No. 14-990

In The
Supreme Court of the United States

STEPHEN M. SHAPIRO, *et al.*,

*Petitioners*,

v.

DAVID J. MCMANUS, JR., *et al.*,

*Respondents*.

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

# BRIEF FOR RESPONDENTS

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## QUESTION PRESENTED

Under a district judge's authority to "determine[] that three judges are not required" to hear a reapportionment challenge under 28 U.S.C. § 2284, is a single judge permitted to dismiss the challenge where it is legally insufficient to state any claim for relief under Federal Rule of Civil Procedure 12(b)(6)?

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## STATEMENT

In *Duckworth v. State Administrative Board of Election Laws*, 332 F.3d 769 (4th Cir. 2003), the Fourth Circuit held that, in a reapportionment challenge stating no plausible claim for relief, a single district judge can determine that three judges are not required to be convened under 28 U.S.C. § 2284. That interpretation accords with the plain text of the statute, as amended by Congress in 1976; reflects congressional purposes in enacting and later amending the three-judge-court procedure; minimizes the burden on the lower federal courts; and reduces the number of cases that bypass the traditional appellate channels through a direct appeal to this Court. This Court should uphold the Fourth Circuit's interpretation and affirm its decision in this case.

### Statutory Background

In 1910, Congress enacted the Three-Judge-Court Act (the "Act") in response to this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), which had allowed single federal district court judges to enjoin state statutes and thereby paralyze the operations of state government. *See* 45 Cong. Rec. 7256 (1910) (statement of Sen. Overton). "[T]he states, experimenting with a variety of novel regulatory and tax measures to cope with the needs of the new industrial world, were encountering stubborn obstacles in the persons of federal judges who insisted on reading their own economic theories into the due process and commerce clauses." David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 5 (1964). Congress intervened to ensure that only a special three-judge district court could issue a

preliminary injunction suspending a state statute as unconstitutional. *See* Act of June 18, 1910 ch. 309, § 17, 36 Stat. 557. Thus, the purpose of the Three-Judge-Court Act is to provide "procedural protection" for the States "against an improvident state-wide doom by a federal court of a state's legislative policy." *Phillips v. United States*, 312 U.S. 246, 251 (1941).

The 1910 Act provided that "no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state . . . shall be issued" on "the ground of the unconstitutionality of such statute unless the application for the same . . . shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge . . . and unless the majority of said three judges shall concur in granting such application." Act of June 18, 1910 ch. 309, § 17. After the application for a preliminary injunction was "presented" to a judge, the judge was required to "immediately call to his assistance" two other judges "to hear and determine the application." *Id.* The Act also allowed for "an appeal [to] be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case." *Id*.

This "procedural device," *Phillips*, 312 U.S. at 250, was later extended to cover requests for preliminary injunctions on constitutional grounds against state administrative agency orders and federal statutes. *See* Act of Mar. 4, 1913 ch. 160, 37 Stat. 1013 (state administrative orders); Act of Aug. 24, 1937 ch. 754, 50 Stat. 752 (federal statutes). As with the original

enactment, the purpose of these amendments was to "prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154 (1963).

Congress consolidated and recodified the various three-judge-court statutes in 1948. *See* Act of June 25, 1948 ch. 646, 62 Stat. 869, 928 (codified at 28 U.S.C. §§ 2281-2284). By that time, the Act applied to all requests for both preliminary and permanent injunctions against state and federal statutes on constitutional grounds. *Id.* The predecessor of the provision at issue in this case, § 2284, stated: "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges . . . [t]he district judge to whom the application for injunction or other relief is presented shall . . . immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge." *Id*.

By 1976, "the burden of three-judge-court cases" was "causing a considerable strain on the workload of Federal judges," clogging this Court's appellate docket, and preventing it from controlling its own caseload. S. Rep. No. 94-204 (1975), at 3-4. That year, Congress enacted reform legislation that significantly altered the three-judge-court procedure. *See* Act of Aug. 12, 1976, Pub. L. 94-381, § 3, 90 Stat. 1119. First, Congress amended the Act to limit its applicability to cases in which a party submits a "request for three judges" and granted a single district judge the express authority to examine the party's request and "determine that three judges are not required." 28 U.S.C. § 2284(b)(1).

Second, Congress "eliminat[ed] the requirement for special three-judge courts in cases seeking to enjoin the enforcement of State or Federal laws on the grounds of unconstitutionality." S. Rep. No. 94-204, at 1.

Congress retained the three-judge court only "when otherwise required by Act of Congress, or 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). As explained in more detail below, Congress believed that apportionment cases "continue[d] to need the [same] protection that three-judge district courts were originally designed to give," namely, that "no one Federal judge set aside what the Congress has done or what the State legislature has done." *Admiralty Jurisdiction, United States as a Party, General Federal Question Jurisdiction and Three-Judge Courts: Hearing on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 92d Cong. 635, 791 (1972) ("1972 Hearings") (testimony of Judge Skelly Wright).

The current version of 28 U.S.C. § 2284 provides in pertinent part:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.
>
> (b) In any action required to be heard and determined by a district court of three judges

> under subsection (a) of this section, the composition and procedure of the court shall be as follows:
>
> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. . . .

**Maryland's 2011 Congressional Redistricting**

On October 20, 2011, the Maryland General Assembly enacted, and the Governor signed into law, a new Congressional districting plan based on the results of the 2010 decennial census. 2011 Md. Laws, Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701—8-709 (2014 Supp.). The plan divides Maryland into 8 Congressional districts with populations as equal as mathematically possible: 7 districts have exactly the same population, and the 8th district has one additional voter because the State's population as determined by the census is not evenly divisible by 8.

Within months after the plan's enactment, this Court considered a challenge to Maryland's reapportioned Congressional districts. In *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), the plaintiffs challenged the 2011 districting plan on grounds that included allegations of racial gerrymandering and partisan gerrymandering. On December 23, 2011, a three-judge district court rejected all of the plaintiffs' claims and unanimously upheld the constitutionality of the 2011 districting plan. This

Court summarily affirmed on June 25, 2012. 133 S. Ct. 29 (2012). During that same period, the lower federal courts rejected two other challenges to the 2011 districting plan. *Gorrell v. O'Malley*, Civil No. WDQ–11–2975, 2012 WL 226919 (D. Md. Jan. 19, 2012), *aff'd*, 474 Fed. App'x 150 (July 12, 2012); *Olson v. O'Malley*, Civil No. WDQ–12–0240, 2012 WL 764421 (D. Md. Mar. 6, 2012).

**The Petitioners' 2013 Lawsuit**

On November 5, 2013, more than 15 months after this Court issued its decision summarily affirming the result in *Fletcher v. Lamone* and a year after voters in the redrawn districts elected their representatives to Congress, the petitioners filed this suit for injunctive relief. Their complaint asserted three constitutional claims, all arising from the petitioners' objection to "the essentially non-contiguous structure and discordant composition of the separate distinct pieces comprising the 4th, 6th, 7th, and 8th Congressional districts." Opp. App.[1] 2 ¶ 2; 29 ¶ 2.

The complaint began by acknowledging that a three-judge panel had "previously found the Congressional Districts established by the General Assembly of Maryland . . . not to be a 'partisan gerrymander' (*Fletcher v. Lamone*) in violation of the 14th Amendment." *Id.* The complaint then asserted that rights of "representation" under Article I, § 2 and

[1] Pursuant to Rule 26.8, with the Court's permission, the parties have not filed a Joint Appendix. "Opp. App." refers to the appendix to the Brief in Opposition to Certiorari, "Pet. App." refers to the appendix to the Petition for a Writ of Certiorari, and "Resp. Br. App." refers to the appendix to this brief.

the First and Fourteenth Amendments of the Constitution were denied to residents of certain districts. *Id.* As the applicable "standard [the petitioners] propose[d] for this case," the complaint advocated "a presumption of invalidity if an individual district has neither effective geographic nor demographic contiguity." Opp. App. 15 ¶ 21; 42 ¶ 21. Under the proposed standard, "minimal representational rights" require the "presence of either (1) geographic or (2) demographic/political commonality—i.e., real or de-facto contiguity OR similarity in the demographic/partisan composition of non-contiguous (including essentially or de-facto non-contiguous) segments." Opp. App. 3 ¶ 3; 30 ¶ 3 (emphasis in original).

