 450,187 and not 516,391.

Based on the above figures, the maximum positive and negative percentage deviations from the population means for the State Senate and Assembly districts as presently constituted are as follows: [7]

District	Percentage Deviation from Population Mean	Maximum Percentage Deviation
Senate # 1	48.91	
Senate # 32	-35.84	84.75
Assembly # 1	51.91	
Assembly # 79	-57.09	109.00

It has been conceded that if a legislative reapportionment plan for the State Assembly and Senate were enacted today which contained such deviations from the population means, it would violate the Equal Protection Clause of the Fourteenth Amendment.[8] *See* Stipulation 15 of Stipulation of Facts.

The New York State Legislature has been convened in regular session since January 6, 1982, and has not passed a new apportionment plan based on the 1980 decennial census.[9]

The following is a partial calendar of significant dates in the New York State 1982 electoral process:

State Committee meetings to designate statewide candidates	June 15–22
First day to sign designating petitions for primary election	June 22
Dates for filing designating petitions	July 26–29
Primary Election	September 14
General Election	November 2

Any redistricting plan enacted by New York State reapportioning New York congressional, Senate and Assembly districts will have to be enacted pursuant to the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973 *et seq.* and precleared pursuant to Section 5 of the Act, 42 U.S.C. § 1973c.[10]

There are no genuine issues of material fact with respect to the foregoing. We turn, therefore, to the issues of law.

7. An accepted measure in considering the constitutionality of apportionment plans is that of maximum percentage deviation from the population mean. Such a formula for determining the constitutionality of apportionment plans was approved by the Supreme Court in *Abate v. Mundt*, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971). The maximum percentage deviation is determined by adding the percentage deviation above the population mean of the district with the greatest number of voters to the percentage deviation below the population mean of the district with the fewest number of voters. This formula can presently be applied with respect to the State Senate and Assembly districts, since the 1980 census figures will be applied to the same number of districts. It does not lend itself to the congressional district situation, since there has been a change (from 39 to 34) in the number of districts.

8. The census figures show substantial increases in the population of racial minorities in the State of New York, particularly in Bronx and Kings Counties. We have not deemed it necessary to this point, in deciding the issues before us, to consider dilution problems. We assume that in developing appropriate reapportionment plans New York State will give consideration to such matters.

9. Both houses of the legislature have released separate proposed reapportionment plans for the State Senate and State Assembly districts and the Senate has passed Bill # 8534 for statewide congressional redistricting.

10. Because Bronx, New York, and Kings Counties fall under § 5 of the Voting Rights Act, before any reapportionment plan enacted by the legislature and signed by the Governor may be implemented, it must be submitted to the United States Attorney General for preclearance, or else a declaratory judgment approving the plan must be obtained from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 157, 97 S.Ct. 996, 1005, 51 L.Ed.2d 229 (1977). If the plan is submitted to the Attorney General (the usual method used by covered jurisdictions), he has 60 days to file an objection or to request additional information. If no objections or requests for information are made within 60 days the plan becomes law. If an objection or a request is made, the sixty day period commences again when a satisfactory response is received. *Georgia v. United States*, 411 U.S. 526, 539, 93 S.Ct. 1702, 1710, 36 L.Ed.2d 472 (1973); 28 C.F.R. § 51.3(b)–(d). Thus a plan does not necessarily become law after the 60 days elapse.

III.

We consider preliminarily whether the issues presented in this action are ripe for judicial intervention. Is there a case or controversy? While plaintiffs attack New York State's failure to reapportion in the wake of the 1980 decennial census, the state legislature is in session and presumably will remain in session, and it still has time to act.

All state parties, whether aligned as plaintiffs or defendants, recognize their constitutional and statutory obligation to reapportion New York's congressional districts, and this court's direction with respect to those districts was consented to by defendants.

[1, 2] As to State Senate and Assembly districts, some of the defendants forcefully maintain that the state is not constitutionally required to effect reapportionment this year. Of course, the concurrence of these defendants—the State Senate itself and the Majority Leader of the Senate—is necessary for enactment of any reapportionment plan. Absent intervention by this court, New York will not reapportion its Senate and Assembly districts this year unless there is a speedy change of position by these defendants. While there has been no final failure to reapportion to date, the inevitability of such failure if this court does not direct reapportionment has persuaded us that the matter is ripe for adjudication. Since New York State still has time to act, no constitutional violation has yet occurred. It is nevertheless entirely appropriate for us to conclude, as we have, that unless we direct that reapportionment of State Senate and Assembly districts take place this year it will not take place, and that such a failure would be constitutionally unacceptable. If we waited until there no longer was time in 1982 for the reapportionment to be effected, the constitutional violation would then have occurred, but it would be too late for any timely remedy to be structured. *Cf. Watson v. Commissioners Court of Harrison County*, 616 F.2d 105, 107 (5th Cir. 1980).

IV.

The present New York statute with respect to congressional redistricting (Laws of 1972, Chs. 76, 77 and 78 as amended by Ch. 589 of the Laws of 1974), which provides for 39 congressional districts, cannot serve as the basis for the 1982 election of 34 representatives. An election held under the present congressional districting plan would therefore violate Article 1, § 2 of the United States Constitution.[11]

All parties have agreed that a new apportionment plan must be enacted for the 1982 congressional election.

V.

Plaintiffs urge that immediate reapportionment of New York's Senate and Assembly districts, based on the data derived from the 1980 decennial census, is constitutionally compelled. Certain of the defendants [12] maintain that since there are in place carefully structured New York constitutional provisions with respect to reapportionment, New York need not reapportion its Senate

11. Article 1, § 2, Clause 3 provides:

> Apportionment of representatives and taxes
>
> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

12. The Senate, the Senate Majority Leader, and the co-chairman of the Legislative Advisory Task Force on Reapportionment.

and Assembly districts this year so long as it does reapportion in due course in accordance with the state constitutional provisions. These provisions would permit New York to delay Senate and Assembly reapportionment until 1986.

