Dispute Memo

To: Partners
From: Associate
Date: March 2, 2018
Re: Tennessee State Senate Redistricting

ISSUES

a) Do the courts have jurisdiction to adjudicate a partisan gerrymander?
b) Does any proposed redistricting plan split any ethnic minority communities?
c) Does any plan cross county lines without making the resulting districts more equal in population?
d) Does any plan exceed the threshold for population variance between districts?

SHORT ANSWER

a) Possibly. Opponents to the plan will likely argue that discriminates on partisanship; however, it is still unanswered whether a court has jurisdiction for a partisan gerrymander.
b) No. The proposed redistricting plan ensures that all ethnic minority communities are preserved and actually redistricts so that similar ethnic communities are together in the same district
c) No. The plan maintains the same number of county lines that are crossed in order to achieve similar district populations
d) No. The changes for Davidson County result in a variance that is significantly less than the 22% threshold.

FACTS

Every ten years the United States federal government conducts a census to account for total population changes, demographic shifts, etc. as the years pass. Most states utilize this census information to redraw their legislative districts.

Particularly, the Tennessee State Senate Republicans (our clients) have asked us to look at the most recent census data from 2010 and advise them thereafter on the best plan to implement in order to break the Democratic stronghold of Davidson County.

Out of the 33 state Senate seats in the state of Tennessee, 28 of them are Republican, which leaves only five to the Democrats. The average population of each of these districts is approximately 194,000 people. Davidson County encompasses Senate Districts #19, 20, 21. Two of these districts--19 and 21--belong to the Democratic party. This county is further divided into 35 county districts, which span the entire county. When redistricting, multiple counties that are in the same district must touch. This essentially mean that the districts must be contiguous.

As of now, Davidson County is split twice. It is bordered by Districts 23 and 13, both of which represent the entirety of their respective counties. Looking at the county districts, District 21 of Davidson County is the only district in the county to have a majority African-American population (72%).

The Democratic Party won District 19 in the past election by a total of 18,534 votes, and it also on District 21 by 12,688 votes. On the other hand, the Republican Party touted a win of 11,783 for District 20. All surrounding districts that border Davidson are similarly Republican districts. Reflecting these numbers as a total percentage of the voting population who actually turned out to vote in the election, this would mean District 19 is 75% Democratic, District 20 is 56.2% Republican, and District 21 is 66.6% Democratic.

Looking at the composition of each of the Senate districts in terms of voting precincts, we see that Senate District 19 is comprised of: 1-3, 1-5, 2-1, 2-2, 2-3, 2-4, 2-5, 3-3, 3-4, 3-5, 3-6, 5-1, 5-2, 5-3, 5-4, 5-5, 6-1, 6-3, 6-5, 7-3, 8-1, 8-2, 8-4, 10-5, 13-2, 15-5, 16-1, 16-2, 17-1, 17-2, 17-3, 17-6, 19-1, 19-2, 19-3, 19-4, 19-5, 20-1, 21-1, 21-2, 21-3, 24-4, 26-1, 28-1, 28-2, 28-3, 29-1, 29-2, 29-3, 30-2, 32-1, and 32-2. Senate District 20 is from: 1-1, 1-2, 1-4, 3-1, 3-2, 4-1, 4-2, 4-3, 4-4, 9-1, 9-3, 10-1, 10-2, 10-3, 10-4, 10-6, 11-1, 11-3, 13-4, 14-1, 14-2, 14-5, 15-1, 15-2, 15-3, 16-5, 17-5, 18-5, 22-1, 22-2, 22-3, 22-4, 23-1, 23-2, 23-3, 23-4, 24-3, 24-6, 25-1, 25-2, 25-3, 26-2, 26-4, 27-2, 27-3, 34-1, 34-2, 34-3, 34-4, 34-5, 35-1, 35-2, 35-3, and 35-4. Finally District 21 is made of: 6-2, 6-4, 7-1, 7-2, 7-4, 7-5, 7-6, 8-3, 9-2, 12-5, 13-1, 13-3, 14-3, 15-4, 16-3, 16-4, 17-4, 17-7, 18-1, 18-2, 18-3, 18-4, 19-6, 20-2, 20-3, 21-4, 23-5, 24-1, 24-2, 24-5, 25-4, 26-3, 27-1, 29-4, 30-1, 30-3, 30-4, 31-1, 31-2, 31-3, 31-4, 32-3, 32-4, 33-2, 33-3, 33-4, and 33-5. The population variance of Senate District 19--based off an approximation of around 194,197 as the mean district size-- about about 1.5%. Using the same calculations, the population variance for Senate District 20 is 5.7%. Finally, the variance for Senate District 21 is 6.2%.

