
In Reynolds v. Sims, the Supreme Court held that, under the Equal Protection Clause of the Fourteenth Amendment, state legislative districts must comport with a one person–one vote principle: that is, states are required to make a “good faith effort to construct districts . . . as nearly of equal population as is practicable.” The Court clarified in Brown v. Thomson that population deviations under 10% are considered “minor” and are therefore afforded a presumption of constitutionality. Consequently, courts have routinely refused to strike down state legislative plans with maximum deviations within the 10% threshold — a “hands off” approach that mirrors judicial reluctance to entertain political gerrymandering claims, which may not even be justiciable at all. Against this backdrop, Larios v. Cox, which invalidated redistricting plans for the Georgia State House and

2 Id. at 558, 568 (quoting Gray v. Sanders, 372 U.S. 368, 381 (1962)).
3 Id. at 577.
6 Brown, 462 U.S. at 842 (quoting Gaffney v. Cummings, 412 U.S. 735, 745 (1973) (internal quotation marks omitted)) (“Minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination . . . .” (internal quotation mark omitted)); see also id. at 852 (Brennan, J., dissenting) (characterizing 10% as a “rough threshold” under which deviations are “considered de minimis”).
7 “[M]aximum deviation” is the sum of “the deviations . . . of the most underrepresented and most overrepresented districts.” Id. at 852 (Brennan, J., dissenting).
8 See Stephanie Cirkovich, Note, Abandoning the Ten Percent Rule and Reclaiming One Person, One Vote, 31 CARDOZO L. REV. 1823, 1826 (2010) (characterizing the practical effect of Brown as establishing an “uncrossable bright line — state reapportionment plans that fall below the ten percent threshold are virtually impervious to one person, one vote claims”).
10 Vieth v. Jubelirer, 541 U.S. 267, 326 (2004) (plurality opinion) (“We would . . . decline to adjudicate these political gerrymandering claims.”).
Senate that each had 9.98% maximum deviation, and its summary affirmation by the Supreme Court, stand as notable exceptions. Recently, in Favors v. Cuomo, the United States District Court for the Eastern District of New York rejected an equal population challenge to a redistricting plan implemented for the New York State Senate with a maximum population deviation of 8.80%. Because the proposed redistricting plans at issue in Larios and Favors are not substantially different, the real difference between the two cases appears to be how forthright the cartographers were in expressing their political intentions while drawing the maps. While Larios may have given courts more power to rein in what has been perceived as an overly political redistricting process, Favors shows that courts have generally been unwilling to exercise that power. Because of this inclination against judicial intervention, Favors demonstrates that those looking to curb gerrymandering will need to seek political, and not judicial, relief.

Following each decennial census, the New York State Legislature is responsible for redrawing district boundaries for the State Assembly and the State Senate. Though data were delivered by the Census Bureau on March 2011 and new districts were required by July 2012, the legislature had not taken any action through October 2011. A group of voters filed suit in the United States District Court for the Eastern District of New York alleging that the legislature’s inaction (which left in place district boundaries drawn after the 2000 Census), inter alia, violated the Equal Protection Clause of the Fourteenth Amendment; they requested that the court appoint a Special Master to conduct redistricting in place of the legislature. Several groups representing minority voters intervened as plaintiffs, and a three-
judge panel was then convened.24 Meanwhile, the legislature released redistricting plans for both chambers25 and subsequently passed both plans, which were then signed into law by the Governor.26 Notably, the State Senate plan changed the size of the chamber from sixty-two members to sixty-three members27 and constructed districts in New York City and its suburbs with populations over the ideal size.28 As a result, upstate New York residents received more representation — their State Senators were each accountable to fewer residents — at the expense of those living in overpopulated districts.29 The passage of the legislature’s proposal rendered the initial claims of the original plaintiffs moot, but the enacted State Senate plan “provoked [new] claims,”30 including challenges on population deviation grounds by the plaintiff-intervenors.31


30 Favors, 2014 WL 2154871, at *1. Two defendants, both members of the State Senate’s Democratic minority, filed a cross-claim against the other defendants on similar population deviation grounds, see Amended Answer to Amended Complaint and Cross-Claim at 9–11, Favors, No. 11-cv-5632 (E.D.N.Y. May 1, 2012), ECF No. 344-3, which was dismissed for lack of standing, see Favors, No. 11-cv-5632 (E.D.N.Y. Oct. 29, 2013), ECF No. 636.