The complaint conceded that "the enacted districts are technically contiguous" but contended that "[i]f there is an actual or perceived requirement for the districts to be technically contiguous, then it follows that such districts must be de-facto contiguous as well – i.e., not connected through just a narrow ribbon or orifice. . . ." Opp. App. 19 ¶ 25; 46 ¶ 25. The complaint acknowledged the lack of any "Constitutional or statutory mandate" for the claimed contiguity requirements, *id.* 17 ¶ 24(b); 44 ¶ 24(b), and recognized that what it termed "non-contiguous districts do not inherently constitute impermissible abridgement of voting and representational rights," *id.* 16 ¶ 22; 43 ¶ 22. The complaint nonetheless asserted that an "impermissible abridgement" results when "*de facto*" noncontiguity is "combined with disparity in demographics," *id.* (emphasis in original), or, rather, disparity in "political views and the demographic factors that shape them," *id.* The "demographic

factors" petitioners advocated as appropriate indicators of demographic "contiguity" included race, ethnicity, and socioeconomic status. *Id.* 21 ¶ 29; 48 ¶ 29.

According to the complaint, the use of "narrow ribbons" and "orifices" to join "non-contiguous" areas is permissible if the result is to create a district with greater "similarity of political views" and other "demographic factors," Opp. App. 16 ¶ 22; 43 ¶ 11 22, but another district with an identical geographic configuration or shape would run afoul of the Constitution if it linked areas with "demographically discordant" populations, *id.*, meaning groups of persons who are "socioeconomically, demographically, and politically inconsistent" with each other, *id.* 6 ¶ 11; 33 ¶ 11.

Although the complaint alleged that an "abridgement" caused by "the design and demographics" of four of the districts (the 4th, 6th, 7th and 8th districts) "impacts only areas with highly Republican voting history," Opp. App. 17 ¶ 23; 44 ¶ 23, the petitioners insisted that "the focus of [their] claim is not so much that the State incorporated too much focus on impermissible partisan gerrymandering – but rather that the State incorporated too little focus on affording adequate representation to voters in the abridged sections . . . ," *id.* 3 ¶ 2; 30 ¶ 2.

Attached to the complaint were exhibits that included 6 districting plans, designated as Options A through E, which the petitioners proposed as potential remedies that would implement the districting concepts advocated in the complaint. Opp. App. 56. As indicated by the district population table appearing to the left of each proposed alternative map, the plans

petitioners offered had districts deviating from the ideal equal population by as many as 760 persons, Opp. App. 56 (Ex. 11, Option A, Exhibit 15, Option D, Exhibit 16, Option E), and population variances between districts of as many as 1,103 persons, Opp. App. 56 (Ex. 11, Option A). Unlike Maryland's enacted plan, which achieved the maximum equality of district population mathematically possible, none of the district plans proposed by the petitioners purported to achieve the "precise mathematical equality" that this Court has demanded of Congressional districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

After filing their initial complaint, the petitioners requested and were granted leave to file an amended complaint. Opp. App. 28. The amended complaint added a "Supplemental Request for Relief," which unlike the petitioners' "Primary requested relief," Opp. App. 51-53 ¶¶ 34, 35, advocated "less deference to the legislature's intent," *id.* 53 ¶ 36. The Supplemental Request for Relief specifically asked the district court, as an alternative, to combine "the small sections of the 6th, 8th, and 7th districts," which "are predominantly Republican in voting history," thereby effectively creating a statewide map with "6 Democratic and 2 Republican districts." *Id.* 53 ¶ 36.

**The District Court's Decision**

The defendants moved to dismiss the complaint. Invoking the statutory authority of a single district judge in a Congressional redistricting challenge to "determine[] that three judges are not required," Pet. App. 6a (quoting 28 U.S.C. § 2284(b)(1)), the district court followed Fourth Circuit precedent holding that

"the single judge may grant a defendant's motion to dismiss under Rule 12(b)(6) where a plaintiff's pleadings fail to state a claim for which relief can be granted," Pet. App. 6a (citing *Duckworth*, 332 F.3d 769). The district judge then proceeded to "evaluate [the motion to dismiss] under the usual Rule 12(b)(6) standard" to test "the legal sufficiency of [the] complaint." Pet. App. 7a (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007); *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). On the basis of that evaluation, the district court determined that the amended complaint should be dismissed in its entirety. On April 8, 2014, the district court dismissed the complaint.

The district court liberally construed the amended complaint to have asserted two claims or categories of claims: one under Article I, § 2 and the Fourteenth Amendment alleging that "the structure and composition of the 4th, 6th, 7th, and 8th districts constitute impermissible abridgment of representational and voting rights," Pet. App. 8a-9a, and another under the First Amendment alleging that "'the intentional structure and composition of the challenged districts, . . . aggravated by the operation of Maryland's closed primary election system,' infringes upon their First Amendment rights as Republican voters," *id.* at 9a (citation omitted).

The district court observed that the petitioners' first claim, under Article I, § 2 and the Fourteenth Amendment, was "in essence, a claim of political gerrymandering," Pet. App. 14a, and the Court found this claim to be precluded for two reasons: (1) this

Court has held that a partisan gerrymandering claim is unavailable in the absence of "'judicially discernible and manageable standards for adjudicating'" such claims, *id.* 15a (quoting *Vieth v. Jubilier*, 541 U.S. 267, 281 (2004)), and (2) "the standard Plaintiffs propose is, in substance, markedly similar to tests that have already been rejected by the courts," *id.* 18a (citing *Vieth*, 541 U.S. at 308-09 (Kennedy, J., concurring) ("[E]ven those criteria that might seem promising at the outset (e.g., contiguity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise political neutrality when used as the basis for relief.")). *See also* Pet. App. 18a (citing *Radogno v. Illinois State Bd. of Elections*, No. 1:11–cv–04884, 2011 WL 5868225, at *2-*3 (N.D. Ill. Nov. 22, 2011) (reviewing seven "standards [for partisan gerrymandering] the Supreme Court has rejected")). Given this lack of "'judicially discoverable and manageable standards,'" the district court concluded that the first category of the petitioners' claims presents "a nonjusticiable political question" requiring dismissal. Pet. App. 20a (quoting *Vieth*, 541 U.S. at 277-81; citing *Baker v. Carr*, 369 U.S. 186, 217 (1962); *League of United Latin American Citizens ("LULAC") v. Perry*, 548 U.S. 399, 423 (2006)).

The district court determined that precedent also barred the petitioners' second claim under the First Amendment, a claim that is similar to those claims asserted and rejected in *Anne Arundel County Republican Central Committee v. State Administrative Board of Elections*, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992), *rehearing denied*, 505 U.S. 1230 (1992); and in *Duckworth v. State Board of*

*Elections*, 213 F. Supp. 2d 543, 557-58 (D. Md. 2002), *aff'd*, 332 F.3d 769 (4th Cir. 2003). The district court observed that, just as in those cases, "'nothing [about the congressional districts at issue in this case] . . . affects in any proscribed way . . . [P]laintiffs' ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves. They are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.'" Pet. App. 20a-21a (quoting *Duckworth*, 213 F. Supp. 2d at 557-58; brackets in original (quoting *Anne Arundel Cnty. Republican Cent. Comm.*, 781 F. Supp. at 401)).

Six months later, on October 7, 2014, the court of appeals affirmed in an unpublished per curiam decision, Pet. App. 1a-2a, and subsequently denied the petitioners' request for rehearing and rehearing en banc, *id*. at 22a.

## SUMMARY OF ARGUMENT

1. In 1976, Congress enacted sweeping changes to 28 U.S.C. § 2284, making clear that the statute does not impose a jurisdictional limit on the power of a single district judge to decide an apportionment claim. "The best evidence of [Congress's] purpose is the statutory text . . . ," *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991), and the plain language of 28 U.S.C. § 2284 does not prohibit a single district judge from dismissing on the merits a reapportionment challenge that fails to state any claim for relief. Moreover, in this respect, the Fourth Circuit's interpretation of the statute furthers Congress's singular purpose in enacting the three-judge-court

procedure, while also minimizing the burden on the federal courts. This Court should adopt this understanding of the statute.

a. The 1976 amendments to § 2284 established, unambiguously, that the three-judge-court statute is a purely procedural device that does not impose a jurisdictional requirement on the district courts. The statutory text provided, for the first time, that the three-judge-court procedure is triggered only "upon the filing of a request for three judges" by the petitioner or by the respondent State. Because the procedure can be waived, the statute does not require that the district court convene a three-judge court to decide the merits of every case. Moreover, although Congress could have easily done so, it did not prescribe that district court judges employ an "insubstantiality" standard, which was used to test jurisdiction under the pre-1976 statute, when deciding whether a three-judge court was "required." There is no reason to employ the insubstantiality test, which is used to decide the jurisdictional limits of a federal court, when the determination about whether the case must be heard by one judge or three is not a jurisdictional one.

b. The Rule 12(b)(6) standard, which applies to all civil actions and which single district judges employ on a daily basis, best serves the purposes of the three-judge-court statute. As this Court has explained, "Congress established the three-judge-court apparatus for one reason: to save state . . . statutes from improvident doom, on constitutional grounds, at the hands of a single federal district court." *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 97 (1974). The Act ensured careful deliberation by a three-judge

court and prompt review in this Court, not to grant special rights to plaintiffs with meritless claims, but "so that *the states* shall be put to the least possible inconvenience in the administration of their laws." *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 319 (1940) (emphasis added). Because the text of the statute does not compel this Court to adopt an insubstantiality test, this Court should instead adopt the standard that district court judges routinely apply and that best effectuates the congressional purpose of the Three-Judge-Court Act.

