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 United States District Court
for the District of Maryland
(James K. Bredar, District Judge)

BRIEF OF APPELLEES

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June 19, 2014

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutional Provisions

Statutes

Rules

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JURISDICTIONAL STATEMENT

In this civil action, plaintiffs O. John Benisek, Stephen M. Shapiro, and Maria B. Pycha filed a complaint for injunctive relief in the United States District Court for the District of Maryland against Bobby S. Mack, Chairman of the Maryland State Board of Elections, and Linda H. Lamone, State Administrator of the Maryland State Board of Elections. (Dist. Ct. Dkt. 1.) The district court had

subject matter jurisdiction under 28 U.S.C. § 1331. On April 8, 2014, the district court granted the defendants' motion to dismiss. (Dist. Ct. Dkt. 22.) The plaintiffs noted this appeal on April 28, 2014. (Dist. Ct. Dkt. 23.) This Court has jurisdiction under 28 U.S.C. § 1291 to review the district court's judgment.

ISSUE PRESENTED FOR REVIEW

Did the district court properly grant the defendants' motions to dismiss because, as the district court correctly determined, the plaintiffs failed to state a claim upon which relief can be granted?

STATEMENT OF THE CASE

This is a challenge to the congressional districting plan adopted by the Maryland General Assembly in the 2011 Special Session. The case was filed on November 5, 2013—more than a year after all other cases challenging the new congressional districting plan had been decided in favor of the State of Maryland and one year after the first election was held under the plan.

The plaintiffs' attack on Maryland's districting plan is based on their assertion that the fourth, sixth, seventh, and eighth congressional districts consist of "de-facto non-contiguous segments—i.e., discrete segments that would be wholly non-contiguous but for the placement of one or more narrow orifices or ribbons connecting the discrete segments." (Dist. Ct. Dkt. 1 ¶ 10.) The plaintiffs

also complain that these districts' segments differ in population density and are "socioeconomically, demographically, and politically inconsistent." (*Id.* ¶ 11.) The plaintiffs assert that based on the configurations of these districts, Maryland's districting plan denies them rights representational, voting, and associational rights under Article I, § 2 and the First and Fourteenth Amendments of the United States Constitution. (*Id.* ¶¶ 2, 5, 23, 32.)

The district court rejected the plaintiffs' request for a three-judge district court and dismissed the action on the ground that the complaint fails to state a claim upon which relief can be granted. The district court concluded that the plaintiffs' purported claims under Article I, § 2 and the Fourteenth Amendment are "in essence, a claim of political gerrymandering" (Dist. Ct. Dkt. 21 at 10), and are not justiciable in light of the lack of "judicially discoverable and manageable standards" for determining such claims (Dist. Ct. Dkt. 21 at 14). The district court also determined that the plaintiffs failed to state a claim under the First Amendment because (1) the plaintiffs failed to plead facts showing any harm to their ability to participate in political debate, form or join political committees, or use other means to influence the opinions of their congressional representatives, (Dist. Ct. Dkt. 21 at 15 (quoting *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543, 557–58 (D. Md. 2002)), and (2) the First Amendment does not protect any

rights beyond those protected by the Fourteenth and Fifteenth Amendments (*id.* (quoting *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981)).

ARGUMENT

I. THIS COURT REVIEWS THE DISTRICT COURT'S ORDER DISMISSING THE ACTION UNDER A *DE NOVO* STANDARD OF REVIEW.

This Court reviews a district court's grant of a motion to dismiss for failure to state a claim under a *de novo* standard of review, "inquiring solely whether [the plaintiff's] pleadings adequately state a set of facts, which, if proven to be true, would entitle [the plaintiff] to judicial relief." *Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769, 772 (4th Cir. 2003); *see also Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 364–365 (4th Cir. 2012). Under 42 U.S.C. § 2284(a), a district court of three judges shall be convened to hear and determine an action challenging the constitutionality of a congressional districting plan, but a single judge may hear and determine the action if the judge "determines that three judges are not required." 42 U.S.C. § 2284(a)(1). *Duckworth*, 332 F.3d at 772–73. If the complaint fails to state a claim, "it is subject to dismissal by the district court without convening a three-judge court." *Duckworth*, 332 F.3d at 772–73 (citing *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980)).

To survive a motion to dismiss for failure to state a claim on which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true,

'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the reviewing court is required to "'take the facts in the light most favorable to the plaintiff,'" the court "need not accept legal conclusions couched as facts or 'unwarranted inferences, unreasonable conclusions, or arguments.'" *Wag More Dogs*, 680 F.3d at 365 (quoting *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (internal citation omitted)). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

II. THE DISTRICT COURT APPLIED THE CORRECT LEGAL STANDARD IN DETERMINING THAT IT WAS NOT REQUIRED TO CONVENE A THREE-JUDGE DISTRICT COURT.

