No. 16-588

In The
Supreme Court of the United States

NEIL PARROTT, *et al.*,

Appellants,

v.

LINDA H. LAMONE, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

MOTION TO AFFIRM

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DECEMBER 2016

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QUESTIONS PRESENTED

1. Did the three-judge district court properly dismiss on jurisdictional grounds the complaint challenging Maryland's 2011 congressional districting plan because the plaintiffs failed to allege an invasion of a legally-protected interest and therefore lacked standing?

2. Did the plaintiffs, by alleging only that Maryland's congressional districts are not as compact as the plaintiffs believe they should be, fail to state a substantial claim that Maryland's 2011 congressional redistricting plan violates the Constitution?

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MOTION TO AFFIRM

INTRODUCTION

More than four years ago, this Court upheld the constitutionality of Maryland's 2011 State Plan for Congressional Redistricting ("State Plan") against claims that it was an impermissible racial or partisan gerrymander. *Fletcher v. Lamone*, ___ U.S. ___, 133 S. Ct. 29 (2012), *aff'g Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011). The plaintiffs in the present action also purport to state a claim for partisan gerrymandering but have alleged no facts to support a claim of partisan discrimination.[1] Instead, the plaintiffs seek to enjoin the use of the now-established districts solely because some of those districts are less compact than the plaintiffs contend they ought to be. Further, the plaintiffs have asserted that relative compactness of districts alone determines the constitutionality of a districting plan, regardless of whether there exists any evidence of partisan motivation or partisan effect. The district court correctly determined that there is no basis in the Constitution, or support in the case law, for the plaintiffs' asserted right to vote in more compact

[1] "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. Jubilirer*, 541 U.S. 267, 271 n.1 (2004) (quoting *Black's Law Dictionary* 696 (7th ed. 1999)). The essence of any gerrymandering claim is thus the contention that complainants are members of a cohesive political group that has suffered unlawful discrimination.

districts and that the plaintiffs therefore failed to allege the invasion of a legally-protected interest necessary to establish Article III standing. Moreover, the plaintiffs' claims that either unconstitutional partisan gerrymandering or a burden on fundamental voting rights may be established exclusively by reference to district shapes is plainly insubstantial. Accordingly, the district court's judgment dismissing the action should be summarily affirmed.

STATEMENT

1. The General Assembly of Maryland adopted the State Plan in a special session held October 17 through October 20, 2011, and it took effect on October 20, 2011, as Chapter 1, Laws of Maryland of the Special Session of 2011. *Fletcher*, 831 F. Supp. 2d at 891. In 2012, the voters approved the State Plan by an affirmative vote of 64%-to-36% in a statewide referendum.[2]

The State Plan creates eight congressional districts that are as equal in population as is mathematically possible, with seven of the eight districts having an adjusted population of 721,529 and the eighth having an adjusted population of 721,528. *Id*. at 894. Like the districting plan passed after the 2000 census, the

[2] The official referendum election results for the ballot question regarding the districting plan are available at http://elections.state.md.us/elections/2012/results/general/gen_qresults_2012_4_00_1.html.

State Plan creates two majority African-American congressional districts. *Id*. at 891. All of the districts are drawn to protect the cores of existing districts, and several of the districts have not changed substantially since the last redistricting, indicating "that incumbent protection and a desire to maintain constituent relationships might be the main reasons they take their present forms." *Id*. at 903.

2a. The plaintiffs in this action are Maryland registered voters, one from each of the State's eight congressional districts. J.S. App. 17a-19a ¶¶ 8-16. They brought this lawsuit in June 2015 as "voters" against their "legislators," who are alleged to gerrymander in their own interests as against all voters in the State, J.S. App. 24a ¶ 32, "for injuries . . . that all Maryland voters endure. . . ." *Id.* ¶¶ 31, 35 (alleging that gerrymandering harms everyone "regardless of their party preferences or how they would vote in a particular election"). The complaint thus seeks to vindicate rights or interests alleged to be common to "all voters" rather than particular injuries imposed upon any subset of voters or politically cohesive group.

b. The plaintiffs allege that the State Plan harms every Maryland voter by inflicting "particular, intentional harm on partisan and non-partisan voters of every description." J.S. App. 25a ¶ 36. Although the plaintiffs generally allege that the State Plan causes different injuries for different classes of voters based on those voters' political preferences, *id*. ¶ 36a-f, the plaintiffs do not seek redress for injuries suffered "as

Republicans," but only "as *voters*." J.S. at 8 (emphasis in original).

c. Count I of the complaint alleges that Maryland's partisan gerrymander violates Article I, § 2 of the Constitution. J.S. App. 38a ¶ 83. The plaintiffs contend that applying a "mathematically derived compactness measure to congressional districts can be used as a judicially manageable, discernible, and non-arbitrary standard with which to measure, and deter, excessive partisan gerrymandering." J.S. App. 30a ¶ 54.