The panel granted the defendants’ motion for summary judgment and rejected the population deviation challenges.²² The court began by noting the maximum deviation of the Senate plan was 8.80% — within the 10% threshold established in Brown.³³ Therefore, as long as a rational basis existed for the population deviations, “the burden [fell] upon the Plaintiffs to offer evidence from which a reasonable fact finder could conclude that the redistricting process was tainted by an impermissible motive.”³⁴ Because the plan fell within the 10% threshold, the additional statistical analyses offered by the plaintiff-intervenors were insufficient.³⁵ The court further accepted the “nondiscriminatory rationale for the deviations” offered by the defendants³⁶ — the plan “preserv[ed] the cores of prior districts and avoid[ed] contests between incumbent representatives.”³⁷ Reaffirming that redistricting was “a political and legislative process” rather than a judicial one,³⁸ the court concluded that the plaintiff-intervenors “fail[ed] to adequately demonstrate an impermissible motive.”³⁹

The panel noted the plaintiff-intervenors “lean[ed] heavily” on Larios⁴⁰ — one of the few instances in which a plan with less than 10% maximum deviation was invalidated — but then held that Larios was insufficiently comparable.⁴¹ Though the panel accepted that “the defective plan in Larios possessed statistical characteristics . . . roughly comparable to . . . those of the Senate Plan at issue,” it distinguished Larios by noting that the Larios record contained “explicit evidence of discrimination” in two problematic areas⁴²: First, the process in Larios was marked by “explicit regional favoritism.”⁴³ Second, the Larios plans featured “implementation of incumbent protection” to the benefit

²² Favors, 2014 WL 2154871, at *11. The court also dismissed the racial discrimination claims and denied as moot the plaintiff-intervenors’ outstanding motions to compel discovery, noting that, in its in camera review of legislatively privileged materials, it “found no evidence” that racial animus was a “motivating factor,” id. at *10, in constructing the Senate plan (as would be required to find an equal protection violation under Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)), see Favors, 2014 WL 2154871, at *8–10.


³⁴ Id. at *5.

³⁵ Id. at *6.

³⁶ Id.

³⁷ Id. at *5.

³⁸ Id. at *6 (quoting Gaffney v. Cummings, 412 U.S. 735, 749 (1973)).

³⁹ Id. at *5.

⁴⁰ Id. at *6. The Senate Minority cross-claimants, for example, summarized Larios’s holding as: “[I]t is unconstitutional to deviate from population equality in order to gain partisan advantage for one geographic region at the expense of another.” Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment on the Equal Population Claims at 4, Favors, No. 11-cv-5032 (E.D.N.Y. July 20, 2012), ECF No. 453.


⁴² Id.

⁴³ Id.
of only one party. Additionally, the Larios cartographers, unlike the Favors defendants, failed to offer rationales for the regional pattern in population disparities and incumbent protection that conformed to “traditional redistricting principles.” Having distinguished Larios, the court instead found that Rodriguez v. Pataki, a 2004 case rejecting a population deviation challenge to the 2002 New York State Senate redistricting plan, “offer[ed] a closer factual analogue.” The court concluded that Larios and Rodriguez, taken together, “reinforce[ed] the conclusion that summary judgment must be grant-
ed . . . on the Plaintiffs’ equal population claim.”

Though the court viewed the redistricting processes and outcomes in Favors and Larios as sufficiently different such that it upheld the Favors map, the maps themselves are rather similar. The difference between Favors and Larios then — and that between permissible plans and impermissible ones more generally — lies in the underlying process. By focusing on process rather than outcome, the panel declined to exercise the judicial authority evident in Larios, and in doing so demonstrated that courts are unlikely to provide the limitations on gerrymandering sought by opponents of the practice.

