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

PLAINTIFFS-APPELLANTS' RESPONSE TO WAKE COUNTY BOARD OF ELECTIONS PETITION FOR REHEARING *EN BANC*

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The panel decision does not relax pleading standards nor misapply well-established one person, one vote doctrine. Pursuant to Fed. R. App. P. 35(b)(1), rehearing *en banc* is not warranted here. The Court's opinion, finding that the Complaint states a claim for relief for violation of the one person, one vote requirement of the Equal Protection Clause of the Fourteenth Amendment, is squarely in line with Supreme Court precedent establishing pleading requirements. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The panel decision is also entirely consistent with Supreme Court decisions and this Circuit's precedent on the elements of a one person, one vote claim. *See Cox v. Larios*, 542 U.S. 947 (2004); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). In arguing for rehearing, Defendant seeks to recast Plaintiffs' case as a partisan gerrymandering claim and then asserts that dismissal is warranted because such claims are non-justiciable. However, even Judge Motz's dissenting opinion in this case does not adopt that argument. *See* Op. 30-41, May 27, 2015, ECF Doc. 46 (hereinafter "Op.").

The Complaint contains detailed factual allegations, not merely "labels and conclusions," *Twombly*, 550 U.S. at 555, that Session Law 2013-110, creating new districts for the Wake County Board of Education, contains deviations from the equal population requirement that are significantly higher than necessary to achieve any legitimate governmental purpose, resulting in the unconstitutional

dilution of the voting strength of voters in over-populated districts. J.A. 28-29. The Defendant has "fair notice of what the … claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555, (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

STATEMENT OF THE CASE

In 2011, following release of the decennial census redistricting data, the Wake County Board of Education redrew its nine single-member districts to comply with the one person, one vote requirement. J.A. 18. The districts they drew each had less than 1% deviation from the ideal district size, and the overall population deviation was 1.66%. J.A. 20. Those districts were used to elect members of the Board in 2011 and 2013. J.A. 20-22. In 2013, the North Carolina General Assembly enacted local legislation changing the method of election in numerous ways. The new law established seven single-member districts with an overall deviation of 7.11% and two super-districts that divide the county into an urban district and a donut shaped rural district, with an overall deviation of 9.8%. J.A. 11. The new districts will first be used in elections in 2016. J.A. 22.

Plaintiffs are residents, or have members who are residents, of Wake County, North Carolina, who are registered to vote. J.A. 12-15. Under the new district system, each of the Plaintiffs lives in at least one over-populated district relative to other voters, and some Plaintiffs live in over-populated districts in both

the seven-member district plan and in the two-super district plan. J.A. 14 (¶15, William B. Clifford; ¶17 Greg Flynn; ¶18 Beverly S. Clark). Plaintiffs allege that as voters in over-populated districts, their votes are "weighted less than votes of citizens in districts that are unjustifiably under-populated," J.A. 11, and they are harmed by "having to participate on an unequal footing in an election system that deprives them of equal representation on the Board of Education," J.A. 28. They allege that advancing partisan interests "is not a legitimate state interest that justifies the population deviations." *Id.* They further allege that the population deviations are arbitrary in that the deviations "do not further any legitimate redistricting criteria." *Id.* The Complaint alleges that the new districts are less compact and split more precincts than the prior districts, *id.*, as evidence that legitimate redistricting principles such as compactness and respecting subdivision boundaries do not explain the population deviations.

Plaintiffs seek injunctive relief to prohibit the use of election districts that violate their right to participate equally in elections to the Board of Education, and to allow the use of election districts that comply with the one person, one vote requirement of the state and federal constitutions. J.A. 31.

Defendants State of North Carolina and Wake County Board of Elections filed a joint Answer. J.A. 39. Defendant North Carolina simultaneously filed a motion to dismiss on sovereign immunity grounds and for failure to state a claim,

J.A. 36, and Defendant Board of Elections filed a motion to dismiss for failure to state a claim. J.A. 33. Plaintiffs filed a motion to amend the Complaint to substitute state officials in their official capacities. J.A. 52. On March 17, 2014, the district court denied Plaintiffs' motion and granted Defendants' motions, dismissed the action in its entirety, and entered judgment for Defendants. J.A. 92.

