UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

O. JOHN BENISEK, et al.,

Plaintiffs-Appellants,

v.

Case No.: 14-1417
(on appeal from D.Md. 13-CV-3233-JKB)

BOBBIE S. MACK, Chair,
Maryland State Board of Elections, et al.,
in their official capacities,

Defendants-Appellees.

* * * * * * * *

PLAINTIFFS-APPELLANTS' INFORMAL OPENING BRIEF

Jurisdiction:

Appeal from the U.S. District Court for the District of Maryland, at Baltimore

Hon. James K. Bredar, U.S. District Judge, presiding

Memorandum and Order dated April 8, 2014, dismissing this case—which alleges that Maryland's Congressional Districts violate the U.S. Constitution—under Rule 12 (b)(6) for failure to state a claim for which relief can be granted, without referring it to a three-judge District Court panel under 28 U.S.C. § 2284

Case Summary

We commenced this action to challenge Maryland's Congressional Districts, in that we alleged in our Amended Complaint that the structure and composition of specific districts constitute an abridgement of our representational rights under

Article 1 § 2, our voting rights under the 14th Amendment § 2, and our political association rights under the 1st Amendment.

In our Response in Opposition to Defendants' Motion to Dismiss, we further noted that the Privileges or Indemnities Clause of the 14th Amendment § 1 reinforces that the Maryland General Assembly must not abridge these representational, voting, and political association rights--even as it regulates elections for Representatives to Congress as authorized by Article 1 § 4. The abridgement of representational and voting rights results from the legislature exceeding its Article 1 § 4 authority to regulate Congressional elections by doing so in a manner that unduly influences the outcomes—substituting its will in place of the people, who are exclusively afforded that right under Article 1 § 2. We also alleged that the structure and composition of the districts constitute a violation of the Equal Protection Clause of the 14th Amendment § 1, in addition to our primary claims addressing violation of the constitutional provisions cited above.

Summary of Issues

In this appeal, we contend that the District Court erred in (1) applying a legal standard of review that, while perhaps consistent with a Fourth Circuit panel opinion, is clearly inconsistent with controlling Supreme Court opinions, opinions

by other Circuits, and other Fourth Circuit opinions; (2) finding our claims not to be justiciable; (3) analyzing claims that we based on Article 1, Sections 2 & 4, as well as the Privileges or Immunities Clause and Section 2 of the 14th Amendment only as an Equal Protection Clause claim of partisan gerrymandering; (4) rejecting our proposed standard for resolving our claims; (5) finding that our First Amendment claim failed to state a claim for which relief can be granted; (6) not analyzing the Equal Protection Clause claim we separately alleged; and (7) exceeding the jurisdiction of a single-judge District Court under 28 U.S.C. § 2284 by resolving our claims without referring the case to a three-judge panel.

Background and Summary of Argument

As Judge Bredar noted on page 9 of his Memorandum, Article 1 § 4 gives states authority to draw Congressional districts, but also authorizes Congress to make or alter them. Congress has so acted only once in the past century, to require election of Representatives by single member districts after passing the Voting Rights Act.

Through modern computer technology, some state legislatures have increasingly assumed a greater role in determining the outcomes of Congressional elections. We demonstrate that the Maryland General Assembly exceeded its Article 1 § 4 authority by unduly influencing the outcome of these elections through its design

of our Congressional districts. The Representatives elected through such districts have little incentive to use their Article 1 § 4 authority to alter them. Similarly, U.S. Senators were far more receptive to the prerogatives of their state legislatures during the years when the legislatures elected them.

However, Article 1 § 2 reserves the authority to determine the outcomes of elections for Representatives exclusively to the People, and the Privileges or Immunities Clause of the 14th Amendment § 1 reinforces that the Maryland General Assembly must take care not to abridge its citizens' representation rights under Article 1 § 2, its citizens' voting rights under the 14th Amendment § 2, or its citizens' political association rights under the First Amendment, even as it exercises its authority and responsibility under Article 1 § 4. The role of the people in determining the outcome of elections for Representatives must not be diminished to that of largely ratifying the outcomes determined by the legislature. Judge Bredar notes in footnote 4 on page 14 of his Memorandum that other state legislatures, specifically citing Texas, have engaged in similar behavior. This would seem to auger more for intervention rather than for dismissal.

