18-17458

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS FOR FAIR REPRESENTATION; et al.,

Plaintiffs-Appellants,

v.

SECRETARY OF STATE ALEX PADILLA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:17-cv-00973-KJM-CMK

APPELLANTS' REPLY BRIEF

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Appellee rehashes the arguments that led the district court into error but largely fails to respond to the arguments in the Opening Brief.

1. Appellee claims that "Plaintiffs' injury is shared by all or nearly all Californians in substantially equal measure." Red Br. at 17. He also claims that "[t]he diverse communities of interest represented by Plaintiffs cut so broadly as to encompass virtually all California residents." *Id*. at 19. This is wishful thinking. As appellants explain, "[m]illions of white, well-heeled Californians—beneficiaries of the current apportionment system who hold a disproportionate share of political power—are excluded from the plaintiff class." Blue Br. at 21. In bringing a motion to dismiss, a defendant must accept the facts as pleaded in the complaint. And the complaint here alleges that various minority groups—racial, ethnic, economic and political—are disadvantaged by the 80/40 apportionment scheme vis-à-vis other voters in the state. Appellee, like the district court, simply ignores this argument.

Appellants also dispute that their claims can be aggregated: "Standing must be determined on a claim-by-claim basis because it is the claim that defines the harm being suffered and thus whether the grievance is concrete or generalized." *Id.* Should the case go forward, the various claims would be judged by different standards: The racial discrimination claim will be subject to strict scrutiny whereas some of the others may be subject to intermediate scrutiny or rational

basis review. Some may fail while others succeed. Since this is not a class action, each plaintiff is entitled to have standing determined individually as to each separate claim. And each claim clearly does not apply to all California voters. Therefore, the district court erred in treating the complaint as if it presented a single, homogeneous claim rather than a series of disparate claims. Appellee fails to explain why it was appropriate for the district court to do so.

2. Appellee also argues that plaintiffs "offer no logical explanation of how the size of the districts, standing alone, could affect these communities [represented by plaintiffs] differently than anyone else." Red Br. at 18. *See also id.* at 23 (Plaintiffs' vote dilution claim "is entirely speculative"); *id.* at 26-27 (attempting to distinguish census data cases on the ground that in those cases "residents of one jurisdiction stood to gain political power *at the clear and demonstrable expense of others*") (emphasis added). But all these are objections to the merits of plaintiffs' claims, not to standing. And, in a case brought under 28 U.S.C. § 2284, the district court's authority to dismiss a case for failure to state a claim is exceedingly narrow. This was the point of *Shapiro v. McManus*, 136 S. Ct. 450 (2015), where the Supreme Court held that "'constitutional claims will not lightly be found insubstantial for purposes of' the three-judge-court statute." *Id.* at 455 (quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 147-48 (1980) (alteration deleted)). Justice Scalia's unanimous opinion

in *Shapiro* went to great lengths to emphasize that a district judge, sitting alone, may not dismiss a case brought pursuant to 28 U.S.C. § 2284 for failing to state a claim for relief on the merits. Rather, the single judge may dismiss only for failure to raise a substantial federal question, a standard akin to frivolity:

> We have long distinguished between failing to raise a substantial federal question for jurisdictional purposes . . . and failing to state a claim for relief on the merits; only "wholly insubstantial and frivolous" claims implicate the former. *Bell v. Hood*, 327 U.S. 678, 682–683(1946); see also *Hannis Distilling Co. v. Mayor and City Council of Baltimore*, 216 U.S. 285, 288 ("obviously frivolous or plainly insubstantial"); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962) (*per curiam*) ("wholly insubstantial," "legally speaking non-existent," "essentially fictitious"); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89 (1998) ("frivolous or immaterial"). Absent such frivolity, "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell*, *supra*, at 682. Consistent with this principle, *Goosby* [*v. Osser*, 409 U.S. 512 (1973)] clarified that "'constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'" 409 U.S., at 518 (citations omitted). And the adverbs were no mere throwaways; "the limiting words 'wholly' and 'obviously' have cogent legal significance." *Ibid.*

Shapiro, 136 S. Ct. at 455-56 (alterations and parallel citations omitted).