Count II alleges that the non-compactness of districts produces harm by making more difficult candidates' use of mass media to reach the relevant electorate, increasing the cost of campaigns, and creating voter confusion. J.S. App. 28a-30a ¶¶ 48-52. Because of these alleged "electoral harms arising from non-compact districts," the plaintiffs contend, the congressional district plan "burdens Plaintiffs' right to vote in violation of their constitutional right to Due Process" under the Fifth and Fourteenth Amendments to the Constitution. J.S. App. 38a ¶ 86.

The plaintiffs seek a declaratory judgment finding the State Plan unconstitutional and a permanent injunction against "calling, holding, or certifying any elections" under the plan. J.S. App. 39a. The plaintiffs also request that the district court "[o]rder State authorities to adopt a new congressional districting plan"

without unlawful political gerrymandering and "consistent with the compactness standards articulated in . . . [the] Complaint." *Id.*

3a. The defendants, who are Maryland state election officials, moved to dismiss the action for lack of standing, failure to state a claim, and laches. The Chief Judge of the United States Court of Appeals for the Fourth Circuit designated a three-judge district court to hear the motion to dismiss. J.S. App. 5a.

b. The three-judge district court held a hearing on July 12, 2016, J.S. App. 5a, and on August 24, 2016, dismissed the action, *id*. 14a. The court held that the plaintiffs lack standing because they have not alleged "an invasion of a legally protected interest." *Id*. 10a (citing *Spokeo v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The court explained that the plaintiffs have not identified "a constitutional provision or case that establishes a right to reside in a district that has not been mechanically manipulated in a manner that transfers the power to select representatives away from the people." *Id*. The plaintiffs filed a notice of appeal to this Court on August 29, 2016. *Id*. 1a.

ARGUMENT

I. The Three-Judge District Court Properly Dismissed the Complaint Because the Plaintiffs Lack Standing.

A. The Plaintiffs Failed to Allege Invasion of a Legally-Protected Interest.

To establish Article III standing, a plaintiff must show, among other things, an invasion of a legally-protected interest, *Robins*, 136 S. Ct. at 1548, that is "concrete and particularized." *Lujan*, 504 U.S. at 560-61. Here, as the three-judge district court correctly determined, J.S. App. 10a, the harm asserted by the plaintiffs – the "mechanical[] manipulat[ion of] Maryland's congressional districts in a manner that transfers the power to select representatives from the people to the Maryland General Assembly" – is not a legally-protected interest.

The plaintiffs analogize their claim to this Court's One Person, One Vote Cases. *See* J.S. App. 10a (citing *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); and *Baker v. Carr*, 369 U.S. 186 (1962)). These cases establish that Article I, § 2 of the Constitution requires population equality among the congressional and state legislative districts of each State such that every person's vote has equal weight. *See Wesberry*, 376 U.S. at 5, 18; *Baker*, 369 U.S. at 206, 237 (congressional districts); *Reynolds*, 377 U.S. at 577 (1964) (state legislative districts). These cases thus require mechanical manipulation of districts to achieve the required population equality. As the three-judge

district court rightly observed, "[t]hat fact alone militates against reading those cases as establishing that the Constitution protects the right to reside in districts that have not been mechanically manipulated." J.S. App. 12a. Moreover, nothing in these cases "suggests that the Court should apply [them] to claims not asserting unequal population." *Id*.

The plaintiffs' effort to analogize claims based on population inequality with those alleging insufficiently compact districts breaks down at the most basic level. Article I, § 2 of the Constitution requires districts of equal population. *Reynolds*, 377 U.S. at 577; *Wesberry*, 376 U.S. at 5, 18. By contrast, as the courts have made clear, no part of the Constitution requires that congressional districts be of any particular shape or relative compactness, much less that they adhere to the arbitrarily-chosen standard espoused by the plaintiffs. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (traditional districting criteria such as compactness, contiguity, and respect for political boundaries are not "constitutionally required"); *see also Duckworth v. State Admin. Bd. of Elections*, 332 F.3d 769, 775 (4th Cir. 2003) ("[A]llegations that districts have a bizarre appearance . . . are not probative as to the discriminatory effect that must be proven in political gerrymandering cases. . . ."). Under Article I, § 2, population inequality *is* the representational injury that must be avoided or justified as "necessary to achieve some legitimate goal." *Karcher v. Daggett*, 462 U.S. 725, 731 (1983). That is not true of non-compactness or "mechanical manipulation" of districts, neither of which

represents an injury in itself or requires special legislative justification.

