No. 14-1417

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

O. JOHN BENISEK, et al.,

Plaintiffs-Appellants,

v.

BOBBIE S. MACK, Chair,
Maryland State Board of Elections, et al.,

Defendants-Appellees.

On appeal from the U.S. District Court for the District of Maryland, at Baltimore
James K. Bredar, District Judge
(D.Md. 13-CV-3233-JKB)

PLAINTIFFS-APPELLANTS' INFORMAL REPLY BRIEF

July 2, 2014

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Case Summary

We have challenged Maryland's Congressional Districts (Exhibit 1 to our Complaint, District Court ECF 1), whereas we alleged in our Amended Complaint that the structure and composition of specific districts constitute an abridgment 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. We further alleged that the structure and composition of the districts also constitute a violation of the Equal Protection Clause of the 14th Amendment § 1.

Summary of Issues

We raised seven specific issues for review in our Informal Opening Brief, which Appellees have condensed into a single issue in page 2 of their Response (ECF 14, page 6 of 17). We respectfully suggest that the seven issues we separately raised involve distinct topics that warrant individual review and analysis. In this reply, we address the topics as laid out in pages 4-9 of the Board (of Election)'s Response Brief (ECF 14, pages 8-13): (I) Court of Appeals Standard of Review; (II) District Court Legal Standard; (III.A) District Court Analysis of our Claims Under Article 1 §§ 2 & 4, and the Privileges or Immunities Clause and Section 2 of the 14th Amendment; and (III.B.) District Court Analysis of our First Amendment Claim.

Argument

I. Court of Appeals Standard of Review

The Board suggests that this Court, in its *de novo* review, be limited to determining whether we state a claim pursuant to Rule 12(b)(6). While we contend and will later argue that we have indeed stated such claims, we have raised other relevant issues, beginning with the legal standard of review used by the District Court. Obviously this Court would be unable to address this and other issues critical to the resolution of this case were it to limit its review as suggested by the Board.

II. District Court Legal Standard

We have addressed this at length in our Informal Opening Brief (ECF 11-1, p. 5-9). The three-judge panel of this Court that decided *Duckworth v. State Admin. Board of Election Laws* (332 F.3d 769, 4th Cir. 2003) cited *Simkins v. Gressette* (631 F.2d 287, 4th Cir. 1980). *Simkins* cited *Goosby v. Osser* (409 U.S. 512). From *Goosby*:

> previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject…

In paragraph 29 of *Simkins*, this Court found that the case at issue in *Simkins* presented "no substantial claim" as prior decisions "inescapably render the claim frivolous. *Goosby* p. 518." As we noted on page 8 of our Opening Brief, the Supreme Court further clarified the definition of "substantial," specifically holding in *Neitzke v. Williams* (490 U.S. 319) that an arguable or non-frivolous question is met by a lower standard than that needed to survive a Rule 12(b)(6) challenge, even under the lower 12(b)(6) standard under *Conley v. Gibson* (355 U.S. 41) that applied at the time of *Neitzke* and *Duckworth*. We did not just "theorize" this as suggested in the Board's Response Brief at page 6. *Denton v. Hernandez* (504 U.S. 25) later emphasized that dismissals for insubstantiality should only be ordered when the legal theories are "indisputably meritless" or when factual allegations are "clearly baseless." Interpreting *Duckworth* to require our action to

meet the current 12(b)(6) standard under *Wag More Dogs v. Cozart* (680 F.3d 359) in order to be referred to a three-judge panel under 28 U.S.C. §2284 would conflict with *Simkins*, *Goosby*, *Neitzke, and Denton*—which *Duckworth* could not have overturned. Such a holding would be unique, with no counterparts by other Circuits. Only two post-2010 redistricting cases outside the Fourth Circuit were dismissed for insubstantiality. *Lavergne v. Bryson* (D.NJ. 11-7117) challenged the national number of Congressional districts and *Garcia v. 2011 Legislative Reapportionment Commission* (3rd Cir., 13-2319) challenged legislative districts. The District Court dismissed *Garcia* based on *Duckworth*, but the Third Circuit used *Page v. Bartels*, 248 F.3d 175, 193, n.12 (3rd Cir. 2001)—based on *Goosby*. Less plausible cases from other Circuits go to three-judge Courts almost without question. See cases cited on page 29 of our Opening Brief as well as *League of Women Voters v. Quinn* (N.D. Ill, 11-cv-5569, ECF 34) as examples.

