UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JAMILA JOHNSON, ET AL.

VERSUS

Civil Action No. 3:18-cv-00625
SDD-EWD

KYLE ARDOIN, in his official capacity as Secretary of State of Louisiana

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MEMORANDUM BY SECRETARY OF STATE
IN RESPONSE TO NOTICE OF ADDITIONALAUTHORITY

MAY IT PLEASE THE COURT:

The Alabama district court's approach to the applicability of 28 U.S.C. § 2284 in the Plaintiffs Notice of Supplemental Authority (Docs 40, 40-1) is literal to a fault and discounts the purpose for three judge panel review. The decision turned, not on the character and nature of the claims asserted by the plaintiffs, but on whether the word "constitution" made its way into the pleading. If so, reasoned the court, the statute would be triggered and a three judge panel must be convened; if not, the very same pleading without the word "constitution" is subject to review by a single district judge. It made no difference to the Alabama court that the plaintiff's claim is inherently constitutional or that a determination of the claim will follow a constitutional and statutory analysis.

Complaints are to be construed according to the claims and causes of action actually contained in them. *Skinner v. Switzer*, 562 U.S. 521, 530 (2011), (under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory).

Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible "short and plain" statement of the plaintiff's claim, not an exposition of his legal argument," citing 5 C. Wright & A. Miller, Federal Practice & Procedure § 1219, pp. 277-278).

"Under Federal Rules of Civil Procedure, a complaint is not an anagrammatic exercise in which the pleader must find just exactly the prescribed combination of words and phrases." *Thompson v. Allstate Insurance Company*, 476 F. 2d 746, 749 (5th Cir. 1973). A plaintiff may suggest in his pleading one legal theory on which he can prevail, but a complaint sufficiently pleads a claim or cause of action if the plaintiff is entitled to relief under any legal theory. *Thompson*, 749. The plaintiffs here pled a constitutional claim even if they did not explicitly use the term "constitutional".

Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007) rejected the "labels and conclusions" method of pleading in preference of pleading facts and claims that would entitle a plaintiff to relief under principles implicated by the complaint. Conversely, a legal theory cannot be extracted from a case by intentionally omitting its mention from the complaint if the underlying facts implicate that theory as a basis for recovery. The court is bound to apply any laws that afford relief under the facts of the case. For example, were a state defendant in a congressional reapportionment case to urge the absence of a constitutional claim upon the same allegations as those set out in the present complaint, the plaintiffs, and likely the court, would reject the state's argument and say that the complaint is controlled by its substance, and constitutional claims must be considered plausible under the facts set out in the complaint. The plaintiffs would undoubtedly be allowed to proceed with their constitutional claims even though they did not use the word "constitutional".

The Secretary of State is unable to find a provision in the Federal Rules or jurisprudence requiring some magic word or phrase that must be in a complaint in order for a claim to be treated as a constitutional claim. For instance, were a complaint to allege facts to the effect that the plaintiff was arrested and jailed arbitrarily without charge or opportunity for a hearing, the pleader would not need to say "constitution" for the court to discern a due process claim. The applicable constitutional principles would be applied there as they must be here.

Section 2 of the Voting Rights Act, as the enforcement mechanism for constitutional principles related to the right to vote, are ordinarily pled with a claim under the Fourteenth and Fifteenth Amendments of the Constitution. This is so because, even with the 1982 amendment to Section 2, the substantive constitutional claims are inseparable from Section 2 claims based upon an alleged denial of equal protection and invidious discrimination in congressional reapportionment.

On the allegations of gerrymandering and unequal treatment, clearly pled in the present case, the underlying claims have a constitutional base and must be reviewed as such by a three judge panel. See, *Page v. Bartels*, 246 F. 3d 175 (3rd Cir. 2001). Voting rights are fundamental constitutional rights grounded in the Fourteenth and Fifteenth Amendments, and a challenge to those rights carries unavoidable constitutional implications. The importance of reapportionment cases compels three judge panel review so that a single judge does not invalidate a statewide reapportionment plan. *Page v. Bartels, supra*.

The extensive jurisprudence on voting rights has developed around the application of principles embodied in the Fourteenth and Fifteenth Amendments, and trying to apply Section 2 in isolation is not feasible. Teasing out the strands of a constitutional claim from a Section 2

claim under the facts pled in this case does not seem to the Secretary to be a plausible exercise. The plaintiffs have not waived any constitutional claims arising out of their complaint, assuming that they can waive such claims without dismissing their suit, and the Court can hardly read those claims away for them.

Louisiana chose to enact its congressional reapportionment plan by statute, La. R.S. 18:1276.1, and the plaintiffs here seek invalidation of the reapportionment statute. The statute was precleared under Section 5, and the reapportionment was found to be unobjectionable to the U.S. Department of Justice. Elections have been held in the congressional districts since 2012. The changes urged by the plaintiffs would ripple across all of Louisiana's districts and effectively require the reapportionment and reimplementation of a new reapportionment plan statewide with the attendant convening of the Legislature and other machinery necessary to a second apportionment of congress for a single election based upon such stale data that the new plan would surely violate the *Reynolds v. Sims*, 377 U.S. 533 (1964) one man one vote rule.

If such a dramatic shift in congressional districts is to be made at this late date, consideration of the change by a three judge panel is essential to avoid an improvident invalidation of Louisiana's reapportionment statute. *Page v. Bartels*, 246 F. 3d 175 (3rd Cir. 2001); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Moreover, given the timing of the suit, there may be insufficient time for appellate review with the result that the decision of a single district judge would require congressional redistricting statewide.

CONCLUSION

For some undisclosed reason, the plaintiffs want to evade review of the case by a three judge panel. They amended their complaint to purge any mention of the constitution once the

prospect of a three judge panel was raised. But the factual averments and the basis of the claim remain, and if the original complaint contained a constitutional claim, so does the amended one. The question is not, as the Alabama court suggested, whether or not 28 U.S.C. § 2284 requires a constitutional claim for the statute to apply. Of course it does. The question is whether or not the Complaint before this Court contains a constitutional claim. Same answer - - of course it does.

Dated: Feb. 4, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 4th day of February 2019, the foregoing pleadings was filed electronically with the Clerk of Court using CM/ECF system which gives notice of filing to all counsel of record. Counsel of record not registered in the CM/ECF system were served via other means.

/s/ Angelique Duhon Freel
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