IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
GREENBELT DIVISION

*

PATRICIA FLETCHER, *et al.*,

*

Plaintiffs,

*

v. Civil Action No: RWT 11-3220

*

LINDA H. LAMONE, *et al*.,

*

Defendants.

*

* *

MOTION TO DISMISS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT AND
REQUEST FOR REVIEW OF THE ORDER OF THE SINGLE DISTRICT
JUDGE CONVENING A THREE-JUDGE PANEL

Defendants Linda H. Lamone and Robert L. Walker, by their undersigned attorneys, move to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and, in the alternative, request the entry of judgment on the pleadings pursuant to Rule 12(c) with respect to the Plaintiffs' Count 7 partisan gerrymandering claim. Plaintiffs' claims fail to state a claim upon which relief can be granted for the reasons provided in the accompanying Memorandum in Support filed herewith.

Because the complaint fails to state a claim, it is also "insubstantial" under the controlling Fourth Circuit precedent, *Duckworth v. State Administrative Board of Election Laws*, 332 F.3d 769, 772-73 (4th Cir. 2003). This three-judge district court was convened under 28 U.S.C. § 2284 as a result of the November 21, 2011, order and

memorandum opinion granting the plaintiffs' motion to convene the court over the defendants' objection. *See* Memorandum Opinion filed Nov. 21, 2011 (ECF Doc. 17) ("Memorandum Opinion"). This Court should reconsider the single district judge's decision to convene a three-judge court, because the reasoning explaining the decision does not acknowledge *Duckworth*, which is the controlling Fourth Circuit precedent on the appropriate standard to be applied when a single district judge "determines [whether] three judges are not required." 28 U.S.C. § 2284(b)(1); *see also id*. (b)(3) (providing that "[a]ny action of a single judge may be reviewed by the full court at any time before final judgment").

Subsection (b)(1) of 28 U.S.C. § 2284 has been interpreted to authorize a district court to forgo a three-judge panel "'[i]f it appears to the single district judge that the complaint does not state a substantial claim for injunctive relief. . . .'" *Simkins v. Gressette*, 631 F.2d 287, 290 (4th Cir. 1980) (citation omitted). In this case, the single district judge's Memorandum Opinion stated that "the Fourth Circuit has not directly addressed when a constitutional claim has 'substantive merit'" for purposes of determining whether a three-judge court should be convened, and "[t]he Fourth Circuit has never expressly held that a single judge should rely on the standard of review for a motion to dismiss under Rule 12(b)(6) to determine if a constitutional claim that seeks to invoke the provisions of 28 U.S.C. § 2284 is 'substantial.'" Memorandum Opinion at 3.

The Fourth Circuit has actually addressed those very questions in *Duckworth*—a decision that is not cited in the single-district judge's opinion or in plaintiffs' motion to appoint a three-judge panel, but was relied upon in the State Defendants' Opposition to Motion for Three-Judge Panel and Memorandum in Support of Motion to Dismiss. (ECF

Doc. 14-1) ("Opposition to Three-Judge Panel") at 2. In affirming a single-district judge's granting of a Rule 12(b)(6) motion to dismiss a challenge to Congressional redistricting on grounds of insubstantiality, *Duckworth* directly addressed the test for determining whether claims may be dismissed as insubstantial: "If . . . pleadings do not state a claim" under 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. Later in the same decision, the Fourth Circuit reiterated the standard by concluding that Duckworth's complaint "cannot survive the demands of Rule 12(b)(6)," and "having failed to state a claim at all, Duckworth also failed to present a substantial question." *Id.* at 777. "Thus, the district court was justified in acting on the case itself and refraining from referring it to a three-judge district court." *Id.* (citing *Simkins*, 631 F.2d at 290)).

Given this clear instruction from the Fourth Circuit, and its affirmance of a single-district judge's dismissal of a constitutional challenge for failure to state a claim under Rule 12(b)(6), the single district judge in this case underestimated his authority in concluding that a single judge should not "rely on the standard of review for a motion to dismiss under Rule 12(b)(6)" and should instead "apply a distinct procedure and standard that differs from a 12(b)(6) motion." Memorandum Opinion at 4. The law of this Circuit authorizes a single district judge to grant a motion to dismiss for failure to state a claim in a challenge to Congressional redistricting whenever the claims asserted "cannot survive the demands of Rule 12(b)(6)." *Duckworth*, 332 F.3d at 772-73.

This Court should revisit the decision to convene the three-judge court and apply the Fourth Circuit's standard of "insubstantiality," as set forth in *Duckworth.* For the

reasons stated in the defendants' opposition to the motion to convene a three-judge court, and reiterated in the Memorandum in Support filed herewith.

Finally, in the event that any portion of the Complaint were to survive dismissal under Rule 12 or for insubstantiality, the Defendants move for summary judgment under Rule 56(a) on the grounds that there is no genuine dispute of any material fact and the Defendants are entitled to judgment as a matter of law, again, for the reasons set forth in the accompanying Memorandum in Support.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

/s/

DAN FRIEDMAN (Bar No. 24535)
KATHRYN ROWE (Bar No. 09853)
Assistant Attorneys General
104 Legislative Services Building
90 State Circle
Annapolis, Maryland 21401
(410) 946-5600 (telephone)
(410) 946-5601 (facsimile)
dfriedman@oag.state.md.us

ADAM D. SNYDER (Bar No. 25723)
STEVEN M. SULLIVAN (Bar No. 24930)
Assistant Attorneys General
Office of the Attorney General
Civil Division
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6326
(410) 576-6955 (fax)
asnyder@oag.state.md.us

Attorneys for Defendants Linda H. Lamone and Robert L. Walker

Dated: December 2, 2011