

1 UNITED STATES DISTRICT COURT

2 FOR THE

3 DISTRICT OF CONNECTICUT

4 Docket No. 3:99 CV 2250 (SRU)

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8 WADE H. HORSEY, II, Individually and on behalf of all other
9 Suburban and Rural Citizen Voters Similarly Situated,

10 Plaintiff,

11 - v. -

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15 SUSAN BYSIEWICZ, Secretary of the State of Connecticut, JEFF
16 TRANDAHL, Clerk of the United States House of Representatives,
17 JOHN G. ROWLAND, Governor of the State of Connecticut, DENISE
18 L. NAPPIER, Treasurer of the State of Connecticut, NANCY
19 WYMAN, Comptroller of the State of Connecticut, and the 2001
20 REAPPORTIONMENT COMMITTEE OF THE STATE OF CONNECTICUT,

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22 Defendants.

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27 B e f o r e: WINTER, Circuit Judge, HALL, and UNDERHILL,
28 District Judges.

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30 ROBERT A. HEGHMANN, Law Office of
31 Piazza and Pickel, Stamford,
32 Connecticut, for Plaintiff.

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34 SUSAN QUINN COBB, Assistant
35 Attorney General of Connecticut,
36 Hartford, Connecticut and KERRY
37 W. KIRCHER, Deputy General
38 Counsel for the United States
39 House of Representatives,
40 Washington, D.C. (Richard
41 Blumenthal, Attorney General of
42 Connecticut, Gregory T. D'Auria,
43 Associate Attorney General of
44 Connecticut, and Jane R.

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Rosenberg, Assistant Attorney
General of Connecticut, of
counsel), for Defendants.

MEMORANDUM AND ORDER

WINTER, Circuit Judge:

Wade H. Horsey moves for reconsideration of our grant of summary judgment to the defendants. See Horsey v. Bysiewicz, No. 3:99CV2250 SRU, at 3 (D. Conn. Sept. 18, 2002) (memorandum and order) ("Horsey I"). He also asks us to order the defendants to show cause why they should not be ordered to request that the Department of Commerce, Bureau of Census provide the parties and the court with Census 2000 Supplementary Survey Profiles of fourteen Connecticut State House of Representatives voting districts established in 1991.

In our prior decision, id., familiarity with which is assumed, we granted summary judgment against Horsey on his claim that apportioning voting districts solely on total population denies him equal protection of the laws because, as a suburban voter, his vote is diluted relative to that of an urban voter for purposes of elections to the United States House of Representatives and to the Connecticut House of Representatives. Underlying this claim is Horsey's factual assertion that urban districts have disproportionate (to suburban districts) numbers of persons who are not eligible voters because they are aliens, minors, or we might add, felons. We concluded that Horsey had submitted only

1 "speculative evidence based on various, often non-comparable
2 demographic data," that was insufficient as a matter of law to
3 support these factual claims, Horsesey I, at 3, or to allow a
4 redrawing of the districts, id. at 14. We did, however, hold
5 out the possibility that Horsesey might cure the evidentiary
6 deficiencies on a motion for reconsideration. See id. at 16-
7 17 n.3.

8 On October 17, 2002, Horsesey moved for reconsideration and
9 submitted further evidentiary data in a supporting affidavit.
10 The defendants argue that Horsesey's motion is untimely under
11 Rule 9(e)(1) of the Local Rules of the District of Connecticut
12 and that it has been submitted without the accompanying
13 memorandum of law as required under Rule 9(e). Defendants
14 also request that this court deny Horsesey's application for an
15 order to show cause because he has provided no legal basis for
16 requiring defendants to gather evidentiary support on his
17 behalf. We grant Horsesey's motion for reconsideration,
18 reaffirm our grant of summary judgment and deny Horsesey's
19 request for an Order to Show Cause.

20 DISCUSSION

21 A. Untimely Filing under Local Rule 9(e)(1)

22 Local Rule 9(e)(1) requires that motions for
23 reconsideration be "filed and served within ten (10) days of

1 the filing of the decision or order from which such relief is
2 sought, and [that such motions] shall be accompanied by a
3 memorandum setting forth concisely the matters or controlling
4 decisions which counsel believes the Court overlooked in the
5 initial decision or order." D. Conn. L. Civ. R. 9(e)(1)
6 (reserved and recodified at D. Conn. L. Civ. R. 7(c)(1)
7 (2003)). Defendants are correct that Horsey's motion is
8 untimely by almost three weeks and lacks a supporting
9 memorandum of law.