It was this purpose that motivated Congress to retain the apparatus for apportionment suits when eliminating the procedural device in most other cases. Although Congress sought to alleviate the burden on the judiciary caused by three-judge-court cases, it determined that three-judge courts were still necessary to protect the States in apportionment cases because federal district courts had recently made controversial decisions threatening state sovereignty in that area. There is no risk that a rule permitting a single judge to dismiss a meritless claim under Rule 12(b)(6) will interfere with the sovereignty of the States; on the contrary, such a rule fully supports that congressional purpose. Moreover, permitting dismissal by a single judge under Rule 12(b)(6) reduces the burden on the federal judiciary, another goal of Congress's 1976 amendments, by preventing lower courts from having to empanel three-judge courts in meritless cases and by relieving this Court of the obligation to hear those cases on direct appeal.

2. In any event, even if this Court adopts the insubstantiality test as it existed prior to 1976, the

district court in this case was correct to dismiss the complaint without impaneling a three-judge court because the petitioners' claims are indeed insubstantial. All of the petitioners' claims are grounded in the same allegation that Maryland's districts are not sufficiently contiguous, and this Court has specifically rejected the notion that a district's shape or lack of contiguity can prove a political gerrymandering claim. Although the petitioners contend that they have a novel First Amendment claim, in reality, the claim is based on the same foreclosed arguments as their other claims. They cannot escape dismissal merely by adopting a new label for a previously rejected and otherwise insubstantial claim.

## ARGUMENT

### I. SECTION 2284 AUTHORIZES A SINGLE JUDGE TO DISMISS A REAPPORTIONMENT CHALLENGE UNDER RULE 12(B)(6) WHEN THAT CHALLENGE FAILS TO STATE A CLAIM.

In 1976, for the first time in the history of the three-judge-court statute, Congress "expressly recognize[d] the power of the single judge to determine that a three-judge court is not required." *Diversity Jurisdiction, Multi-Party Litigation, Choice of Law in the Federal Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 92d Cong. 86 (1971) (section-by-section analysis of bill). As the petitioners acknowledge, this case turns on how this Court interprets that phrase. In *Duckworth v. State Administrative Board of Elections Laws*, the Fourth Circuit set forth the standard that this Court should

adopt. It held that a single district judge properly determines that a three-judge court need not be convened to hear a challenge to a State's reapportionment legislation where the complaint fails to "state a set of facts, which, if proven to be true, would entitle [the plaintiff] to judicial relief." 332 F.3d at 772 (citing *Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 334 (4th Cir. 1996)). That is, redistricting complaints failing to state a claim for relief sufficient to survive "a motion to dismiss under Rule 12(b)(6)" "properly are subject to dismissal by the district court without convening a three-judge court." *Id.* at 772-73.

The plain text of § 2284, as amended in 1976, supports this common sense result. So does Congress's purpose in enacting the three-judge-court statute: to provide a "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy," *Phillips*, 312 U.S. at 251, while minimizing "interference with the normal adjudicatory and appellate processes of the federal judicial system[,]" *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 375 (1949). Observing that the "three-judge requirement is a technical one to be narrowly construed," this Court has found that the procedure is "not required" where the "reasons for convening an extraordinary court are inapplicable." *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *see also Phillips*, 312 U.S. at 251 (emphasizing that the three-judge-court statute was enacted, "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such").

### A. The Text of 28 U.S.C. § 2284 Demonstrates That the Three-Judge-Court Procedure Does Not Impose a Jurisdictional Requirement on the Federal District Courts.

The 1976 amendments to § 2284 make clear that the statute provides a procedural framework for the disposition of cases required to be heard by a three-judge court, rather than a jurisdictional limit on the power of a single judge to decide an apportionment case. With the 1976 changes, § 2284 provided, for the first time, that the three-judge-court procedure is triggered only "upon the filing of a request for three judges" by the petitioner or by the respondent State. Because the procedure can be waived, the petitioners are incorrect that the statute "requires" that the district court convene a three-judge court to decide the merits of every case. Moreover, although Congress could have easily done so, it did not prescribe that district court judges employ the "insubstantiality" standard, previously used to test jurisdiction under the pre-1976 statute, when deciding whether a three-judge court is "required."

As this Court has "repeatedly held, the authoritative statement" of a statute's meaning "is the statutory text," *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), and "[t]he starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (internal citation omitted). In at least two ways, the plain text of 28 U.S.C. § 2284 recognizes that the three-judge-court procedure is "not required" in every

reapportionment challenge filed in the federal district courts, § 2284(b)(1), and, thus, is not a jurisdictional requirement.

First, the statute's procedural mechanism for convening a three-judge court does not commence with the filing of a complaint asserting a constitutional challenge to reapportionment, but is instead triggered upon a party's "filing of a request for three judges." 28 U.S.C. § 2284(b)(1). Indeed, only "upon the filing of a *request* for three judges" does the statute impose upon a single judge the duty to determine whether a three-judge court is required and, if so, to "notify the chief judge of the circuit" who shall designate the other two judges to comprise the court. *Id.* (emphasis added). The language in § 2284(b)(1) giving parties the choice to forgo a three-judge court forecloses the petitioners' argument that the three-judge-court statute is a jurisdictional requirement, because it is well established that "'subject-matter jurisdiction . . . can never be forfeited or waived,'" *Arbaugh v. Y&H Corp*., 546 U.S. 500, 516 & n.11 (2006) (quoting *United States v. Cotton,* 535 U.S. 625, 630 (2002)).

Though the petitioners prefer to read the statute as if the procedural mechanism is triggered upon the filing of any reapportionment challenge, even if no party requested three judges, Br. of Pet'rs 17, that is not the procedure Congress chose to adopt in 1976. Under the predecessor statute, a single judge's obligation to convene a three-judge court arose any time "an application" for an "interlocutory injunction" was presented to a single judge or justice. Thus, historically, it was the filing of a request for relief that required the convening of three judges, even when no

party requested a three-judge court. *See McLucas v. DeChamplain*, 421 U.S. 21, 28 (1975). By amending the statute in 1976 to make the three-judge procedural mechanism commence upon the filing of a request for that *procedure*, rather than a request for specific *relief*, Congress empowered the parties to waive a three-judge court even when the other statutory conditions are satisfied.

This change is consistent with this Court's longstanding view that the convening of a three-judge district court is an "extraordinary procedure," *Wilentz v. Sovereign Camp, W.O.W.*, 306 U.S. 573, 579 (1939), one that "'makes for dislocation of the normal structure and functioning of the lower federal courts . . . [and] expands this Court's obligatory jurisdiction . . . .'" *Swift & Co. v. Wickham*, 382 U.S. 111, 128 (1965) (quoting *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 92-93 (1960) (Frankfurter, J., dissenting)).

Second, upon the filing of a request for three judges, the statute authorizes the single district judge to "determine[] that three judges are not required." 28 U.S.C. § 2284(b)(1). If the single judge determines that three judges are "not required," then the remainder of the statutory provisions do not apply and the single district judge may adjudicate the case in accordance with generally applicable procedures, including those pertaining to a motion to dismiss. Only after a three-judge court is convened does the statute expressly limit the single judge's ability to conduct proceedings. *Id.* § 2284(b)(3). That is, once the three-judge court has been established under § 2284(b)(1) to "hear and determine the action or proceeding," *id.*, § 2284(b)(3)

provides that "[a] single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except" those specified in subsection (3). *See id*. (listing types of orders that a single judge may not enter during a three-judge-court proceeding, including "judgment on the merits").

