No. 14-1329

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CALLA WRIGHT; WILLIE J. BETHEL; AMY T. LEE; AMYGAYLE L. WOMBLE; JOHN G. VANDENBERGH; BARBARA VANDENBERGH; AJAMU G. DILLAHUNT; ELAINE E. DILLAHUNT; LUCINDA H. MACKETHAN; WILLIAM B. CLIFFORD; ANN LONG CAMPBELL; GREG FLYNN; BEVERLEY S. CLARK; CONCERNED CITIZENS FOR AFRICAN-AMERICAN CHILDREN, d/b/a Coalition of Concerned Citizens for African-American Children; RALEIGH WAKE CITIZENS ASSOCIATION,

Plaintiffs-Appellants,

v.

STATE OF NORTH CAROLINA; WAKE COUNTY BOARD OF ELECTIONS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of North Carolina

PETITION OF DEFENDANT-APPELLEE WAKE COUNTY BOARD OF ELECTIONS FOR REHEARING *EN BANC*

Charles F. Marshall
Matthew B. Tynan
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
1600 Wells Fargo Capitol Center
150 Fayetteville Street
Raleigh, North Carolina 27601
Telephone: (919) 839-0300
Attorneys for Defendant-Appellee

STATEMENT OF PURPOSE

The Wake County Board of Elections respectfully submits this petition for rehearing *en banc* from a 2-1 decision of a panel of this Court reversing the dismissal of a constitutional challenge to new electoral districts for the Wake County Board of Education.

Rehearing *en banc* is necessary because the panel majority's decision conflicts with decisions of the United States Supreme Court:

1. The panel majority improperly relaxed the Rule 12 dismissal standard of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), by allowing Plaintiffs to avoid dismissal by pleading a "novel legal theory" or by showing that the Defendant had fair notice of a claim for which Plaintiffs otherwise failed to plead the required elements.

2. The Complaint reflects that Plaintiffs are, in essence, alleging a political gerrymandering claim cast in one person, one vote terms. Such a claim is foreclosed by the Supreme Court's decision in *Vieth v. Jubeliler*, 541 U.S. 267 (2004), which requires the existence of judicially discernable and manageable standards to adjudicate political gerrymandering claims. The panel majority's decision conflicts with *Vieth* by allowing the case to proceed in the absence of such standards.

The dissent properly notes that the panel majority's decision will, for the first time, require courts to wade into the political thicket to resolve claims of "policy" favoritism in challenges to redistricting plans. It also could force local election boards to defend claims of pure political gerrymandering from all walks of the political and issue advocacy spectrum regarding electoral districts that contain only de minimis population deviations. The prospect of such open-ended litigation will only increase the uncertainties and costs borne by local elections boards charged to prepare for and administer local elections. Review of the panel majority's decision by the *en banc* Court pursuant to Fed. R. App. P. 35(b) is therefore warranted in this case.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2013, the North Carolina General Assembly passed Session Law 2013-110 ("Session Law"), which changed the methods for electing board members to the Wake County Board of Education. The Session Law created a nine-district system with seven numbered districts and two lettered "super" districts, in which each of the nine board members would be elected by voters within their respective districts. J.A. at 21–22. The Board of Education elections are nonpartisan. J.A. at 17.

In August 2013, Plaintiffs filed a complaint against the State of North Carolina and the Wake County Board of Elections ("Board of Elections").

Plaintiffs alleged that the Session Law violates the one person, one vote requirement of the Equal Protection Clause of the Fourteenth Amendment and the Equal Protection guarantee of Article I, § 19, of the North Carolina Constitution. J.A. at 29-30. Plaintiffs' chief complaint was that the Session Law was intended to favor Republicans and those who support conservative education policies and to disfavor Democratic incumbents and those who favor progressive education policies. *See* J.A. at 27-28. Defendants moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. J.A. at 33.