While Congress has the authority to enforce these Constitutional provisions, the Judiciary also has a responsibility to enforce minimal levels of compliance—

particularly when Congress has not acted to do so. The Supreme Court has done so in *Cook v. Gralike* (531 U.S. 510), reversing a legislature that unduly influenced the outcome of an election through a ballot's design, thereby abridging voters' Article 1 § 2 rights. The standard we have proposed affords the opportunity to measure when a legislature has abridged these rights with respect to its state's Congressional districts' design in a specific but particularly egregious manner that merits intervention. We show below that these legal theories and our proposed standard are substantial—i.e., not frivolous—if not plausible and compelling.

Under 28 U.S.C. § 2284, the jurisdiction of a single-judge District Court in an action such as this is limited to determining whether any of the claims within the action are substantial—i.e., non-frivolous. If substantial claims are identified, the case must be referred to a three-judge panel. Only a three-judge panel has jurisdiction to dismiss a substantial claim under Rule 12(b)(6). We cite below the significant case law that supports this interpretation.

Issues for Review

Issue 1. Did the single-judge District Court apply the proper standard of review for dismissing an action challenging the constitutionality of Congressional districts under 28 U.S.C. § 2284?

Supporting Facts and Argument

A single-judge District Court may only dismiss such an action upon a finding that the action is "insubstantial." The well-established definition of "insubstantial" is "frivolous." This is the standard used by other Circuits and the standard that is mandated by controlling Supreme Court opinions. "Frivolous" should have been standard applied here.

In this case, the District Court held that the proper standard to survive a motion to dismiss before a single judge is whether the actions state claims for which relief can be granted under Rule 12(b)(6). (D.Md. 13-CV-3233 ECF 21, Page 3). Judge Bredar went on to note that standard he would apply under Rule 12(b)(6) would be the usual standard pursuant to the *Ashcroft v. Iqbal* (2009) and *Bell Atlantic v. Twombly* (2007) decisions. The Judge also noted that while substantiality may have been the standard at one time, this Court's opinion in *Duckworth v. State Administrative Board of Election Laws* (332 F.3d 769, 4th Cir.) (2003) changed the standard to that under Rule 12(b)(6). We contend that insubstantiality remains the proper standard, and that substantiality is properly defined as "non-frivolous."

We addressed this in paragraphs 8 – 17 of our Response in Opposition to Defendants' Motion to Dismiss (ECF 18, Pages 7 - 11). The District Court's

interpretation of *Duckworth*, or perhaps *Duckworth* itself, is inconsistent with other decisions of this Court, decisions from other Circuits, and relevant Supreme Court decisions. The District Court recently addressed *Duckworth* in its handling of *Fletcher v. Lamone* (D.Md. 11-CV-3220) two years. As we noted in our Response, Judge Titus, the single-judge District Court first presiding in *Fletcher*, rebuffed the Defendants' contention that *Duckworth* set a higher standard, and went on to apply the prior Supreme Court decisions we cite (D.Md. 11-CV-3220, ECF 17; 831 F. Supp. 2d 887 (D. Md. 2011)) eleven days after that case was filed. As Judge Bredar noted in his Memorandum dismissing our case, the three-judge panel in *Fletcher* later considered *Duckworth*, found no material distinction between the standards for Rule 12(b)(6) and for substantiality, but went on to rebuff the Defendants' contention that there should be two distinct standards. However, the *Fletcher* Defendants did not contend this. It was the *Fletcher* Plaintiffs who contended—as we do here—that it is a second distinct and lower bar to survive a challenge of insubstantiality than of a failure to state a claim. It was the *Fletcher* Defendants who contended—as they do here—that *Duckworth* set a single higher pleading standard, at the *Iqbal/Twombly* level, for when a single-judge Court must refer a redistricting challenge to a three-judge panel. We note that *Iqbal* and *Twombly* had not been decided at the time of *Duckworth*, when *Conley v. Gibson* was the contemporary and lower Rule 12(b)(6) pleading