Notably, Congress chose not to prescribe any particular standard that a single judge must employ when determining whether three judges are not required. Congress did not limit the scope of the district court's review to a determination that the district court lacks subject matter jurisdiction over the claim, as the petitioners contend. Indeed, because the statutory provision calling for a three-judge court "necessarily assumes that the District Court has jurisdiction," *see Ex parte Poresky*, 290 U.S. 30, 31 (1933), the petitioners' suggestion that the district court is authorized only to "determine[] that three judges are not required" due to the absence of subject matter jurisdiction makes little sense. *See Arbaugh*, 546 U.S. at 514 (stating that "courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists" (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

Nor did Congress incorporate the terms "insubstantial" or "frivolous" to characterize claims for

which three judges are not required. Congress knows how to engraft that type of limitation on a federal court's review of a complaint, *see, e.g., Neitzke v. Williams*, 490 U.S. 319, 330-31 (1989) (holding Congress's description of certain claims as "frivolous" in the *in forma pauperis* statute had specific meaning distinct from Rule 12(b)(6) standard), and Congress does not hesitate to employ the terms "insubstantial" or "frivolous" if and when that is the intended meaning, *see, e.g.*, 15 U.S.C. § 6601(b)(4) (expressing legislative purpose to "lessen the burdens on interstate commerce by discouraging insubstantial lawsuits while preserving the ability of individuals and businesses that have suffered real injury to obtain complete relief"); 5 U.S.C. § 552(a)(4)(E)(ii)(II) (authorizing an award of attorneys' fees on judicial review of denial of records requested under the Freedom of Information Act where the court finds "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial"); 15 U.S.C. § 4304(a)(2) (in antitrust actions, authorizing award of attorneys' fees to a substantially prevailing defendant "if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith"). Congress's "use of explicit language in other statutes cautions against inferring a limitation in" § 2284(b)(1), which contains no such explicit language. *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013).

The plain text of the statute permits a single judge to determine, as the district judge did in this case, that "three judges are not required." By conferring such authority in plain terms, and further, by providing that a three-judge court is not required in every

reapportionment challenge and may be avoided entirely if no party requests three judges, the statute confirms that Congress did not categorically prohibit a single district judge from adjudicating a reapportionment challenge.

Moreover, the current version of 28 U.S.C. § 2284 does not present an instance where the statute adopted by Congress "clearly states that a threshold limitation . . . shall count as jurisdictional," and nothing in § 2284 "expressly restricts application of a jurisdiction-conferring statute." *Arbaugh*, 546 U.S. at 516 & n.11. In construing statutes, this Court has deemed it significant that Congress chose, as in this case, not to "'speak in jurisdictional terms.'" *Id*. (quotation omitted). To the extent the original three-judge-court statute was interpreted to be a jurisdictional requirement, *but see Bailey*, 369 U.S. at 33 (holding three-judge court was improperly convened and single district judge should have enjoined state statute that on its face was unconstitutional), Congress's 1976 amendments to the statutory scheme set forth above resolve any ambiguity on this issue. *See Exxon*, 545 U.S. at 557 (reiterating "that '[w]hatever [this Court] say[s] regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.'" (quoting *Finley v. United States*, 490 U.S. 545, 556 (2003)).

In arguing to the contrary, the petitioners emphasize that 28 U.S.C. § 2284(a) provides that a three-judge court "shall" be convened. However, "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any

precedents or authorities that inform the analysis." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Harbison v. Bell*, 556 U.S. 180, 198 (2009) ("This Court's interpretive function requires it to identify and give effect to the best reading of the words in the provision at issue."). Here, through its amendments to § 2284, Congress expressly granted authority to the single district judge to determine that three judges are not required and, thus, not to convene a three-judge court, and granted the parties the option of waiving the procedural device. Thus, an examination of Congress's use of "shall" "in light of context, structure, and related statutory provisions," *Exxon*, 545 U.S. at 558, demonstrates that § 2284 is not, as the petitioners contend, a jurisdictional statute.

Moreover, "[a] statute's use of [the word 'shall'] alone has not always led this Court to interpret statutes to bar judges (or other officials) from taking . . . action . . . ." *Dolan v. United States*, 560 U.S. 605, 611-12 (2010). Rather, most recently in *Dolan v. United States*, this Court concluded that Congress's use of the word "shall" in a statute setting forth a court's procedural requirements did not divest a judge of his or her authority to act. *See id.* at 611 (holding use of "shall" in victim restitution act's timing provision did not "deprive the court of the power to order restitution" when the court failed to act within the statutory deadline); *see also United States v. Montalvo-Murillo*, 495 U.S. 711, 717-18 (1990) (holding use of "shall" in Bail Reform Act's prompt hearing provision did not deprive government "of all later powers to act"); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (use of "shall" without more was not a "jurisdictional

limit precluding action later"); *Brock v. Pierce Cnty.*, 476 U.S. 253, 262 (1986) (same).

Here, too, the three-judge court statute is "a procedural rule" that "govern[s] the distribution of judicial responsibility," *Swift & Co.*, 382 U.S. at 124, and is not a font of substantive rights conferred upon complainants. *See also Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 136 (1947) (observing that the three-judge-court requirement "is a technical rule of procedure to be applied as such").

Finally, 28 U.S.C. § 2284(b)(3) does not broadly prohibit a single district judge from ever dismissing a reapportionment challenge on the merits; rather, it prohibits a single judge from dismissing a claim on the merits only *after* a three-judge court has been convened. Subsection (b) sets forth "the composition and procedure of the court" for "any action required to be heard and determined by a district court of three judges under subsection (a)" of § 2284. Subsection (b)(1) prescribes that a three-judge court is convened where either party files a request for three judges and a district judge determines if three judges are required. Subsection (b)(2) provides how and when "notice of hearing of the action shall be given" to certain state officials.

Once a three-judge court has been convened, subsection (b)(3) prescribes which types of orders a single judge may, and may not, enter and provides that "[a]ny action of a single judge may be reviewed by the full court at any time before final judgment." By making specific reference to "the full court," this section inarguably pertains to cases being heard by three judges. Thus, subsection (b)(3)'s prohibition that

a "single judge shall not . . . enter judgment on the merits" applies only when a three-judge court has been convened. This subsection does not prohibit a single judge from acting under subsection (b)(1) to determine preliminarily that three judges are not required because the complaint fails to state a plausible challenge to reapportionment.

### B. The Rule in *Duckworth* Best Effectuates Congress's Purposes in Enacting Sweeping Reforms to § 2284.

As this Court has instructed, the decisions in *Iqbal* and *Twombly* prescribe "the pleading standard for '*all* civil actions.'" *Iqbal*, 556 U.S. at 684 (quoting Fed. R. Civ. P. 1; emphasis added).[2] The Rule 12(b)(6) standard, as this Court has explained, allows for a complaint's "'basic deficiency'" of failing to "raise a claim of entitlement to relief" to "'be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Twombly*, 550 U.S. at 558 (quoting 5 Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ*. § 1216 at 233-34 (3d ed.) (internal quotation omitted)). In the context of 28 U.S.C. § 2284, the most efficient use of the parties' and courts' resources would be to dismiss a complaint that fails to state a claim as early in time and with as little inconvenience to the lower federal courts as possible.

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[2] Rule 1 provides that the Federal Rules of Civil Procedure "govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81." Rule 81 specifies proceedings in which the Rules have limited application or do not apply. Rule 81 does not mention redistricting challenges under 28 U.S.C. § 2284.

Given the great frequency with which district judges decide Rule 12(b)(6) motions, in the context of all manner of constitutional claims, adhering to this well-understood practice establishes a more workable rule and a "more settled . . . procedural system by which these cases are to run the judicial gauntlet." *Yazoo Cnty. Indus. Dev. Corp. v. Suthoff*, 454 U.S. 1157, 1160-61 (1982) (Rehnquist, J., dissenting from denial of cert.) (highlighting the confusion "among the Federal Courts of Appeals in deciding whether the federal question alleged in a complaint is 'wholly insubstantial and frivolous'").

**1. The rule in *Duckworth* furthers Congress's purpose in enacting the three-judge-court procedure while minimizing the burden on the federal courts.**

a. As this Court has long recognized, "Congress established the three-judge-court apparatus for one reason: to save state . . . statutes from improvident doom, on constitutional grounds, at the hands of a single federal district court." *Gonzalez*, 419 U.S. at 97. In the wake of this Court's decision in *Ex parte Young*, "the fact that one Federal judge [could] tie[] the hands of a sovereign State . . . in this manner" caused "great feeling among the people of the States." 42 Cong. Rec. 4847 (1908) (statement of Sen. Overton). The sponsor of the three-judge-court legislation, Senator Overton of North Carolina, explained that "[w]henever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there

was almost a rebellion" over these injunctions. 45 Cong. Rec. 7256 (1910).

Congress determined that the three-judge court would protect States by preventing single judges from making "hasty" and ill-considered decisions to grant preliminary injunctions and by "recogniz[ing] the superior degree of consideration and sanction which should be given to a state statute." 45 Cong. Rec. 7253 (1910) (statement of Sen. Burton). Moreover, in the event that a preliminary injunction did issue, a State would be able to appeal directly to the Supreme Court "so that the state[] shall be put to the least possible inconvenience in the administration of [its] laws." *Mayo*, 309 U.S. at 319. The Act, in the view of its congressional sponsors, would also promote public confidence in, and official deference to, any federal court judgment overturning state law: As Senator Overton emphasized, if "three great judges say that the statute is unconstitutional, the officers of the State will be less inclined to resist" and "the people" will be more "inclined to abide by the decision." 42 Cong. Rec. 4847 (1908) (statement of Sen. Overton); *see also* 45 Cong. Rec. 7256 (1910) (statement of Sen. Overton).

