
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' PETITION FOR REHEARING AND FOR REHEARING EN BANC

October 17, 2014

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Statement of Purpose

We respectfully request rehearing by the panel and by this Court en banc to resolve conflicts in the panel's decision with decisions of the United States Supreme Court in *Neitzke v. Williams* (490 U.S. 319) and in *Goosby v. Osser* (409 U.S. 512) that were not addressed by the panel. The panel decision and the prior panel opinion of this Court upon which the District Court relied, *Duckworth v. State Admin. Board of Election Laws* (332 F.3d 769, 4th Cir. 2003), are also in conflict with an earlier opinion of this Court, as well as with current opinions within the other Circuits.

The proceeding also involves questions of exceptional importance—most particularly, the proper pleading standard that should be used to determine when a challenge to the constitutionality of Congressional districts is afforded review under the special procedures mandated by 28 U.S.C. §2284—to include original consideration by a three-judge District Court and the right of direct appeal to the U.S. Supreme Court. Under *Duckworth*, such cases from within the 4th Circuit states must meet a higher pleading standard than in the rest of the country.

There is similar conflict regarding the jurisdiction of a single District Judge under 28 U.S.C. §2284(b)(3) to enter an order dismissing such a case under FRCP 12(b)(6). A further conflict involves the exceptionally important question of whether a redistricting plan that incorporates political gerrymandering is subject to claims alleging concurrent violations under other statutory or constitutional provisions. This Court has calendared for argument on December 10, 2014 another case, *Wright v. North Carolina* (14-1329), that incorporates this question.

Argument

I. Viability of *Duckworth v. State Admin. Board of Election Laws*

The Supreme Court's unanimous opinion in *Goosby v. Osser* (409 U.S. 512) provides the current pleading standard to convene a three-judge District Court:

> Title 28 U.S.C. § 2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. "Constitutional insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," Bailey v. Patterson, 369 U.S. at 369 U. S. 33; "wholly insubstantial," ibid.; "obviously frivolous," Hannis Distilling Co. v. Baltimore,216 U. S. 285, 216 U. S. 288 (1910); and "obviously without merit," Ex parte Poresky,290 U. S. 30, 290 U. S. 32 (1933). The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; 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 and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'"
>
> Ex parte Poresky, supra, at 290 U. S. 32, quoting from Hannis Distilling Co. v. Baltimore, supra, at 216 U. S. 288; see also Levering & Garrigues Co. v. Morrin,289 U. S. 103, 289 U. S. 105-106 (1933); McGilvra v. Ross,215 U. S. 70, 215 U. S. 80 (1909).

The Supreme Court unanimously further clarified in *Neitzke v. Williams* (490 U.S. 319) that the standard for surviving dismissal for frivolousness is more lenient than the standard for surviving a motion for dismissal under FRCP 12(b)(6):

> The question presented is whether a complaint filed *in forma pauperis* which fails to state a claim under Federal Rule of Civil Procedure 12(b)(6) is automatically frivolous within the meaning of 28 U.S.C. § 1915(d). The answer, we hold, is no…
>
> 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, while in the context of an IFP case, is directly analogous to authorizing a single District Judge to dismiss frivolous claims for insubstantiality under 28 U.S.C. §2284, but requiring a three-judge District Court to consider motions for the dismissal of non-frivolous claims under FRCP 12(b)(6). This conclusion is discernible from *Goosby* and its predecessors alone. This Court held, in *Duckworth*, specifically what *Neitzke* and *Goosby* proscribed—

> If, as the district court concluded, Duckworth's pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court. *See Simkins*, 631 F.2d at 295.

Duckworth did not address its inconsistency with *Neitzke* and *Goosby*, and its holding that a case that fails to state a claim is inherently insubstantial cannot be reconciled with those unanimous Supreme Court decisions. It also cannot be reconciled with this Court's prior opinion that it did cite, *Simkins v. Gressette* (631 F.2d 287, 4th Cir. 1980). *Simkins* cited *Goosby*, and was consistent with it. 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." *Simkins* provided no basis for the holding in *Duckworth* that cases failing to state a claim are inherently insubstantial.