Judge Bredar (Memorandum, page 3), relied on 28 U.S.C. §2284(b)(3) as authority for a single judge District Court to dismiss a case under Rule 12(b)(6). However, it is clear from the structure and content of 28 U.S.C. §2284(b)(3) that it applies only where a three-judge panel has been or will be designated, and that the single judge may not dispose of the case. "Any action of a single judge may be reviewed by the full court any time before final judgment." 28 U.S.C. §2284(b)(3) allows a single

judge to act for the Court where it would be inefficient and undue for all three judges on a District Court panel to take such actions prior to the trial. Examples include the actions performed by Judge Titus prior to the hearing by the three-judge panel in *Fletcher v. Lamone* (D.Md. 11-CV-3220, 831 F.Supp.2d 887), of which his ruling on substantiality was affirmed by the full Court under this section.

III.A. District Court Analysis of our Claims Under Article 1 §§ 2 & 4, and the Privileges or Immunities Clause and § 2 of the 14th Amendment

We have stated a substantial and cognizable claim that the structure and composition of the current Maryland Congressional districts abridges our rights under Article 1 § 2 and the 14th Amendment § 2, and that such abridgment directly results from the legislature exceeding its authority under Article 1 § 4. We have addressed this at length in our Opening Brief and summarize below.

The abridgment of Article 1 § 2 includes both the undue diminution of our role in selecting our Representatives as well as the undue diminution of the effectiveness of representation afforded by these districts. Both should be held impermissible.

In *Wesberry v. Sanders* (376 U.S. 1), the Supreme Court held that "the command of Art. I, § 2 that Representatives be chosen 'by the People of the several States' means that, as nearly as is practicable, one man's vote in a congressional election is

to be worth as much as another's." It is even more discernible that this command means that Representatives may not be chosen by the legislature; our influence in the choosing our Representatives must not be diminished by the State's assuming this role, such as by unduly influencing the selection of our Representatives as we allege. That brings us to Article 1 § 4. We cited case law on the limits of state authority granted by Article 1 § 4 in our Opening Brief (pages 12-13). See cites to *Cook v. Gralike* (531 U.S. 510), *U.S. Term Limits v. Thornton* (514 U.S. 779), *Smiley v. Holm*, 285 U.S., at 366, 52 S.Ct., at 399, and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 544, 550, 93 L.Ed.2d 514 . Sufficient Article 1 standards existed to enable the Court to make those judgments.

Not only is the state legislature limited from unduly influencing the outcome of Congressional elections, as discussed above, it is also limited from unduly diminishing the effectiveness of representation afforded to citizens by their elected Representatives. This is discernable from the language of Article 1 § 2 itself—as the elected Members are "Representatives." "The House of Representatives shall be composed of Members chosen every second Year by the People…"

We now focus on these "Representatives" and their constitutionally-protected role in representing us. It is well-established, such as through *Wesberry*, that the People have representational rights provided by Article 1 § 2. However, the scope

of such constitutionally-protected representational rights it is not well-established. *Reynolds v. Sims* (377 U.S. 533, 1964) held that the Equal Protection Clause mandates equal populations for legislative districts, further holding at 565 that "the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment…" *Wesberry* and its progeny through *Karcher v. Daggett* (462 U.S. 725 at 730, 1983) held that equal population is a protected element of Article 1 § 2 representational rights for Congressional districts. But there is no indication that equal population is the only such protected element; equal population was the representational element at issue in those cases. It is discernible from Article 1 § 2, *Wesberry*, and *Reynolds* that the effectiveness of representation is just as protected from undue abridgment as equal representation. We discuss relevant points from *Anne Arundel Republican Central Committee v. State Administrative Board of Election Laws* (781 F.Supp 394, 1991), on page 16 of our Opening Brief and pages 11-15 (paragraphs 18-22) of our Response in Opposition (Dist. Ct. ECF 18), and from *Gaffney v. Cummings* (412 U.S. 735) on page 16 (paragraph 24) of our Response in Opposition.