standard. Even so, *Neitzke v. Williams* (490 U.S. 319) was also decided while the *Conley v. Gibson* standard was still in effect. While an action that is insubstantial—i.e., frivolous--may inherently fail to state a claim, an action that is ultimately determined by a three-judge panel to fail to state a claim may still have been substantial—i.e., non-frivolous. *Neitzke* shows that *Duckworth*, if applicable, may have stated the relationship among the two standards backwards. In any event, the clear Supreme Court precedents on substantiality should apply here.

Of the cases we cited in our Response in Opposition, we would particularly call this Court's attention to prior Supreme Court decisions in *Idlewild Bon Voyage Liquors v. Epstein* (370 U.S. 713), *Lake Carriers v. MacMullen* (406 U.S. 498), *Goosby v. Osser* (409 U.S. 512), and *Neitzke v. Williams* (490 U.S. 319). Our quote from *Neitzke* is particularly relevant:

> dismissal is proper only if the legal theory (as in *Williams'* Fourteenth Amendment claim) or the factual contentions lack an arguable basis. The considerable common ground between the two standards does not mean that one invariably encompasses the other, since, where a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not.

The Supreme Court's discussion here is directly analogous to the dismissal of frivolous claims for insubstantiality by single-judge Courts, but requiring the

further consideration for dismissal of non-frivolous claims on Rule 12(b)(6) grounds by three-judge Courts under 28 U.S.C. § 2284. Permitting a single-judge District Court to dismiss non-frivolous actions under Rule 12(b)(6) would vitiate much of the protections afforded to plaintiffs challenging the constitutionality of Congressional districts under 28 U.S.C. § 2284. It would also unduly limit the role of three-judge District Courts under 28 U.S.C. § 2284 to largely judging matters of fact. Fully considering matters of law—most particularly the viability of novel or unsettled legal theories—is particularly important in redistricting challenges, and is a critical role of and reason for the special processes afforded by 28 U.S.C. § 2284.

Relevant prior decisions of this Court would include *Roman v. Glass* (968 F.2d 1211) and *Crosby v. Holsinger* (816 F.2d 162). Relevant decisions of other Circuits include *Kalson v. Paterson* (2nd Circuit, 07-1243, 2008), *Page v Bartels* (3rd Circuit, 01-1943, 248 F3d 175, 2001), *LULAC v. Texas* (5th Circuit, 96-50714, 1997), *Prather v. Norman* (11th Circuit, 901 F.2d 915, 1990), and *Feinberg v. FDIC* (D.C. Circuit, 522 F.2d 1335, 1975).

Issue 2. Are claims alleging that the structure and composition of Congressional districts constitute (1) a denial of equal protection under the 14th Amendment,

Section 1; (2) an abridgement of representational and voting rights guaranteed under Article I § 2, the Privileges or Immunities Clause of the 14th Amendment, Section 1, and the 14th Amendment, Section 2; and (3) an overreach of the legislature's authority under the Elections Clause of Article I § 4, justiciable?

Supporting Facts and Argument

We have addressed justiciability on pages 18-28 of our Response in Opposition to Defendants' Motion to Dismiss (D.MD. 13-3233; ECF 18).

The District Court found our action to be non-justiciable based on *Vieth v. Jubelirer*. However, *Vieth* did not hold that political gerrymandering claims are not justiciable. We address this and cite relevant cases in paragraphs 34-35 on pages 25-28 of our Response in Opposition. We note that Judge Bredar's Memorandum (page 13) cites the same *Radogno v. Illinois* (N.D.Ill. 11-cv-4884, ECF 59) opinion that we cite (Response in Opposition, paragraph 35(b) on pages 26-27); however, the three judges hearing *Radogno* held political gerrymandering claims to be justiciable.

