

**COLLEGE TOWN RESIDENTS UNSUCCESSFUL IN VOTE
DILUTION CHALLENGE: *FAIRLEY V. HATTIESBURG, MISS.*, NO.
08-60942, 2009 WL 3088313 (5TH CIR. 2009)**

Highlight

Bryan Dotson

In *Fairley v. Hattiesburg, Miss.*, the appellants, the African-American residents (residents) of Hattiesburg, Mississippi, sued the city alleging that the city's 2004 redistricting plan violated the Voting Rights Act and the Fourteenth Amendment. The residents alleged the redistricting plan placed the University of Southern Mississippi students living in the dormitories in the first ward and unnecessarily packed the black voters into wards two and five.¹ In support of this claim, the residents advanced three redistricting plans, but only provided an illustrative plan in support of the proposed redistricting scheme that involved the exclusion of the dormitory college students.²

A plaintiff in a voter-dilution claim must establish the following three preconditions: "(1) [the minority group] is sufficiently large and geographically compact to constitute a majority in a[n additional] single-member district; (2) [the minority group] is politically cohesive; and (3) the white majority votes sufficiently as a bloc to enable it-in the absence of special circumstances-usually to defeat the minority's preferred candidates."³ In examining the first precondition to the *Gingles* test, the district court expressly rejected one of the proposals but failed to mention the other two.⁴ The failure to discuss the other two proposals was not error because, although a district court is required to discuss all substantial evidence that is contrary to its opinion, the court was not required to "fish through the record for evidence that might conceivably support redistricting approaches that were never urged by the plaintiffs or presented as developed plans."⁵ The residents needed to establish the first *Gingles* precondition through "pressing" hypothetical redistricting schemes in the form of illustrative plans and developing arguments and evidence in support.⁶ Since the residents here failed to press

¹ *Fairley v. Hattiesburg, Miss.*, No. 08-60942, 2009 WL 3088313, at *1 (5th Cir. Sept. 29, 2009).

² *Id.* at *3.

³ *Id.* at *2.

⁴ *Id.*; see generally *Thornburg v. Gingles*, 478 U.S. 30 (1986) (establishing the test for determining whether there has been a violation of § 2 of the Voting Rights Act on a vote-dilution theory).

⁵ *Id.*

⁶ *Id.* at *4.

the second and third proposed plan, the district court could not have concluded that a third majority-minority district would have been feasible if the students were included.⁷ Judge Dennis wrote an opinion, dissenting in part, where he disagreed with the majority's imposition of this new requirement, arguing that although plaintiffs commonly use illustrative plans because they are a helpful method of providing evidence, nothing in case law or the Voting Rights Act requires a plaintiff to present hypothetical redistricting schemes to the district court as an illustrative plan.⁸

After dismissing the other two proposed plans, the court held that the first plan to exclude the dormitory students from the redistricting plan was not a permissible redistricting scheme.⁹ This plan would call for the exclusion of all students, regardless of whether or not they were city residents eligible to vote.¹⁰ Thus, because residents did not explain how their plan would avoid this unconstitutional exclusion of city residents, their first redistricting plan was impermissible.¹¹ Judge Dennis again disagreed with the majority because the residents presented incomplete evidence as to the number of students who were city residents, so disposition without more detailed findings of fact would be improper.¹²

Although the court could have upheld the district court's decision on those grounds, it examined the resident's claim under the second part of the *Gingles* framework.¹³ The residents asserted that they were less able to participate in the political process because the city based its redistricting plan on census data and voting age population rather than voter registration figures.¹⁴ The census is presumptively correct until rebutted with clear and convincing evidence, and since the residents had no evidence contradicting the census, the city's use of the census data was appropriate.¹⁵ Likewise, voter registration responds to incentives, so they are inherently unstable as the number of registered voters may change in response to the redistricting scheme itself, leading to more challenges.¹⁶ Moreover, because voter registration figures are based upon political activity, those figures are susceptible to improper influences by entrenched political powers.¹⁷ The residents repeated both arguments in their Equal Protection claim, but they failed to prove the required lack of good faith or the presence of discriminatory purpose in the

⁷ *Id.* at *5.

⁸ *Id.* at *10.

⁹ *Id.* at *6.

¹⁰ *Id.*

¹¹ *Id.* (“Though ‘aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime’ may be excluded for voter apportionment purposes . . . *bona fide* [c]ity residents certainly may not be.” (quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966))).

¹² *Id.* at *11.

¹³ *Id.* at *7.

¹⁴ *Id.* at *8.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

city's decision to draw its districts as it did.¹⁸ Judge Dennis took issue with both these findings by stating that the residents did present evidence that the Census generally undercounts African-Americans.¹⁹ As to the use of voter registration figures, the Supreme Court has expressly declined to prefer one set of figures over another, as one set of data may be preferable in certain situations to the other.²⁰ Since Hattiesburg has a large transient population, the use of voter registration data may be preferable.²¹

While the court did not change the substantive requirements to a vote dilution challenge, it certainly imposed higher evidentiary requirements. A plaintiff will have to present its required redistricting scheme in the form of an illustrated plan to satisfy the first *Gingles* precondition. As to the second *Gingles* precondition, redistricting plans based upon census data are likely to be upheld in the absence of some evidence contradicting it. Likewise, the court showed a clear distaste for using voter registration data by stating that redistricting schemes should be based upon "more solid grounds of population figures" in most cases.²² These new evidentiary requirements could lead to vote dilution in towns with large transient populations because census data and voting age population may not be an accurate assessment of city residents, leading to the possibility of district manipulation by the entrenched political forces to stay in power.

¹⁸ *Id.* at *10.

¹⁹ *Id.* at *12.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *9.