"The sole and simple purpose" of the Act was thus "to prevent a single inferior Federal judge from pronouncing a law of a State unconstitutional." 42 Cong. Rec. 4852 (1908) (statement of Sen. Knox). This singular purpose continued to motivate Congress as it refined the three-judge-court apparatus over the ensuing decades. In 1937, for example, Congress enacted a parallel three-judge-court statute to protect federal legislation from the same hasty, imprudent invalidation that had plagued the States. Act of Aug.

24, 1937 ch. 754, 50 Stat. 752. "Repeatedly emphasized during the congressional debates . . . were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law" that were "wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme . . . until a judge was ultimately found who would grant the desired injunction." *Kennedy*, 372 U.S. at 154.

b. Even in 1976, when Congress substantially narrowed the three-judge-court requirement, it continued to focus on protecting the States from imprudent actions by the federal courts in cases, like apportionment suits, where such protection was still necessary. Congress believed that, in most cases, the three-judge court was no longer necessary to serve its original purpose because intervening statutory changes and court decisions had made it less likely that federal courts would excessively intrude into state prerogatives or make hasty decisions to enjoin state statutes. *See* S. Rep. No. 94-204, at 7-8. In the words of a representative from the American Bar Association, the three-judge court was an "anachronism" because "[r]emedial legislation" and "improved court procedures" had largely eliminated the need for them. *Improvement of Judicial Machinery: Hearings on H.R. 6150 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 1, 131 (1975) (written testimony of Bernard Segal).

In most cases, Congress could no longer justify the "severe burden" of the three-judge-court apparatus, *Ex*

*parte Collins*, 277 U.S. 565, 569 (1928), on the Federal judiciary. *See* S. Rep. No. 94-204, at 3-4. "Whenever such a court [was] required, a second district judge, as well as a judge of a circuit court of appeals, [had to] be brought in to hear and determine the case." *Id*. at 4. The process of deciding the cases themselves was also "very cumbersome" because the three-judge court had to "take[] evidence" and collectively rule on matters as they arose during trial. 1972 Hearings at 784 (testimony of Judge Skelly Wright). Moreover, the direct appeals in those cases to this Court also "consume[d] a disproportionate amount" of the Court's time and attention. S. Rep. No. 94-204, at 4. The three-judge-court scheme was clogging this Court's appellate docket and "depriving [this Court] of the wise and often crucial adjudications of the courts of appeals." *Allen v. State Bd. of Elections*, 393 U.S. 544, 562 (1969).

Despite this burden, Congress concluded that the three-judge-court apparatus was essential to protect the States in one key area: "cases involving congressional reapportionment or the reapportionment of a statewide legislative body." S. Rep. No. 94-204, at 9. In Congress's view, "these issues [were] of such importance that they ought to be heard by a three-judge court." *Id*.; *see also* 119 Cong. Rec. 16680 (1973) (statement of Sen. Burdick). These cases were not just important in the abstract; rather, Congress decided that three-judge courts were necessary for precisely the same reasons that the original Three-Judge-Court Act had been enacted – to prevent a single federal judge from usurping a State's authority.

After this Court's decisions in *Baker v. Carr* and *Reynolds v. Sims*, 377 U.S. 533 (1964), the "record of the district courts" in dealing with the new, controversial one-person/one-vote reapportionment cases was "unsettling." *Three-Judge Courts and Six-Person Jury: Hearings on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 93d Cong. 1, 91 (1973-1974) ("1973-1974 Hearings") (testimony of Assistant Attorney General Robert G. Dixon, Jr.). Plaintiffs were offering their own, purportedly "more equal," redistricting plans that were "radically different politically" from the State's plan, and many district courts were ordering States to adopt these plans before the next election. *Id*. This posed a substantial risk to state sovereignty because, unless the district court's order were stayed pending appeal, the new legislature "elected under the plaintiffs' plan could reapportion the State on a permanent basis." *Id*. at 87. In a number of these cases, this Court had to stay the district court's order on direct appeal. *Id*. at 91.

Thus, "[o]nly the provision for prompt Supreme Court review, and the resultant stays pending appeal . . . avoided use of dubious plaintiff plans in several states." *Id*. The political nature of these suits also heightened the risk of having one judge overturn a State's congressional districting plan and impose his or her own districting plan. Federal intervention in state elections "involv[es] a potential for substantial interference with government administration," *Allen*, 393 U.S. at 562, and thus it was deemed "more acceptable . . . if such cases are heard by a court whose members include adherents of more than one political

party." 1972 Hearings at 749 (testimony of Chief Judge Henry Friendly).

As Judge Skelly Wright emphasized in his testimony before the Senate, "this is an area of great public concern *that continues to need the protection that the three-judge district courts were originally designed to give*." 1972 Hearings at 791 (emphasis added). "No one Federal judge," he explained, should be able to "set aside what the Congress has done or what the State legislature has done." *Id*. The sponsor of the legislation, Senator Burdick, expressly agreed with this assessment. *Id*. at 792. During the debates over the 1976 amendments, therefore, Congress had in mind two principal goals: (1) to continue to protect the States from the actions of single district judges in reapportionment cases and (2) to minimize the severe burden of three-judge courts on the federal judiciary.

c. The Rule 12(b)(6) standard effectuates the congressional purposes of the Act and the 1976 amendments far better than the insubstantiality test. There is, of course, no risk that permitting a single judge to dismiss a meritless claim will interfere with the State's sovereignty or "paralyze totally the operation of" the State's electoral process. *Kennedy*, 372 U.S. at 154. Dismissal of a meritless claim also poses no risk that a single district judge could impose his or her own reapportionment plan that is "radically different" from the State's plan and thwart the will of the majority by requiring that plan to go into effect before the next election. 1973-1974 Hearings at 87, 91 (testimony of Robert G. Dixon). In other words, "[i]t is certain that the congressional policy behind the three-judge-court and direct-review apparatus – the saving of

state . . . statutes from improvident doom at the hands of a single judge – will not be impaired," *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975), by permitting a single judge to dismiss a complaint that fails to state a claim under Rule 12(b)(6).

The petitioners contend that all reapportionment cases, even meritless ones, should be heard by a three-judge court because reapportionment cases are "important." However, congressional purpose here was asymmetric in that the Act was intended solely for the benefit of the States. "Congress intended that . . . prompt hearing and decision shall be afforded the parties" in these cases "so that the states shall be put to the least possible inconvenience in the administration of their laws," *Mayo*, 309 U.S. at 318-19, not to benefit plaintiffs who file meritless claims. Forcing a State to litigate in front of a three-judge court when a single judge could easily have dismissed the complaint would, in direct contravention of this purpose, subject the State to far greater inconvenience.

Moreover, three-judge courts impose a significant burden on the judiciary, a burden that Congress sought to alleviate by enacting the sweeping 1976 amendments. As this Court has recognized, convening a three-judge court "makes for dislocation of the normal structure and functioning of the lower federal courts . . . [and] not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves. . . ." *Swift & Co.*, 382

U.S. at 128 (internal quotation omitted).[3] There is simply no indication that Congress intended to clog the dockets of the lower federal courts with meritless apportionment claims or give those meritless claims a direct appeal to this Court.

**2. The statutory objectives claimed by petitioners in their interpretation of § 2284 directly conflict with the goals that Congress actually sought to achieve.**

a. In light of the congressional purposes in enacting the initial three-judge court statute and the 1976 amendments, there is no compelling rationale for importing the "insubstantiality" test for which the petitioners advocate. Neither the text of the statute

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[3] In Maryland alone complainants filed seven separate actions in federal district court challenging Maryland's redistricting plan enacted in response to the 2010 census, up from the four federal court challenges to the State's 2000 redistricting plan. *See Steele v. Glendening*, Civil No. WMN-02-1102 (D. Md. June 13, 2002); *Mitchell v. Glendening*, Civil No. WMN-02-602 (D. Md. July 8, 2002); *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543 (D. Md. 2002), *aff'd*, 332 F.3d 769 (4th Cir. 2003); *Kimble v. State of Maryland*, Civil No. AMD-02-2984 (D. Md. June 10, 2004), *aff'd*, (4th Cir. Feb. 1, 2005); *Martin v. Maryland*, Civil No. RDB–11–00904, 2011 WL 5151755 (D. Md. Oct. 27, 2011); *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012); *Gorrell v. O'Malley*, Civil No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson v. O'Malley*, Civil No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012); *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014), *aff'd*, *Benisek v. Mack*, 584 F. App'x 140 (2014), *cert. granted sub nom.*, *Shapiro v. Mack*, No. 14-990, 135 S. Ct. 2805 (June 8, 2015); *Parrott v. Lamone*, Civil No. 1:15-cv-01849-GLR (D. Md. June 24, 2015); *Bouchat v. Maryland*, Civil No. 1:15-cv-02417-ELH (D. Md. Aug. 31, 2015).

nor the legislative history support it. Absent any jurisdictional basis for importing the "insubstantiality" test into § 2284, such a standard finds no support in the federal rules of civil procedure, which "ha[ve] the force of a federal statute." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941).