In the Supreme Court's opinion in *LULAC v Perry*, 548 U.S. (2006), Justice Kennedy reviewed the status of political gerrymandering claims:

> In *Davis v. Bandemer*, 478 U. S. 109 (1986), the Court held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy, id., at 118–127, but there was disagreement over what substantive standard to apply…That disagreement persists. A plurality of the Court in *Vieth v. Jubelirer* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so.

The above discussion is particularly focused on claims that political gerrymandering constitutes a violation of the Equal Protection Clause of the 14th Amendment. While we did offer such a claim in our Response in Opposition (paragraphs 48-56 on pages 39-41), the claims within our Amended Complaint focused on abridgement of representational rights under Article 1 § 2, and of voting rights under the 14th Amendment § 2. We view our claims as a logical extension of *Wesberry v. Sanders* (376 U.S. 1), which found that the prior statutory policy that Congressional districts be of equal population, was otherwise still required by Article 1 § 2. We show that claims under these provisions are justiciable in paragraphs 28-31 on pages 18-21 of our Response in Opposition—most particularly from our cite from *Baker v. Carr* (369 U.S. 186):

> …the mere fact that the suit seeks protection of a political right does not mean it presents a political question. ... The courts cannot reject as "no law suit" a *bona fide* controversy as to whether some action denominated "political" exceeds constitutional authority… Article I, § § 2, 4, and 5, and

> Amendment XIV, § 2, relate only to congressional elections, and obviously do not govern apportionment of state legislatures. However, our decisions in favor of justiciability even in light of those provisions plainly afford no support for the District Court's conclusion that the subject matter of this controversy presents a political question….

Our reliance on the Privileges or Immunities Clause of the 14th Amendment § 1 is based on the plain reading of that provision. It is not a stand-alone provision. Rather, it reinforces the applicability of the other Constitutional provisions we cite.

Our claim that the legislature exceeded its authority under Article 1 § 4 is an element of our claim that Article 1 § 2 was thereby abridged. Its justiciability is also covered in the quote from *Baker v. Carr* above. Also from *Baker*:

> When the Ohio Supreme Court sustained Ohio legislation against an attack for repugnancy to Art. I, § 4, of the Federal Constitution, we affirmed on the merits and expressly refused to dismiss for want of jurisdiction.

The Supreme Court has also confirmed justiciability through its rulings in *Cook v. Gralike* (531 U.S. 510) and *U.S. Term Limits v. Thornton* (514 U.S. 779):

> The Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.
>
> Our cases interpreting state power under the Elections Clause reflect the same understanding. The Elections Clause gives States authority "to enact

> the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley* v. *Holm*, 285 U. S., at 366. However, "[t]he power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights." *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). States are thus entitled to adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson* v. *Celebrezze*, 460 U.S. 780, 788, n. 9 (1983).

The Tenth Circuit, in *Hansen v. Wyatt* (Case 06-6204, 10th Cir, 2008), citing *New York v. United States* (505 U.S. 144) (1992) at 185-186, held in a political question case that unlike jurisdiction, justiciability need not be confirmed prior to the Court addressing the merits. In *Comer v. Murphy Oil* (Case 07-60756, 5th Cir, 2009), the Fifth Circuit addressed the political question doctrine at length and held that where a question is not entrusted exclusively to a federal political branch, then a motion to dismiss based on the political question doctrine "should be denied without applying the Baker formulations." That opinion further noted that the "federal courts must decide matters of…constitutional interpretation…and cannot avoid this responsibility when their decisions may have political implications" citing *Japan Whaling Association v. American Cetacean Society* (478 U.S. 221, 230) (1986).

Issue 3. Should our claims based on Article 1, Sections 2 & 4, the Privileges or Immunities Clause of the 14th Amendment, and the 14th Amendment, Section 2 been considered with respect to those provisions rather than only as an Equal Protection Clause claim of partisan gerrymandering?