The three-judge district court thus correctly rejected the plaintiffs' "untenable" reading of this Court's One Person, One Vote Cases. J.S. App. 12a. Because these cases were the sole basis for the plaintiffs' claim of a legally-protected interest "to reside in a district that has not been mechanically manipulated in a manner that transfers the power to elect representatives away from the people," the three-judge district court held that the plaintiffs had "not sufficiently alleged standing to assert their claims."[3] *Id.*

Similarly, the plaintiffs failed to establish standing on their due process claim. In Count II of the complaint, they alleged "electoral harms arising from non-compact districts," which purportedly burden their voting rights in violation of the Due Process Clause of the Fifth and Fourteenth Amendments. J.S. App. 38a ¶¶ 84-86. No case establishes a constitutional right of voters to be free from alleged "burdens" due to irregularly shaped districts. Here, too, the plaintiffs failed to allege an invasion of a legally-protected interest.

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[3] Article I, § 4, cl. 1 of the Constitution provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof. . . ." The plaintiffs' theory that redistricting by Maryland legislators somehow represents a usurpation of a power reserved to the voters is therefore untenable.

B. The Plaintiffs Lack Standing to Assert Political Gerrymandering Claims on Behalf of All Maryland Voters.

The plaintiffs also lack standing because they do not allege that they are registered Republican voters or that the alleged harm they have suffered from voting in non-compact districts is due to their membership in any cohesive political group. In purporting to seek relief in the interest of "voters" generally, the plaintiffs do not allege an injury to themselves that is concrete and particularized. Instead, the plaintiffs allege as members of the class of "all voters" that they have been harmed by their "legislators," who are alleged to gerrymander in their own interests as against all voters in the State. J.S. App. 24a ¶¶ 31, 32; *id*. 25a ¶ 35. Because the plaintiffs rely only on a common grievance or "discrimination" that is alleged to be shared by everyone, they fail to allege facts necessary to Article III standing. *See, e.g*., *Lujan*, 504 U.S. at 573-74 (finding no Article III case or controversy where plaintiff raised only a "generally available grievance about government" and sought "relief that no more directly and tangibly benefits him than it does the public at large"). Accordingly, the plaintiffs lack standing to assert political gerrymandering claims on behalf of voters generally and the three-judge district court properly dismissed their claims for want of federal court jurisdiction.

II. The Plaintiffs' Claims Are Non-Justiciable and Insubstantial.

A. The Political Gerrymandering Claims Are Non-Justiciable.

In general, to assert a claim under Article I, § 2, a plaintiff must allege some avoidable population inequality among a State's congressional districts. *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. ___, 133 S. Ct. 3, 5 (2012) (stating that "parties challenging the plan bear the burden of proving the existence of population differences that 'could practicably be avoided' ") (citations omitted). In theory, a plaintiff may state a justiciable claim without alleging population inequality, but only if the plaintiff is able to provide a reliable and non-arbitrary standard sufficient to make the political gerrymander claim a justiciable issue. *League of United Latin Am. Citizens ("LULAC") v. Perry*, 548 U.S. 399, 418 (2006). Failing that, as the plaintiffs have in this case, a complaint alleging a political gerrymander is properly dismissed at the pleading stage. *See Perez v. Perry*, 26 F. Supp. 3d 612, 624 (W.D. Tex. 2014) (where the plaintiffs do not allege an adequate standard, a claim should be dismissed based on insufficiency of the complaint, as the Court did in *Vieth*).

The plaintiffs have not alleged any deviation from precise mathematical equality in the composition of Maryland's congressional districts. Nor have they provided a reliable and non-arbitrary standard by which to measure and detect "excessive" partisanship in redistricting. Instead, the plaintiffs assert that the constitution is violated where more compact districts

could have been drawn while still respecting, to the same or a greater extent, a partial and arbitrarily chosen set of traditional districting principles, as measured by the number of "split counties," "split precincts," or "county fragments" resulting from the actual and comparator plans. *See* J.S. App. 35a ¶¶ 71-74. In effect, the plaintiffs contend that Article I, § 2 requires population equality *and* an arbitrarily chosen degree of compactness.