The district court concluded that the Wake County Board of Elections was the only party with responsibility for implementing Session Law 2013-110, and therefore is the only proper defendant. J.A. 84. The district court further held that the Complaint failed to state a claim for violation of the one person, one vote requirement because "[t]he Supreme Court has expressly rejected the argument that the possibility of drafting a 'better' plan alone is sufficient to establish a violation of the one person, one vote requirement." J.A. 87. The court concluded that "[t]he remainder of plaintiffs' alleged facts state a political gerrymandering claim." J.A. 88. Those claims, the court held, are nonjusticiable following *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

On appeal, the district court's ruling dismissing the State of North Carolina and denying the motion to amend was affirmed. Op. 7 n. 2; 10. The Court also held that Plaintiffs have stated a claim for relief under the one person, one vote requirement of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the equal protection guarantees of the North

Carolina Constitution. Op. 3. The majority opinion followed well-settled principles: "'accept[ing] as true all of the factual allegations contained in the complaint' and drawing 'all reasonable inferences in favor of the plaintiff.'" Op. 12 (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)). The Court held that "Plaintiffs allege in detail a redistricting that resulted in a maximum population deviation of nearly 10%. Plaintiffs describe how and why that deviation was unjustified, discriminatory, and unconstitutional… [T]hey plead facts indicating that the apportionment 'had a taint of arbitrariness or discrimination.'" Op. 18-19 (quoting *Daly v. Hunt*, 93 F.3d at 1220).

With regard to whether the Complaint in this case sufficiently identified a desire to favor rural and suburban voters over urban voters, the Court observed that even the district court recognized that "Plaintiffs allege a favoritism of rural areas of the county over urban areas," Op. 17. In rejecting defendant's argument that a complaint alleging that partisan favoritism is a discriminatory reason for population deviations actually states a non-justiciable partisan gerrymandering claim, the Court held that *Cox v. Larios*, which invalidated a redistricting plan where population deviations were driven in part by discriminatory partisan considerations, is "illustrative of the district court's error in dismissing Plaintiffs' complaint." Op. 21. The Court further held that even if Plaintiffs had pled only a

political gerrymandering claim, the district court was wrong to conclude that such claims raise non-justiciable political questions. Op. 25-26.

ARGUMENT

I. THE PANEL DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT ON RULE 12(B)(6) DISMISSAL STANDARDS

In concluding that Plaintiffs sufficiently plead facts which, if true, state a claim for relief for violation of the one person, one vote principle arising from the federal and state constitutional guarantees of equal protection, the Court's opinion properly applied *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435 (4th Cir. 2011); and is consistent with *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *See* Op. 12-13 & 16 n.4. Collectively, those precedents require a plaintiff to 1) state a claim to relief that is plausible on its face; and 2) give the defendant fair notice of what the claim is and the grounds upon which it rests. *See Iqbal*, 556 U.S. at 679; *Twombly*, 550 U.S. at 555; *E.I. du Pont de Nemours*, 637 F.3d at 440. *See also Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1322 n.12 (2011) ("[T]o survive a motion to dismiss, respondents need only allege enough facts to 'state a claim to relief that is plausible on its face.'") (quoting *Twombly*, 550 U.S. at 570). A court must accept as true all of the factual allegations in the complaint, and draw all reasonable inferences in favor of the plaintiff. *See Iqbal*, 556 U.S. at 678; *E.I. du Pont de*

Nemours, 637 F.3d at 440 (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009)).

Here, the elements of a claim for violation of the one person, one vote standard are clear. Where the overall population deviation in a redistricting plan is less than 10%, the presumption of constitutionality is overcome by the plaintiff's showing that the redistricting process had a "taint of arbitrariness or discrimination." *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). Thus, a plaintiff must allege facts demonstrating that the redistricting plan was not supported by legitimate, neutral, consistently applied standards, but rather was the product of "bad faith, arbitrariness, or invidious discrimination." *Id.* at 1222.

