No. 19-60133

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSEPH THOMAS; VERNON AYERS; MELVIN LAWSON,

Plaintiffs – Appellees

v.

PHIL BRYANT, Governor of the State of Mississippi, all in the official capacities of their own offices and in their official capacities as members of the State Board of Election Commissioners; DELBERT HOSEMANN, Secretary of State of the State of Mississippi, all in the official capacities of their own offices and in their official capacities as members of the State Board of Election Commissioners,

Defendants – Appellants

On Appeal from the United States District Court for the Southern District of Mississippi;
USDC No. 3:18-cv-00441-CWR-FKB

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. Pursuant to Federal Rules of Appellate Procedure 26.1(a), *amicus curiae* Judicial Watch, Inc. hereby submits that it is a registered 501(c)(3) educational non-profit organization, that it is a private non-publicly held corporation, and that it has no parent corporation. No publicly held corporation or parent corporation owns ten percent (10%) or more of Judicial Watch's stock. Judicial Watch further certifies that, in addition to the persons and entities identified in the briefs of Plaintiffs-Appellees and Defendants-Appellants, the following persons may have an interest in the outcome of this case:

Judicial Watch, Inc. (*amicus curiae*)

Robert D. Popper (*counsel for amicus curiae*)

Coates, H. Christopher (*counsel for amicus curiae*)

J. Henry Ros (*counsel for amicus curiae*)

October 23, 2019

Respectfully submitted,

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Judicial Watch is a non-partisan, public interest organization headquartered in Washington, DC. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch files amicus curiae briefs on issues involving both Section 2 of the Voting Rights Act and 28 U.S.C. § 2284(a) and prosecutes lawsuits on matters it believes are of public importance. *See, e.g.*, *Ohio Democratic Party v. Husted*, Case No. 16-3561 (6th Cir. July 1, 2016) (Voting Rights Act Section 2 lawsuit concerning early voting period); *State of North Carolina, et al. v. League of Women Voters of North Carolina, et al.*, Case No. 14-780 (U.S. Feb. 3, 2015) (Section 2 challenge to voter ID and other election laws); *League of Women Voters of North Carolina et al. v. State of North Carolina, et al.*, Case No. 14-1845 (4th Cir. Sept. 17, 2014); *Shapiro v. McManus*, Case No. 14-990 (U.S. Aug. 14, 2015) (challenge to Fourth Circuit's standard for convening three-judge panels under 28 U.S.C. § 2284(a)).[1]

[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), Judicial Watch, Inc. and its counsel certify that this brief was not authored in whole in or part by any party's counsel; that no party or party's counsel contributed money to fund preparing or submitting this brief; and that no person other than Judicial Watch, Inc., and its members contributed money to fund preparing or submitting this brief. Judicial Watch, Inc. further certifies that it obtained prior consent from all parties to the filing of this brief.

ARGUMENT

I. As a Matter of Statutory Construction, the Application of "Constitutionality" in § 2284 is Cut Off by the Use of a Determiner, and Thus It Does Not Modify "Any Statewide Legislative Body."

"A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). In its decision rejecting the application of this statute, the district court concluded that "[t]he term 'the constitutionality of' modifies all of the phrases which follow it, per the series-qualifier canon of construction." *Thomas v. Bryant*, Case No. 3:18-CV-441-CWR-FKB, 2019 U.S. Dist. LEXIS 18006, at *5 (S.D. Miss. Feb. 5, 2019), citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 147 (2012). The district court thus determined that "the constitutionality of" modifies the second phrase, so that a challenge must be to the "constitutionality" of a "statewide legislative body" for a three-judge court to be necessary, notwithstanding its concession that this reading of the statute rendered the words "the apportionment of" superfluous. *Id.* at *6. But courts "generally presum[e] that statutes do not contain surplusage." *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1037 (2019), quoting *Arlington Central School Dist. Bd. of Ed.*, 548 U.S. 291, 299 n.1 (2006).

Judicial Watch respectfully submits that the district court applied the "series-qualifier canon" incorrectly. In her dissent from the motions panel, Judge Clement described that canon as follows: "When there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the whole series." *Thomas v. Bryant*, 919 F.3d 298, 322 (5th Cir. 2019) (Clement, J., dissenting), citing SCALIA & GARNER at 147. "A typical example is the phrase '*Forcibly assaults, resists, opposes, impedes, intimidates, or interferes with*,' in which the modifier '*forcibly* modifies each verb in the list.'" *Id.*, citing SCALIA & GARNER at 148.

Yet just as important as determining when a qualifier *does* modify a series is determining when it *does not*. The main way to limit the application of a qualifier is to insert a "determiner" before any term that is not supposed to be modified:

> The typical way in which syntax would suggest no carryover modification is that a determiner (*a, the, some*, etc.) will be repeated before the second element: [for example,] *The charitable institutions or the societies* (the presence of the second *the* suggests that the societies need not be charitable).