This Court has been clear, however, that Article I, § 2 itself does *not* require adherence to the redistricting principles that the plaintiffs espouse. In *Shaw*, for example, the Court stated that although there is much discussion of compactness and contiguity in the context of redistricting cases, that did not mean that such qualities "are constitutionally required – they are not." 509 U.S. 630, 647 (1993); *see also Wood v. Broom*, 287 U.S. 1, 6-8 (1932) (rejecting challenge based on lack of compactness and contiguity in light of repeal of federal statute imposing those requirements with respect to congressional districts). Although *Shaw* was a split opinion, all nine justices agreed that "compactness and contiguity . . . are not constitutionally required." *Id*. at 687 (Souter, J., dissenting); *see also id.* at 671-72 (White, J., joined by Blackmun, J., dissenting) (stating that, while "[l]ack of compactness or contiguity" and other "district irregularities may provide strong indicia of a potential gerrymander, . . . *they have no bearing on whether the plan ultimately is found to violate the*

Constitution") (emphasis added). Because "compactness" is not a constitutional requirement – as to particular districts or the plan overall – demonstrating non-compactness is insufficient to establish, and ultimately irrelevant to, whether a constitutional violation has occurred.

The plaintiffs' proposed standard is therefore not mandated by the Constitution. Rather, the plaintiffs' standard is directly contrary to the reasoning in *Shaw* because it would make "compactness" the determining factor as to whether a given districting plan violates the Constitution, regardless of any actual evidence of excessively partisan motive or discriminatory effect. The plaintiffs' compactness standard even excludes consideration of any direct evidence of intent, even though discriminatory intent has always been a core requirement of Equal Protection analysis. *See LULAC*, 548 U.S. at 514 (Scalia, J., concurring) ("A vote dilution claim focuses on the majority's intent to harm a minority's voting power.").

Similarly, because the proposed standard takes no account whatsoever of the partisan makeup (and thus the presumed competitiveness) of the resulting districts, it also fails entirely to address discriminatory effect. In place of a requirement to prove an excessive discriminatory effect, the plaintiffs would simply equate a non-compact district with a gerrymandered one, and vice versa, regardless of whether the demographic data confirm or refute such a conclusion. *See*, *e.g.*, J.S. App. 28a ¶ 48 ("Because gerrymandered districts are non-compact. . . ."). As a result, the plaintiffs'

standard would invalidate a plan that is not as compact as it might be – *i.e.*, as compact as is practicable, as measured by the Polsby-Popper scale – even if the plan does not produce an actual partisan disadvantage for any particular group.

The exclusive focus of the plaintiffs' standard on compactness also divorces it from the essence of the constitutional issue. Specifically, the concept of discrimination, and thus equal protection, cannot be separated from a gerrymandering claim. "The act of drawing district lines to favor the majority party (*i.e.*, "political gerrymandering") *is* the act of discriminating against voters based on their political beliefs." *Radogno v. Illinois State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5868225, at *5 (N.D. Ill. Nov. 22, 2011) (emphasis in original). A political gerrymandering claim does not cease to require evidence of discrimination simply because a plaintiff fails to plead any specifics about the kind of gerrymander he or she is alleging. Such omissions do not in any way strengthen the plaintiffs' claims, but instead fatally undermine them by omitting from their allegations any assertion of a legally-protected interest to support their claim. The plaintiffs' failure to recognize that a discriminatory effect must be alleged and proven only reinforces the implausibility and insubstantiality of the legal theory asserted in the complaint.

Without any allegations pertaining to the demographic composition of Maryland's congressional districts, including specific facts as to any allegedly unfair concentration or dispersion of voters belonging to any

particular group, it is impossible to say that the State Plan is excessively partisan. Alleging no more than the relative non-compactness of district shapes can never establish the extent of any discriminatory effect. *See*, *e.g.*, *Duckworth*, 332 F.3d at 775 ("[A]llegations that districts have a bizarre appearance . . . are not probative as to the discriminatory effect that must be proven in political gerrymandering cases. . . .").