The petitioners argue that under *Duckworth*, "the result is likely to be years of litigation before the plaintiffs receive a final answer just on the threshold question of whether they are entitled to a hearing before a three-judge court." Br. of Pet'rs 32. The legislative history demonstrates, however, that the Act was intended to check the district court's ability to paralyze a State's statutory scheme and not as an entitlement to those challenging state law.

Moreover, the petitioner's arguments regarding the effect of a dismissal under Rule 12(b)(6) apply equally to a dismissal for lack of a substantial federal claim. In either case, plaintiffs must proceed to the Court of Appeals if they wish to seek reversal of a wrongly dismissed complaint. Although it is conceivable that in a given case both the district court and court of appeals might err in concluding that three judges were not required because the complaint, on its face, failed to state a claim for relief, such a coincidence of error is just as likely to arise under the petitioners' proposed substantiality test. In any event, such cases are likely to be rare given how frequently challenges to reapportionment claims are dismissed at the pleadings stage. *See* Justin Levitt, *Litigation in the 2010 Cycle, All About Redistricting*, http://redistricting.lls.edu/cases.php (last visited Sept. 22, 2015) (compiling statistics

on redistricting challenges in 2010 cycle).[4] Thus, to the extent the *Duckworth* rule leads to "duplicative" appeals in a small number of cases, that risk of some occasional inefficiency would be more than justified by the overall savings to judicial economy that would result from reducing the number of cases heard by three-judge courts.

b. The petitioners also contend that the rule in *Duckworth* will undermine the statute's purpose of "'ensuring this Court's swift review'" of the merits. Br. of Pet'rs 31 (quoting *Gonzalez*, 419 U.S. at 98). The legislative history demonstrates, however, that "swift review" in this Court was conceived as a check on the district court's ability to paralyze a State's statutory scheme and not as an entitlement to those challenging state law. In any case, courts of appeals possess the ability to expedite review where warranted. If the circumstances require it, "the threshold question" may be answered quickly.[5]

Although "[a]llegations of unconstitutional bias in apportionment are most serious claims," *Vieth*, 541 U.S. at 311-12 (Kennedy, J., concurring), so too are all manner of claims of unconstitutionality that the lower federal courts routinely decide at the pleadings stage. In cases involving substantial deprivations of liberty, including the prior restraint of First Amendment

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[4] In the eleven cases challenging Maryland's two most recent redistricting plans, *see*, *supra*, n.3, only one of the nine cases thus far decided by the district court survived a motion to dismiss on the pleadings.

[5] In this case, the Fourth Circuit affirmed the district court's dismissal order within six months.

rights, litigants must proceed through the lower federal courts, with no guarantee that this Court will take up the issues. In such cases, as Chief Justice Burger noted when he urged Congress to eliminate entirely the three-judge-court procedure, "[t]here are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it." S. Rep. No. 94-204 at 3 (quoting Remarks of Warren E. Burger, Chief Justice of the United States, before the American Bar Association, San Francisco, Calif., Aug. 14, 1972).[6]

Nor will the *Duckworth* standard deprive this Court of direct review of reapportionment challenges where a three-judge court dismisses the claim on the merits. *See* Br. of Pet'rs 34. The petitioners misunderstand the statutory scheme by conflating a single judge's determination that three judges are not required with a three-judge court's decision on the merits. Section 2284 expressly provides that a single judge determines whether three judges are required; the statute grants no review of that initial decision to a three-judge court. Thus, a three-judge court's dismissal of an action for failure to state a claim does not "overrule" a single judge's determination that the three-judge court was required. That the decisions may have been based on

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[6] The petitioners' plea that being made to wait for direct appeal in this Court may "frustrate" the purposes of their lawsuit because "it may be too late for effective relief," Br. of Pet'rs at 33, rings particularly hollow given that they waited to file their complaint in the district court until after this Court had already summarily affirmed the three-judge court's determination on the merits in *Fletcher v. Lamone*, upholding Maryland's redistricting legislation against constitutional attack.

the same legal standard does not contradict their distinct statutory significance. Under *Duckworth*, where a single judge determines that a three-judge court is required, and the three-judge court proceeds to dismiss the action on its merits, a direct appeal lies in this Court. *See* 28 U.S.C. § 1253. Unquestionably, this Court has appellate jurisdiction to review the threshold question whether a three-judge court was required and, if answered in the affirmative, to review the three-judge court's decision on the merits.

### C. This Court's Precedents Interpreting the Pre-1976 Three-Judge-Court Statute Support the Adoption of a Standard That Best Effectuates the Congressional Purposes.

This Court's precedents interpreting the pre-1976 statute did not purport to address the standard by which a district judge "determines that three judges are not required," because the pre-1976 statute did not contain this express grant of authority. Rather, under the prior statutory scheme, "[t]he district judge to whom the application for injunction or other relief is presented . . . shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge." 28 U.S.C. § 2284 (1970).

Before 1976, the single district judge had no express authority to determine whether a three-judge court was required. In order "to make workable sense" of the three-judge-court "procedural statutes," *see Gonzalez*, 419 U.S. at 95-98, however, this Court made clear that the "extraordinary procedure" was reserved for cases "of unusual gravity." *Ex parte Collins*, 277 U.S. at 569.

Thus, cases composed of "groundless allegations," *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 391 (1934), or that were "obviously without merit," *Goosby v. Osser*, 409 U.S 512, 518 (1973), could be disposed of by a single district judge.

Indeed, shortly after the enactment of the three-judge-court statute, this Court adopted a judge-made limitation grounded in whether the claim of unconstitutionality was a "substantial" one. *See, e.g., Louisville & N.R. Co. v. Garrett*, 231 U.S. 298 (1913) (explaining that under the statute "the question of unconstitutionality . . . must be a substantial one"); *Wilentz,* 306 U.S. at 582 ("The extraordinary procedure before a court of three judges . . . cannot properly be extended to cases in which there is no substantial basis for relief . . . ."); *California Water Serv. Co. v. City of Redding*, 304 U.S. 252, 254 (1938) (observing the district court's "duty . . . to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable"); *see also Poresky*, 290 U.S. at 32.

Notably, at that time, where a suit was brought in federal court based on a federal question, this Court's use of the term "substantial" to describe the merits of a claim was not necessarily synonymous with a check on the court's jurisdiction to decide the claim. *See, e.g.*, *Swafford v. Templeton*, 185 U.S. 487, 493-94 (1902) (observing that there is "jurisdiction to entertain [cases based on a federal question], although the averments set out to establish the wrong complained of or the defense interposed were unsubstantial in character"). Although it has since become a "settled rule that the

insubstantiality of a federal question is the occasion for a jurisdictional dismissal as opposed to a dismissal on the merits for failure to state a claim upon which relief can be granted," *Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970), in many cases this Court's inquiry as to whether a hearing by a three-judge court was "not required," and thus whether appellate jurisdiction was lacking in this Court, "was not one of the federal jurisdiction of the District Court." *Oklahoma Gas & Elec. Co.*, 292 U.S. at 391 (citations omitted); *Wilentz*, 306 U.S. at 582 (same).

Rather, observing that the "three-judge requirement [was] a technical one to be narrowly construed," this Court continued to narrow the scope of the three-judge court procedure, finding that it was "not required" where the "reasons for convening an extraordinary court [were] inapplicable." *Bailey,* 369 U.S. at 33 (1962); *see also Gonzalez*, 419 U.S. at 97-98 (acknowledging that this Court did not always adhere to "the literal words of the statutory apparatus" where they bore "little or no relation to [the] underlying policy" of protecting state statutes from "improvident doom . . . at the hands of a single federal district judge"). In *Bailey*, for example, this Court held that a three-judge court was "not required" where the plaintiffs challenged a statute requiring racial segregation of transportation facilities, a statute the Court deemed so obviously unconstitutional that consideration by a three-judge court was unwarranted. 369 U.S. at 33.

Thus, even though subject matter jurisdiction was clearly vested in the district court, this Court nonetheless held that a single district judge could

enjoin a state law because "the policy behind the three-judge court requirement – that a single judge ought not to be empowered to invalidate a state statute under a federal claim – does not apply." *Id.* Similarly, in *Swift & Co. v. Wickham*, this Court, emphasizing "the important considerations of judicial administration" and "concern for efficient operation of the lower federal courts," held that a three-judge court was *not* required in a suit seeking an injunction on the ground that a state law conflicted with a federal law and, thus, violated the Supremacy Clause. 362 U.S. at 128; *see also Ex parte Collins*, 277 U.S. at 568 (holding "[d]espite the generality of the language" of the three-judge-court statute, that it did not apply to a suit where "although the constitutionality of a statute is challenged," the suit does not seek to enjoin "the enforcement of a statute of general application").