The New York constitution does set rigorous requirements with respect to apportionment. N.Y.Const.Art. 3, §§ 4 and 5. Apportionment by the legislature is subject to review by the New York courts. It is also, as a practical matter, subject to preclearance by the Attorney General of the United States or the District Court of the District of Columbia pursuant to 42 U.S.C. § 1973c. *See* fn. 10, *supra*.

Thus these defendants present squarely to this court the issue of whether state legislative elections may be held where the legislative districts are concededly malapportioned, if the state concerned has a constitutional provision which in time will require a correction of the malapportionment. The specific question in terms of New York State is whether it would be constitutionally permissible, in the face of existing maximum percentage deviations from the mean of 84.75% for the Senate and 109% for the Assembly, to hold elections this year (and perhaps also in 1983, 1984, and 1985) on the basis of district lines which were last drawn in 1972 based on 1970 census data.

One of the fundamental Constitutional rights underlying the American system of representative government is the right of a citizen to participate in an election on an equal basis with every other citizen. *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972); *Seamon v. Upham*, 536 F.Supp. 931 (E.D.Tex.1982) (Justice, J., concurring and dissenting). Any alleged infringement of the right to vote requires close scrutiny:

> Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, supra, 377 U.S. at 562, 84 S.Ct. at 1381.

[3–5] The guiding constitutional principle, with respect to state legislative apportionment plans, is that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568, 84 S.Ct. at 1384. A reapportionment plan must contain "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579, 84 S.Ct. at 1390.

"Substantial equality" does not mean that each district must have an "identical number of residents, or citizens, or voters" because "[m]athematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577, 84 S.Ct. at 1389. Districts must, however, be "as nearly of equal population as is practicable." *Id. See also Gaffney v. Cummings*, 412 U.S. 735, 743–44, 93 S.Ct. 2321, 2326–37, 37 L.Ed.2d 298 (1973).

Deviations from population equality of under ten percent have been held to be "minor" with respect to state legislative districts, and they do not constitute *per se* violations of equal protection. *Gaffney v. Cummings, supra; Marshall v. Edwards*, 582 F.2d 927, 934 (5th Cir. 1978), *cert. denied*, 452 U.S. 938, 101 S.Ct. 3080, 69 L.Ed.2d 952 (1981). Deviations which are more than "minor" must be based on "legitimate considerations incident to the effectuation of a rational state policy" to be constitutionally permissible. *Reynolds v. Sims, supra*, 377 U.S. at 579, 84 S.Ct. at 1390. *See also Mahan v. Howell*, 410 U.S. 315, 325, 93 S.Ct. 979, 985, 35 L.Ed.2d 320 (1973).[13]

13. Congressional reapportionment is subject to a more stringent constitutional standard than state legislative reapportionment. *Gaffney v. Cummings, supra*, 412 U.S. at 741–42, 93 S.Ct.

In *Mahan, supra*, the policy of maintaining the integrity of political subdivision lines was held to justify a maximum percentage deviation from the population mean of 16.4%. 410 U.S. at 329, 93 S.Ct. at 987.[14] The same policy was held to justify a maximum deviation of 11.9% in *Abate v. Mundt*, 403 U.S. 182, 185, 91 S.Ct. 1904, 1906, 29 L.Ed.2d 399 (1971).

Reynolds v. Sims, supra, suggests a toleration of otherwise unjustifiable malapportionment if the state can demonstrate that it has adopted, and is in compliance with, "a reasonably conceived plan for periodic readjustment of legislative representation." 377 U.S. at 583, 84 S.Ct. at 1392. The mere fact that there is significant malapportionment at any given time does not necessarily give rise to a constitutional violation if the state shows that it has enacted a plan pursuant to "a rational approach to readjustment of legislative representation in order to take into account population shifts and growths." *Id.*

However, despite some tolerance for deviations in cases where a "rational state policy" will otherwise be furthered, some deviations are so substantial that no state interests or policy can justify them. *Gaffney v. Cummings, supra*, 412 U.S. at 744, 93 S.Ct. at 2327.[15] If present New York Senate and Assembly district lines were used, the maximum percentage deviations would be 84.75% and 109%, respectively. Deviations of such a magnitude, if presently enacted, would constitute *per se* violations of the equal protection principle of "one person, one vote."

Defendants argue that Article 3, § 4 of New York State's constitution evidences a "reasonably conceived plan for periodic readjustment of legislative representation." This provision mandates reapportionment to be made each decade, at some time prior to the conclusion of the sixth year of the decade. Since it is only 1982, defendants insist that there will be a constitutional violation only if a Senate and Assembly reapportionment plan has not been enacted prior to December 31, 1986.

The issue, then, becomes whether the state constitution provides "a rational approach to readjustment of legislative representation in order to take into account population shifts and growths." *Reynolds v. Sims, supra*, 377 U.S. at 583, 84 S.Ct. at 1392.

The *Reynolds* Court held that "if reapportionment were accomplished [pursuant to a state reapportionment provision] with less [than decennial] frequency, it would assuredly be constitutionally suspect." *Id.* at 584, 84 S.Ct. at 1393. Since the last reapportionment in New York occurred in 1972,[16] a failure to reapportion the current districting lines for the state legislature with respect to terms commencing on or after January 1, 1983 would render New York's present apportionment scheme more than ten years old and hence "constitutionally suspect." [17] To determine whether this scheme would be "constitutionally infirm"

at 2325–26; *Mahan v. Howell, supra*, 410 U.S. at 322, 93 S.Ct. at 984. Therefore, greater population deviations are permitted when a state reapportions its state legislature than when it reapportions its congressional districts. *Gaffney v. Cummings, supra; Mahan v. Howell, supra.*

14. The average percentage deviation in *Mahan* was ± 3.89%. Out of 52 districts, 35% were within 4% of the ideal and 9 exceeded a 6% variation from the ideal. 410 U.S. at 319, 93 S.Ct. at 982.