The plaintiffs do not argue that their proposed standard can reliably distinguish between excessively partisan district maps, in terms of intent or effect, and less partisan maps. Rather, their proposed standard would prevent only "extreme noncompactness," regardless of discriminatory intent or effect, and would allow any "presumably more limited gerrymandering" that could be accomplished with districts that are not extremely non-compact, also regardless of discriminatory intent or effect. J.S. 28. Such a standard fails to accomplish what this Court has held an appropriate standard must.

Necessary to the adjudication of any partisan gerrymandering claim are "clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring). The plaintiffs' standard does not in any way measure the burdens imposed on a plaintiffs' representational rights; it purports only to prevent some alleged gerrymanders achieved with non-compact districts.

The defects in the plaintiffs' proposed standard are also evident with respect to the remedy that the plaintiffs seek. No facts are alleged that, if proved, would show how the plaintiffs' proposed map would result in significantly more competitive or otherwise "fairer" congressional elections, district-by-district or state-wide. What the plaintiffs have actually offered to prove is merely that more highly-compact districts could have been formed without increasing the number of county or precinct boundaries crossed, *see* J.S. App. 34a-37a ¶¶ 69-79, a contention that is ultimately irrelevant to whether the plaintiffs have suffered a constitutional injury, *Wood*, 287 U.S. at 6-8, or whether that injury would be remedied by an alternative plan.[4] *See*, *e.g.*, *LULAC*, 548 U.S. at 447; *Vieth*, 541 U.S. at 281 (plurality); *see also Fletcher*, 831 F. Supp. 2d at 903 (existence of alternative plan allegedly superior in vindicating some legitimate redistricting interests irrelevant to validity of State Plan). In sum, the plaintiffs' compactness standard is neither constitutionally required nor a reliable measure of the burden imposed on voters' representational rights.

The need for a judicially discernible standard for adjudicating partisan gerrymandering claims is not limited to claims brought under the Equal Protection Clause. *See*, *e.g.*, *Vieth*, 541 U.S. at 305 ("We conclude

[4] The plaintiffs' conclusory assertion that a non-compact district is necessarily a gerrymandered district does not meet the pleading standard with regard to proving discriminatory effect. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("conclusory statements" are insufficient and "are not entitled to the assumption of truth").

that neither Article I, § 2 nor the Equal Protection Clause, nor . . . Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting."). Accordingly, the plaintiffs' failure to plead facts relevant to partisan discrimination does not transform a complaint alleging non-compactness into a justiciable claim.

B. The Claim Under the Due Process Clause for Alleged Electoral Harms Caused by a Non-Compact Congressional Districting Plan Is Insubstantial.

Count II of the complaint purports to seek judicial relief from alleged "electoral harms arising from non-compact districts," which the plaintiffs contend burden their voting rights in violation of the Due Process Clause of the Fifth and Fourteenth Amendments. J.S. App. 38a ¶¶ 84-86. This claim, like the plaintiffs' Article I, § 2 claim, is foreclosed by prior decisions of this Court and is therefore insubstantial. *See*, *e.g.*, *Goosby v. Osser*, 409 U.S. 512, 518 (1973).

The plaintiffs have identified no decisions of this Court, or any court, holding that any provision of the Constitution, including the Due Process Clause, compels legislators to create congressional districts that are more compact in shape relative to other possible options. To the contrary, this Court and the lower courts have expressly observed that the Constitution

imposes no such rule. *Shaw*, 509 U.S. at 647; *Duckworth*, 332 F.3d at 778. Similarly, no court has recognized in the Due Process Clause the guarantee of a right to vote in a congressional district that meets any particular standard of compactness, including the arbitrarily-chosen standard that the plaintiffs propose in this litigation. The Constitution protects voters against malapportionment and unlawful discrimination, not against the alleged "burden" on voters of irregularly shaped districts.

Whether non-compact districts *per se* violate the Constitution, or whether a "rule of compactness" makes non-justiciable political gerrymandering claims justiciable, are not subjects of genuine controversy. *See*, *e.g.*, *Goosby*, 409 U.S. at 518. Similarly, plaintiffs' unsupported theory of a legislators' gerrymander against the voters fails to present a substantial federal claim. *Kalson v. Paterson*, 542 F.3d 281, 290 (2d Cir. 2008) (affirming decision not to convene a three-judge panel where there was "no basis in the case law" for the claim that Article I, § 2 requires districts of equal voting age population).

CONCLUSION

The judgment of the district court should be summarily affirmed.

Respectfully submitted,

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