DISCUSSION

Is there a way for the Republican Party in the Tennessee State Senate (our clients) to redistrict in a manner such that the Democratic Party of Tennessee loses its hold over the surrounding the city of Nashville? This topic consists of four main components: court jurisdiction, ethnic minorities, population variances, and crossing county boundaries.

First is the conversation of whether or not courts would have jurisdiction over a partisan gerrymander. In terms of redistricting as a whole, the two cases that discuss the Supreme Court has decided on the issue are: *Colegrove v. Green 328 US 549 (1946)* and *Baker v. Carr 369 US 186 (1962)*. The former of these cases set a precedent for nearly two decades that maintained that courts should not interfere in the legislative processes as it is an inherent political question, and as per judicial norms, the courts try to avoid answering "political questions." Yet the *Baker* decision held that redistricting claims are justiciable when they raise a Fourteenth Amendment argument as to the Equal Protections Clause. However, there is still controversy over whether the court has jurisdiction over a *partisan* gerrymander. While the high Court has cracked down on state legislatures for *racial* gerrymandering (*Shaw v. Reno 509 US 630 (1993)*), the question of whether it has jurisdiction on the sole basis of partisan gerrymandering remains unanswered. However, the Tennessee state courts have been much more lenient in giving the legislative "flexibility" with redistricting, because of the underlying argument that a court ought to restrain itself--as an undemocratically elected body--from intervening in an otherwise democratic process of legislation (*Moore v. State 436 S.W.3d 775 (2014)*). This leniency of the Tennessee courts implies that so long as the redistricting plan reaches levels near even population between districts and does not cross more district lines than necessary, the plan would not be unconstitutional *(State Ex Rel. Lockert v. Crowell 631 S.W.2d 702 (1982))*.

Second, any proposed redistricting plan cannot split or break any major ethnic communities within the district. As mentioned previously, the Courts have regularly subjected redistricting plans that have racial gerrymandering allegations to a strict analysis, often ordering that they be immediately redrawn before the next election (*North Carolina v. Covington 581 US _ (2017)*). Yet, the difference of *racial* and *partisan* gerrymandering in terms of recognition and intervention of the Court cannot be overstated. Looking at one of previous cases, *Shaw v. Reno 509 US 630 (1993)*, which has become a landmark case for racial gerrymandering claims, one can recognize that both the district court and Supreme Court of the United States initially denied the North Carolina voters' claims on the basis of political gerrymander. Therefore, if any redistricting plan is to succeed it cannot warrant any legitimate claim of racial gerrymandering.

Shifting to county boundaries, redistricting plans that cross too many district lines can also be subject to scrutiny especially by the Tennessee courts. Repeatedly, the Tennessee courts have criticized redistricting plans that cross significantly more county lines than necessary (*Lincoln County v. Crowell 701 S.W.2d 602 (1985)*; *Moore v. State 436 S.W.3d 775 (2014)*). Even though in both of these cases, the statutes were ultimately upheld, the courts only found

that in one case that crossing district lines alone does not constitute bad faith and in the other that the number of lines that were crossed was not a significant enough difference from the alternative plan presented by those suing the legislature to warrant a judicial intervention. Once again echoing those sentiments about judicial restraint, the courts in Tennessee have been willing uphold redistricting statues they admit have flaws in them (Ibid).