Appellee's inability to understand a logical connection between the archaic 80/40 apportionment scheme and unlawful discrimination is of no consequence. *Shapiro* gave teeth to the admonition quoted above by holding that a case presenting a legal theory that had been *rejected* by a plurality of the Justices

(including *Shapiro*'s author) nevertheless "easily clear[ed] *Goosby*'s low bar." *Id.* at 456. "Accordingly," *Shapiro* concluded, "the District Judge should not have dismissed the claim as 'constitutionally insubstantial' under *Goosby*. Perhaps petitioners will ultimately fail on the merits of their suit, but § 2284 entitles them to make their case before a three-judge district court." *Id.*

While there is no case directly supporting plaintiffs' claims that California's 80/40 apportionment scheme is unconstitutional, there is also no case rejecting them. Their claims are novel, to be sure, but if novelty were equated with frivolity, countless ground-breaking cases raising novel claims, such as *Roe v. Wade*, 410 U.S. 113 (1973) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), would have been strangled in the cradle. Indeed, even contrary authority directly on point does not render a case frivolous. *See, e.g.*, *Brown v. Bd. of Education*, 344 U.S. 1 (1952); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Lawrence v. Texas*, 539 U.S. 558 (2003). Courts must be chary of labelling cases raising untested legal theories as frivolous, lest they stunt development of the law.

Nor is plaintiffs' claim factually frivolous. As the Supreme Court lyrically noted in *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992):

> a court may dismiss a claim as factually frivolous only if the facts alleged are "clearly baseless," [*Neitzke v. Williams*,] 490 U.S.[319, 327 (1989)], a category encompassing allegations that are "fanciful," *id.*, at 325, "fantastic," *id.*, at 328, and "delusional," *ibid*. As those words suggest, a finding of factual

> frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them. . . . Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be "strange, but true; for truth is always strange, Stranger than fiction." Lord Byron, Don Juan, canto XIV, stanza 101 (T. Steffan, E. Steffan, W. Pratt eds. 1977).

Appellants' claim that California's 80/40 apportionment scheme violates Equal Protection may be "improbable," yet it may turn out to be "strange, but true." Although they might lose at the motion to dismiss stage, at summary judgment or after trial, that possibility does not render their case "fantastic" or "delusional," any more than were the equally novel claims in *Baker v. Carr*, 369 U.S. 186 (1962) or *Hunter v. Underwood*, 471 U.S. 222 (1985). Under the clear teaching of *Shapiro*, such matters of *substance* are for the three-judge district court to decide, not for the single judge sitting alone.

The central question is whether any of the cases where the Supreme Court found lack of standing on generalized grievance grounds are so clearly dispositive of *each* claim presented by *every single* plaintiff as to render the entire case "obviously frivolous," "legally speaking non-existent" or "essentially fictitious." *Shapiro*, 136 S. Ct. at 455-56 (citations omitted). If even one of plaintiffs' claims survives this minimal test, the district court's judgment must be reversed and the case remanded so that the district court may convene a three-judge panel.

3. Appellee attempts to distinguish *Baker* on the spurious ground that that "no plaintiff [here] can allege the concrete harm of having lost calculable voting share to a plaintiff [sic] in another district." Red. Br. at 25. But nothing in *Baker* calls for alleging a "calculable voting share" to establish standing. Plaintiffs here, like those in *Baker*, have alleged that the current apportionment system was designed, and continues to operate, so as to reduce their voting power compared to that of other voters in the state. *Baker* requires no more.

Appellee's exiguous effort to distinguish *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), the poll tax case, actually contradicts the Court's opinion. According to appellee, "[t]he loss of the vote is . . . suffered only by those voters unable to pay the tax, as opposed to all voters." Red. Br. at 26. But the harm identified in *Harper* was not denial of the vote but imposition of the poll tax, which the Court held "[wa]s not germane to one's ability to participate intelligently in the electoral process." 383 U.S. at 668. Accordingly, the harm was borne equally by "those unable to pay a fee to vote or who fail to pay." *Id*. Elsewhere the Court made it clear that the Equal Protection violation was suffered by *all* citizens "whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." *Id*. It's hard to imagine harm that applies more equally or universally to all voters than a poll tax, yet no Justice, in majority or dissent, intimated that the plaintiffs in *Harper* lacked standing.