10 Motions for reconsideration under Local Rule 9(e) are
11 essentially motions for amendment of judgment under Fed. R.
12 Civ. P. 59(e). See City of Hartford v. Chase, 942 F.2d 130,
13 133 (2d Cir. 1991). When such motions are untimely, they are
14 construed as motions for relief from judgment under Fed. R.
15 Civ. P. 60(b). See Wright, Miller & Kane, Federal Practice
16 and Procedure § 2817 & n.16, at 184 (1995). Although a
17 district court retains the "inherent power to decide when a
18 departure from its Local Rules should be excused or
19 overlooked," see Somlyo v. J. Lu-Rob Enters., 932 F.2d 1043,
20 1048 (2d Cir. 1991), specific provisions of the Federal Rules
21 of Civil Procedure may shed light on whether a district court
22 has abused its discretion in departing from its local rules.
23 See Ass'n for Retarded Citizens of Conn., Inc. v. Thorne, 68

1 F.3d 547, 553-54 (2d Cir. 1995) (finding no abuse of
2 discretion where district court's consideration of untimely
3 motion was "[b]ased on rationales for granting Rule 60(b)
4 relief").

5 While reluctant to disregard rules and deadlines, and
6 mindful of Horsey's failure in other regards to observe
7 procedural niceties, see Horsey I, at 5-6, we will entertain
8 his motion. First, Horsey's motion is somewhat unusual in
9 that we invited him to submit this data, see id., at 16-17
10 n.3, rendering his motion equally analogous to a supplement of
11 the summary judgment record as to a motion for
12 reconsideration. Second, some of Horsey's claims raise
13 serious constitutional issues, in particular whether a
14 disproportionate number of non-voting-eligible persons in one
15 district violates the rights of voters in other districts. We
16 are reluctant in such circumstances not to give him every
17 opportunity to pursue his claim.

18 Courts have the latitude to deal with extenuating
19 circumstances under Fed. R. Civ. P. 60(b)(6), which provides
20 that courts may relieve a party from a final judgment for "any
21 other reason justifying relief from the operation of the
22 judgment." For these reasons, we grant Horsey's motion for
23 reconsideration and consider the impact of his new data on our

1 prior summary judgment order.

2 B. The Nature of Horsey's Claims

3 In his pleadings and other submissions, Horsey challenges
4 the apportionment of: (i) Connecticut State House of
5 Representatives districts; (ii) United States congressional
6 districts within Connecticut; and (iii) Congressional
7 districts nationally, in particular, Connecticut, New York and
8 California. Horsey also challenges the manner in which the
9 federal government allocates the number of seats to the United
10 States House of Representatives.

11 In our prior opinion, we viewed Horsey's claim of
12 unconstitutional dilution as mainly based on the
13 disproportionate combination of residents who were either non-
14 citizens or were citizens ineligible to vote (hereafter
15 "ineligible citizens"). See id. at 2. However, we do note
16 that, at times, Horsey has characterized his apportionment
17 challenges as based solely on disparities in the numbers of
18 citizens and non-citizens among legislative districts,¹ and
19 that, at other times, he has described his claims as based
20 solely on disparities in the numbers of ineligible citizens.²
21 See Second Amended Compl. at ¶¶ 12, 13, 16, 17, 22, 25, 27,
22 28, 30, 33, 51. See also Horsey I, at 2 (characterizing
23 Horsey's claim as focused on apportionment practices that have

1 "given no regard to whether the number of citizens eligible to
2 register to vote ('eligible voters') in the resultant
3 districts is also equal"). Our analysis of Horsey's new
4 evidence varies depending on whether his claims are
5 characterized as based on disparities resulting from the
6 number of aliens, ineligible citizens, or a combination
7 thereof.

