No. 14-990

In the Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA
Petitioners,

v.

DAVID J. MCMANUS, JR. AND LINDA H. LAMONE,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Statutes

Miscellaneous

REPLY BRIEF FOR PETITIONERS

With the Three-Judge Court Act, Congress provided that certain cases of exceptional importance "shall * * * be heard and determined by a district court of three judges * * * unless [the single judge to whom the case is initially referred] determines that three judges are not required." 28 U.S.C. § 2284. As we demonstrated in our principal brief, there are just two circumstances in which "three judges are not required" within the meaning of the Act: (1) when the conditions for three-judge-court review set forth in Section 2284(a) are not met or (2) when the federal courts lack subject matter jurisdiction, including when the complaint's claims are "insubstantial."

The Fourth Circuit, in *Duckworth*, did not disagree with that basic framework. Its mistake, instead, was holding that a claim is "insubstantial" (and that jurisdiction is therefore lacking) when it fails to state a claim under Rule 12(b)(6). That holding is flatly inconsistent with this Court's precedents, and thus also with what Congress would have understood the words "not required" to mean when it amended the Act in 1976.

Unable to defend the Fourth Circuit's holding on its own terms, respondents now offer an entirely new and even more troubling approach. In their view, Section 2284(b)(1)'s requirement that the single-judge district court determine whether "three judges are not required" does not call for application of the substantiality standard at all and instead invites single-judge district courts to rule on motions to dismiss, apparently as a matter of discretion.

There is no basis in the statutory text for such a radical departure from historical practice. In fact, the plain language expressly forbids it—it says that, when the statutory prerequisites are satisfied, "[a] district

court of three judges *shall* be convened." 28 U.S.C. § 2284(a) (emphasis added). Few rules of statutory interpretation are more fundamental than the maxim that "the word 'shall' admits of no discretion." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015).

Respondents have little else to say in defense of the Fourth Circuit's *Duckworth* decision. They offer no meaningful response to our argument (Pet. Br. 22-23) that Congress is presumed to have been aware of this Court's precedents when it used the words "not required" in the 1976 amendment. And while respondents strain to show that their interpretation of the statutory language is more consistent with the Act's settled purposes (Resp. Br. 25-40), they fail to grapple with the myriad complications that follow when single-judge courts are permitted to dismiss on the merits.

In the end, there is no doubting that the *Duckworth* rule—whether on its own terms or reframed as respondents now suggest—is inconsistent with both the statutory text and the Act's clear purposes. The judgments below accordingly should be vacated.

A. Three judges are "not required" only when the statutory preconditions are absent or when the court lacks jurisdiction

1. The statutory language could hardly be clearer: "A district court of three judges *shall* be convened *when*" such a court is either "required by Act of Congress" or "an action is filed challenging the constitutionality of the apportionment of congressional [or statewide legislative] districts." 28 U.S.C. § 2284(a) (emphasis added). It follows that "three judges are not required" (*id.* § 2284(b)(1)) when those conditions are not met: when the lawsuit does not bring a constitutional challenge to the apportionment of congressional or

legislative districts and is not otherwise one required by act of Congress to be heard by a three-judge court.

As we explained in our principal brief (at 19), this Court has recognized a second circumstance in which a single-judge court may decline to convene a three-judge court: "when the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez* v. *Automatic Emp. Credit Union*, 419 U.S. 90, 100 (1974) (citing *Ex parte Poresky*, 290 U.S. 30, 31 (1933)). And one ground for holding that a claim is "beyond the jurisdiction of the District Court" and subject to dismissal without a three-judge panel is that the claim is "insubstantial." *Hagans* v. *Lavine*, 415 U.S. 528, 539 (1974). Accord *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006).

Apart from those two circumstances—that is, when (1) the complaint *is* of the sort identified in Section 2284(a) and (2) there are *no* impediments to federal jurisdiction—review by a three-judge court is mandatory. That follows inescapably from Congress's use of the word "shall," which "admits of no discretion." *Mach Mining*, 135 S. Ct. at 1651.