Finally, the arguably most important consideration (other than race) of the Tennessee courts when evaluating the merits of redistricting is equality of population. This notion of equality of population is the often the court's paramount consideration with Equal Protections arguments under the Fourteenth Amendment. The Tennessee Supreme Court even went as far to say that from the lineage of redistricting cases, "'rule of thumb' appears to have developed, whereunder variances of 10% or less need not be justified absent a showing of invidious discrimination (*State Ex Rel. Lockert v. Crowell 631 S.W.2d 702 (1982)*). While that burden of having to show "invidious discrimination" appears to be a rather low burden to overcome, it is safer to introduce a plan that has variances significantly lower than 10%, if possible. Previous to this case, the Tennessee Supreme Court maintained a maximum of a 22% variance if a 33 senate-district plan split county borders (*State ex Rel. Lockert v. Crowell 631 S.W.2d 702 (1982)*). All of this in mind, it is while it is possible to have higher population variances, it is best to keep them under 10%.

With all of these legal boundaries, the clients have two feasible solutions--the first of which is significantly more simple to adopt. The first plan would be to redistrict Davidson County--where Nashville is located. Currently there are three districts there (19, 20, 21) that boast two (19, 21) of the five Democratic Senate seats in the entire state. This redistricting plan will follow current voter precinct lines to ensure that the senate districts are distinct, discernable, and contiguous. District 19 would be composed of precinct: 1-3, 1-5, 2, 3-3, 3-4, 3-5, 3-6, 5, 6-1, 6-3, 6-5, 8-1, 8-3, 9-2, 10-5, 13-2, 15-5, 16-1 16-2 16-3 16-4, 17-1, 17-2, 17-3, 17-4, 17-6, 17-7, 18-1, 18-2, 18-3, 18-4, 19-1, 19-5, 20, 21, 23-1, 23-2, 23-3, 23-4, 24-1, 24-2, 24-4, 24-5, 25-4, 26-1, 28, 29-1, 29-2, 29-3, 30-2, 32-1, and 31-2. District 20 could consist of: 1-1, 1-2, 1-4, 3-1, 3-2, 9-1, 9-3, 10-1,10-2,10-3,10-4,10-6, 11, 13-4, 14-1, 14-2, 14-5, 15-1, 15-2, 15-3, 16-5, 17-5, 18-5, 22, 24-3, 25-1, 25-2 25-3, 26-2, 26-4, 27-2, 27-3, and 35. Finally District 21 would be: 4, 6-2, 6-4, 8-2, 8-4, 12, 13-1, 13-3, 14-3, 15-4, 19-6, 23-5, 26-3, 27-1, 29-4, 30-1, 30-3, 30-4, 31, 32-3, 32-4, 33, 34.

Though it may appear these are a random distribution of precincts, based on previous voter turnout and precinct data, this plan will actually flip District 21 from a Democratic to a Republican district. That means that it will shatter the Democratic stronghold throughout Davidson County and reduce it to just the area immediately around Nashville. More than just that, there are other benefits to this plan that can prevent it from harsh criticisms seen in the legal boundaries discussed previous. Starting with ethnic minorities, and a possible racial gerrymandering claim, this plan actually reunites historically African-American communities that were previously split by districting. One such area is County District 21, which has a

African-American population of over 72%, according to census data. Previously, this area was split between Senate Districts 19 and 20, but has now been reunited under this plan. When looking at district lines, this plan does not change the number of county lines crossed of previous redistricting plans--only manipulating how the lines are drawn within Davidson County. Finally, when it comes to population variance, the variance in two out of the three districts is actually decreased. District 20 lowers from 5.7% to 3.2%; District 21 decreases from 6.7% to 3.1%. The only exception is District 19 which increases from 1.5% to 6.5%--which is still far less than the 10% threshold and results in an overall decrease of variation between the three districts.

The alternative option is for the General Assembly to pass legislation that brings down the number of Senate districts from 33 to 30. With only 30 districts the idea size of each district would increase, so a similar precinct analyse would yield that one could get rid of one, two, or three Democratic districts and pack those votes into the surrounding districts. However, an option like this is highly likely to gain national attention and could possibly cost the Republican Party other seats in the Senate.