If the Maryland General Assembly has designed the challenged districts in a manner to unduly influence the outcome of their elections, and/or disfavored voters of the minority party, it has exceeded its Article 1 § 4 authority and, in so doing,

abridged our Article 1 § 2 rights to choose our Representatives. Similarly, if the General Assembly has designed the challenged districts in a manner that unduly minimizes the effectiveness of the representation they afford, it has also abridged our Article 1 § 2 rights to effective representation. Such actions further violate the Privileges or Immunities Clause of the 14th Amendment. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" such as those protected by Article 1 § 2.

We have offered a prospective standard to adjudicate when districts enacted pursuant to Article 1 § 4 have impermissibly abridged representational rights protected by Article 1 § 2, or have impermissibly exceeded the authority granted by Article 1 § 4 by unduly influencing the outcome of elections or disfavoring a class of voters—be they the voters of the smaller segments of the challenged districts, or Republican voters, as such intent was established in *Fletcher v. Lamone*. We addressed our proposed standard in Issue 4 of our Opening Brief.

Contrary to the contention in the Board's Response Brief at page 8, we have not relied on the challenged districts' "unusual shape" or "bizarre shape" to justify our claims, as did *Duckworth*. Rather we identified and applied limited factors most discernibly relevant to representation. See Issue 4 in our Opening Brief at pages

17-24. Our case is also distinguished from *Duckworth* in that *Duckworth* appealed only a claim under the Equal Protection Clause. The *Duckworth* appellant did not offer a proposed standard, but did claim that those challenged districts were not technically contiguous--when they were. We claim that the districts at issue here are not effectively or de-facto contiguous, using a definition of such contiguity that does not accept a ribbon or narrow orifice as effecting any real contiguity in a manner supporting representation. As we note, this addresses Justice Kennedy's concerns on the use of technical contiguity, as that may not reflect representation. Our case is distinguished from *Duckworth* and *Gorrell* in that those cases claimed that Anne Arundel Co. and Maryland farm communities, respectively, were unduly divided. We do not claim representational rights for Counties, farms, or other specific communities; we instead investigated the representation afforded to the voters in the various segments of the challenged districts—a critical difference. Our proposed standard would allow for common interests among voters of non-contiguous segments to afford representation in lieu of that by effective contiguity.

Far from being precluded by prior decisions, our claims have been informed by relevant prior decisions. We have shown here and in prior pleadings that some elements of our claims are well-supported by prior decisions, while other elements rely on novel or unsettled areas of law that are discernible, arguable, and plausible.

Alternatively, our standard should be considered at least probative of whether undue influence has been imposed or effective representation unduly abridged.

In *Kerr v. Hickenlooper* (12-1445, 10th Cir., 2014), the Tenth Circuit noted that

> "judicially manageable standards must include—but cannot be limited to—precedent. We must not hold a case nonjusticiable under the second *Baker* test without first undertaking an exhaustive search for applicable standards" citing *Alperin v. Vatican Bank* (410 F.3d 532, 532, 9th Cir., 2005).
>
> We are unwilling to allow dicta suggesting that the Guarantee Clause is per nonjusticiable to become a self-fulfilling prophecy; in order to develop judicially manageable standards, courts must be permitted to reach the stage of litigation where such standards are developed.