8 C. Horsey's New Evidentiary Submission

9 Horsey's affidavit offers three sets of data based on
10 Census 2000 Supplemental Survey Profiles. Two sets compare
11 Connecticut's Sixth Congressional District³ to a total of
12 eight or nine congressional districts in California and New
13 York. Horsey's first set of data shows that the total number
14 of votes cast in the Sixth Congressional District exceeded by
15 more than 100,000 the total number of votes cast in the New
16 York and California districts. See Heghmann Aff. at ¶ 8.
17 Horsey's second set of data shows that whereas Connecticut's
18 Sixth Congressional District has 2.9 percent non-citizens,
19 nine congressional districts spread across California and New
20 York have non-citizen populations of between 17.8 percent and
21 40.7 percent. See id. at ¶ 12. A third set of data shows
22 that Connecticut has a total non-citizen population of 4.9
23 percent whereas California's non-citizen population is 15.7

1 percent and New York's is 10.9 percent. See id. at ¶ 14.⁴

2 We find this submission insufficient to justify
3 overturning our prior decision for the reasons that follow.

4 1. Claims Regarding Ineligible Citizens or a Combination
5 of Ineligible Citizens and Aliens

6 Horsey's new submission provides no support for his
7 claims regarding disparities resulting from the number of
8 ineligible citizens or a combination of ineligible citizens
9 and aliens among Connecticut state legislative and federal
10 congressional districts. The submission includes data showing
11 only the distribution of citizens and aliens within districts,
12 whereas his factual claims as to the inclusion of ineligible
13 citizens or a combination of ineligible citizens and aliens
14 require a different and more refined showing.

15 Although there is an overlap between citizenship and
16 voter eligibility, the need for naked speculation to support
17 his claim regarding the distribution of ineligible citizens in
18 the various voting districts at issue is not eliminated by the
19 new data. To uphold his factual claim we would need to know
20 the distribution of those under 18 who are citizens in each
21 district and the distribution of those who are over 18 but
22 ineligible to vote as felons in each district. It might also
23 be necessary for Horsey to provide evidence showing how many

1 residents of particular areas live in "institutions, college
2 dormitories, and other group quarters," their eligibility to
3 vote, and where they are registered to vote. See id., at A-6
4 note. None of this information is included in the census data
5 presented. See id. Finally, for remedial purposes, far more
6 localized information would be necessary to redraw the
7 boundaries of the districts involved.

8 While we construe the record in the light most favorable
9 to the non-movant on a summary judgment motion, and draw all
10 permissible inferences in his favor, see Anderson v. Liberty
11 Lobby, Inc., 477 U.S. 242, 255 (1986), a non-movant cannot
12 "escape summary judgment merely by vaguely asserting the
13 existence of some unspecified disputed material facts,"
14 Borthwick v. First Georgetown Sec., Inc., 892 F.2d 178, 181
15 (2d Cir. 1989), "or defeat the motion through mere speculation
16 or conjecture," W. World Ins. Co. v. Stack Oil, Inc., 922 F.2d
17 118, 121 (2d Cir. 1990) (internal quotation marks and
18 citations omitted).

19 As explained above, Horsey's new submission does not
20 eliminate the need for wholly speculative inferences, and we
21 therefore adhere to our prior grant of summary judgment to the
22 defendants on these claims.

23 2. Claims Regarding Citizens and Aliens

1 citizen/non-citizen data for Connecticut's six congressional
2 districts as they existed in the year 2000. See Heghmann Aff.
3 at ¶ 5. While Horsey states that, if we follow these
4 instructions we will have "all the statistical evidence [we]
5 need[] to rule [on] the issues raised by [Horsey] regarding
6 the dilution of his vote in congressional elections," id., he
7 neither compiles the statistical information nor elaborates on
8 its relevance to, or effect on, his equal protection claim.

9 While we are reluctant to interpret data that is not
10 properly submitted or explained, we consider it, such as it
11 is, but find it unpersuasive. The data reveal that the
12 percentage of non-citizens in Connecticut's congressional
13 districts varies from between 2.2 percent and 9.7 percent.
14 However, this is within a generally accepted range of
15 deviation from equality. See Chen v. City of Houston, 206
16 F.3d 502, 522 (5th Cir. 2000) (less than 10% deviation is
17 constitutionally tolerated for state elections); Garza v.
18 County of Los Angeles, 918 F.2d 763, 785-86 (9th Cir. 1990)
19 (Kozinski, J., concurring in part and dissenting in part)
20 (same).