15. *See also Swann v. Adams*, 385 U.S. 440, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967) (a 25.65% deviation held invalid); *Kilgarlin v. Hill*, 386 U.S. 120, 122–123, 87 S.Ct. 820, 821–822, 17 L.Ed.2d 771 (1967) (a 26.48% deviation viewed with suspicion but not ruled on).

16. *See* p. 7, *supra*. The legislative reapportionment predicated on the 1970 census was enacted in 1972. The 1974 amendments, necessitated by the application of the Voting Rights Act, affected only 8 Senate districts, 16 Assembly districts, and 4 congressional districts.

17. Indeed, by allowing up to six years from the date of the last decennial census, Article 3, § 4, of the New York State constitution affords the possibility that the interval between apportionment could be as great as fourteen years, *i.e.*, reapportionment, having last occurred in 1972, might be accomplished as late as December of 1986 based on the 1980 census.

as well, we must balance the state's interest in delaying reapportionment until after the 1982 general elections against the interests of the thousands of New York voters whose voting strength in the 1982 general election stands to be diluted, relative to the voting strength of citizens living in other parts of New York State, if such a delay in reapportionment occurs. In assessing the interests of the voters we must consider the extent of the dilution.

The state certainly has interests in sovereignty and self-government and "the need for stability and continuity in the organization of the legislative system." *Reynolds v. Sims, supra*, 377 U.S. at 583, 84 S.Ct. at 1392. Apportionment is a political and legislative process with respect to which judicial caution is indicated. Defendants have, however, presented no strong or convincing reasons why reapportionment should not be accomplished in time for the 1982 general elections. They do not assert that immediate reapportionment is impossible. They, instead, rely on tradition. They argue that reapportionment ought not be accomplished this year because "[t]he tradition of New York State has been that reapportionment had [sic] not occurred until after the first election in the decade and until the third year of the decade." Transcript of Argument, March 26, 1982, at 45.

We will assume that this "tradition" of third-year reapportionment in fact exists in New York State, although we note that it was not observed in the 1960's or the 1970's.[18] Such a tradition is of significance to our present analysis only if it is an expression of significant state interests or concerns. Defendants have, however, failed to suggest any reason for the advent of this tradition; more importantly, they have advanced no argument, other than the fact of its existence, for its continued observance. Under these circumstances, we decline to accord New York State's tradition of third-year reapportionment significant weight in striking the balance of interests described above.

The significance of the voters' interest in any given reapportionment case is primarily a function of the relative severity of the malapportionment. In New York we are faced with deviations as much as five times greater than the largest deviations that the Supreme Court has found to pass constitutional muster in newly enacted apportionment plans. Given these variations, and defendants' failure to present any compelling justification for delay, we conclude that the Equal Protection Clause of the Fourteenth Amendment, in conjunction with the Supremacy Clause of Article 6 of the United States Constitution, mandates immediate reapportionment. *Reynolds v. Sims, supra*, 377 U.S. at 583–584, 84 S.Ct. at 1392–1393; *Goines v. Rockefeller*, 338 F.Supp. 1189, 1195 (S.D.W.Va.1972); *Bennett v. Elliott*, 294 F.Supp. 808, 810 (M.D. Tenn.1968).[19]

VI.

The United States Supreme Court has enunciated on numerous occasions that "legislative reapportionment is primarily a matter for legislative consideration and determination." *Reynolds v. Sims, supra*, 377 U.S. at 586, 84 S.Ct. at 1394; *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 676, 84 S.Ct. 1429, 1440, 12 L.Ed.2d 595 (1964); *Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975); *Connor v. Finch*, 431 U.S. 407, 414, 97 S.Ct. 1828, 1833, 52 L.Ed.2d 465 (1977). Reapportionment is a "legislative task which the federal courts should

18. New York enacted a reapportionment plan based on the 1970 census in 1972. It did not enact a reapportionment plan based on the 1960 census until 1964, and did so at that time only after having been ordered to reapportion by the United States Supreme Court. *See WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 563 (1964).

19. As *Goines v. Rockefeller, supra*, stated in discussing the Supremacy Clause requirements: "In state legislative apportionments, the equal protection clause of the United States Constitution and the 'one man-one vote' principle developed therefrom, being a part of the supreme law of the land, will prevail over any inconsistent provisions of a state constitution." 338 F.Supp. at 1195.

make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S.Ct. 2493, 2496, 57 L.Ed.2d 411 (1978), citing to *Connor v. Finch, supra*, 431 U.S. 407, 414–415, 97 S.Ct. 1828, 1833–1834, 52 L.Ed.2d 465. *See also Seamon v. Upham, supra*, 536 F.Supp. at 938. Therefore, when the court declares an existing apportionment plan unconstitutional, it is "appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise v. Lipscomb, supra*, 437 U.S. at 540, 98 S.Ct. at 2497. *See also Connor v. Finch, supra*, 431 U.S. at 414–15, 97 S.Ct. at 1833–34.

We believe that the April 16, 1982 deadline ordered by this court affords the legislature "a reasonable opportunity ... to meet constitutional requirements ..." *Wise v. Lipscomb, supra*, at 540, 98 S.Ct. at 2497. As the Supreme Court reasoned in *Reynolds v. Sims*, once a plan has been found unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." 377 U.S. at 585, 84 S.Ct. at 1393.