Equally vain is appellee's attempt to distinguish the racial gerrymandering cases. According to appellee, standing attaches "only to those [voters] in racially gerrymandered districts who can assert an individualized injury based on the loss of voting power to the racial majority created by the gerrymander." Red. Br. at 27. Not so. In *United States v. Hays*, 515 U.S. 737 (1995), the Supreme Court held that "[w]here a plaintiff resides in a racially gerrymandered district . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." *Id.* at 744-45 (citation omitted). Thus, voters in racially gerrymandered districts have standing to challenge the gerrymander, whether their voting power is increased or decreased; the injury consists of being subjected to racial classification, not its effects. And, because the classification applies to all voters in the gerrymandered district, *Hays* stands squarely for the proposition that all voters have standing, even though they each suffer the same harm in equal measure.

4. Appellee defends the district court's reliance on taxpayer and citizen standing cases by claiming that "the Supreme Court has found generalized grievances in non-taxpayer standing cases." Red Br. at 30. But appellee does not dispute (and thereby implicitly concedes) that taxpayer and citizen standing cases are inapposite, for the reasons explained by appellants in their Opening Brief. Blue Br. at 12-13.

Appellee claims that *Lance v. Coffman*, 549 U.S. 437 (2007) is not a citizen standing case by arguing that "the generalized grievance in *Lance* . . . involved injuries beyond those attributable to the plaintiffs' taxpayer status." Red Br. at 30-31 (citing the unpublished district court order in *Lance*). But whatever may have been alleged in the district court, the Supreme Court clearly treated this as a citizen standing case: "The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance*, 549 U.S. at 442. In the very next sentence, the Court explained that this "is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." *Id.*

Appellants agree that there are non-taxpayer cases where the Court has found lack of standing. But their existence does not change the fact that the district court's reliance on taxpayer and citizen standing cases, which (as *Lance* held) are fundamentally different from voting rights cases, is misplaced. Appellee has failed to present any Supreme Court or Ninth Circuit case where claims such as plaintiffs' have been held to present a generalized grievance.

5. Appellee fails to address appellants' argument that *FEC v. Akins*, 524 U.S. 11 (1998), fundamentally shifted the mode of analysis for determining whether a grievance is generalized or individual by focusing, not on how

widespread the harm is, but on whether the harm is abstract or concrete. Appellants' lengthy quotation from *Akins*, Blue Br. at 18-20, is answered only with an unadorned quotation from a First Circuit case to the effect that "what was important [in *Akins*] was that the voters had been denied access to information that would have helped them evaluate candidates for office, when such information was specifically required by statute to be disclosed to the public." Red Br. at 28-29 (quoting *Becker v. FEC*, 230 F.3d 381, 389 (1st Cir. 2000)). The quoted language is obviously consistent with appellants' position that widespread harm, such as denial of information that is useful to *all* voters, nevertheless can support constitutional standing.

It gets even worse for appellee when the quoted language is read in context. The First Circuit in *Becker* rejected one of the arguments raised by the voter plaintiffs, namely that corporate funding of presidential debates causes "corruption of the political process." 230 F.3d at 389-90. Applying the teaching of *Akins*, the First Circuit held that the voter plaintiffs' "concern for corruption of the political process 'is not only widely shared, but is also of an abstract and indefinite nature,' comparable to 'the common concern for obedience to law.'" *Id.* at 390 (quoting *Akins*, 524 U.S. at 23). The First Circuit thus recognized that, after *Akins*, a generalized injury must be not merely widespread, but also "abstract and indefinite

in nature." *Id*. This is precisely what appellants here argue in their Opening Brief. Appellee offers no response.

Unlike the voters in *Becker*, who claimed an interest in preventing the corrupting influence of corporate funding, plaintiffs here have alleged precisely the type of concrete injury that conferred standing in other voting rights cases. This includes reduction of their voting power through the use of an apportionment scheme that discriminates based on factors unrelated to any state interest "germane to one's ability to participate intelligently in the electoral process." *Harper*, 383 U.S. at 668.

6. Appellants agree that the First Amendment overbreadth cases are sui generis and thus inapplicable to many of their claims. But they don't agree that "[t]he unique nature of the doctrine makes it a poor analogy . . . even to Plaintiffs' own First Amendment claim." Red Br. at 29. While none of the First Amendment overbreadth cases are *directly* on point, they don't need to be in order to help establish that plaintiffs' claims are not "essentially fictitious." *Shapiro*, 136 S. Ct. at 456. That the Supreme Court has shown a special solicitude for First Amendment cases, to the point of relaxing the standing rules, does help plaintiffs cross the very low threshold set by *Shapiro*.