On March 17, 2014, the district court entered an order dismissing Plaintiffs' claims. J.A. at 81-92. The district court reasoned that the allegations in the complaint failed to show a *prima facie* constitutional violation because the population deviations were de minimis. J.A. at 86–87. Furthermore, the district court determined that Plaintiffs' allegations amounted to political gerrymandering claims that are non-justiciable:

> Although plaintiffs dress the claim in the language of a one person, one vote claim, it is actually not so. Because the Supreme Court found political gerrymandering claims to be nonjusticiable in *Vieth v. Jubeliler*, 541 U.S. 267 (2004), plaintiffs have not stated a claim upon which relief may be granted and their claim must be dismissed.

J.A. at 88.

On May 27, 2015, by a 2-1 decision, a panel of this Court reversed the portion of the District Court's order dismissing the complaint under Rule 12(b)(6).

The panel majority applied a relaxed Rule 12(b)(6) standard that would allow cases to proceed if the plaintiff advances a "novel legal theory," if the claims do not fall "within the four corners of our case law," or if the allegations are sufficient to provide fair notice of the claims. Op. at 12-13. The panel majority further determined that, under that standard, Plaintiffs sufficiently pled a one person, one vote claim based political and policy favoritism, geographic favoritism, and the creation of districts that were "less compact" and more "confusing" than a prior plan. Op. at 25.

Judge Motz dissented, explaining that the panel majority's standard for reviewing Rule 12(b)(6) motions "does not reflect the law" and that the complaint failed to contain sufficient factual allegations to support the showing of bad faith, arbitrariness, or invidious discrimination required by *Daly v. Hunt*, 93 F.2d 1212 (4th Cir. 1996) to overcome the presumptive constitutionality of the districts. The dissent contended that the complaint merely alleged that the redistricting plan "alters the political balance among those favoring different 'policies.'" Op. at 32-33 (Motz, J., dissenting). Allowing such a dispute to proceed, according to the dissent, would "recast federal judges as pollsters" and force them into the very "political thicket" that the Supreme Court has instructed courts to avoid in cases regarding minor deviations in the apportionment process. Op. at 31–33 (Motz, J., dissenting).

ARGUMENT

I. The panel majority's decision applied a motion to dismiss standard that conflicts with the decisions of the United States Supreme Court.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The panel majority relaxed the contours of the standard for Rule 12(b)(6) dismissals in two ways that conflict with *Twombly* and *Iqbal* and are not supported by the decisions of this Court.

First, the panel majority relied on cases from the Ninth, Second, and First Circuits to hold that motions to dismiss are "especially disfavored" if the complaint sets forth a "novel legal theory" that can best be assessed after factual enhancement. This Court has not endorsed, and should not adopt, any such cautionary gloss because the apparent novelty of a claim cannot allow it to proceed if it is otherwise foreclosed by the application of governing precedents. For example, *Veney v. Wyche* affirmed the dismissal of an apparently novel claim of discrimination against a homosexual man in a prison housing policy. 293 F.3d 726, 730-31 (4th Cir. 2002). While recognizing that particular care must be taken before a civil rights claim is dismissed, this Court nevertheless held that the plaintiff had not stated a claim after engaging in an analysis of legal principles set forth in relevant precedent. *Id*. at 731-35. This Court also has held, contrary to the

panel majority's reasoning, that a lower court need not identify case law "on all fours" to say what the law is for the purpose of evaluating whether a claim has been sufficiently pled. *E.g.*, *Braun v. Maynard*, 652 F.3d 557, 562 (4th Cir. 2011) ("Previous cases need not be on all fours with the current one to clearly establish the law for qualified immunity purposes.").

Second, the panel majority appears to consider whether a defendant has notice of a plaintiff's claim as a proxy for determining whether the complaint itself contains sufficient factual allegations that "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. In evaluating the sufficiency of allegations in the complaint, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. at 678.