Since Judge Bredar held on page 14 of his Memorandum that the challenged districts "may well…fail to provide fair and effective representation for all citizens," the District Court should have undertaken a more exhaustive search to identify or develop an applicable standard, if the proposed standard was deficient, or allowed further development of the record by a three-judge panel of that Court. That Congress has authority to set policies for districting under Article 1 § 4 does not relieve Courts of responsibility to enforce minimal rights under Article 1 § 2. Courts have sufficient standards to enforce limits on Article 1 § 4 authority, as shown above. Article 1 standards may differ from those relevant to *Bandemer*, which addressed undue partisan discrimination under the Equal Protection Clause.

We would like to clarify that our proposed standard would not remove or obviate the first prong of the test currently used to address population variances under *Karcher v. Daggett*. Our proposed standard addresses other representational rights. Looking back at earlier decisions upon which *Karcher* is based, it is clear that the second prong, whereby population variances can be justified by showing they are "necessary to achieve some legitimate goal," is based on the latitude earlier allowed states in developing legislative districts by *Reynolds.* It is not based on the "legitimate goal" affording representation to offset that lost due to the variances. However, *Karcher* does support the manageability of our proposed standard.

We have separately alleged that the structure and composition of the challenged districts unduly abridges the voting rights of voters within the smaller segments of these districts—such segments being a class created by the legislature—and of Republicans. The right to vote for—i.e., to choose—Representatives is protected as an elements of representational rights by Article 1 § 2: "The House…shall be composed of Members chosen…by the People." Our vote for Representatives is also protected by the 14th Amendment § 2:

> "…when the right to vote at any election for the choice of…Representatives in Congress…is denied…or in any way abridged…"

Similar to the scope of representational rights, the scope of protection of the voting rights afforded by these provisions, and by the First Amendment—which we

discuss later in section III.B—remains arguable. It is clear that a law stating that voters of the smaller sections of each challenged district—or that Republicans—may not cast a ballot for their Representative would clearly be in violation. Our pleadings contend and cite case law holding that voting rights extend further than casting a ballot. While it is well-established that the right to vote is clearly not a right to win, there is a point upon which the state's intentional diminution of the ability to win, such as through the structure and composition of the districts, becomes an abridgment of the right to vote. This is discernible through the 14th Amendment § 2: "denied…or in any way abridged." Outright denial is clearly not the only protected element of voting contemplated by the 14th Amendment § 2. Also, there is similarity in the language of the 14th Amendment § 2 and of the 15th Amendment. Judge Niemeyer wrote in *Fletcher* at page 29 that

> It is unclear whether the Fifteenth Amendment applies to vote dilution claims like the one being brought by plaintiffs here. The Supreme Court has raised the issue, but has not yet issued a definitive holding. See *Voinovich v. Quilter*. 507 U.S. 146, 159 (1992).

From *Committee for a Fair and Balanced Map v. Illinois* (N.D. Ill. 11-cv-5065, ECF 98) at page 13:

> The law isn't as straightforward as the Board of Elections sees it…The Supreme Court has not decided whether the Fifteenth Amendment applies to vote dilution claims. *Voinovich*, 507 U.S. at 159. The language the Board of Elections cites in *Bossier Parish Sch. Bd.*, 528 U.S. at 334 n.3, doesn't resolve the issue; it simply keeps the issue undecided. As one court of appeals said, "We simply cannot assume that the [Supreme] Court's silence

> and reservation on these issues clearly forecloses Plaintiffs' Fifteenth Amendment claim" *Page v. Bartels*, 248 F.3d 175, 193, n.12 (3rd Cir. 2001).

Therefore it is at least plausible that both the 14th Amendment § 2 as well as Article 1 § 2 protect our right to vote from any undue abridgment or dilution. We cite and discuss further passages supporting a broad scope of the right to vote from *Reynolds* and *Wesberry* in paragraphs 30-31 on pages 19-21 of our Response in Opposition to Defendants' Motion to Dismiss (District Court ECF 18).