Larios showed that the door for redistricting challenges, previously thought closed to political gerrymandering claims, remained at least somewhat open to equal population claims — indeed, some commentators expected that courts would be more skeptical when evaluating redistricting plans in its wake. Though it did not do so, the Favors

44 Id. The court also reasoned, in a footnote, that there was a “practical distinction”: the Larios plans were passed by a Democratic-controlled legislature and signed by a Democratic governor, whereas the Favors plans were passed by a Democratic-controlled State Assembly and a Republican-controlled State Senate, and were signed by a Democratic governor. Id. at *6 n.7. Because the Favors plan was “not the unilateral product of a legislative majority,” it was “the result of precisely the sort of political process that . . . should not be lightly displaced.” Id.

45 Id. at *6. These criteria include “contiguity, compactness, preserving the cores of existing districts, desiring not to pit incumbents against one another, [and] respecting then-current political subdivisions and county lines.” Id. at *7 (quoting Rodriguez v. Pataki, 308 F. Supp. 2d 346, 367 (S.D.N.Y.), aff’d mem., 543 U.S. 997 (2004)) (internal quotation mark omitted).

46 308 F. Supp. 2d 346.
49 Id. The summary judgment order was modified on denial of reconsideration to remedy the accidental exclusion of the Lee intervenors. See Favors v. Cuomo, No. 11-cv-5632, 2014 WL 3733478, at *2 (E.D.N.Y. July 28, 2014).
court very well could have exercised its authority under Larios: the cartographic characteristics to which the Larios court objected — population deviation and regional population disparity — can also be found in Favors. Indeed, the panel itself noted that the plans had “roughly comparable”\footnote{Favors, 2014 WL 21544871, at *6.} maximum population deviations — 9.98% in Larios and 8.80% in Favors. The plans also share a similar degree of regional population disparity. The Larios court found “that regional favoritism substantially drove the population deviations” because “every single district that was underpopulated” in the Senate plan was located in two areas of the state and the “vast majority of the House districts” fit the same pattern.\footnote{Larios v. Cox, 300 F. Supp. 2d 1320, 1342 (N.D. Ga. 2004). The court further held that the plans “must be struck down on this basis alone.” Id. (emphasis added).} By this reasoning, then, the Favors plan’s deviations were also driven by regional favoritism, as its regional population disparity was as severe as that of the Larios Senate map (and more severe than that of the House map) — every underpopulated district, not just the “vast majority,” was north of Westchester County.\footnote{See Senate Exhibit 9, supra note 28 (showing negative deviations for Senate Districts 38 through 63).} This favoritism is underscored by the addition of the new sixty-third seat — Senate District 46\footnote{See Jimmy Vielkind, Democrats Lining Up Behind Tkaczyk?, TIMES UNION (Albany): CAPITAL CONFIDENTIAL (June 6, 2012, 9:03 AM), http://blog.timesunion.com/capitol/archives/134334/democrats-lining-up-behind-tkaczyk [http://perma.cc/TsX8-8ZCK] (describing Senate District 46 as “newly minted”).} — in upstate New York, despite that part of the state having already had underpopulated districts and having had a lower rate of population growth compared to the state as a whole.\footnote{The population of downstate New York (defined to be New York City, Long Island, and Westchester County) increased from 11,685,650 in 2000 to 11,057,128 in 2010, an increase of 2.3%. American FactFinder, U.S. CENSUS BUREAU, http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_PL/P1/0400000US36050000 (last visited Mar. 1, 2015) (2010 Census Data); American FactFinder, U.S. CENSUS BUREAU, http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/00_PL/PL001/0400000US36050000 (last visited Mar. 1, 2015) (2000 Census Data).} Indeed, population growth in downstate New York is what made the change in chamber size permissible at all.\footnote{See Cohen v. Cuomo, 969 N.E.2d 754, 755–56 (N.Y. 2012) (discussing mathematical treatment of population growth in Nassau, Queens, Richmond, and Suffolk counties).}