The panel majority's use of these relaxed standards lowered the bar for avoiding dismissal in contravention of *Twombly*, *Iqbal*, and their progeny and, as set forth in Sections II and III, resulted in a misapplication of the controlling legal principles. Such standards would cause special problems in redistricting cases because the Supreme Court has admonished courts to avoid interfering in traditional political decisions inherent in the redistricting process, and such interference would impose burdens and uncertainties on local election boards charged to administer elections using districts duly enacted by the state legislature.

II. Allegations that the redistricting plan was drawn to favor a particular political party or a particular policy preference do not state a justiciable claim under the Supreme Court's decision in *Vieth v. Jubeliler*.

Plaintiffs' complaint reveals that the population deviations in the challenged redistricting plan are less than 10%. J.A. at 26. Such deviations are presumptively constitutional and are *prima facie* evidence that the plan was the result of an "honest and good faith effort to construct districts … as nearly of equal population as is practicable." *Daly*, 93 F.3d at 1220 (quoting *Reynolds v. Sims*, 377 U.S. 533, 577 (1964)).

To overcome this presumption, this Court requires a plaintiff to allege specific facts to establish that the redistricting plan was "the product of bad faith, arbitrariness, or invidious discrimination." *Id.* at 1222. Here, the complaint squarely and exclusively alleges that the "intent" of the Session Law was "to disfavor incumbents who are registered Democrats and support progressive education policies"—most notably student assignment policies. J.A. at 28. The complaint further alleges that the "only goal" of the plan was to "further Republican interests and advance conservative agenda policies." *Id.*

Although pled as a one person, one vote claim, Plaintiffs' allegations contain the hallmarks of political bias and favoritism associated with a political gerrymandering claim—including allegations of presidential election results as a "common means of determining political preferences/performance of an electoral

district." J.A. at 27. The one person, one vote principle "'guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups.'" *See Benisek v. Mack*, 11 F. Supp. 3d 516, 523 (D. Md. 2014) (quoting *Vieth*, 541 U.S. at 288 (plurality opinion)), *aff'd*, 584 F. App'x 140 (4th Cir.) (per curiam), *cert. granted*, *Shapiro v. Mack*, 2015 U.S. LEXIS 3839 (June 8, 2015). Here, Plaintiffs' core allegations are based upon the purported intent of the redistricting plan to impact groups that share a particular partisan or policy-based affiliation. J.A. 26-28.

The District Court correctly held that Plaintiffs' attempt to cast their political gerrymandering claim as a one person, one vote claim is foreclosed by *Vieth v. Jubelilier*, 541 U.S. 267 (2004). In *Vieth*, the Supreme Court rejected a political gerrymandering claim on the grounds that there were no judicially discernable or manageable standards to adjudicate the use of political affiliation in the redistricting plan. *Id*. at 281–306 (Scalia, J.) (plurality opinion); 541 U.S. at 308–09 (Kennedy, J., concurring). A plurality of the court agreed that political gerrymandering claims were nonjusticiable. Justice Kennedy allowed for the possibility of a viable political gerrymandering claim in the future, but he confessed that "our attention has not been drawn to statements of principled, well-accepted rules of fairness that should govern districting, or to helpful formulations

of the legislator's duty in drawing district lines." *Id*. at 309 (Kennedy, J., concurring).

This Court has not recognized or applied any such judicially manageable standards to resolve political gerrymandering claims in the wake of *Vieth*. Rather, this Court summarily affirmed the dismissal of an equal protection claim that was "in essence" a political gerrymandering claim alleging that Maryland's Congressional districts "work an unfairness to Republicans." *See Benisek*, 11 F. Supp. 3d at 523, 525.