In the 1976 amendments to 28 U.S.C. § 2284, Congress acknowledged that a three-judge court is "not required" to hear every challenge to a State's redistricting legislation and expressly authorized the single district judge to make that determination before convening a three-judge court. 28 U.S.C. § 2284(b)(1). Where a challenge fails to state any claim for relief, single judges, who frequently decide the merits of cases challenging the constitutionality of state statutes, may determine that three judges are not required and dismiss the challenge. That is, in such cases, the "reasons for convening an extraordinary court are inapplicable." *Bailey*, 369 U.S. at 33.

## II. PETITIONERS' CLAIMS ARE INSUBSTANTIAL.

Even if the Court were to conclude that § 2284(b)(1) does not permit a single judge to "determine[] that three judges are not required" based on the legal insufficiency that generally necessitates dismissal of a complaint under Rule 12(b)(6), the Court should still affirm the dismissal of the petitioners' complaint because it is insubstantial, as that term was used prior to the 1976 Congressional enactment at issue. *See N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 722 (2001) (noting this Court's "settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason'") (citations omitted). Indeed, the petitioners effectively concede that their claims under the Fourteenth Amendment and Article 1 are insubstantial and contend only that their First Amendment claim is "not frivolous." Br. of Pet'rs 35 (stating that "petitioners have presented a non-frivolous First Amendment claim").

Whether evaluated under the Fourteenth Amendment, Article 1 § 2 or the First Amendment, the petitioners' claims are insubstantial in that they are "'obviously without merit,'" *Goosby*, 409 U.S. at 518 (citation omitted), and "their unsoundness" is made clear by "previous decisions of this court," *Poresky*, 290 U.S. at 32. Notwithstanding the petitioners' suggestion that their First Amendment claim is substantial even though the "merits" of the district court's disposition of the rest of the amended complaint "are not subject to challenge here," Pet. 9 n.2, the petitioners cannot separate the First Amendment claim from the rest of

the complaint. The First Amendment claim is insubstantial for the same reasons that their other claims, which they appear to have abandoned, are insubstantial.

As drafted by the petitioners, the complaint and amended complaint emphasized that their three constitutional claims all arose from a single grievance, namely, "that the essentially non-contiguous structure and discordant composition of the separate distinct pieces comprising the 4th, 6th, 7th, and 8th Congressional districts impermissibly abridge [their] rights" under Article I, § 2 of the U.S. Constitution, the Fourteenth Amendment, and the First Amendment, Opp. App. 29 ¶ 2; *see* 2 ¶ 2 (same).

In such circumstances, where the same feature of a State's reapportionment is claimed to offend more than one constitutional provision, this Court has treated the various constitutional theories as a single set for purposes of analysis. *See, e.g.*, *LULAC*, 548 U.S. at 416, 416-20 (Kennedy, J.) (analyzing together the plaintiffs' claims that "mid-decennial redistricting, when solely motivated by partisan objectives, violates equal protection and the First Amendment"); *id*. at 461-62 (Stevens, J., concurring in part, dissenting in part) (same). Moreover, the only "standard" proposed by the petitioners in their complaint and amended complaint evidently purports to apply to the case as a whole. *See* Opp. App. 42 ¶ 21 ("[T]he standard we propose *for this case* – a presumption of invalidity if an individual district has neither effective geographic nor demographic contiguity . . . ." (emphasis added)).

Viewing the complaint as a whole, the petitioners' theory or "standard" for addressing alleged partisan

gerrymandering or denial of representation is foreclosed by this Court's precedent because the petitioners' "effective geographic" or "demographic contiguity" test "is, in substance, markedly similar to tests that have already been rejected by the courts," Pet. App. 18a, and, most significantly, by this Court.[7] This Court, after all, "has rejected standards that 'are not discernible in the Constitution' and have 'no relation to Constitutional harms.'" *Fletcher*, 831

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[7] *See Vieth*, 541 U.S. at 281-82 (plurality opinion) (rejecting as partisan gerrymandering standard "'both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group'" (citation omitted)); *id.* at 290-91 (rejecting as standard "whether district boundaries had been drawn solely for partisan ends to the exclusion of 'all other neutral factors relevant to the fairness of redistricting,'" with the "most important" factor being "'the shapes of voting districts and adherence to established political subdivision boundaries'" (citation omitted)); *id.* at 284 (rejecting as standard whether "mapmakers acted with a predominant intent to achieve partisan advantage," as shown by evidence "that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage"); *id.* at 295-96 (rejecting five-part test requiring plaintiff to show "(1) that he is a member of a 'cohesive political group'; (2) 'that the district of his residence. . . paid little or no heed' to traditional districting principles; (3) that there were 'specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group'; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of the plaintiff's group, and deviates less from traditional districting principles; and (5) that 'the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group'" (citation omitted)); *id.* at 299 (rejecting as standard "'the unjustified use of political factors to entrench a minority in power'" (citation omitted)).

F. Supp. 2d at 909 (Williams, J., concurring) (quoting *Vieth*, 541 U.S. at 295).

The petitioners' amended complaint both concedes that Maryland's enacted Congressional districts are contiguous within the commonly understood meaning of the term, Opp. App. 46 ¶ 25, and further acknowledges the lack of any "Constitutional or statutory mandate for contiguous districts." Opp. App. 44 ¶ 24(b). *See Shaw v. Reno*, 509 U.S. 630, 647 (1993) (emphasizing that "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" are not "constitutionally required") (citing *Gaffney v. Cummings*, 412 U.S. 735, 752, n.18 (1973)); *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality opinion) ("The Constitution does not mandate regularity of district shape."); *id*. at 1029 (Breyer, J., dissenting) (noting that this Court has "assured States that the Constitution does not require compactness, contiguity, or respect for political borders"). If actual geographic contiguity is not "constitutionally required," *Shaw*, 509 U.S. at 647, then necessarily the petitioners' more demanding – and more amorphous – "effective" or "*de facto* contiguity" test could have no conceivable basis in the Constitution.

Similarly, although the petitioners propose a "demographic contiguity" component calling for districts to be drawn based on "shared interests – demographic, ethnic, racial, socioeconomic, and political," Opp. App. 48 ¶29, the amended complaint itself recognizes that under the Constitution "communities of interest are not entitled to representation," *id*. 49 ¶29. *See Bush*, 517 U.S. at 977-

78 (A "constitutional problem" involving "'a State's discretion to apply traditional districting principles'" such as "maintaining communities of interest and traditional boundaries" would "arise[] only from the subordination of those principles to race.").

Even if it were possible to isolate completely the petitioners' First Amendment claim from their other averments, the claim would still be just as insubstantial as the rest of the amended complaint. First, the petitioners' claim suffers from the same deficiency that, in the view of Justice Kennedy, doomed the unsuccessful First Amendment claim in *LULAC*, 584 U.S. at 418 (Kennedy, J.). That is, whether the claim of partisan gerrymandering is based on the First Amendment or any other source of constitutional authority, at a minimum the complainants must "show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id.*; *see also Vieth*, 541 U.S. at 315 (Kennedy, J., concurring) (opining that the availability of a First Amendment basis for challenging reapportionment "depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters"). The only "standard" proposed by the petitioners here is the same "geographic and demographic contiguity" theory that they proffered in support of their other claims, which, as the district court correctly discerned, bears a fatal resemblance to the proposed standards that this Court has already rejected as unmanageable, Pet. App. 18, and which the petitioners themselves appear to concede are insubstantial.

In fact, it is difficult to imagine any standard that would afford all individuals in the electorate the same entitlement that the petitioners claim: (1) the supposed right not to be apportioned into a "discrete small section" of a district that also includes residents of a "larger segment" who do not share "similarity of political views" or other "demographic factors," Opp. App. 43 ¶ 22, *and* (2) a guaranteed opportunity to "vot[e] in the determinative (primary) election for their Representative," irrespective of one's party affiliation, Opp. App. 50 ¶ 32. The realities of geography, demographics, and the "one person-one vote" imperative render the former unattainable, while this Court's precedent precludes the latter. *See Rosario v. Rockefeller*, 410 U.S. 752 (1973).

The insubstantiality of the petitioners' First Amendment claim becomes even more apparent when measured against this Court's precedent addressing "the First Amendment's protection of political association," which the petitioners expressly invoke. Opp. App. 17 ¶ 23; 44 ¶ 23. "The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas," and "[a]s a result, political parties' government, structure, and activities enjoy constitutional protection." *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (First and Fourteenth Amendment protection of political association includes "freedom to engage in association for the advancement of beliefs and ideas," "partisan political organization," and "[t]he right to associate with the political party of one's choice.") (internal quotations omitted).