Respondents point (Resp. Br. 23) to *Dolan* v. *United States*, 560 U.S. 605 (2010), as suggesting that the word "shall" actually means "may." Respondents misread that case. *Dolan* involved a statute that required the district court to act within a certain time period. *Id.* at 607-608. The question was whether a court's failure to act within the prescribed timeframe divested it of authority to act beyond the "missed statutory deadline." *Id.* at 611-612. The Court held that although the word "shall" made a court's duty to act before the deadline "mandatory," it did not spell "'loss of all later powers to act'" subsequently. *Id.* at 612 (quoting *United States* v. *Montalvo-Murillo*, 495

U.S. 711, 718-719 (1990)). That holding does nothing to suggest that Congress's use of the word "shall" in Section 2284(a) leaves wiggle room for a single-judge court to decline to convene a three-judge court when the statutory prerequisites are met and jurisdiction is present.

2. Respondents observe (Resp. Br. 17, 21) that "Congress * * * did not [expressly] prescribe that district court judges employ the 'insubstantiality' standard," although it "could have easily done so" and has done so in other statutes. They likewise note (*id*. at 20) that Congress did not expressly "limit the scope of the district court's review to a determination that the district court lacks subject matter jurisdiction."

That misses the point. As we noted in our principal brief (at 19-20), this Court stated—just two years before the 1976 amendment—that "[a] three-judge court *is not required* when the district court itself lacks jurisdiction of the complaint." *Gonzalez*, 419 U.S. at 100 (emphasis added). And by 1976, it was "unexceptionable under prior cases" of this Court "that a 'substantial' question was necessary to support jurisdiction." *Hagans*, 415 U.S. at 536. Thus, the Court explained, the Act "*does not require* the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial." *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973) (emphasis added).

That was how matters stood when Congress added the words "unless he determines that three judges are not required" in 1976. See Pub. L. No. 94-381, § 3, 90 Stat. 1119 (Aug. 12, 1976). It would blink reality to say that Congress did not understand in enacting the 1976 amendment that the only accepted grounds for holding that "three judges are not required" under prior versions of the Act were that (1) the statutory criteria are

not satisfied or (2) the court lacks jurisdiction, including when the underlying claims are insubstantial.

That ought to be an end to the matter. This Court's "evaluation of congressional action in [1976] must take into account its contemporary legal context." *Cannon* v. *U. of Chicago*, 441 U.S. 677, 698-699 (1979). "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with * * * [this Court's] precedents * * * and that it expected its enactment to be interpreted in conformity with them." *Id*. at 699. There are no "contrary indications" to suggest otherwise. *Marshall* v. *Marshall*, 547 U.S. 293, 307 (2006). We made that point in our principal brief (at 22), but respondents ignore it.

Respondents are, for similar reasons, wide of the mark when they insist (Resp. Br. 20) that "Congress chose not to prescribe any particular standard [for] * * * determining whether three judges are not required." No express statement of a "standard" was necessary—it was crystal clear then (and remains so now) that three judges are "not required" only when the statutory criteria are not met or jurisdiction is lacking. We are unaware of any case decided at any time in the century-long history of the Three-Judge Court Act to suggest otherwise.[1] And respondents' alternative

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[1] Respondents say (Resp. Br. 39-40) that this Court's precedents more broadly held that three judges are not required when the reasons justifying a three-judge court are "inapplicable." That is manifestly wrong. In *Swift & Co.* v. *Wickham*, the Court held that statutory preemption claims are not "constitutional" claims within the meaning of the statute. 382 U.S. 111, 126-129 (1965). And in *Bailey* v. *Patterson*, the Court held that three-judge court review is not required when the State's constitutional defense, like a plaintiff's claim. "is foreclosed as a litigable issue." 369 U.S. 31, 33 (1962). Neither of those holdings suggests that a single-judge court may rule on a Rule 12(b)(6) motion to dismiss.

theory—that the Act imposes no standard at all, leaving the question whether three judges are "required" to the unchecked discretion of singular judges—finds support in neither the statutory text nor common sense.