Id., quoting SCALIA & GARNER at 148.

This rule explains the structure of 28 U.S.C. § 2284(a). The statute requires a three-judge court for actions "challenging the constitutionality of the apportionment of congressional districts or *the apportionment* of any statewide legislative body." (emphasis added). Repeating the phrase "the apportionment"—

in other words, using it as a "determiner"—shows that the word "constitutionality" is not meant to modify the phrase that follows, "any statewide body."[2] That this approach is correct is confirmed by the fact that the meaning of a hypothetical statute that omitted the determiner would be crystal clear. If the statute referred instead to actions "challenging the constitutionality of the apportionment of congressional districts or of any statewide legislative body," then the term "constitutionality" would indisputably apply to both phrases.

The majority of the merits panel found that Appellants' interpretation of § 2284(a) conflicted with the "settled understanding" of circuit and district courts that "§ 2 challenges to state legislative maps [are] single-judge matters[.]" *Thomas v. Bryant*, 938 F.3d 134, 145 (5th Cir. 2019) (alterations bracketed). Yet, even cases cited by the majority opinion illustrate how courts can misapply § 2284(a). *Id.*, n.32. For example, in *Mirrione v. Anderson*, 717 F.2d 743 (2nd Cir. 1983), a single judge dismissed both § 2 *and constitutional* challenges to New York State's legislative reapportionment plan. On appeal, the Second Circuit never addressed the fact that the single judge lacked jurisdiction to hear the constitutional claims under § 2284(a) before it simply affirmed the dismissal.[3] In a later opinion,

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[2] The determiner is the phrase "the apportionment."

[3] Courts treat § 2284 as jurisdictional. *See Thomas*, 919 F.3d at 304 (collecting cases).

the Second Circuit found § 2284(a) to be jurisdictional, requiring district courts to automatically convene a three-judge panel, unless the claim is wholly insubstantial. *Kalson v. Patterson*, 542 F.3d 281, 287 (2nd Cir. 2008). Given how infrequently § 2 results cases are pursued independently without constitutional claims under the Fourteenth or Fifteenth Amendments, it is difficult to find any consistency in how courts apply § 2284.

Canons of statutory construction were developed to interpret statutory language. Common usage *does* incorporate determiners to shape meaning. There is an obvious difference between "a solid wall or a fence," meaning only the wall is solid, and "a solid wall or fence," where solid modifies both wall and fence. *See* SCALIA & GARNER at 149. The difference is the determiner, "a." This Court applied the rule of determiners in *United States ex rel. Vaughn v. United Biologics, L.L.C.*, 907 F.3d 187 (5th Cir. 2018). The False Claims Act provides that an action "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." *Id.* at 195. The plaintiffs argued "that the modifier 'written' applies both to 'consent' and to 'reasons for consenting,' so it was entitled to a written explanation" for the relevant consent. *Id.* The Court noted that that "[t]he typical way to break the series" to which a modifier may apply "is to insert a determiner." *Id.*, citing SCALIA & GARNER at

148. The Court rejected the plaintiffs' argument, in that case because of a single word: "the possessive determiner, 'their,' is attached to the second noun in the list, 'reasons.' This makes clear that 'written' was not intended to modify both 'consent' and 'reasons.'" *Id.*

In the same way here, the presence of a determiner before the phrase "any statewide legislative body" in § 2284(a) means that the earlier phrase "the constitutionality of" was *not* meant to modify that second phrase. The plain language of the statute simply does not require that a challenge to a statewide legislative body must concern a constitutional claim in order for three judges to be required. *See United States ex rel. Vaughn*, 907 F.3d at 196 (where a determiner limited the reach of a modifier, "Congress has clearly communicated its intent through the text of the statute"). *United States v. Stanford*, 883 F.3d 500, 511 (5th Cir. 2018) (once a statute is determined to be "unambiguous, and does not lead to an 'absurd result,' the court's inquiry begins and ends with the plain meaning of that language").[4]

[4] Judicial Watch respectfully submits that the language of § 2284 is unambiguous for the reasons stated in the text, so that any resort to legislative history is unnecessary. But Judicial Watch agrees with Defendants-Appellants that the legislative history of § 2284 clearly establishes that Congress intended challenges to statewide redistricting, and particularly those brought under Section 2 of the Voting Rights Act, to be heard by three-judge panels. Brief for the Appellants Governor Phil Bryant and Secretary of State Delbert Hosemann, April 18, 2019, at 16-18.

Interpreting § 2284(a) to include only challenges to the constitutionality of the apportionment of statewide legislative districts, as Plaintiffs-Appellees and the district court does here, could lead to anomalous results. For example, a claim of *intentional* discrimination in the drawing of statewide districts equally violates Section 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments. The identical factual claim could end up either before a single judge or before a three-judge panel, depending on how a plaintiff would choose to plead it.