Lower courts in this Circuit also have rejected political gerrymandering claims after *Vieth* as either nonjusticiable, *see Gorrell v. O'Malley*, Civil No. WDQ-11-2975, 2012 U.S. Dist. LEXIS 6178, at *11 (D. Md. 2012) (unpublished), or failing to offer a "reliable standard by which to adjudicate" such a claim, *see Fletcher v. Lamone*, 831 F. Supp. 2d 887, 904 (D. Md. 2011), *aff'd*, 133 S.Ct. 29 (2012). And in a subsequent challenge to Georgia's districts drawn in the wake of the *Larios v. Cox* decision relied upon by the panel majority, the district court rejected allegations of political motivation to support a one person, one vote claim. *See Kidd v. Cox*, Civil Action No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *34 (N.D. Ga. 2006) (unpublished) (reasoning that "the presence of partisan considerations in redistricting does not necessarily equate bad faith on the part of the Georgia General Assembly in passing S.B. 386").

Far from being the landmark case to allege such a workable standard, this case more accurately reflects just how judicially "unmanageable" any standard would be. The dissent properly recognized that any claim of *partisan* gerrymandering fails because the elections at issue in this case are nonpartisan. Even if partisanship was relevant to voting preferences in nonpartisan elections, the *Vieth* plurality accurately reasoned that ever-shifting partisan allegiances, split voting, and wide discrepancies in the quality of candidates make it "impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy" for the "lawful and common practice" of partisan districting. 541 U.S. at 286–87; *see also Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting invariably has and is intended to have substantial political consequences."). That impossibility is highlighted further in nonpartisan elections where voters do not elect candidates running under a partisan banner.

The allegation that the redistricting plan in this case was drawn to advance certain preferred education policies is even less justiciable than allegations of partisan bias. The dissent correctly concluded that adjudicating the impact of redistricting on a voter's policy preferences would "recast federal judges as pollsters" and "require a granular scrutiny of voting patterns" relating to policy positions of voters and candidates. Op. at 33 (Motz, J., dissenting). Partisan

preferences at least attempt, however unscientifically, to reflect a voter's cumulative outlook on macro-political issues. Policy preferences, by contrast, reflect views on discrete issues that may come and go with each election, and voters sharing the same policy preference on one specific issue may prioritize that preference differently in relation to other issues that impact their ultimate vote.

The panel majority's decision not only conflicts with *Vieth*, it also would empower a new set of policy-based redistricting challenges from all walks of the political spectrum that will prove to be even more unmanageable than the partisan challenges foreclosed by *Vieth*. If student assignment policy preferences may be grounds for challenging a redistricting plan with de minimis population deviations, so too could a host of other policy preferences. That result would impose additional and open-ended burdens on the Board of Elections' role as administrator of county elections—a task that inevitably requires a degree of certainty in the redistricting process so that the Board of Elections may adequately plan for and implement local elections.[1]

[1] The prospect of additional litigation has already materialized in a separate lawsuit filed in the district court challenging the use of the districts at issue for the election of the Wake County Board of Commissioners. *See Raleigh Wake Citizens Ass'n et al. v. Barefoot et al.*, No. 5:15-cv-156 (filed April 9, 2015).

III. *Cox v. Larios* does not prevent dismissal of the complaint as a political gerrymandering claim.

The panel majority sidestepped the political gerrymandering issue by relying heavily on *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *summarily aff'd*, 542 U.S. 947 (2004), to characterize the complaint as one steeped in regional—rather than political—bias.[2] The panel majority's efforts in this regard do not square with the face of the complaint and, in any event, the intent and the motivations behind the redistricting plan in *Larios* are far different than the straightforward political and policy motives alleged here.

In *Larios*, the district court found that Georgia's state legislative redistricting plans were expressly motivated by (i) "deliberate regional favoritism" to aid certain urban and rural regional interests at the expense of suburban regions, and (ii) protection of Democratic incumbents. 300 F. Supp. 2d at 1337 (finding that districts were "systematically and intentionally" designed to achieve these goals).

Unlike *Larios*, this case does not contain factual allegations of "deliberate regional favoritism." Rather, the complaint contains only a single, fleeting reference to one "urban" super-district and one "rural" super-district (J.A. at 11).