A third and even more unlikely option is to advocate for the passage of a state constitutional amendment. This amendment would have to amend Article II Section V which fixes the number of representatives to 99. Section VI then fixes the number of state senators to not exceed one third of the number of representatives--which is amount of the 33 state senators originated from. So if the proposed amendment were to increase the number of representatives to say 108, that would mean that the legislature could add up to an additional three senate districts. The reason that this is the least likely option to occur is because this option would require an amendment to the state's constitution. Being an amendment, this legislation will likely prompt observers to question what is the reasoning behind passing this amendment. Throughout the country's history there is only one legitimate reason to advocate for more representatives in one party's favor. That is ineffective governance. By claiming that population sizes are too vast and as such there needs to be more representatives, the client can potentially provide a stable reasoning as to why there needs to be more state senators. However, there may be heightened criticism of this policy option with the consideration of the Wisconsin case *Gill v. Whitford* on the Supreme Court of the United State's docket this term. This case in specific challenges the constitutionality of partisan gerrymandering and aims to set a standard for evaluating redistricting plans in order to see if they are being unfairly drawn. Thus there is a distinct possibility that such a bold legislative proposal--amending the state's constitution--would garner negative attention for the client and expose the client's plan to break the Democratic majority. Such exposure might foment the Democratic party and increase voter turnout for the next election, an action which could possibly lead the client to lose even more seats in the state legislature.

CONCLUSION

In terms of legal avenues to pursue, the client has three distinct options. First, the client can pursue a redistricting policy that would redraw the Senate District lines for Districts 19, 20, and 21 along voting precinct lines to create an optimal voting boundary that will project a Republican win in the next election for District 21. Prior to this election, Democrats enjoyed a strong victory over the Republicans in this District by 12,688 votes. This is probably the most advantageous option for the client. It makes a relative small amount of changes in the grand scheme of a redistricting plan, but it does help the client break the Democratic base in Davidson County. Overall this option decreases the net population variances for the three districts--with District 19 being the only one experiencing an increase in population. Furthermore, none of these districts, even with the increase, come close to the threshold variance set by the courts. Even if it does come under criticism and the courts or media question this increase in variance, the client can just explain that the plan actually brings together a formerly split African-American dominant community.

The second option for the client is to advocate for a statute that decreases the number of senate districts present in the state. Since the state constitution does not fix the limit of senatorial seats--but rather only sets a maximum--it stands to reason that the legislature could decreased the amount of senate seats available. Consequently, as the number of districts decreases, the ideal/average population of each district in order to achieve population equality would be increased. Yet a strong limitation on this act is that it is likely to draw negative attention to the client and the rest of the Republican Party. Going through with this option may present a threat to the current popularity of the party throughout the state.

Finally, the client has the option to pursue legislation that amends the constitution to increase the amount of representatives. Since the number of state senators is fixed at a ratio of 1 : 3 to the number of representatives, increasing the number of representatives would proportionally increase the number of state senators. With this increase in districts, the ideal size of each district would decrease, so this new district would be able to take votes from the Democratic districts in Davidson County and combine them with the overwhelming amount of Republicans in the surrounding districts. This would also break the Democratic control over Davidson County, yet the cost could potentially be quite high. In order to push a constitutional amendment through the state legislature the client is definitely going to be subject to national coverage, especially with the Supreme Court of the United State's docket for this term.

Overall, the client's request is completely feasible. Given the current state of affairs, the state legislature has been given strong latitude by the Tennessee courts to enact redistricting plans. The largest barrier for the client is *Gill v. Whitford*, so it is advisable for the client to enact a proposal before the Supreme Court of the United States to attempt to answer the issues in *Gill*. If the client waits until the Court makes a decision, the client risks the Court adopting a standard

that eliminates all three of these options. eliminate the first option for the client, which is already the most probable for the client to sponsor legislation for.