Supporting Facts and Argument

The District Court considered our entire action, except for our First Amendment claim, to be a political gerrymandering claim under the Equal Protection Clause (page 10 of Judge Bredar's Memorandum). The District Court did not differentiate its analysis among the specific different Constitutional provisions upon which we base our challenge. This is particularly crucial, as these provisions afford different rights and obligations—very specific to Congressional districts and elections—and have different legal histories. We specifically developed these claims differently from those claiming undue partisan gerrymandering claims under the Equal Protection Clause—in large part to avoid the infirmities with such claims as documented in *Vieth*, and to focus on avenues with greater potential viability. While the cause for our action is certainly gerrymandering—not limited to partisan purposes--we address the resulting harms to constitutionally protected rights as the basis for judicial intervention rather than that the districts are too partisan.

The principal claims in our Amended Complaint allege abridgement of representational rights afforded by Article I § 2, and of voting rights afforded by Section 2 of the 14th Amendment of the U.S. Constitution. These each require a different analysis than Equal Protection Clause claims of political gerrymandering. The inquiries within *Bandemer* and *Vieth* were relatively narrow—focused on Equal Protection Clause claims of undue political gerrymandering, with the unanswered question of those claims being at what point does classification by political party go from being legitimate to unconstitutional.

We have alternatively addressed more answerable questions such as: When does representation afforded within a district drop to a level that violates Article I § 2? When does influencing the outcome through a district's design and composition exceed the legislature's authority granted by Article I § 4—thereby infringing upon the authority of the people to determine their Representatives under Article I § 2 in violation of the Privileges or Immunities Clause of the 14th Amendment, Section 1? When does the structure and composition of a Congressional district abridge the voting rights of voters within the district in violation of the 14th Amendment § 2?

Our Amended Complaint (paragraphs 2-4 and 13-17) and Response in Opposition (paragraphs 18-26 and 36-40) further address and cite case law in support of our reliance on and interpretations of the constitutional provisions we cite above.

There are two prongs to our claim with respect to representational rights under Article 1 § 2. One is that our right to select our Representatives has been abridged by the legislature unduly influencing the selections, as we have previously noted. The other is that the level of representation afforded within the challenged districts—most acutely within the smaller sections—has been impermissibly minimized. A previous three-judge District Court in *Anne Arundel Republican Central Committee v. State Administrative Board of Election Laws* (781 F.Supp 394, 1991) held that in concept, Article 1 § 2 could well be violated in this manner, even without an Equal Population violation. While the majority did not find that Article 1 § 2 was violated in that specific instance, Judge Niemeyer, in his dissent, would have stricken Maryland's 1991 map for violations of Article 1 § 2 and § 4.

Even in the context of a claim alleging partisan gerrymandering, Justice Kennedy, in his concurrence in *Vieth*, repeatedly suggests that the focus be to measure the resulting burden on representational rights. Our proposed standard, which we address more fully within Issue 4, specifically does this. As our claim and

standard challenge representational and voting rights within Congressional districts, analysis through those more specific provisions of the Constitution is indicated. Our standard is not suited to measuring partisanship within an Equal Protection Clause claim—and it and our claim should not be analyzed as such.

Issue 4. Do we offer an arguable standard for resolving our claims?

Supporting Facts and Argument

Our proposed standard is both discernible and manageable. It also addresses many of the concerns with prospective standards expressed by the Supreme Court in *Bandemer* and *Vieth*. It would set a floor—not an ideal--measuring whether a district affords a minimally permissible level of representation—and similarly, measuring whether the legislature has impermissibly exceeded its authority by overly influencing the outcome through the district's design, effectively substituting its voice over voters' to a repugnant degree. The proposed standard incorporates a feature—real contiguity—that we demonstrate is the most widely accepted and established traditional districting principle that directly bears on quality of representation. This is discernible, as representation is what is guaranteed by Article 1 § 2, it is what the General Assembly is responsible to facilitate under Article 1 § 4, and it is what the General Assembly is commanded

not to abridge by the Privileges or Immunities Clause. The 14th Amendment § 2 similarly commands the General Assembly not to abridge citizens' voting rights.