[2] The panel majority also cites allegations that the new districts are "visually less compact" and "confusing" compared to the prior districts. However, "[t]he Constitution does not mandate regularity of district shape," *Bush v. Vera*, 517 U.S. 952, 962 (1996) (O'Connor, J.) (plurality opinion), and the fact that a different redistricting plan may be "better" or more "constitutionally perfect" does not render the plan unconstitutional. *See Daly*, 93 F.2d at 1221.

There are no factual allegations detailing how or to what extent the plan creates any favoritism among either rural or urban voters, or the motivations or effect of any such favoritism. The complaint also does not allege that any geographic favoritism was "deliberate" or intentional, a necessary component to support an allegation of bad faith, arbitrariness, or invidious discrimination.

This case, therefore, presents the very scenario that *Larios* admittedly avoided—allegations that political and policy motivations "alone" created de minimis deviations in redistricting plans. *Id*. at 1352 ("We need not resolve the issue of whether or when partisan advantage alone may justify deviations in population[.]"). Those allegations are foreclosed by *Vieth* because they lack any judicially discernable or manageable standards for adjudication. In fact, in a subsequent challenge to certain of Georgia's districts that were redrawn in the wake of *Larios*, the district court rejected allegations of political motivations underpinning a one person, one vote claim and also rejected a stand-alone political gerrymandering claim. *See Kidd*, 2006 U.S. Dist. LEXIS 29689, at *32–33, 44 ("[T]he Court cannot ascertain from the materials submitted what manageable or politically neutral standards might exist in this case that would make a political gerrymandering dispute based on the Equal Protection Clause justiciable.").

The panel majority's decision, if left unchecked, will provide a blueprint for political gerrymandering claims to survive a motion to dismiss without any

workable standards to adjudicate such claims as required by *Vieth*. And, as the dissent notes, it will also mark the first time that a presumptively constitutional redistricting plan may be challenged merely on the basis that it "alters the political balance among those favoring different 'policies'"—forcing federal courts into an unnecessary and unmanageable political thicket of polling data, voting patterns, and legislative motivations. The Court should grant rehearing *en banc* to prevent these outcomes.

CONCLUSION

For the foregoing reasons, the Wake County Board of Elections respectfully requests that the Court grant the Petition for Rehearing *En Banc*.

Respectfully submitted this 10th day of June, 2015.

/s/ Charles F. Marshall
Charles F. Marshall
N.C. State Bar No. 23297
cmarshall@brookspierce.com

/s/ Matthew B. Tynan
Matthew B. Tynan
N.C. State Bar No. 47181
mtynan@brookspierce.com

Brooks, Pierce, McLendon,
Humphrey, & Leonard, L.L.P.
1600 Wells Fargo Capitol Center
150 Fayetteville Street
Raleigh, NC 27601
Telephone: (919) 839-0300
Fax: (919) 839-0304

Attorneys for Defendant-Appellee
Wake County Board of Elections

CERTIFICATE OF COMPLIANCE WITH RULES 35(b)(2) and 32(a)

1. This Petition complies with the page limitation of Fed. R. App. P. 35(b)(2) and 32(a)(7)(A) because it contains 15 pages, excluding material exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Respectfully submitted this 10th day of June, 2015.

/s/ Charles F. Marshall
Charles F. Marshall

REQUEST FOR ORAL ARGUMENT

In the event that the Petition is granted, the Wake County Board of Elections requests oral argument, which it believes will aid the Court in (i) addressing the nature of political and policy-based redistricting claims, (ii) exploring the impact of adjudicating redistricting claims based allegations of policy preferences, and (iii) exploring the impact of the decision on local election boards in other possible redistricting challenges.

CERTIFICATE OF SERVICE

I hereby certify that, on the date below, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Anita S. Earls
Allison Jean Riggs
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
919-323-3380 x115
Fax: 919-323-3942
anita@southerncoalition.org
allison@southerncoalition.org
Counsel for Plaintiffs-Appellants

Respectfully submitted this 10th day of June, 2015.

/s/ Charles F. Marshall
Charles F. Marshall