The case before us is not the "unusual case" contemplated by *Reynolds v. Sims*. For example, a situation which "*might* justify a court in withholding the granting of immediately effective relief" is one "where an impending election is imminent and a State's election machinery is already in progress." *Id.* (emphasis added).

The machinery for the 1982 elections in New York State is not yet in full operation and the primary elections are six months in the future. Furthermore, the political process does not commence until June 22. *Cf. Wells v. Rockefeller*, 394 U.S. 542, 547, 89 S.Ct. 1234, 1237, 22 L.Ed.2d 535 (1969) (where the primary election was only three months away, the court held that "we cannot say there was error in permitting the [1968] election to proceed under the plan despite its constitutional infirmities"); *Klahr v. Williams*, 313 F.Supp. 148, 152 (D.Ariz.1970), *aff'd sub nom. Ely v. Klahr*, 403 U.S. 108, 91 S.Ct. 1803, 29 L.Ed.2d 352 (1971) (the court allowed elections to be held under the old plan where nominating petitions had already been circulated and had to be filed within seven weeks of the court's decision); *Swann v. Adams*, 383 U.S. 210, 212, 86 S.Ct. 767, 768, 15 L.Ed.2d 707 (1966) (the Supreme Court ordered a valid apportionment plan "be made effective for the 1966 elections").

[6] Considering these circumstances, it is not unreasonable to insist that the legislature enact, and the Governor sign, a valid reapportionment statute in time for the 1982 elections to proceed as scheduled.

VII.

Plaintiffs have also contended that the present state legislative and congressional plans violate the 15th Amendment and the Voting Rights Act of 1965 as amended, 42 U.S.C. § 1973 *et seq.* Since on the basis of the "one person, one vote" rule of *Reynolds v. Sims, supra*, and Article 1, § 2, we have directed that reapportionment plans be devised and enacted, we need not reach plaintiffs' other claims.

As previously stated, *supra* at 6–7, an order in accordance with this opinion was filed on March 26, 1982.

SKLUT HIDE AND FURS, a Delaware corporation, Plaintiff,

v.

PRUDENTIAL LINES, INC., a Delaware corporation, Defendant.

Civ. A. No. 80–552.

United States District Court, D. Delaware.

April 2, 1982.

Shipper brought action in admiralty for loss of cargo carried in ocean transportation

script, pp. 66–67. Defense counsel did not attempt to use Mr. Garcia's prior testimony to refresh his recollection or to impeach him on this point. While the witness' statements at trial were not identical to those made during the preliminary hearing, I find absolutely no inconsistency between them.

Finally, the petitioner claims there is a substantial inconsistency in Mr. Garcia's testimony about the manner in which Mr. Ruiz wielded the knife. On direct examination at the preliminary hearing, Mr. Garcia demonstrated how Mr. Ruiz held the knife; under cross examination, Mr. Garcia admitted that he did not know for sure. At trial, Mr. Garcia again demonstrated how he thought Mr. Ruiz had held the knife. The description of this demonstration would appear to be very similar, if not identical, to the description of his demonstration at the preliminary hearing. Although Mr. Garcia's testimony on this point was not consistent throughout the preliminary hearing, I cannot conclude that there were substantial inconsistencies between his testimony at the preliminary hearing and at trial.

For the foregoing reasons, I am persuaded that the prosecutor's failure to disclose his agreement with the witness Thomas Garcia did not deprive Mr. Ruiz of his constitutional right to due process at trial. There were no substantial inconsistencies between Mr. Garcia's testimony at the preliminary hearing and at trial, so evidence of the agreement would not have created a reasonable doubt where none otherwise existed.

This conclusion is based on the assumption, made by both parties for purposes of this motion, that the agreement in question was made sometime after the preliminary hearing but before trial. Pursuant to the direction of the court of appeals for this circuit, the petitioner is to have an opportunity "to allege and attempt to prove otherwise." *Ruiz v. Cady*, 635 F.2d 584, 587 n.3 (7th Cir. 1980). If Mr. Ruiz desires to allege and attempt to prove that the agreement did not arise after the preliminary hearing, he should, within twenty days of the date of this order, serve and file a written statement to that effect.

The instant decision disposes of the petitioner's motion for summary judgment, but it does not purport to resolve his underlying petition for habeas corpus in its entirety. The court will consider the petition itself only after it is determined whether a factual issue exists regarding the time of the making of the Garcia agreement in relation to the preliminary hearing and the trial.

[3] The second argument made by the petitioner in his motion for summary judgment is that the standard Wisconsin jury instruction on intent used in his case is unconstitutional. The constitutional validity of that instruction was recently upheld in *Pigee v. Israel*, 670 F.2d 690 (7th Cir. 1982). Thus, the petitioner's second argument is without merit.

Therefore, IT IS ORDERED that the petitioner's motion for summary judgment granting his petition for a writ of habeas corpus be and hereby is denied.

Jonathan K. FARNUM, et al.

v.

Robert BURNS, et al.

Civ. A. No. 82-0500.

United States District Court,
D. Rhode Island.

Aug. 11, 1982.

Citizens and registered voters of Rhode Island brought action challenging constitutionality of plan to conduct the 1982 primary and general elections for office of state Senator according to senatorial apportionment scheme enacted in 1974. The three-judge District Court, Pettine, Senior District Judge, held that: (1) population disparities violated equal protection where

Atch. 2

average deviation was 14% and ratio of population in largest district to that in smallest district was 2.35 to one; (2) use of 1974 senatorial lines in 1982 elections would be unconstitutional, notwithstanding Supreme Court's suggestion that reapportionment every ten years was a rational approach to legislative readjustment; and (3) state would be enjoined from conducting the senatorial elections according to the 1974 senatorial apportionment plan.