Other circuits are unanimous in their fidelity to *Goosby*. No other circuit has adopted a holding that raised the pleading standard akin to *Duckworth*. Relevant decisions of other Circuits include *Kalson v. Paterson* (542 F.3d 281)(2nd Cir., 2008), *Page v Bartels* (3rd Circuit, 01-1943, 248 F3d 175, 2001), *LULAC v. Texas* (5th Circuit, 113 F.3d 53; 96-50714, 1997), *Armour v. Ohio* (6th Cir. en banc, 925 F.2d 987) (1991), *Connolly v. PBGC*, 673 F.2d 1110 (9th Cir., 1982), *Lopez v. Butz,* 535 F.2d 1170 (9th Cir. 1976), *LaRouche v. Fowler* (152 F.3d 974, 998 (D.C.Cir.1998)*)*, and *Feinberg v. FDIC* (522 F.2d 1335 (D.C. Cir. 1975).

The Fifth Circuit recently confirmed in *Bohannan v. Doe* (527 F.App'x 283, 5th Cir. 2013) that

> A claim is frivolous when it lacks any arguable basis in law or fact. *Samford v. Dretke*, 562 F.3d 674, 678 (5th Cir. 2009). A claim lacks any arguable basis in law or fact when it is based on an indisputably meritless legal theory. A complaint fails to state a claim upon which relief can be granted when, assuming the plaintiff's allegations are true, it nevertheless fails to state a plausible claim to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Given the articulations of the two standards, it is not logically inconsistent to conclude that a claim is both frivolous and fails to state a claim upon which relief can be granted. Indeed, a claim that is indisputably meritless necessarily fails to plead a plausible claim of relief.

At the end of the passage above, the Fifth Circuit correctly stated in *Bohannan* what *Duckworth* stated backwards. A claim that fails under FRCP 12(b)(6) may well be substantial. A substantial—i.e., non-frivolous—claim under 28 U.S.C. §2284 must be referred to a three-judge court for resolution of a motion to dismiss.

II. Jurisdiction under 28 U.S.C. §2284(b)(3) for a Single Judge to Grant a Motion to Dismiss without convening a Three-Judge District Court.

The District Court cited 28 U.S.C. §2284(b)(3), allowing that a single judge "may conduct all proceedings except the trial and enter all orders permitted by the rules of civil procedure except as provided in this subsection" in addition to *Duckworth*, as its authority to dismiss this case under FRCP 12(b)(6). The panel of this Court did not address the issue.

The D.C. Circuit explained in *LaRouche v. Fowler* that

> Although §2284 does provide that a single judge may determine that three judges are not required, a single judge may do so only if a plaintiff's challenge is wholly insubstantial. *LULAC v. Texas* (quoting *Goosby*)…The Supreme Court made clear just how minimal a showing is required to establish substantiality in *Goosby v. Osser*…
>
> Although the DNC contends LaRouche's challenge fails even under the *Goosby* standard, it also contends that standard was altered when Congress amended §2284 in 1976. It points out that the pre-1976 version provided that a single judge may not dismiss the action, while the current version does not. The DNC concludes than Congress must have meant, by this deletion, to permit a single judge to grant a motion to dismiss.
>
> No court has noticed the language change pointed to by the DNC or interpreted it as having such import. See *LULAC v. Texas* at 55 (continuing to apply *Goosby* test); *Armour v. Ohio*, 925 F.2d 987, 989 (6th Cir. en banc 1991) (same); *Backus v. Spears*, 677 F.2d 397, 400 (4th Cir. 1982). There is good reason for this. First, the legislative history suggests that Congress did not intend the change to have any substantive effect. Second, the section of the statute in which the quoted provision appeared applied only to the powers available to an individual judge who was a member of a three-judge court, not to the powers of a single judge before such a court had been

> convened. Third, at the same time Congress deleted the bar against a single member of a three-judge court alone dismissing an action, it inserted a new prohibition that an individual member of a three-judge court has no more power to decide a case on the merits than a single judge has under *Goosby*; neither may enter judgment on the merits of a claim requiring action by a three-judge court—i.e., a claim that is not "wholly insubstantial" or "obviously frivolous."

It is also 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." It would be illogical to interpret §2284 to require three judges to hear a substantial case, but to authorize any one of them to unilaterally dismiss the case. From *Page v Bartels*:

> Section 2284(b)(3) delineates the scope of a single district judge's authority to act (and thus his or her jurisdiction) in proceedings that require the establishment of a three-judge district court… The provisions of § 2284(a) and § 2284(b)(3) are necessarily interdependent: The constraints imposed by § 2284(b)(3) on a single district judge's authority to act are not triggered unless the action is one that is required, under the terms of § 2284(a), to be heard by a district court of three judges. Grants or denials of injunctive relief by a three-judge court are directly appealed to the United States Supreme Court. See 28 U.S.C. § 1253…
>
> …a single district judge cannot reach the merits of the statutory claims unless he or she concludes that the constitutional claims are legally frivolous and insubstantial.