The panel majority found that the Complaint in this case did just that by alleging that the imbalanced districts in the redistricting plan for the Wake County School Board were the product of a desire on the part of the legislature to give some voters a greater voice in the election of school board members, and to give other voters less voice. Specifically, the legislature intended to favor rural voters over urban voters; to favor voters of one political party over those of another; and to disadvantage certain incumbents while benefitting others. Op. 16-18. The requirement that election districts be the same size is intended to ensure that every voter's vote carries the same weight, hence, that principle can only be violated for

neutral reasons consistently applied. *See Reynolds v. Sims*, 377 U.S. 533, 563, 565 (1964). Following subdivision boundaries, for example, to keep all of the City of Garner in one district, or to keep precincts whole, are the kinds of neutral principles that might justify higher than necessary population deviations. But violating the one person, one vote principle to obtain a particular partisan outcome or to give greater weight to the votes of voters who favor a particular policy is discriminatory and unjustified. *See Cox v. Larios*, 542 U.S. 947, 948 (2004).

Defendant contends that the panel opinion is in conflict with *Iqbal* and *Twombly* in two respects: 1) by holding that motions to dismiss are disfavored if the complaint sets forth a novel legal theory, and 2) by improperly considering whether a defendant has notice of a plaintiff's claim in determining whether the allegations of the complaint are sufficient. Both arguments are wrong because they misconstrue the majority opinion.

First, the Court's holding does not turn on whether a novel legal theory should survive a motion to dismiss. While the Court discusses other circuit precedent holding that dismissals under Rule 12(b)(6) should be disfavored where the complaint asserts a novel legal theory, Op. 12-13, later in the opinion the Court notes that in fact, it is Defendant's position that dismissal is warranted here that has no support in case law, Op. 19. The Court concluded that Plaintiffs' claims are

similar to those successfully pled in *Cox v. Larios*, and found Defendant's attempt to distinguish that case unavailing. Op. 21-24.

Moreover, the two cases Defendant relies on in arguing that this Court has not adopted any such "cautionary gloss" on the standard for Rule 12(b)(6) dismissals are completely inapposite. In *Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002) the plaintiff's factual circumstances may seem novel to some, but his legal claim was not. In that case, Daniel Veney's legal claim was a standard equal protection claim that he was being treated differently from other similarly situated individuals, and that his unequal treatment was the result of intentional or purposeful discrimination. *Veney*, 293 F.3d at 730. The Court affirmed dismissal of the complaint not because it was based on a novel legal theory, but because Veney failed to allege facts that, if true, "would demonstrate that the disparate treatment lacks justification under the requisite level of scrutiny." *Id.* at 731.

Defendant's reliance on *Braun v. Maynard*, 652 F.3d 557 (4th Cir. 2011) is even more confusing. *Braun* involved a standard application of qualified immunity doctrine to a prison's use of new technology. *Id.* 652 F.3d at 560. The Court's opinion in this case is not contrary to any holding in *Braun.*

With regard to novel claims, the more instructive case is *Republican Party v. Martin*, 980 F.2d 943 (4th Cir. 1992), where this Court denied a petition for rehearing and for rehearing *en banc* after a panel decided that the Republican Party

of North Carolina adequately stated a claim for relief for partisan gerrymandering in the election of state trial court judges, relying on the plurality opinion in *Davis v. Bandemer*, 478 U.S. 109 (1986). *See Martin*, 980 F.2d 943, *reh'g denied sub nom. Republican Party v. Hunt*, 991 F.2d 1202 (4th Cir. 1993). The plaintiffs' legal claim in that case involved the completely new legal proposition that *Bandemer*, which dealt with state legislative elections, opened the door to applying the same standards to judicial office, when the Supreme Court previously held in *Wells v. Edwards*, 409 U.S. 1095 (1973), that constitutional one person, one vote claims do not apply to judges. *Martin*, 980 F.2d at 951, 954. Indeed, the majority opinion here is not in conflict with *Iqbal*, *Twombly*, or this Court's precedents on the standards governing motions to dismiss for failure to state a claim.