Declaratory and injunctive relief granted.

1. States ⇐27(5)

Where ideal state senatorial district consisted of 18,943 persons while largest district under existing reapportionment scheme consisted of 29,164 persons and the smallest consisted of 12,429 persons, those gross disparities did not pass muster under the *Reynolds v. Sims* substantial equality test and even assuming the deviations were not per se unconstitutional the state offered no justification for such shocking malapportionment. U.S.C.A. Const.Amend. 14.

2. States ⇐27(5)

Although *Reynolds v. Sims* reapportionment case suggested that reapportionment every ten years is a rational approach to readjustment of legislative representation, as regards 1982 elections, Rhode Island could not adhere to 1974 reapportionment scheme where 1980 census data, as received in May of 1981, reveal massive population shifts among senatorial districts rendering use of 1974 apportionment lines invalid. U.S.C.A. Const.Amend. 14.

3. States ⇐27(10)

In cases involving unconstitutional malapportionment of a state legislature courts must fashion relief according to the well-known principles of equity, although equitable principles may require a court not to interfere with the conduct of rapidly upcoming elections where the election machinery is already in gear even where existing apportionment scheme clearly violates the "one man/one vote" principle. U.S.C.A. Const.Amend. 14.

4. States ⇐27(10)

Where Rhode Island election machinery was stalled and 1982 election for offices other than state Senate could proceed on time, the state was enjoined only from conduct in 1982 senatorial elections according to invalid 1974 senatorial apportionment plan. U.S.C.A. Const.Amend. 14.

Max Wistow, Providence, R.I., for plaintiffs.

Eileen G. Cooney, Sp. Asst. Atty. Gen., Providence, R.I., for defendants.

Before BOWNES, Circuit Judge, ZOBEL, District Judge, and PETTINE, Senior District Judge.

OPINION AND ORDER

PETTINE, Senior District Judge.

Plaintiffs in this action are all citizens and registered voters of the State of Rhode Island. Defendants consist of the Secretary of State and the Rhode Island Board of Elections. Plaintiffs challenge the constitutionality of Rhode Island's plan to conduct the September 1982 primary and November 1982 election for the office of state senator according to the state senatorial apportionment scheme enacted in 1974. This scheme was apparently based on the 1970 federal census. Plaintiffs contend that the results of the 1980 federal census indicate that massive population shifts have occurred among senatorial districts in Rhode Island since the 1970 census, rendering use of the 1974 senatorial apportionment lines in the 1982 elections invalid under the "one man/one vote" principle enunciated in *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In addition, plaintiffs argue that use of the 1974 senatorial district lines in the 1982 elections would violate the Rhode Island constitution as interpreted in *Sweeney v. Notte*, 95 R.I. 68, 183 A.2d 296 (1962).[1]

1. *See* note 7 *infra*.

Plaintiffs thus seek a judgment declaring the proposed use of the 1974 senatorial lines in 1982 to be unconstitutional. In addition, plaintiffs request that this Court enjoin such use of the 1974 lines and order that the 1982 Rhode Island elections be conducted under a constitutionally acceptable senatorial apportionment scheme. The plaintiffs suggest that this Court either order the state to fashion a constitutionally valid scheme for the 1982 elections, or implement a court-devised scheme. For the reasons that follow, this Court declares that use of the 1974 senatorial district lines in 1982 would violate the Equal Protection Clause, and enjoins Rhode Island from conducting state senatorial elections until such time as a constitutionally acceptable reapportionment plan is devised.[2]

FACTUAL BACKGROUND

The recent history of reapportionment in Rhode Island bears some mention in this case.[3] On April 9, 1982 a statutory reapportionment plan, based on the 1980 federal census, for state senatorial and representative districts and United States congressional districts became law. This statute repealed the 1974 Rhode Island reapportionment scheme. On June 7, 1982, however, the Rhode Island Supreme Court affirmed a judgment of the state superior court that struck down the new senatorial redistricting provision on federal and state constitutional grounds. *Licht v. Quattrochi*, C.A. Number 82-0259, (R.I. July 7, 1982). The Rhode Island legislature then enacted a new reapportionment plan for state senatorial districts.

The Governor, however, vetoed this bill. He ordered the legislature to reconvene in a special session for the purpose of re-enacting the same bill with an effective date *after* the November 1982 elections in order to afford an opportunity to test the constitutionality of the new senatorial plan in the courts. The legislature reconvened and passed H9101, which provides that the new senatorial reapportionment plan will be effective beginning with the 1984 elections. In addition, section one of H9101 repealed the portion of the April 1982 statute that abrogated the 1974 senatorial lines, thus reviving them for use in the 1982 elections.[4]

On August 4, 1982, this Court heard argument from counsel on the merits of this case. The parties agreed that, in light of the 1980 census, the 1974 senatorial district lines do not provide for substantial equality of votes. Nonetheless, the defendants contended that this Court should refrain from ordering that the 1982 senatorial elections proceed under different lines because such an order would prevent Rhode Island from conducting its elections on time. Plaintiffs, however, argued that Rhode Island could not possibly conduct any of its elections on schedule *in any event* because the chaotic attempts to reapportion the senate have irremediably delayed the state's election machinery. Plaintiffs offered to produce deposition testimony from the members of the Providence Board of Canvassers that the Board cannot complete the tasks necessary to hold the fall elections under the 1974 senate lines in enough time to insure that there can be a September 14th primary. However, plaintiffs represented that the Board members would testify that all *other* elections in 1982 could occur on time

2. Plaintiffs seek certification of this case as a class action under Fed.R.Civ.P. 23(b)(2). They wish to represent the class of all registered voters in the State of Rhode Island. The defendants have not objected to class certification, and the Court perceives no reason why this suit should not be certified because it meets all the requirements of Rule 23. This case is therefore certified as a class action under Rule 23(b)(2).