From Arizona v. AIRC (D. Az. 12-01211 Doc. 24), for which the U.S. Supreme Court has noted probable jurisdiction and ordered argument to be held this term, the initial single District Judge held at the outset that

> While the sufficiency of the FAC is being challenged by the AIRC defendants in their pending Motion to Dismiss, filed pursuant to Fed.R.Civ.P. 12(b)(6), the resolution of that motion must be made by the statutory three-judge court. See Lopez v. Butz, 535 F.2d at 1172 ("Because a three-judge court was required, the single district judge was without authority to determine the merits of [the plaintiff's] claims."); 28 U.S.C. § 2284(b)(3) ("A single district judge shall not ...enter judgment on the merits [in any action required to be heard and determined by a three-judge court.]"

III. Application of *Vieth v. Jubelirer* on other claims in an action where political gerrymandering is one of multiple issues.

In *Vieth v. Jubelirer* (541 U.S. 267), a plurality of the U.S. Supreme Court held that claims of political gerrymandering are not justiciable due to the lack of discernible and manageable standards to identify where political considerations become impermissible. There is disagreement among federal courts as to how *Vieth* should be applied, both to claims of political gerrymandering as well as to further claims in addition to or incident to political gerrymandering. This Court has calendared such a case, *Wright v. North Carolina* (14-1329), for argument on December 10, 2014. Argument is well justified, as the issue is unsettled and undeniably one of exceptional national importance. In *Wright*, upon finding that political gerrymandering was an issue in that case, the District Court held the case nonjusticiable – effectively immunizing those defendants against the critical claim that the school board districts at issue violated the equal population requirements of the Equal Protection Clause of the 14th Amendment. Similarly, in our case,

challenging Maryland's Congressional districts (Complaint, Exh. 1), the District Court declined to reach our primary claims—i.e., that Article I §§2 and 4 were violated in a manner that could be discernibly and manageably identified without the need to distinguish between permissible and impermissible levels of partisanship. The panel of this Court did not address the issue.

Similar reasoning, based on the presence of political gerrymandering, could have foreclosed review by three-judge District Courts of cases such as the earlier review of Maryland's Congressional districts—largely over the Voting Rights Act—in Fletcher *v. Lamone* (D.Md. 11-CV-3220, 831 F.Supp.2d 887), as well as the recent review of a Virginia Congressional district—similar to *Fletcher*, but with a claim of packing rather than dilution—in *Page v. Virginia* (E.D.Va. 13-cv-00678). In *Fletcher*, the initial single judge found that a three-judge Court was required based on *Goosby* rather than *Duckworth*. The three-judge Court later confirmed the finding based on other reasoning. In *Page*, the initial single judge requested designation of a three-judge court at the very outset, with no discussion or opposition. That divided three-judge Court struck down the challenged district. The Supreme Court hears the similar *ALBC v. Alabama* on November 12. Even within the 4th Circuit, *Vieth* and *Duckworth* are being applied inconsistently.

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.

In *Radogno v. Illinois* (N.D.Ill. 11-cv-4884, ECF 59), that Court held that political gerrymandering claims remain justiciable—citing *Vieth* and *LULAC*. The *Radogno* Court's thorough discussion at p. 10 cited other cases showing the ongoing disagreement among federal courts. While the three-judge *Radogno* Court ultimately dismissed the plaintiffs' 14th Amendment claims of gerrymandering since they did not propose a viable standard, it proceeded to reach the other claims alleged by plaintiffs under the Voting Rights Act. That Court did not immunize the defendants against those other claims. Our briefs cite other similar cases.

Even if the courts holding gerrymandering itself to be nonjusticiable under the Equal Protection Clause ultimately prevail, the door should remain open to other statutory and constitutional provisions that may well hold a path to review the impacts of gerrymandering in a discernible and manageable manner. 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.

Recognizing the hurdles to sustain a 14th Amendment claim of undue political gerrymandering, we raised claims—based on alleged facts, analysis, and a proposed standard—that the state exceeded its authority under Article I §4 by unduly influencing the outcome of the elections, and violated Article I §2 by enacting districts affording impermissible levels of representation. The District Court only analyzed these as a single claim of undue partisanship under the 14th Amendment, which it held nonjusticiable under *Vieth*. The panel of this Court did not address whether the District Court should have analyzed our specific claims.