Similar to precedent on equal population standards, we propose that real or effective contiguity may be breached where a legislature demonstrates that the non-contiguous segments nevertheless afford adequate representation—such as if the non-contiguous segments are demographically or politically compatible.

We discuss our proposed standard in our Amended Complaint (paragraphs 2-3, 17-18, 24-29, and 33) and our Response in Opposition (paragraphs 35(a), 37, 41-42).

We approached the development of our proposed standard for measuring the alleged burden on representational and voting rights by reviewing and addressing comments on standards from prior Court decisions. While those cases and comments focus on standards for partisan gerrymandering, they have been helpful to our development of a standard that is substantial if not compelling.

For example, Judge Bredar's Memorandum (bottom of page 13) cites Justice Kennedy as observing that contiguity and compactness, while promising at the outset, are not altogether sound for measuring a burden on representational rights

and that they cannot promise political neutrality, further citing M. Altman's concerns with a standard incorporating compactness (page 13-14).

The districts we challenge are technically contiguous, and in keeping with Justice Kennedy's comment, that metric does not demonstrate their level of representation. We therefore modified contiguity, as used in our standard, to be "de-facto or real contiguity." This would exclude the challenged districts, which comprise multiple discrete geographic areas, but are technically contiguous through a narrow rope or orifice. The technical contiguity provided by the narrow rope or orifice affords no representational value—and we are seeking to measure representation. De-facto or real contiguity is a more meaningful element of a representation metric than technical contiguity. The paragraphs cited above in our Amended Complaint and Response in Opposition have further discussion and evidence of contiguity's importance and acceptance as an element of representation.

On compactness, the Congressional Research Service and the Heartland Policy Study (Response in Opposition, paragraph 42(b)) noted concerns similar to those expressed by Justice Kennedy and M. Altman, also cited by Judge Bredar. For such reasons, we did not incorporate compactness in our proposed standard.

Judge Bredar also noted Justice O'Connor's concerns with a standard leading to political proportionality (Memorandum, page 10) and the *Vieth* plurality's concerns with a standard leading to discernible group proportionality (page 11).

We note in paragraph 27 of our Amended Complaint that we do not purport to eliminate partisan gerrymandering—or provide political neutrality (to quote Justice Kennedy above), as we are looking more to maintain a minimal level of representation for the voters within a district independent of their political affiliation; requiring de-facto contiguity could not lead to political proportionality. However, it would support the "self-limiting" aspect of political gerrymandering as debated by Justices Scalia and O'Connor in *Bandemer* at 126 and 152. (see Amended Complaint, paragraph 28 on page 21).

Both are evident from the primary requested relief in our Amended Complaint (paragraphs 34-35 on pages 24-26). As we explained in paragraph 27 of the Amended Complaint, we created eight de-facto contiguous districts of which seven have at least a 54% Democratic majority. This maintains seven Democratic-leaning districts as intended by the legislature. Even if they would not lean quite as strongly as the current districts, they afford their citizens a higher level of representation. The difference in the degree of leaning could be thought of as the amount by which the legislature exceeded its authority to determine the outcome.

We would permit demographic, political, socio-economic, or similar commonality among non-contiguous segments to be permitted as providing equivalent representation in lieu of de-facto contiguity; we do not suggest imposing such commonality as an additional requirement. We adapted this from how Federal Courts currently consider Equal Population variances, where traditional districting principles can justify minor variances. We do not suggest permitting de-facto contiguity variances to be justified by any traditional districting principal since, as Justice Kennedy noted in *LULAC*, they do not all always enhance representation:

> The Court has noted that incumbency protection can be a legitimate factor in districting, see *Karcher* v. *Daggett*, 462 U. S., at 740, but experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents. If…incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters.

Also in *LULAC*, the Supreme Court noted testimony linking a district's structure and composition with "adequate and responsive representation."

> As witnesses who know the south and west Texas culture and politics testified, the districting in Plan 1374C "could make it more difficult for thinly financed Latino-preferred candidates to achieve electoral success and to provide adequate and responsive representation once elected."

