No. 14-990

In The
Supreme Court of the United States

STEPHEN M. SHAPIRO, *et al.*,

Petitioners,

v.

BOBBIE S. MACK, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the district court correctly dismiss, as insubstantial, petitioners' partisan gerrymandering challenge to Maryland's decennial Congressional reapportionment, where the theories asserted in the complaint had been rejected by previous decisions of this Court and the suit was filed two years after the plan was enacted and more than fifteen months after the plan had been upheld by a three-judge district court's decision that this Court summarily affirmed?

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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, Special Session, ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701 – 8-709 (2014 Supp.). The enacted plan provided Maryland's 8 Congressional districts with populations as equal as mathematically possible: 7 districts had exactly the same population, and the 8th district had one additional voter because the State's population as determined by the census was not evenly divisible by 8.

Within months after the plan's enactment, this Court had an opportunity to consider Maryland's reapportioned Congressional districts. In *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), a group of plaintiffs challenged the plan on grounds that included allegations of racial gerrymandering and partisan gerrymandering. On December 23, 2011, a three-judge district court rejected all claims and unanimously upheld the plan's constitutionality. This Court summarily affirmed on June 25, 2012. 133 S. Ct. 29 (2012). During that same period, the plan also survived two other court challenges. *Gorrell v. O'Malley*, Civil No. WDQ–11–2975, 2012 WL 226919 (D. Md. Jan. 19, 2012), *aff'd*, 474 F. 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

The petitioners filed this suit for injunctive relief objecting to the "structure" and "composition" of Congressional districts on November 5, 2013, Resp. App. 2 (Complaint ¶ 2) – 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' complaint did not allege that Maryland's Congressional districts offended any constitutional or statutory principles pertaining to equality of district population, race, or any other suspect classification. Instead, the complaint asserted that rights of "representation" under Article I, Section 2 and the First and Fourteenth Amendments of the Constitution were denied to residents of certain districts to the extent the districts lacked "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." Resp. App. 3 (Complaint ¶ 3; emphasis and parentheses in original).

The complaint conceded that "the enacted districts are technically contiguous" but contended – without citation to any supporting authority – 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. . . ." Resp. App. 19 (Complaint ¶ 25). The complaint acknowledged the lack of any "Constitutional or statutory mandate" for the contiguity requirements the petitioners advocate, Resp. App. 17 (Complaint ¶ 24(b)), and recognized that what it termed "non-contiguous districts do not inherently constitute impermissible abridgement of voting and representational rights," Resp. App. 16 (Complaint ¶ 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. Resp. App. 21 (Complaint ¶ 29); *see also* Resp. App. 6 (Complaint ¶ 11 (complaining that segments within challenged districts are "socioeconomically, demographically, and politically inconsistent")).

The complaint suggested that the supposed requirement of "de-facto contiguity" could be satisfied either through "geographic" means, by "strik[ing] the use of narrow ribbons and orifices," Resp. App. 14 (Complaint ¶ 18), or alternatively through something the complaint termed "demographic contiguity," Resp. App. 15 (Complaint ¶ 21), which the petitioners equate with homogeneity or commonality of "shared interests–demographic, ethnic, racial, socioeconomic, and political," Resp. App. 21-22 (Complaint ¶ 29).

Thus, in the petitioners' view, 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," Resp. App. 16 (Complaint ¶ 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, Resp. App. 6 (Complaint ¶ 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," Resp. App. 17 (Complaint ¶ 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," Resp. App. 3 (Complaint ¶ 2). The complaint further acknowledged that the "geographic factors" petitioners emphasize "do not guarantee" either "effective representation" or "fairness," and conceded that the relief sought by the petitioners "will *not* eliminate gerrymandering." Resp. App. 20 (Complaint ¶ 27). The petitioners specified that the relief they sought did *not* "include changing the overall (7 Democratic – 1 Republican) partisan make-up of the enacted districts." Resp. App. 3 (Complaint ¶ 2; parentheses in original).

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. Resp. 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, Resp. 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, Resp. 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 come close to the "precise mathematical equality" that this Court has demanded of Congressional districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969); *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) ("[T]he command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.").