Supreme Court opinions in *Cook v. Gralike* (531 U.S. 510), *U.S. Term Limits v. Thornton* (514 U.S. 779), *Smiley v. Holm*, 285 U.S. 355 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 show our Article I §4 claim is arguable, if not plausible. In *Cook v. Gralike*, citing *U.S. Term Limits*, the Supreme Court held that

> Through the Elections Clause, the Constitution delegated to the States the power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to a grant of authority to Congress to "make or alter such Regulations." Art. I, §4, cl. 1; see *United States* v. *Classic*, 313 U.S. 299, 315 (1941). No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.
>
> As we made clear in *U.S. Term Limits*, "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."
>
> Article VIII is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal…Thus, far from regulating the procedural mechanisms of elections, Article VIII attempts to "dictate electoral outcomes." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S., at 833—834. Such "regulation" of congressional elections simply is not authorized by the Elections Clause.

The Supreme Court found Article I §4 to provide sufficiently discernible and manageable grounds for these rulings. Just as the Supreme Court found in *Cook v. Gralike* that a ballot design enacted to facilitate Congressional elections under the Elections Clause impermissibly favored and disfavored candidates and unduly dictated outcomes, a three-judge District Court should be designated to evaluate our claim that the structure and composition of Congressional districts enacted under the Elections Clause unduly favored and disfavored certain candidates and unduly influenced the outcome. These claims should be afforded original review

by a three-judge District Court and the right to directly appeal from that Court's judgment to the U.S. Supreme Court as mandated by 28 U.S.C. §§2284 and 1253.

There is no prior case law applying *Cook* to Congressional districts. Earlier, in *Anne Arundel Republican Central Committee v. State Administrative Board of Election Laws* (781 F.Supp 394, 1991), Judge Niemeyer wrote a sharp dissent to hold that such a violation of Article I §4 had occurred. The later *Cook* decision affords support to Judge Niemeyer's position. His dissent also held that those districts afforded impermissibly poor representation to its voters under Article I §2. While the majority did not concur that Article I §2 was violated, they stated that Article I §2 might be violated, even with equal sized districts. We demonstrated with particularity how the current districts are more repugnant with respect to Article I §§2 and 4 than those considered by the *Anne Arundel* Court. Justice Kennedy, in his concurrence in *Vieth*, repeatedly suggests that the focus of inquiry should be to measure the resulting burden on representational rights. This is precisely how we stated our claim under Article I §2—on representational rights. Inquiry under neither Article I §2 nor §4 are so completely foreclosed so as to withhold jurisdiction from a three-judge District Court under *Goosby* and *Neitzke*.

IV. Importance of 28 U.S.C. §2284 cases and uniform processes

Congress has determined that challenges to the constitutionality of Congressional districts are among the most important actions that come before the federal judiciary. Congress opted to leave this class of actions among the very few that it has accorded original review by three-judge District Courts, with the right of direct appeal from their judgments to the U.S. Supreme Court. It is through this process that challenges, even if based on unsettled or untested legal theories, are afforded definite and expeditious review by the U.S. Supreme Court. Uniform intra-circuit and nationwide application—per *Goosby* and *Neitzke*—is critical to ensure that all such challenges are equally afforded this special review as intended by Congress. Rehearing en banc is needed to establish consistency both within the 4th Circuit as well as to ensure that non-frivolous challenges from states within the 4th Circuit receive the same review as those from states within the other circuits—as the current disparate 4th Circuit treatment stems from this Court's 2003 published opinion in *Duckworth v. State Admin. Board of Election Laws* (332 F.3d 769).

Conclusion

In light of the foregoing, this petition for rehearing and for rehearing en banc should granted. We would be pleased to retain counsel to provide oral argument and/or formal briefs on our behalf if it would assist the Court.

Respectfully submitted,

(see scanned signature page)

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CERTIFICATE OF SERVICE

I certify that I have served, through the CM/ECF system on October 17, 2014, copies of the foregoing Petition for Rehearing and for Rehearing En Banc on the attorney for the Appellees:

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I certify that I have also served, through first class mail on October 17, 2014, copies of the foregoing Petition on the other attorney for the Appellees, who is not served through the CM/ECF system, as well as on the other Appellants:

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