B. When a complaint comes within the requirements of the Act, Section 2284(a) divests single-judge courts of jurisdiction to decide the merits

In holding that single-judge courts may decide 12(b)(6) dismissal motions in cases covered by Section 2284, the Fourth Circuit did not purport to reject the framework we have just described. Its mistake—one that not even respondents here defend—was conflating the insubstantiality standard with the standard for a 12(b)(6) motion to dismiss. See *Duckworth* v. *State Admin. Bd. of Election Laws*, 332 F.3d 769, 772-773 (4th Cir. 2003). This Court long ago held that those two standards are distinct: Because failure to state a claim calls for a judgment on the merits, and because a judgment on the merits requires the court to have jurisdiction, the grant of a Rule 12(b)(6) motion *assumes* jurisdiction and cannot be a basis for finding it lacking. *Bell* v. *Hood*, 327 U.S 678, 682 (1946). The Fourth Circuit's contrary holding was erroneous and should be corrected.

1. Respondents now offer an alternative route for reaching the same improbable conclusion as the Fourth Circuit—one that they did not present in their brief in opposition or at any other point in this litigation.

Their reasoning goes like this: As of 1976, Section 2284(b)(1) provides that the process for calling a three-judge court commences "[u]pon the filing of a request for three judges." The parties may therefore "ch[oose] to forgo a three-judge court" by declining to file such a

request. Resp. Br. 18. That means that review before a three-judge court is waivable—and because it is waivable, that the statute is non-jurisdictional. *Ibid.* From there, respondents leap to the conclusion that Congress "[did] not broadly prohibit a single district judge from ever dismissing a reapportionment challenge on the merits." Resp. Br. 24.[2]

That line of reasoning ignores nearly a century of this Court's precedents holding that the Three-Judge Court Act *is* jurisdictional: "[A] single judge has no jurisdiction to entertain a motion to dismiss [a] bill on the merits" in a case covered by the Act. *Stratton* v. *St. Louis Sw. Ry.*, 282 U.S. 10, 15 (1930). Thus, the question whether "a three-judge court [is] inappropriate" is a "jurisdictional question." *Swift*, 382 U.S. at 124. And when a complaint presenting a substantial federal claim "comes within the requirements of the three-judge statute, * * * the applicable jurisdictional statute * * * ma[kes] it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962). Thus, a single-judge court "invade[s] the province of a three-judge court" when it "decide[s] the merits of the case, either by granting or by withholding relief." *Id.* at 718.

There is nothing fuzzy about those holdings: The Three-Judge Court Act is jurisdictional, and when the prerequisites for convening a three-judge court are satisfied, the single-judge court loses jurisdiction over the merits of the case.

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[2] Respondents also describe Section 2284 as "procedural" rather than "substantive." See Resp. Br. 24. We do not disagree—but nothing here turns on that distinction.

Nor do those holdings deserve revisiting. Under this Court's more recent teachings, the question whether a statute is jurisdictional asks whether the statute "'delineat[es] the classes of cases'" that a court has "adjudicatory authority to determine." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 160-161, 164 (2010). That is just what the Three-Judge Court Act does—it delineates a class of cases that three-judge district courts are authorized (and, indeed, required) by statute to adjudicate: "A district court of three judges shall be convened" to decide all actions that, among other things, "challeng[e] the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). The clear implication of the statute's mandatory language, moreover, is that a single-judge court is without authority to adjudicate cases reserved for three-judge courts—such cases *shall* be heard by a court of three judges.[3]