3. Except where otherwise noted, all facts are drawn from the stipulation of facts which the parties have submitted to the Court and which they agree contain all facts necessary for a resolution of the apportionment issue.

4. In an advisory opinion issued on July 23, 1982, two members of the Rhode Island Supreme Court stated that the court's invalidation on July 7th of the first senatorial reapportionment lines automatically "revivified" the 1974 senatorial lines. *See* Ex. B., *Parties' Stipulations to Facts.*

if the Board was not required to prepare for the senate race. The plaintiffs thus argued that, because the fall senate elections could not occur on schedule under any circumstances, equitable principles do not counsel that this Court refrain from ordering that the senate elections be conducted according to new lines. Any additional delay and disruption, they argued, would be minimal.

Rather than receive live testimony on this issue, the Court ordered all parties to submit to the Court any deposition testimony relevant to whether the fall senate elections can occur on schedule. The Court has now received and read these depositions.

The deposed officials, who were from the cities of Providence and Pawtucket, testified that after the first reapportionment statute was passed, all of the senate lines were redrawn so as to conform to it. This took about two months. The election officials explained that going back to the 1974 lines is not simply a matter of substituting one set of lines for another; reinstating the 1974 lines requires, *inter alia,* setting up different polling places and rechecking and revising the street lists of voters. We realize that the State has offered to assist local election officials in every way possible including providing financial assistance and furnishing additional personnel. We are also aware that the predictions of the election officials are in the nature of self-fulfilling prophecies; this, however, is a factor over which neither we nor the State have any control.

Based on the deposition testimony, the Court is persuaded that if the election officials of Providence and Pawtucket are forced to reinstate the 1974 senate lines, it is highly probable that none of the fall elections can proceed as scheduled in these two municipalities, which comprise about half of the State's population. The deposition testimony makes it a certainty that the other elections to be held in the fall can take place as scheduled if local officials are not required to prepare for the State senate races.

DISCUSSION

I. *One Man/One Vote*

A. *Numerical Deviation*

"The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places...." *Reynolds v. Sims,* 377 U.S. 533, 568, 84 S.Ct. 1362, 1385, 12 L.Ed.2d 506 (1964). A state must, therefore, make "an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577, 84 S.Ct. at 1390. In the instant case, the parties agree that use of Rhode Island's 1974 senatorial districts for the 1982 elections do not comport with this standard. *See* Defendants' Memorandum of law at page 4 (August 4, 1982). ("Defendants submit that [the] ... 1974 plan ... does not currently reflect substantially equal senatorial districts.").

The 1980 federal census reveals that massive population shifts have occurred among the senatorial districts drawn up in 1974. The populations of these senatorial districts are now grossly disproportionate. Using 1980 census figures, the "ideal"[5] district consists of Eighteen Thousand, Nine Hundred and Forty-three (18,943) persons. The largest district under 1974 lines consists of Twenty-nine Thousand, One Hundred and Sixty-four (29,164) persons; the smallest consists of Twelve Thousand, Four Hundred and Twenty-nine (12,429). Thus, the population of the largest district exceeds the ideal by Fifty-four (54%) percent; the smallest deviates from the ideal by Thirty-four (34%) percent, the "total deviation" is therefore Eighty-eight (88%) percent. The "average deviation" is Fourteen (14%) percent. Finally, the ratio of population in the largest district to that in the smallest district is 2.35 to 1.

5. For purposes of this opinion, the "ideal district" is the figure arrived at by dividing the state's total population by fifty, the number of senatorial districts in Rhode Island. "Total deviation" will refer to the sum of the percentage deviation of both the largest district and the smallest district from the ideal district. "Average deviation" will refer to the average of the percentage deviation of all districts from the ideal district.

[1] These gross population disparities obviously do not pass muster under the *Reynolds v. Sims* "substantial equality" test. Moreover, they far exceed any deviations that the Supreme Court has ever upheld. *See, e.g., White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973) (total deviation 9.9%); *Gaffney v. Cummings,* 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1974) (total deviation 7.83%); *Mahan v. Howell,* 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973) (total deviation 16.4%). Finally, even assuming that these deviations are not *per se* unconstitutional and could be justified by the state, Rhode Island has offered no justification for such shocking malapportionment. *See Connor v. Finch,* 431 U.S. 407, 418, 97 S.Ct. 1828, 1835, 52 L.Ed.2d 465 (1974) (deviations of more than 10% can be justified only if "based on legitimate considerations incident to the effectuation of a rational state policy" (quoting *Reynolds v. Sims,* 377 U.S. 533, 579, 84 S.Ct. 1362, 1390, 12 L.Ed.2d 506 (1964)).

B. *Decennial Reapportionment*

In *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the Supreme Court stated that the requirement of substantial equality among voting districts "does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes." *Id.* at 583, 84 S.Ct. at 1392. The Court then suggested that reapportionment once every ten years would be a "rational approach to readjustment of legislative representation." *Id.* The Court reasoned that "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system...." *Id.* Although declining to hold that decennial reapportionment is constitutionally required, the Court stated that "reapportionment ... with less frequency ... would assuredly be constitutionally suspect." *Id.* at 584, 84 S.Ct. at 1393. Based on this language in *Reynolds,* one could thus argue that, despite the population shifts exposed by the 1980 census, Rhode Island is not constitutionally compelled to reapportion its senate lines until 1984, because its last senatorial reapportionment occurred in 1974. *See Flateau v. Anderson,* 537 F.Supp. 257, 264 (S.D.N.Y.1982) *(per curiam)* (three judge court); *Sims v. Amos,* 336 F.Supp. 924, 941 (M.D.Ala.) *(per curiam)* (three judge court), *aff'd mem.,* 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972).