21 Moreover, it is not at all clear, and Horsey's papers are
22 unhelpful in this regard, that the data offered is
23 sufficiently refined to allow the redrawing of congressional

1 districts to achieve the equality in citizen population that
2 he wants. A similar lack of refined data was in part the
3 basis for our earlier decision. See Horsey I, at 14.

4 (iii)

5 Apportionment of Congressional Districts Nationally

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7 As noted in our prior decision, Horsey filed a waiver of
8 relief of all claims relating to the apportionment of
9 congressional seats among the states, although he continues to
10 seek a declaratory judgment that these apportionments are
11 unconstitutional. See id., at 6. Horsey's new evidence --
12 which indicates that some states may receive a
13 disproportionate share of congressional seats due to higher
14 numbers of non-citizens -- provides factual support for his
15 claim. Nevertheless, his claim is foreclosed by the text of
16 the Constitution.

17 The Fourteenth Amendment states that "Representatives
18 shall be apportioned among the several States according to
19 their respective numbers, counting the whole number of persons
20 in each state, excluding Indians not taxed." U.S. Const.
21 amend. XIV, § 2 (emphasis added). For Horsey's claim to have
22 merit, i.e., for us to conclude that the federal government
23 has unconstitutionally included non-citizens in its
24 apportionment determination, the meaning of "persons" would

1 have to be restricted to "citizens." The text of the
2 Fourteenth Amendment clearly indicates that this
3 interpretation is incorrect. Section 1 of the Fourteenth
4 Amendment uses both terms in a manner suggesting that
5 "persons" comprises a broader category of people that includes
6 both citizens and non-citizens. See U.S. Const. amend. XIV, §
7 1 ("No State shall make or enforce any law which shall abridge
8 the privileges or immunities of citizens of the United States;
9 nor shall any State deprive any person of life, liberty, or
10 property, without due process of law; nor deny to any person
11 within its jurisdiction the equal protection of the laws.")
12 (emphasis added).

13 Nor does the pre-Civil War text of the Constitution lend
14 support to Horsey's argument that the apportionment of
15 representatives is restricted to citizens. As originally
16 enacted, the Constitution deliberately "diluted" the voting
17 power of citizens living in free states by counting three-
18 fifths of all slaves in the apportionment determination. See
19 U.S. Const. art. I, § 2, cl. 3 ("Representatives . . . shall
20 be apportioned among the several States . . . according to
21 their respective Numbers, which shall be determined by adding
22 to the whole Number of free Persons, including those bound to
23 Service for a Term of Years, and excluding Indians not taxed,

1 three fifths of all other Persons."). While Horsey's new
2 evidence may support his argument that there is a disparity
3 between citizenship and the allocation of congressional
4 representatives among the fifty states, this disparity is
5 sanctioned by the Constitution.

6 Horsey's remaining claim is therefore limited to
7 disparities among congressional districts in California and
8 among congressional districts in New York with regard to the
9 numbers of resident citizens and non-citizens. However,
10 Horsey lacks standing to bring such a claim. As a non-
11 resident of either state, Horsey has suffered no cognizable
12 injury from the alleged malapportionment of California's or
13 New York's congressional districts. Nor may Horsey bring an
14 equal protection claim on behalf of California and New York
15 residents who have had their votes diluted by their respective
16 states' redistricting. See United States v. Hays, 515 U.S.
17 737, 739 (1995) (holding that plaintiff lacks standing to
18 assert an equal protection voting rights claim in a state
19 where he or she is not a resident of the challenged district);
20 see also Dillard v. Baldwin County Comm'rs, 225 F.3d 1271,
21 1279 (11th Cir. 2000) (interpreting Hays to mean that "if the
22 plaintiff lives in the racially gerrymandered district, she
23 has standing; if she does not, she must produce specific

1 evidence of harm other than the fact that the composition of
2 her district might have been different were it not for the
3 gerrymandering of the other district."); cf. Allen v. Wright,
4 468 U.S. 737, 755 (1984) (plaintiff only has standing to bring
5 equal protection challenge where he is "personally denied
6 equal treatment"); Valley Forge Christian Coll. v. Americans
7 United for Separation of Church and State, 454 U.S. 464, 489-
8 90 n.26 (1982) (disapproving the proposition that every
9 citizen has "standing to challenge every affirmative-action
10 program on the basis of a personal right to a government that
11 does not deny equal protection of the laws").