Defendant argues that the Court's opinion considers the fact that the defendant and the court below have notice of the plaintiff's claim a "proxy" for whether the factual allegations in the complaint are sufficient. That is not accurate. Instead, what the majority held was that "Defendants' concession [that Plaintiffs allege the plan favors rural over urban voters] highlights that Plaintiffs here fulfilled Rule 8's core requirement: they gave the defendant fair notice of their claims." Op. 17 (citations omitted). The opinion goes on to explain in great detail why the allegations of the Complaint are sufficient to establish a one person, one vote claim.

Finally, even if the dissenting opinion were correct that Plaintiffs' complaint utterly fails because it does not contain the words "bad faith," "arbitrariness," or "invidious discrimination," the correct remedy is not to dismiss the Complaint entirely, but rather to allow Plaintiffs an opportunity to amend. Recently the Supreme Court granted certiorari and summarily reversed, in a per curiam opinion, a ruling in which the lower courts had dismissed a plaintiff's complaint for failure to invoke 42 U.S.C. § 1983 as the basis for the claim. *See Johnson v. City of Shelby*, 135 S. Ct. 346, 346 (2014) (holding that plaintiffs only need to inform defendants of the factual basis of their claim, and it is unnecessary to set out a legal theory for the plaintiff's claim for relief). In *Johnson*, citing Fed. R. Civ. P. 15(a)(2), the Court instructed that "[f]or clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to §1983." *Johnson*, 135 S. Ct. at 347.

II. PLAINTIFFS ALLEGE A ONE PERSON, ONE VOTE CLAIM, NOT A PARTISAN GERRYMANDERING CLAIM

Defendant's second reason for seeking rehearing *en banc* is that political gerrymandering claims are non-justiciable after *Vieth v. Jubelirer*, 541 U.S. 267 (2004). As the majority opinion ably explains, this view is incorrect. Op. 25-27. Most importantly, Defendant's argument that rather than a one person, one vote claim, Plaintiffs' Complaint actually alleges a political gerrymandering claim is

sophistry and cannot stand. If Plaintiffs alleged that the nearly 10% deviations in district size, resulting in one district having nearly 45,000 more people than another, J.A. 26, were based on the invidious intent to discriminate against African-American voters, the Complaint might be said to "contain the hallmarks of" racial bias, but it would still be a one person, one vote claim, for which the remedy would be elections from districts that do not have such large deviations. A one person, one vote claim where the deviations are 9.8%, and 7.11%, requires allegations concerning the reason for the deviation. Those reasons do not "covert" the claim to some other type of claim. The Complaint would not "in essence" be alleging a racial gerrymandering claim merely by pointing out the type of unlawful discrimination motivating the departure from the equal population principle.

Defendant asserts that the panel opinion allows the case to proceed in the absence of judicially discernable and manageable standards to adjudicate partisan gerrymandering claims. However, the law governing the claim Plaintiffs actually assert is very clear. The one person, one vote principle applies to school boards. *Avery v. Midland Cnty.*, 390 U.S. 474 (1968). Local governments must make an honest and good faith effort to construct districts as close to equal population "as is practicable". *Daly*, 93 F.3d at 1217. Districts above 10% deviation are presumptively unconstitutional unless shown to be justified by valid, neutral state policies, evenly applied, *see Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ([a]ny

number of consistently applied legislative policies might justify some variance, including, for instance, making district compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives."); *see also Tennant v. Jefferson Cnty. Comm.*, 133 S. Ct. 3 (2012) (approving deviations justified by neutral and legitimate governmental interests). Districts with overall deviations below 10% are presumptively constitutional unless shown to be the result of bad faith, arbitrariness or discrimination. *Daly*, 93 F.3d at 1222.