Our adaptation of commonality to justify lack of contiguity could not lead to the type of discernible group proportionality cited by Justice Scalia in *Vieth*. We further address this (i.e., that we do not lead toward such proportionality) in paragraphs 21(d) and 42 (c) of our Response in Opposition (pages 14 and 33).

While Justice Kennedy raised concerns noted above that prospective standards would not guarantee political neutrality, he has also noted in his *Vieth* concurrence that an acceptable standard is likely to have limited scope:

> I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.

Our standard was developed to address a particularly egregious tool used in gerrymandering that has a particular impact on representation. It is indeed limited in scope and would still afford state legislatures broad discretion in exercising their Article I § 4 responsibilities.

Regarding manageability, our proposed standard is similarly manageable as those currently used to handle equal population cases and perhaps more manageable than

those for racial gerrymandering cases. It is much more manageable than the approach prescribed for partisan gerrymandering under *Bandemer*. Further, Justice Scalia noted in *Vieth* that "courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear."

The point of the above argument is that our proposed standard is an arguable (non-frivolous) if not plausible standard to judicially measure whether minimal representation rights have been afforded under Article I § 2 as well as to measure whether the legislature has exceeded its authority under Article I § 4. It warrants consideration beyond what a single-judge District Court has jurisdiction to provide.

We also raise a procedural concern here. Judge Bredar's Memorandum on pages 12-13 notes that relief may be available contingent upon a reliable standard. The Memorandum then proceeds to analyze the standard we have offered in a manner which appears to be a ruling on the merits. See *Barnett v. Bailey*, Section II. B. ii (11th Circuit, 91-8054, 956 F. 2d 1036). That section of *Barnett*, citing *Bell v. Hood* (327 U.S. 678) (1946), suggests that the analysis of whether the Constitutional provisions on which we rely afford a right of relief "is properly an issue for determination on the merits." As we note in Issue 1 above as to the

proper standard for review and authority of a single-judge District Court, a ruling on the merits of a Congressional redistricting challenge is only within the jurisdiction of a three-judge District Court under 28 U.S.C. § 2284.

This relates to the bandwidth of cases of cases that, under *Neitzke*, may be within the range between non-frivolous and plausible. That band may be particularly wide for redistricting cases where the facts may be relatively plain and undisputed, but where the law remains unsettled and the viability of a standard proposed by plaintiffs or developed by the Court may well determine whether the entire case is dismissed or proved. Where such may be the case, *Barnett* is particularly relevant, and further justifies affording review by a three-judge panel per 28 U.S.C. § 2284.

Issue 5. Was it proper for the single-judge District Court to dismiss our First Amendment claim under Rule 12(b)(6)?

Supporting Facts and Argument

We address our First Amendment claim in paragraphs 5 and 23 (pages 5 and 17) of our Amended Complaint, and in paragraphs 57-60 (pages 41-43) of our Response in Opposition.

Our First Amendment claim, similar to our voting rights claim, depends in part on how broadly to interpret political association rights and voting rights. Some Courts have defined these rights narrowly, along the lines described by Judge Bredar on page 15 of his Memorandum. Others suggest a broader view.

From *Reynolds v. Sims* - 377 U.S. 533 (1964):

> …the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise… Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there… One must be ever aware that the Constitution forbids "sophisticated, as well as simple-minded, modes of discrimination." *Lane v. Wilson,* 307 U. S. 268, 307 U. S. 275…

From Justice Kennedy concurring in *Vieth*:

> If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest…
>
> Where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause...First Amendment analysis concentrates on whether the legislation burdens the representational rights of the

> complaining party's voters for reasons of ideology, beliefs, or political association.

The analysis Justice Kennedy suggests has been similarly used by the Supreme Court as we noted in our Amended Complaint (paragraph 32 on page 23) and Response in Opposition (paragraph 58 on page 42). Where the disposition of a claim hinges on provisions of law for which there are multiple interpretations, it is not appropriate to dismiss the claim for insubstantiality if the claim may be arguable under some interpretations. See *Denton v. Hernandez* (504 U.S. 25, 31) (1992) and *Cotton v. Burgess* 188 Fed. App'x 964, 965 (11th Circuit 2006) citing *Barnett v. Bailey* 956 F.2d 1036, 1041 (11th Circuit 1992).