2. Undeterred, respondents point to a change in the statutory language, insisting that Congress's insertion of the words "[u]pon the filing of a request for three judges" makes review by a three-judge district court "waivable" and therefore "non-jurisdictional." Resp. Br. 17-19. Their theory seems to be that the waivability of three-judge court review means that "shall" doesn't really mean "shall"—that, because the statute permits parties to "waive" a court of three judges in cases otherwise covered by the terms of Section 2284(a), "the statute does not [actually] require

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[3] That has been the conclusion of every court of appeals to consider the question since the 1976 amendment: Single-judge courts "lack jurisdiction to decide" cases that "properly belong[] before a three-judge district court." *LaRouche* v. *Fowler*, 152 F.3d 974, 981 (D.C. Cir. 1998). Accord *Kalson* v. *Paterson*, 542 F.3d 281, 287 (2d Cir. 2008); *Page* v. *Bartels*, 248 F.3d 175, 184 (3d Cir. 2001).

that the district court convene a three-judge court to decide the merits of every [such] case." Resp. Br. 13. That is both irrelevant and wrong.

It is *irrelevant* because petitioners here *did* request three judges. See Opp. App. 31 ¶ 6. The question whether an express request for three judges is an indispensable prerequisite to the convocation of a three-judge court makes no difference here. Respondents give no reason to think that the supposed waivability of a three-judge court means that a single-judge court may disregard a request for three judges when one is duly made.

It is *wrong* because the statutory text does not prohibit single-judge courts from convening three-judge courts *sua sponte*. To be sure, it describes "the filing of a request for three judges" as one trigger for commencing the procedure for convening a three-judge court. 28 U.S.C. § 2284(b)(1). But it does not say that such a request is the *exclusive* trigger, nor does it otherwise prohibit single-judge courts from convening three-judge courts on their own motions.

Even if an express request were an inflexible precondition for convening a three-judge court, it would not follow that Section 2284 is non-jurisdictional. Under respondents' reasoning, 28 U.S.C. § 1291, which confers jurisdiction on the federal courts of appeals to hear appeals from final judgments of federal district courts, would be non-jurisdictional. After all, 28 U.S.C. § 2107 requires appellants to file a timely notice of appeal to invoke the appellate court's jurisdiction under Section 1291. By respondents' lights, because the filing of such a notice "can be waived," Section 1291 must be "non-jurisdictional." Resp. Br. 13.

That makes no sense. When a party fails to check all of the boxes for invoking the exclusive jurisdiction

of a federal court (say, by filing a notice out of time or not at all), the answer is to dismiss the case for lack of jurisdiction, not to deny the jurisdictional nature of the statute. Although the Court "must not give jurisdictional statutes a more expansive interpretation than their text warrants, * * * it is just as important not to adopt an artificial construction that is narrower than what the text provides." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005). Precisely so here.

C. Respondents' interpretation of Section 2284(b)(1) makes nonsense of the statutory scheme

We showed in the principal brief (at 25-27) that permitting single-judge courts to decide the merits of cases covered by Section 2284(a) would upend the statutory scheme, for two reasons. *First*, if a single-judge court can decide that "three judges are not required" because it elects to enter judgment on the merits itself, Section 2284(b)(3)'s exclusive allocation of authority to three-judge panels to "enter judgment on the merits" would be frustrated. *Second*, because Section 1253 assigns jurisdiction over appeals from judgments of three-judge district courts to this Court alone, "a court of appeals [is] precluded from reviewing on the merits a case which should have originally been determined by a court of three judges." *Idlewild*, 370 U.S. at 715-716. Yet allowing single-judge courts to find three judges "not required" under Rule 12(b)(6) will require the courts of appeals to decide the merits of cases even when they determine that a three-judge court should have been convened.