12 c) Request for an Order to Show Cause

13 Horsey requests that we order the defendants to show
14 cause why they should not be ordered to request that the
15 Bureau of Census provide the parties and the court with Census
16 2000 Supplemental Survey Profiles of fourteen Connecticut
17 State House of Representatives voting districts established in
18 1991. We deny this request. Not only could Horsey have
19 purchased a Special Tabulation showing the percentages of non-
20 citizens in various Connecticut State House of Representatives
21 districts from the Bureau of Census,⁶ but it remains unclear
22 whether such a tabulation would contain sufficient data to
23 permit findings on the number of eligible voters in the state

1 districts.

2 CONCLUSION

3 For the reasons indicated, we grant Horsey's motion for
4 reconsideration, reaffirm our earlier grant of summary
5 judgment for the defendants, and deny Horsey's request for an
6 Order to Show Cause. We again emphasize that we intimate no
7 view on whether Horsey's claims, if factually supported, would
8 be valid.

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/s/ Ralph K. Winter
Ralph K. Winter, U.S.C.J.

FOOTNOTES

1. See, e.g., Second Amended Compl. at 22 (demanding preliminary and permanent injunction preventing Clerk of the U.S. House of Representatives from including representatives from any state "in which election districts are not apportioned to reflect as nearly as possible equal percentages of the citizen population"); Plaintiff's Reply to Defendants' Objections to the Plaintiff's Motion for Reconsideration and Application for an Order to Show Cause at 2-3:

Because the Census Bureau has now published detailed reports congressional district by congressional district stating with 90% accuracy the number of non-citizens in each district, the plaintiff if permitted to do so can now factually demonstrate the constitutional violation.

The constitutional issue simply stated is does the disparity in the vote total between voting districts reflect the disparity in the distribution of the citizen population. . . . Now the plaintiff can use the Census Bureau Community Surveys to link the disparity in the distribution of the citizen population with the disparity in the vote totals.

(emphasis added)

2. An equal protection claim that apportionment must be based solely on the number of citizens resident in a district differs crucially from a claim that apportionment must be

based solely on the number of eligible voters. Whereas upholding the former would exclude aliens, upholding the latter would exclude citizens as well, principally minors and felons. There is of course a tension between equality of representation and equality of voting power. However, a claim of dilution seems intuitively weaker when based solely on disparities in ineligible citizens resident in a district. For example, dilution of voting power in one district based on a disproportionate number of minor citizens in another does not discriminate between groups with differential claims to representation in the political process. Minors are denied the right to vote on grounds of judgment and independence rather than a weak claim to representation. Aliens, however, are denied the right to vote based on potential loyalty to another nation, their presumed smaller stake in the outcomes of American elections, etc.

3. Ironically, Connecticut's Sixth Congressional District no longer exists following reapportionment after the 2000 census although the apportionment of state House of Representatives districts is unaffected by these changes. Horsey's claims as to federal House districts are nonetheless not moot because they might escape review and recur. See Southern Pacific

Terminal Co. v. ICC, 219 U.S. 498, 515 (1911) (providing an exception to the mootness doctrine for situations "capable of repetition, yet evading review.").

4. Horsey has also instructed this court on how to compile a fourth data set providing information on the numbers of citizens and non-citizens in Connecticut's congressional districts. See Heghmann Aff. at ¶ 5.

5. In view of our disposition, we need not reach the propriety of both waiving relief and seeking a declaratory judgment in these circumstances.

6. In order to obtain these numbers, Horsey would have had to determine which census tracts corresponded to the state house districts. Once he had this information, the census could have performed a statistical breakdown similar to one Horsey provided for congressional districts in the affidavit accompanying his motion for reconsideration.