UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10462
Summary Calendar

PHILIP BENHAM, a/k/a,
Flip Benham, ET AL.,

Plaintiffs-Appellants,

VERSUS

ROBERT DRIEGERT, as County
Chairman of The Republican
Party of Dallas County, Texas, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:94-CV-252-T)

(October 5, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

The district court dismissed this § 1983 civil rights action, and we **AFFIRM**.

I.

The plaintiffs assert that Tex. Gov't. Code § 25.0014(3) (West Supp. 1994), which requires that a candidate for statutory county court judge be a licensed and practicing attorney or a serving

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

judge, denies them the rights to vote, of free association, of free speech, liberty and equal protection, in violation of the First and Fourteenth Amendments. Plaintiff Benham asserts that this statute impermissibly interferes with his right to be a candidate; the remaining plaintiffs, that it violates their rights to vote for Benham as a constitutional county judge.

When the plaintiffs filed their complaint, they also moved for injunctive relief to have Benham's name placed on the ballot in the upcoming election. In support, they submitted their affidavits and the affidavit of their attorney to demonstrate that satisfying the requirements of § 25.0014(3) was expensive and could not be met by Benham. The plaintiffs argued that § 25.0014(3) was not necessary to further the State's interest in a competent judiciary, but offered no evidence supporting this argument.[2]

After the district court denied injunctive relief, the defendants moved, under Rule 12(b)(6), to dismiss for failure to state a claim. In opposition, the plaintiffs asserted that the motion was actually one for summary judgment under Rule 56. They offered no additional evidence in support of their opposition, stating only that they believed they would be able to provide substantial evidence at the trial of the case that § 25.0014(3) does not advance judicial competence, although they did not state

[2] The plaintiffs also moved to consolidate the hearing on the motion for preliminary injunction with the trial on the merits, stating that the facts are largely undisputed and the case presents "only issues of law."

what this evidence would be. The district court granted the defendants' motion.

II.

The district court characterized the motion as one for dismissal under Rule 12(b)(6); but, because it considered matters outside the pleadings, we review it as one for summary judgment. *See* ***United States v. East Baton Rouge Parish School Board***, 594 F.2d 56, 57 n.3 (5th Cir. 1979).[3] It goes without saying that our review is *de novo*.

On appeal, the plaintiffs first contend that the district court erred in refusing to accept as true their allegation that § 25.0014(3) is not reasonably necessary to further judicial competence. This was not reversible error for two reasons. First, the complaint contains only the barest conclusory allegation that the statute and the defendants' actions violate various constitutional rights[4] and no allegation concerning the relation between the statute and any state interest. The district court was not required (nor are we) to give weight to the conclusory

[3] Any error committed by the district court in not giving formal notice of the conversion of the motion to one for summary judgment is harmless inasmuch as the plaintiffs argued in their response brief in district court, as noted, that the motion was in fact for summary judgment.

[4] The complaint merely included the conclusory allegation that the statute and the defendants' actions "deny Plaintiffs the right to vote, right of free association, right of free speech, liberty, and the equal protection of the laws, in violation of the First Amendment to the Constitution of the United States, under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States."

allegations unsupported by any facts. *See* ***Guidry v. Bank of LaPlace***, 954 F.2d 278 (5th Cir. 1992).

Second, the plaintiffs' conclusory allegations, even including those contained in briefs filed before the district court,[5] were not sufficient to overcome the facts submitted by the defendants. In support of their motion, they submitted the legislative history of § 25.0014(3) to show that it was enacted as part of an omnibus bill revising the civil courts. That legislation raised the jurisdictional limit of constitutional county courts to $100,000 and, at the same time, imposed the requirement that judges in those courts be practicing lawyers or judges. This material supported the defendants' claim that the candidacy requirement of §25.0014(3) bears a rational or compelling relation to the State's interest in judicial competency; when the subject matter jurisdiction of the

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[5] In the brief in support of their motion for a preliminary injunction, the plaintiffs asserted that the statute's requirements "are not `necessary' to further the only benign state interest which can conceivably underlie them, the interest in a qualified or competent judiciary. Judicial competence is furthered little, if at all, by the statute--certainly not enough to justify its adverse effects. Judicial competence can be promoted by less drastic means." In that brief, the plaintiffs also opined that "wisdom, integrity, administrative ability, intelligence, and technical knowledge of the field of law" are the components of judicial competence, arguing that it "cannot seriously be argued that the least drastic way to promote the first four of these qualities ... is to require [candidates] to graduate from law school and practice law four years." With respect to technical legal knowledge, the plaintiffs urged that less burdensome and "much more effective[]" means were available, such as a competency exam. In their response to the motion to dismiss, the plaintiffs added further that they intended to prove at trial that "the statute does not advance the only state interest (judicial competence) which underlies the statute enough to justify the damage it inflicts on the constitutional rights of voters and candidates."

court was increased, the State correspondingly increased the candidacy requirements.[6] The plaintiffs responded to these factual assertions, however, only with more conclusory allegations which were insufficient to avoid dismissal. *See* ***Lujan v. National Wildlife Federation***, 497 U.S. 871, 110 S. Ct. 3177, 3188-89 (1990). The plaintiffs, therefore, failed to counter evidence that is fatal to their case. Accordingly, the district court properly determined that §25.0014(3) is constitutional and dismissed the plaintiffs' complaint.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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[6] The plaintiffs further assert that the district court applied the incorrect level of scrutiny in analyzing their constitutional claims. In light of our determination that the district court properly dismissed the complaint on other grounds, we need not address this question. Other circuits also have declined to determine the applicable level of scrutiny. *See* ***O'Connor v. State of Nevada***, 27 F.3d 357 (9th Cir. 1994); ***Bullock v. Minnesota***, 611 F.2d 258 (8th Cir. 1979).