Respondents ignore our second point altogether. And as to the first point, they note only that Section 2284(b)(3) "pertains to cases being heard by three

judges." Resp. Br. 24. That is exactly right. Our point is that Section 2284(b)(3)'s allocation of responsibility, applicable only when three judges are convened, would be a dead letter if a single judge could decline to convene three judges on the very grounds that he or she otherwise would be forbidden by Section 2284(b)(3) from deciding. Respondents offer no response to that commonsense observation.

* * *

At bottom, respondents propose a complete overhaul of the Three-Judge Court Act and the Court's precedents interpreting it. They ask this Court to (1) substitute the word "may" for the word "shall," (2) insert the word "only" before the phrase "upon the filing of a request," (3) disrupt the statutory scheme, and (4) overrule a century of precedent holding that the Act is jurisdictional. But this Court cannot rewrite statutes, and "[o]verruling precedent is never a small matter." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). If respondents truly believe that traditional single-judge district courts should have discretion to decide the merits of cases covered by Section 2284, they must "take their objections across the street, [to] Congress." *Ibid.*

D. Respondents' interpretation of Section 2284(b)(1) disserves the statute's purposes

We demonstrated in our principal brief (at 29-34) that our reading of Section 2284 better accords with the statute's purposes to "assure more weight and greater deliberation by not leaving the fate of [important] litigation to a single judge" (*Phillips* v. *United States*, 312 U.S. 246, 250 (1941)) and "to minimize the delay incident to a review upon appeal from an order granting or denying an * * * injunction" (*Stratton*, 282 U.S. at 14).

Respondents offer two responses. *First*, they assert without explanation (Resp. Br. 32) that "[f]orcing a State to litigate in front of a three-judge court * * * subject[s] the State to far greater inconvenience" than allowing it to litigate in front of a single-judge court. That is nonsense. Whether a case is decided by one judge or three has no impact on how it is litigated; it affects only who must decide the merits. If anything, three-judge-court review reduces the burdens on the parties by cutting out intermediate appellate review in the courts of appeals. 28 U.S.C. § 1253.

Respondents likewise exaggerate when they assert (Resp. Br. 34-35) that more frequently avoiding three-judge-court review would promote judicial efficiency. Although the Three-Judge Court Act may have imposed a "severe burden" on the courts early in its history (Resp. Br. 28 (quoting *Ex parte Collins*, 277 U.S. 565, 569 (1928)), that is hardly true any longer. Single judges are now empowered by Section 2284(b)(3) to handle the day-to-day minutiae of cases without convening the full panel, and modern air travel and video-conferencing technology make convening three judges easy for hearings on dispositive motions and trial.

Plucking a single statement from a century-old volume of the Congressional Record (Resp. Br. 27), respondents assert, *second*, that the Act actually has just one purpose: "to protect the States" from "a single federal judge * * * usurping a State's authority" (Resp. Br. 29). And that sole purpose is best served, respondents maintain, by permitting single-judge courts to dismiss Section 2284 cases on the merits, without calling a three-judge court. *Id.* at 26-33. Respondents' premise and conclusion are both wrong.

Concerning the *premise*: If all Congress intended to accomplish with the 1976 amendments was to save

States from improvident injunctions entered by imperious federal judges, it would have provided for direct appeals to this Court only from *grants* of injunctions. It did not. Section 1253 says that "any party may appeal to the Supreme Court from an order granting *or denying* * * * [an] injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (Emphasis added). That is clear evidence that Congress intended careful and speedy review in *all* cases like this one, regardless of whether such review serves the interests of plaintiffs when relief is denied, or of the States when relief is granted.

Respondents' cramped view of the statute's purposes also fails to account for cases other than challenges to congressional or legislative reapportionments. 28 U.S.C. § 2284(a). With respect to the Bipartisan Campaign Reform Act of 2002, for example, Congress's purpose in providing three-judge court review could not possibly have been to "protect[] the States from imprudent actions by the federal courts" (Resp. Br. 28). No, lawmakers were concerned to ensure "prompt and definite determination of the constitutionality of many of the bill's controversial provisions" and to "afford the Supreme Court the opportunity to pass on the constitutionality of this legislation as soon as possible." 147 Cong. Rec. S3189 (2001) (statement of Sen. Hatch). Respondents do not argue that their rule serves those purposes, nor do they assert that different rules should apply in suits not involving requests for injunctions against the enforcement of state laws. That leaves them without an answer to such cases.