The petitioners conceded below that the State's enacted districting plan does not deny them the ability to "associate and to form political parties for the advancement of common political goals and ideas," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). *See* Resp. Br. App. 2 (CM/ECF Doc. No. 18, Plaintiffs' Opp. to Defs.' Mot. to Dismiss at 42 ¶60 (admitting that "Republican voters in the challenged districts may be active in political committees, express their views, and influence their Representatives" but complaining that those activities have "minimal impact").) Moreover, the amended complaint does not allege that the reapportionment itself interferes with "political parties' government, structure, and activities." *Timmons*, 520 U.S. at 358. Given the petitioners' concession and the absence of any pertinent contrary allegation in the amended complaint, the petitioners' claim can be no more substantial than the First Amendment claim that was rejected in *Anne Arundel County Republican Central Committee v. State Administrative Board of Elections*, which this Court summarily affirmed, 504 U.S. 938 (1992).

As the district court concluded, "'nothing [about the congressional districts at issue in this case] . . . affects in any proscribed way . . . [P]laintiffs' ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves. They are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.'" Pet. App. 20a-21a (quoting *Duckworth*, 213 F. Supp. 2d at 557-58; *Anne Arundel Cnty. Republican Cent. Comm.*, 781 F. Supp. at 401 (brackets in original)).

The insubstantiality of the petitioners' claims can be confirmed by making the same comparison that Justice Kennedy made in *LULAC*, 548 U.S. at 420. That is, the challenged redistricting plan in Texas was deemed objectively "fairer than the [Pennsylvania] plan that survived in *Vieth*," which had "led to a Republican majority in the congressional delegation despite a Democratic majority in the statewide vote." *LULAC*, 548 U.S. at 419. The Texas plan could be deemed "fairer" on its face than the plan upheld in *Vieth*, and, therefore, not constitutionally suspect, because "a congressional plan that more closely reflects the distribution of state party power," as the Texas plan did, "seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority," as the Pennsylvania plan did. *Id*. at 419.

Like the Texas plan, Maryland's enactment is also demonstrably "fairer" than the Pennsylvania plan this Court upheld in *Vieth*. Unlike Pennsylvania's reapportionment, Maryland's congressional plan "more closely reflects the distribution of state party power" and does not "entrench[] an electoral minority." *LULAC*, 548 U.S. at 419. Although the petitioners complain that "each of the abridged sections" of the map they challenge "voted strongly Republican in the 2008 Presidential election," Opp. App. 31 ¶ 5, and they note that 7 of the Maryland's 8 congressional districts are represented by Democrats, Opp. App. 29 ¶ 2, the Democratic Party has long been the majority party in Maryland.[8] Therefore, Maryland's plan is "a less likely

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[8] In the most recent primary election held in 2014, Maryland's registered Democrats outnumbered Republicans by 2,051,319 to 950,195, a ratio of more than 2:1. *See* Resp. Br.

vehicle for partisan discrimination," *LULAC*, 548 U.S. at 419, than the reapportionment this Court upheld in *Vieth*.

Finally, the petitioners' claim for relief is rendered insubstantial by their still unexplained two-year delay in bringing their challenge to the 2011 redistricting. Petitioners waited to file suit until more than two years after the plan was enacted; more than 15 months after the plan had survived challenges in three other federal cases, including one that resulted in this Court's summary affirmance; and a year after voters in the redrawn districts had gone to the polls to elect their representatives to Congress. The petitioners themselves acknowledge that redistricting cases are "time-sensitive," and that "delay may also undermine the underlying purpose of the suit." Pet. 23, 22. Courts have held that a plaintiff's delay in bringing a redistricting challenge and the resulting threat of disrupting the election process may render a claim insubstantial due to the unavailability of injunctive relief. *See, e.g.*, *Simkins v. Gressette*, 631 F.2d 287, 290, 295-96 (4th Cir. 1980) (insubstantiality of claim may result "because injunctive relief is otherwise unavailable"); *Maryland Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 611 (4th Cir. 1970) (same); *MacGovern v. Connolly*, 637 F. Supp. 111, 114 (D. Mass. 1986) (same); *cf. Reynolds*, 377 U.S. at 585 (in awarding or withholding relief, a court should "endeavor to avoid a disruption of the election process").

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App. 5 (http://www.elections.state.md.us/press_room/2014_stats/PrecinctRegisterCounts_ByCongressionalDistrict.pdf (visited Sept. 18, 2015)).

## CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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# APPENDIX

# APPENDIX

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MARYLAND**

**Civil No.: JKB-13-CV-3233**

**[Filed December 31, 2013]**

O. JOHN BENISEK, et al )
)
Plaintiffs )
)
v. )
)
BOBBIE S. MACK, Chairman, )
Maryland State Board of Elections, et al )
)
In their official capacities )
)
Defendants )

* * * * * * * *

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

* * *

[Pages 42-43]

58. Courts have held the impact of a state's primary election system to be a factor into whether classes of voters may be impermissibly denied effective participation in the political process. See *Washington v. Finlay* (664 F.2d 913), paragraph 29, and *Lodge v Buxton* (639 F.2d 1358), paragraph 74: "As the District Court correctly pointed out, '(e)lection in the (Democratic) primary is 'tantamount' to election to the

office'." While *Lodge* specifically addressed internal discrimination within another state's Democratic party, Republican voters in the challenged districts are completely precluded from voting in the primary that is "tantamount to election."

59. We discuss in paragraph 32 of our Amended Complaint where Courts have required States to balance voting rights and other laws that may enact that impact voting. While we do not contend that the State is required to adopt an open primary, we do contend that Maryland's closed primary system combined with the intentional structure of the challenged districts results in an intentional impermissible infringement of first amendment rights. Voters in the smaller segments were placed into these districts to minimize their votes because they are largely Republicans. We previously discussed intent in paragraphs 49-53 above, and harms in paragraphs 38-40 above.

60. We expressly disagree with Defendants contention on page 25 of their Motion that has no impact on our First Amendment rights. While Republican voters in the challenged districts may be active in political committees, express their views, and influence their Representatives, the State has designed these districts to make such First Amendment activities of minimal impact. This is true to a far greater extent with respect to the challenged districts than to the 1991 districts that were the subject of the *Anne Arundel* cite on page 25 of the Defendants' Motion. Further, a position that first amendment rights are acceptably afforded in light of the mere expression of views and participation in political

activities—without considering the larger context as to whether the influence or effect of such expression and activities have been intentionally muted by the challenged actions—is more in keeping with *Colegrove* than with *Baker, Reynolds,* and *Wesberry*.

Conclusion

61. For the reasons set forth in our Amended Complaint and above, the Defendants' Motion to Dismiss for *Res Judicata* and for Insubstantiality should be denied; Plaintiffs' request to convene a three-judge panel of this Court should be granted; and Defendants' Motion to Dismiss for Failure to State a Claim should be referred to and denied by that three-judge panel.

* * *

**Eligible Active Voters on the Precinct Register -**
**By Congressional District Code**
**2014 GUBERNATORIAL PRIMARY ELECTION**
Election Date: 6/24/2014 ***As of June 7, 2014*

| DISTRICT | COUNTY | DEM | REP | LIB | GRN | OTH | UNA | TOTAL |
|---|---|---|---|---|---|---|---|---|
| Congressional District Code 01 | STATEWIDE | 178,653 | 204,630 | 952 | 385 | 1,458 | 35,457 | 421,535 |
| Congressional District Code 02 | STATEWIDE | 256,551 | 95,731 | 281 | 143 | 464 | 11,779 | 364,949 |
| Congressional District Code 03 | STATEWIDE | 251,707 | 112,965 | 522 | 318 | 1,030 | 28,850 | 395,392 |
| Congressional District Code 04 | STATEWIDE | 326,832 | 71,995 | 181 | 134 | 3,054 | 10,356 | 412,552 |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Congressional District Code 05 | STATEWIDE | 282,963 | 115,204 | 1,012 | 491 | 3,687 | 48,493 | 451,850 |
| Congressional District Code 06 | STATEWIDE | 195,725 | 144,753 | 1,887 | 1,033 | 2,363 | 100,671 | 446,432 |
| Congressional District Code 07 | STATEWIDE | 316,687 | 75,743 | 482 | 265 | 1,383 | 23,637 | 418,197 |
| Congressional District Code 08 | STATEWIDE | 242,201 | 129,174 | 1,796 | 1,283 | 2,623 | 104,616 | 481,693 |
| | | 2,051,319 | 950,195 | 7,113 | 4,052 | 16,062 | 363,859 | 3,392,600 |

* * *