7. Appellee devotes a substantial portion of his brief to the political question issue, but in vain. As appellants pointed out, no case since *Gomillion v.*

Lightfoot, 364 U.S. 339 (1960), has dismissed a claim that an apportionment scheme is racially discriminatory on political question grounds, and such arguments are "seldom even raised anymore." Blue Br. at 24. And, of course, plaintiffs allege that the 80/40 apportionment scheme was adopted with a racial animus and continues to operate in a racially discriminatory fashion. Blue Br. at 11; **E.R. 37.**

Appellee's Brief expends much effort trying to show that plaintiffs' non-racial claims raise political questions. *E.g.* Red Br. at 33 ("Plaintiffs claim violations on behalf of those who hold 'minority' political views, are 'not wealthy,' or lack 'political connections'"). They are wrong, for the reasons explained below, *see* pp. 13-16 *infra*, but it doesn't matter: If plaintiffs' claim that the 80/40 apportionment scheme discriminates on the basis of race is justiciable, and they are able to prove their claim at trial, the apportionment scheme must be set aside and a remedy will *have* to be found, because the federal courts cannot leave in place an apportionment scheme that is racially discriminatory.

Which is why it matters that appellee cannot meet the challenge in plaintiffs' Opening Brief that he point to a single case raising a claim of racial discrimination dismissed on political questions grounds. Appellee, in fact, cites two cases, but neither of them proves his point. At page 38 appellee cites *Levy v. Miami-Dade County*, 358 F.3d 1303 (11th Cir. 2004), but that case is inapposite because no

racial discrimination was alleged. And, at page 33, appellee throws in a conferatur cite to the Supreme Court's fractured opinions in *Holder v. Hall*, 512 U.S. 874 (1994). But the district court in *Holder* had *rejected* the constitutional claim of racial discrimination, finding that plaintiffs "had failed to provide any evidence that Bleckley County's single member county commission was the product of original or continued racial animus or discriminatory intent." *Id.* at 878 (quoting 757 F. Supp. 1560, 1571 (M.D. Ga. 1991)). "The Court of Appeals for the Eleventh Circuit reversed on the statutory claim …. Because of its statutory ruling, the Court of Appeals did not consider the District Court's ruling on respondents' constitutional claim." 512 U.S. at 879.

Holder is thus doubly unhelpful to appellee. First, any message about the challenge based on the size of the governing authority one can piece together from the Court's fractured opinions was expressly a *statutory* ruling, not a ruling on the *constitutional* considerations of standing or the political question doctrine. Indeed, only Justice Thomas (joined by Justice Scalia) used the term "political question" and then only to criticize the Court's earlier ruling in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) for requiring federal courts "to confront a number of complex and essentially political questions in assessing claims of vote dilution under the Voting Rights Act." *Id.* at 896 (Thomas, J., concurring in the judgement).

Second, *Holder* undermines appellee's argument by demonstrating that a constitutional claim that the size of the governing body "stemmed from a racial or discriminatory motivation"—much like plaintiffs' claim here—was litigated on the merits, with not even a hint, much less a ruling, that it presented a non-justiciable political question. 757 F. Supp. at 1569. While the plaintiffs in *Holder* lost on that claim, they were allowed to present evidence of what the Georgia legislature had in mind 78 years earlier when it established Bleckley County with a single-commissioner form of government.

The fact thus remains, entirely unrefuted by appellee, that colorable claims that a districting scheme was adopted and operates so as to discriminate based on race do not present non-justiciable political questions. That should be the end of the argument because, if plaintiffs are able to prove that claim, the unconstitutional scheme would have to be struck down and the courts (hopefully with the cooperation of the legislature) would have no choice but to come up with an apportionment scheme that removes the constitutional defect.

But appellee is also mistaken about plaintiffs' non-race-based claims. As will be recalled, plaintiffs' Opening Brief relied principally on *Baker v. Carr*, which did not present a claim of racial discrimination. Yet, the Supreme Court allowed the case to go forward, rejecting an argument that it raised a political question. Blue Br. at 23-24. Appellee struggles to distinguish *Baker* by arguing

that, in that case, "simple arithmetic could rectify the vote dilution caused by the wildly uneven distribution of Tennessee's population across districts . . . ." Red Br. at 38. A moment's reflection demonstrates the fallacy of this argument. Simple arithmetic can identify a violation, but it takes far more than arithmetic to come up with a satisfactory *remedy*.