Concerning the *conclusion*: There is, in any event, no reason to think that respondent's reading of the statute better protects States from improvident injunctions. To begin with, the logic of respondents' statutory

reading does not stop at a single-judge court's authority to *grant* a motion to dismiss; if respondents were correct that the "waivability" of the statute means that it "does not broadly prohibit a single district judge from ever dismissing a reapportionment challenge on the merits" (Resp. Br. 24), there is no principled reason to think that it would not also allow a single judge to *deny* a motion to dismiss or enter an injunction.

Moreover, if Congress had in mind solely to protect the interests of States in cases where injunctions are sought, it would have done away with three-judge-court review altogether. That is because, by 1976, the "three-judge district court, as compared to single district judges, [had become] *more* favorable to civil rights plaintiffs overall." Michael E. Solimine, *Congress,* Ex Parte Young*, and the Fate of the Three-Judge District Court*, 70 U. Pitt. L. Rev. 101, 129 (2008) (emphasis added). Thus, as the legislative history of the Voting Rights Act demonstrates, Congress understood that a hearing before three judges ensures "a *greater* willingness to safeguard the individual's right to vote." H.R. Rep. No. 88-914, at 2491 (1964), as reprinted in 1964 U.S.C.C.A.N. 2391 (emphasis added). We made this point in our principal brief (at 30-31 & n.6), and respondents again ignore it.

E. Respondents' rule is unworkable

Respondents assert that their standardless rule is "more workable" (Resp. Br. 26) than the rule that has governed three-judge court cases since 1976 and many decades before then. But it is unclear how respondents' rule would work *at all*.

If a single district judge determined in his or her discretion that "three judges are not required" in a reapportionment challenge and went on to dismiss the complaint on the merits under Rule 12(b)(6), what

would be the consequence of a reversal by the court of appeals? Would it follow from such a reversal that three judges were, in fact, required? If so, would the three-judge court be bound by the decision of the court of appeals on the 12(b)(6) question? If it does not follow that three judges are required, could the single district judge go on to enter summary judgment or try the case? And when a single district judge decides that three judges *are* required, could the defendants argue on appeal to this Court that the judge abused his or her discretion under respondents' theory? Would that not become a threshold question in every case appealed to this Court under Section 1253?[4]

And what, anyway, would be the standard for deciding when three judges are required and when they are not? Respondents here propose none at all; they offer only the truism that "[t]he plain text of the statute permits a single judge to determine * * * that 'three judges are not required'" (Resp. Br. 21) and suggest that *one* ground for finding three judges unnecessary is the complaint's failure to state a claim (Resp. Br. 31, 40). But when else might three judges be "not required"? Respondents propose no way to tell.

Surely any standard is better than none. Congress and this Court have, over the past 100 years, established a perfectly workable scheme for administering the Three-Judge Court Act. The scheme is perhaps not

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[4] Respondents mistakenly claim (Resp. Br. 36) that we conflated a single judge's conclusion that three judges are not required with a three-judge court's decision on the merits. There is no mistaking that, under *Duckworth*, Rule 12(b)(6) governs both whether a three-judge court is required and whether a complaint states a claim. Thus, when a three-judge court holds that a complaint fails to state a claim, it should (under *Duckworth*) dissolve as having not been required in the first place.

flawless. But if the Court's concern is to encourage predictable and "straightforward" jurisdictional rules (*Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010)) and "efficient operation of the lower federal courts" (*Swift*, 382 U.S. at 128), there is little question that it should not adopt respondents' late-developed approach, which would overturn a century of settled practice (see Petr. Br. 31-34) and create far greater confusion and uncertainty than it resolves.