Further, just as the population deviations in Larios could not be justified by adherence to traditional redistricting criteria like compactness, contiguity, and respect for existing political subdivisions, nor should the deviations in Favors have been. The Larios court noted that the lack of compactness could be “discern[ed] . . . just by looking at the maps themselves.”\footnote{Larios, 300 F. Supp. 2d at 1331.} The same holds true for the challenged
Favors plan: one news article, for example, described the shapes of new districts as “suggest[ing] a stealth bomber, an assorted menagerie, a few cartoon humans, a mushroom and SpongeBob SquarePants.”59 Using the “Perimeter-to-Area measure” of compactness cited in Larios,60 the Favors plan, at an average measure of 0.23,61 is actually less compact than the House plan at issue in Larios, which had an average measure of 0.24.62 Contiguity, which the Larios court deemed lacking in the Georgia plans,63 could be viewed as lacking in Favors too. Though “all of the districts [were] technically contiguous” in Larios, many districts were connected by “a lake or other body of water.”64 The same holds true in Favors— for example, Senate Districts 23 and 60 are each “only contiguous at low tide.”65 Respect for political subdivisions like counties and municipalities is similarly questionable,66 and though the plan at issue in Favors may have better “preserve[d] the cores of existing districts”67 and may not have “pit[ted] incumbents against one another,”68 it was measured against the 2002 plan, which itself disregarded traditional redistricting principles.69

60 Larios, 300 F. Supp. 2d at 1331. “[A] value of one indicates perfect compactness,” and more compact districts will have greater Perimeter-to-Area measures. Id.
62 Larios, 300 F. Supp. 2d at 1331.
63 See id. at 1332.
64 Id.
68 Id. at *7.
69 See, e.g., Danny Hakim, The Shape of Things, N.Y. TIMES: EMPIRE ZONE (Apr. 12, 2007, 4:30 PM), http://empirezone.blogs.nytimes.com/2007/04/12/the-shape-of-things (noting a description of then–Senate District 51 as “Abraham Lincoln riding on a vacuum cleaner” (internal quotation marks omitted)). Numerous districts in the 2002 plan were connected only by water, and Senate District 14 was not contiguous at all. See Senate Exhibit 6 – 2002 Plan Maps – New York City Senate Districts, in LATFOR SUBMISSION, supra note 26, http://www.latfor.state.ny
Because the statistical and geographic characteristics of the Favors and Larios plans are so similar, these cases show that the difference between impermissible and permissible plans is not what the maps say for themselves, but rather what the cartographers might have said in drawing them — the ultimate basis on which the Favors court distinguished the two cases. State legislators attempting to craft a redistricting plan that serves their partisan ends have every incentive, then, to avoid expressing their political intentions and disregard for traditional redistricting criteria. Instead, as long as they are discreet about those intentions and leave themselves some criteria to which they can claim adherence, almost any plan that they craft (within the 10% threshold) should withstand judicial scrutiny, and indeed, deviation-based challenges to such maps — Favors being the most recent example — continue to fail. As Favors shows, Larios’s lesson is not that state legislatures should minimize population deviations in achieving their partisan ends in redistricting, but merely that they should be discreet in doing so. Given the blatantly political ends that state legislatures can achieve while still withstanding judicial scrutiny, those seeking to limit gerrymandering are unlikely to find much help from the courts.

70 See Cirkovich, supra note 8, at 1840 (describing Larios as “remarkable” based on the “ample testimony about what motivated [defendants] to malapportion Georgia’s election districts”).
71 Favors, 2014 WL 2154871, at *6 (“[T]he record in Larios attested to the facial presence of discrimination . . . .”).
73 This requirement is not particularly stringent because traditional redistricting criteria often conflict with each other and with other legal requirements. See, e.g., Paul L. McKaskle, The Voting Rights Act and the “Conscientious Redistrictor,” 30 U.S.F. L. REV. 1, 85 (1995) (noting that adherence to existing political subdivisions “may conflict with the Voting Rights Act”). For example, the state legislative plans invalidated in Reynolds v. Sims, 377 U.S. 533 (1964), featured the ultimate form of respect for existing political subdivisions: each county served as a single district, see id. at 539.
74 See Cirkovich, supra note 8, at 1841–48 (arguing that “legislative privilege and the political nature of reapportionment have combined . . . to make [population deviation challenges] unwinning,” id. at 1826). Population deviations in many state legislative maps remain close to, or even above, Brown’s 10% threshold, see Brunell & Manzo, supra note 51, at 356 (showing fifteen state plans with maximum deviations above 8.80%, the deviation challenged in Favors, including three above 10%), though Larios may have decreased the magnitude of such deviation, id. at 359.