This fact will allow plaintiffs to engage in forum- or judge-shopping, simply by altering how they plead their complaints. Indeed, it appears that this may have happened here, where Plaintiffs freely acknowledged in the briefing before the district court that "Plaintiffs consciously chose to bring a Section 2 results claim, and not a constitutional claim." Plaintiffs' Memorandum in Opposition to the Motion for Stay Pending Appeal Filed by the Governor and the Secretary of State at 6, *Thomas v. Bryant*, Case No. 3:18-441-CWR-FKB (S.D. Miss. Feb. 22, 2019), ECF No. 65.

II. The District Court Erred When It Relied Upon the Number of African American Candidates Elected to the Mississippi Senate as Probative Evidence of a Section 2 Violation of the Voting Rights Act.

In 1982 Congress, in amending Section 2 of the Voting Right Act of 1965, 52 U.S.C. § 10301, added a *proviso* to the amendment that states that "nothing in

this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Subsequently, in *Johnson v. De Grandy*, 512 U.S. 997 (1994), the U.S. Supreme Court elaborated on the distinction between this anti-proportional representation *proviso* and the term "proportionality" in vote dilution cases brought under Section 2.[5] In opining about this distinction, the Court stated,

> "Proportionality" as the term is used here links the number of majority-minority voting districts to minority members' share of the relevant population. The concept is distinct from the subject of the proportional representation clause of § 2, which provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." . . . This proviso speaks to the success of minority candidates, as distinct from the political or electoral power of minority voters. *Cf.* Senate Report 29, n. 115 (minority candidates' success at the polls is not conclusive proof of minority voters' access to the political process). And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success . . . .

Id. at 1014 n. 11; *accord*, *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 938-40, n.12 (8th Cir. 2018); *Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1226, n. 5 (11th Cir. 2000). This distinction between the proportional election of minority representatives, which is not required by Section 2, and proportionality between the minority population and the number of

[5] *De Grandy* involved challenges to single-member legislative districts in the Florida Legislature. 512 U.S. at 1000.

majority-minority districts is an important one in Section 2 jurisprudence that the district court confused.

In making its determination that Mississippi Senate "District 22's lines result in African-Americans having less opportunity . . . to elect the State Senator of their choice" (*Thomas v. Bryant*, Case No. 3:18-CV-441-CWR-FKB, 2019 U.S. Dist. LEXIS 18006, at *38 (S.D. Miss. Feb. 16, 2019)), the district court relied upon a number of findings that conflict with the anti-proportional representation *proviso* of Section 2. First, the district court noted that Mississippi's non-white population, according to the 2010 Census of Population, is 40.9%.[6] The district court then went on to state that "one might have expected fresh maps to result in an upper legislative chamber with something like 31 white Senators and 21 non-white Senators." *Id*. at 37. This reasoning is directly contrary to the anti-proportional representation *proviso* of Section 2 that makes clear that minority groups do not have a statutory right to be able to elect a certain number of candidates of a particular race.

[6] The district court's use of the 40.9 percentage of Mississippi's "non-white" population, instead of the percentage of Mississippi's "African American or black" population (which is 37.8 percent) was incorrect. Plaintiffs in this lawsuit challenged Senate District 22's configuration solely on the grounds that it denies to black voters the equal opportunity to participate politically and to elect candidates of their choice. Since Plaintiffs in this action made no claims that Senate District 22's boundaries adversely affect non-white citizens who are *not* black, the percentage of Mississippi's population that is black, and not "non-white," is the relevant basis for comparison.

In addition, the district court stated in its opinion that the Mississippi "Senate has never had more than 13 African-American members" at one time. *Id.* Further, the district court summarized the evidence regarding the election of African Americans to the Mississippi Senate this way: "[i]n plain English, Mississippi's Senate is much whiter than Mississippi." *Id.* In reaching its conclusions, these statements by the district court make clear that it incorrectly gave great probative weigh to the fact that the percentage of Mississippi's senators who are African American is not proportional to the percentage of statewide population that is African American. Again, this fundamentally incorrect approach to finding a violation of Section 2 conflicts with the statute's *proviso*.

Although this reasoning by the district court regarding what weight to be given to the number of African-American members was clear legal error, this issue was not addressed by the merit panel majority. The issue was correctly discussed and considered in the merit panel dissent. *Thomas*, 938 F.3d at 180, 183-85 (Willett, J., dissenting). This legal error fundamentally affected the district court's legal analysis and requires that its final judgment be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* Judicial Watch, Inc. respectfully requests that the Court vacate the final judgment of the district court and render judgment dismissing the complaint.

October 23, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) and 29(b)(4) because, excluding parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32.2, this document contains 2,500 words.

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October 23, 2019

/s/ J. Henry Ros
J. Henry Ros