F. Petitioners have stated a substantial First Amendment claim

Respondents finally assert (Resp. Br. 41) that "the Court should affirm the dismissal of the petitioners' complaint because it is insubstantial." That is wishful thinking.

1. Respondents' primary argument—also one that did not appear in their opposition brief and was not presented to or decided by Judge Bredar—is not really that the First Amendment claim is insubstantial, but that it is nonjusticiable. To be sure, they say that "the First Amendment claim [cannot be separated] from the rest of the complaint," and that it is therefore "*insubstantial* for the same reasons that [the] other claims * * * are insubstantial." Resp. Br. 41-42 (emphasis added). But the other claims were dismissed for lack of justiciability, not substantiality. See Pet. App. 20a. Elsewhere, respondents say more straightforwardly that there is no "standard" for evaluating the First Amendment claim. See, *e.g.*, Resp. Br. 45.

Those assertions misunderstand our First Amendment theory. To begin with, the First Amendment claim is unambiguously distinct from the complaint's other claims. Petitioners alleged that, "*in addition to* infringement of representational and voting rights, we also claim that" various features of Maryland's reap-

portionment map "constitute infringement of First Amendment rights of political association, as each of the abridged sections voted strongly Republican in 2008." Opp. App. 31 (¶ 5) (emphasis added). For that reason—because Maryland's reapportionment map "most particularly impacts only areas with highly Republican voting history"—it "*also* constitutes [a] violation of the First Amendment's protection of political association[,] along the lines suggested by Justice Kennedy in his concurrence in *Vieth*." *Id*. at 44 (¶ 23) (emphasis added). That is a standalone claim.[5]

The distinction is critical because the First Amendment claim marks a difference not just in labels, but in *what* is being measured and *how* to measure it. As we explained in the principal brief (at 35-38), a First Amendment challenge to political gerrymandering is best analogized to the First Amendment retaliation doctrine. The question, under such a theory, is not whether the map or any particular district is so contorted as to raise a constitutional eyebrow. Nor is the underlying injury the abstract harm to representative democracy that a gerrymandered map inflicts—this is not an "I know it when I see it" theory of gerrymander-

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[5] Any uncertainty about that (and there should be none) would be resolved by the fact that the complaint here was filed *pro se*. "A document filed *pro se* is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,'" so "'as to do substantial justice.'" *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citations omitted) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) and Fed. R. Civ. P. 8(f)). Beyond that, "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires.'" *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). If the Court remands to the district court, an amended complaint by counsel is a sure thing.

ing (see *Karcher* v. *Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring)).

The questions, instead, are: When a state legislature shifts a block of voters from one district to another, does it do so with an intent to penalize those voters for their prevailing political-party affiliation or voting history? And if retaliation for protected First Amendment conduct *was* a principal motivating factor in the legislature's decision, does the legislature have a constitutionally permissible justification for its action, "including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests" (*Miller* v. *Johnson*, 515 U.S. 900, 916 (1995) (racial gerrymandering))? [6] Those questions drive at a settled principle: "'[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes * * * or to evade important constitutional restraints'" on state action. *Cook* v. *Gralike*, 531 U.S. 510, 523 (2001).

Measuring legislative motivation is a task familiar to the courts. In racial gerrymandering cases, for example, the question is whether a reapportionment law "purposefully distinguishes between voters on the basis of race." *Shaw* v. *Reno*, 509 U.S. 630, 646 (1993). Of course, "[t]he distinction between being aware of [impermissible] considerations and being motivated by them may be difficult to make," and in light of "the sensitive nature of redistricting and the presumption of

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[6] In the related context of direct regulatory burdens on First Amendment conduct, the Court similarly weighs "the burden the State's rule imposes * * * against the interests the State contends justify that burden." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution in adjudicating claims" like the one at issue here. *Miller*, 515 U.S. at 916. Nevertheless, the question whether First Amendment retaliation "was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district" (*ibid.*) is a familiar question that brings along a manageable decisional framework.