Someone must decide *how* the new district lines will be drawn. This inevitably raises the kinds of questions appellee claims are judicially unmanageable: Should political boundaries of counties, cities and towns be respected, or should the lines be drawn so as to maximize geographical compactness? Should ethnically homogeneous neighborhoods be kept in one district or divided into two or more districts. *Cf. United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977) (considering a claim that the Hasidic community of Kings County, New York, was divided into two Assembly districts under pressure from the Justice Department). Should the lines be drawn so as to preserve safe seats for incumbents? Should the party affiliation of the constituents be considered in deciding whether to place them in this district or that one?

There are countless ways of drawing districts of equal population and if doing so were just matter of "simple arithmetic," then districting in the post-*Baker* world could have been entrusted to a group of high school math teachers. In fact, shameless political gerrymandering by the California legislature was perceived to

be so problematic that voters in 2008 adopted Proposition 11, known as the Voters First Act, Cal. Gov. Code §§ 8251-8253.6, which removed the state legislature from the districting process altogether and assigned it to the California Citizens Redistricting Commission. And, why would the U.S. Supreme Court have occasion to decide whether political gerrymandering is justiciable, *e.g.*, *Rucho v. Common Cause*, 558 U.S. __ ,139 S. Ct. 2484 (2019), if drawing district lines consistent with *Baker* were a matter of "simple arithmetic"?

Appellee—the Secretary of State of California—surely knows better than most that drawing district lines is not an exercise in bean counting; it inevitably implicates the kind of political considerations he claims are not suitable for judicial resolution. Had the *Baker* majority accepted the proposition advanced here by appellee that the remedy must be "placed . . . at the heart of the political question analysis," Red. Br. at 40, *Baker* would have been decided the other way. Indeed, that was the position of the concurring and dissenting Justices, *see* 369 U.S. at 259 ("we must consider if there are any appropriate modes of effective judicial relief") (Clark, J., concurring); *id.* at 341("*none* of the permissible policies and *none* of the possible formulas on which it might have been based could rationally justify particular inequalities") (Harlan, J., dissenting) (emphasis in original). But a majority of the Justices rejected this view. *Id.* at 198 ("it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial")

(majority opinion); *id.* at 250 ("The justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity.") (Douglas, J., concurring).

This case is at least as viable as that presented in *Baker*, even if one sets aside the indisputably justiciable claims of racial discrimination. The plaintiffs in *Baker* presented a constitutional claim that the Supreme Court had previously rejected as nonjusticiable. *See Colegrove v. Green*, 328 U.S. 549 (1946). Plaintiffs here are also presenting a novel constitutional claim but, unlike the plaintiffs in *Baker*, their claim has never been held to be nonjusticiable by the Supreme Court. As in *Baker*, plaintiffs here have the burden of proving their claims by substantial evidence, which they are prepared to do. If they fail, the political question will be rendered moot. But if they succeed, they would (like the plaintiffs in *Baker*) at least be entitled to have the apportionment scheme declared unconstitutional. Any further remedies to which they may be entitled could, in the words of Justice Douglas, "be fashioned in the light of well-known principles of equity." *Baker*, 369 U.S at 250. As a practical matter, once the state's antediluvian apportionment scheme is struck down, the legislature will have to adopt a plan that conforms to the new constitutional standard, as it did following *Baker* and *Reynolds v. Sims*, 377 U.S. 533 (1964).

CONCLUSION

The judgment of the district court should be reversed and the case remanded with directions that the district court exercise its statutory duty of convening a three-judge court pursuant to 28 U.S.C. § 2284.

Respectfully submitted,

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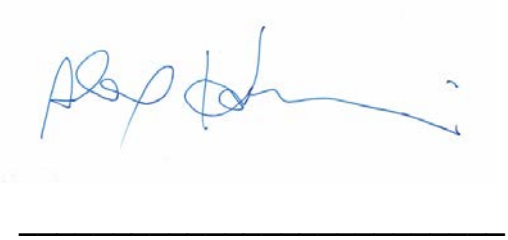
CERTIFICATE OF COMPLIANCE

I certify that his brief complies with the type-volume limitation of Circuit Rule 32-1(a) because it contains 4047 words, excluding those portions of the brief required by FRAP 32(f). The brief's typeface and type styles comply with FRAP 32(a)(5) and (c).



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