[2] The Court must reject this argument. The language in *Reynolds* cannot possibly mean that, for purposes of the 1982 elections, Rhode Island is free to ignore the results of the 1980 census and can constitutionally use patently malapportioned senatorial districts. The right to an equal vote and to equal representation is too important to permit a state such freedom. Furthermore, subsequent opinions of the Supreme Court indicate that a state can constitutionally be compelled to reapportion in time for the first election after a census, even where the existing reapportionment scheme is less than ten years old.

In *Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187, 92 S.Ct. 1477, 32 L.Ed.2d 1 (1972) *(per curiam),* the plaintiffs in 1971 challenged the constitutionality of a reapportionment scheme enacted in 1966. They requested the district court to order the reapportionment of Minnesota legislative districts, according to 1970 census data prior to the 1972 state elections. The Minnesota legislature had attempted to reapportion, but the Governor vetoed its reapportionment act. The district court declared that use of the 1966 lines in the 1972 elections would be unconstitutional and imposed a court-ordered reapportionment plan on the state, for use in these elections. On appeal, although the 1966 scheme was less than ten years old, the Supreme Court stated that "under [the] circumstances [of the case] judicial relief was appropriate." *Id.* at 195, 92 S.Ct. at 1483.

Another case that indicates that a state may be compelled to reapportion prior to the first election after a census regardless of the age of the existing apportionment plan is *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971). In *Whitcomb,* the district court in 1965 had ap-

proved the state's plan of reapportionment based on the 1960 federal census. Because of subsequent decisions of the Supreme Court, however, it became apparent that the 1965 plan had actually *not* been constitutional when enacted. Thus, in 1969 the district court invalidated the 1965 plan because of the same population disparities that the court had thought permissible in 1965.

On appeal, the state argued that, under *Reynolds v. Sims*, "a State cannot be compelled to reapportion itself more than once in a ten year period." Id. at 163, 91 S.Ct. at 1879. The Supreme Court rejected this argument, noting that "[s]uch a reading misconstrues the thrust of *Reynolds* in this respect." *Id.* The Court explained that *Reynolds* had suggested decennial reapportionment as a "presumptively rational method [in order] to avoid 'daily, monthly, annual or biennial reapportionment' as population shifted throughout the State." *Id.* (quoting *Reynolds v. Sims*, 377 U.S. at 583, 84 S.Ct. at 1392–1393). Furthermore, the Court stressed that in *Reynolds* it "was careful to note that 'we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practically desirable.'" *Id.* at 163 n. 43, 91 S.Ct. at 1879 (quoting *Reynolds v. Sims*, 377 U.S. at 584, 84 S.Ct. at 1393).

Thus, the Supreme Court in *Whitcomb* upheld the district court's 1969 reapportionment order. In doing so, the Court dispelled any notion that a state's interest in "stability and continuity of organization of the legislative system," *Reynolds v. Sims*, 377 U.S. at 583, 84 S.Ct. at 1393, absolutely frees it from having to reapportion more than once in a ten year period. *Accord Honsey v. Donovan*, 236 F.Supp. 8, 20–21 (D.Minn.1964) (three judge court) (Blackmun, Circuit J.) (invalidating 1959 reapportionment plan in 1964). In sum, this Court holds that use of the 1974 senatorial lines in the 1982 Rhode Island elections would be unconstitutional in light of the population shifts revealed by the 1980 federal census [6] results [7].

II. *Remedy*

[3] The Supreme Court has acknowledged that, in cases involving unconstitutional malapportionment, Courts must fashion relief according to the "well-known principles of equity." *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 1393–1394, 12 L.Ed.2d 506 (1964). *Accord Roman v. Sincock*, 377 U.S. 695, 711–12, 84 S.Ct. 1449, 1458–1459, 12 L.Ed.2d 620 (1964). *See Ely v. Klahr*, 403 U.S. 108, 113–15, 91 S.Ct. 1803, 1806–1807, 29 L.Ed.2d 352 (1971). Furthermore, the Court has made it clear that equitable principles may require a court *not* to interfere with the conduct of rapidly upcoming elections where the election machinery is already in gear even where the existing apportionment scheme clearly violates the "one man/one vote" principle. *E.g., Roman v. Sincock*, 377 U.S. at 709–12, 84 S.Ct. at 1457–1459; *Reynolds v. Sims*, 377 U.S. at 585–86, 84 S.Ct. at 1393–1394.

6. The Court wishes to emphasize that its holding as to frequency of reapportionment is limited to the specific facts of this case. At the hearing held on August 4, 1982, counsel agreed that Rhode Island received the 1980 census data in May of 1981. Thus, Rhode Island had a more than reasonable opportunity to enact a constitutionally valid reapportionment plan prior to the 1982 elections. This Court expresses no opinion as to whether it would be unconstitutional not to reapportion prior to the first elections after a census where, for example, the elections are scheduled to occur two months after census data becomes available.

7. As noted earlier, plaintiffs also contend that use of the 1974 senatorial reapportionment scheme in 1982 would violate the Rhode Island constitution as interpreted in *Sweeney v. Notte*, 95 R.I. 68, 183 A.2d 296 (1962). Because the Court has found that use of this scheme in 1982 would violate the federal constitution, the Court need not reach this pendent state law claim. However, the Court wishes to note that it is highly doubtful whether the Rhode Island constitution requires the Rhode Island legislature to reapportion prior to the first elections after a census. *See Opinion to the Governor*, 95 R.I. 109, 185 A.2d 111, 117–18 (1962) (legislature's determination of impossibility of reapportioning according to 1960 census before 1962 elections is presumed not to violate constitutional duty enunciated in *Sweeney* to reapportion after a census "within such reasonable time as circumstances . . . permit").