Issue 6. Our separate claim of an Equal Protection Clause violation was not addressed in the District Court's Memorandum.

Supporting Facts and Argument

The Defendants, in their Motion to Dismiss (D.Md. 13-CV-3233 ECF 13, Pages 19-24), contended that we did not state a plausible claim under the Equal Protection Clause. In our Response in Opposition (paragraphs 49-56 on pages 39-41), we noted that while we opted to focus on other more viable avenues in our Amended Complaint, the facts we alleged in the Amended Complaint would still

plausibly support such a claim. We proceeded to offer this claim and explained how the facts we had earlier alleged could indeed support a finding of partisan gerrymandering under the Equal Protection clause, providing rationale and citing relevant case law. However, Judge Bredar's Memorandum did not analyze or otherwise address this additional claim. Our further claim should have been fully considered by the District Court in its ruling on the Defendants' motion.

Issue 7. Did the single-judge District Court exceed its authority under 28 U.S.C. § 2284 to resolve our case without referring it to a three-judge panel?

Supporting Facts and Argument

This issue has two components: (1) What is the proper standard of review; and (2) Does our case meet that standard?

We have already addressed the first component within Issue 1. We showed in Issue 1 that a single-judge District Court must refer a case to a three-judge panel if it is substantial—i.e., arguable or non-frivolous. A single-judge District Court only has jurisdiction to dismiss a case for insubstantiality.

We have shown in our Amended Complaint, Response in Opposition, and in the foregoing parts of this Informal Opening Brief that our case is substantial. It is not frivolous. It merits the procedures intended by Congress in 28 U.S.C. § 2284, to include consideration by a three-judge panel. See *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 at 715 (1962).

If this Court alternatively finds that Rule 12(b)(6) sets the applicable pleading standard at the single-judge stage of a redistricting challenge, our Amended Complaint, Response in Opposition, and this Informal Opening Brief demonstrate that we have stated a plausible claim under *Iqbal/Twombly* or *Conley v. Gibson*.

Further, we note that "Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be assessed after factual development." *Baker v. Cuomo*, 58 F.3d 814, 818-19 (2d Cir. 1995), vacated in part on reh'g en banc sub nom. *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (citing Wright & Miller, *5A Federal Practice and Procedure: Civil 2d* § 1357 at 341-43 (1990 & 1994 pocket part)). See also, *Electrical Const. & Maint. Co., Inc. v. Maeda Pac. Corp.*, 764 F.2d 619, 623 (9th Cir. 1985):

> The court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is

> important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions.

Our case compares favorably with the two redistricting complaints since the 2010 Census that solely addressed gerrymandering not linked to a racial discrimination claim and are (Tex. Dem. Party) or were (Morris) before three-judge panels. See Morris v. Texas (S.D. Tx. 11-cv-02244; and W.D. Texas 11-cv-615) and Texas Democratic Party Cross-Claim re Perez v. Texas (W.D. Tx. 11-cv-360; ECF 902). It also compares favorably with the few redistricting complaints dismissed by single-judge District Courts since the 2010 Census. See Turcotte v. LePage (D.Me. 11-cv-312) , LaVergne v. Bryson (D.N.J. 11-7117), Gorrell v. O'Malley (D.Md. 11-cv-2975), Martin v. Maryland (D.Md. 11-cv-904 and 11-cv-3443), and Olson v. O'Malley (D.Md. 12-cv-240).

Relief Requested

We respectfully request that the Court of Appeals vacate the April 8, 2014 Order of the District Court and remand this case to a three-judge panel of the District Court for further proceedings under 28 U.S.C. § 2284.

Prior Appeals

We have not previously filed any other cases in this Court.

Respectfully submitted,

(signature provided on scanned page)

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