The majority opinion appropriately follows *Cox v. Larios*, 542 U.S. 947 (2004), for the propositions that the Supreme Court has not created a 10% safe harbor below which all redistricting plans are inherently constitutional; and that the discriminatory treatment of incumbents, and allowing citizens in certain areas to have disproportionate electoral influence, are not legitimate and neutral reasons for population deviations. Op. 22-23.

The parade of horribles predicted by Defendant to result from the majority opinion is inaccurate and irrelevant. The panel opinion does not invite courts to wade into political thickets or invite claims for pure political gerrymandering from every corner of the political spectrum for *de minimis* population deviations. *Daly v. Hunt*, permitting such claims, has been good law in this Circuit since 1996, and

no such deluge has flooded the courts.[1] Indeed, determining whether a state policy is neutral and evenly applied, as a court must do in a one person, one vote case, does not invite courts to adopt or favor one particular policy over another. Much as government regulation of speech must be content-neutral, government structuring of election districts must provide for equal representation of every person, no matter what their location, political affiliation, policy preferences or favorite candidates. *Reynolds*, 377 U.S. at 565-68. It is the state policy underlying population deviations among districts that the court must evaluate when there is evidence of bad faith, arbitrariness or discrimination, not the particular policy preferences of voters and candidates. Courts routinely examine whether a redistricting plan's deviations from the one person, one vote principle are the product of appropriate redistricting criteria. *See, e.g.*, *Arizona State Legis. v. Arizona Indep. Redist. Comm'n*, No. 13-1314, 2015 U.S. LEXIS 4253, at *54 (U.S. Jun. 29, 2015).

Finally, Defendant's fears about open-ended burdens on Boards of Election are no justification for the maintenance of an unconstitutional redistricting plan

[1] Defendant suggests that "additional litigation has already materialized," Pet. at 11 n.1. However, the case referenced there is, in fact, a challenge to the exact same redistricting plan as challenged here, because the North Carolina General Assembly, in 2015, enacted the same districts for the Wake County Board of County Commissioners. *See* Session Law 2015-4. It can hardly be held against Plaintiffs that when the exact same unconstitutional plan is imposed for another local body, a court challenge follows.

that privileges some voters at the expense of others. When they go to vote, Plaintiffs are entitled to a level playing field, not one tilted against them.

III. THE STATE OF NORTH CAROLINA IS NO LONGER A PARTY TO THIS ACTION

The State of North Carolina was dismissed below, Plaintiffs' motion to amend their complaint to add state officials sued in their official capacities was denied and the Court on appeal affirmed that ruling. Op. 7 n.2 & 10. Plaintiffs have not sought rehearing or rehearing *en banc* on that question. Defendant Wake County Board of Elections likewise did not seek rehearing or rehearing *en banc* on that issue. Therefore, the State of North Carolina is not a party to this action and should not participate as a party.

CONCLUSION

For all the reasons given above, the petition for rehearing *en banc* should be denied.

Respectfully submitted this 29th day of June, 2015.

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

1. This Response complies with the applicable page limitations of Fed. R. App. P. 32(a)(7)(A) and 35(b)(2) because it contains 15 pages, excluding material exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This Response 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 Response has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Respectfully submitted this 29th day of June, 2015.

/s/ Anita S. Earls
Anita S. Earls

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34, Plaintiffs-Appellants submit that while this case is not appropriate for rehearing, if the Petition for Rehearing *en banc* is granted, oral argument would assist the Court. However, rehearing should be limited to the question of whether the Complaint states a claim for relief and not whether the Wake County Board of Elections is the only proper party, as Defendant prevailed on that issue and Plaintiffs have not sought rehearing on that question. Similarly, the State of North Carolina is no longer a party in the case and should not be heard at oral argument. Finally, Plaintiffs-Appellants request expedited hearing because of the impending implementation in 2016 of the redistricting plan at issue here.

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:

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