Accord Cosner v. Dalton, 522 F.Supp. 350, 364 (E.D.Va.1981) (three judge court) (Butzner, Circuit J.). Thus, to avoid disruption of a state's normal election processes, lower courts have permitted impending elections to proceed under unconstitutional apportionment lines. *E.g., Cosner v. Dalton,* 522 F.Supp. at 364; *Martin v. Venables,* 401 F.Supp. 611, 621 (D.Ct. 1975) (Newman, J.) (apportionment of city council districts).

[4] But here, the election machinery is not in gear; it is stalled. And unlike the cases adverted to above, positive action by us is the only way of insuring that the elections for all offices except State senator go forward as scheduled. Based on the only evidence we have, we are faced on the one hand with the definite problem that if the clearly unconstitutional senate lines are implemented, there will be no election at all as scheduled, and on the other hand with the certainty that, if the senate elections are enjoined, the others will proceed on time. Equity clearly requires that we order immediate relief at this time.

The Court therefore enjoins the State of Rhode Island from conducting the 1982 senatorial elections according to the 1974 senatorial apportionment plan. The State is enjoined from holding the senatorial elections until such time as a constitutionally permissible apportionment plan is devised. All preparations on both the state and local levels for the 1982 senatorial elections are to cease until such a plan is adopted. The State Board of Elections and the local boards of canvassers will thus be able to devote all their time to preparation for the other fall elections, which this Court is convinced can now occur on schedule.

Ruby Rose LEDET, et al.

v.

George FISCHER.

Civ. A. No. 82–16.

United States District Court,
M. D. Louisiana.

Aug. 18, 1982.

Disabled widow and recipient of supplemental security income, who was in need of eyeglasses, challenged state regulations limiting provision of free eyeglasses, and she moved for class certification and for preliminary injunction. The District Court, John V. Parker, Chief Judge, held that: (1) question whether or not plaintiff would actually receive pair of eyeglasses as result of favorable judgment was immaterial to standing issues; (2) factual and legal prerequisites for maintenance of class action were satisfied; but (3) there was little likelihood that plaintiff would prevail on merits at trial.

Order accordingly.

1. Federal Courts ⇐219

Provision of federal statute governing civil rights and elective franchise was sufficient to base jurisdiction of federal district court over constitutional claims where there was no binding Supreme Court precedent which foreclosed constitutional claims presented. 28 U.S.C. (1976 Ed.) § 1343(3, 4).

2. Federal Courts ⇐14

Federal statutory and state law claims were cognizable by federal district court under theory of pendent jurisdiction.

3. Federal Courts ⇐13

Under "case or controversy" requirement of United States Constitution, one challenging constitutionality of legislative enactment must establish that, in fact, asserted injury was consequence of unconstitutional statute or regulation, or, in other words, that there is substantial likelihood

SENATE BILL NO. _____

By Committee on Ways and Means

AN ACT providing for a state census.

Be it enacted by the Legislature of the State of Kansas:

Section 1. A state census shall be taken by the secretary of state with the assistance of the county election officers and persons employed by the county election officers. The first state census shall be taken as of July 1, 1983, and subsequent censuses shall be taken each fourth year thereafter as of July 1. The census taken in the year 1983 shall be reported in final form by the secretary of state to the governor and legislature on the day of convening of the 1984 session of the legislature. The secretary of state may adopt rules and regulations for the administration of this act.

Sec. 2. In taking the state census, the secretary of state shall provide forms for the enumeration to county election officers in such quantities as are needed. County election officers in taking the enumeration in their respective counties shall utilize the forms provided by the secretary of state and follow such instructions and rules and regulations as are issued or adopted by the secretary of state for the purpose of taking the state census.

Sec. 3. For the purpose of taking the census, the guidelines provided in this section shall be followed:

(a) Take the state census as of July 1. Include the name, address and age of each resident. List all persons who are residents of the county, in alphabetical order, by township or city, and by precincts and wards where precincts and wards exist, including those who have died since July 1. Do not list children born after July 1.

(b) List all persons who have established a permanent

residence in the county, including those who are temporarily absent therefrom. Do not list visitors or transients.

(c) List persons under 18 years of age at the residence of the father. If the father is dead, list such person at the residence of the mother. If both parents are dead, or if the person is a ward, list the person as a resident of the place where the person's guardian resides.

(d) Persons 18 years of age and over may establish a residence separate from tneir parents if they so intend. The place where such a person registers to vote may be accepted as an expression of intent to establish a residence in such place, and as such person's established residence where the person should be enumerated.

(e) Do not list aliens. List only citizens of the United States. Foreign students should not be listed.

(f) Military personnel are presumed to have the residence they had at the time of induction into the service. They may, however, abandon this residence and establish another. Military personnel who have established a residence in Kansas should be listed in the place where they reside.

(g) Do not list persons living in areas over which the state of Kansas has surrendered jurisdiction to the United States. This includes areas purchased or condemned by the United States for its purposes and those areas designated in article 1 of chapter 27 of Kansas Statutes Annotated, such as Fort Riley military reservation. List bona fide residents of Kansas living in a housing project on a military reservation in the county in which the housing project lies geographically, as determined by the descriptions in chapter 18 of Kansas Statutes Annotated.

Sec. 4. This act shall take effect and be in force from and after its publication in the Kansas register.