In dismissing the case, the district court applied the standard that this Court has approved for determining whether a three-judge district court should hear and determine a constitutional challenge to a congressional districting plan. In *Duckworth v. State Administrative Board of Election Laws*, this Court upheld the action of the single-judge district court in dismissing the case for failure to state a claim, observing that if the plaintiff's pleadings do not state a claim for purposes of Rule 12(b)(6), "then by definition they are insubstantial, and so properly are subject to dismissal by the district court without convening a three-judge court." 332 F.3d at 772–73 (citing *Simkins*, 631 F.2d at 295). In applying this test, the

Court held that "simple formulaic restatements," of the elements of a political gerrymandering claim did not state a claim on which relief could be granted, and that the case must be dismissed. *Id*. at 774–75. The Court explained that a party must do more than "merely offer conclusory charges that there had been intentional discrimination against an identifiable group and that that group has suffered discriminatory effect." *Id*. at 775. While *Duckworth* predates *Iqbal*, and *Twombly*, this test is not substantially different than that stated in those two cases.[1]

Here, the plaintiffs argue incorrectly that the test is whether the claim stated is "frivolous." Informal Opening Brief at 6. They do not articulate a test for determining what is "frivolous," but simply theorize that a complaint might fail to state a claim on which relief can be granted and yet still not be frivolous. Informal Opening Brief at 6–8. This Court's precedents, however, leave no doubt that failure to state a claim under Rule 12(b)(6) means that the case is not substantial,

[1] In the most recent round of redistricting legislation in Maryland, the failure to state a claim test was applied by single judge district courts in *Gorrell v. O'Malley*, No. WDQ-11-cv-2975, 2012 U.S. Dist. LEXIS 6178, at *6 (D. Md. Jan. 19, 2012) and *Olson v. O'Malley*, No. WDQ-12-cv-0240, 2012 U.S. Dist. LEXIS 29917, at *4 (D. Md. Mar. 6, 2012). In both cases, the single judges analyzed whether a claim had been stated in light of the holdings in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Gorrell*, at *7–8; *Olson*, at *5–6. Previously, the three-judge district court in *Fletcher v. Lamone* had determined that there is "no material distinction" between a complaint that does not state a substantial claim for relief for purposes of 28 U.S.C. § 2284 and one that does not meet the Rule 12(b)(6) standard. 831 F. Supp. 2d 887, 892 (D. Md. 2011).

and that the single judge below applied the proper standard in determining that the claims in this case are insubstantial.

III. THE DISTRICT COURT CORRECTLY DISMISSED THE CASE FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

The claims stated in the complaint are insubstantial and the single judge district court therefore correctly dismissed the complaint under Rule 12(b)(6) for failure to state a claim. Despite the plaintiffs' efforts to recast their claims in order to differentiate them from those previously rejected in other cases, the plaintiffs' claims are not novel—similar claims have been rejected repeatedly, and in any event, the plaintiffs' allegations are not sufficiently supported with facts so as to state a claim.

A. The District Court Correctly Concluded That the Plaintiffs Have Not Stated a Claim Under Article I, § 2 and the Fourteenth Amendment of the United States Constitution.

The plaintiffs' claim regarding the composition of Maryland's fourth, sixth, seventh, and eighth congressional districts is "in essence, a claim of political gerrymandering"[2] (Dist. Ct. Dkt. 21 at 9) and, as such, is non-justiciable (Dist. Ct. Dkt. 21 at 13–14). *See Vieth*, 541 U.S. at 281 (holding that because there are no judicially discernible and manageable standards for adjudicating political

[2] "The term 'political gerrymander' has been defined as '[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.'" *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (quoting Black's Law Dictionary 696 (7th ed. 1999)).

gerrymandering claims, such claims are not justiciable). As the district court correctly explained, the so-called "manageable" standards that the plaintiffs have proposed do not differ materially from proposed standards that the courts have already rejected. (*Id*.)

The district court correctly rejected the plaintiffs' reliance on the unusual shape of the fourth, sixth, seventh, and eighth congressional districts. (Dist. Ct. Dkt. 21 at 14.) It is well-established that an allegation that a districting plan includes "bizarre-shaped" districts does not state a claim of unconstitutional political gerrymandering. *Duckworth*, 332 F.3d at 775. The plaintiffs' contention that there must be "geographic" or "demographic/political contiguity" fares no better. *See id*. at 777 (rejecting challenge to districting plan that lacked geographic contiguity); *Gorrell*, 2012 U.S. Dist. LEXIS 6178, at *10 (rejecting challenge to districting plan that allegedly divided farmers' community of interest).

Because the plaintiffs' claims under Article I, § 2 of the United States Constitution and the Fourteenth Amendment are precluded by decisions of the Supreme Court and this Court, they fail to state a claim on which relief can be granted and are therefore insubstantial. Thus, the district court correctly dismissed these claims. *See Duckworth*, 332 F.3d at 774.

B. The District Court Correctly Concluded That the Plaintiffs Have Not Stated a Claim Under the First Amendment to the United States Constitution.

The plaintiffs' First Amendment claim rests on the districting plan's alleged impact on Republican voters' "representational, voting, and association rights." (Dist. Ct. Dkt. 1 ¶ 5.) In *Washington v. Finlay*, however, this Court concluded that "where there is no device in use that directly inhibits participation in the political process, the first amendment, like the thirteenth, offers no protection of voting rights beyond that afforded by the fourteenth or fifteenth amendments." 664 F.2d at 927. The district court correctly rejected the plaintiffs' claims because the districting plan does not)"affect[] in any proscribed way" the plaintiffs' "ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves." (Dist. Ct. Dkt. 21 at 15 (quoting *Duckworth*, 213 F. Supp. 2d at 558); *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Elections*, 781 F. Supp. 394, 401 (D. Md. 1991)). The plaintiffs "are free to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." *Id.* The claim in this case is virtually identical to the one that was found insubstantial in *Duckworth*. 213 F. Supp. 2d at 557–58. Thus, it does not meet any possible substantiality test and was properly dismissed.

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,066 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word in Fourteen point, Times New Roman.

TEXT OF PERTINENT PROVISIONS
(Fed. R. App. P. 28(f))

28 U.S.C. § 2284.

§ 2284. Three-judge court; when required; composition; procedure.

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body..

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) 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. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 19th day of June, 2014, the Brief of Appellees was filed electronically and served by first-class mail on appellants at the addresses set forth below:

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