After filing their initial complaint, the petitioners requested and were granted leave to file an amended complaint. Resp. App. 28. The amended complaint retained nearly all of the text of the original complaint but added a "Supplemental Request for Relief," which unlike the petitioners' "Primary requested relief," Resp. App. 51-53 (Amended Complaint ¶¶ 34, 35), advocated "less deference to the legislature's intent,"

Resp. App. 53 (Amended Complaint ¶ 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." Resp. App. 53 (Amended Complaint ¶ 36).

The District Court's Decision

The defendants moved to dismiss the complaint. Invoking the authority of a single district judge in 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 proceeded to grant the motion and reject all of the petitioners' claims. The district court discerned that the petitioners' claims fell into two categories: (1) a claim under Article I, Section 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 (2) a claim 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 then concluded that the petitioners' claim under Article I, § 2 and the Fourteenth Amendment was "in essence, a claim of political gerrymandering," Pet. App. 14a, one that is

precluded by precedent 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–048842011, WL 5868225, at *2-*3 (N.D. Ill. Nov. 22, 2011) (reviewing seven "standards [for partisan gerrymandering] the Supreme Court has rejected").

The district court also determined that precedent barred the petitioners' claim under the First Amendment, which 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)). The district court also quoted the Fourth Circuit's holding in *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981), that "'to the extent [the First Amendment] protects the voting rights here asserted . . . . their protections do not in any event extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments [*sic*].'" Pet. App. 21a.

The Court of Appeals for the Fourth Circuit 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.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL QUESTION OF FEDERAL LAW.

Further review is unwarranted because the unpublished decision of the Court of Appeals correctly affirmed the district court's dismissal of the petitioners' insubstantial claims, which are founded on theories this Court has previously rejected. This case presents an especially poor vehicle for addressing the question posed in the petition, because the petitioners' claims are insubstantial and will remain eminently dismissible irrespective of how the Court might answer the question. This case is also unrepresentative of typical reapportionment challenges due to its peculiar circumstances, most notably the petitioners' unexplained two-year delay before filing suit to challenge the enactment of Maryland's decennial Congressional districting plan, after the plan already had been reviewed by a three-judge district court and upheld by this Court in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012), and after the plan already had been implemented in the 2012 Congressional elections.

A. The District Court Properly Dismissed the Petitioners' Claims As Insubstantial.

Under this Court's precedent interpreting the statutory language now codified in 28 U.S.C. § 2284,[1] a complaint challenging the constitutionality of the apportionment of congressional districts may be dismissed by a single district judge, without first convening a three-judge court, when the plaintiff's "constitutional attack . . . is insubstantial," that is, "'obviously without merit.'" *Goosby v. Osser*, 409 U.S. 512, 518 (1973) (citation omitted); *see McLucas v. DeChamplain*, 421 U.S. 21, 28 (1975) (same).

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[1] 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. . . .

(Emphasis added.)

In this case, the dismissal of the amended complaint was within the single district judge's authority under 28 U.S.C. § 2284(b)(1) and this Court's precedent, because the petitioners' claims are "obviously without merit" and "their unsoundness" is made clear by "previous decisions of this court. . . ." *Ex parte Poresky*, 290 U.S. 30, 32 (1933). As the district court below determined, the petitioners' theory or "standard" for addressing alleged partisan gerrymandering under Article I, Section 2 and the Fourteenth Amendment "is, in substance, markedly similar to tests that have already been rejected by the courts," including this Court. Pet. App. 18a. The petitioners' preoccupation with the shapes of districts, their variations on the theme of contiguity, and their belief that district boundaries should be drawn to link populations of common interests, socioeconomic status and political views, all merely constitute a restatement of various standards that this Court has deemed unacceptable as a basis for a partisan gerrymandering claim.[2] Though the petitioners

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[2] *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

claim to find support in Justice Kennedy's concurrence in *Vieth*,[3] Petition at 27 (citing *Vieth*, 541 U.S. at 314-15), as the district court rightly noted, Pet. App. 18a, the same concurring opinion concluded that geographic criteria such as those espoused by the petitioners have proved unworkable:

> [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. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not. For example, if we

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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)).

[3] In *Vieth*, four justices joined the plurality opinion, and Justice Kennedy wrote separately concurring in the judgment.

> were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political party over another.