We laid all of this out in the opening brief (at 35-39); respondents again pretend that we did not.

2. Respondents also assert that the First Amendment claim is insubstantial. First, they say that we have conceded that a redistricting plan, taken alone, "does not deny" anyone the right to "'associate and to form political parties for the advancement of common political goals and ideas.'" Resp. Br. 47 (quoting *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 357 (1997)). That, again, misunderstands our theory. First Amendment retaliation does not entail a direct limitation on the exercise of free speech or association; on the contrary, it entails retribution *for* the exercise of free speech or association.

Thus, the passage that respondents cite shows that petitioners vigorously pressed their First Amendment claim in the district court: Petitioners argued that, *regardless that* "Republican voters in the challenged districts may be active in political committees, express their views, and influence their Representatives," their voices "have been intentionally muted by the challenged actions." Resp. Br. App. 2-3 (¶ 60); accord *id.* at 2 (¶ 60) (stating that "[w]e expressly disagree with Defendants" that Maryland's reapportionment map

"has no impact on our First Amendment rights"). That is the opposite of a concession or waiver.[7]

3. Respondents also suggest that the First Amendment claim is insubstantial "'because injunctive relief is otherwise unavailable'" in light of a fifteen-month delay in filing. Resp. Br. 49 (quoting *Simkins* v. *Gressette*, 631 F.2d 287 (4th Cir. 1980)). As we explained in our certiorari-stage reply brief (at 8-9), however, courts frequently enter injunctive relief after delays of that length. See, *e.g.*, *Johnson* v. *Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), aff'd, 515 U.S. 900 (1995). And regardless, the propriety of injunctive relief is an issue for the district court in the first instance. See *Holland* v. *Florida*, 560 U.S. 631, 654 (2010).

4. Finally, Respondents cite the summary affirmance in *Anne Arundel County Republican Central Committee* v. *State Administrative Board*, 504 U.S. 938 (1992) (Mem.), and the decision in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006) ("*LULAC*"), as support for their assertion that the First Amendment claim is insubstantial. See Resp. Br. 47-49. But respondents' contentions based on those cases are quintessential 12(b)(6) arguments. Though we do not concede that they get respondents even this far, the

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[7] Respondents likewise accuse us of "abandon[ing]" our other claims (Resp. Br. 42) and of "appear[ing] to concede [those claims] are insubstantial" (*id.* at 45). That is mistaken. We did not press the complaint's other claims in the petition for certiorari because they were dismissed as nonjusticiable and therefore were not implicated by the question presented. See Pet. 9 n.2. But we have been clear all along that we believe those claims should be referred, alongside the First Amendment claim, to a three-judge district court. See Pet. 29 n.12, Petr. Br. 39. We certainly never conceded that the complaint's other claims are insubstantial or that they were properly dismissed as nonjusticiable. Cf. Petr. Br. 20 n.2. They are not and were not.

most those cases might do is show that the claim is of "doubtful or questionable merit." *Goosby*, 409 U.S. at 518. That is not the standard: "[P]revious decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of [the Three-Judge Court Act]." *Ibid.*

Against this backdrop, it is simply wrong to say that this Court's precedents render the First Amendment claim so "obviously frivolous" and so "obviously without merit" as to "leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby*, 409 U.S. at 518. In fact, the opposite is true—Justice Kennedy's opinion in *Vieth*, which respondents do not deny is the controlling opinion in that case (see Petr. Br. 36 n.9), strongly supports the claim. See Petr. Br. 36-37.

CONCLUSION

The judgements below should be vacated, and the case should be remanded with instructions to convene a three-judge district court.

Respectfully submitted.

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