Exercising its Article 1 § 4 authority, Congress enacted 2 U.S.C. § 2c in 1967. This provision prohibits at-large voting for Representatives, and was enacted to prevent the dilution of minority votes after the passage of the Voting Rights Act. A map that would provide for the election of one Representative by Maryland's highly-Republican first district and the election of Maryland's remaining seven Representatives at-large by the largely-Democratic remainder of the State would clearly violate 2 U.S.C. § 2c. Establishing the remaining seven single-member districts from disparate segments across the State, such that each is politically similar to that of the highly Democratic at-large remainder, while not a violation of the letter of 2 U.S.C. § 2c, is not in keeping with its intent. At some point to which the districts mimic the at-large model, 2 U.S.C. § 2c would be effectively violated.

III.B. District Court Analysis of our First Amendment Claim

We have addressed our First Amendment claim at length in our Opening Brief within Issue 5 at pages 24-26. The scope of protections afforded by the First Amendment is similarly arguable as for voting rights as discussed in III.A. above. Again we question at what point the state's intentional diminution of the effect of our vote, speech, or political association becomes an impermissible infringement.

Justice Kennedy had to have been fully aware of the scope and state of First Amendment law when he suggested in his *Vieth* concurrence (541 U.S.) that

> these allegations involve the First Amendment interest in not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. See *Elrod v. Burns*, 427 U.S. 347 (1976)… 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.

There may be no inherent inconsistency between our contention that the First Amendment plausibly offers relief and the Board's cite from *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981) in their Response Brief at page 9 that the First, Thirteenth, Fourteenth, and Fifteenth Amendments offer similar degrees of protection of voting rights. First Amendment analysis, in keeping with Justice Kennedy's *Vieth* concurrence, may provide a more fruitful determination of the protection afforded by all four of these Amendments than the modes of analysis

used for the other three. For example, in *Wag More Dogs*, this Court looked to determine whether the sign regulation at issue was content-neutral or if it favored or disfavored specific groups as a critical factor in its First Amendment analysis.

Also, in Anderson v. Celebrezze (460 U.S. 780, 792), the Supreme Court noted:

> It is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Clements v. Fashing,* 457 U. S. 957, 457 U. S. 964 (1982) (plurality opinion), quoting *Lubin v. Panish,* 415 U.S. at 415 U. S. 716. A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and -- of particular importance -- against those voters whose political preferences lie outside the existing political parties. *Clements v. Fashing, supra,* at 457 U. S. 964-965 (plurality opinion)…the primary values protected by the First Amendment -- "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan,* 376 U. S. 254, 376 U. S. 270 (1964) -- are served when election campaigns are not monopolized by the existing political parties.

Anderson suggests that designing districts to monopolize election campaigns for Representatives by one political party also implicates the First Amendment.

Further to *Anderson* and to *Washington v. Finley* at 58 "where there is no device in use that directly inhibits participation in the political process…" we refer to the discussion in our Response in Opposition (Dist. Ct. ECF 18) at paragraphs 57-60

on pages 41-43. "We have held that the impact of a state's primary election system to be a factor into whether classes of voters may be impermissibly denied effective participation in the political process." *Washington* at paragraph 29. As we discussed in paragraphs 57-60, Maryland's closed primary system is such a device, inextricably linked with the structure and composition of the challenged districts, in that they operate together to minimize the impact of Republican voters, who are wholly inhibited from participating in the primary election that will choose their Representative, with the general election designed to be a formality.

Conclusion

We have shown above and in earlier pleadings that (1) substantial questions challenging the constitutionality of Congressional districts must be referred to a three-judge District Court; (2) Supreme Court and Fourth Circuit precedents define insubstantiality in such terms as "frivolous," "indisputably meritless," and "clearly foreclosed"; and (3) we have raised substantial and plausible questions challenging the constitutionality of Maryland's Congressional districts (Exh. 1 to Complaint).

In light of the foregoing, 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.

Respectfully submitted,

(signature provided on scanned page)

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