Vieth, 541 U.S. 308-09 (Kennedy, J., concurring in the judgment).

In setting forth their partisan gerrymandering claim and citing repeatedly to *Wesberry*, the petitioners seek to give their notions of "*de facto* contiguity" and "demographic contiguity" a constitutional significance on par with that of district population equality, which this Court has pronounced "the paramount objective of apportionment," *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). *See* Resp. App. 40 (Amended Complaint ¶ 17 (asserting that lack of "real geographic contiguity or some degree of demographic or political commonality" would be tantamount to having districts of unequal population)). The petitioners' misguided effort to elevate geographic and political considerations and to equate them with the mandate of population equality directly conflicts with this Court's precedent. *See Vieth*, 541 U.S. at 290 ("Our one-person, one-vote cases. . . have no bearing upon this question [of partisan gerrymandering], neither in principle nor in practicality.") (citing *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry*, 376 U.S. 1). As demonstrated by the comparatively large population deviations and variances in the district maps that the petitioners have proposed as alternative remedies, Resp. App. 56 (Exs. 11-16), the petitioners' theory appears to be

incompatible with the "precise mathematical equality" that precedent requires of Congressional districts. *Kirkpatrick*, 394 U.S. at 530-31.

As for the petitioners' First Amendment claim, the district court correctly concluded that the petitioners could not satisfy the applicable standard used in a prior decision that this Court summarily affirmed, *Anne Arundel Cnty. Republican Cent. Comm.*, 781 F. Supp. at 401, as well as Fourth Circuit decisions rejecting similar claims, *Duckworth*, 213 F. Supp. 2d at 557-58; *Washington*, 664 F.2d at 927. Although not binding on this Court, summary affirmances do bind lower federal courts and "do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

B. The Petitioners' Dilatory Pursuit of Their Redistricting Challenge Makes This a Poor Vehicle for Examining the Three-Judge District Court Statute.

Finally, the policies underlying the three-judge district court statute would be ill-served by granting further review in this case, which was filed more than 15 months after this Court had already upheld the same Congressional reapportionment in *Fletcher v. Lamone*, 133 S. Ct. 29 (2012). As this Court has recognized, the precursor of 28 U.S.C. § 2284 was enacted, not for the benefit of plaintiffs who might object to federal and state enactments, but to protect enacted statutes from being struck down improvidently: "Congress established the three-

judge-court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 97 (1974); *see Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) ("The three-judge district court is a unique feature of our jurisprudence, created to alleviate a specific discontent within the federal system," that is, "to assuage growing popular displeasure with the frequent grants of injunctions by federal courts against the operation of state legislation. . . ."). The statute "authorizes direct review by this Court, . . . as a means of accelerating a final determination on the merits," *not* because such a departure from normal appellate procedure was deemed necessary to aid plaintiffs disappointed by a dismissal of their complaint; instead, the streamlining of procedure and availability of direct Supreme Court review were adopted by Congress to reduce "the length of time required to appeal . . . and *the consequent disruption of state . . . programs* caused by the outstanding injunction." *Id.* at 119-20 (emphasis added).

This interest in protecting state statutes and avoiding disruption of state programs, which undeniably prompted the enactment of what is now 28 U.S.C. § 2284, would not be served by prolonging the petitioners' belated and properly dismissed challenge to Maryland's 2011 Congressional reapportionment. The petitioners themselves acknowledge that redistricting cases are "time-sensitive," and that "delay may also undermine the underlying purpose of the suit." Petition at 23, 22.

For this very reason, one of the criteria for whether to convene a three-judge court asks whether the complaint "alleges a basis for equitable relief," *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962), and 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 General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970) (same); *MacGovern v. Connolly*, 637 F. Supp. 111, 114 (D. Mass. 1986) (same); *c.f.*, *Reynolds*, 377 U.S. at 585 (in awarding or withholding relief, a court should "endeavor to avoid a disruption of the election process").

By addressing these and similar concerns in the three-judge statute, Congress intended to protect the states' interest in maintaining the integrity of their enactments, not to encourage or facilitate a suit such as the one the petitioners filed more than two years after Maryland enacted its Congressional plan, and more than fifteen months after the plan had already survived review by a three-judge district court and this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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